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SELECTION OF CRIME OBJECTS: JUSTIFICATION AND CRITERIA

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Abstract. The current issues of justification and criteria for selecting the objects of a criminal offense are analyzed in the article. From the right choice of mentioned objects depends the correct and timely application of the law on criminal liability in the practice of law enforcement and judicial authorities. The possibility of choosing the object of the crime from the point of view of its social conditionality is investigated. The substantiation and criteria of the object of the crime and the need to enshrine it in law are highlighted. A lot of attention is given to the task of the law, the choice of those criteria that should be in the possible choice of a particular object of crime. The need for such choice is due to the fact that the legal superstructure always corresponds to a certain economic basis, which protects it by Criminal law. To achieving this goal depends on the criminal remedies policy of the state, the need to ensure the protection of public relations. Analyzing that the possibility of the existence of such objects of criminal law protection in the system of legislation on criminal liability, which due to insignificance do not pose a public danger, and therefore should be referred to the legislation on administrative offenses. It is emphasized that when choosing the object of encroachment, the legislator must take into account the victimology, which will serve to improve the legislation on criminal liability.

Keywords: crime, criminal law, norm, insignificance of the act, sanctions, principles, victimology, criminal offense

INTRODUCTION

The choice of the object of a criminal offense has a great scientific and practical importance. The solution of this important problem will make it possible to correctly identify the object of criminal protection, to clarify its social conditionality, to indicate its place in the system of legislation on criminal liability. Examining the presented problem, the legislator will be able to formulate and adopt the rule, which fully indicates the correct choice, justification and criteria of the object of the criminal offense. Legislative consolidation of the object of criminal law protection will allow law enforcement agencies and the court to correctly

apply the relevant rule in the qualification of a criminal offense and in the fight against crime.

The relevance of the research topic is that in domestic legal science the question of the specifics of the choice of objects of criminal law protection has not been sufficiently studied. The lack of such research leads to an imperfect construction of criminal law, their wrong place in the system of legislation on criminal liability and errors in the qualification of socially dangerous acts. The correct choice of the location of the object of a criminal offense will allow to establish its objective and subjective features, to impose a just punishment and to ensure the constitutional rights and freedoms of man and citizen.

The question of choosing the object of a criminal offense, its justification and criteria, remain relevant not only today but also in the distant future. The lack of basic research on this problem indicates its relevance and necessity. The available works of some scientists indicate only involvement in this problem. The greatest contribution to the study of the choice of the object of the crime made Professor M.J. Korzhansky, who was the first among the scientists of the post-Soviet time to make a deep study of this problem.

The purpose and objective of the study is to try to emphasize and highlight the importance of correct, research-based, criteria for selecting the object of a criminal offense. Indicate the importance of the place and role of the object of criminal protection in the system of legislation on criminal liability.

1. CRITERIA AND JUSTIFICATION OF THE CHOICE OF CRIME OBJECTS

The Law of Ukraine on Criminal Liability (Article 1 of the Criminal Code of Ukraine) has the task of legal protection of human and civil rights and freedoms, property, public order and public safety, environment, constitutional order of Ukraine from criminal encroachment, peace and security of mankind, and crime prevention. The main task of the law is the protection of public relations [Vorobey, Korzhansky, and Shchupakovsky 1997, 116–23].

What criteria is (and should be) guided by the legislator in the protection of public relations, choosing the object of criminal protection from the general mass of public relations?

The legal superstructure always corresponds to a certain economic basis, which protects it by criminal law. This is determined mainly by the social and political system of society, its class structure, the level of historical and cultural development. Such conditionality is coming from the tasks of state-building in a democracy, an important task of which is the protection of public relations. Achieving this goal depends primarily on the criminal law policy of the state.

The need to ensure the protection of public relations (material, political and spiritual interests of society, the state and the individual) is emphasized in the

Constitution of Ukraine (Articles 1–19, 21–25, 57–64), laws, state decisions and resolutions.

Depending on the social value of social relations, economic factors and the effectiveness of legal protection, the social conditionality of criminal law protection is determined. In order to choose the object of criminal protection, the legislator must take into account, first of all, objective factors, the main of which are: a) the place, role and social value of certain social relations; b) the prevalence of relevant socially dangerous violations of these public relations; c) the amount and nature of the damage caused by such violations of socially dangerous damage; d) effective available means of protection. To this end, the legislator must determine the regularity of social development, the economic consequences of publication and the application of specific criminal law. An important role in this is played by the substantiation of the possibility, necessity and expediency of application of criminal law in specific cases.

The legislator, choosing the objects of criminal law protection and establishing appropriate prohibitions, must take into account the social conditionality of legal regulation (which requires this rule) and the value of certain social relations. It is also necessary to establish and justify the role and significance of these norms (norms) for the entire system of existing social relations. The protection of the relevant public relations by the means available in the state must not harm other, no less important public relations.

In our opinion, the most valuable and most important in the system of social relations are the relationships that are the main benefits of the person (life, health, sexual integrity, etc.). Without a person, there can be no social relations at all, and therefore, they must be the most protected. Part 2 of Article 11 of the Criminal Code of Ukraine states that an act or omission is not a crime, which although formally contains signs of any act provided by this Code, but due to insignificance does not constitute a public danger, to wit did not cause and could not cause significant damage to a natural or legal person, society or the state. The above-mentioned relations are so important and the public danger of encroachment on them is so great that the provisions of Part 2 of Article 11 of the Criminal Code of Ukraine cannot be applied to them. On the other hand, such crimes as banditry, robbery, murder, etc. cannot be recognized as not socially dangerous on the grounds of insignificance. Regardless of the main object of criminal law protection, these crimes directly or indirectly encroach on human life.

B.S. Nikiforov believed that the criminality of a particular behaviour is determined by the properties of the subject of the offense, the peculiarities of its attitude to the act and the properties of the objective side (mode of action, severity of consequences, etc.). However, the main criteria for the criminality of actions, in the presence of all other preconditions and the severity of the damage caused [Nikiforov 1958, 19–27]. This point of view was supported by prof. M.J. Korzhansky. In general, such a statement needs to be supplemented by an indication of other cases where the criminal act poses a threat of causing serious social harm.

Here we should take into account those actions that create a real danger of changing social relations, as well as all kinds of attempts. One of the main factors determining the need for criminal law protection of certain social relations is the occurrence of inevitable serious consequences, regardless of whether it is defined, the measured socially dangerous damage in a particular case.

Unlike serious and especially serious crimes, in the commission of which, public harm is not amenable to quantitative differentiation, abduction and some other encroachments can make significant changes in the field of objects protected by law. But, at the same time, minor acts do not require such criminal protection as the above-mentioned crimes. Some social relations are characterized by the fact that the damage caused in the field of these relations requires measurement and quantification. Depending on the damage caused, the abduction has several types (significant damage, large size, especially large size – note 2, 3 and 4 to Article 185 of the Criminal Code of Ukraine). The extent of the social damage caused to the object of encroachment is applied to some other encroachments with a similar differentiation.

Protection of public relations under certain conditions can be provided only by Criminal law. Although objective reasons significantly affect the processes. Such reasons include the impossibility of organizing appropriate forms of control in the sphere of public life, the impossibility of restoring the broken relations, severe consequences, and the irreversibility of the socially dangerous damage.

Of course, these are not all socially dangerous changes in social relations, but only the most significant ones. They are precisely of practical importance in that they are the basis for the classification of offenses. If the relevant encroachments do not have such properties, then the fight against them can be ensured by administrative, civil and other measures, excluding criminal law. Such acts are administrative offenses. As we can see, the choice of the object of the crime is a difficult and responsible task of the legislator.

Changing the social economical formation requires a timely response to all processes in the state, including legislation. The practice of applying the law on criminal liability shows that many acts should be decriminalized in general, or translated into the category of administrative offenses. Therefore, the question of changing the legislation on criminal liability is timely.

In many actions, harmful social consequences do not occur immediately and can be remedied by damages or other measures. There are many norms in the legislation on criminal liability, which contain alternative sanctions of deprivation of the right to hold certain positions or engage in certain activities (Articles 205(1), 206(2), 209, 209(1), 210, 211, 212, 212(1), 218(1), 219, 220(1), 222, 222(1), 223(1), 223(2), 224, 227, 229, 232(1), 232(2), 237, etc.) The above-mentioned measure of punishment at compensation of the caused damage, will give the chance not to apply to the person of measures of criminal legal influence. As practice shows, measures of criminal law influence are not always expedient and effective. Conversely, in the presence of only such measures, damage is inflicted that requires protection by

criminal law. In Articles 21–24 of the Constitution of Ukraine enshrines an important constitutional provision that citizens of Ukraine have full social economic, political and personal rights and freedoms, and therefore, deserves special attention to the criminal protection of these freedoms by the law on criminal liability. In comparison with the European legislation on observance of the constitutional rights and freedoms of the person and the citizen, human rights and freedoms in our state are approximately equal. Although in some issues of criminal law protection of property, freedom of marriage, etc., there is a difference.

The guarantee of protection of rights and freedoms in the state is the inviolability of the person (Article 29 of the Constitution of Ukraine), housing (Article 30 of the Constitution of Ukraine), protection of privacy, secrecy of correspondence, telephone conversations and telegraph messages (Article 31 of the Constitution of Ukraine) protection of honour, dignity and personal freedom (Articles 21–22 of the Constitution of Ukraine). To ensure these constitutional rights, it is necessary to strengthen their criminal law protection [Korzhanovsky 2004, 45–47]. Not only does the set of goods protected by law affected the degree of protection, but also the object of protection of each of them.

2. EUROPEAN APPROACHES TO THE SELECTION OF CRIMINAL PROTECTION OBJECTS

In some European countries, the subjective rights of citizens are more fully protected than in Ukraine. For example, Bulgarian law contains 18 types of encroachments on the interests of the family and young children, while the Criminal Code of Ukraine contains ten types of such encroachments. The sphere of personal security of citizens in European countries is significantly expanded when a person is in immediate danger, which threatens his life or health.

These laws of European countries more fully than domestic law protect the inviolability of the home, the secrecy of correspondence, and some other constitutional rights of citizens. Bulgarian criminal law, in addition to unlawful deprivation of liberty (Article 142 of the Bulgarian Criminal Code) provides for criminal liability for any coercion to commit or not to commit any acts against the will of a person (Article 143 of the Criminal Code). Liability for coercing the use of violence or threat of harm to certain behaviour is provided by the legislation of the Republic of Poland (Article 167 of the Criminal Code). The absence of such a rule in domestic law leads to the fact that in practice some cases of socially dangerous violence or coercion to commit certain actions do not constitute a crime.

The sphere of protection of personal safety of citizens is significantly expanded by the norms of the legislation of European countries, which provide for criminal liability for endangering the life or health of a person.

The important value for the choice of object prevalence of violations of certain social relations in specific socio-economic formations and historical conditions is important for the choice of objects of criminal law protection. The constant

violation of such relations indicates the inadequacy of the means of their protection and the need for more effective measures. Or, conversely, the practice of application of statutory measures to protect certain social relations indicates their unfoundedness and inexpediency. According to judicial and investigative practice, many crimes in the field of economic activity should be classified as administrative offenses.

The choice of the object of criminal protection, in general, is determined primarily by the public danger of encroaching on specific social relations. Public danger is the most significant and main feature inherent only in a criminal offense. All other offenses of public relations can be considered only socially harmful. Public danger and social harm have different legal nature, and therefore differ not only in terms. For example, physical pain is harmful to health, and penetrating an injury to the abdomen or chest is dangerous, and so on. Such changes in its natural functioning that violate the conditions of its existence are dangerous for a certain system of social relations. Harmful can be considered only those changes that do not violate the conditions of the system, but only create temporary or local obstacles to it. Thus, socially dangerous violations can lead to the destruction and liquidation of the system, and harmful violations do not threaten such consequences. The above gives grounds to assert that danger and harmfulness are not only not identical concepts, but also different in essence. A crime is an act that is dangerous for the interests of society, the individual and the state, because it violates the conditions of its existence. This explains the need to protect society from dangerous encroachments by criminal law. At the same time, criminal law measures should be applied only for socially dangerous offenses.

The legislator's knowledge of the laws of social development and evaluative-volitional opinion about the social value of specific social relations has important meaning for the choice of objects of criminal law protection. When issuing a criminal law norm on the protection of certain social relations, the legislator must take into account, first of all, objective factors, the real living conditions of society. Legislation should be based primarily on the knowledge accumulated by experts in various fields of science, the generalization of public opinion, expectations and needs.

The comparative importance and social value of social relations, as well as the necessity and expediency of their criminal protection in society is determined by the interests of society as a whole. An equally important factor in choosing the object of criminal protection is the level of legal awareness of citizens and the ethical foundations of society. For the life of the object of criminal law protection, an important circumstance is the legal awareness of the majority of members of society, including law enforcement officers and the court. Of particular importance here acquires the legal awareness of citizens. They must be convinced of the necessity of such a law and of the justice of the punishment for committing the crime specified in it.

As practice shows, many laws on criminal liability do not correspond to the legal consciousness of the majority of members of society, they practically do not

act, do not fulfill their social role for which they were adopted. Such laws have no general warning effect, i.e. they are socially dead [Vorobey, Korzhansky, and Shchupakovsky 1997, 116–23]. These include Articles 174–184, 210, 213, 236–241, 297, 338, 339 of the Criminal Code of Ukraine. With a more in-depth and meticulous analysis of criminal law to the above articles, much more can be added.

The application of the law on criminal liability, which does not correspond to the legal consciousness of society, is harmful, because it cannot fulfill its social task: to ensure the protection of relevant public relations. The preventive effect of such a rule is so insignificant that it is often called “dead.”

When choosing the object of criminal protection, it is equally important to take into account the ethical beliefs of society, its moral principles and principles. Analyzing the domestic criminal law literature, we can see that the issues of ethical foundations of the law on criminal liability, the relationship of moral norms with legal norms are at a fairly low level of research. This state of affairs has a negative impact on the rule-making process, as it does not allow the full expression of moral norms in the law and provide prospects for the development of legislation on criminal liability.

A necessary condition for the emergence of new legal norms is the ethical basis, and the ethical content of the rule of law, part of its general content. Therefore, when choosing the object of criminal law protection, it is necessary to take into account the ethical basis of the future norm and express in these norms the ethical ideals of society. Any normative act must be based on the requirement of fairness [Demkov 1996, 10–12]. Contradictions caused by the dialectic of public life between the norms of criminal liability legislation and the norms of morality (morality) must be resolved by changing the relevant legal norms.

Today, the legislation on criminal liability, in some cases, does not fully establish and implement the principles of public morality. This applies to the rules that protect life, health, honour and dignity and some other relationships. Ethical and moral foundations of criminal liability legislation are an important and relevant topic today, which requires in-depth study. Therefore, we will limit ourselves to general remarks on this important and necessary issue.

The above social relations are characterized by some features as equivalent objects of criminal law protection, regardless of the psycho-physiological state of the subject of relations, his social status and other features. Life, health, honour, dignity and other inalienable personal goods of a person belong to specific individuals, and are not just members of society. Each individual is ethically, morally, materially, and socially connected with a large number of other members of society by thousands of “threads.” Such relations have a public assessment. Some relationships are considered highly moral, ethical, friendly, personal, family, and others are immoral. But even high moral ties can be broken by murder, betrayal, insult, and so on. There is a great ethical distance between similar acts committed by a stranger and a close person. They are divided mainly by the special properties of the relationship – friendship, intimacy, kinship, and so on. Ethical principles

of society are most clearly manifested in relations with relatives: father, mother, daughter, son, grandson, brother, sister. Preserving the foundations of social morality, constantly educating, developing the ethical principles of people's lives are important tasks of society and the state. Article 3 of the Constitution of Ukraine guarantees the protection of equality and human dignity and defines it as an important state task.

Domestic criminal liability legislation does not adequately take into account ethical principles. The analysis of the legislation shows the possibilities of its further improvement. The law does not distinguish as an aggravating act the murder of a relative (father, mother, etc.), as well as other crimes against loved ones (rape, bodily harm, etc.). Here it is obvious that preference should be given to the ethical principles of society as the most valuable public good.

CONCLUSIONS

The legislation of European countries provides more severe criminal liability for the murder of the above persons. The destruction of morality will inevitably lead to more serious consequences than, for example, the harm caused by justice in individual cases of concealment of a crime. From what has been said, it is clear that for crimes against relatives, criminal liability should be strengthened, and for concealment of crimes by relatives, it should be excluded [Vorobey, Korzhansky, and Shchupakovskyy 1997, 116–23]. Again, the legislation of European countries contains provisions on the exemption from criminal liability of relatives and friends for concealing crimes.

There are views of scientists that when choosing the objects of criminal law protection, the legislator must also take into account the possibility of such protection. To make a decision on the protection of the object of encroachment by criminal law, the legislator must take into account the victimology. The discussion on the problem of victimology showed its important practical significance [Tulyakov 2001, 24–26]. The conclusions of such a discussion deserve attention, and the proposed proposals can be used in the rule-making process in the selection of objects of criminal law protection and in the construction of specific criminal law. This will improve the legislation when choosing the object of criminal protection.

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THE DISEASE CONCEALMENT AS A PREMISE OF REFUSING THE LIFE INSURANCE POLICY PAYMENT IN THE INTERWAR INSURANCE SYSTEM

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Abstract. In the difficult times of reconstruction of Polish statehood, having a life insurance policy that actually secured the existence of the family after the death of its breadwinner was a luxury that few citizens could afford. The burden of paying premiums was too heavy for the vast majority of society, hence the decision to take out the policy was sometimes made too late – at a time when the person concerned already knew about a deadly disease that was consuming his body. In order to obtain an insurance policy, he hid information about the disease, which in turn exposed the insurance companies to losses. They fought this practice by refusing payments to people who, by signing the contract, concealed information important from the insurer's point of view.

Keywords: insurance policy, insurance company, insurer

INTRODUCTION

The insurance market in interwar Poland was struggling with numerous problems that had a huge impact on the mutual relations between insurance companies and their clients. The intertwining of historical events has led to a significant part of society approaching the idea of securing all goods with distrust or even hostility, treating insurers as opponents whose outsmarting can be a reason for glory. This attitude had an impact on the behavior of policyholders to recover funds paid in the form of contributions.

In Poland, insurance did not have a long tradition. Contrary to the great trading powers such as England or the Netherlands, Poland did not participate in the colonial expansion, and international trade did not constitute a significant branch of the domestic economy.¹ Due to these circumstances, apart from a few exceptions before the fall of the First Republic, the custom of protecting themselves against the consequences of unfortunate and unexpected events among its citizens did not spread. On a larger scale, property insurance was first encouraged, and then forced during the partitions.

The first compulsion to insure property was introduced by the Prussian invader, who in 1803 ordered that municipal property be insured against fire, and a year later extended this obligation to rural buildings. The people living in the

¹ On the relationship of insurance with geographical discoveries and with the conquest and exploitation of new continents see Bednaruk 2018b, 19.

areas subject to compulsion treated the new burdens as another way of the hostile authorities to extract money from the pockets of the inhabitants of the Prussian partition. It took many years to convince her of the sensibility of the introduced solutions [Szczęśniak 2003, 75].

Compulsory insurance was adopted in a similar scope in the territory of the Duchy of Warsaw, and after its collapse in the Kingdom of Poland, while in the Austrian partition, despite attempts made, it was not possible to introduce it and the protection of goods remained a voluntary decision of citizens. At the end of the 19th century and in the first years of the 20th century, the insurance industry in Poland, taking advantage of the gained trust of customers, expanded its activities to an unprecedented size. Millions in profits attracted the biggest players in the insurance market from all over the world. The number of products offered was constantly growing, and the number of policies signed was multiplied with it [Biskupski 1925, 22].

The outbreak of World War I introduced some turmoil on the insurance market, but after temporary problems, the industry continued to develop. The catastrophe happened only after the end of hostilities. Virtually all establishments with foreign capital withdrew from the territory of the nascent Polish state the contributions of Polish citizens accumulated over the years, leaving them without the possibility of applying for compensation in a situation where events occurred that entitle them to claim the benefit specified in the contract. To this day, it is impossible to fully estimate the amounts lost as a result of unfair actions of insurers, but we are talking about gigantic amounts of contributions paid by successive generations of inhabitants of Polish lands [ibid., 22ff].² Many millions of Polish citizens have been injured.³

It is true that the Versailles treaty required the defeated states to settle the collected premiums and pay fair compensation to insurance company customers,⁴ but

² I. Biskupski lists that the Russians took away insurance funds worth 19 million 300 thousand. Rubles. See also: *Sprawozdanie rachunkowe Polskiej Dyrekcji Ubezpieczeń Wzajemnych za rok 1923-1924*, Warsaw 1925, p. 37, where the table shows that the Russians took away the amounts of almost 13.5 million accumulated as supplementary capital from the largest insurer. rubles in gold; *Zabezpieczenie mienia poddanych Państwa Polskiego w Rosji 01.03-14.11.1918*. *Zbiór dokumentów AAN. Zespół Gabinet Cywilny Rady Regencyjnej*, ref. 169, p. 7, where calculations of the sums exported to Russia from other financial institutions of the Kingdom of Poland amount to almost half a billion rubles. Only in the area of the former Congress Poland, German plants gathered reserves of 3 million from the contributions of the local population. 800 thousand brands, 300 thousand. crowns and 400 thousand rubles [Kozłowski 1922, 1ff].

³ *Korespondencja w sprawie zabezpieczenia mienia poddanych Państwa Polskiego w Rosji*. *AAN. Zespół Gabinet Cywilny Rady Regencyjnej*, ref. 169, p. 2ff; *Korespondencja Komisji Rejestracji Strat Wojennych z czerwca 1918 r. w sprawie zwrotu należnych Polsce sum*, ibid., ref. 171, p. 1ff; *Rewindykacja i reewakuacja z Rosji*, ibid., ref. 310, p. 1ff; *Korespondencja w sprawie rewindykacji zabytków polskich z Rosji*. *AAN. Zespół Delegacja Polska w Komisjach Mieszanych w Moskwie*, ref. 6, p. 1.

⁴ *Traktat pokoju między mocarstwami sprzymierzonymi i skojarzonymi i Niemcami, podpisany w Wersalu dnia 28 czerwca 1919 roku*, *Journal of Laws of 1920*, No. 35, item 200, Articles 77, 238–239.

both Germany and Austria dragged out the negotiations for several years. When finally the payment of insurance claims was made, they turned out to be so symbolic that a Polish citizen in return for long-term premiums received the equivalent of the weekly earnings of a worker in industry.⁵ Customers who had policies in Russian, American or Italian plants had to deal with slightly less problems, they also had to fight for a long time and the results achieved were far from satisfactory.

The indicated circumstances, combined with the generally difficult living conditions in interwar Poland, created a specific atmosphere of consent to dishonesty towards insurance companies. With the passage of time, the acceptance of such behavior grew, especially when it turned out that after the loss of the fight for the insurance market by Polish entities, foreign capital, dominating an increasing part of the industry, returns to the game. Often these were the same players who had used Polish clients once, but under a changed banner, and when it was impossible to infer honest intentions of foreign capital from the negotiations for the return of receivables, frustration in society grew to enormous size [Piątkiewicz 1928, 3ff; Gnatowski 1937, 32ff; Geppert 1979, 210ff].

1. UNFAIR CUSTOMER PRACTICES

The vast majority of life insurance policies in the analyzed period were bought by men who thus secured the existence of their family after their own death. Contracts with women were few and in the entire interwar period they constituted a small percentage of all documents of this type [Kozłowski 1927, 17; Michalak 1979, 188ff].⁶ According to some analysts at the time, the reluctance of women to insure against death was supposed to result from superstitions that were easier for the fair sex to succumb. Belaying was allegedly treated as provoking fate to the occurrence of a given event. Thus, life insurance could, according to the superstitious part of society, hasten the death of the policy holder [Kozłowski 1928, 38].

However, more importance should be attributed to the role of the man in the family of that period. The burden of earning money, and thus the financial security of the family, rested primarily on the male part of society. Thus, the death of a man drastically worsened the property status of his wife and children. Hence the need to secure the life of the sole breadwinner.

Life policies concluded after a medical examination were available on the market, treated as safer for the insurer, hence the conditions proposed in this type of contracts were more favorable for customers and without the obligation to test. In the latter case, as the more risky one, the proportions of the premiums paid to the sum insured were less favorable for the life policyholder [Idem 1926, 29ff].

⁵ For more detailed calculations see Bednaruk 2018a, 141ff.

⁶ See *Sprawozdanie Dyrekcji Krajowego Ubezpieczenia na Życie w Poznaniu z działalności za rok 1931*, Poznań 1931, p. 3ff.

Naturally, people who knew their poor health tried to avoid contact with a doctor at the insurer's services and sign a contract without having to be examined. The costs of such a policy, however, were high and in the long run difficult to bear for a less wealthy person, and as a consequence it could have turned out that in the event of a long-term illness, the company compensated itself with higher premiums for the amount of compensation due. Therefore, people who were not able to precisely determine the length of their further life often decided to join insurance with a compulsory medical examination, hoping that they would be able to slip through the insurer's security network.

Even if the doctor employed by the insurer diagnosed the disease, considering that the risk of death of the potential client is high, it did not mean that he would be left without the protection provided by the life policy. The insurance services market in our country was relatively large and the competition was fierce, so it was always possible to give up the services of one plant and try your luck in another. The insurance industry did not yet develop coherent rules for the exchange of information, hence the chance of concealing information about the disease and about applying for a policy in a competitive company was large.

2. DEFENSE OF INSURANCE COMPANIES AGAINST ATTEMPTS TO EXTORT UNDUE BENEFITS

In the analyzed period, the insurance industry no longer operated on the basis of assumptions and assumptions as to the possible occurrence of events provided for in the policy. Particularly in life insurance, intensive research was carried out on the statistical life expectancy broken down by sex, occupation, age and living conditions. Scientific research on the so-called The "law of mortality" began in the 17th century, but the development of detailed tables for the needs of the insurance market took place much later, and it was not until the end of the 19th century that the probability of human death in a specific age category was quite precisely calculated [Eichstaedt 1928, 5ff; Idem 1934, 10ff].

Apart from extraordinary situations such as war or epidemic, it was possible to calculate the amount of the premium in proportion to the sum insured in such a way as to ensure protection to the client and an appropriate profit for the insurer without greater risk. However, the condition of the correctness of the calculations was the appropriate base reflecting the state of health of the society, unadulterated by one or the other party to the contract.⁷ On the one hand, insurers would like to have young and healthy people among their clients, guaranteeing constant and long-term income from premiums, and on the other hand, life insurance policies were of interest to those who predicted that they would have little life left.

⁷ See *Tablice śmiertelności z liczbami komutacyjnymi obliczonymi przy stopie 4% i 4 1/2%*, "Rocznik Państwowego Urzędu Kontroli Ubezpieczeń za rok 1929", Warsaw 1930, p. 149ff, in which, on the basis of data from insurance companies from other countries, the statistics of mortality in particular years at the turn of the 19th and 20th centuries are shown.

The establishments defended themselves against such situations, employing the best doctors and forcing applicants to fill out more and more detailed questionnaires, in which they asked about their health status and previous illnesses. There were also demands to submit health declarations under the threat of losing the right to a benefit in the event of a lie being discovered. The questionnaires took into account the most common diseases that lead to a reduction in the statistical life expectancy of the client and asked directly whether the person applying for the policy was sick.

Interestingly, however, insurers with time less and less often resigned from signing the contract in the event of a lie being discovered by a potential client. They discovered that among the competition there will always be an entity ready to accept a rejected customer, provided that they agree to pay higher premiums. Not wanting to lose the expected profits, often, having knowledge of the disease, they agreed to issue the policy, collected premiums and only when attempting to exercise the rights under the contract refused to fulfill their part of the obligations, pointing out that the policy owner had deliberately and intentionally misled the insurer.⁸

There were many such cases of refusal to provide the benefit with reference to concealment of illness by the client in the analyzed period, but it can be assumed that only some of them saw the light of day. Investigators are mainly aware of those cases that ended up in court. However, there is a reasonable suspicion that what went to court is only the tip of the iceberg. It was not in the insurer's best interest that clients go to court with any such case. Indeed, a number of judgments rejecting undue claims could show the determination of the companies in the fight against fraud attempts, but too large a scale of the phenomenon could lead to deterring potential customers.

Therefore, the insurance market sought to maintain a reasonable balance between refusals to pay benefits in the most glaring cases, and consent to bend the rules in a situation where the company had already earned enough on a given client to turn a blind eye to some inaccuracies in his sickness card. Somewhere between these types of situations there was a whole bunch of unknown to us examples of secret agreements leading to partial satisfaction of claims in return for resignation from the court, concluded when both parties decided that there was room for reaching a compromise.

3. JURISPRUDENCE OF POLISH COURTS

In the first years of the existence of the independent Polish state, disputes between companies and their clients under insurance contracts were submitted to various courts, depending on the regulations inherited from the invaders in a gi-

⁸ See *Orzeczenie Sądu Najwyższego C.III. 81/33 w sprawie odstąpienia przez zakład ubezpieczeń od umowy ubezpieczenia na życie z powodu zatajenia choroby przez ubezpieczonego*, "Rocznik Państwowego Urzędu Kontroli Ubezpieczeń za rok 1935", Warsaw 1936, p. 186ff.

ven area. Only the Code of Civil Procedure adopted in 1930 introduced the exclusive jurisdiction of regional courts in disputes over payment of the sum insured to clients.⁹

The first decade of the interwar period was also characterized by great freedom in shaping the content of contracts between entities in the insurance industry and their clients. The lack of effective supervision over the insurance market in Poland resulted in an unequal position of the parties to this type of agreement, and as a consequence often detriment to the policy holder. The establishments, taking advantage of their advantage, included clauses in the content of the documents allowing for release from liability in a convenient situation.¹⁰

As long as this type of solution was not explicitly banned, the courts ruled against the policyholders. With time, however, an obligation was introduced to prepare a document called “General insurance conditions” in each society. They were subject to approval by the State Insurance Control Office and could not be arbitrarily changed by the insurer. The regulation of the President of the Republic of Poland on the control of insurance from 1928 clarified that they cannot be changed, especially to the detriment of the insured.¹¹

For some time, some plants tried to circumvent the applicable regulations by introducing annexes to contracts in the form of the so-called specific insurance conditions, contrary to the general conditions. However, the strong reaction of the supervisory authority combined with the jurisprudence of the competent courts prevented the use of prohibited clauses.¹²

The change consisted, *inter alia*, in the introduction of time limitations as regards the termination of the contract by the company in the event of receiving information about the misleading of the insurance company by the customer. The point was that the insurer could not freely use the benefits of the concluded contract as long as it was favorable to him. Collect a premium despite the knowledge that the other party was not honest in completing the documents, and withdraw from the contract at the time of the client’s death to free himself from obligations.

In line with the adopted jurisprudence, the company could withdraw from the contract if it was misled as to the health of its client, as long as the underlying disease directly contributed to death.¹³ An important objection that should be made

⁹ Article 13(2)(6) of the Code of Civil Procedure of November 29, 1930, Journal of Laws No. 83, item 651; see also *Orzeczenie Sądu Apelacyjnego we Lwowie I.C.Z. 155/34 w sprawie wyłącznej właściwości sądów okręgowych w sporach o zapłatę sumy ubezpieczenia*, “Rocznik Państwowego Urzędu Kontroli Ubezpieczeń za rok 1935”, Warsaw 1936, p. 190.

¹⁰ See *Okólnik PUKU nr 94 z dnia 21 lutego 1930 r. w sprawie interpretacji art. 33 ust. 2 rozporządzenia o kontroli ubezpieczeń*, “Rocznik Państwowego Urzędu Kontroli Ubezpieczeń za rok 1930”, Warsaw 1931, p. 200ff.

¹¹ Article 33(2) of the regulation of the President of the Republic of Poland of January 26, 1928 on insurance control, Journal of Laws No. 9, item 64.

¹² See *Okólnik PUKU nr 94; Okólnik PUKU nr 113 z dnia 23 lutego 1931 r. w sprawie ogólnych warunków ubezpieczenia*, “Rocznik Państwowego Urzędu Kontroli Ubezpieczeń za rok 1931”, Warsaw 1932, p. 184ff.

¹³ See *Orzeczenie Sądu Okręgowego we Lwowie* [no file ref. – W.B.] *w sprawie stwierdzenia, iż*

is the fact emphasized by the courts that the misrepresentation must have been conscious, because if the client declared that he was healthy, but he was not healthy, but was not aware of his illness, it was not possible to infer on this basis of the will to mislead the insurer and refuse to cover the policy.¹⁴ However, the time for withdrawing from the contract was limited to one year from the issuance of the policy and to one month from the moment the insurer became aware of the existence of the condition in the form of confusion.¹⁵

CONCLUSIONS

In the analyzed period, concealment of the illness by the client at the time of signing the contract with the insurance company remained one of the main reasons for refusing to pay compensation after the death of the insured person. The first years after Poland regained independence were characterized by considerable freedom of insurance companies in terms of shaping the content of contracts, which often resulted in abuse and harm to the families of customers who took out life insurance policies. It was only the change of regulations in conjunction with the active policy of the State Office for Insurance Control that forced a significant change in the approach to the rights of the insured.

udzielenie odpowiedzi niezgodnych z prawdą na pytania postawione przez lekarza, dotyczące istotnych okoliczności i jako takie zamieszczone we wniosku ubezpieczeniowym, powoduje utratę prawa do świadczenia, "Rocznik Państwowego Urzędu Kontroli Ubezpieczeń za rok 1930", Warsaw 1931, p. 236ff; Orzeczenie Sądu Okręgowego w Cieszynie III.12/31 w sprawie stwierdzenia, iż zatajenie przez ubezpieczającego przy zawieraniu ubezpieczenia na życie, że jest lub był chory na syfilis uprawnia zakład ubezpieczeń do odstąpienia od umowy ubezpieczenia, "Rocznik Państwowego Urzędu Kontroli Ubezpieczeń za rok 1932", Warsaw 1932, p. 191ff.

¹⁴ See *Orzeczenie Sądu Okręgowego we Lwowie II. Cg. 122/30.*

¹⁵ See *Orzeczenie Sądu Najwyższego C.III. 81/33 w sprawie stwierdzenia, iż odstąpienie przez zakład ubezpieczeń od umowy ubezpieczenia na życie z powodu zatajenia choroby przez ubezpieczonego dopuszczalne jest z zachowaniem umówionego terminu również po śmierci ubezpieczającego, "Rocznik Państwowego Urzędu Kontroli Ubezpieczeń za rok 1935", Warsaw 1936, p. 186ff; Orzeczenie Sądu Najwyższego C. I. 622/31 w sprawie stwierdzenia, iż zastrzeżone w polisie prawo zakładu zaczeplenia umowy ubezpieczenia w ciągu 1 roku od doręczenia polisy z powodu zapłacenia pierwszej składki w chwili, gdy ubezpieczony był już ciężko chory, może zakład skutecznie przez oświadczenie wobec przeciwnika, a nie koniecznie w drodze skargi powodowej, "Rocznik Państwowego Urzędu Kontroli Ubezpieczeń za rok 1933", Warsaw 1934, p. 175ff; Orzeczenie Sądu Najwyższego C. III. 358/32 w sprawie stwierdzenia, iż zakład ubezpieczeń nie może, odmawiając wypłaty odszkodowania z powodu podania we wniosku ubezpieczeniowym ważnej okoliczności niezgodnie z rzeczywistością, powoływać się na przepisy §§ 17, 18 i 21 ustawy z dnia 30. V. 1908 r. o umowie ubezpieczenia, o ile nie odstąpił od umowy w terminie miesięcznym, "Rocznik Państwowego Urzędu Kontroli Ubezpieczeń za rok 1934", vol. I, Warsaw 1935, p. 158ff; Orzeczenie Sądu Apelacyjnego w Krakowie C.A. II. 1065/36 w sprawie stwierdzenia, iż termin miesięczny w § 6 ustawy z dn. 23. XII. 1917 r. o kontrakcie ubezpieczenia biegnie dla zakładu ubezpieczenia nie od daty, w której zakład zebrał wszelkie dowody co do wadliwości zeznań, lecz od daty, w której zakład uzyskał takie dane, z których według wszelkiego prawdopodobieństwa mógł i powinien był wnosić o wadliwości zeznań, "Rocznik Państwowego Urzędu Kontroli Ubezpieczeń za rok 1937", Warsaw 1938, p. 188ff.*

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POLISH SYSTEM OF OUT-OF-COURT COMPENSATION FOR MEDICAL INJURIES

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Abstract. One of the most serious problems in proceedings intended to repair personal injury caused while treating a patient is an attempt to reconcile two divergent interests – the interest of the injured party and the interest of the party responsible for repairing said damage. This leads to lengthy lawsuits, escalation of court costs and sometimes to the aggrieved parties' giving up their pursuit of recompense for the injury caused to them. This is why research and legislative attempts are being taken up throughout the world to aid the aggrieved patient in obtaining compensation. These legislative works and the related comparative research have contributed to the introduction in countries such as New Zealand, Sweden or France of alternative systems of remedying medical injuries. In Poland a system based on 16 commissions for the evaluation of medical incidents has been in operation since 1 January 2012. The Polish system was intended to mirror foreign models which exercised the principle of facilitating the patient in obtaining quick, inexpensive and certain recompense for the injury suffered during medical treatment. The Polish system, despite the legislator's declarations, has not sufficiently drawn on foreign models. It is unique and completely novel in the world scale, which does not, however, translate into its effectiveness. The aim of this paper is to present to a foreign reader the premises of liability and the proceedings before voivodship commissions for evaluating medical events. This paper intends to demonstrate the main mistakes made by the Polish legislator so that other countries can avoid wrong models during their own legislative works. Moreover, the conclusions present proposals of legislative amendments which would improve the operation and effectiveness of the commissions.

Keywords: repairing damage, compensation, recompense, medical incident, patient

INTRODUCTION

On 1 January 2012 provisions regarding the procedure and rules for determining compensation and recompense in case of medical incidents entered into the Polish legal system.¹ The new provisions are a response to the growing number of so-called medical lawsuits and the need to enable patients or, in the event of their decease, their heirs to pursue claims for damages arising from the broadly understood treatment process.

In Poland – as in other countries – the right model of the system in which the injured party could quickly and at the lowest possible cost obtain compensation for personal injury has been discussed for years. Since the late 1960s, views have begun to appear in the Polish legal writings according to which the traditional

¹ Act of 28 April 2011 amending the act on patients' rights and Patient's Ombudsman and the Act on compulsory insurance, the Insurance Guarantee Fund and the Polish Motor Insurers' Bureau, Journal of Laws item 660 as amended.

model of civil liability for medical injuries based on fault does not fulfil its role and in practice often does not lead to providing the aggrieved party with even partial indemnification [Karkowska and Chojnacki 2014, 31; Bączyk–Rozwadowska 2013, 209]. The search for other solutions also on the basis of branches of the law that are not associated in the domestic legal order with the regulation of traditionally understood principles of liability for damage provides evidence of the existence of the crisis known in Western literature as *malpractice crisis* [Furrow, Greaney, Johnson, et al 1997, 283]. Attempts to amend legislation in countries such as New Zealand [Skegg 2004, 298–334], Sweden [Wendel 2004, 367–91] or Belgium [Kozioł 2004, 89–120] aimed at enabling a quick and full compensation for the damage suffered by patients during the treatment process in isolation from the requirement to prove the fault of a particular health professional [Bączyk–Rozwadowska 2013, 213].

As a result of the legislative work, a new agency for legal protection was incorporated into the Polish legal system – voivodeship commissions for the evaluation of medical incidents² that operate in each of the 16 Polish voivodeships. The provisions regulating the proceedings before the commission for the evaluation of medical incidents were introduced into the Act of 6 November 2008.³ With the establishment of these commissions, the Polish legislator created a system of out-of-court compensation for damages resulting from “medical incidents.” The aim of this system was to introduce into domestic legislation a method independent of and subsidiary to the judicial course of compensation for damage that was suffered during a treatment process. The legislator’s guiding principle was to eliminate those difficulties in obtaining compensation for medical injuries in civil proceedings which actually led to limitation of access to the court and thus also of the right to compensation. Therefore, changes in Polish law were aimed at simplifying and accelerating pursuit of claims and reducing the costs of proceedings [Karkowska and Chojnacki 2014, 35–36].⁴ Fundamental data in this regard is provided by the explanatory memorandum to the draft amendment to PRA.⁵ The data presented there shows that if in 2001–2009 there had been no new claims in Poland regarding compensation or recompense in medical injury cases, examination of a case concerning damage suffered as a result of medical treatment would, on average, last about four years (assuming that the case is examined in two-instance proceedings, without remanding the case for re-examination and that no cassation appeal is filed). The main purpose of the reform in this scope was, therefore, to lighten the common courts’ burden and to transfer at least part of the compensation cases outside the common court system.

² Hereinafter: the voivodeship commission/the commission.

³ Act of 6 November 2008 on patients’ rights and Patient’s Ombudsman, Journal of Laws of 2019, item 1127 [hereinafter: PRA].

⁴ Judgment of the Constitutional Tribunal of 11 March 2014, ref. no. K 6/13, Journal of Laws item 372.

⁵ Explanatory memorandum to the draft act of 6 November 2008 on amending the act on patients’ rights and Patient’s Ombudsman, <http://ww2.senat.pl/k7/dok/sejm/074/3488.pdf> [accessed: 14.03.2020].

The aim of the article is to present to a foreign reader the Polish out-of-court compensation system for damages incurred during treatment. Due to global tendencies to facilitate compensation (not only for damage caused during treatment), it is justified to include the Polish system in the scholarly discussion. It is the comparative works that give the impulse – due to the convergence of the methods adopted throughout the world – for further development of the no-fault systems. They make it possible to draw on good practices and to avoid duplication of mistakes.

1. THE PREREQUISITES FOR LIABILITY IN PROCEEDINGS BEFORE VOIVODESHIP COMMISSIONS FOR THE EVALUATION OF MEDICAL INCIDENTS

The Polish legislator has formulated the legal definition of the concept of “medical incident” (Article 67a PRA). As stipulated in PRA, a medical incident involves infecting a patient with a biological disease agent, a bodily injury or a disorder of the patient’s health or his death that have occurred in a hospital as a result of the following procedures that are contrary to the current medical knowledge: 1) diagnosis, if it caused malpractice or delayed appropriate treatment, contributing to the development of the disease; 2) treatment, including performance of a surgical procedure; 3) use of a medical product or medical device.

Investigation whether a specific damage arose as a result of a “medical incident” may be carried out in proceedings before a voivodeship commission (Article 67c section 1 PRA). Therefore, in practice a medical incident means an undesirable consequence of circumstances that involve medical risk. This concept departs from the determination of a specific perpetrator of the injury and, consequently, the assessment of the subjectively understood fault. The concept of a medical incident is, therefore, confined to establishing whether a treatment process is objectively contrary to the principles of medical knowledge. Therefore, determining that in certain conditions there are prerequisites for a medical incident will not affect – as a general rule – the criminal or disciplinary liability of the direct perpetrator of the injury, because this perpetrator does not have to be determined in the course of the proceedings. This is why the responsibility of the organizational unit (the health care entity) that operates the hospital is depersonalized.

The legislator’s restriction of the possibility of pursuing claims concerning medical incidents only to injuries that took place in hospitals operated by health care entities was justified by the legislator by saying that hospitals carry out the most complex medical procedures, consequently an injury is most likely to occur in such an entity.⁶ Even before the entry into force of the amendment to PRA Polish legal scholars and commentators [Karkowska and Chojnacki 2014, 35] raised, pertinently, in author’s belief, doubts about the compliance of the said restric-

⁶ Ibid.

tion with the principle of equality before the law.⁷ According to the cited view, the discussed regulation does not provide injured persons with equal treatment within the healthcare system. A person injured in a hospital may take advantage of a faster and, above all, definitely cheaper way of pursuing compensation for the injury, while a patient injured outside the hospital is excluded from proceedings before a voivodeship commission [Urbaniak 2014, 153–65; Sarnes 2014, 79–97].

2. WHO MAY REQUEST THAT A MEDICAL INCIDENT BE DECLARED?

Naturally, the directly injured patient is entitled to request that a medical incident be declared. In addition, the Polish legislator also granted this right to the heirs of the deceased patient (Article 67b(1–2) PRA). While there is no doubt about the patient’s right, the legislator’s decision that heirs may also appear in the proceedings before voivodeship commissions is controversial [Nesterowicz and Wałachowska 2011, 21–35; Bączyk–Rozwadowska 2013, 345–46; Kowalewski, Śliwka, and Wałachowska 2010, 22–39; Serwach 2011, 20–29; Ziemiak 2011, 165–217].

The source of – justifiable – doubts of representatives of legal science involves first of all the granting of the entitlement to compensation for non-financial personal injury to the patient’s heirs, while the Polish Civil Code⁸ includes the closest family members in the catalogue of “indirectly injured” persons. This concept is interpreted in the established line of Polish judicial decisions through the lens of the actual emotional relationship between the deceased and the person seeking compensation or recompense in relation to his decease and is not restricted to formal family legal ties,⁹ as is the case in inheritance. Seeking recompense by persons who are heirs of the deceased, and who did not keep in contact with the deceased for a long time or were in conflict with him (these circumstances are not subject to examination in the proceedings before the commission) could meet strong social opposition. For the purposes of proceedings before the commission it is sufficient to have the formal status of an heir, i.e. to hold a valid court declaration of succession, a notarial certificate of succession registered by a notary or a European Certificate of Succession.

The second significant weak point of the adopted solution is the risk – rather only theoretical, but still valid – that the municipality of the last place of residence of the deceased or the State Treasury participate in the proceedings as a party (Article 935 CC). If the deceased leaves no spouse, relatives by consanguinity or chi-

⁷ Article 32(1) of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended.

⁸ See Article 446(3–4) of the Act of 23 April 1964, the Civil Code, Journal of Laws of 2019, item 1145 as amended [hereinafter: CC].

⁹ Judgment of the Supreme Court – Civil Chamber of 13 April 2005, ref. no. IV CK 648/04, OSNC 2006 no. 3, item 54.

Children of the deceased's spouse called to succession by law, the estate falls to the municipality of the deceased's last place of residence as the statutory heir or if the deceased's last place of residence in the Republic of Poland cannot be established or the deceased's last place of residence is abroad, the estate falls to the State Treasury. It is difficult to imagine a logical justification for granting the State Treasury the right to seek recompense for the death of the patient.

3. WHEN SHOULD THE PETITION BE SUBMITTED?

A patient or his heir may submit a petition for a declaration of a medical incident within 1 year of the day on which he became aware of the occurrence of damage justifying the claim for medical incidents (*a tempore scientiae*), while this period is limited to 3 years from the date of the damage (*a tempore facti*) (Article 67c(2) PRA). In the case of heirs, the final date for submitting the request does not run until the inheritance proceedings close (Article 67c(4) PRA). The deadline for initiating proceedings before a voivodeship commission is time-barred under substantive law, which means that its expiry should be taken into account by the commission *ex officio* and should constitute the basis for the commission's issuing a decision on the absence of a medical incident [Białkowski 2020, 142–59].

4. WHAT IS THE ORGANISATION OF VOIVODESHIP COMMISSIONS?

Voivodeship commissions for the evaluation of medical incidents are classified in the Polish legal writings as quasi-judicial bodies [Karkowska 2012, 496; Mucha 2012, 38–52; Sadowska 2014, 84–93; Zduński 2013, 129–44]. These are such bodies of legal protection (distinguished next to courts and out-of-court bodies, e.g. police) [Bodio, Borkowski, and Demendecki 2013, 23–24], which lack one of the features of judicial bodies – most often they do not have the statutory guarantee of independence [ibid.].

Sixteen voivodeship commissions (one in each Polish voivodeship) were appointed to adjudicate on medical incidents. The voivodeship commission is composed of sixteen members, of which eight must have a university master's degree or equivalent in the field of medical sciences, and the remaining eight members must have a university master's degree in the field of legal sciences. Each member of the commission must have relevant professional experience (minimum five years) or hold a doctoral degree in legal sciences or in the field of medical sciences. An additional requirement formulated for commission members is knowledge of patients' rights and full public rights (Article 67e PRA). Fourteen out of the sixteen members of the commission are appointed by the voivode from among candidates proposed by professional associations of doctors, dentists, nurses, midwives, laboratory diagnosticians and advocates, by the association of attorneys-at-law and by social organisations operating in the voivodeship for the

benefit of patients' rights. The minister competent for health matters and the Patient's Ombudsman each appoint one member of the commission.

A member of the commission may not be sentenced by a final judgment for an intentional offence or intentional tax offence, be punished for disciplinary or professional liability with legal validity and may not be subject to a final decision on a penalty consisting in a prohibition from operating an activity involving upbringing, treatment and education of minors and providing care for them. The term of office of a member of the commission is six years, and in the event of his dismissal (Article 67e(9) PRA) or death a new member is co-opted for the remaining term of office. The work of the voivodeship commission is managed by the chairperson elected by its members by a majority of votes with a quorum of 3/4 of the commission's composition. The Commission independently adopts the regulations on the basis of which it proceeds.

5. THE PROCEEDINGS BEFORE THE COMMISSION – AN OUTLINE

Proceedings before the commission are initiated by a petition [Białkowski 2020, 142–59]. The entities entitled to submit a petition are the patient or the patient's heir (Article 67b(1) PRA). The petition is subject to a flat fee of PLN 200, which, compared to the filing fee (5% of the value in dispute) should be considered a very favourable solution for the petitioner.

After passing the initial (formal) verification, the petition for a declaration of a medical incident is forwarded to the head of the health care entity operating the hospital to which the petition refers and to the insurer with which the entity has executed a contract of insurance for patients in the event of medical incidents (this insurance in the current regulatory environment is not mandatory). These entities may, within 30 days of being served the petition, come forward with their position, otherwise the petition, as for the circumstances indicated in it and the amount of compensation and recompense (Article 67d(6) PRA), shall be deemed fully acknowledged.

If the aforementioned entities present their position, the stage of examination of cases begins. The presentation of the parties' positions and the taking of evidence is done during a public sitting in which both the petitioner and the representative of the head of the health care entity and the agent of the insurer may participate (Article 67i(2) PRA). The organisation of sittings and explanation of the case, including the taking of evidence, were regulated by the legislator by a broad reference to the provisions of the civil procedure [Jarocha 2013, 29–52].¹⁰ The proceedings before the commission should be completed within four months from the date of submission of the petition (Article 67j(2) PRA).

Pursuing the objective of the proceedings, which is to determine whether the incident that results in material or non-material damage was a medical incident

¹⁰ The Polish civil procedure is regulated in the Act of 17 November 1964, the Code of Civil Procedure, Journal of Laws of 2019, item 1460 as amended [hereinafter: CCP].

(Article 67i(1) PRA), the commission adjudicating in a four-member panel (Article 67f(1) PRA) issues a written decision. The Commission may issue two types of substantive decisions: on a declaration of a medical incident or lack thereof (Article 67j(1) PRA). The decision is made by a 3/4 majority in the presence of all members of the commission (Article 67j(3) PRA). The decision is delivered to the parties, who may within 14 days from the date of service submit a request for the case to be reconsidered (Article 67j(7) PRA).

The Commission informs the parties about the ineffective expiry of the time limit for submitting a request for the case to be reconsidered (Article 67j(9) PRA). The thirty-day period for the submission by the insurer or health care entity that operates the hospital of the offer of the amount of compensation and recompense (Article 67k(2) PRA)¹¹ begins as from the date of serving the information on the expiration of the time limit for submitting a request to have the case reconsidered.

The insurer is bound by the commission's decision (Article 67k(1) PRA), which, however, does not rule on the amount of compensation due to the patient or his heir. The state of being bound by the decision lasts until the performance is made for the benefit of the petitioner or until he rejects the payment offer (Article 67k(5) PRA) [Ziemiak 2011, 165–217]. The payment offer proposed by the insurer must be within the limits set out in the Act, i.e. up to PLN 100,000 for the patient and up to PLN 300,000 for the heirs of the deceased patient – damage caps (Article 67k(7) PRA). It is also known in other legal systems, e.g. in Sweden [Farrell, Devaney, and Dar 2010, 34]. The regulation of the Minister of Health¹² provides details on how to determine the amount of compensation for damages suffered as a result of a medical incident.

The provisions of this regulation are, *de facto*, a dead letter as the legislator did not foresee mechanisms for the commission's authority to inspect whether the parties in the proceedings comply with its content. Furthermore, neither PRA nor the quota regulation sets minimum compensation thresholds that would be granted in the event of a certain type of injury.

If the insurer makes an offer to pay compensation or recompense to the petitioner, the patient or his heir is entitled to accept or reject it within 7 days of its receipt. Making a statement of acceptance of the proposal has far-reaching consequences. Along with the acceptance of the proposal, the patient or his heir is also required to submit a declaration on the waiver of any further claims for compensation and recompense for injury suffered that may result from events consi-

¹¹ It should be emphasized that in the second stage of the proceedings which starts with the service of the notice referred to in Article 67j(9) PRA or with the date of service of the decision of the voivodship commission issued as a result of submitting a request for reconsideration of the case, the hospital operator may act independently instead of the insurer (see Article 67k(10) PRA). Therefore, comments on the insurer's operation at this stage of the proceedings should be appropriately related to the activity of the hospital operator.

¹² Regulation of the Minister of Health of 27 June 2013 on the detailed scope and conditions of specifying the performance amount in the case of a medical incident, Journal of Laws item 750 [hereinafter: quota regulation].

dered by the voivodeship commission to be a medical incident in the scope of injuries that had been revealed before the date of submission of the petition (Article 67k(5) PRA). If the proposal is accepted by the patient or his heir, the proposal becomes an enforcement title without the court's declaring it enforceable (Article 67k(8) PRA).

In the event that the insurer fails to submit a compensation and recompense proposal within the time limit, the insurer is obliged to pay performances in the amount specified by the patient or his heir in the petition though not exceeding the statutory limits (Article 67k(3) PRA). In such a case, the commission issues a certificate in which it states that the petition has been submitted, the amount of compensation or recompense, and the fact that the insurer has not submitted the proposal. The certificate issued by the commission constitutes an enforcement title (Article 776 CCP) without the court's declaring it enforceable and is the basis for the initiation of enforcement proceedings by a court enforcement officer [Frąckowiak 2014, 233–42].

The provisions of PRA do not provide for inspection by a higher instance or judicial review or judicial review of administration. The parties are only allowed to request that the case be reconsidered (Article 67j(7–8) PRA) and to file a complaint only on formal objections against a decision on the existence or non-existence of a medical incident (Article 67m PRA) to be declared unlawful, which can only be based on a violation of the rules of proceedings before the commission. Both appeal measures are examined by voivodeship commissions.

The proceedings before the commission are divided into two stages [Bączyk–Rozwadowska 2013, 354; Mogilski 2011, 111–43]. The first stage commences with the submission of the petition for a declaration of a medical incident by the petitioner and ends with the issuance of a decision by the commission in which the commission determines whether the incident causing the damage was a medical incident (case examination stage). The proceedings transform into second stage proceedings only if the commission issues a decision on declaring a medical incident. The proceedings then begin with the submission of a proposal to pay compensation and recompense by the insurer or health care entity that operates the hospital and end with the acceptance of the proposal by the petitioner (quasi negotiations stage).

Therefore, in order to determine whether the commissions actually facilitate obtaining the recompense by the patient, it is essential to establish not only the percentage of cases that end with a decision declaring a medical incident, but also the share of proposals of health care entities or insurers that is accepted by patients.

6. COMPARISON OF THE AMOUNT OF COMPENSATION OBTAINED IN PROCEEDINGS BEFORE A VOIVODESHIP COMMISSION AND IN COURT PROCEEDINGS

The Polish legislator, enforcing the out-of-court system of compensation for medical injuries, decided that the compensation awarded to a patient in proceedings before a voivodeship commission may amount to up to PLN 100,000 whereas the patient's heirs may receive up to PLN 300,000 (Article 67k(7) PRA). In the proceedings – as has already been mentioned – the patient or his heirs may demand recompense (compensating a non-financial personal injury) and compensation (compensating a financial personal injury). This solution was *ab initio* criticised by Polish scholars in particular in relation to the stipulated amount of damage caps [Bączyk–Rozwadowska 2013, 364; Nesterowicz and Wałachowska 2011, 21–35; Frąckowiak 2014, 233–42]. It is rightly pointed out that a non-standard solution is to adopt limits on performances that the indirectly injured persons (heirs) can obtain at a higher level than the limits for a living patient [Nesterowicz and Wałachowska 2011, 21–35]. A serious defect of the regulation involves also absence of an option to obtain an annuity in proceedings before the commission, although the original draft law provided for the possibility of awarding it in the course of proceedings in the amount of up to PLN 3,000 per month.¹³ In order to compare the performances which can be obtained before a commission with the realities of judicial application of the law, several rulings of the Polish Supreme Court and common courts of law will be quoted:

1) in the judgment of 7 October 2010 the Court of Appeal in Wrocław awarded the claimant PLN 600,000 as recompense, compensation in the amount of PLN 220,000 and between PLN 4,500 and PLN 7,200 as annuity per month depending on the period¹⁴ (the case concerned an improperly performed removal of both thyroid lobes resulting in a sudden cardiac arrest, cerebral edema and, consequently, “cerebral coma” [Nesterowicz 2012, 415–23]);

2) in an older judgment of the Court of Appeal in Cracow, the claimant received PLN 200,000 as recompense, PLN 500 monthly as annuity and compensation in the amount of PLN 3,298 (the case concerned an incorrectly performed adenoidectomy, where the adenoid fell into the esophagus and then into the trachea during surgery, which combined with concealing this information from anaesthesiologists who were unable to intubate the patient, led to a cardiac arrest for about 10 minutes and 100% detriment to the patient's health);¹⁵

¹³ The legislator did not explain in the explanatory memorandum to the draft the reasons for resigning from the possibility of pursuing an annuity in the proceedings before a voivodeship commission.

¹⁴ Judgment of the Court of Appeal in Wrocław of 7 October 2010, ref. no. I ACa 896/10, “Przegląd Sądowy” 2 (2012), p. 123.

¹⁵ Judgment of the Court of Appeal in Cracow of 9 March 2001, ref. no. I ACa 124/01, Lex no. 357408.

3) the third example from the established line of Polish judicial decisions is the judgment of the Court of Appeal in Katowice of 21 November 2007,¹⁶ in which the court awarded the claimant PLN 15,577.27 as compensation, PLN 700,000 as recompense and a monthly annuity of PLN 1,900 (as a consequence of incorrect connection of a drip; the fluid, which was to be delivered into the bloodstream was pumped all night into epidural space, which resulted in the claimant's paralysis);

4) in the fourth case, the Supreme Court upheld the judgment awarding the claimant the amount of PLN 153,044 as recompense for a resection of the wrong kidney;¹⁷

5) the fifth case concerns the ruling on the claim of parents of a child who died as a result of the application of the Kristeller maneuver in labour. In this case, the court awarded the claimants jointly PLN 1,000,000 as recompense.¹⁸

Therefore, in the established line of Polish judicial decisions the amounts of total compensation and recompense that are awarded in court proceedings are several times higher than those which may be obtained by petitioners in proceedings before the commission. Furthermore, in the Polish legal system an important factor compensating for the suffered injury involves annuity, i.e. a periodic payment awarded to the aggrieved party in connection with diminishment of his future prospects or an increase of his needs due to the detrimental occurrence or due to being completely or partially incapable of working (Article 444(2) CC). This annuity may be claimed by other persons related to the deceased to whom the latter provided means of subsistence (Article 446(2) CC).

The conclusions that can be drawn based on the examples from the rulings quoted above are also reflected in the research carried out for the purposes of the discussed reform. According to data collected by the Ministry of Health, e.g. the amount of recompense awarded for jaundice infection in 2000 was on average PLN 168,000, while in 2006 it was already PLN 345,825.¹⁹ In the years 1996–1998 the average amount of compensation for HBV hepatitis infection ranged between PLN 5,000 and PLN 8,000.²⁰ However, in the judgment of 28 July 2016, the Court of Appeal in Lublin awarded the claimant the amount of PLN 100,000 as the mere recompense for getting infected with the same virus.²¹ Moreover, just a few years ago, the indemnification of personal injury awarded to a minor claimant

¹⁶ Judgment of the Court of Appeal in Katowice of 21 November 2007, ref. no. I ACa 617/07, Lex no. 795203.

¹⁷ Judgment of the Supreme Court – Civil Chamber of 10 March 2005, ref. no. IV CSK 80/05, OSNC 2006 no. 10, item 175.

¹⁸ Judgment of the Supreme Court – Civil Chamber of 24 March 2011, ref. no. I CSK 389/10, OSNC – Additional collection 2012 no. A, item 22.

¹⁹ Explanatory memorandum to the draft act of 6 November 2008.

²⁰ *Ibid.*

²¹ Judgment of the Court of Appeal in Lublin – I Civil Department of 28 July 2016, ref. no. I ACa 21/16, Legalis no. 1509100.

mant for an error in perinatal care did not exceed PLN 150,000.²² The analysis of the established line of judicial decisions carried out in the explanatory memorandum to the draft law indicates that currently in the case of an extremely severe condition of the child as a result of faulty conduct of labour, amounts of compensation not less than PLN 500,000²³ are awarded. An example of this is the judgment of the Court of Appeal in Lublin,²⁴ in which the court awarded a minor claimant the amount of PLN 600,000 as recompense, an annuity in the amount between PLN 4,069 and PLN 5,630 (depending on the period) and PLN 57,436.19 as compensation.

Given the above, and particularly in view of the amount of indemnification obtainable in the proceedings before the commission and the lack of a possibility to claim annuity, legal writings have proposed to increase the amounts that could be obtained in the course of proceedings before the commission to PLN 1,000,000, which would already include a capitalised annuity or up to PLN 500,000 as compensation and recompense along with the possibility of receiving an annuity by a directly injured patient, while leaving the amounts that can be obtained by indirectly injured persons at the current level [Nesterowicz and Wałachowska 2011, 21–35].

CONCLUSIONS

Despite the fact that the discussed amendments have already entered into force, the situation of patients injured during a medical treatment has not improved significantly in the provisions of Polish law. Research carried out by the Supreme Audit Office shows that only 32% of petitions end with a ruling that is a favourable to the patient, while only in 10% of all decisions on declaring a medical incident the payment for the patient is actually made.²⁵

Although credit must be given to the option of having the case for repairing a medical injury settled in an out-of-court establishment such as ADR where the costs are low (a PLN 200 fee as compared to the 5% charge when filing an application in a court) and although the time of proceedings is stipulated in the statute to be 4 months, the Polish legislator failed to avoid many errors which should not be repeated in works on analogical solutions in other countries.

The legislator's mistakes include mainly the fact that liability for repairing the damage is determined by "violation of the principles of medical knowledge." And even though this circumstance does not need to be "proven," as is the case in court proceedings, but only "substantiated," the greatest problem of medical suits

²² Explanatory memorandum to the draft act of 6 November 2008.

²³ *Ibid.*

²⁴ Judgment of the Court of Appeal in Lublin of 10 November 2009, ref. no. I ACa 523/09, Lex no. 1163111.

²⁵ Report of the Supreme Audit Office, <https://www.nik.gov.pl/kontrola/P/18/057/> [accessed: 14.04.2020].

is valid in proceedings before the voivodship commissions. Expert witness testimonies still need to be taken and such expert witnesses are responsible for determining whether the medical treatment was appropriate. This premise is contrary to the idea of a no-fault system.

Another major flaw involves giving the patient's heirs the right to file petitions for a medical incident to be declared (e.g. where there are no other heirs, the municipality of the last place of residence of the deceased will act as an heir in Poland). The Polish legislator relied here on a certain formal relation between the heir and the testator instead of granting this right, as modelled in the Polish civil code, to a person who actually suffered personal injury as a result of the death of the patient (e.g. closest family members).

One may also wonder why the occurrence of medical incidents was limited solely to hospitals run by health care entities. Any patient who suffered any injury during a treatment, regardless of the legal form in which the medical activity is carried out, should be allowed to seek recompense before a voivodship commission. The limitation introduced by the Polish legislator should be considered as entirely unfounded.

The time limit for submitting a petition for a medical incident to be declared is not praiseworthy either. The time limit for the patient to pursue his claims before a commission should be extended from one year from the date of learning about the injury to three years from the date of learning about the injury and about the person liable for repairing it. At the moment, the very short time limit (one year) runs from the moment of learning about the injury itself. When the treatment is carried out in a number of medical centres, the patient must determine in which of them he suffered the injury so as to pursue his claim effectively. Only after the patient collects all the information that allows him to file the petition effectively should the period start running.

The intent for proceedings before a commission to only declare a medical incident was also a no lesser mistake. The commissions do not have the authority to determine the amount of compensation. The amount of the proposed compensation depends on the unilateral decision of the entity liable for repairing the damage. The legislator limited the role of the commissions solely to deciding whether the facts meet the requirements of liability for a medical incident. When a commission does actually decide so, the entity that operates the medical activity or their insurer take over and may offer absurdly low compensation, e.g. PLN 1 for an injury involving the death of the patient, and bears no further related liability. The legislator did not stipulate an option of negotiations in the course of proceedings either, nor did he grant the commissions the authority to act as a mediator between the parties to the proceedings. This greatly prevents the medical entity and the aggrieved party from coming closer together to work out a compromise. Moreover, the medical entity's or the insurer's proposal is not subject to inspection either by the commission or by a common court of law and, what is more, is limited by the introduction of damage caps (PLN 100,000 for a patient;

PLN 300,000 for his heirs). These amounts deviate from the established line of judicial decisions and differ significantly from compensation that could be obtained in judicial proceedings. What cannot be overlooked either is the fact that the patient cannot pursue an annuity in proceedings before a commission. This means that if the type of the injury requires long-term and regular financing (physical therapy, medicines taken for life or specialist feeding), this injury will be allowed to be covered, in a limited scope, in a single compensation payment.

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THE NEED FOR ECOLOGICAL CONVERSION AND THE CANONICAL STANDARD. ANALYSIS IN THE LIGHT OF THE LATEST DOCUMENTS OF THE MAGISTERIUM OF THE CATHOLIC CHURCH

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Abstract. Due to the current situation of the ecological crisis, the author takes up the topic of the analysis of the most recent Church Magisterium. He concludes that it is in the light of the documents *Laudato si'*, *Evangelii gaudium*, *Fratelli tutti*, etc. of Pope Francis, that can find a doctrine which (in terms of the need for ecological conversion) is normative, although informal and take the conviction that maybe this doctrine in line with the words of Cardinal Coccopalmero, former president of the Pontifical Council for Legislative Texts, will soon be introduced into the Code of Canon Law.

Keywords: Church Magisterium, canon law, ecological crisis, environmental education, socio-environmental crisis

INTRODUCTION

In the teaching of the Catholic Church, facts have emerged that encourage us to address, in view of current canonical doctrine, the issue of the need for ecological conversion. In agreement with the thesis contained in the article: *Edukacja ekologiczna w dokumentach Kościoła oraz prawie kanonicznym*, that “it is not easy to discuss the problems of protecting the environment of human life, which are anchored in the legislation of the Church, because in Canon Law we do not find any norm that directly addresses this issue”¹ [Krajewski 2011, 145], it should be noted that the encyclical of Pope Francis *Laudato si'*,² and the encyclical *Fratelli tutti*,³ gives a clear indication that the Church’s teachings are to be looked at again in this matter.

An important assumption for our analysis is the concept of canon law, understood as “a set of laws issued by the competent authority of the Church, guarding

¹ The author of this article has translated the citation.

² Franciscus PP., Litterae encyclicae *Laudato si'* de communi domo colenda (24.05.2015), AAS 107 (2015), p. 847–945 [hereinafter: LS].

³ Francis, Encyclical letter *Fratelli tutti* on fraternity and social friendship (03.10.2020) [hereinafter: FT], https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_enciclica-fratelli-tutti.html [accessed: 05.01.2021].

those who live in the community of Christ.”⁴ The point is, however, that such a collection does not have to be limited to the images contained in the Code of Canon Law. “The legal force – however different in terms of scope and validity – may have standards issued by, among others: popes, councils, synods, religious institutes, episcopal conferences or dicasteries of the Roman Curia” [Krzywkowska and Kubala 2016, 137]. Moreover, the Catholic Church and the Holy See,⁵ in canonical doctrine, have the character of moral persons [Dzierżon 2014, 7–22], because they are of “the very establishment of God” (Canon 113, para. 1 CIC/83). This means that the source of these institutions and the norms they emanate is simply God’s law [Krzywkowska and Kubala 2016, 138]. The Catechism of the Catholic Church sees it similarly in no. 340.⁶

The apostolic constitution of Pope John Paul II *Sacrae disciplinae legis*⁷ provides additional clarification in this area. It states that the Code of Canon Law includes “a long legacy of law, which is contained in the books of the Old and New Testaments, and from which the entire legal and legislative tradition of the Church derives as if from its first source” (SDL 14). In this light, CIC/83 is “conceived of as a great transmission lane that transmits this doctrine to canonic language” (SDL 14). And although it is not possible to translate (the whole) picture of the Church into canonical language [Wróbel 2016, 121–47; Sobański 1972, 59–70], if the ecological attitude of the faithful is to be the result of education and upbringing, those in turn “must result from a «programme» outlined by law and doctrine” [Krajewski 2011, 146]. It is supposed to correspond to the trend, present in all legal systems, to “describe in the most precise and professional language possible a catalogue of rights and obligations of certain persons and categories of natural persons, persons and categories of legal persons” [Adamowicz 2020, 3].

The search center is the question about the content and doctrinal validation of the ecological norm, which on the assumptions of the idea of ecological conversion would be transposed into the CIC/83. Such a norm could be a stimulus on the way to conversion if this norm would contain a content calling the faithful to action that would integrate humanity with all creation that desires salvation. This norm should include not only ideas and concepts of action, but also “first of all, about motivations arising from spirituality to strengthen the passion for the care of the world” (LS 216).

⁴ *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1–317 [hereinafter: CIC/83], Canon 1752.

⁵ Act of 17 May 1989 on relations between the State and the Catholic Church in the Republic of Poland, Journal of Laws of 2019, item 1347, Article 6(1); Concordat between the Holy See and the Republic of Poland of 28 July 1993, Journal of Laws of 1998, No. 51, item 318, Article 4(1).

⁶ *Catechismus Catholicae Ecclesiae*, Libreria Editrice Vaticana, Città del Vaticano 1997 [hereinafter: CCE].

⁷ *Ioannes Paulus PP. II, Constitutio apostolica Sacrae disciplinae legis* (25.01.1983) [hereinafter: SDL], in: CIC/83, p. 7–17.

1. WHY THE CATHOLIC CHURCH IS COMMITTED TO PROMOTING ENVIRONMENTAL PROTECTION AND ENVIRONMENTAL ATTITUDES

The subject of the crisis, ecological sin, the need for conversion, etc., indicates the existence of certain deficiencies in the moral attitude of the faithful as well as in the legal order. Their essence, meaning and scope has already been shown by John XXIII⁸ – in the context of sanctity of life and demography; Paul VI⁹ – in the sense of calling for the integral development of man; John Paul II¹⁰ – talking about the need for human ecology [Babiński 2012, 249–64]; Benedict XVI¹¹ – recognizing the issues of ecology as part of the integral development of man [Zagończyk 2015, 79–92], and now Pope Francis in the encyclical *LS* or *FT* – demanding common, i.e. global concern for a common home [Twardziłowski 2017, 135]. And this is (it seems) sufficient to put forward the thesis that there is a need to introduce into *CIC/83* as well such regulations that would speak of the need for ecological conversion. These regulations could have their special place in the Church's current doctrine of education and freedom of conscience.¹² That is, with reference to canon 217 of the *CIC/83*, under which the baptised “have the right to a Christian upbringing, by which they should be properly prepared for the maturity of the human person” [Krajczyński 2005, 171; Gręźlikowski 2009, 180].

The idea is to provide the faithful at the level of universal law with such normative means (i.e. assistance, instruction, etc.) so that, when making a concrete choice, they know what applies to them and what does not, where their objectified good is, whether in terms of environmental education or the formation of an ecological conscience. If the meaning of God's law “is discovered only by those who have found it, they stand by it and follow it” (Canon 748, para. 1 *CIC/83*), this is a particularly important observation for the church legislature. When establishing an ecological standard, it should take into account (apart from its material subject matter), the cognitive and existential conditions of its recipients. The question of

⁸ Ioannes PP. XXIII, Litterae encyclicae de pace omnium gentium in veritate, iustitia, caritate, libertate constituenda *Pacem in terris* (11.04.1965), AAS 55 (1963), p. 257–304, no. 2; Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio pastoralis de Ecclesia in mundo huius temporis *Gaudium et spes* (07.12.1965), AAS 58 (1966), p. 1025–115, no. 31, 39, 42.

⁹ Paulus PP. VI, Litterae encyclicae de populorum progressionem promovenda *Populorum progressio* (26.03.1967), AAS 59 (1967), p. 257–99.

¹⁰ Ioannes Paulus PP. II, Litterae encyclicae saeculo ipso Encyclicis ab editis litteris «Rerum novarum» transacto *Centesimus annus* (01.05.1991), AAS 83 (1991), p. 793–867, no. 38; Idem, Litterae encyclicae vicesimo expleto anno ab editis Litteris Encyclicis a verbis «Populorum progressio» incipientibus *Sollicitudo rei socialis* (30.12.1987), AAS 80 (1988), p. 513–86, no. 26; Idem, *Stworzenie glosi wielkość Boga*. Speech on the Angel of the Lord, Lorenzago di Cadore (23.08.1992), “L'Osservatore Romano” (Polish edition), 13/10 (1992), p. 30.

¹¹ Benedictus PP. XVI, Litterae encyclicae de humana integra progressionem in caritate veritateque *Caritas in veritate* (29.06.2009), AAS 101 (2009), p. 641–709, no. 27.

¹² Sacrosanctum Concilium Oecumenicum Vaticanum II, Declaratio de educatione christiana *Gravissimum educationis* (28.10.1965), AAS 58 (1966), p. 728–39.

whether a potential believer will be able to understand it and practice it adequately highlights a specific difficulty here, as it lies between the ideology and doctrine of the Catholic Church. That is why in this field two basic motivational elements can be seen to interweave. One is economic and health-related, and the other is ethical and religious. The report: *Survey of the Consciousness and Ecological Behaviour of the People of Poland* speaks about this fact. It shows that the average citizen wants to protect the natural environment for reasons of: a) health; b) concern for future generations¹³ [Kawulka 2010].

Moreover, the contemporary notion of the ecological norm is determined by the fact that the Church's traditional doctrine has seen the position of man in the world in the light of anthropology based on personal and Christian dignity (Canon 208–233 CIC/83). If, therefore, today he is being urged (in his primacy over creation) to rethink his Christian duties, it is worth recalling that the concept of conversion according to the document *Dignity and the Rights of the Human Being*, the International Theological Commission (1983), means accepting the kerygma of faith in the form of accepting “many consequences in every field of activity.”¹⁴ It also means that if we recognise that the fundamental aim of the CIC/83 is the good of the faithful, understood as their “supernatural happiness” [Dzięga 2019, 2879], then each of them, being obliged to acknowledge their grave sins, according to Canon 989 CIC/83, should also see the call to an examination of conscience in the context of ecological sin.

However, the task of caring for ecological conversion that the Church has set itself today is not an easy one. The new vision of Pope Francis' human community must resist the criticism that it is detached from the Tradition of the Catholic Church. This criticism, however, forgets that the papal invitation to ecological cooperation of all people (as brothers) is to be an opportunity to evangelise. The exposition, first in the Exhortation *Evangelii Gaudium*,¹⁵ and then in LS, FT 8, of the slogan: “we cannot act alone, we must revive the desire for brotherhood among all,” because it expresses the biblical conviction that only the unification of people (Jn 17, 20–6) can save not only the environment of human life from catastrophe, but humanity itself from eternal condemnation. In other words, if we say that “no one saves himself [...] we need a community to support us” (FT 54), what is important here is that the deeper meaning of this principle can also be found in CIC/83. This is made clear by Canon 1752 when it says: “salus animarum suprema lex esto” – the salvation of souls (that is, of all the brothers) by the highest law in the Church [Dyduch 2014, 23].

Moreover, regardless of the controversy that may arise in connection with the Catholic Church's philosophy of nature [Bochenek 2015, 140], it is, however, the

¹³ See <https://www.gov.pl/web/klimat/badania-swiadomosci-ekologicznej> [accessed: 11.12. 2020].

¹⁴ See https://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_1983_dignita-diritti_pl.html [accessed: 12.12.2020].

¹⁵ Franciscus PP., Adhortatio apostolica *Evangelii gaudium* de Evangelio Nuntiando nostra aetate (24.11.2013), AAS 105 (2013), p. 1019–137, Chapters II and IV.

relationship that the Church has built “between man and the reality around him” that has always been based on the truth (whether natural or revealed) [Krajewski 2011, 147–48]. Hence, “the radical current of the ecological hermeneutics of the Bible, which is currently developing, denies and rejects the anthropocentric approach, and instead proposes and adopts a strictly biocentric perspective as the only legitimate one,” is negatively assessed [Twardziłowski 2017, 147]. And this is (as it seems) a thesis which should become (also in the normative aspect) the important content of the ecological catechesis [Kostorz 2015, 59–69], which “under the guidance of the legitimate ecclesiastical authority, belongs to all the members of the Church, in the proper part of each one” (Canon 774, para. 1 CIC/83).

In addition, the issue of the need for ecological conversion is covered by criminal awareness [Zawłocki 2014, 127–46]. This is a special context. It is necessary to know that the Church, starting from the fact of Revelation, has always linked the issue of the protection of creation with the issue of the eternal salvation of man, and has been persistent in this field. Thus, this notion of punishment “for offences against the obligation to raise children Catholic in the Codes of Canon Law” [Wąsik 2004, 463–85], can now be extended to include negligence in the field of environmental education, i.e. so-called ecological sin.

In accordance with Canon 266, para. 2 CIC/83, the responsibility for religious and moral education belongs to parents, because they give life, but not only. There’s something more. His dignity is also determined by his participation in the pedagogy of God the Father,¹⁶ as well as by the fact that he consists in the “spiritual birth of a child”¹⁷ [Krajczyński 2005, 154], and that it has its place in state legislation,¹⁸ so it cannot be abandoned (for some reason).

2. UNDERSTANDING THE NEED FOR ECOLOGICAL CONVERSION IN THE TRADITIONAL CHURCH DOCTRINE

In the doctrine of the Catholic Church there has always been a conviction that “being defenders of God’s work is an essential part of an honest life.”¹⁹ John Paul II has repeatedly reminded us of our duty to care for creation, “leading us directly out of faith in God the Creator and relying on the texts of Scripture and rational knowledge”²⁰ [Twardziłowski 2017, 137]. This time, however, the issue of “edu-

¹⁶ Ioannes Paulus PP. II, Adhortatio apostolica de Familiae Christianae muneribus in mundo huius temporis *Familiaris consortio* (22.11.1981), AAS 74 (1982), p. 81–191, no. 14.

¹⁷ Idem, Litterae Familiis ipso volente Sacro Familiae anno MCMXCIV *Gratissimam sane* (2.02.1994), AAS 86 (1994), p. 868–925, no. 16.

¹⁸ *Carta dei Diritti della Famiglia presentata dalla Sante Sede a tutte le persone, istituzioni ed autorità ed autorità interessate alla missione della famiglia nel mondo di oggi* (22.10.1983), “Communicationes” 15 (1983), no. 2, p. 140–52.

¹⁹ See http://www.vatican.va/content/benedict-xvi/pl/messages/peace/documents/hf_ben-xvi_mes_20091208_xliii-world-day-peace.html [accessed: 16.12.2020].

²⁰ Ioannes Paulus PP. II, Ob diem paci fovendae anno MCMXC dicatum missus. *La paix avec Dieu Créateur – la paix avec toute la création* (08.12.1989), AAS 82 (1990), p. 147–56.

cation and ecological conversion”²¹ is about the need to implement a “paradigm of integral ecology” that is anchored in respect for creation. Here the Church is aware that this is a task that “requires a far-reaching vision that is to be expressed in places and spaces where education and culture are cultivated and transmitted, awareness is created, an attitude of political, scientific and economic responsibility is formed” (HS, p. 16).

In other words, even if the Church’s opening up to environmental issues is considered to be the moment of Pope Paul VI’s meeting “with members of an organisation dealing with environmental issues” [Bochenek 2015, 140], it is essential from a doctrinal point of view that the Pope, when describing the relationship between man and nature, used terms such as “respect and unity,” which have personal characteristics. This is the year 1972, when a document was written, considered to be the official voice of the Catholic Church, entitled: *The position of the Holy See towards environmental protection*. “Since man is one with nature, it is necessary to replace its previous brutal exploitation with respect for the biosphere seen as a whole” [ibid., 143].

Thus, if in the ecological optics of Pope Francis, the concept of “respect for nature” is the basic principle of reference, then in the Magisterium of the Catholic Church, this optics was already well known. This is the catechism’s phrase: “every creature has its goodness and perfection” (CCE 339), created the framework for reflection, as well as for the norms on subjective responsibility for the environment. And perhaps this is why Pope Francis, in his encyclical LS, followed, in the spirit of the Second Vatican Council, John Paul II, who still understood the problems of ecology in terms of “lack of harmony with the natural world.”²² The Commission has also raised the responsibility for anti-environmental attitudes to the level of sin, the need for conversion, change of mentality, etc. He did so in an unambiguous way, i.e., one which, in the interpretation of Canon 15, para. 1 CIC/83, does not recognise ignorance, i.e. ignorance or error.²³ Thus in LS we find what the Church’s sacramental doctrine on sin already existed as codified in Canon 914, 916, 959 CIC/83 and no. 1422–484 CCE, etc. [Lech 2017, 82]. This is the conviction that “a profound interior conversion in the relationship to creation must take place within the context of the sacrament of Penance and Reconciliation. What is needed is our penance, repentance, regret «for the evil we do to our common home»” (FT 57).

²¹ *Tavolo interdicasteriale sull'ecologia integrale. In cammino per la cura della casa comune. A cinque anni dalla Laudato si'* (31.05.2020), Libreria Editrice Vaticana, Città del Vaticano 2020 [hereinafter: HS], p. 20–30.

²² Ioannes Paulus PP. II, Ob diem paci fovendae anno MCMXC dicatum missus.

²³ “§. Ignorance or mistake regarding the annulling or rendering inoperative acts shall not prevent their effects, unless otherwise expressly stated. § 2. There shall be no presumption of ignorance or error with respect to a law, a penalty, or with respect to one’s own or someone else’s notorious fact; but it shall be presumed with respect to someone else’s notorious fact until the contrary is proven” (Canon 15 CIC/83).

This need for conversion is theocentric in nature and is a concept that can be described as traditional. It directs the sinner's man to God the Creator, in the awareness that "the dramatic effects of ecological recklessness are always the result of sin" (HS 39), that is, some kind of departure from God.²⁴ It is a formative, but also expressive task, touching upon the very interior of Christian spirituality, which is inscribed in the content of Canon 960, 987–991 CIC/83, which are the essential need to enter and fulfil the conditions of the sacrament – "penance and reconciliation." This is an "objective world order," read "according to the spirit of the present time" (according to Pope Francis), becomes the basis for how to "define a moral code [...] with regard to environmental issues" [Bochenek 2015, 153].

The point is that even if the world was created as a good one, the man who was put at the heart of it did not have absolute freedom. He was not allowed to eat fruit from a forbidden tree. This fact is momentous enough to understand that the rules that Pope Francis talks about in relation to ecology can only be laid down and implemented in the theocentric option. I.e. under the condition that they are directed to the realization of the will of the Creator himself, who wanted everything he created to be subject to the laws of good, recognized in the act of freedom of conscience (Canon 748, para. 1–2 CIC/83). This has its reference to the Apostolic Constitution of the Second Vatican Council, *Gaudium et spes*²⁵: "for man has a law inscribed in his heart by God; obedience to this law constitutes precisely his dignity and according to him he will be judged" [Sitarz 2018, 76].

If we see the *raison d'être* of canon law in the study of Scripture, in the sense that "if one does not know Scripture, it is easy to believe that canon law is superfluous" [Kasprzak 2005, 348], this may be the case when it comes to the Church's teaching in general and its environmental doctrine in particular. Pope John Paul II warned against this when he spoke to the Pontifical Council on Legal Texts: "an even more dangerous form of reductionism is to try to interpret and apply Church laws in isolation from the doctrine of the Magisterium."²⁶ One could also conclude here that the normative, possibly to be incorporated into the CIC/83, would express the content of the idea of ecological conversion in the conviction that the Catholic Church has always been concerned with man and the world, which should aim at its God Father and Creator in a theologically established hierarchy (i.e. in order, harmony, etc.).²⁷

This fact makes a significant difference when we want to distance ourselves from the philosophical idea of biocentrism in line with the content of the LS, FT,

²⁴ Jan Paweł II, Katecheza "Stworzenie a słuszna autonomia rzeczy stworzonych" (02.04.1986), "L'Osservatore Romano" (Polish edition), 4 (1986), p. 19.

²⁵ Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio Pastoralis de Ecclesia in mundo huius temporis *Gaudium et spes* (07.12.1965), AAS 58 (1966), p. 1025–116, no. 16.

²⁶ John Paul II, The Holy Father's speech to the participants of the symposium of the Pontifical Council for Legal Texts: *Fundament teologiczny norm prawnych* (24.01.2003), "L'Osservatore Romano" (Polish edition), 5 (2003), p. 42–3.

²⁷ John Paul II, Catechesis: *Stworzenie a słuszna autonomia rzeczy stworzonych* (02.04.1986), "L'Osservatore Romano" (Polish edition), 4 (1986), p. 19.

HS, etc. documents. In them, the Church's Magisterium expresses its connection with the position that "you cannot defend nature unless you defend every human being," which has its due origin in God. Conversely, man "only in solidarity with the rest of creation, only with responsibility towards the world of animals, plants and things, can long live as the master of creation, without becoming a slave to his mania of greatness, a slave rejected by creation"²⁸ [Krajewski 2011, 149].

So, if we consider that "key concepts for understanding the post-conciliar teaching of the Church have become terms: «integral ecology» and «integral human development»" [Stelmach 2019], and that all this has already been incorporated in some way into the teachings of Pope Francis, it should also be recognised that only one question remains open. It is not so much a question of how the norm (which speaks of the need for ecological conversion) should be written into the content of the current canons of CIC/83, but how to transfer it into the framework of the traditionally lived Catholic faith. The precept as such cannot be (because) "properly applied without being rooted in the Catholic faith" [Grocholewski 2004, 21].

It seems that the dilemma as to whether the justification and announcement of the ecological standard to be attached to the CIC should be made due to the value and autonomy of creation, which is realized by the word: "respect," or rather because of the complete totality that created reality finds in relation to Christ Jesus, Saviour, and what are expressed by the words: "harmony, order, orderliness" [Twardziłowski 2017, 139], in fact does not exist. The decisive condition here is whether the issue of the shape of the ecological standard will be based strictly on the question of respect for the principle of justice, or also on the optics of equity, and whether it will continue to be "more flexible than any other law" [Grocholewski 2004, 21].

3. THE POSITIONS OF AMENDMENTS TO THE CODE OF CANON LAW

Combination of the topic of conversion and ecological education (which has been present in the Magisterium of the Catholic Church for some time) is in line with the need to introduce new regulations into canon law. And it is in connection with the ever stronger views existing in the Church, concerning the need to protect nature, that there is talk of a doctrinal and cultural trend. It is not surprising, therefore, that "in 2018, Cardinal Francesco Coccopalmerio announced the need to make certain changes to CIC/83 that would concern the ecological formation of the faithful."²⁹ His statement points to the fact that there are already enough reasons to justify such a record. It is a widely recognised principle that: "legitimises the law what determines its validity, the procedure for making laws, the

²⁸ Conferenza Episcopale Tedesca, *Dichiarazione su "Futuro della creazione e futuro dell'umanità"* (Fulda, settembre 1980), "Medicina e Morale" 2 (1990), p. 367–81.

²⁹ *Ekologiczny trend nie ominie Kodeksu Prawa Kanonicznego?*, <https://www.pch24.pl/ekologiczny-trend-nie-ominie-kodeksu-prawa-kanonicznego> [accessed: 07.07.2020].

procedure for justifying the law, the cultural heritage, the system of values, social communication, social consensus” [Piszko 2020, 355].

Taking into account how the process of the canonical law is being established and how extensive the scope of matters covered by the term “need for ecological conversion” is, it is necessary to have an in-depth ecclesiological awareness that the reception of such a new standard will be something exceptionally important for the quality of functioning of the entire Catholic community. The question of whether and how the faithful will accept the canonical norms established by the Church is a problem which is expressed in the fact that “the indication of the formal validity of the law remains vain and fruitless if the prescribed instruction is not fulfilled in practice. The argument that the law applies regardless of its reception is then little. In this way, religious life is not stimulated or community built” [Sobański 1990/1991, 79]. It seems that the controversies that could possibly arise here should rather relate to the interpretation of the provisions, i.e. how far they result from the choice of biblical hermeneutics, than to the essence of the law, its need and its amendments, the sources or the system of professed values.

The most important thing, however, is that there is an authoritative proposal to resolve the problematic situation of the lack of ecological provisions in the canonical legislation of the Catholic Church. If the former President of the Pontifical Council for Legal Texts, Cardinal Coccopalmero, states that: “the canons which concern the rights and duties of believers make no mention at all of one of the most important, namely the protection and development of the environment,”³⁰ it also adds that appropriate changes will be proposed for Pope Francis’ approval, and the new canon should take the following form: “Every Christian, aware that creation is a common home, has a serious duty not only not to destroy but also to improve, either through normal behaviour or through special initiatives, the environment in which each person is brought to life.” Moreover, according to the Cardinal, “the papal council, which he himself led until recently, should also request the addition of such a canon.”³¹

It is also important that the doctrinal background to the principle of ecological conversion (in the form proposed by Cardinal Coccopalmero), in addition to the need to carry out deeds of mercy [Poznański 2016], e.g. at the parish level,³² may be, in addition to accompaniment and contemplation,³³ those guidelines that have

³⁰ Ibid.

³¹ Ibid.

³² Congregation for the Clergy, Instruction *The pastoral conversion of the Parish community in the service of the evangelising mission of the Church* (20.07.2020), <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2020/07/20/200720a.html> [accessed: 22.07.2020]: “the point is not only that Pope Francis modified the deeds of mercy that originated from the beginnings of Christianity, but that he placed the concern for creation in the context of contemplating God’s mercy.”

³³ Francis, Catechesis: *Wednesday audience* (16.08.2020), <https://deon.pl/kosciol/serwis-papieski/papiez-franciszek-przypomnial-wazne-slowa-sw-jana-pawla-ii-i-zachecil-polakow-do-wprowadzenia> [accessed: 17.09.2020]: “finally contemplating and caring: these are two attitudes that show the way to improve and restore balance in our relationship between people and creation. Very often, our relationship with creation seems to be one of enemies.”

been highlighted in the (already quoted here many times) document Holy See: *On the road of caring for the common home* (HS). In terms of how to achieve the most current ecological goals, this document, as edited jointly by many of the dicasteries of the Holy See, indicates what should be considered necessary and good by all the faithful, and what has been inscribed for many years in the process of their moral, i.e. spiritual and religious renewal. On the other hand, it seems that all this should correspond to the Code's provision on the ways of implementing the common good in the Catholic Church (Canon 223, para. 1 CIC/83).

Thus (it seems) that the matter of incorporation of an ecological normative into the CIC/83 should be looked at in an optic: a) adequate to the so-called *signs of the formation* of the conscience of the community of believers; b) taking into account the most important motivations existing on the part of parents, children, etc., but also the institutions of the Church and the state [Biały 2020, 21–32]; c) integrating in the work of ecological renewal of all people, seen as brothers of one God and Creator. For, looking at the need for ecological conversion, the salvific obligation to sanctify people (Canon 1752 CIC/83), as called with all creation to salvation in Christ, is imposed first. And all this according to the principle that “experience teaches that the attitude (of the faithful, as a supplicant) [...] is closely related to the whole religious life” [Janczewski 1998, 129].

FINAL CONCLUSIONS

The analysis of (socioecological) documents of the Catholic Church's Magisterium, as well as of the literature on the subject, allows us to notice that its ethical and theological doctrine, which is the basis for canonical legislation, is based on cultural currents related to philosophical biocentrism (LS 91; HS 8) [Commoner 1971; Liszewski 2015, 36]. The point is that even if the teaching of the Catholic Church about the idea of fraternity has been extended by Pope Francis to the whole of creation, it has the imperative to link it with other traditional concepts such as salvation, holiness, missionaryism, sin, conversion, grace, the sacrament of penance and reconciliation, etc.

All of this means that the essence of the duty of ecological conversion remains the objective of making man sufficiently aware of his respect for nature and of his reconciliation with God, his Creator. The common denominator of the work (inner transformation) is therefore everything that results from the Revelation made in Christ the Lord, which aims to integrate all people as called to eternal salvation. The special function of unification and sanctification in this field has always been fulfilled by canonical law, e.g. through the call to works of love or solidarity (Canon 839, para. 1 CIC/83). In this sense, the normative norms of conversion, based on fraternity with all creation, would be enriched by a matter of appreciation of all those abilities “which God has bestowed on every believer [...] to develop his creativity and enthusiasm” (LS 220).

It seems that the standard for ecological conversion, in the amended CIC/83, should look like this: “Catholics, aware of their vocation to salvation, according to the will of Jesus Christ, should take the utmost account of environmental protection in their faith. The sense of respect for the environment, each believer should find in the duty of love of God the Creator and his neighbour, which is finally presented in the pages of Scripture. This dimension of concern for the environment should be every aspect of human life, since, by building good relations with man, man builds a sufficiently good relationship with an environment that “reflects something of God and contains a message” (LS 221).

A wider sense of environmental responsibility and the need to standardise this issue in canon law can be found in the warning that Pope Francis (at the consistory on 29 November 2020) addressed to the newly appointed cardinals: “Dear brothers, we all love Jesus, we all want to follow him, but we must always be vigilant to stay on his path. For we can be with him with our feet, with our bodies, our hearts can be far away and lead us astray” [Zawistowska 2020].

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THE NATIONAL REVENUE ADMINISTRATION AS AN ELEMENT OF THE ORGANISATIONAL STRUCTURE OF PUBLIC ADMINISTRATION AND AS AN ELEMENT OF THE FINANCIAL SECURITY OF POLAND

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Abstract. The study presents a fragment of Polish public administration, namely the National Revenue Administration (“Krajowa Administracja Skarbowa”). The National Revenue Administration is an element of the structure of public administration in Poland and forms part of the administration designed to safeguard the financial security of Poland. The study presents characteristics of the public administration, including units of the National Revenue Administration, and the role of this administration in safeguarding financial security, emphasizing the role and responsibilities of the National Revenue Administration in this regard.

Keywords: National Revenue Administration, public administration body, financial security, public finance

INTRODUCTION

The study presents a specific fragment of public administration, namely the National Revenue Administration.¹ As it will be demonstrated, the National Revenue Administration² is an element of the Polish public administration structures and an element of administration whose task is to safeguard the financial security of Poland. In the paper, I will present the characteristic properties of public administration, including of the organisational units of the NRA and its role in ensuring financial security, while highlighting the related role and tasks of the National Public Administration.

1. THE NATIONAL REVENUE ADMINISTRATION IN THE LIGHT OF THE NOTION OF *ADMINISTRATION*

The first question that should be posed with respect to these considerations should concern the nature of the organisational units that form the NRA. The name in itself suggests the answer that these are *organisational units* of public administration. Public administration is the subject of interest not only in management

¹ Act of 16 November 2016 on National Revenue Administration, Journal of Laws, item 1948 as amended.

² Hereinafter: the NRA.

sciences, but also in sociology, economic sciences, and psychology, and, first of all, within the scope of the analysis presented here, it is a subject of focus of administrative and legal sciences. The issues of management in public administration may be analysed in two fundamental aspects. The first one is managing public affairs on the scale of the given unit, and this process is referred to as *administering*. On the other hand, the second aspect consists in managing the organisation that is the auxiliary element of the administration body, i.e. managing *the office*. In this case, one may refer to managing an organisation. The science of administrative law, in particular the field that deals with issues of the public administration system, analyses the problems of the system of relationships between state and local self-government administration organs. From this point of view, one may see public administration as a specific system that consists of ordered elements which are interconnected by channels of information. Additionally, the environment of the system may be defined, including, for example, other public authorities, the legal system, geographic and natural conditions as well as social and cultural ones, and, finally, the addressees of the actions taken by administration [Wrzosek 2002, 19]. The doctrine has long noticed that the subject of interest of administrative sciences are the issues related to the influence of the state system on the shape of administration, issues of the environment in which this administration operates and their mutual dependencies. An important group of issues are related to administration structures and mutual relationships between administrative bodies [Leoński 1999, 21]. The organisation of the NRA supports the thesis that it remains within the orbit of interest of administrative sciences. The NRA as an organisation of administration units contains elements that, according to the doctrine, should be analysed precisely by administrative sciences, i.e.: a specific structure, a set of dependence relationships that exist in the organisation, information flow within the organisation, the decision-making process, issues related to conducting control activities in the organisation and their efficiency, recruitment and training of staff, and the contacts between the organisation and its environment [Wrzosek 2002, 21].

2. PUBLIC ADMINISTRATION

The organisation called the NRA belongs to the organisations referred to as *public administration*, as it constitutes a set of specific administering entities (bodies) of varied competences and duties. Public administration deals with managing various spheres of the community life, hence it is referred to as *public*. The NRA also performs certain functions in the public interest, including the collection of taxes and customs duties, combating smuggling and trade of illegal goods, such as fuels, etc. In general, it may be stated that the activity of the NRA is conducted as part of the organisational structure called the administration. *Administration*, on the other hand, may be determined by the scope of activity, and being conducted in the public interest, it is public – apart from legislation and the

judiciary. Administration may also be understood as an activity with the aim to realise specific public tasks, and then it is the activity of public organs. The properties of public administration are described very accurately by doctrine. They are: political nature; operating based on law and within its limits; absence of the aim in form of achieving profits; a uniform organisational nature; monopolistic nature; impersonal nature; authoritative nature; being organised and operating based on supervision and subordination; qualified personnel; continuous and stable activity, activity on its own initiative and on demand [Łętowski 1990, 8]. Thus, in principle, administration constitutes a specific, legally distinctive part of the state authorities that belongs to the executive [Ura 2015, 82]. Public administration is performed by the state in the widest meaning of this term, i.e. by state authorities and public and private associations (self-government associations) as well as other administration entities [Ochendowski 2002, 18]. In the light of the existence of the NRA it is worth noting that some representatives of the doctrine use the term *national public administration*, to refer to the activity of administration units in the areas regulated by national and European law [Nowak–Far 2015, 61].

3. ADMINISTRATIVE POLICY

It should be noted that public administration realises a specific mission, which is the realisation of *administrative policy*. The realisation of administrative policy requires organising the administration in an appropriate way, which should correspond to the underlying systemic basis of the state. The public administration system consists of two elements. First of all, it is the public administration organ and the office as the auxiliary element of the organ. This distinction is necessary due to the need to emphasise so-called *competences*. In the doctrine, competences are defined as the sphere of specific rights and obligations [Góralczyk 1986, 28]. One may also distinguish between general competences, which are related to performing specific tasks prescribed in legal regulations, and so-called specific competences that involve the right to handle an individual case [Jandy–Jendrońska and Jendrońska 1978, 179]. Obviously, the spectrum of competences refers to the activity of the administration organ, not of the office. As opposed to the *public administration organ*, the *office* may be defined as an organised system with a specific structure and a relevant degree of formalisation, whose main objective is to realise tasks related to public administration within the scope of competences granted to the given organ. On the other hand, a state authority is an organisational unit of the state that is authorised to express the will of the state. Granting competences to the organ is an expression of this will. For public administration organs, one may refer to the definition, which states that it is: a person or a group of individuals in collective organs, who belong to the organisational structure of the state or of local territorial self-government, appointed in order to execute the norms of administration law in a manner and with the effects specific for this law, within the scope of competences granted to it by law [Boć 1997, 120]. The above

definition of a public administration organ exhausts the essence of the matter. However, it may be précised and shortened to emphasise its most important components. Using such approach, one may assume that a public administration organ is characterised by: organisational distinction within the public administration system; acting on behalf and on account of the state; the right to use authoritative measures and to act within the competences granted by law [Szreniawski and Stelmasiak 2002, 15]. The above requires a brief characteristic. Namely, organisational distinction refers to a legally defined organisational form that makes the organ a specific whole. Nevertheless, it should be noted that organisational distinction does not prejudice the unity of public administration operating in the state. On the other hand, the possibility to use authoritative measures is an important element that distinguishes public administration organs from others, e.g. from legal entities in law-making, whose execution guarantees the possibility to use enforcement measures and highlights their specifics and role in the whole operations of the organs. It is essential that an administration organ should comply with its competences. The geographical jurisdiction defines the territory of operations of the given administration organ, the jurisdiction related to subject matter refers to the type of issues handled by the given organ, while jurisdiction related to instance concerns the stage (level) of processing issues in the structure of the administration system. The number and variety of public administration organs that are subjects of administrative and legal relationships, operate in the name of the state, are granted specific competences and are distinguished from the whole state system, leads to the need to make specific divisions and classifications. Based on various criteria, organs are usually divided into central and field ones, collective and monocratic, decisive and auxiliary, and, finally, professional and voluntary ones. The NRA is an organised system of field organs of non-combined state (public) administration, of a monocratic and professional nature, authorised to exercise authoritative rights. It is worth noting the word *non-combined* in the above definition. State (public) administration deals with numerous issues of public life. It is defined in the relevant legislation.³ It should be noted that Article 5(3) of the said Act stipulates that one of the divisions of public administration is public finance. At the same time, pursuant to Article 8(1) of the Act, public finance includes matters related to the realisation of incomes and expenditures of the state budget, as well as protecting the interests of the Treasury, with the exception of cases that are assigned to other departments pursuant to separate regulations. The NRA operates in the area of *public finance*. It is placed in the so-called *non-combined area*. This means that such administration reports directly to the central organ called the minister, not to the local representative of the government, i.e. the voivode (obviously, with a certain margin). Pursuant to Article 3(2) of the relevant Act, the voivode is the supervisor of the combined government

³ Act of 4 September 1997 on the Divisions of Public Administration, Journal of Laws of 2020, item 1220 as amended.

administration in the voivodeship.⁴ Combined administration is an element of local state administration. It is based on the organisational links between organs of such administration that are distinctive in terms of their subject, belonging to various areas of state administration (in the Act referred to as the heads of the combined services, inspections, and guards, e.g. the Chief Fire Officer, Chief Veterinary Surgeon, or the Voivodeship Authority for Education, etc.), under the supervision of one organ with general competences – the Voivode, with the aim to reduce administration costs, improve the coordination of activities and avoid overlapping competences. One may call it the opposite of the so-called departmental approach. As far as the combined administration is concerned, the voivode is authorised, among others, to appoint the heads of services, inspections, and guards (the exceptions are the Voivodeship Police Commander – voivode's opinion required, and Chief Fire Officer – approval required), to approve the regulations of such units, to create and dissolve organisational units constituting their auxiliary elements. In principle, these organs should be clustered in one Voivodeship Office and use a common budget, but in practice this principle is subject to some significant exceptions, e.g. in the case of the police. One may distinguish many such units (administration organs) that operate based on various legal acts [Bielecki 2011, 157–58].

4. DIVISION OF ADMINISTRATION

The fundamental issue in this respect is the clear division made by the legislator in the Act on the NRA: division into organs of the NRA (Section II of the Act) and into organisational units of the NRA (Section III of the Act). In my opinion, this results from the aspect of the consolidation of customs and revenue services (which took place at a specific time) and the role of the Revenue Administration Chamber as an organisational unit (for subordination management, and labour law, i.e. the competences and the financial and organisational aspect) first of all, and further, it refers to the role that is played in the NRA by the organ and its auxiliary element referred to as the office. The term *office* has had several meanings through the years, and it is still used in different contexts even today. It may refer to the seat of a public administration organ or an organisational unit of any other institution that deals with office work. It may also refer to the team of employees of public administration, the public administration organ itself in the colloquial meaning, the auxiliary element of such organ, a distinctive set of competences of an organ, or a position in public administration [Taras 2009, 39; Michalska-Badziak 2009, 257]. The doctrine provides numerous precise definitions of the term *office*. According to one of the Authors, the term *office* refers to the auxiliary elements of the given organ and describes an appropriately organised team of persons assigned to the public administration organ to help it perform

⁴ Act of 23 January 2009 on the Voivode and Public Administration in the Voivodeships, Journal of Laws of 2019, item 1464 as amended.

its functions. Apart from the team, the scope of this term also includes specific technical resources (such as the buildings, office equipment, etc.). Offices defined like this are not administration organs, as they do not have any authoritative powers and cannot issue any decisions or orders [Matan 2014, 35; Czerw 2016, 224]. Thus, the administrative law science defines *office* in only one way – as a separate team that provides assistance to a public administration organ in exercising its competences, as an auxiliary element of this organ. Similarly, according to part of the doctrine, the office holder, i.e. the person who, being appointed in a specific way, enters the competences of the organ being, in fact, a set of them, has to use the assistance of the auxiliary element, i.e. the office [Adamczyk 2011, 297]. At the same time, the name of the office is assigned to the given administration organ by the establishing act (e.g. Head of the Revenue Administration Chamber in the Act on the NRA). Another issue is to determine the internal structure of such auxiliary element. This takes place through lower rank acts, such as statutes, organisational regulations or by-laws. To illustrate the above, one may state that, for example, the auxiliary element for the Head of the Revenue Administration Chamber is the Revenue Administration Chamber, while the auxiliary element for the Head of the Tax Office is the Tax Office. One should remember that the auxiliary element of an organ cannot exercise the competences of the organ. It may only support them and substitute for the organ in performing tasks pursuant to an explicit authorisation. Here, it is worth noting the judgment, according to which, “the person authorised to sign – to issue decisions on behalf of the Tax Office is the Head of the Office, and for the Tax Chamber – its Director. The sole representation of the Office and the Chamber, granted to handle individual matters, may be assigned to employees of the organisational unit in writing, in form of a written authorisation to issue decisions, orders, and certificates.”⁵ It should also be noted that in the discussed scope we are dealing with so-called administrating entities that have so-called legal personality. This includes two notions: legal capacity and the capacity to perform acts in law. Administrating entities only have legal capacity, i.e. the capacity to be the subject of rights and obligations. However, they do not possess the capacity to perform acts in law, which is possessed only by natural persons who may express their will and act on their behalf. Thus, it is a person or a group of persons who perform the function of the so-called office holder of a public administration organ, which is a role held by appointment [Adamiak 2006, 43].

5. THE ROLE AND TASKS OF THE NATIONAL REVENUE ADMINISTRATION WITH RESPECT TO FINANCIAL SECURITY

The NRA was established from three previously independent administrations: tax, customs and treasury control. The NRA reform was guided by specific goals.

⁵ Judgment of the Supreme Administrative Court of 28 November 1995, ref. no. SA/Lu 2452/94, <http://orzeczenia.nsa.gov.pl> [accessed: 22.10.2020].

First of all, the uniformization of organisational structures, reducing the circulation of paper documents, providing additional equipment for offices, optimisation of resource management, developing a uniform career path, improving internal communication, uniformization of databases, procedures and operational standards, defining uniform competences and eliminating the competition between the activities of three former administrations [Zalewski 2018, 6–7]. The main objective of the NRA, as defined in the preamble to the Act on NRA, is to ensure modern and friendly execution of tax and customs duties and effective collection of public levies and the financial security of the Republic of Poland. The NRA is a specialised state administration, which has been entrusted with the tasks related to the realisation of income due to taxes, customs duties, payments, and non-tax budget receivables, protecting the interests of the Treasury, and safeguarding the customs area of the European Union. It also ensures services and support for taxpayers and payers in the proper execution of their tax duties and services and support for entrepreneurs in the proper execution of customs duties.

As far as ensuring the financial security of the state is concerned, it should be noted that it is a defined network of entities consisting of: state governments, central banks, financial supervision authorities, and deposit security systems. As for the NRA, this goal is achieved through the effective realisation of its main objective, i.e. effective collection of public levies. It should be noted that a state that realises a planned or higher budget and may dispose of revenues obtained from the collection of taxes, customs duties and other levies, will also be economically stable and will secure the funds for the realisation of internal and external policy goals. However, it is worth adding that the security of the state and of the European Union is realised by the NRA not only through budget revenues, but also by revealing smuggling on the border between Poland and the EU and combating economic crimes by the customs and tax services.

The analysis of the Act on NRA provides a basis to claim that it distinguishes the following organs: the competent minister for public finance, the Head of the NRA, the Head of the National Fiscal Information, the Head of the Revenue Administration Chamber, the Head of the Tax Office and Head of the Tax and Customs Office – together with the organisational units supporting these organs.

The above organs realise specific objectives of the NRA according to their acquired competences. Considering the regulations of the Act on NRA, the detailed tasks of the NRA may be classified into the following groups: group 1 – tasks related to the realisation of public revenues (realisation of public revenues, realisation of revenues from taxes and levies, realisation of revenues from customs duties and other fees connected with the import and export of goods); group 2 – realisation of the customs policy resulting from the membership in the customs union of the European Union (tasks resulting from the membership in the customs union of the European Union); group 3 – performing administrative enforcement of financial liabilities and performing the security of financial receivables (duties of the enforcement authority, enforcement of public law obligations); group 4 –

education and vocational training of the NRA personnel (the tasks of the Tax & Customs Academy); group 5 – tasks related to performing audit, audit activities and official review (audit duties, audit actions, official review); group 6 – tasks related to combating crime (operations in the grey zone, counteracting money laundering, white collar crimes, revealing and recovering property threatened by forfeiture); group 7 – tasks related to the fuel package monitoring system (tasks related to the road monitoring system of the transport of goods SENT); group 8 – fulfilling the duties related to foreign currency law (tasks related to foreign currency trade); group 9 – other tasks (duties resulting from the bans and restrictions in the trade of goods).

The above demonstrates that the tasks currently performed by the organs of NRA are the same as the tasks that were previously realised by three separate administration, but the catalogue of tasks has been expanded to include new duties, which were previously not performed by tax, customs, and inspection services, consisting in this respect in recognising, preventing, detecting and persecuting perpetrators of certain penal and penal fiscal crimes.

CONCLUSIONS

It is doubtless that the National Revenue Administration, and in particular its organs that realise the statutory tasks and duties constitute an important element of the public administration structure in Poland, in particular of administration, whose task is the realisation of budget revenues and ensuring the economic security of the state. It is precisely this type of task that makes this administration a key administration in the orbit of the referenced duties, as no other administration would be able to provide the required outcomes in this respect. In my opinion, the NRA is the most important administration in Poland and its importance is much higher than that of all other administrations, with the exception of the Prime Minister. Its role is however not duly appreciated, although it is more important even than the role of voivode on the voivodeship level (at least in the financial aspect). I would like to express my hope that the importance of this administration for the State of Poland will be properly understood and that it will be treated adequately, both in terms of its importance and proper appreciation.⁶

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⁶ Personally, as a long-term employee of tax administration (1997–2020) and the Head of Tax Administration Chamber in Lublin (2015–2010), I believe that this postulate should finally be brought into life.

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CONSTITUTIONAL PRINCIPLE OF JUSTICE IN UKRAINE IN ITS GENESIS AND IMPLEMENTATION IN PRACTICE

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Abstract. The authors study the principle of justice in Ukraine, focusing on the problematic issue – the violation of the principle of justice in the administration of law. An example is the decision of the Constitutional Court of Ukraine of 27 October 2020 No. 13-r/2020 on the abolition of electronic declaration of officials, which led to a constitutional crisis in the country. To resolve the situation, the President of Ukraine submitted to the Verkhovna Rada of Ukraine a bill on the dissolution of the Constitutional Court of Ukraine and the annulment of the above-mentioned decision of the Constitutional Court of Ukraine. The situation in the country is of great concern, as Ukraine's visa-free regime with the European Union and Ukraine's expected membership in the European Union are under threat. Corruption, long-term judicial reform, the constitutional crisis, violations of the principle of justice lead to the outflow of foreign investment from Ukraine, mass migration of Ukrainians to developed countries of the European Union. All these factors hinder the development of the state as independent and democratic. It is concluded that a necessary step for Ukraine's European integration is not only the declaration, but first of all the implementation of the principle of justice by all branches of Ukrainian power.

Keywords: justice, principle of law, state, law, judge, court decision, court proceedings

INTRODUCTION

Socio-political situation in Ukraine, the latest constitutional crisis caused by the decision of the Constitutional Court of Ukraine In the case of the constitutional petition of 47 people's deputies of Ukraine on the constitutionality of certain provisions of the Law of Ukraine *On Prevention of Corruption* No. 13-r/2020, as well as the attempt of the parliament to resolve the situation, testifies to the urgency of the fight against corruption in our country and its causes and manifestations. In practice, the problem of fighting corruption is closely linked to the implementation of the principle of justice. In Ukraine, there are problems with judicial reform. Therefore, the aim of the article is to study a key principle in law – the principle of justice.

The authors set themselves the task to analyze the development of the principle of justice in Ukraine and the practice of its application, to identify problematic issues regarding the implementation of the principle of justice in practice and to provide appropriate proposals for their solution. The research used such a method as historical and legal, because with its help the historical aspects of the origin, formation of the principle of justice are analyzed; with the help of the formal-legal method the problems of realization of the constitutional principle of justice in Ukraine are investigated.

1. PRINCIPLE OF JUSTICE IN THE HISTORICAL ASPECT

In ancient Rome, the principle of justice was referred to as “*aequitas*” and was used by both praetors and Roman jurists in the administration of justice when there was a gap in the current legislation, i.e. there was no relevant legal norm or it was insufficient. That is, as we see, in Ancient Rome the analogy of law or the analogy of justice was not applied, but the principle of justice was applied at once, on the basis of which law was built. As I. Babich notes, etymologically the Latin “*aequitas*” meant “uniformity, proportionality, equality.” In relation to legal phenomena in Roman jurisprudence, this concept acquired the meaning of “justice” and became a phenomenon of concretization of the concept of justice, which was defined by the word “*iustitia*.” The term “*aequitas*” was used by Roman jurists to contrast “*iniquitas*” (injustice), a legal situation that contradicts justice. “*Aequitas*” was an expression of natural justice, which significantly recognized and evaluated the existing law, which served as a guiding principle, a moral standard in the law-making of praetors, senates and lawyers, in the interpretation and application of law [Babich 2017, 8]. At the beginning of scientific the concept of “justice” was considered as a purely philosophical category. However, according to R. Dzhabrailov, perhaps in ancient times, when the civilized model of legal regulation of various spheres of social relations was emerging, the main components of the category of “justice” acquired those characteristics that today are beyond doubt and are perceived as a reflection of objective reality [Dzhabrailov 2017, 74].

“Law” and “justice” are synonyms. These two concepts are identified. According to E. Reniov, this suggests that the law was not considered unjust or detached from justice [Reniov 2016, 91]. According to the Regent-Professor of the University System of Maryland, Director of the Center for International and Comparative Law (University of Baltimore, USA) M. Sellers, philosophers from the time of Aristotle and Cicero, asserted the “rule of law” (*legum imperium*) as the main guarantee of practical justice [Sellers 2014, 212]. “The rule of law, not people” (to be more precise) requires a criterion beyond human will to protect the subjects of law and society from the arbitrariness of any other person. Cicero’s criterion of reasonableness draws the traditional distinction between the “rule of law,” which takes into account this external criterion of legitimacy, and the “rule

of man”, which does not take it into account. This does not mean that the law should ignore emotions, but rather that the law should include human emotions and direct them to achieve appropriate goals, which include the development and establishment of justice in society. The rule of law, as noted by Aristotle, Cicero and the founders of modern constitutionalism, requires constant adherence to the guidelines of reason and justice in lawmaking, interpretation and application of law [Reniov 2016, 91].

Justice is an eternal value, the basic principle of law. According to H. Perelman, “justice is a fundamental value” that must be considered in the context of the division into “a just deed, a just rule, a just man” [Perelman 2012, 95–115]. From time immemorial there has been an axiom that law must be just, because it is the embodiment of justice. D. Lloyd in his book “The Idea of Law” noted that “the idea of law has always been associated with the idea of justice” [Lloyd 1966]. All laws must be fair, because in case of violation of the principle of justice in their creation, it will lead to right-wing nihilism, non-compliance. No values can contradict justice. However, we often witness unfair laws being passed in Ukraine. Not all ideals of justice are always reflected in law. Usually in Ukraine, the law enshrines the ideas of justice only of those who created it, and public opinion about the justice of a law is not taken into account. That is, it turns out that lawmaking can realize both justice and injustice. It all depends in whose hands the power is.

Article 129 of the Constitution of Ukraine does not refer the principle of justice to the basic principles of justice. The principle of legality comes to the fore here. But this implies that laws are a priori fair and legal. If legality or constitutionality (after all, the Constitution is the expression of the sovereign will of the people, and therefore it must be the embodiment of the highest justice in the state), laws and other legal acts of the Verkhovna Rada of Ukraine, acts of the President of Ukraine, the Cabinet of Ministers of Ukraine, legislative acts of the Verkhovna Rada of the Autonomous Republic of Crimea is questioned, then the relevant state authorities may send an appeal to the Constitutional Court of Ukraine to resolve the issue of their compliance with the Constitution of Ukraine – the will of the people. Therefore, in general, the principle of legality can be in some way correlated with the principle of justice [Holovchenko 2012, 6].

At the same time, it should be reminded that a number of constitutional requirements directly follow from the principle of justice – this also indicates the indirect enshrinement of this principle in the Constitution. For example, the idea of justice is concretized in the principle of non bis in idem, enshrined in Article 61 of the Constitution of Ukraine. The principle of justice also stipulates the obligation to promulgate regulations (Part 3 of Article 57 of the Constitution), the general prohibition of retroactive laws (Part 1 of Article 58 of the Constitution), the right not to be forced to testify against oneself (Part 1 of Article 63 of the Constitution), the right to judicial protection (Article 55 of the Constitution), etc. [Pogrebnyak 2009, 31–32].

An urgent issue today is the study of how the principle of justice is implemented in practice. In the light of recent events in Ukraine, it is advisable to analyze the case law, which will allow us to conclude how the courts adhere to the principle of justice. Legality is the constitutional basis of justice. The decision of the Constitutional Court of Ukraine of 30 January 2003 No. 3-rp/2003 in the case of consideration by the court of certain decisions of the investigator and prosecutor [ibid.] states that “legality is inherently defined only if it meets the requirements of justice and ensures effective restoration of justice rights.” Some constitutional requirements follow precisely from the principle of justice. Article 55 of the Constitution of Ukraine guarantees the right to judicial protection. Part 1 of Article 63 of the Constitution of Ukraine enshrines the right not to testify about oneself, family members or close relatives. The principle of justice enshrines the obligation to promulgate regulations (Part 2 of Article 57 of the Constitution of Ukraine). Justice is effective only if it is fair. The problem is that judges often only formally refer to the principle of fairness in the administration of justice.¹

In Ukraine, in view of recent events, namely the decision of the Constitutional Court of Ukraine to abolish the electronic declaration of officials, the issue of justice is quite acute. As already noted, Ukrainian society did not accept the decision of the Constitutional Court of Ukraine In the case of the constitutional petition of 47 deputies of Ukraine on the constitutionality of certain provisions of the Law of Ukraine *On Prevention of Corruption*, the Criminal Code of Ukraine/2020, by which the Constitutional Court of Ukraine abolished criminal liability for false data in the declarations of officials and closed the public register of declarations. The norm, which was abolished provided that the submission by the declared subject of unreliable information in the person’s declaration authorized to perform state or local self-government functions. It was provided by the Law of Ukraine *On Prevention of Corruption* or intentional failure of the declared subject 3,000 non-taxable minimum incomes of citizens or public works for a period of 150 to 240 hours, or imprisonment for up to two years. It also means deprivation of the right to hold certain positions or be engaged in certain activities for up to three years.² The Court substantiates its position as follows: “The Constitutional Court of Ukraine considers that the establishment of criminal liability for declaring inaccurate information in a declaration, as well as intentional failure of the subject of declaring a declaration is an excessive punishment for these offenses. The negative consequences resulted from the prosecution of committing crimes under Article 366(1) of the Criminal Code of Ukraine are disproportionate to the dama-

¹ Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of the Supreme Court of Ukraine on the constitutionality of the provisions of part three of Article 120, part six of Article 234, part three of Article 236 of the Criminal Procedure Code of Ukraine (case on consideration by court of separate decisions of the investigator and the prosecutor) (2003). <http://www.ccu.gov.ua/docs/470> [accessed: 03.01.2021].

² *KSU skasuvav vidpovidal'nist' za nedostovirne deklarovannya: osnovni aspekty rishennya*, https://jurliga.ligazakon.net/news/199232_ksu-skasuvav-vidpovdlnst-za-nedostovirne-deklaruvannya-osnovn-aspekti-rshennya [accessed: 03.01.2021].

ge that has occurred or could cause an event of the commission of the relevant acts. Thus, the above shows that the legislator did not observe the principles of justice and proportionality as elements of the principle of the rule of law, and therefore Article 366(1) of the Criminal Code of Ukraine contradicts part one of Article 8 of the Basic Law of Ukraine.”³ We believe that such a fundamentally soft position of the body of constitutional jurisdiction in Ukraine is a direct “green” light for Ukrainian corrupt officials. This decision establishes complete irresponsibility for acts of corruption.

In our opinion, such a decision of this body of constitutional jurisdiction in Ukraine grossly violates the principle of justice and the principle of equality of all before the law and the court. The Venice Commission concluded that the actions of the Constitutional Court of Ukraine were an usurpation of the will of parliament. The President of Ukraine Volodymyr Zelenskyi reacted to this decision of the Constitutional Court of Ukraine and submitted to the Verkhovna Rada of Ukraine a draft law *On Restoration of Public Confidence in the Constitutional Judiciary*. There are two key points in this bill – the dissolution of the Constitutional Court of Ukraine and the recognition of its decision as null and void, i.e. one that does not create legal consequences. On January 27, 2021, the project was withdrawn. The Decree of the President of Ukraine of 26 January 2021 No. 26/2021 put into effect a new decision of the National Security and Defense Council of Ukraine.⁴ The draft law to which this decision applies provides for the return of punishment in the form of restriction or imprisonment of false declaration and failure to file a declaration. Thus, it is proposed to amend Article 366(2) of the Criminal Code (declaration of inaccurate information), providing that intentional inclusion of inaccurate information in the declaration, which differs from the reliable in the amount of 500 to 2000 subsistence minimums for able-bodied persons, is punishable by a fine of 3000 to 4000 non-taxable minimum incomes of citizens or public works for a period of 150 to 240 hours, or restriction of freedom for up to two years, with deprivation of the right to hold certain positions or engage in certain activities for up to three years. If the declarant intentionally entered inaccurate information that differs from the reliable in the amount of more than 2000 living wage for able-bodied persons, it is proposed to impose a penalty of 4,000 to 5,000 tax-free minimum incomes of citizens or public works for a period of 150 to 240 hours, or restriction of liberty for up to two years, or imprisonment for the same term, with deprivation of the right to hold

³ The decisions of the Constitutional Court of Ukraine according to the approval of 47 Member Deputies of Ukraine regarding the constitutional correspondence to the laws of Ukraine in particular on the law of Ukraine *On corruption prevention*, according to the Criminal code of Ukraine (2020), <https://zakon.rada.gov.ua/laws/card/v013p710-20> [accessed: 03.01.2021].

⁴ The decision of National Security and Defense of Ukraine on the Draft of the law of Ukraine on Changes of Ukraine Codex about administrative violations, on Criminal Law concerning the responsibility for declaring unreliable information and for not declaring a proper declaration by the subject who is empowered with the authority of state or local self-governing functions, <https://zakon.rada.gov.ua/laws/show/n0001525-21#Text> [accessed: 03.01.2021].

certain positions for up to three years. In addition, the bill proposes to amend Article 366(3) of the Criminal Code (failure to file a declaration of a person authorized to perform state or local government functions), according to which for intentional failure to file a declaration is punishable by a fine of 2,500 to 3,000 tax-free minimum incomes citizens or public works for a period of 150 to 240 hours, or imprisonment for up to two years, with deprivation of the right to hold certain positions for up to three years.

Another painful issue for Ukrainians is the sale of Ukrainian land. The following question arises: is such a sale fair or unfair? The next interesting issue is the “rescue operation” of PJSC CB “Privatbank,” which was declared insolvent. Such a rescue cost Ukrainians 116 billion hryvnias. Are such actions of the state in relation to the Ukrainian people fair?

2. PRINCIPLE OF JUSTICE IN UKRAINIAN LEGISLATION AND ITS IMPLEMENTATION

Justice is the foundation of the welfare state, which must ensure human rights. If we analyze the state of human rights in Ukraine, the principle of justice is treated quite formally, because it is considered as a theoretical stencil, from which there is no practical use. In any democratic state, the principle of justice is a fundamental principle in law that must permeate all spheres of public life. In their decisions, courts very often refer to the principle of justice. Thus, for example, the Constitutional Court of Ukraine in its decision of 2 November 2004 No. 5-rp/2004 in the case of imposing a milder sentence by the court notes that justice – one of the basic principles of law, is decisive in determining it as a regulator social relations, one of the universal dimensions of law. Justice is usually seen as a property of law, expressed, in particular, in the equal legal scale of behavior and in the proportionality of legal responsibility for the offense.⁵ The decision of the Constitutional Court of Ukraine of 11 October 2005 No. 8-rp/2005 in the case of the level of pension and monthly lifetime allowance states that the activities of law-making and law enforcement bodies should be carried out on the principle of fairness.⁶ In its judgment of 22 September 2005 No. 5-rp/2005 in the case of permanent land use, the Constitutional Court of Ukraine emphasized that “the con-

⁵ Judgment of the Constitutional Court of Ukraine in the case on the constitutional petition of the Supreme Court of Ukraine on the constitutionality of the provisions of Article 69 of the Criminal Code of Ukraine (case on sentencing by a court) (2004), <http://www.ccu.gov.ua/docs/504> [accessed: 10.12.2020].

⁶ Judgment of the Constitutional Court of Ukraine in the case on constitutional petitions of the Supreme Court of Ukraine and 50 people’s deputies of Ukraine on compliance of the Constitution of Ukraine (constitutionality) with the provisions of the third and fourth paragraphs of item 13 Section XV “Final Provisions” of the Law of Ukraine *On Compulsory State Pension Insurance* and the official interpretation of the provisions of Part 3 of Article 11 of the Law of Ukraine *On the Status of Judges* (case on the level of pension and monthly lifetime allowance) (2005), <http://www.ccu.gov.ua/docs/519> [accessed: 31.01.2021].

stitutional principles of equality and fairness require the definition, clarity and unambiguity of a legal norm, as nothing else application, does not preclude unlimited interpretation in law enforcement practice and inevitably leads to arbitrariness.”⁷

In the field of law enforcement, justice is manifested, in particular, in the equality of all before the law, the conformity of crime and punishment, the goals of the legislator and the means chosen to achieve them. A separate manifestation of justice is the question of the conformity of punishment to the crime committed; the category of justice presupposes that the punishment for a crime must be commensurate with the crime. Fair application of legal norms is, first of all, a non-discriminatory approach, impartiality. This means not only that the *statutory corpus delicti* and the scope of punishment will be commensurate with each other, but also that the punishment must be in fair proportion to the gravity and circumstances of the offense and the identity of the perpetrator. The adequacy of punishment for the severity of the crime follows from the principle of the rule of law, from the essence of constitutional rights and freedoms of man and citizen, in particular the right to liberty, which can not be limited, except as provided by the Constitution of Ukraine [Holovchenko 2012, 7].

The problematic issue in practice is that corruption is rampant in Ukraine, especially in the courts, and it is very difficult to get a fair trial in court. We often witness the so-called “custom” decisions, when some “manual” judges make such decisions, because “telephone law” in Ukraine has not yet been *de facto* abolished. For example, according to the latest polls conducted by the Razumkov Center, distrust of the judiciary among Ukrainian citizens is preceded only by distrust of officials in general and the Russian media.⁸

The judicial system of Ukraine has a rather difficult situation. Currently, there is a “staff shortage” in the courts, which leads to an increase in the workload of current judges and violation of the terms of consideration of cases. The shortage of staff in local and appellate courts is about 30 percent, and in some courts there are no judges at all. A. Ovsienko, Chairman of the High Council of Justice, notes the following: the events during the last five years witnessed to the fact that in the continuing process of judicial reforms losing over 2500 judges, the state was able to fill in the vacancies only for 10%, despite the fact that there exists an urgent need in judges. It is connected with the work overload and as a result pro-

⁷ Judgment of the Constitutional Court of Ukraine in the case on the constitutional petition of 51 People’s Deputies of Ukraine on the constitutionality of the provisions of Article 92, paragraph 6 of Section X *Transitional Provisions* of the Land Code of Ukraine (case on permanent land use) (2005), <http://www.ccu.gov.ua/docs/519> [accessed: 31.01.2021].

⁸ *Ukrayins’ki sudy hirshi za koruptsiyu, vvezhayut’ investory*, <https://www.bbc.com/ukrainian/news-54891061> [accessed: 31.01.2021].

longing the cases investigation and in the long run causing mistrust and in general deterioration of justice.⁹

Such a violation of the principle of justice in the judiciary leads to a deterioration of the economic situation in Ukraine due to the outflow of foreign investment. The situation was further complicated by the COVID-19 pandemic. In order for a foreign investor to want to work in Ukraine, he needs certain guarantees, including a guarantee of fair justice.

According to A. Selivanov, the first thing to understand the purpose and purpose of justice is the trust of citizens, when justice is done exclusively by law, and access to court is guaranteed. The task for judges is to completely exclude the possibility for each participant in the proceedings to seek means of illegal influence on judges, which may give him an advantage in obtaining the desired court decision. This is the main danger of losing the authority of professional judges and the right to judge. None of the citizens agrees to live in such a society with unforeseen circumstances, which deprives a person of confidence in his own legal protection and constitutional security. Isn't that why the "trembling of soul and body" penetrates deep into people's minds when they find themselves in a court deprived of the right to a fair trial. And this is the main factor inhibiting positive change in Ukraine [Selivanov 2017, 4].

We fully agree with T.R.S. Allan's argues that in responding to a claim, a judge or arbitrator must convince the plaintiff of the fairness of his or her treatment in terms that demonstrate the independence of his or her position. Judicial procedure presupposes respect for its participants, which is manifested not only in their specific treatment in accordance with the established rules, but also in the recognition of their dignity, in the manner in which, in their opinion, it should be expressed to make them feel gifted, equal rights of citizens. The use of an independent format of judicial procedure in courts, tribunals and other official institutions can be considered an integral component of the concept of constitutional government, which reflects the status of a citizen as an autonomous moral agent. The wider the individual's participation in the court proceedings – and hence his control over its course – the higher the moral authority of its outcome. And to the extent that the citizen will be able to obtain a justification for the administrative action presented in the most justified light, and will be able to challenge its consequences in their own interests, as he will be forced to make a decision of an impartial judge, proving his consent [Allan 2001, 106].

Violation of the principle of justice in Ukraine leads to mass migration of the population of Ukraine to the developed countries of the European Union. The situation in the country is complicated by the war in Eastern Ukraine, unemployment, a pandemic of coronavirus infection. The threat to Ukraine is that if effective reforms are not carried out in the near future, our state may become a state

⁹ *Holova VRP Andriy Ovsiienko: Kadrovyy holod u sudakh znyzhuye riven' dostupu hromadyan do pravosuddya*, <https://hcj.gov.ua/news/golova-vrp-andriy-ovsienko-kadrovyy-golod-u-sudah-znyzhuye-riven-dostupu-gromadyan-do> [accessed: 31.01.2021].

of “corrupt and retired people.” In order to achieve justice in the courts, judges are needed who, in addition to knowledge, will also have high moral qualities. In addition, the implementation of the principle of justice raises issues related to the imperfection of legal norms. Therefore, very often individuals are unfairly prosecuted, and there is no principle of justice in disciplinary liability. In general, the judge must bear in mind that in interpreting national law he must take into account the principle of fairness. Then the goal of justice will be achieved – protection of violated rights.

Ukrainians are one of the leaders in appealing to the European Court of Human Rights to protect their violated rights. This state of justice is a cause for concern. Mr. Guyvan investigates this issue and notes that of the 60,000 complaints before the Court, more than 20% are filed against Ukraine. However, not only the quantitative indicator is impressive. The fact is that most lawsuits before the European Court are based on the same grounds, so there is duplication of decisions [Guyvan 2019, 153]. In Ukraine, court decisions are often appealed to the European Court of Human Rights due to the fact that national courts do not implement the principle of fairness in practice, only formally refer to it. However, there are cases when the judge sees in the case that the law applicable to the disputed legal relationship is unfair. Modern law enforcement solves this problem by achieving a certain balance between the so-called established types of morality – “morality of aspirations” and “morality of duty,” taking into account the priority of the latter as a more universal type of morality that can serve as a basis for law [Fuller 1969, 51–52]. However, even if there is already a decision of the ECtHR to be used by national courts in the future, there are problems with law enforcement.

The problem for the Ukrainian judiciary is the lack of uniform criteria for the application of ECtHR precedents. Courts are often unaware of the legal meaning of their application. If the case law of the ECtHR is applied by national courts, then only at the formal level. This is a problem, as courts in Ukraine must not only refer to the ECtHR’s decision, but also interpret it [Guyvan 2019, 107].

The importance of the constitutional principle of justice is that it requires equal application of the law to persons in similar situations and differentiated application to those in different situations. The value of the principle of justice is revealed in the opposition to legal arbitrariness. Therefore, an important step for Ukraine is to strengthen the principle of justice as a fundamental principle of law. In the field of law enforcement, justice is manifested, in particular, in the equality of all before the law, the conformity of crime and punishment, the goals of the legislator and the means chosen to achieve them.

In constitutional and legal relations, the criterion for the legitimation of state power is justice. The procedure for access to public positions is open. In this way, according to V. Vasylichuk, the principle of justice is realized. He believes that officials should not abuse their rights in carrying out their activities. In this case, state power will be exercised on the basis of justice [Vasylichuk 2013, 16]. The right to a fair trial is a good example. It is the “political” branches of government

that must decide what resources the justice system can count on. The courts must assert their rights, because it is necessary to ensure a fair hearing for each individual. The right to a fair trial is of paramount importance when a citizen faces serious criminal sanctions [Allan 2001, 328].

It is the efficiency of the national judiciary that is a topical issue today. To address this issue, the ECtHR's statistics on the recognition of national judicial enforcement as illegal need to be improved. Ukraine's judicial system is currently being renewed and it is hoped that the new judges will use European principles of a fair trial. The requirements of morality and justice must be taken into account when making court decisions [Guyvan 2019, 107–108]. It should be noted that the principle of justice is implemented not only during the administration of justice, but also during the execution of a court decision. A problematic issue in practice is the fact that in Ukraine about 70% of court decisions remain unfulfilled. Then what is the meaning of justice? Such non-enforcement of court decisions affirms legal nihilism in the state, which is a dangerous phenomenon. In Ukraine, there is no effective mechanism to ensure the enforcement of court decisions. There are no effective coercive measures against the debtor, which leads to non-enforcement of court decisions. A fair court decision can remain a simple sheet of paper for years. We often witness that court decisions are not enforced fairly, there are significant delays in enforcement, enforcement deadlines are violated or decisions are not fully enforced.

CONCLUSION

The principle of justice is a fundamental principle in law, which was applied in ancient Rome, but does not lose its significance and relevance today. "Aequitas" – justice means "equality." In Ukraine, a number of constitutional requirements follow from this principle. The difficult situation in the country, caused by the scandalous decision of the Constitutional Court of Ukraine to cancel the electronic declaration of their income by officials leads to a violation of the principles of justice and equality before the law and the courts. The situation is currently unresolved.

Ukraine aspires to become a full member of the European Union. Therefore, one of the most important tasks for it is both overcoming corruption and carrying out judicial reform in order to ensure a fair trial. A necessary step for Ukraine is the implementation of the principles of democracy and the rule of law. However, in practice we are witnessing only the imitation of a fair trial in Ukraine. This leads to mass migration of Ukrainians to developed countries of the European Union. On the other hand, the number of ECtHR decisions against Ukraine is increasing.

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HOMELESSNESS AGAINST THE PRINCIPLE OF INDIVISIBILITY OF HUMAN RIGHTS

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Abstract. The main aim of this study is to present homelessness against international human rights law, whilst assessing the state of regulations in force and pointing out whether they sufficiently protect homeless persons as a group which requires special legal protection. At the same time, the analysis will confirm or falsify the research hypothesis which asks us to ponder on whether (and if yes – why) homelessness violates the principle of indivisibility of human rights in a particular way and whether it should be examined as such. Does homelessness *per se* – violating inherent human dignity – negate the essence of human rights and *de facto* exclude the possibility of exercising some of them? Formulation of this hypothesis implicates a question about the relationship between homelessness and indivisibility of human rights. Verification of the above hypothesis will outline the scope of further reflections carried out on the basis of the analytical method and by interpretation of the law in force, supported by the statistical method.

Keywords: homelessness, human rights, international protection of human rights, principle of indivisibility of human rights

INTRODUCTION

Among various grave problems that are a challenge in the 21st century both for states and for the international community, particular attention needs to be given to the problem of homelessness which *in genere* escapes the regulations in force. Therefore, it is not without a reason that the issue in question has not been the subject of quantitatively extensive scholarly analyses in law in general and in research addressing international (including European) protection of human rights in particular. The difficulties in specifying the normative nature of the occurrence of homelessness is additionally affected by the fact that in legal writings it is most often juxtaposed with the right to housing or the right to protection against social exclusion [Płoszka 2015, 50], which is difficult to recognize as a precise and sufficient way of describing the analysed issue. Even though on the one hand the discussed manner of presenting the problem of homelessness in the discourse about human rights raises – *de lege lata* – a number of doubts, thus complicating the description of the legal nature of homelessness, on the other it still remains the only way to make the issue in question a reality under international human rights law.

The above findings allow us to outline the framework of this study among many contexts in which homelessness may be and is presented in the Polish and international literature alike [Robson 1994; Stoner 1995; Pawlik 2015; Luba, Da-

vies, Johnston et al. 2018] – special focus will be given to locating (associating) the phenomenon in question in the system of international human rights protection. Thus, the occurrence of homelessness *per se* will be placed in the category of human rights, which will allow for it to be perceived as a problem of a juristic character leaving its economic, social, ethical and other determinants beyond the scope of the analysis. Additionally, focus will be given to the European aspect of the phenomenon in question, at the same time using international determinants only in a subsidiary scope, always where the conducted research requires certain completion. This will make it possible to draft the research area and bring its scope down solely to the ground of international (European) law, leaving out the analysis of the subject-matter of domestic law.

The adopted research scope allows for a clarification that the main aim of this study is to present homelessness against international human rights law and at the same time to assess the state of regulations in force and to point out whether they sufficiently protect homeless persons as a group which requires special legal protection. At the same time, the analyses will allow a confirmation or falsification of the research hypothesis which asks us to ponder on whether (and if yes – why) homelessness violates the principle of indivisibility of human rights in a particular way and whether it should be examined as such. Does homelessness *per se* – violating inherent human dignity – negate the essence of human rights and *de facto* exclude the possibility of exercising some of them? Formulation of this hypothesis implicates a question about the relationship between homelessness and indivisibility of human rights.

Verification of the above hypothesis will outline the scope of further reflections carried out on the basis of the analytical method and through interpretation of applicable law, supported by the statistical method.

1. HOMELESSNESS – INTRODUCTORY OBSERVATION

Statistics that directly or only indirectly address homelessness leave readers with no doubt as to the great scale and certain universality of the phenomenon in question. When one takes into account the fact that on the basis of national reports it is cautiously estimated that “no less than 150 million people, or about 2 percent of the world’s population, are homeless” while “about 1.6 billion, more than 20 percent of the world’s population, may lack adequate housing” [Chamie 2017], then the social gravity of the problem of homelessness cannot be questioned any more.

Reports addressing homelessness in Europe, with particular emphasis on the European Union countries, emphasize that in 24 of them the level of homelessness has gone up in the last decade, in some even quite significantly (a rise by 16 to 389%). The only EU Member State in which homelessness has decreased significantly in the last couple of decades is Finland, while three countries (Croatia, Poland and Portugal) display mixed models [Baptista and Marlier 2019, 13]. The

fact that Poland stands rather stably against other EU states does not undermine the problem since in 2019 30,330 people were diagnosed as homeless in Poland, of whom 83.6% were men (25,369 people) and 16.4% were women (4,961 people).¹ Despite the general statistics and the accompanying trends this still proves (especially given it is the 21st century) the great scale of the occurrence.

However, it needs to be emphasized that the above presented statistics are not reliable and cannot constitute a full quantitative image of homelessness. A direct reason for this is the absence of one universal and generally accepted definition of the concept of homelessness, which results from the fact that the research conducted on homelessness is based not only on a different methodology, but mostly on different definitional elements which provide the construct for the adopted definitions. It is the case, for instance, with the exceptionally essential – from the perspective of the concept in question – temporal aspect. If one were to assume in short that homelessness is “a relatively permanent situation of a person deprived of a roof over their head or who does not have their own housing” [Porowski 1995, 433–34], then such understanding of homelessness requires specification what this “relatively permanent” situation is. On the scholarly ground it is rightly emphasized that “houselessness” is a wider term which includes those who are living in emergency and temporary accommodation provided for homeless people, such as night shelters, hostels and refuges. It also covers people who reside in long-term institutions, for example psychiatric hospitals, simply because there is no suitable accommodation for them in the community. Another group in this category are households staying in bed and breakfast hotels and other places which are unsuitable as long-stay accommodation [Fitzpatrick 2000, 33].

The number of the above-mentioned situational categories, classified under the term homelessness, shows a significant degree of complexity of the analysed matter. Moreover, this allows two ordering reflections. First of all, from the perspective of human rights, a specification of the semantic scope of the analysed conceptual category which, as pointed out by Kaźmierczak–Kałużna, involves “exact” understanding of homelessness and bringing down the essence of the problem to absence of “a roof over one’s head” or not having “one’s own” housing [Kaźmierczak–Kałużna 2015, 21], without going into detail, needs to be considered especially significant. From the legal and personal perspective, homelessness as such is problematic. Homelessness as a social question is not easy to regulate formally [ibid.] which is why it is a special conceptual category in its nature. By escaping classic methods of defining concepts, due to its vague nature and difficulty in specifying the meaning of individual definitional elements, the way it is understood depends strictly on a certain research perspective adopted in the course of the definition-giving process. Secondly, homelessness in legal and human terms, understood as a conceptual category, does not have an independent character. In order to explicate its meaning, it is necessary to demonstrate other

¹ See <https://www.gov.pl/web/rodzina/wyniki-ogolnopolskiego-badania-liczby-osob-bezdomnych-edycja-2019> [accessed: 22.10.2020].

conceptual and factual categories (i.e. right to housing, social exclusion, etc.), which will be addressed below.

2. HOMELESSNESS – NORMATIVE APPROACH

As pointed out at the outset, the subject of special interest to this part of the study will consist in – referring to the discussed homelessness – regulations of international law, including European law, adopted on the legal and human ground. By default, regulations of domestic law, which do not fall under the outlined scope of analysis, will not be addressed.

Therefore, in the universal system of human rights the issues of homelessness can be interpreted from the provisions of Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, signed in New York on 19 December 1966.² Pursuant to them, parties to the Covenant recognize the right of everyone to an adequate standard of living for himself and his family (including adequate food, clothing and housing) and to the continuous improvement of living conditions. Indicating, by means of the said provisions, that everyone has the right to housing is crucial from the perspective of further reflections. It is difficult to look for a clearly worded obligation to combat homelessness in the framework of positive obligations of states, which from the perspective of national legal systems should be significant enough so that “the legal title to housing is not considered sufficient protection against homelessness” [Każmierczak–Kałużna 2015, 21]. If having a title to housing does not exclude the state of homelessness, then giving “homelessness” the status of a normative category by including it in the framework of the “right to housing” is certainly not a legally perfect manoeuvre, though – *de lege lata* – the only one. Confirmation of the above may be found in the position of the Committee on Economic, Social and Cultural Rights (2019).³ The Committee observes that significant problems of homelessness and inadequate housing also exist in some of the most economically developed societies.

Therefore, placing rights such as i.a. the right to food, housing and water, and also the right to the highest possible standard of health (Articles 10–12) [Kędzia 2018, 14] under the material scope of the right to an adequate standard of living may be considered as a form of application of the issues of homelessness to the provisions of the Covenant.

European law focuses mainly on three legal aspects which outline – in the context of the described homelessness – the appropriate standard of the right to housing. First of them is the European Convention for the Protection of Human Ri-

² International Covenant on Economic, Social and Cultural Rights, signed at New York on 16 December 1966, United Nations, Treaty Series, vol. 993.

³ CESCR *General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)*. Adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, on 13 December 1991 (Contained in Document E/1992/23), <https://www.refworld.org/docid/47a7079a1.html> [accessed: 22.10.2020].

ghts and Fundamental Freedoms signed on 4 November 1950 in Rome under the auspices of the Council of Europe,⁴ for which Protocol 4 was signed on 16 September 1963 in Strasbourg.⁵ Article 2(1) of this Protocol (which stipulates everyone's right to freedom to choose his residence on the territory which he legally resides in) and Article 8(1) of the Convention (which treats – under the right to respect for one's private and family life – also about respect for one's home) address the issues of the right to housing differently to the way they are referred to in the said Covenant. Not only does the Convention assume by default that this right is afforded to everyone (without exceptions and without personal exclusions), but it also expands the material scope of this right to include the choice of residence as such and an obligation resting with state authorities to respect housing. Only that the last of the cited regulations is rather related to the already acquired ownership of a house, marginally protecting homeless persons by default deprived of such ownership.

Compared to the European Convention, the issue is more precisely regulated in another legal act of the Council of Europe, that is the reviewed version of the European Social Charter.⁶ Pursuant to its Article 31, *in extenso* addressing the right to housing, with a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: firstly, to promote access to housing of an adequate standard; secondly, to prevent and reduce homelessness with a view to its gradual elimination; and finally, to make the price of housing accessible to those without adequate resources. The provision in question may be considered as the fullest wording of the right to housing on the normative ground, which in its essence is a legal form of protection against homelessness. A statement – by means of international law regulations – that the right to housing is afforded to everyone and also that implementation of this right is an obligation of state authorities is of fundamental importance in the context of protection of natural persons against homelessness and the related social exclusion.

However, it is worth adding that a direct reference to the premise in question, by juxtaposing it not only with the right to housing, but also with poverty and social marginalization, can be found in the Charter of Fundamental Rights⁷ signed in Lisbon on 13 December 2007 appended to the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon.⁸ When it comes to the first aspect (of the right to housing), the Charter provides in Article 34(2) that everyone residing and moving legally wi-

⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, signed at Rome on 4 November 1950, ETS 5.

⁵ Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, ETS No. 046.

⁶ European Social Charter (Revised), signed at Strasbourg on 3 May 1996, ETS 163.

⁷ Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

⁸ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1–271.

thin the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices. This means that in the adopted approach residence is treated as a *sine qua non* condition to enjoy other benefits. Absence of a formal possibility to prove one's place of residence – which by default affects homeless persons – is of great importance in the context of the research hypothesis formulated in the beginning. Absence of residence as such predetermines that a homeless person cannot enjoy – in the context of the analysed provisions – any social rights the exercise of which requires residence and in the long-run leads to discrimination. When it comes to the second aspect (poverty and social marginalisation), the Charter stipulates in Article 34(3) that in order to combat social exclusion and poverty, the Union recognizes and respects the right to social and housing support to ensure, in accordance with principles established in the Union's law and national legislations and practices, life in human dignity. Three issues seem particularly interesting from this perspective: firstly, the fact that the European Union allows housing support as a form of combating social exclusion and poverty; secondly, reference in the cited provision to dignity as a value that underlies all human rights and freedoms; and thirdly, associating homelessness with the indivisible nature of human rights, which we will return to later.

3. HOMELESSNESS – JURIDICAL APPROACH

The above brief analysis of regulations in force demonstrates certain trends which allow for the discussed homelessness to be placed in the system of international (European) protection of human rights. This makes it valid to reach for the case-law basis so as to demonstrate by examples from the European Court of Human Rights that the essence of the adopted regulations is reflected in the judiciary.

A compilation of statistics drawn up by the author on the basis of the HUDOC database search demonstrates that the ECtHR has addressed the “homeless” category in 105 judgments which *explicite* include the analysed category in their content. And although the said statistics of judgments cannot be recognized as a fully reliable source of information on statistical determinants of homelessness, they outline the trend mentioned above, thus allowing a conclusion that the number of references is significant and their substantive determinants and place in the international (European) context of human rights are diverse.

The first group of the analysed ECtHR judgments includes those in which the Court – addressing homelessness – refers to obligations of local authorities towards the homeless. Pointing to domestic legislations concerning pregnant women and new-borns, social security and raising children as well as accommodation for homeless persons, it pointed to the category of persons who require special protection from the state. In the last context the requirement of accommodation is associated not only with the requirement to ensure housing, but, what is

more, the Court sees this obligation as a requirement to ensure “secure accommodation.”⁹ In other judgments the Court refers, also in personal terms, to the status of persons unintentionally homeless who have a minor child¹⁰ or to the situation of unaccompanied minors who are homeless.¹¹

The second group of selected judicial decisions is associated with the issues of homelessness of¹² and homelessness of asylum-seekers. In this context the Court points out that many homeless asylum seekers, mainly single men but also families, illegally occupy public places. The Court also emphasizes that having permanent residence is a requirement to obtain a tax identification number, which excludes a homeless person from the labour market. Moreover, according to the Court, health care authorities, often unaware of their obligation to provide asylum-seekers with free medical care or of the existence of any other additional health risks such persons are vulnerable to, fail to implement the rights of homeless and destitute persons or other basic forms of social assistance.¹³

In the context of social assistance, the Court developed its earlier case-law in another judgment pointing out that in the face of a choice between an uncertain life of a homeless person and the relative security offered by social assistance homes, disabled persons (in the Central and Eastern European countries) may opt for the second solution only because the national system of social assistance did not offer them any alternative services. However, this does not mean, in the Court’s opinion, that the stakeholders freely expressed their consent to be placed in such institutions.¹⁴

Free will is also noticed in other Court judgments, though in a completely different context. It is because the Court addresses the issue of homelessness juxtaposing it with the essence of deprivation of liberty. By asking a valid question whether a given person may renounce their right to freedom, the Court states that situations in which the person is not *de facto* deprived of their liberty need to be excluded. A homeless person or a vagrant entering police headquarters asking for

⁹ Judgment of the European Court of Human Rights of 18 January 2001, *Chapman v. the United Kingdom*, Application No. 27238/95; judgment of the European Court of Human Rights of 18 January 2001, *Lee v. The United Kingdom*, Application No. 25289/94; judgment of the European Court of Human Rights of 18 January 2001, *Beard v. The United Kingdom*, Application No. 24882/94.

¹⁰ Judgment of the European Court of Human Rights of 27 September 2011, *Bah v. The United Kingdom*, Application No. 56328/07.

¹¹ Judgment of the European Court of Human Rights of 28 February 2019, *Khan v. France*, Application No. 12267/16.

¹² Judgment of the European Court of Human Rights of 23 November 2000, *The Former King of Greece and Others v. Greece*, Application No. 25701/94.

¹³ Judgment of the European Court of Human Rights of 21 January 2011, *M.S.S. v. Belgium and Greece*, Application No. 30696/09.

¹⁴ Judgment of the European Court of Human Rights of 17 January 2012, *Stanev v. Bulgaria*, Application No. 36760/06.

a place to sleep, whose wishes are met by placing him in a prison cell, is not deprived of liberty if he can leave the cell at any point he wishes to.¹⁵

Moreover, the Court analysed cases where homelessness occurred as a result of action or negligence of state authorities, citing situations in which a person becomes homeless due to a few-week or a few-month long delay between a given person reporting at the immigration department of relevant police headquarters and registering his application.¹⁶ Such a line of judicial decisions orients the process of thinking about homelessness towards positive obligations of states which, by creating a minimum standard of protection against homelessness, should contribute to limiting the discussed problem.

What is interesting, apart from the above personal and material aspects, the Court approaches homelessness by presenting it against procedural aspects and by invoking the “intentionally homeless” measure recognized by municipalities or the procedure where local authorities put a specific person on the list of homeless persons.¹⁷ In its case-law the Court supplements procedural aspects with material aspects, for example by juxtaposing the right to housing (treated i.a. as an ownership right) with the principles of a fair trial interpreted from Article 6 of the European Convention. In one of its judgments, the Court emphasizes that “the deprivation of a home requires a fair and public hearing and the other procedural requirements which have developed from the jurisprudence of Art. 6 ECHR” [Kenna 2008, 193–208]. The legitimacy of such reasoning results also from the analysis of other judgments in which the Court directly refers to the obligation resting with states to protect the right of everyone to respect for his home and private and family life.¹⁸

4. SUMMARY – HOMELESSNESS AS VIOLATION OF THE PRINCIPLE OF INDIVISIBILITY OF HUMAN RIGHTS

These reflections legitimise the outlining of certain trends intended to place homelessness in the international law of human rights, which is being done in two ways. On the one hand, both the legislation in force and the case-law of the European Court of Human Rights guarantee everyone the right to housing by demonstrating that the obligation to implement this right rests with state authorities where absence of such implementation and being homeless deprive one of the possibilities to exercise other human rights or at least limit these possibilities to a significant degree. On the other hand, though, homelessness is juxtaposed with

¹⁵ Judgment of the European Court of Human Rights of 5 July 2016, *Buzadji v. The Republic of Moldova*, Application No. 23755/07.

¹⁶ Judgment of the European Court of Human Rights of 4 November 2014, *Tarakhel v. Switzerland*, Application No. 29217/12.

¹⁷ Judgment of the European Court of Human Rights of 18 January 2001, *Jane Smith v. The United Kingdom*, Application No. 25154/94.

¹⁸ Judgment of the European Court of Human Rights of 22 February 2005 (final 22.05.2005), *Novoseletskiy v. Ukraine*, Application No. 47148/99.

the requirement of ensuring an adequate standard of living, respect for one's private and family life, poverty and social marginalisation.

Even though the right to housing is a social right in its legal nature, thus a second generation right, as a social human right, as Sławicki believes, it enjoys protection afforded to individual rights under other identified human rights [Sławicki 2015]. This, in turn, equips it with a special normative valour, legitimising a conclusion that the category of homelessness on the ground of human rights is not autonomous. The example of homeless persons – which is emphasized by Ploszka – proves that using first generation rights is not possible without guaranteeing the implementation of basic social rights. All human rights are universal, indivisible, interdependent and interconnected [Ploszka 2015, 44]. If the position of the cited author were to be modified a little, then going further one could say that using second generation rights will be all the more impossible if the exercise of personal rights as fundamental rights is not ensured. Homelessness does not only deprive people of their inherent dignity underlying any legal and human protection, but most of all it ruins the possibility of exercising human rights as such. Homelessness *in extensio* negates the essence of human rights.

The above observation directs the thinking about homelessness towards the concept of indivisibility of human rights which is a leading idea (if not principle) of international human rights law which ensures effective protection of rights, regardless of the category they were assigned to [Kulińska-Kępa 2017, 21]. The example of the social group described in this study, that is homeless persons doomed to be marginalised and socially excluded, exposes in a special way the fact that homelessness, understood as a phenomenon, state and process, violates the principle of indivisibility of human rights. If one were to conclude, as pointed out by the UN Human Rights Council, that “all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing and must be treated in a fair and equal manner, on the same footing and with the same emphasis”¹⁹ [ibid., 22], there is no doubt that inability to ensure personal or social rights to homeless persons violates the principle of the indivisibility of human rights *in toto*.

In the face of the 21st century growing homelessness, the analysis of regulations in force validates a view that international law acts protect homeless persons too weakly. Therefore, it still remains an open question “whether the bare minimum of rights can be protected and, in the huge and complex European housing system, how effective this approach is” [Kenna 2008, 206]. When treating homelessness as a challenge both to countries and the international community, there is no doubt that there is still a lot to do in this regard. The actions of governments, which insufficiently protect the homeless, cannot be solely assessed by the prism of inefficiency. Inability to ensure the full spectrum of human rights to homeless persons is contrary to the indivisible nature of these rights.

¹⁹ Human Rights Council, Report of the Human Rights Council on its eighth session (UN Doc. A/HRC/8/52), 1 September 2008.

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LAND REMEDIATION OBLIGATION FROM AN ENTITY-BASED PERSPECTIVE

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Abstract. The aim of the paper is to examine the issue of allocation of responsibility for conducting land remediation works, the aim of which is to return the land to its original state or some degree of its former baseline condition, understood as creation or restoration of utility or natural value for degraded land. Remediation is meant to stop or reverse environmental damage to soils, waters and air. The study seeks, in the first place, to determine how the obligation to remediate arises and the impacts it has. Secondly, it shall determine to what degree the obligation to remediate is allocated to a specific entity and whether it can be transferred to another entity. These considerations have been made on the grounds of applicable provisions of the Act of 3 February 1995 on the Protection of Agricultural and Forest Lands.

Keywords: use value of soil, degradation, personal responsibility, *ex lege*, transfer of responsibility

INTRODUCTION

The discussed issue (land remediation obligation from an entity-based perspective) belongs to the branches of administrative law and environmental protection law. Therefore, the analysis will take into account the specificity of both these branches of law.

Natural and technical sciences underline that “remediation and rehabilitation of degraded lands [...] is a significant and urgent task, since landscape, as physical space, is a limited resource that is being depleted. Land remediation is also an inseparable element of the transformation of the entire land development processes” [Gonda–Soroczyńska and Kubicka 2016, 163–75].¹ The importance of environmental remediation as actions that return land resources to their original state or as close to the original as possible, as part of environmental conservation efforts,² is acknowledged by the Polish legislator. This attitude is reflected in a number of regulations setting forth the obligation to remediate³ land and water resources.⁴

To clarify the terms used herein, let us start with the statutory understanding of the term “environmental remediation.” First, it must be noted that the definition

¹ More on environmental restoration from the perspective of technical and biological sciences in Hutniczak, Borowski, and Woźniak 2019, 14–20.

² For restoration and rehabilitation in the context of ecological safety see Korzeniowski 2012a, 230.

³ Cf., i.a., Article 244a(1)(2) of the Act of 14 December 2012, the Waste Law, Journal of Laws of 2020, item 797 as amended.

⁴ Restoration of waters is referred to in Article 389(4) of the Act of 20 July 2017, the Water Law, Journal of Laws of 2020, item 310 as amended.

of this term was removed from the Act of 27 April 2001, the Environmental Law,⁵ in result of which the Act on the Protection of Agricultural and Forrest Lands of 3 February 1995⁶ is the main legal act laying down the rules for remediation of natural resources. The significance of PAFL in the area of environmental remediation is enhanced by the fact that other acts of law directly refer to the PAFL provisions in this regard.⁷

It should also be noted that the regulations set out in PAFL, including the definition of “environmental remediation” is rather general, and thus, can be universally applied. This is in contrast to other legal acts that adapted such a narrow wording of the provisions on environmental remediation, that they can be applied only within the subject matter of the given act.⁸ Therefore, due to their universality, the PAFL provisions are applied to various aspects of environmental remediation, referred to in other acts of law, even if the provisions of these acts do not include any direct reference to PAFL.⁹

A legal definition of the umbrella term of “remediation” was provided in Article 4(18) PAFL. Pursuant to the provision, “land remediation” is defined as creation or restoration of utility or natural value for degraded lands through proper formation of the landscape, enhancements of physical and chemical properties, regulation of water conditions, and restoration of soil, reinforcement of banks and reconstruction or construction of indispensable roads. It must be noted that the above understanding of remediation is based on a number of indeterminate phrases¹⁰ and concepts defined in PAFL.¹¹

A comprehensive study of all the aspects covered by such a broad definition of remediation, far exceeds the scope of an academic paper.¹² Therefore, the author shall focus on only one legal aspect of environmental remediation regula-

⁵ Journal of Laws of 2020, item 1219 as amended [hereinafter: EL]. The change occurred in result of the implementation of the Act of 13 April 2007 on the Prevention and Remedying of Environmental Damage (Journal of Laws No 75, item 493), and in strict relation to Article 32(5) of the Act. On the basis of the said provision, Article 103(1) and (2) were removed from the EL which stipulated that restoration of natural landscape that was adversely impacted consists in restoring it to its original state, whereas remediation of degraded soil and land means returning it to the condition required by quality standards. Analysis of the legal state prior to the enforcement of the said amendment with regard to the definition of the term “restoration” [Barczak 2006].

⁶ Journal of Laws of 2017, item 1161 as amended [hereinafter: PAFL].

⁷ Cf. Article 129(2) of the Act of 9 June 2011, the Geological and Mining Law, Journal of Laws of 2020, item 1064 as amended. More see Szalewska 2015; Walas 2016; Judecki 2018a, 22.

⁸ For the sake of comparison, the definition of environmental remediation set forth in Article 3(1)(11) of the Act of 10 July 2016 on Mining Waste, Journal of Laws of 2018 as amended is appropriate to the regulatory scope of the Act.

⁹ The reference here is to, i.a., Article 15(3)(3) of the Act of 27 March 2003 on Spatial Planning and Development, Journal of Laws of 2020, item 293 as amended. Cf. Plucińska-Filipowicz 2019.

¹⁰ For example, such phrases as “proper formation of the landscape.”

¹¹ Meaning degraded and devastated lands, the legal definition of which were provided in, respectively (Article 4(16) and (17) PAFL).

¹² More on the interpretation of the concept of remediation in Jerzmański 2007, 26–29; Radecki 2012a; Korzeniowski 2012b, 111–24.

tions, i.e. the obligation to remediate, i.e. to carry out remediation works, and approach it from the subject-matter perspective. The aim of the paper is to outline the principles of allocation of legal responsibility for carrying out remediation of land.

To avoid confusion created by a multitude of terms related to “environmental repair” which overlap and mean similar, but not the same things, often resulting from different typologies, the terms adopted in the paper were simplified. The terms “repair works” and “remediation works” were used with the meaning of remediation (embracing processes involved in restoring the soil to its natural, pollution-free state, such as rehabilitation, restoration and revegetation). Similarly, any reference to the perpetrator of land degradation, i.e. decline in the use value of land, shall mean the entity responsible for remediation.

1. OBLIGATION TO REMEDIATE LAND

Pursuant to Article 20(1) PAFL, the event that gives rise to the obligation to rehabilitate land is the loss or limitation of the use value of soil. Hence, the responsibility for decreased use value of land arises by reason of occurrence of specific circumstances, and thus, the land remediation obligation arises by operation of law.¹³

Environmental remediation liability is similar in nature to tax liability. The point here is that, as pursuant to the Article 4 of the Act of 29 August 1997, the Tax Ordinance,¹⁴ tax liability is defined as unspecified duty, resulting from the occurrence of an event specified by tax acts [Nowak and Nowak 2009, 47–70], similarly, to paraphrase the tax provision, environmental rehabilitation liability should be understood as unspecified duty to perform obligatory service in response to the occurrence of an event specified by PAFL. Therefore, just as the manifestation of circumstances giving rise to the tax liability is not tantamount to the obligation of taxpayers being liable to pay specific tax, causing of loss or limitation of the use value of soil resulting in land remediation obligation is not tantamount to the obligation to undertake land repair works.

The nature of the rehabilitation liability outlined hereinabove becomes clear upon comparison of Article 20 PAFL with other solutions of the said Act.

First, pursuant to Article 20(4) PAFL, remediation should be carried out when industry no longer needs a given piece of land, on its whole or part, or will not use it for a specified period of time. Hence, while the said industrial activity¹⁵

¹³ It was also the case during the period when regulations on remediation formulated under the Environmental Law were in effect, i.e. the obligation to remediate also arose by operation of law [Czech 2014, 195–204]. Under the current legal status, the thesis presented is supported by case law. Cf., i.a., judgment of the Voivodship Administrative Court in Rzeszów of 10 December 2015, ref. no. I SA/Rz 1027/15, <http://orzeczenia.nsa.gov.pl/doc/A8F03746E4> [accessed: 10.02.2021]; judgment of the Supreme Administrative Court of 14 March 2018, ref. no. II FSK 694/16, <http://orzeczenia.nsa.gov.pl/doc/0841147F57> [accessed: 10.02.2021].

¹⁴ Journal of Laws of 2020, item 1325 as amended [hereinafter: TO].

¹⁵ As a side note, pursuant to Article 4(26) PAFL, industrial activity should be understood as non-

may, through degrading the quality of land, cause the remediation obligation to arise, pursuant to Article 20(4) PAFL, remediation works should be launched only after industrial operations are shut down in part or in whole on the degraded or devastated area, or else, are discontinued for some time. In other words, as the wording of the provision suggests, the legislator accepts temporary worsening of soil quality, simultaneously stating that the effects of land degradation or devastation must be remediated.

Secondly, in accordance with Article 22(1)(1–3) PAFL, both the extent of loss or decline in the use value of land, the person responsible for remediation, the direction and deadline for completion of remediation should be determined by administrative decisions.¹⁶ It can be thus stated that the launching of remediation works depends on the finality of administrative decisions.¹⁷ Coming back to the tax regulations mentioned above, it can be noted that just as tax obligation is defined as arising from taxpayer's tax liability to pay taxes for the benefit of the State Treasury, province, county and commune, in the amount, at the time and location stipulated in the provisions of tax law (Article 5 TO) [Dzwonkowski 1999, 21–35], the same can be said about the remediation obligation arising from the responsibility to carry out remediation in accordance with the said administrative decisions, by the person who caused loss or limitation of the use value of the land.

In the context of Article 22(2)(1–3) PAFL, it must be emphasized that neither of these provisions asserts the competence of public administrative authority to determine, through an administrative decision, the general or detailed scope of remediation works. Moreover, as outlined in the introductory part, the legal definition of remediation defines environmental repair works in very general terms, which were not made more precise within the body of the Act.¹⁸ In consequence, the entity obliged to perform remediation works is given free hand to choose actions to be carried out to mitigate land damage. Finally, the appropriateness of

agricultural and non-forest activity causing loss or decline in soil quality.

¹⁶ As a side note, it is worth to quote an apt remark made by W. Radecki: "A more careful analysis of the provisions of Article 22(1) PAFL reveals that there is no one, single decision on remediation, but rather a series of decisions which contain elements mentioned in the provision: 1) the extent of reduction or loss of soil value – reference is made to Article 28(5) PAFL, which means that the "extent" should be determined on the basis of two expert opinions prepared by two valuers; 2) the person liable; 3) initial strategy and deadline for completion of remediation; 4) decision confirming completion of land remediation works" [Radecki 2012b].

¹⁷ The same solutions were in force under the previous legal status, i.e. when regulations on remediation were part of the Environmental Law. It was emphasized by, i.a., W. Szczuka–Skarżyńska: "While the obligation to remediate arises from the operation of law, the process of remediation should be launched in accordance to the terms of the decision, which determines the scope, direction and deadline for completion of remediation, issued on the basis of Article 106(2) Environmental Law" [Szczuka–Skarżyńska 2003].

¹⁸ Remediation works, pursuant to Article 4(18) PAFL (i.e. providing a legal definition of remediation) consist in: "creation or restoration of utility or natural value for degraded or devastated land through proper formation of the landscape, enhancements of physical and chemical properties, regulation of water conditions, and restoration of soil, reinforcement of banks and reconstruction or construction of indispensable routes."

the method selected and the way remediation works are conducted are assessed by an administrative authority only after remediation has been completed, i.e. at the stage when the authority is about to issue a decision confirming completion of remediation works (Article 22(1)(4) PAFL).

2. SUBJECTIVE ASPECT OF THE LAND REMEDIATION OBLIGATION

The starting point for determining the rules by which responsibility for remediation is allocated is Article 20(1) PAFL, which provides that the person who causes loss or limitation of the use value of land is obliged to remediate that piece of land at their own expense. This provision is supplemented by Article 20(5) PAFL, which provides that in case a number of persons contribute to the degradation of land, each of them shall bear the obligation for its remediation proportionally to the impact their activity had on the land. It should be underlined that the rules of assigning responsibility for remediation of land are limited to the two provisions. The wording of the provisions of Article 20(1) and (5) PAFL demonstrates that for the legislator the only attribute of the entity obliged to remediate is their negative impact on the use value of land. In effect, the establishment of the remediation obligation is not linked to the attributes of the perpetrator of land degradation, nor to the nature of the event that contributed to land degradation or devastation. In this context, J. Bieluk aptly remarked that the provisions of Article 20(1) and (5) PAFL are the case of “liability based on risk as set forth in the Polish Civil Code” [Bieluk 2015a]. It also implies that the responsibility to remediate examined herein, corresponds directly to the overarching principle of environmental law (the so-called “polluter pays principle”) [Kuraś 2012, 215–38; Gruszecki 2016] requiring that the costs of pollution and pollution prevention measures be borne by those who caused damage to the environment.

Therefore, the stand taken in the legal doctrine and case law stating that for the identification of the entity obligated to carry out repair works “it is not important [...] who is the owner of the devastated or degraded lands subject to restoration.”¹⁹ In other words, the lack of a legal title to the devastated or degraded land on the part of the perpetrator of environmental damage does not release them from the obligation to carry out remediation works.

Hence, if the event when people responsible for decline in land and soil quality cannot be identified, the provision of Article 20(2) or (2a) PAFL applies, which provides that, by principle, the costs of remediation of land devastated or degraded by unidentifiable persons are covered from the state budget. Moreover,

¹⁹ Cf. judgment of the Voivodship Administrative Court in Lublin of 23 October 2008, ref. no. II SA/Lu 511/08, *Legalis* no. 239264. The statement and judgment cited in literature and case law: Bieluk 2015a. See judgment of the Voivodship Administrative Court in Bydgoszcz of 03 February 2015, ref. no. II SA/Bd 1309/14, <http://orzeczenia.nsa.gov.pl/doc/E4F7B4DAF9> [accessed: 10.02.2021]; judgment of the Voivodship Administrative Court in Bydgoszcz of 03 February 2015, ref. no. II SA/Bd 1310/14, <http://orzeczenia.nsa.gov.pl/doc/0FB5E05EF2> [accessed: 10.02.2021].

release of the owner of degraded or devastated land from the obligation to carry out remediation by a third party results from normative changes that shifted the burden of regulation of environmental remediation from EL to PAFL.²⁰ One should remember that under the previous regulation, remediation duty was assigned to the land-holder [Lipiński 2001]. The land-holder could be released from this liability upon proving that reduced use value of land was the result of third party's actions [Radziszewski 2003]. Therefore, since the legislator did not include the said rules in PAFL, it may well be assumed that the principle of liability presumption of the land-holder was dismissed.

In consequence, “decisions issued on the basis of Article 22(1) PAFL²¹ are addressed to the perpetrator of damage, who doesn't necessarily have to be, and often is not, the land holder” [Zieliński 2010, 497–510]. In this context it must be emphasized that at least three of the procedures leading to the issuance of decisions specified in Article 22(1) PAFL have direct impact on the execution of landholder rights²² in relation to the remediated land. This particularly relates to procedures with regard to the direction and deadline for remediation works, and decision confirming completion of remediation works. It may be safely assumed that the decision determining the entity responsible for remediation is also important for the landholder. For on the grounds of this decision, the holder of degraded or devastated site is obligated to ensure access for a given entity (i.e. liable for remediation of the site) to conduct the said works. To recapitulate, in case of procedures that end in the issuance of decision referred to in Article 22(1) PAFL, the land-holder is entitled to be treated as the party to the proceedings²³ also in the event when the land-holder is not the perpetrator of land degradation.

The case law is dominated by the approach that, despite the personal nature of the rehabilitation obligation, the perpetrator of environmental damage is not obligated to execute repair works on their own.²⁴ And yet, the argument that is supposed to speak in favour of such approach is the absence of statutory liability of the

²⁰ The change was brought by the entry into force on 30 April 2007 of the Act of 13 April 2007 on prevention of environmental damage and its remediation (Journal of Laws No 75, item 493) [Rudnicki and Zacharczuk 2014, 377–91].

²¹ It refers to Article 22(1–4) PAFL, which provides that decisions on remediation and development shall determine: 1) the extent of reduction or loss of the use value of land and soil, as specified in the appraisal mentioned in Article 28(5); 2) the person responsible for remediation of land; 3) direction and deadline for completion of remediation works; 4) decision confirming completion of land remediation works.

²² The term “landholder rights” was used in the context analyzed to facilitate understanding. It should be read as any title to the degraded or devastated land.

²³ Pursuant to Article 28 Code of Administrative Procedure, a party is any participant in legal proceeding whose legal interest or obligation is the subject matter of the proceeding, or anyone who demands enforcement of action by the authority on account of their legal interest or obligation [Kmieciak 2013, 19–35].

²⁴ Cf. judgment in Rzeszów of 19 April 2018, ref. no. II SA/Rz 1356/17, Legalis no. 1777085; judgment of the Voivodship Administrative Court in Łódź of 22 June 2018, ref. no. II SA/Łd 15/18, Legalis no. 1818480. Similar arguments as presented in the judgments are invoked by J. Bieluk [Bieluk 2015b].

perpetrator to remediate damage to the environment in person.²⁵

Without denying the rationale of the above presumption, it seems that the argument cited does not suffice to accept the stand that despite the private and public nature of the obligation to remediate, and due to the mere absence of a different statutory provision, it can be assumed that remediation does not have to be carried out by the perpetrator of land damage. However, attributes of specific obligations (i.e. their public and private nature) provide the basis for exclusion of the possibility to transfer the obligation to conduct remediation works to other entities than the entities liable.²⁶ Moreover, contrary to the premises underlying the above thesis, the provisions of PAFL contain arguments favouring execution of rehabilitation works by the damage perpetrator himself. Article 20(1) PAFL, crucial to the subject obligation, provides that “A person causing loss or limitation of the use value of land is obligated to remediate the site.” It seems that the wording of this provision leaves no room for doubt as to who is responsible for the execution of remediation works.

In view of the above, it should be underlined that the provisions of PAFL do not stipulate precisely how land remediation should be carried out. Likewise, competent authorities have not been vested with authority to specify how exactly site remediation works should be carried out. This seems to imply that for the legislator, the methods and measures of land restoration are a secondary issue, and the entire focus is on achieving the goal, i.e. rehabilitating or restoring the use value or natural value to degraded or devastated lands [Kuc 2014]. On the other hand, in criminal law terminology, the act described in Article 20(1) PAFL is a common law administrative tort,²⁷ hence liability should be borne by everyone, regardless of their competence. Moreover, it can be reasonably assumed that the vast majority of perpetrators of land degradation shall not have the competence required to conduct remediation works. Therefore, presupposing that the remediation obligation has to be carried out literally in person may, at the very least, hinder the achievement of the goal in question.

The arguments presented above suggest that a literal interpretation of Article 20(1) PAFL should be refrained from, and favour the approach that a perpetrator of environmental damage is not obligated to carry out remediation works personally, by themselves. Hence, what Article 20(1) and (3) PAFL actually refer to is

²⁵ Cf. judgment of the Voivodship Administrative Court in Łódź of 22 June 2018, ref. no. II SA/Łd 15/18, Legalis no. 1818480.

²⁶ Just for the sake of analogy, subjective criteria for tax payment were made clear as late as 2015. Nonetheless, the Supreme Administrative Court (SAC) passed a resolution, based on i.a. the public legal and personal nature of tax obligation, providing that “payment [...] made by another entity on behalf of a taxpayer does not release the tax payer of their tax liability,” see the resolution of the SAC of 26 May 2008, ref. no. I FPS 8/07, Legalis no. 104986. It can be thus assumed that the mere absence of specification of subjective criteria for execution of remediation works, in the light of the public legal and personal nature of the remediation obligation, is not a sufficient argument to imply that this obligation does not have to be fulfilled in person.

²⁷ Cf. terminology of crimes in Gardocki 2013, 29–40.

not the obligation to remediate *per se*, but rather the liability to remediate for the loss or decline in the use value of land.

3. RULES FOR TRANSFERRING REMEDIATION OBLIGATIONS

First, it must be emphasized that in view of its public nature, the transfer of the obligation to remediate on the basis of private law (i.e. in particular, civil law contracts) should be deemed unacceptable [Judecki 2018b, 37]. Consequently, transfer of the obligation to remediate on the grounds of a civil law agreement is tainted with invalidity. Hence, it can be implied that the authority supervising the execution of remediation works is obligated to ensure that restoration works are conducted properly by the damage perpetrator, rather than the entity that was supposed to take over the remediation duty based on a contractual agreement.

In this context, let us remember that land remediation works embrace a number of factual acts, the purpose of which is to restore land and soil quality [Korzeniowski 2012b, 111–24]. Thus, in contrast to e.g. the performance of public obligation such as payment of tax by an unauthorized entity [Goettel 2016], it would be rather difficult to return a site to the condition predating rehabilitation performed by an entity who is not legally liable, and secondly, it would also be difficult to establish follow-up liability of the damage perpetrator to carry out remediation works again, for the second time. Above all, reversal of the effects of the remediation would be contradictory to the provisions of PAFL or, in broader terms, environmental law. Reversal of restoration works would, *de facto*, be tantamount to re-degradation or re-devastation of land.

What should not be overlooked is that the legislator does not foresee sanctions for restoring the land to its best condition by an entity not liable for land remediation in the meaning of Article 20(1) and (5) PAFL, which implies that the effect achieved is not unwished for by the legislator even if it results from remediation works performed by an inappropriate entity. Hence, it may be presumed that proper execution of restoration works by a person who is not statutorily liable, releases the perpetrator of land damage from their liability for remediation. To be consistent, one should also assume that in such case, the decision confirming completion of remediation is addressed at the entity liable, and not the entity onto whom the obligation was to be passed on the basis of a private law contract.

Moreover, Article 20(6) PAFL also speaks against the possibility of transferring land remediation duty on the basis of private law actions. Pursuant to the said provision, transfer of rights and obligations arising from decisions pertaining to remediation that have already been issued requires a separate administrative decision. Therefore, since the legislator has foreseen an option to transfer the remediation obligation, it can be assumed that an alternative solution (e.g. agreement), would also have been provided in PAFL if it were admissible.

It should be noted that the abovementioned Article 20(6) PAFL does not expressly stipulate the criteria for the transfer of rehabilitation obligations. Despite

this silence on the part of the legislator, the concept of an entity's freedom with regard to the subsequent assignee of the remediation obligation is commonly rejected. One of the arguments in favour of this stand is the opinion that the possibility of transferring the said obligation onto arbitrary entities "would release entities whose actions resulted in degradation of agricultural lands from their obligation to remediate by means of a civil law contract, following which a poviatski starosta could transfer the obligation onto other entities, including natural or legal persons, that may potentially play the role of a dummy company, a bogus entity, lacking the capacity to ever meet the obligation. In consequence, remediation costs would have to be paid by the Agricultural Land Protection Fund or the state."²⁸ Importantly, assigning the remediation obligation solely to the entity that caused land degradation does not guarantee that remediation will be carried out properly. Secondly, there might be other obstacles, e.g. the entity liable may simply lack financial means to conduct proper remediation works. Hence, the above argumentation is not very convincing. Nonetheless, ultimately, it seems that the legislator did not intend to authorize administrative authorities, on the grounds of Article 20(6) PAFL, to transfer the said obligation to arbitrarily chosen entities. As per the case law, "proceedings pertaining to land remediation and management are initiated *ex officio* in case any incidence of degradation or devastation of agricultural or forest land is revealed by a competent authority."²⁹ And so, if we assume that from the point of view of Article 20(6) PAFL no criteria have been provided that could serve as grounds for the competent authority to make a decision about the transfer of obligations, we would have to accept the arbitrariness of the authority with regard to decisions on who should carry out remediation. Doubtlessly, such conclusion is unacceptable as it would breach the principle of predictability of the state's actions, and, in particular, constitute abuse of administrative authority by imposing obligations on an individual.

With the above in mind, it must be emphasized that the provision of Article 20(6) PAFL mentions explicitly that the person liable for land remediation can be substituted. This provision foresees that it may be necessary to replace one person liable for remediation with another one, responsible for the same. To be more precise, in the proposed interpretation of Article 20(6) PAFL, the subsequent assignee of responsibility to remediate (successor body) may only be an entity obligated to carry out remediation as at the date on which the decision on transferring the obligation to remediate was issued. In turn, in view of the fact that the only premise to allocate responsibility to remediate is contribution to land degradation, one should agree with the thesis that the normative meaning of Article 20(6) is to be sought in relation, and inclusive of, to Article 20(1) PAFL.³⁰ In conclusion, it

²⁸ Cf. judgment of the Voivodship Administrative Court of 07 November 2013, ref. no. II SA/GI 980/13, Legalis no. 863275.

²⁹ Cf. judgment of the Voivodship Administrative Court in Gdańsk of 15 June 2011, ref. no. II SA/Gd 250/11.

³⁰ Cf. Judgment of the Supreme Administrative Court of 24 November 2015, ref. no. II OSK 701/14,

can be implied that solely the entity that caused or contributed to the loss or limitation of the use value of land can be the addressee of the decision transferring the responsibility to remediate.³¹

In view of the above, a reservation needs to be made that the provision of Article 20(6) PAFL should not serve as means to modify the original decision ordering remediation in case it had misidentified the addressee (i.e. was addressed at a person who did not contribute to land degradation). In the light of Article 156(1)(4) Code of Administrative Procedure, such incorrect identification is sufficient grounds to invalidate the administrative decision [Kiełkowski 2015].

It should also be assumed that the decision referred to in Article 20(6) PAFL should not constitute grounds for transferring responsibility to remediate to an entity whose activity contributed to deterioration of land quality on their own or in collaboration with the entity originally burdened with the remediation duty. If this is the case, a decision with regard to the new perpetrator should be issued based on the above cited Article 20(5) PAFL.

It seems thus that the necessity to transfer the remediation obligation arises when there is another entity that damages or pollutes the same land that had already been damaged by another entity, originally bound to carry out remediation works, which ceased its activity.

What transpires in this context is that both in the doctrine and case law, the possibility to transfer the responsibility to remediate is made conditional on a simultaneous “takeover by the new entity of the land damage perpetrator’s activity (in particular, their industrial activity) which led to the degradation or devastation of land in the first place.”³² However, such approach is not reflected in the provisions of PAFL since the only thing that connects the two entities, primarily and secondarily liable, is their negative impact on the quality of land. At the same time, the source of the negative impact, i.e. the identity of the two perpetrators, does not seem very important from the point of view of the goal, which is successful restoration and remediation of land.

In the light of Article 20(6) PAFL, the decision transferring the responsibility to remediate results in the transfer of rights and obligations arising from the previously issued decisions (i.e. decisions establishing the extent of limitation or loss of the use value of land, the person responsible for remediation, direction and deadline for completion of land remediation). Aside from appointing a successor body liable for remediation, Article 20(6) does not stipulate other elements of the decision transferring liability. In the absence of separate provisions to the contrary, it is understood that identification of the scope of repair works carried out

<http://orzeczenia.nsa.gov.pl/doc/209B333B41> [accessed: 31.08.2018].

³¹ Cf. judgment of the Voivodship Administrative Court of 23 June 2016, ref. no. VIII SA/Wa 1005/15, <http://orzeczenia.nsa.gov.pl/doc/91969FAD95> [accessed: 31.08.2018].

³² Cf. decision of the Self-Government Appeal Court in Wrocław of 16 January 2018, SKO 4201/33/17, OwSS 2018, No. 2, items 46–54, <https://sip.lex.pl/#jurisprudence/539379616/1/sko-4201-33-17-przeslanki-przejscia-publicznoprawnych-obowiazkow-rekultywacji-i-zagospodarowania...?cm=URELATIONS> [accessed: 21.01.2021].

by the primary polluter is beyond the subject matter of administrative proceedings leading to the decision on transferring the obligation to remediate. Here, it is important to note that the Act does not contain provisions that would specify how to appraise remediation works performed by the primary polluter (predecessor body). Hence, the decision referred to in Article 22(1)(4) PAFL would not be appropriate in relation to the predecessor body since it can be issued only after all remediation works, subject to the obligation, are completed. In contrast, the decision issued on the basis of Article 20(6) PAFL refers to cases when remediation has not yet been completed. Moreover, it is important to note that PAFL does not contain regulations that would be equivalent to art. 55⁴ Civil Code³³ or Article 112(1) TO.³⁴ Therefore, on the basis of information presented herein, it can be concluded that the successor body, i.e. the entity secondarily liable for remediation, is liable for the decline in the use value of land resulting from both their own activity, and the activity of their predecessor, and is held liable for overall remediation of land.

In view of the above it can be reasonably assumed that an administrative decision pursuant to Article 20(6) PAFL cannot be issued after the decision affirming completion of land remediation is deemed final.

CONCLUSIONS

The analysis allowed the author to formulate a thesis that in the light of provisions of PAFL, the establishment of the obligation to remediate is not tantamount to the order to initiate remediation works. The point here is that the obligation to remediate arises by operation of law following the occurrence of factual circumstances specified in the Act (i.e. degradation or devastation of land). In contrast, the obligation to start remediation works arises in consequence of an administrative decision issued by a competent authority. Therefore, by analogy to tax law regulations, the author suggested to use the term “obligation to remediate” with reference to the former case, and “responsibility for remediation” in the latter case.

The obligation to remediate arises when one premise is present, i.e. land and soil degradation. In other words, anyone, regardless of how they contributed to land degradation or devastation, may be obliged to carry out remediation works.

³³ Pursuant to Article 55⁴ of the Civil Code: “The acquirer of an enterprise or an agricultural farm is liable jointly and severally with the transferor for the transferor’s obligations related to running the enterprise or agricultural farm unless, at the time of acquisition, the acquirer was not aware of those obligations despite having used due care. The acquirer’s liability is limited to the value of the acquired enterprise or farm as at the moment of acquisition and according to the prices as at the time the creditor is satisfied. This liability cannot be excluded or limited without the creditor’s consent.”

³⁴ Pursuant to Article 112(1) TO: “The acquirer of an enterprise or an organized part of the enterprise shall be jointly and severally liable with the taxpayer, with all his or her assets, for tax arrears connected with the pursued economic activity that arose before the day of purchase, unless, despite exercising due diligence, he or she could not have known about these arrears.”

At the same time, although the obligation to remediate is bound to a specific person, they do not have to carry out remediation works by themselves, in person.

The obligation to remediate has a public law nature. Therefore, it can be transferred solely on the basis of an administrative decision of a competent authority, and not on the basis of a civil law contract. In turn, under administrative law, the grounds for transferring the obligation to remediate onto another entity is their secondary contribution to land degradation, i.e. subsequent to the decline in the use value of land caused by entity primarily liable for the degradation. It should be noted that in result of transferring the obligation to remediate, the primarily liable entity, the perpetrator of original land degradation or devastation, is released from responsibility for the completion of remediation works, including land degradation they themselves caused.

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CHANGES IN THE FIELD OF BUDGETARY RESERVES MANAGEMENT IN CONNECTION WITH THE NEED TO ENSURE THE EPIDEMIC AND FINANCIAL SECURITY OF THE STATE DURING THE PANDEMIC OF SARS COV-2

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Abstract. The spread of the SARS-CoV-2 virus and the related restrictions on commercial transactions have an economic effect whose scale is difficult to assess. At the same time, the need for activities intended to prevent and counter the epidemic results in a significant increase in public spending, which undoubtedly threatens the financial security of the state. For the above reasons, numerous rules that modify the principles of public finance management were introduced to the Polish legal system after the state of epidemic had been declared. The aim of the article is to present and analyse the amendments in the field of management of the general reserve and special purpose reserves that were introduced to the Polish legal system in order to ensure the proper execution of budgetary tasks during the pandemic. This aim is achieved through the presentation and analysis of the so-called Second Anti-Crisis Shield, i.e. the Act of 31 March 2020 amending the Act on Special Solutions Related to Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Resulting Crisis, as well as the provisions of the so-called Budget-Related Act for 2021, i.e. the Act of 19 November 2020 r. on Special Solutions to Implement the Budget Act for 2021. The implementation of the indicated research objective leads to the conclusion that the introduced changes significantly broaden the scope of the executive's decision-making competence in the implementation of the state budget, which may raise doubts in the light of the constitutional principle of exclusivity of the legislative authority in shaping state revenues and expenditures.

Keywords: general reserve, special purpose reserves, implementation of the state budget, COVID-19

INTRODUCTION

The growing number of SARS CoV-2 infections poses a risk to many aspects of social, economic and political life. The spread of the new pathogen and the related restrictions on commercial transactions have an economic effect whose scale is difficult to assess. At the same time, the need for activities intended to prevent and counter the epidemic results in a significant increase in public spending, which undoubtedly threatens the financial security of the state.¹ For the above reasons, numerous rules that modify the principles of public finance management were introduced to the Polish legal system after the state of epidemic had been

¹ More about the budget balance and equilibrium in the public finance sector as legal values see, among others: Łączkowski 1999, 283–91; Zubik 2000, 9–24; Skórzewska 2003, 229–40; Dębowska–Romanowska 2010, 118–22; Gorgol 2014, 23–35; Hanusz 2015, 20–33.

declared.² As far as the state budget is concerned, the provisions included in the amendments govern mainly the implementation of the Budget Act. This means that significant changes were introduced to those financial law institutions that provide for making various adjustments to the state budget without the need to amend the Budget Act, i.e., blocking expenditures planned in the Budget Act, transferring expenditures between the items of budgetary classification, and the management of budgetary reserves.³ As will be argued below, some of the legislative changes discussed can be viewed as controversial in light of the constitutional principle of exclusivity of the legislative authority in shaping state revenues and expenditures.

The aim of the article is to present and analyse the amendments in the field of management of the general reserve and special purpose reserves that were introduced to the Polish legal system in order to ensure the proper execution of budgetary tasks during the pandemic. This aim is achieved through the presentation and analysis of the so-called Second Anti-Crisis Shield, i.e. the Act of 31 March 2020 amending the Act on Special Solutions Related to Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Resulting Crisis,⁴ as well as the provisions of the so-called Budget-Related Act for 2021, i.e. the Act of 19 November 2020 r. on Special Solutions to Implement the Budget Act for 2021.⁵

The provisions amending the principles of budgetary reserves management can be grouped into two categories, which determine the inner structure of the paper. The first category consists of those provisions set out in the Act on Special Solutions Related to Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Resulting Crisis⁶ which contain legal norms ordering or authorising state authorities to take specific actions in order to “counteract COVID-19,” “perform tasks related to counteracting COVID-19” or “finance tasks related to counteracting COVID-19.” Consequently, actions referred to in the aforementioned regulations may be undertaken both during the legal state of epidemic and after it has come to an end. It is beyond doubt that in the case of highly transmittable pathogens, preventive measures need to be taken on a regular

² The state of epidemic was declared by the Regulation of the Minister of Health of 20 March 2020 on Declaring the State of Epidemic in the Area of the Republic of Poland, *Journal of Laws*, item 491 as amended. In this respect, it must be underlined that although the state of epidemic involves certain restrictions, it is not an extraordinary measure within the meaning of the Constitution of the Republic of Poland. See more in Krakala 2018, 87–103; Szmulik and Szymanek 2020, 9–20.

³ See more in: Stepaniuk 2006, 123–31.

⁴ Act of 31 March 2020 amending the Act on Special Solutions Related to Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Resulting Crisis and Some Other Acts, *Journal of Laws*, item 568 as amended [hereinafter: Second Anti-Crisis Shield].

⁵ Act of 19 November 2020 on Special Solutions to Implement the Budget Act for 2021, *Journal of Laws*, item 2400 [hereinafter: Budget-Related Act for 2021].

⁶ Act of 2 March 2020 on Special Solutions Related to Preventing, Counteracting and Combating COVID-19, other Infectious Diseases and the Resulting Crisis, *Journal of Laws*, item 1842 as amended [hereinafter: Anti-Crisis Act].

basis: vaccination of the new population members is a good case in point. Without question, it will also be necessary to take measures to alleviate the economic effect of the epidemic. The second category consists of temporary regulations contained in both the Act on Special Solutions Related to Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Resulting Crisis and the Budget-Related Act for 2021. The main difference between the regulations contained in both Acts is that while the provisions laid down in the Anti-Crisis Act were already in effect in 2020, the provisions of the Budget-Related Act for 2021 have come into force in 2021.

1. PROVISIONS GOVERNING THE MANAGEMENT OF BUDGETARY RESERVES THAT REMAIN IN EFFECT INDEFINITELY

The provisions governing the management of budgetary reserves that remain in effect indefinitely concern two aspects of budgetary reserves management, i.e. their creation and division. Changes in the field of creation of budgetary reserves relate exclusively to special-purpose reserves, whereas amendments to the provisions on their division are applicable to both the general reserve and special purposes reserves. Modifications to the rules on creation of special-purpose reserves are strictly related to the extension of the executive's power to block expenditures planned in the Budget Act. The first of the aforementioned amendments applies to the institution of blocking which is placed at the disposal of the Minister of Finance under the provisions of the Polish Public Finance Act.⁷ The second amendment is consequential on the provisions of the Anti-Crisis Act establishing the legal basis for budget expenditures being blocked by the President of the Council of Ministers (Prime Minister). The amendments to the provisions dealing with division of special-purpose reserves are mainly intended to ensure adequate funds for the budgetary tasks related to preventing, counteracting and combating COVID-19 as well as its consequences.

In accordance with the provisions of the Public Finance Act, blocking of expenditures provided for in the Budget Act means a ban on administering a part or the whole of planned expenditures for a specific period or until the end of the year (Article 177(2) of the Public Finance Act).⁸ Such a decision can be made in a limited number of prescribed situations, namely: mismanagement in specific units, delays in the execution of tasks, excessive amount of funds held, and violation of the principles of financial management specified in the Public Finance Act

⁷ Act of 27 August 2009 on Public Finance, Journal of Laws of 2019, item 869 as amended [hereinafter: Public Finance Act].

⁸ The institution of blocking expenditures planned in a Budget Act makes it possible to introduce changes in the state budget without the need to amend the Budget Act. However, it is also one of the instruments for the supervision exercised by the Minister of Finance and the administrators of budget parts, as well as an instrument for the protection of budget balance. See more in: Lipiec-Warzecha 2011; Kosikowski 2011b; Durczyńska 2014a; Idem 2014b; Duda 2014a, 905–909, Idem 2014b, 911–15; Miemiec 2019; Nowak 2019.

(Article 177(1) of the Public Finance Act). It should also be noted that under the Public Finance Act, it is the Minister of Finance who is authorized to block planned expenditures within the scope of the whole budget, with the exception of the expenditures of the public authorities and institutions that have a special budgetary position (the so-called privileged budget parts).⁹ Nevertheless, the Minister of Finance must then inform the Council of Ministers about this decision, which, in turn, may repeal it within 30 days of receiving the information (Article 177(5) of the Public Finance Act). As it is aptly pointed out in the literature, the provision empowering the Council of Ministers to repeal the decision on blocking planned expenditures is consistent with both the formal supervision of budget implementation exercised by this authority and the relationship between the Council of Ministers acting collectively and particular ministers [Misiąg 2019b]. Through the revision of the Anti-Crisis Act, the Minister of Finance has been endowed with full autonomy over the decisions to block planned expenditures – at the expense of the competences of the Council of Ministers (Article 15zi(7) of the Anti-Crisis Act).

The second thing that was changed by the Second Anti-Crisis Shield was the treatment of the funds blocked. Under the Public Finance Act, the funds blocked in accordance with the foregoing procedure shall reduce the total expenditure that may be incurred in the budgetary year in the course of budget implementation or shall be reallocated and used for other purposes. The funds blocked may be reallocated only to a limited extent; to be more precise, reuse of the resources is permissible in two cases only. First, in the event that there are delays in the implementation of a budgetary task. Second, in the event that an excessive amount of funds has been earmarked for a given budgetary task. More importantly, the funds blocked may be reallocated exclusively by means of establishing a special-purpose reserve to finance the State Treasury's liability, or for purposes separately laid out in the Budget Act (Article 177(7) of the Public Finance Act). It is also worth noting that in accordance with the Public Finance Act, the decision on establishing a new special-purpose reserve shall be made by the Minister of Finance; however, it has to be preceded by the approval given by the Sejm committee on budget (Public Finance Committee) (Article 177(6) Public Finance Act). The Second Anti-Crisis Shield established the legal basis for the reuse of all funds blocked, including the cases where the reason for initiating the blocking procedure is mismanagement or a violation of the principles of financial management detected in the course of implementing the budget. As a result, the Minister of Finance has been authorized to establish a new special-purpose reserve. In the light of the analysed provision, the Minister of Finance, by order of the Prime Minister, shall establish a new special-purpose reserve and place in it the funds blocked. The Act also states that the opinion of the Sejm committee on budget (Public Finance Committee) is not required (art. 15zi, sect. 6 of Anti-Crisis Act).

⁹ The authorities and institutions are enumerated in Article 139(2) of the Public Finance Act.

The analysis of the provisions invoked may give rise to the following considerations. First, in contrast to the decisions setting up special-purpose reserves taken in accordance with the Public Finance Act, the decision made by the Minister of Finance pursuant to the provision referred to above is neither autonomous nor is subject to government supervision. The Anti-Crisis Act expressly provides that the new reserve is established as a consequence of an order given by the Prime Minister. Under the Public Finance Act, the legal concept of a binding command given by the Prime Minister to the Minister of Finance represents a novelty and might give rise to controversy both in the constitutional and legal-financial aspects [Duda-Hyz 2020, 67]. In the constitutional aspect, the aforementioned competence must be considered against the dominant role of the Council of Ministers as a body which shall manage the internal affairs of the Republic of Poland. In accordance with the provisions of the Constitution of the Republic of Poland, it is the Council of Ministers, not its president, that ensures the implementation of statutes, supervises the implementation of the state budget, passes a resolution on the closing of the state's accounts and reports on the implementation of the budget.¹⁰ It should also be stressed that the power to give orders is a management tool of a clearly substantive nature,¹¹ whereas there is no unity of opinion in the constitutional law literature as to whether the Prime Minister's competence entails substantive management of the Council of Ministers.¹² In the legal-financial aspect, it remains an open question whether the Prime Minister should be entrusted with the power to give an order to establish a new special-purpose reserve.¹³ It is beyond doubt that this legal solution results in the weakening of the position of the Minister of Finance, who is an authority that performs and – according to the representatives of the legal-financial doctrine – should perform a key role in the process of public financial management.¹⁴

Secondly, the decision to create the special-purpose reserve does not have to be preceded by obtaining a positive opinion issued by the Sejm committee on budget. In consequence, the process of establishing the new reserve is the exclusive competence of the bodies bestowed with the executive power. The participation of the Public Finance Committee in the process of budget implementation, which should be seen in the broader context of the so-called executive's veto powers,¹⁵ is assessed differently in legal literature.¹⁶ Nevertheless, it seems that even in the

¹⁰ Article 146(4)(1) and (6) of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended [hereinafter: Constitution of Poland]. In view of the Constitution, the public finance sphere is one of the areas of specific tasks, but it is also a responsibility of the Council of Ministers. See more in: Dudek 2016; Zubik 2001, 291–300.

¹¹ See more in Sarnecki 2011, 68.

¹² See more in Kuciński 2017a, 65–68.

¹³ The conferral of such powers might raise doubts in the light of Prime Minister's accountability. Under the provisions of the Republic of Poland the vote of no confidence against the Prime Minister is not acceptable. See more in: Kuciński 2017b; Eckhardt 2018.

¹⁴ See more in: Kucia-Guściora 2015, 73–222; Kosikowski 2011a, 491–96.

¹⁵ See more in: Czarny 2016; Kuciński 2017c, 20–22; Pajdała 2003, 70–75.

¹⁶ See more in: Zubik 2003, 321–23; Mojak 2007, 431; Kucia-Guściora 2015, 193; Miemiec 2019.

light of the position that the role of the Committee is justified under the Constitution of Poland,¹⁷ there are no grounds for a profoundly negative assessment of the adopted solution. The need for a smooth adjustment of the state's financial management to the exceptional circumstances arising from the epidemic, as a general rule, justifies broadening the scope of the executive's decision-making competence in the implementation of the state budget. It is also worth noting that the explanatory statement to the Second Anti-Crisis Shield does not give any specific reasons for the exclusion of the Public Finance Committee from the process of creating a new special-purpose reserve.¹⁸ However, it can be assumed that the solution was motivated by the need to shorten the duration of the process and, consequently, to ensure greater flexibility in budget implementation [Duda-Hyz 2020, 68].

The last issue to be mentioned here is the allocation of funds transferred to the newly created special-purpose reserve. The essence of a special-purpose reserve is that the appropriations entered in it may be allocated solely to the specific purpose for which the reserve has been established [Augustyniak-Górna 2002, 9; Lipiec-Warzecha; Kosikowski 2010, 385]. However, there is no clear indication of the purpose of the newly created reserve in the wording of the regulation discussed. Yet, the structure of the provision, as well as the content of the explanatory statement to the Second Anti-Crisis Shield, seem to imply that the intention of the legislature was to establish the legal basis for the allocation of the funds blocked to tasks related to counteracting COVID-19. In the context of the division of the newly created reserve, it should also be noted that the wording "counteracting COVID-19" has a predefined meaning. In accordance with the definition provided in the Anti-Crisis Act, 'counteracting COVID-19' means all activities related to fighting infection, preventing transmission, prophylaxis, and combating effects, including the socioeconomic impact, of the disease caused by the SARS-CoV-2 virus (Article 2(2) of the Anti-Crisis Act).¹⁹ In the light of this legal definition, there is every reason to claim that the appropriations entered in the newly created reserve can be allocated to executing a broad spectrum of budgetary tasks. Needless to say, the existence of such reserves broadens the scope of the executive's decision-making competence in the implementation of the state budget.

The second change in the establishment of special-purpose reserves is connected with empowering the Prime Minister to block expenditures planned in the Budget Act, which represents a novelty in the Polish legal system. Within the meaning of the analysed provision, in order to counteract COVID-19, the President

¹⁷ See more in: Stankiewicz 2015, 287–301.

¹⁸ Explanatory statement to the Bill Amending the Act on Special Solutions Related to Preventing, Counteracting and Combating COVID-19, other Infectious Diseases and the Resulting Crisis, Sejm print no. 299, Sejm of the 9th term, henceforth cited as: Explanatory statement to the Second Anti-Crisis Shield.

¹⁹ The definition was broadened in the Second Anti-Crisis Shield to include the "socioeconomic impact of the disease caused by the SARS-CoV-2 virus."

of the Council of Ministers may decide to block planned expenditures in the scope of the whole budget, specifying the part of the state budget and the total amount of expenditure subject to blocking (Article 31(2) of the Anti-Crisis Act). A detailed analysis of the provision within the context of separation of powers in the budgetary process goes beyond the scope of this article. However, it is important to point out that the regulation might give rise to controversy. Both the condition for the utilization of the blocking instrument and the scope of expenditure subject to blocking are defined very broadly. As a result, the President of the Council of Ministers has a greater power of discretion with regard to the blocking of expenditures than the Council of Ministers itself, i.e., the authority responsible for the implementation of the budget.²⁰ This being the case, the so-called Anti-Crisis Shield authorizes the Minister of Finance to establish a new special-purpose reserve of the funds blocked by the Prime Minister. Appropriations entered in the reserve shall be allocated to “counteracting COVID-19.” However, the decision to allocate the reserve is not autonomous. This is because it has to be preceded by a request from the administrator of the budget part carrying out a given task related to counteracting COVID-19, which in turn must find acceptance from the Prime Minister (Article 31(4) of the Anti-Crisis Act). In view of the presented provisions, a conclusion can be drawn that there is a marked tendency to strengthen the Prime Minister’s position in the process of budget implementation at the expense of the competences of the Minister of Finance.

The next category of changes that have been introduced by the Second Anti-Crisis Shield is related to the division of already existing budgetary reserves. According to the provisions of the Public Finance Act, the general reserve must not be allocated to increase expenditures which have been reduced in the process of budget implementation through the institution of transferring expenditures between items of budgetary classification (Article 155(3) of Public Finance Act). Namely, the provisions refer to a procedure in which the administrators of budget parts at first reduce expenditures for a given purpose, and then strive to increase those expenditures by means of releasing of appropriations from the reserve [Borodo 2020]. The above limitation has been abolished by the Second Anti-Crisis Shield. In consequence, the general reserve may be allocated to increase expenditures which have been previously reduced provided that the purpose of this is to “perform tasks related to counteracting COVID-19” (Article 15zi(2) of the Anti-Crisis Act).

The procedure of change of the designated use of special-purpose reserves has also been modified. Under the Public Finance Act, special-purpose reserves can be allocated only for the original purpose they were earmarked for and used in accordance with the classification of the expenditure. The Act also states that the Minister of Finance, after obtaining a positive opinion of the Sejm committee on budget, may change the purpose of a special-purpose reserve (Article 155(7) of

²⁰ See more in Duda–Hyz 2020, 72–75.

the Public Finance Act). Through the Second Anti-Crisis Shield, a new regulation providing for changes in the original purpose of special-purpose reserves has been introduced. According to this provision, the President of the Council of Ministers, in order to finance tasks related to counteracting COVID-19, may give the Minister of Finance binding orders to change the purpose of a special-purpose reserve, along with the indication of the item and the amount of the reserve. What is important, the opinion of the Public Finance Committee is not required in the abovementioned procedure. It is also worth mentioning that the change may be made by the end of the budgetary year (Article 15zm of the Anti-Crisis Act). According to the wording of the above provision, the Prime Minister has been authorized to dispose of all appropriations of a special-purpose reserve. Still, it should be borne in mind that some of special purpose reserves are related to the legally determined state budget expenditures, which means that the appropriations placed in them, at least in part, must be used for the original purpose they were earmarked for.²¹ Limitations in this field may also result – at least at the political level – from the institution of the so-called assurance of funding granted by the Minister of Finance.²²

2. TEMPORARY REGULATIONS GOVERNING THE MANAGEMENT OF BUDGETARY RESERVES

As already mentioned, the temporary regulations that remained in effect during the year 2020 were introduced by the so-called Second Anti-Crisis Shield. They concern the date by which special-purpose reserves must be divided, as well as the allocation of appropriations entered in those reserves. Under the provisions of the Public Finance Act, special-purpose reserves are generally divided by the Minister of Finance in cooperation with competent ministers or other administrators of budget parts not later than by 15th October (Article 154(1) of the Public Finance Act). The Act also states that the competent ministers or other administrators of budget parts shall apply to the Minister of Finance, by 30 September at the latest, for the division of special-purpose reserves resulting in an increase in expenditures in the budget parts whose administrators are voivodes (Article 154(2) of the Public Finance Act). In accordance with the provisions of the Anti-

²¹ A good illustration of such a reserve is reserve item 64 – *Appropriations for tasks in the field of health protection*, which is included in part 83, division 851, chapter 85195 of Annex 2 to the Bill on Budget for 2021, Sejm print no. 640, Sejm of the 9th term. The reserve amounts to PLN 4,872,391,000, of which 4 billion is designated for the so-called “contribution from the state budget” to the Medical Fund (state special-purpose fund) and, according to the Act on the Medical Fund, constitutes a legally determined state budget expenditure (Article 8(2) of the Act of 7 October 2020 on the Medical Fund, Journal of Laws, item 1875).

²² According to Article 153 of the Public Finance Act, the Minister of Finance, upon request of the administrator of the budget part, may provide an assurance of funding from the state budget of some of the budgetary tasks during the budgetary year and in the following years, provided that the funds were anticipated in a special-purpose reserve. See more in: Świąch–Kujawska 2019; Münnich 2014, 833–35; Misiąg 2019a.

Crisis Act, the division of special-purpose reserves might have taken place until 31st December 2020. Accordingly, the time limit for application to the Minister of Finance had been extended until 5th November (Article 31n of the Anti-Crisis Act). The extension of the time limit for the division of budgetary reserves during the SARS-CoV-2 virus epidemic seems fully justified. The reason behind it is that at the time of adoption of these provisions, it was anticipated that there would be a second wave of the epidemic in autumn; however no one knew what proportions it would assume.

In view of the fact that under the Constitution of the Republic of Poland it is the Sejm that shall adopt the state budget for a fiscal year and, consequently, shape state revenues and expenditures, the second amendment that was in effect during the year 2020, namely the change in the allocation of appropriations entered in special-purpose reserves, should be given substantially greater weight. As has already been indicated, pursuant to the Public Finance Act, the appropriations entered in a special-purpose reserve may be allocated solely to the specific purpose for which the reserve has been established (Article 154(7) of the Public Finance Act). The Minister of Finance may change the designated use of the funds on condition that the Sejm committee on budget issues a positive opinion on the matter (Article 154(9) of the Public Finance Act). According to the regulations of the Anti-Crisis Act, appropriations entered in special-purpose reserves might be allocated to the execution of tasks related to counteracting COVID-19 regardless of the intended use of the reserves. Even more importantly, the division of the reserves in the abovementioned procedure did not have to be preceded by obtaining the approval of the Public Finance Committee. Special-purpose reserves could be divided by the Minister of Finance at the request of the competent administrator carrying out a given task related to counteracting COVID-19, with the authorization of the President of the Council of Ministers (Article 31o of the Anti-Crisis Act). As a result of these provisions, the executive was granted the right to change the designated use of all appropriations entered in special-purpose reserves, which amounted to PLN 22,734,149,000.²³ Nevertheless, as it was argued previously, limitations within the above-mentioned scope are, as a rule, imposed by the legally determined state budget expenditures and by the institution of the so-called assurance of funding granted by the Minister of Finance.

As indicated previously, changes in the field of budgetary reserves management were also introduced by so-called Budget-Related Act for 2021. The essence of the first category of these amendments is the abolition of limits on some budgetary reserves. Under the Public Finance Act, special-purpose reserves may be established in the state budget: (1) for expenditures which may not be precisely divided into budget classification items during the period of drawing up of the Budget Bill; (2) for expenditures whose implementation depends on incurring a loan at an international financial institution or obtaining funds from other sour-

²³ Annex 2 to the Budget Act for 2020 of 14 February 2020, Journal of Laws, item 571.

ces; (3) for expenditures related to the implementation of programmes co-financed with EU funds or EFTA countries' funds; (4) whenever separate acts provide for this effect. The sum of the special-purpose reserves referred to in point 1 and 4 may not exceed 5% of budget expenditures (Article 140(2) and (3) of the Public Finance Act). According to the Budget-Related Act, the provision establishing limit on these reserves will not be in force during 2021 (Article 49 of the Budget Related Act for 2021). It is also worth mentioning that pursuant to the explanatory statement to the Budget-Related Bill, during the period of drawing up of the Budget Bill, it was not possible – due to the epidemic and the economic situation – to plan in detail the expenditures in different parts of the budget, with divisions into budget classification items. In the opinion of the Council of Ministers, the financial consequences of the epidemic that might occur in the following budgetary year justify an increase in the level of appropriations in part “83-special-purpose reserves” in relation to the total amount of the planned expenditures. It is stressed that the adopted solution will make it possible to execute those tasks for which cost figures cannot be assigned to specific public finance sector units. In other words, thanks to this amendment, the budget expenditures can be planned more flexibly, which in turn will make it possible to divide the appropriations in a more efficient way.²⁴

The Public Finance Act also states that a reserve in the amount of up to 1% of the planned expenditure, excluding grants for local government units, may be established in the budget parts which are administrated by particular voivodes (Article 140(4) of the Public Finance Act). In accordance with the Budget-Related Act, the provision will not remain in effect in 2021 (Article 50 of the Budget Related Act for 2021). It is worth pointing out that pursuant to the explanatory statement to the Budget-Related Bill, the amendment is to provide the legal basis for including larger amounts in the reserves created in voivodes' budgets. The justification for that change is a difficult situation connected with the spread of the COVID-19 epidemic and a large number of separate units financed from the voivodes' budgets.²⁵

The purpose of the third change introduced by the Budget-Related Act is to create the legal basis for establishing a new special-purpose reserve in 2021. According to the provision introduced by the Act, in order to carry out the tasks related to the prevention and remediation of natural disasters, including crop losses stemming from drought, as well as prevention and remediation of the epidemic, the President of the Council of Ministers may give the order to the Minister of Finance to establish a new special-purpose reserve and to place in it the funds blocked in accordance with Art. 177(1) of the Public Finance Act. As in the case of the provisions outlined above, a positive opinion of the Public Finance Commi-

²⁴ Explanatory statement to the Bill on Special Solutions to Implement the Budget Act for 2021, Sejm print no. 641, Sejm of the 9th term, p. 7 [hereinafter: Explanatory statement to the Budget Related Bill].

²⁵ Ibid.

tee is not required in the process of the establishment of the new reserve. The Act also states that the reserve may be created until 22 December 2021 and shall be divided by the Minister of Finance upon request of the competent minister (Article 75 of the Budget Related Act). It is also worth mentioning that the provision was introduced to the Bill on Special Solutions to Implement the Budget Act for 2021 at the initiative of the Chief of the Chancellery of the Prime Minister. Nevertheless, the Chief 's letter did not provide any justification for such a solution.²⁶

CONCLUSIONS

It is beyond doubt that exceptional situations call for exceptional measures. The above statement holds true for the COVID-19 epidemic, which poses a risk to so many aspects of social, economic and political life that the situation it results in can be assessed as exceptional. At the same time, it is necessary to emphasise that the Polish Public Finance Act contains provisions that address special circumstances and are aimed at making the process of budget implementation more flexible. However, the condition for the application of these provisions is the exercise of any of the extraordinary measures laid down in the Constitution of the Republic of Poland. In spite of the fact that the outburst of the epidemic may be assessed as exhibiting characteristics of a natural disaster the consequences of which threaten the life and health of a great number of people, the state of a natural disaster as defined in the Constitution has not been declared, the result being that the above-mentioned provisions of the Public Finance Act could not be applied. Instead, new regulations concerning the process of budget implementation have been adopted, including provisions on budgetary reserves management. The analysis of these regulations leads to the following conclusions.

Firstly, the regulations discussed are intended to ensure both the epidemic security of the state – through the allocation of appropriate funds for the execution of tasks related to counteracting COVID-19, and its financial security – by providing the legal basis for changing the allocation of expenditures planned in the Budget Act. Hence, the purpose of the amendments seems understandable and deserves full approval.

Secondly, the essence of these amendments is a significant extension of the powers of executive authorities to make adjustments to the state budget without the need for amending the Budget Act. By way of the analysed provisions, the President of the Council of Ministers has been granted previously unknown powers to create budget reserves and change their allocation. Notably, some of the abovementioned amendments are strictly associated with conferring on the Prime Minister new powers in the field of expenditure blocking. In this regard, it is parti-

²⁶ See The letter from Michał Dworczyk the Chief of the Chancellery of the Prime Minister to Mariusz Skowroński the Secretary of the Permanent Committee of the Council of Ministers, <https://legislacja.rcl.gov.pl/projekt/12337613/katalog/12713880#12713880> [accessed: 10.05.2021].

cularly noteworthy that in matters related to the creation of new special-purpose reserves or changing the allocation of the existing ones, the need to obtain a positive opinion of the Sejm committee on budget has been completely abandoned, which undoubtedly means that the legislature has lost one of the important instruments of ongoing oversight over the implementation of the state budget.

Thirdly, it should be emphasised that the state of epidemic introduced in Poland is something generically different from the constitutional extraordinary measures. While the situations classified as the state of epidemic threat or the state of epidemic do constitute a danger, they are not a “particular danger” as defined in the provisions of the Constitution of the Republic of Poland, and do not interfere with the normal functioning of state institutions. Therefore, if the legislative process is not disrupted, i.e. there exists a possibility of amending the Budget Act, a question arises about the constitutional basis that would justify such a significant shift of competence for determining the expenditure side of the state budget to the bodies of the executive branch.

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THE INFLUENCE OF THE COMMUNIST AUTHORITIES' REFERENCES TO THE MARCH CONSTITUTION ON THE FORMATION OF THE POLITICAL SYSTEM IN POLAND IN THE YEARS 1944–1947

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Abstract. The main purpose of this paper is to answer the question of whether the communist authorities' references to the March Constitution in the 1944 Manifesto of the Polish Committee of National Liberation had a real impact on the shaping of the political system in Poland in 1944–1947. The authorities paid particular attention to the illegal adoption of the April Constitution, refusing its binding force, thus denying the legal activity of the Polish government in exile. The principles on which the March constitution was based will be discussed and then compared with the principles declared by the new authorities and their application in practice. Attention will be paid to the understanding of these principles that differs from the meaning adopted in the interwar period.

Keywords: March Constitution, April Constitution, Polish political system, Polish National Liberation Committee

INTRODUCTION

The starting point for these considerations is the declaration in the Polish Committee of National Liberation's (in Polish: PKWN) Manifesto that the new authorities operate based on the Constitution of March 17, 1921, which, according to the authors of the text, was "the only valid legal constitution enacted by law."¹ It was noted that "Emigration «government» in London and its delegation in the country is a self-proclaimed authority, an illegal authority. It is based on the unlawful fascist constitution of April 1935. The government inhibited the fight against the Nazi occupier and its adventurous policy pushed Poland towards a new catastrophe."² The basic assumptions of the March Constitution were to be in force "until the convocation of the new legislative, Sejm (i.e. Parliament) elected by universal, direct, equal, secret and relative vote, which adopts a new constitution as an expression of the will of the people."³

Consideration should be given to the following issues: can the communist allegation regarding the illegality of adopting the April Constitution be justified and what impact on the formation of the political system in Poland in 1944–1947, i.e.

¹ Journal of Laws of 1944 No. 1, Annex.

² *Ibid.*

³ *Ibid.*

until the adoption of the so-called The Small Constitution, i.e. two constitutional acts containing the basic principles of the functioning of the state system,⁴ had declared maintaining the basic assumptions of the March Constitution.

1. THE QUESTION OF LEGALITY AND BINDING FORCE OF APRIL CONSTITUTION

Referring to the allegation of the illegality of the April Constitution, we should omit the question of the legality of the establishment and operation of communist authorities in Poland – the National State Council, aspiring to the role of a temporary parliament, and the Polish Committee of National Liberation which has its rich literature, and focus on arguments put forward still in the interwar period. Doubts were raised above all by how the April Constitution was adopted in parliament. The procedure was based on Article 125 of the March Constitution, which provided for three variants of its amendment: “Amendments to the Constitution may be adopted only in the presence of at least half of the statutory number of deputies or members of the Senate by a 2/3 majority. A proposal to amend the Constitution should be signed by a quarter of the statutory number of deputies and announced at least for 15 days. The Sejm elected for the second time in a row, based on this Constitution, may revise the Constitutional Act by its resolution adopted by a 2/3 majority of voters, in the presence of at least half of the statutory number of deputies. Every 25 years after the adoption of this Constitution, a constitutional act is to be reviewed by a simple majority of the Sejm and Senate, joined for this purpose in a National Assembly.”⁵

It should be emphasized that the quoted article distinguished two concepts: amendment and revision of the constitution. Professor W. Komarnicki, an outstanding constitutionalist of the interwar period, in the publication *Polish political law (genesis and system)*, published in Warsaw in 1922 (i.e. shortly after the adoption of the March Constitution), explained that revision is a fundamental change, i.e. a change in fundamental concepts, a change in the system, while the normal or partial change applies to points of less significance. The author noted that Article 125 provided for a twofold revision of the constitution: periodic, which is necessary and takes place every 25 years, and extraordinary, which can be made by Sejm’ (the second in turn, elected by the constitution of 1921) resolution, i.e. without the participation of the senate, and this resolution should be adopted by a 3/5 majority voting in the presence of at least half of the statutory number of deputies [Komarnicki 1922, 581]. The institution of the periodic review, which

⁴ The Constitutional Act of 4 February, 1947, on the election of the President of the Republic, Journal of Laws No. 9, item 43 and the Constitutional Act of 19 February 1947 on the system and scope of activity of the highest organs of the Republic, Journal of Laws No. 18, item 71.

⁵ Act of 17 March 1921, the Constitution of the Republic of Poland, Journal of Laws No. 44, item 267.

refers to the Constitution of May 3,⁶ was based on the assumption that the durability of basic constitutional principles should be estimated at the age of one generation, which is just 25 years on average. However, the first constitution after regaining independence was adopted in specific conditions, not conducive to the elaboration of lasting solutions: “among the eastern war, internal confusion caused by anarchic agitation of borderers, lack of participation of representatives from the Eastern and Silesian borderlands in the constitutional assembly, they wanted [sc. the authors of the constitution] to allow the second Sejm, in turn, to review the constitution adopted in these conditions” [ibid., 582]. At the same time, the possibility was provided to amending individual provisions of the constitution (referred to as “constitutional amendment”) with separate participation of the Sejm and Senate, while maintaining a qualified quorum in each of the chambers (at least half of the statutory number of deputies and senators) and a qualified majority – also in each of the chambers (two-third votes) [ibid., 581].⁷ Article 125 also required the signature of the appropriate number of deputies and senators on the application and the submission of the application in advance (at least 15 days) before the planned voting.

Taking into account the requirements provided in Article 125 regarding the amendment and revision of the constitution, it is easy to notice that in 1935 only the option provided in item 1, i.e. amendment by the Sejm and Senate, could be considered. The Sejm elected in 1930 was not the second parliament elected during the period of validity of the March Constitution,⁸ and 25 years enabling the

⁶ Art. VI of the Constitution of May 3 provided for the revision of the constitution at the extraordinary Sejm convened every 25 years for this purpose: “By preventing violent and frequent variations of the national constitution on the one hand, and recognizing the need to improve it after experiencing its effects on public well-being, We mark the time and time of the revision and the improvement of the constitution every twenty-five years, wanting to have such an extra-coordinative constitutional parliament regulated by separate law to describe it.”

⁷ The author answers the doubt that may arise as to why a change in the constitution requires stricter requirements than revision since the effects of the latter go much further. Well, in his opinion, a change to the constitution is, in fact, easier to carry out than a review, because, despite the specific requirements, it can be done at any time, while a review (except in the exceptional case of an extraordinary review) can be made only every 25 years.

⁸ The Sejm of the second term, which met on March 27, 1928, failed to revise the constitution. Admittedly, the initiative to use the right granted to the Sejm to revise the constitution was raised by deputies from the Non-partisan Bloc for Cooperation with the Government (including Walery Sławek), and the Constitutional Commission proposed to supplement the Sejm’s regulations regarding the review procedure, which was adopted by the Sejm in January 1929. Individual deputies’ clubs (Club of the Non-partisan Bloc for Cooperation with the Government, Parliamentary Association of Polish Socialists, Parliamentary Club of the Polish Peasant Party “Liberation,” Parliamentary Club of the Peasant Party, Parliamentary Club of the Polish Peasant Party “Piast,” Christian Democracy and National Workers’ Party and National Club) submitted motions to revise the constitution, and the Constitutional Commission began its discussion on January 11, 1930. Because of the government crisis, the work of the Constitutional Committee was stopped, on 29 March 1930 the session of the parliament was closed, and on 29 August 1930, the president dissolved the parliament and the senate, citing in his message the inability of the parliament to reform the system. See more: Komarnicki 1937, 89–129.

revision of the constitution would not expire until 1946. Since the issue of reforming the system was not made by the Sejm of the second term, it was dealt with by the Sejm of the third term elected in 1930.⁹ A Non-partisan Bloc for Cooperation with the Government (in Polish: BBWR), having a simple majority in the Sejm (not qualified, needed to amend the constitution), submitted on 6th of February 1931 a draft already submitted to the Sejm of the previous term in 1929, in the form of not amendments to the text of the current constitution, but a full act, with the provision that it is only a starting point for further work. At the meetings of the Constitutional Commission held weekly during two ordinary sessions of the Sejm in 1931/32 and 1932/33, designated referents presenting individual issues, formulating theses on which the discussion was then held, and MP S. Car expressed his opinion on them as the main referent [Komarnicki 1937, 160–61]. The work quickened after a speech of MP W. Sławek at the congress of legionaries on August 6th, 1933, where he came up with the concept of departing from the text of the March Constitution as the basis for reform and of adopting new ideological assumptions, among others strengthening the president's power. On December 14th, 1933, during the plenary session of the BBWR club, general clerk S. Car presented the principles of the new constitution included in 63 theses, referring to the speech of W. Sławek, which did not constitute a proposal to change the current constitution, but were based on different assumptions: concentration of power in the hands of the president and oligarchic composition of the Senate. On December 20th, 1933, the Constitutional theses were presented at a meeting of the Constitutional Commission, and then, on January 11, 1934, discussed. After its completion, the Commission adopted a resolution on 18 January to submit to the Sejm a report on the work on the revision of the constitution, enclosing the theses adopted by the Commission together with their justification. On January 26, a session of the Sejm to debate on these theses was held. After the break, due to the absence of opposition MPs from the room, MP Stanisław Car, the referent of theses, stated: "because [...] the opposition is not interested in issues of repairing the political system, so I think that there are no obstacles to deal with this matter right away," and he brought, that "the theses which we have presented today, which were discussed in our Commission for three years, be considered a draft Constitution" and that the title "constitutional theses" should be replaced by another title "constitutional act." S. Stroński, the only opposition

⁹ The primary importance of the reform was emphasized by the president in his address to the opening of the Sejm on December 9, 1930: "Among the many necessary works that the newly elected Sejm and Senate will have to carry out, the repair of the Constitution comes to the fore. The constitution, until now in force in Poland, was developed in the tumult of the external war and among deep internal divergences. It was not an independent achievement of its own experience, thoughts and it did not turn out to be a perfect work, not giving our State conditions for the development of its strength [...]. The elections introduced a representation in a significantly changed composition to the Sejm and Senate. It allows me to hope that the new Sejm and the new Senate will start working with all goodwill and, in the first place, will undertake great work on repairing the fundamental rules governing Republic" (Polish Monitor No. 284).

MP present in the Hall, protested against this request. Then, S. Car requested that the agenda had been supplemented and that the constitution had been adopted following the shortened formal proceedings.¹⁰ The Sejm adopted proposals regarding the agenda and adopted the constitution in ordinary voting by rising from seats, without counting votes. The required 2/3 constitutional majority was visible, but no quorum was established. Therefore, the constitution was adopted in violation of the law. Even if it were assumed that the subject of the vote was not a revision but a mere amendment to the constitution, the provisions of Article 125 of the March Constitution, according to which a proposal to amend the constitution should be signed by at least a quarter of the statutory number of deputies (and there was no such proposal on the agenda at all) and announced at least 15 days before voting. It was also not stated whether the quorum requirement (at least half of the statutory number of deputies) was completed; this fact was even admitted by the Speaker of the Sejm M. Rataj: "I admit that the majority of 2/3 could be seen by eye, since all deputies stood, while the quorum by eye can not. So this provision of agenda's regulation has not been completed." Procedural manipulations were even rebuked by Marshal J. Piłsudski himself, who decided that the adoption of the constitution by "wit and trick" was not correct and ordered to erase the bad impression through a detailed debate in the Senate. Since the BBWR had a corresponding majority in Senate, there was no fear of the outcome of this debate, but once again the law was broken. On March 23th, 1935, the Sejm voted on the Senate's amendments. 139 votes were rejected, 260 were adopted, and the Marshal of the Sejm stated that since the rejection of the Senate amendments did not cast the 11/20 votes required by the March Constitution to reject amendments to the act adopted by the Senate, the amendments were adopted. However – as MPs Róg and S. Stroński pointed out – in this case, art. 35 of the March Constitution, referring to ordinary laws, should not be applied, but art. 125 concerning the procedure for amending the constitution and requiring a 2/3 majority to pass a constitution in both chambers. After the argument of the Marshall of the Sejm in favour of the correctness of the applied procedure, the objection raised by MP Stroński was rejected by a majority of the Sejm votes at the next meeting on March 28th, 1935. The issue of the constitutional amendment was definitively resolved by an act of promulgation by the President of the Republic of Poland on April 23rd, 1935. The new constitution promulgated in No. 30 of the Journal of Laws on April 24th, 1935 came into force on the day of its promulgation. Its date was not the date of the final resolution of the Sejm, but the date of promulgation by the President, hence it is called the April Constitution [Komarnicki 1937, 169–70].

Although the April Constitution was undoubtedly adopted in a manner contrary to the law, it cannot be said that this affected the question of the binding force of that constitution. According to the opinion of one of her opponents, S. Stro-

¹⁰ Article 18 of the Sejm Regulations (Print No. 388) provided: "The Sejm may adopt the following shortening of formal proceedings: a) dispense of motions or reports from printing, b) admission of an immediate hearing without referral to commissions."

ński (the only opposition MP present at the Sejm meeting on January 26th, 1934), denounced in 1944: “As no provision was made by the Polish Constitution or Parliamentary rules for the power of further appeal in this matter (there was no Constitutional Tribunal), the repeal of the old and the adoption of the new Constitution of April 23rd, 1935, came into force, and, although that Constitution was passed illegally, it is legally binding, just as a court judgement may be unjust, but is final and legal when all possibilities of appeal are exhausted [...]. Certainly the Sejm, through its majority, acted unjustly and against the rules. But it does not follow from that that anyone is entitled at any time and in any place to reject the 1935 Constitution” [Stroński 1944, 4–5]. Therefore, the argument indicated in the PKWN Manifesto regarding the unlawfulness of the April Constitution cannot be considered fully justified, nor can the argument regarding its fascist character. Such an argument was based on one of the ideological theses of the April Constitution – the principle of concentration of power in the person of the president. Other fundamental principles of the Constitution were: the principle of solidarity, the primacy of the state over the individual, and elitism. The principle of elitism, emphasizing the role of distinguished categories of citizens, can be considered particularly controversial. Special rights of the “elite” were confirmed by, among others, the procedure of elections of Senate and President. Therefore, at least to some extent, one of the most basic principles of the modern state was disregarded – equality before the law.

2. THE CONSTITUTIONAL PROVISIONS IN CASE OF WAR AND THE ACTIVITY OF POLISH GOVERNMENT DURING WORLD WAR II

Undoubtedly, a good feature of the April Constitution was that it contained well-thought-out provisions allowing for the continuation of the state authorities during the war, even in case of the occupation of the entire territory of Poland. According to Article 24(1), the President should appoint a successor during the war in case of his vacancy before a peace treaty by individual act published in a government newspaper. Article 24(2) provided that the term of holding the office of the successor was to last until the expiry of three months from the peace treaty, and the term of holding the office of the president was extended for that period [Komarnicki 1937, 211]. Secondly, the April Constitution granted the president extraordinary powers reducing the powers of the Sejm and Senate: the right to extend the term of holding the office of both chambers until the peace treaty (which was justified by the impossibility of holding elections), the right to open, postpone and close sessions of the Sejm and Senate on dates adapted to the needs of the defence of the state, appointing the Sejm and Senate in a reduced composition (Article 79(3)). The president had the right to issue decrees regarding all state legislation (except for constitutional amendments), based on the constitution itself, i.e. without authorization in legislative made by the chambers whose activities were, however, limited during the war. The president’s executive powers du-

ring the war included: appointing the Supreme Commander (Article 13(2d)) and holding him accountable (Article 63(4)), a decision to use the armed forces to defend the state (Article 63(2)), ordering martial law (Article 79(1)) and exercising the powers prescribed by the Act on Emergency (Article 79(3)) [ibid., 217–18, 240–41].¹¹

Based on the provisions of the April Constitution Polish state institutions rebuilt after the September 1939 defeat performed their functions in France. This constitution was – as W. Rostocki emphasizes – the basis of Polish legalism in France and treating Poland as a partner by the governments of France, Great Britain and the USA was unthinkable if there were no Polish authorities abroad based on legal grounds [Rostocki 1988, 9]. This sentence, shared by many opposition activists, was aptly reflect the words of S. Stroński in the already mentioned work: “Any Polish Government which arbitrarily announced the elimination of the binding 1935 Constitution would at that moment cease to be the Polish Government, which position it holds precisely and only by virtue of the binding Constitution, and in the same way, any President who recognized and agreed with such an announcement would cease to be President of the Republic, an office which he holds precisely and only by virtue of the Constitution in force [...] Moreover, because of their indisputable legal continuity the present Authorities of the Polish state, with the President and Government, are recognized by all the world with the exception of hostile Governments. If the legal continuity were broken foreign States could recognize some new ostensible authority or other, or not recognize any authority at all. From standing on the firm ground of the law, expressed in the recognition of its authorities and far-reaching international agreements, the Polish state would be thrown on the mercy or the lack of mercy of friendly and unfriendly States. Anyone who cares for Poland must rigidly watch over legal continuity” [Stroński 1944, 15–16].

The last words of the quoted statement refer to the situation that has arisen since the end of July 1944, when quasi-governmental structures, i.e. the Polish Committee of National Liberation (PKWN) and its branches, which since the beginning was active in parts of the central Polish territories freed from German occupation 1945 took the form of the so-called Provisional Government. From 31 December 1943, the National State Council (KRN) was active, aspiring to the role of a temporary parliament. Thus, between July 1944 and July 1945, two independent two systems of state authorities operated. The first in the form of the highest authorities of the Republic of Poland in England (President, Prime Minister, Council of Ministers and Supreme Commander) and their branches in Poland – the

¹¹ The author points out that all extraordinary powers, and thus not falling under the division, were associated with the conduct of war requiring the cooperation of all state authorities. The solutions adopted in the April Constitution were to prevent illegal practice used in European countries during the last war (i.e. World War I), constituting a supplement to constitutional provisions determining the functioning of state organs, which in the war conditions proved to be insufficient. These solutions, which – as the author emphasizes – an original feature of the April Constitution, provided the president with “almost absolute power” [ibid., 249].

Delegate of the Government of the Republic of Poland in the State, the Vice President of the Government of the Republic of Poland and the National Council of Ministers – acted based on the provisions of the April Constitution and were recognized by the international community, except for the USSR and countries associated with the Third Reich [Górski 2004, 40–41]. Rejecting the April Constitution, the National State Council questioned the legality of the authorities appointed on its basis and their right to decide the fate of the country. Therefore, the “repeal” of the April Constitution had obvious political aspects: after all, this constitution was the legal basis for the functioning of the legal Polish authorities in exile. On the other hand, the reference to the March Constitution created a semblance of formal grounds for the KRN to reach power through constitutional means: the takeover of power was not – according to this concept – a coup d’état, but the removal of usurpers, claiming their authority based on legal acts not recognized as legal by most of society, from power [Burda 1984, 129–30; Góra 1972, 77; Działocha and Trzeciński 1977, 5; Trzeciński and Surowiec 1984, 150]. Finally, in mid-1945, KRN got international approval based on the agreements of three powers concluded in Yalta and Moscow – the US, USSR and Great Britain – the Provisional Government of National Unity (TRJN).

3. THE BASIC PRINCIPLES OF MARCH CONSTITUTION

Basic principles of the March Constitution were: the republican system of the state, national sovereignty, the separation of powers, state uniformity (with Silesia’s autonomy) and respect for civil rights. Thus, Article 1 of the March Constitution stated that “the Polish State is the Republic of Poland.” The term “Republic,” referring to the pre-partition tradition, was used in the sense of the republican system, i.e. one where the hub and source of power is the nation.¹² The Constitution adopted the principle of national sovereignty, expressing it with the formula “sovereignty in the Republic of Poland belongs to the nation” (Article 2). The nation delegates attributes of authority to its organs implementing the scope of power specified by the constitution. According to the further content of Article 2, “the Nation’s organs in the field of legislation are the Sejm and the Senate, in the field of executive power – the President of the Republic of Poland together with responsible ministers, in the field of justice – independent courts.” The consequence of the concept of national sovereignty was that each of the authorities had limited power both in terms of material scope and duration [Komarnicki 1922, 213]. The Constitution entrusted each of these organs with appropriate sco-

¹² The quoted article referred to, among others, to Article V Constitution of May 3: “all power of human society originates from the will of the nation.” The March Constitution adopted the concept of a nation in the sense of the state, in contrast to a nation in the ethnographic sense. The word “nation” meant a population element in the concept of the state. The Constitution, therefore, distinguished “nation” from “nationality.” Therefore, the Polish state was a national creation, it had a uniform political face, which did not prejudge the existence of broad rights of elements ethnically different from it, i.e. nationalities [Komarnicki 1922, 215–16].

pe of activity, adopting the principle of separation of powers into legislative, executive and judicial.¹³ According to the March Constitution, Poland was a uniform state, because all three elements constituting the concept of the state (territory, nation and power) referred to the whole of the Republic. The territory of the state was uniform, which can be inferred from the lack of any territorial distinctions in the constitution, the nation was unified because there was only one Polish citizenship, and, finally, there was uniform power, having the feature of universality and exclusivity both in terms of personal and territorial scope [Komarnicki 1922, 224].¹⁴ Finally, Chapter V regulated universal citizenship rights and obligations.¹⁵ Among the rights should be distinguished: political rights, civil rights in the strict sense and rights of liberty. Political rights consisted in the cooperation of citizens in state functions: active and passive electoral rights to the Sejm and Senate (Articles 12, 13 and 36), the participation of citizens in the activity of administrative offices (Article 66), and the right to choose self-government bodies (Article 67), equal access to public offices (Article 96), the election of judges of peace (Article 76), participation in the jury (Article 83), as well as the right of citizens to submit, individually or collectively, petitions to representative bodies and public authorities (Article 107). Civil rights in the strict sense were the protection of individual goods and interests by the state [ibid., 537–39]. These rights included: equality before the law (Article 96), protection of life, freedom and property (Article 95), providing citizens with judicial justice (Article 98), the right to compensation for damage caused to citizens by state authorities (Article 121), the aforementioned right of petition. This category of rights also included the use of state care in specific areas: the right to labor protection (Article 102), the right to moral and religious care in public establishments (Article 102), maternity care (Article 103), children's right who do not have sufficient parental care for the care and assistance of the state (Article 103), special care for the work of children and women (Article 103), the right to free education in state schools (Article 119). Finally, the rights of freedom are those thanks to which the individual obtained a sphere of activity free from state interference. These were: personal freedom (Article 97), inviolability of the apartment (Article 100), the confidentiality of correspondence (Article 106), freedom of resettlement, emigration and choice of occupation (Article 101), inviolability of property (Article 99), free expressing thou-

¹³ The division was not carried out with full consistency, in particular, the advantage of the legislative authority over the executive was evident. See more: Dyjakowska 2013, 27–47.

¹⁴ The autonomy of Silesia, whose system was regulated by the constitutional act of July 15, 1920, Journal of Laws No. 73, item 497, was not in contradiction with the principle of uniformity of the state. Despite the existence of a separate legislative body – the Silesian Sejm, whose competence covered almost the entire scope of internal affairs (excluding foreign, military and some other matters), the territory of Silesia was part of the territory of the Republic of Poland, being under the rule of the central organs of the Republic of Poland.

¹⁵ The Constitution allowed the exercise of civil rights not only by citizens but also by foreigners on the condition of reciprocity, i.e. depending on the granting, by the state to which the foreigner belonged, analogous rights to Polish citizens (Article 95(2)).

ghts and beliefs (Article 104), freedom of the press (Article 105), the right to the coalition, gathering and forming associations and unions (Article 108), freedom of scientific investigations and teaching (Article 117), religious and worship freedom (Article 111–112), religious self-government (Article 113–116), nationality freedom (Article 109–110) [Komarnicki 1922, 539–40].

4. THE COMMUNIST PRINCIPLES RULING POLISH POLITICAL SYSTEM

For the basic distinguishing features of the so-called socialist constitutionalism, however, four principles can be recognized: the sovereignty of the working people of cities and villages, the leadership role of the communist party, the representative form of exercising power, the social value of the means of production.¹⁶ The communists understood the principle of the sovereignty of the working people of towns and villages in a manner completely contrary to the principle of sovereignty of the nation. The understanding of Article 1 of the March Constitution stating that the Polish State was the Republic of Poland, was dissimilar because the sovereign was no longer the nation, which determined a different understanding of the term “Republic” (“Rzeczpospolita”). The sovereignty of working people was understood as the supreme authority in the sense of dictatorship, which Lenin in his work written in 1920 *A Contribution to the History of the Question of the Dictatorship* defined as follows: “Dictatorship means unlimited power, based on strength, not on the law [...]. The scientific term «dictatorship» means nothing more nor less than authority untrammelled by any laws, absolutely unrestricted by any rules whatever, and based directly on force.” Based on the definition above, a well-known Polish specialist in the field of constitutional law, F. Siemieński, stated that sovereign could not be a state organ whose power is based on law, even if it was the highest authority among various organs and even if its power resulted from the constitution. In practice, therefore, only the ruling class can be recognized as the subject of supreme power in a state, which itself decides about lawmaking and its content, and is not bound by it, because – according to the author – no norms are flowing from someone’s will and at the same time obligatory [Siemieński 1976, 72–74]. The structure of supreme power mentioned above, assuming the existence in the state of the highest organ based on its law, and consequently legally irresponsible, completely denied the republican form of government and the democratic nature of the system adopted in the March Constitution.

¹⁶ According to A. Peretiatkowicz, the basic assumptions of the March Constitution, mentioned in the Manifesto of the Polish Committee of National Liberation, have not been formulated anywhere, therefore they cannot be considered legal norms in the proper sense, but only guidelines, directives for the legislator, i.e. the National Council and the government [Peretiatkowicz 1948, 140; cf. Idem 1947, 60]. M. Buszyński believes, however, that these basic assumptions of the March Constitution were interpreted in some acts issued after the Manifesto, especially in the Constitutional Act of 1947 [Buszyński 1947a, 616; Idem 1947b, 103ff].

Unlike the March Constitution, which recognizes the nation as the supreme authority, in the sense of all citizens of the state, the communists used the phrase "working people of cities and villages." This term meant not all the population of the state, but only working people, people living from their own and socially useful work, people who did not exploit someone else's work [Burda 1978, 175; Rozmaryn 1949a, 63, 80; Siemieński 1976, 75; Zamkowski 1977, 34]. According to F. Siemieński, working people include those social groups whose attitude to the means of production is defined in the form of 1) state ownership, i.e. the working class in the traditional sense of the word, i.e. manual workers, and the intellectuals working, i.e. white-collar workers; 2) cooperative ownership, i.e. mainly members of production cooperatives in the countryside and urban work cooperatives; 3) small-scale ownership, i.e. working peasants and craftsmen, owners of small individual manufacturing workshops. The working people do not, however, include those social groups whose way of earning their livelihoods is based on the exploitation of other people, that is, according to the author's description, "both the remains of the capitalist class and the parasitic class" [Siemieński 1976, 75–76]. The author also admits that the principle of working people's sovereignty is different, and even contrary to the principle of national sovereignty, because it clearly indicates the class nature of the state and provides the basis for applying restrictions on political rights to certain groups of citizens [ibid., 77–78]. He tries to defend the validity of this principle by showing that it is not contrary to the principle of national sovereignty, because the working people in each state constitute the majority of the nation, therefore the state power, realizing the interests and the will of the working people, and thus the majority of the nation, in a sense becomes the power of the whole nation. He admits, however, that the other social classes may (although non-necessary) be deprived of political rights and freedoms [ibid., 77–79], which meant their discrimination and denial of democracy.

The consequence of the principle of the sovereignty of the working people of cities and villages understood in this way was the adoption of the principle of the leadership role of the communist party, because "Without maintaining the leadership role of the communist party towards the working class and other classes of the working people, the power of the people can neither be acquired nor subsequently exercised" [Siemieński 1976, 87; cf. Burda 1978, 180–81]. The communist party is a ruling party able to independently exercise state power, which consists of three functions: 1) lawmaking; 2) appointing organs implementing the law; 3) control of the activities of these organs. The principle was adopted that the party exercises power through its representative bodies. According to F. Siemieński, this meant that 1) representative bodies, to be real, and not just formal, should express the interests and the will of the people; 2) should also be organs of state authority, i.e. be positioned in the state apparatus so that they form its political basis, that they form a decisive group of organs; 3) decisions taken by bodies recognized by the constitution as representative bodies of the people should be treated by citizens and by other state organs as the decisions of the people

themselves [Siemiński 1976, 97]. Representative bodies were to be national councils based on Soviet models, as local state authorities. They were headed by the National State Council, which was based on the unpublished Provisional Statute of National Councils adopted by the National State Council on January 1, 1944, replaced by the Act on the organization and scope of operation of national councils adopted by the National Council on September 11, 1944.¹⁷ The system of national councils, existing in all units of the administrative division, was to be, following the adopted Soviet doctrine, the basis of the political system [Pereciatkowicz 1948, 150]. According to the principle of concentration of power, it was in these organs that from the central level through the local levels the power of “working people of cities and villages” was to be exercised [Górski 2002, 302]. At the same time, reference was made to the democratic principles of the March Constitution, which was to counteract the belief that Poland was “Sovietized.”¹⁸ However, the national councils in voivodships and districts functioning at the time did not come from democratic elections, as the majority of their members were delegated by specific political formations and related social organizations [Kallas and Lityński 2000, 58]. By a decree of the Polish Committee of National Liberation of 23 November 1944 on the organization and scope of local government,¹⁹ national councils were merged with the local self-government institution, Article 3 stated: “Territorial self-government represented by the local national council is a corporation governed by public law and has legal personality,” at the same time national councils have been granted broader powers than those owned by territorial self-government in Poland during interwar period.²⁰ The councils were allowed to exercise social control over all state administration organs and to influence the appointment and dismissal of general government administration organs. The combination of the system of national councils with traditional local self-government solutions constituted a political decision with propaganda overtones to disseminate the institution of national councils, treated with reluctance as a foreign element of the political system, among public opinion [Witkowski 2020, 424].

The idea of social ownership of the means of production had little in common with the constitutional principles contained in the March Constitution. As in the Soviet constitution of 1936, social ownership existed in the form of state property

¹⁷ Journal of Laws No. 5, item 22.

¹⁸ According to Article 1 of this Act: “Until the establishment of a permanent political representation of the nation, following the principles of the constitution of 17 March 1921, national councils operate as temporary legislative and self-government bodies in the territories liberated from the occupier of the Republic of Poland.” Of course, such a wording suggesting that the institution of national councils was known under the March Constitution is not true. See also: Kallas and Lityński 2000, 58.

¹⁹ Journal of Laws No. 14, item 74.

²⁰ This state of affairs survived only until the Act of 20 March 1950 on territorial organs of uniform state authority came into force; as a result, national councils ceased to be organs of local self-government and executive organs of local self-government were dissolved [Kallas and Lityński 2000, 60].

(nationwide property) and group ownership, in particular cooperative ownership. Although unlike in the Soviet Union, the land in Poland was not nationalized, the land reform carried out under the decree of the Polish Committee of National Liberation of 6 September 1944²¹ led to the takeover by the State Land Fund of all land properties over 50 ha [Słabek 1974, 41–42]. For owners of land goods above this limit, compensation in the form of so-called landowner's pension was provided, which in practice was paid only to a small group of expropriated persons [Markiewicz 2016, 185–86; Machnikowska 2016, 169–70]. Only about 1/3 of the land obtained in this way went to peasant families; the remaining part was taken over by the State Land Real Estate and State Forests. During the expropriations, the belongings of displaced landowners were often robbed, they were also forbidden to settle in the district where they had their estates before. As a result of the land reform, approx. 12–15 thousand representatives of landowners, presented in the communist propaganda as exploiters, and even collaborators with the occupier, were deprived of property and opportunities for professional development. The lack of respect for private property was also visible in the nationalization of almost all industry sectors,²² and the so-called "Trade battle," i.e. a program for liquidating private trade in Poland and replacing it with state-owned trading facilities. The PKWN Manifesto announced that "German, hated orders restricting economic activity and trade between the village and the city will be lifted."²³ The state will support the broad development of cooperatives. A private initiative that increases the pulse of economic life will also find support from the state. "Meanwhile, in the years 1945–1946 a completely new form of a trade organization in Poland, i.e. a state trade facility, developed. It was started by state-owned production enterprises, which, apart from manufacturing, sold their products. In April 1945, Minister of Industry Hilary Minc announced the creation of sales centres to relieve enterprises from commercial activities. In this way, the state completely subordinated itself the sale of the products of the most important kinds of industry [Kaliński 1970, 33]. Acceptance for the three-sector trade model, i.e. private, cooperative and state trade, proved to be only a tactic. As early as December 1945, Minister H. Minc announced the "battle for trade and cooperative activity." In 1947, after the April plenary, the Polish Workers' Party, which had a parliamentary majority after the rigged elections to the Legislative Sejm (January 17), began to develop a program for internal market reforms [Idem 1974, 167–76; Kunicki and Ławecki 2017, 16–21]. In May 1949, a Price Office was established at the Ministry of Industry and Trade, whose task was to determine acceptable wholesale and retail margins for food products and to develop a list of food products covered by maximum prices, as well as to set maximum prices for industrial products and the amount of gross profit for wholesale and retail. The executive

²¹ Journal of Laws No. 4, item 17.

²² Act of 3 January 1946 on taking over the ownership of the basic branches of the national economy, Journal of Laws No. 3, item 17.

²³ Journal of Laws of 1944 No. 1, Annex.

apparatus of the Office was constituted by regional Quoting and Price Listing Committees, whose auxiliary bodies were Social Price Control Committees at district national councils. In June of that year, the Act on Fighting against Expenses and Excessive Profits in Trade was passed.²⁴

Already in July 1947, the first lists of maximum prices for groceries appeared in all provinces. New prices were set too low, in isolation from the market situation. Merchants indicated, among others, too low gross margins, not including transport costs, which resulted in unprofitable sales. Under the deficit of some items, the lowering of official prices caused speculation to increase. Some facts of insufficient information on price changes also happened; they led to the punishment of wholesalers and shopkeepers who did not provide official prices due to the lack of current price lists. The Social Price Control Committees harassed traders with constant inspections and sent the results of the inspections to the courts. Inventories of goods, trading books, invoices and transactions carried out by private enterprises were monitored [Kaliński 1970, 100–104; Idem 2016, 203; Kunicki and Ławecki 2017, 24–32].²⁵ The committees had the right to seize the property or even close the enterprise. To force private sector representatives to give up their businesses, tax authorities imposed so-called surtax, that is, a tax assessing additionally after paying the turnover and income tax [Kunicki and Ławecki 2017, 40]. Another element of the state policy towards private trade was the licensing of enterprises.²⁶ Merchants applying for a concession, i.e. consent to conduct business, had to submit an application to the industrial authorities, which was then arbitrarily reviewed by the Chambers of Commerce and Industry, and pay a concession fee depending on the amount of turnover (the lowest rate was 2%, the highest was 24%). The Ministry of the Treasury made the acceptance of the license application conditional on the repayment of all tax arrears and additions. Accumulation of financial receivables, often exceeding the possibilities of entrepreneurs, in connection with the fear of buyers whether they will receive permission to continue their business, resulting in the resignation of a large number of business owners from applying for concessions, therefore many merchants voluntarily gave up their enterprises [Kaliński 1970, 105–107; Idem 1974, 177–79; Idem 2016, 202]. All those actions of state organs indicate that the intention of the communist authorities was not so much to improve the living conditions of the society, as the official propaganda proclaimed, but to destroy private trade and wholesale [Kunicki and Ławecki 2017, 29].

The model of the highest state authorities created by the communist authorities testified – contrary to the declarations contained in the Polish Committee of Na-

²⁴ Journal of Laws No. 43, item 218.

²⁵ The authors point out that only in the first year of the “battle for trade” the commissions audited 300 trade facilities, preparing over 69,000. criminal records. On their basis fines of 800 million zlotys were imposed, and 788 people were sent by the Special Committee to labour camps.

²⁶ Act of 2 June 1947 on permits for running enterprises and carrying out commercial activities, Journal of Laws No. 43, item 220.

tional Liberation – not to observe, but to disregard the principles of the March Constitution.²⁷ This model, later confirmed in the Small Constitution of 1947, was based not on the principle of dividing, but the principle of concentration of state power along with the associated principle of the leadership role of the communist party. Also, the lack of respect by the communist authorities of constitutionally guaranteed civil rights and freedoms shows that the declared adherence to the principles of the March Constitution was not confirmed in reality.

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²⁷ A purely propaganda significance should therefore be attributed to the statement of Stanisław Rozmaryn, who wrote about the principles of the March Constitution as an element of the Constitutional Act of 1947: "The upholding of the basic assumptions of the 1921 constitution concerns basic democratic norms and political institutions [...]. These basic democratic assumptions were in the People's Republic of Poland not only restored, but also deepened, because it is only in the popular system that the conditions for the full implementation of the principles of democracy are created. The people's state is a higher level in the history of Polish democratic political thought, because it implements the principle of the National Sovereignty. This is a consequence of the revolutionary changes that characterize the period of People's Poland. As a result of these changes, the economic foundations of the political power of landowners and capitalists in Poland were overthrown, and thus democracy ceased to be just a slogan and a word, but became a reality. Only when the Nation gained its economical sovereignty, the political power of the people has become [...]. And thanks to this, the basic democratic principles of the 1921 constitution could not only be maintained, but were deepened and filled with content" [Rozmaryn 1949b, 137–38; see more: Idem 1948, 18–21].

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25 YEARS IN THE SEARCH OF LEGITIMACY: CONSTITUTION OF GEORGIA IN ACTION

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Abstract. Constitution of Georgia has 25 years of history but still needs more legitimacy from the people. The problem began from the drafting the basic law and continued with many unnecessary constitutional reforms. Constitution of Georgia now has the same challenge: to deal with the horrors of the past and play the function of social integration, which is so important to unite the nation.

Keywords: Constitutional Reform, Georgia, Legitimacy, Social Integration, Constitution of Georgia

INTRODUCTION

Modern nations and governments are more oriented on formality and legality, then legitimacy, because they passed this very important period. Most civilized countries do not have any problem about clarity of elections and recognition of its results, therefore most of them don't worry about legitimacy. But it is real problem in the new democracies, where neither political culture nor governmental institutional memory gives stable ground for the realization of the political or other functions of constitution.

Constitution of Georgia has 25 years of history¹ but none of these years were period of compromise, negotiation or understanding the real needs of society or Georgian population [Gegenava 2021, 54–58]. Story of the Georgian constitution is a mix of political misunderstanding, rise and fall of charismatic bureaucracy and the demand of people for good governance and democracy.

The constitution was aimed to be the real document of consensus to sum up all thoughts and ideas of basic political actors [Babek 2002], but it ruined all expectations: despite of the document of union Georgia got the basic law that more separated people.

1. ADOPTION OF THE CONSTITUTION OF GEORGIA: RISKS AND CHALLENGES FOR START

In 1992 legitimate president and government of Georgia were dismissed by the way of military overturn, illegitimate military council became the ruler of the country [Gegenava 2016, 53]. This council was transferred to the Council of State with the leadership of former Soviet minister Shevardnadze. Well experienced

¹ Adopted in 24 August 1995.

politician decided to take political processes from outside to the parliament. So temporary government organized the parliamentary election without any threshold.² This guaranteed more than 20 parties to have parliamentary representative.³ Shevardnadze himself became Speaker of the Parliament (elected by the population), Head of the Government (elected by the parliament) and Head of State *ex officio* [Gegenava 2016, 56]. He avoided to have title of President because of President Gamsakhurdia, who remained one and only legitimate president for the people.

Shevardnadze suggested all parliamentary forces to create constitutional commission and draft the constitution. 118 representatives of all parliamentary fractions, governmental organizations and universities formed the constitutional commission [ibid., 61]. The only goal of the commission was to make the draft of the future constitution [Tsnobiladze 2005, 132].

More than 2 years draft project of the Constitution of Georgia was discussed in Georgia, Europe and the United States, dozens of international experts worked on it [Babek 2002]. Parties and representatives finally compromised to one idea and created balanced semi presidential republic, with sustainable system of checks and balances. The draft project of the constitution was changed by Shevardnadze a few weeks before the hearing [Gegenava 2021, 54]. Unfortunately the document which was aimed to be the consolidator of divided society and political actors, became the golden apple of discord itself.

2. SOCIAL INTEGRATION FUNCTION, LINK TO THE PAST AND THE ROLE OF THE CONSTITUTIONAL

Law is a social institution and has many social functions from regulation to prevention. But for modern democracies law became more than ordinary social institution, because it took function of social integration, reunion of nation and make stronger the basis of democracy [Khubua 2004, 46].

Constitution is the basic law of the state, symbol of the nation and the link between past, present and future [Barak 2005, 372]. It plays a huge role to constitute real order in the state, not formal, but the actional and practical. In 1995 during the hearings and drafting the constitution, every political actor and the electorate imagined that future constitution would be the document of consensus, which would end the era of disorder and disharmony [Gegenava 2021, 54; Melkadze 2005, 10–11]. Unfortunately, individual ambitions and the love of power made Shevardnadze to refuse primary idea. this ruined all the imaginations about the national reunion and social integrity function in practice.

Every constitutional reform brought something new to the constitution of Georgia, but all of them, even the drafters of the original one tried to show the direct

² See *Electoral History of Georgia 1990-2018, 2021*, Central Election Commission of Georgia, Tbilisi, p. 62.

³ Ibid., p. 82.

link between the first constitution of Georgia of 1921 and the current one to underline hereditary historical and political legitimation. Lack of legitimacy interfered the process of recognition of the basic law by the ordinary people, real addressor of it and till now constitution of Georgia doesn't have the real political or social authority, it still remains as "law in books," not as "law in action" [Pound 1910].

3. CONSTITUTIONAL REFORMS AND CONTINUOUS AMENDMENTS

Constitution of Georgia was amended up to 40 times [Gegenava 2021, 55]. Some of them were concrete amendments, but 2 times more than half text of the basic law was changed and 1 time the new redaction of the constitution was passed [Demetrashvili 2010, 13].

All three constitutional reforms were initiated to "cure" the harms of last reform.⁴ It became like an idea fix of the modern Georgian constitutionalism [Gegenava 2017, 111]. The text and not the political culture or implementation of the basic law, was seen as real problem. Constitutional commissions were created to "deal with" the challenges of the past reform.

None of the constitutional reforms were supported by the electorate and of course, was not legitimated by the people. Unfortunately, this fact was ignored by the ruler parties, which always thought they had privilege to know real challenges of the constitution and constitutional reality. This sad story of the constitutional reforms underlines practical meaning of legitimacy. Beside the fact that government is elected and legitimated, it doesn't mean that their action or political decision is legitimated automatically. Amending the constitution is very complicated process and the initiators should work to make this process clear and understandable for the people and try to get necessary legitimation.

Political actors always try to ensure the electorate in the necessity of every constitutional amendment, but research shows that people is not interested in any new constitutional reform: they know basic directions but don't want to pass it [Metreveli 2020, 65].

4. CONSTITUTION AND THE CROSSROAD

Since 2018 Georgia has a new redaction of the basic law, generally its concept remains the same, but technically it was revised, reduced and rearranged. These amendments became formal changes without real need and support by the people. [Metreveli 2020]. The whole constitution was revised in three months [Gegenava 2021, 57] constitutional law changed the whole text but the signature of the for-

⁴ See: Explanatory Note to the Constitutional Amendments of 2004; Decree of the President of Georgia, 23 June 2009; Explanatory Note to the Constitutional Amendments of 2010; Resolution of the Parliament of Georgia, 4 October 2013; Resolution of the Parliament of Georgia, 27 October 2013.

mer president. So, President Shevardnadze's signature now stands on the end of the text, he even didn't read.

Constitutional law, that amended the constitution, was changed in a few months. From 78 basic articles of the revised document, almost 18 were amended.⁵ This made the whole constitutional process like a caricature and decrease trust in the political processes and the basic law itself.

All constitutional reform brought something new, some of them were unacceptable experiments which humiliated the idea of the constitution, but some of them were accepted by the people. Reform of 2017–2018 had its good side, but it lost the price because of the ignorance by the electorate. Georgian parliament passed the new redaction of the basic law without real necessity and of course it took effect on the level of legitimacy.

Constitution failed its social integration function second time during the pandemic. It didn't integrate people and didn't reunite nation; all the mechanisms of the parliamentary control were useless.

CONCLUSION

History of the constitution of Georgia is the story of tries to get legitimacy and authority over the people. Basic law that was aimed to be the closer of all conflicts and political disorder, needs to get more support from the electorate. But all the actions by political actors, unnecessary amendments and constitutional reforms decreased chances to have powerful document as a symbol of nation.

Unfortunately, personal ambitions made constitution fail even in the beginning and the lost legitimacy was never increased any more. It has magnificent chance to become the act of unity, play the role of social integrity. The only way to improve the situation is the cooperation between political actors, but they must act in accordance with the will of nation, because everyone should remember (and not forget) that the only source of the state power and authority is no one but the people.

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TURNOVER OF AN ENTERPRISE INCLUDING FOREST LAND

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Abstract. The study deals with the issues of trade of an enterprise, an organized part of an enterprise, which includes forest land or the right to use forest land. It was found that the sale of the enterprise, an organized part of the enterprise, which includes forest real estate, is subject to the restrictions resulting from the Forest Act, i.e. the State Treasury has a pre-emption right in case of sale of the enterprise or the right to purchase forest land when a contract other than sale is concluded. Turnover of an enterprise, an organized part of an enterprise which includes the right of perpetual usufruct of forest land, is easier, i.e. it is not subject to restrictions resulting from the Forest Act.

Keywords: forest real estate, enterprise, sale, pre-emptive right, purchase right

INTRODUCTION

Regulations of the Civil Code¹ in Article 55² and Article 75¹ in connection with Article 158 indicate that a legal action relating to an enterprise covers everything that is included in it, unless the parties to the contract agreed otherwise or the specific provisions do not state otherwise, and the legal action relating to the regulation of an enterprise which includes real estate requires the form of a notarial deed. The enterprise may include forest real estate or the right of perpetual usufruct of forest land. The disposal of forest real estate is subject to restrictions resulting from Article 37a of the Forest Act.² The State Treasury for which the State Forest Holding “National Forests” operates has the pre-emptive right to forest land upon sale, and in case of concluding other agreements, e.g. donations, the State Treasury has the right to purchase. An enterprise is a collection of different things and rights that can be disposed of entirely or separately. This implies the question to what extent the provisions of the Forest Act, i.e. restrictions on the acquisition of forest real estate, should be applied to the sale of an enterprise that includes forest real estate. The aim of the study is to determine whether a pre-emption right or the right to acquire forest land applies to the sale of a company that includes forest land, and if this question is answered positively, then what difficulties this may cause when selling the company. The provision of Article 37a of the act on forests has been in force since April 30, 2016. Earlier, in the

¹ Act of 23 April 1964, the Civil Code, Journal of Laws of 2019, item 1145 as amended [hereinafter: CC].

² Act of 28 September 1991 on forest, Journal of Laws of 2020, item 1463 [hereinafter: AF].

act on forests, in force since January 1, 1992, pursuant to Article 82 of the Forest Act, there were no regulations entitling the State Treasury to pre-purchase forest real estate.

1. THE CONCEPT OF ENTERPRISE

In Polish law, the term “enterprise” has three meanings: functional, objective and subjective [Habdas 2018, 399]. The provision of Article 1 of Act on State Enterprises³ contains a subjective definition of a state enterprise as an independent, self-governing and self-financing entrepreneur with legal personality. In the subjective sense, the legislator used the concept of an entrepreneur in Article 429 CC. The functional meaning of an enterprise combines functioning and activities of entities related to running the enterprise [ibid., 401, 403]. Provisions, e.g. Article 709¹ CC (through the leasing contract, the financing party undertakes, in the scope of the activity of its enterprise, to purchase the item from the designated vendor under the conditions set out in this agreement and gives this item to the user only to exploit or to use and receive benefits for a specified period). Article 8(2) Commercial Companies Code⁴ (a partnership runs an enterprise under its own name) indicates the functional use of the concept of an enterprise by the legislator [ibid., 402–403]. The definition of an enterprise is included in Article of the CC, i.e. an enterprise is an organized set of intangible and tangible assets intended for business activities, which in particular are the following: signs individualizing the enterprise or its separate parts (name of the enterprise); ownership of the real estate or movable property, including equipment, materials, goods and products, and other rights in rem to real estate or movable property; rights arising from rental and lease agreements for real estate or movable property; and rights to use real estate or movable property arising from other legal relationships, receivables, rights in securities and cash, concessions, licenses and permits, patents and other industrial property rights, copyrights and property rights, business secrets, books and documents related to running a business. The listed elements of the company are examples and not every company must include them. In particular, the enterprise does not have to include tangible or intangible assets at the same time. It is enough that only one type of assets is included in the enterprise for this group of ingredients to be considered an enterprise. The enterprise does not include liabilities and burdens, which means that the enterprise is a group of assets [ibid., 414]. Material elements are the substrate of the enterprise and the enterprise is not a mechanically set complex of the elements that can be easily detached, because any enterprise is an intangible good [Buczowski 1963, 365–66]. During its economic development, the enterprise acquires an increasingly di-

³ Act of 25 September 1981 on State Enterprises, Journal of Laws of 2020, item 1644 [hereinafter: ASE].

⁴ Act of 15 September 2000, the Commercial Companies Code, Journal of Laws of 2020, item 1526 [hereinafter: CCC].

distinct character from the entrepreneur, and intangible elements that actually determine the prosperity and success of its specific economic activity are more important [Widło 2002, 56]. The essence of the enterprise is the element of its organization, whereas its success is determined by such elements as: reputation, organizational secrets, and the manner of customer service [Poźniak–Niedzielska 1997, 34]. The presented views on the essence of the enterprise indicate a greater importance of intangible elements in the enterprise over things and real estate. Nowadays, in many companies, intangible elements are of much greater value than tangible elements, e.g. in companies that produce computer programs. The computers used to make computer programs and the real estate used by IT specialists, are often of little value compared to the income obtained from the sale of computer programs. Concepts, pointing to the element of organization of the enterprise as the essence of this enterprise, also work well in the enterprises dealing, for example, with real estate trading, because the elements of marketing in the field of real estate trading are very important.

An organized part of an enterprise, as defined in Article 5a(4) of the Act on personal income tax,⁵ Article 4a(4) of the Act on corporate income tax,⁶ Article 2(27e) of the Act on tax on goods and services,⁷ should be distinguished from an enterprise, which is an organisationally and financially separated group of tangible and intangible assets in the existing enterprise and includes liabilities intended for the implementation of specific economic tasks that could also constitute an independent enterprise carrying out these tasks autonomously. An organized part of an enterprise differs from an enterprise, among others, the fact that it includes liabilities, whereas the enterprise does not include liabilities. Dividing the enterprise into several organisationally and financially separated parts and selling them is something different from selling the entire enterprise because, in the first case, the liabilities are also sold, meanwhile, in the second case, only assets are.⁸ An enterprise divided into several organisationally and financially separable parts is not a simple sum of them, as the enterprise includes organizational and management elements related to the merging of individual parts into a single whole. The organized part of the enterprise may also include agricultural real estate, whereas the organized part of the enterprise may be traded. The rules of trading an enterprise and an organized part of an enterprise, which include agricultural real estate, should be the same.

⁵ Act of 26 July 1991 on personal income tax, Journal of Laws of 2020, item 1426 as amended [hereinafter: APIT].

⁶ Act of 15 February 1992 on corporate income tax, Journal of Laws of 2020, item 1406 as amended [hereinafter: ACIT].

⁷ Act of 11 March 2004 on tax on goods and services, Journal of Laws of 2020, item 106 as amended [hereinafter: ATGS].

⁸ As an example of an organized part of an enterprise, one can mention one of the petrol stations with tanks, distributors, cash registers, a shop, and employees in the enterprise constituting a network of entrepreneurs.

2. ENTERPRISE AS AN OBJECT OF THE TRADE

The provision of Article 55² CC stipulates that one can sell the entire enterprise, i.e. make an in-kind contribution to a capital company or a partnership, include an agreement for its exchange, sale, dissolution of co-ownership, partial division of the estate, lease, leasing, etc. The situation becomes more complicated when enterprises enter non-transferable rights, such as the use or acquisition of a specific component of it requires a prior administrative decision regarding the transfer of a license or permit. In the resolution of the Supreme Court of June 25, 2008⁹ it was ruled that upon conclusion of the contract for sale of the enterprise within the meaning of Article 55¹ CC, limitations or exclusions of the admissibility of transferring individual components of this enterprise resulting from the provisions of the Act, contractual reservation or the nature of the obligation remain valid. The same ruling indicated that the sale of an enterprise is a series of singular successions that means the necessity to conduct a separate legal assessment of each of them, which is indirectly indicated in Article 75¹(4) CC. This results in the need to assess the admissibility of each transfer of ownership of things and rights included in the enterprise separately, and thus the sale of the enterprise does not absorb the individual requirements for the transfer of ownership of its individual components.

Agreements covered by Article 55² CC, are not contracts with a general title [Kępiński 2018, 479]. The provision of art. 55² CC: a) does not release the legal successor of the entrepreneur from fulfilling additional conditions necessary for the transfer of rights included in the company;¹⁰ b) it concerns the relationship between the seller of the enterprise and the buyer of the enterprise and does not regulate either the manner of transfer or the effects of selling the enterprise [Hadas 2018, 432].

The contract for sale of the right to the enterprise has an impact on the sale of its components [ibid., 433]. The double obligatory and disposing effect will apply to the parts, the sale of which does not require the fulfilment of special conditions or obligations [ibid.] e.g. the sale of a pharmacy does not result in the transfer of rights to the buyer, resulting from the authorization to run a pharmacy issued to the seller.¹¹ The principle of non-transferable rights under public law of rights resulting from concessions, permits and licenses is not undermined by the provision of Article 55² CC, which, by introducing the principle that a legal transaction relating to an enterprise covers everything that is part of the enterprise, stipulates that it does not apply if the content of the legal act or specific provisions states

⁹ Ref. no. III CZP 45/08, Lex no. 393765.

¹⁰ Resolution of the Supreme Court of 25 June 2008, ref. no. III CZP 45/08, Lex no. 393765.

¹¹ Verdict of the Supreme Administrative Court of 20 February 2007, ref. no. II OSK 350/06, Lex no. 344615.

otherwise.¹² The sale of an enterprise does not lead to universal succession, and certain conditions may be required to transfer certain components of the enterprise successfully [ibid.].

The provision of Article 55² CC is of a dispositive nature and the parties may exclude certain components of the enterprise from the scope of the disposing activity [Kępiński 2018, 477]. The acquisition of an enterprise may occur as a result of several contracts.¹³ When the circumstances of concluding two agreements regarding the sale of an enterprise allow it to be assumed that one of them concerned the acquisition of liabilities and the other of the assets of this enterprise, such agreements may be jointly treated as the sale of the enterprise.¹⁴

Qualifying whether a given activity is the sale of the enterprise or its components has tax consequences. The sale of an enterprise or its organized part is not subject to tax on goods and services (Article 6(1) ATGS), therefore their sale for a payment is subject to tax on civil law transactions, and free disposal may be subject to inheritance and donation tax if the buyer is a natural person. The sale of individual components of an enterprise is a supply of goods and is subject to goods and services tax, unless the specific supply is exempt from this tax in accordance with Article 43 et seq. ATGS, in which case the sale for payment is taxed on civil transactions, and the sale free of charge may be subject to inheritance and gift tax if the buyer is a natural person. Under certain circumstances, separate transactions, which can be carried out unconnectedly, and which, on their own, can lead to taxation or exemption, should be considered as a unitary transaction if they are not independent of each other, e.g. the fact of an in-kind contribution of an enterprise to a corporation in several stages does not change the nature of the activity that should be considered a uniform transaction of the in-kind contribution of the enterprise.¹⁵ When a transaction consists of a set of elements and activities, all the circumstances in which it is made should be taken into account to determine whether it concerns two or more separate transactions or a single transaction.¹⁶

The parties to the contract concerning the enterprise may decide themselves which components to exclude from the scope of the contract subject for sale. However, they do not have full freedom in this regard. The scope of the exclusions cannot override the essence of the enterprise within the meaning of Article 55¹ CC, therefore the sale of the enterprise should include at least those components that determine the functions performed by the enterprise.¹⁷ The sale of the enter-

¹² Verdict of the Supreme Administrative Court of 20 February 2007, ref. no. II OSK 350/06, Lex no. 344615.

¹³ Verdict of the Supreme Court of 6 July 2005, ref. no. III CK 705/04, Lex no. 150645.

¹⁴ Verdict of the Supreme Court of 24 June 1998, ref. no. I CKN 780/97, Lex no. 34441.

¹⁵ Verdict of the Supreme Administrative Court of 7 December 2012, ref. no. I FSK 89/12, Lex no. 1366327.

¹⁶ Verdict of the Supreme Administrative Court of 7 December 2012, ref. no. I FSK 89/12, Lex no. 1366327.

¹⁷ Verdict of the Supreme Court of 17 October 2000, ref. no. I CKN 850/98, Lex no. 50895.

prise takes place when the components necessary for the performance of its economic tasks are transferred.¹⁸ The sale of individual components of the enterprise, even if they represent a significant value compared to the value of the enterprise as a whole, does not constitute grounds for considering that it has been sold.¹⁹ What components of the enterprise must be covered by the content of the activity performed in order to be able to conclude that the enterprise is the object of the legal act, should be specified in a specific factual state [Skowrońska–Bocian 2011, 284]. The subject of the performed act must be the minimum resources necessary to run the enterprise [ibid.].

3. THE CONCEPT OF FOREST LAND

The provision of Article 37a(1) AF provides that the State Treasury on behalf of which the State Forest Holding “National Forests” operates shall have the pre-emptive right to the sold land: 1) marked as a forest in the land and building register, i.e. with the symbol Ls, or 2) intended for afforestation according to the local spatial development plan or in the decision on building conditions and land development, or 3) referred to in Article 3 AF, covered by the simplified forest management plan or the decision referred to in Article 19(3) AF.

When forest land is acquired as a result of: concluding a contract other than a contract for sale or a unilateral legal act, the “National Forests” representing the State Treasury may submit a declaration on the acquisition of this land for a payment of a monetary equivalent. Regardless of how the ownership will be transferred, the State Treasury may purchase forest real estate. The provisions of the act on forests do not indicate that the pre-emption right and the right to purchase should be directly or appropriately applied to the right of the perpetual usufruct of forest land. When selling the right of perpetual usufruct of forest land, the State Treasury has no pre-emption right or the right to purchase.

The definition of forest includes two elements mentioned in Article 3(1–2) AF [Rakoczy 2011, 26]. The first element refers to a specific area, that is, land equal to or greater than 0.1 ha, the second refers to the relationship of land with forest management or its use for forest management purposes [ibid.]. The Act on forests defines four criteria for recognizing a specific land as a forest [Radecki 2008, 25]: 1) natural – a cover with forest vegetation (forest crops), which consists of trees, shrubs, undergrowth, whereas a temporary depriving the ground of the forest vegetation does not deprive it of the features of a forest when other criteria are met; 2) spatial – a compact area of at least 0.1 ha; 3) intended use – for forest production, except for the cases when forests are located in reserves and national parks

¹⁸ Verdict of the Supreme Court from the Supreme Court of 10 January 1972, ref. no. I CR 359/71, Lex no. 1385; verdict of the Supreme Court of 30 January 1997, ref. no. III CKN 28/96, Lex no. 29109; verdict of the Supreme Administrative Court (until 2003.12.31) in Gdańsk of 6 October 1995, ref. no. SA/Gd 1959/94, Lex no. 24237.

¹⁹ Ref. no. SA/Gd 1959/94.

or are included in the register of monuments whose forests are not intended for forest production; 4) related to forest management.

The definition of forest contained in Article 3(1) AF indicates that the property may be a forest, as long as its area is equal to or greater than 0.1 ha and one of the three conditions specified in Article 3(1)(a–c) AF, i.e.: 1) it is land intended for forest production. The concept of forestry production is not defined in the Forest Act. The provision of Article 6(1)(1) AF defines the concept of forest management as forestry activities in the field of forest arrangement; protection and management; maintenance; increase of resources, forest crops; game management; obtaining – with the exception of purchase – wood, resin, fir trees, stumps, bark, pine needles, game and undergrowth crops; sale of these products and implementation of non-productive functions of the forest. The word “production” means an organized activity aimed at the production of some goods, services or cultural goods; something that was produced.²⁰ The word “economy” means, *inter alia*, the entirety of mechanisms and conditions for the operation of economic entities related to the production and distribution of goods and services.²¹ The term “economy” is broader than the term “production,” i.e. the concept of production is included in the concept of economy. The concept of forest management cannot be equated with the concept of forest production. The land with an area of at least 0.1 ha, devoid of forest vegetation by the owner, is still a forest. The land with an area of less than 0.1 ha, i.e. e.g. 0.099 ha, covered with forest vegetation is not a forest, but wooded and bushy land [Biernacki and Mikołajczuk 2016, 17]; 2) it is a nature reserve or part of a national park; 3) it is entered in the register of monuments.

Immovable monuments are, among others parks, gardens and other forms of designed greenery (Article 6(1)(1g) on the protection of monuments²²). An immovable monument, including a forest property, the surrounding of the monument are entered in the register of monuments on the basis of a decision issued by the provincial conservator of monuments *ex officio* or at the request of the owner of the immovable monument or perpetual usufructuary of the land on which the immovable monument is located (Article 9(1) APM). Whether a forest property is entered in the register of monuments should result from section III of the excerpt from the land and mortgage register and from an excerpt from the land register. In addition, the information whether a specific forest allotment is entered in the register of monuments can be obtained from the office of the commune in which the allotment is located, because pursuant to Article 22(4–5)(1) APM the head of the commune (mayor, president of the city) keeps the municipal register of monuments in the form of a set of address cards of immovable monuments

²⁰ See <http://sjp.pwn.pl/szukaj/produkcja.html> [accessed: 12.02.2021].

²¹ See <http://sjp.pwn.pl/szukaj/gospodarka.html> [accessed: 12.02.2021].

²² Act of 23 July 2003 on the protection of monuments and the care of monuments, Journal of Laws of 2020, item 182 [hereinafter: APM].

from the territory of the commune, which should include immovable monuments entered in the register.

According to Article 3(1a–c) AF an allotment of 0.09 ha, covered with trees and shrubs, e.g. entered in the register of monuments or constituting a reserve, cannot be considered a forest. The provision of Article 3(2) AF indicates that the forest is land related to forest management, occupied for forest management purposes: buildings and structures, water drainage facilities, forest spatial division lines, forest roads, areas under power lines, forest nurseries, wood storage sites, and also areas used for forest car parks and tourist facilities. The cited provision does not include the area criterion in its definition, which means that any small allotment related to forest management can be considered a forest. Forest roads are roads located in forests that are not public roads within the meaning of the provisions on public roads (Article 6(1)(8) AF).

To be a forest, a real property does not need to have an area of more than 0.1 ha, it is enough that there is forest management on the land. Whether the real estate is a forest may result from the following documents: a) an excerpt from the land register if the property is marked as Ls; b) a certificate of land use in the local spatial development plan if the plan shows that the property is intended for afforestation or it is a forest; if the local spatial development plan has not been adopted, the decision on development conditions may indicate that the land is intended for afforestation; c) from the simplified forest management plan, which results from the certificate issued by the county governor; d) the governor's decision issued on the basis of the forest inventory, concerning fragmented forests with an area of up to 10 ha.

It is enough for a part of the allotment to be marked in the land register as a forest or, according to the local spatial development plan, a small part of the allotment will be designated for afforestation, then the State Treasury will have a pre-emption right or the right to purchase the entire allotment. When there are two or more allotments in the land and mortgage register, and one of them is even a small part of a forest, the State Treasury also has a pre-emption right or the right to purchase.

4. PROBLEMS OF SALE OF AN ENTERPRISE INCLUDING FOREST PROPERTIES

Forest land may be included in the enterprise: 1) dealing with the production of solid wood panels for the production of furniture; 2) constituting a sawmill; 3) dealing with the production of plant protection products.

In the case described as the third, land is not a significant element of the enterprise, determining the scope of its activity. In the other two cases, forest land: a) may be essential for business operations, when timber harvested from forests within a sawmill or a solid wood panel manufacturing company may constitute the primary substrate for production, or b) may be an unimportant element of the en-

terprise, this applies to a situation where a sawmill or a plant producing solid wood panels purchases cut wood for production from external entities (it does not use its forest resources for this purpose).

The provision of Article 55² CC allows the parties to a future sale agreement of the enterprise to separate from its composition forest real estate (in the cases described above) if they do not constitute elements necessary for the implementation of economic tasks, and to subject the forest land sale agreement to the rigors of the Forest Act, i.e. the right of pre-emption (Article 37a(1) AF) or the right to acquire (Article 37a(2) AF). When forest real estate is a component necessary for the implementation of the basic economic activity of the enterprise (e.g. dealing with the cultivation of tree seedlings), the sale of forest real estate will be the sale of the enterprise to which the provisions of the Act on forests will apply.

When the enterprise includes forest properties, it is necessary to prepare: 1) a contract obliging the sale of forest real estate, provided that the State Forest Holding “National Forests” representing the State Treasury does not exercise the right of pre-emption; 2) a contract obliging the sale of the remaining components of the enterprise, provided that the contract is concluded transferring the ownership of forest real estate in the event that the “National Forests” does not use the pre-emptive right to purchase forest real estate.

These contracts may be covered by one notarial deed, and instead of the second contract, a preliminary contract for the sale of the remaining components of the enterprise may be concluded.

The division of the sale contract or any other contract of transfer of the enterprise which includes forest real estate, into two concerning forest real estate and other components of the enterprise, does not guarantee the achievement of the parties’ goal, i.e. the transfer of the entire enterprise, when the State Forest Holding “National Forests” operating for the State Treasury uses pre-emption rights for forest real estate. The sale of an enterprise which includes forest real estate by a contract other than sale may take place in one contract, transferring the ownership, e.g. donation; in this case the State Forest Holding “National Forests” has the right to acquire the forest real estate pursuant to Article 37a(2) AF.

A different interpretation of Article 55² CC, indicating that by selling the enterprise or concluding another sale agreement the provisions of the Act on forests do not apply, would lead to a situation when contributing a forest property as an in-kind contribution to a capital company would simply result in non-application of the provisions of the Forest Act. The provision of Article 55² CC indicates that the activity of an enterprise may not include everything that is a part of it, when specific regulations so provide; such is the Act on Forests which specifies the purchase of forest real estate very broadly, by indicating that the acquisition of forest real estate may occur as a result of making a legal transaction (e.g. relating to an enterprise). When transferring the ownership of an enterprise which includes any real estate, including forest real estate, the notary drawing up the contract is obliged to submit an application for the entry in the land and mortgage register via

the ICT system servicing the court proceedings (Article 92(4) of the Notary Law²³). The provisions of the Act on forests do not apply to sale of an enterprise which includes the right of perpetual usufruct of forest land, as the pre-emption right and the right to purchase are vested in the State Treasury in relation to forest land and not in relation to the right to use forest land. Such an interpretation of the provisions of the Forest Act is supported by the need for a strict interpretation of the limiting provisions, such as the regulations on the right of pre-emption and purchase, regulated in Article 37a AF.

In bankruptcy proceedings, a participant in the proceedings may file an application for approval of the terms of sale of the debtor's enterprise, its organized part or assets constituting a significant part of the enterprise to the buyer (Article 56a(1) of the Bankruptcy Law²⁴). In the terms of sale of the enterprise which includes forest real estate, it is possible to indicate that the forest real estate should be sold separately from the remaining components of the enterprise. The application for approval of the terms of sale is approved by the court (Article 56c(3) BL). The provision of Article 206(1)(2) BL provides that the creditors' board may agree to withdraw from the sale of the enterprise as a whole in bankruptcy proceedings. If no creditors' council has been established in the bankruptcy proceedings, the judge-commissioner expresses his consent to waive the sale of the business as a whole (Article 213(1) BL). The provisions of the Bankruptcy Law allow for the sale of individual elements of the bankrupt enterprise (e.g. forest real estate) and the application of the pre-emption provisions to the Treasury. The provisions on the pre-emption right and the right to acquire forest land also apply to the turnover of an organized part of an enterprise which includes forest land.

The provisions on the pre-emptive right to forest real estate do not apply in the case of the sale of an agricultural holding which includes this real estate (Article 37a(4)(3) AF). This provision cannot be interpreted broader, so it cannot be assumed that, when selling an enterprise which includes forest real estate, the provisions on the pre-emption right for forest real estate also do not apply. The provisions on the forest land pre-emption right cannot also be interpreted that if the subject of the pre-emption right is not identical with the subject of sale, the "National Forests" operating for the benefit of the State Treasury does not have the right of pre-emption. The fact that the object of sale (the enterprise) is not identical with the object subject to the pre-emption right (forest land) does not constitute an obstacle to the exercise of the pre-emption right to forest real estates included in the enterprise. The provisions of the Act on forests regarding the right to acquire forest real estate should also be applied when contributing an enterprise which includes forest land as an in-kind contribution to partnerships or capital companies.

²³ Act of 14 February 1991, the Notary Law, Journal of Laws of 2020, item 1192.

²⁴ Act of 28 February 2003 on taxes of the Bankruptcy Law, Journal of Laws of 2020, item 1228 [hereinafter: BL].

CONCLUSIONS

The provisions of the Act on forests apply to the sale of an organized enterprise and part of the enterprise which includes forest real estate, i.e. the State Treasury has the right of pre-emption of forest land in the event of sale of the enterprise or an organized part of the enterprise which includes such land, and the right to acquire forest land if a contract other than the sale of the enterprise is concluded. The provisions of the Act on forests do not apply to the sale of the enterprise and an organized part of the enterprise which includes the right of perpetual usufruct of forest land, which means that it can be sold without restrictions resulting from the pre-emption right and the right to purchase, which in these cases the State Treasury is not entitled to. The right of perpetual usufruct of forest land is something other than forest real estate, and the restrictive regulations should be interpreted strictly, not broadly.

An entity intending to acquire an enterprise which includes forest land, by a contract of sale or another contract, may not achieve the intended goal, if the State Forest Holding “National Forests,” acting for the benefit of the State Treasury, exercises its pre-emptive right or the right to purchase by concluding a contract other than sale. This leads to uncertainty in trade. The separation of the sale of an enterprise into two contracts, the sale of forest real estate that is a part of it and the rest of its components, leads to uncertainty in the taxation of both contracts: whether they should be treated as a single transaction subject to tax on civil law transactions, or should they be treated as two separate contracts and be taxed with a tax on goods and services or a tax on civil law transactions. In order to be sure whether in a specific case it will be a sale of the enterprise despite the conclusion of two agreements, or whether the tax office considers it to be two separate agreements, one should apply for an individual interpretation pursuant to Article 14b of the tax ordinance.²⁵ An individual interpretation of the tax law is issued within 3 months from the date of receipt of a complete application (Article 14d(1) of the tax ordinance). This means an extension of the enterprise turnover transaction.

The provisions of the analysed acts do not provide a possibility to obtain a binding letter from the State Forest Holding, acting for the benefit of the State Treasury, stating that the State Treasury will not exercise the right of pre-emption or the right to purchase forest land in the event of concluding a contract other than sale. This would make easier the sale of a company that includes forest land, especially when the area of this land is small. The issuance of a declaration by the State Forest Holding “National Forests,” acting for the benefit of the State Treasury that it would not exercise the pre-emption right for forest land included in the enterprise would require changes in the provisions regulating the pre-emption right. The legislator decided to exclude the provisions on the right of pre-emption and

²⁵ Act of 29 August 1997 on tax ordinance, Journal of Laws of 2020, item 1325.

the right to acquire the forest land included in an agricultural holding; the same may be done for the sale of an enterprise which includes forest land.

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UNCONSTITUTIONAL LEGISLATIVE OMISSION AND THE STATUS OF THE AUTONOMOUS REPUBLIC OF ABKHAZIA

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Abstract. The article deals with a legal problem such as a legal gap, in particular unconstitutional legislative omission. Georgian legislation does not recognize unconstitutional legislative omission, although examples of such shortcomings can be found here. This article focuses on the Article 7(3) of the Constitution of Georgia, which requires the adoption of a constitutional law on the Autonomous Republic of Abkhazia, although this requirement has not been fulfilled for almost twenty years. The article shows the large vacuum related to the constitutional regulation of the Autonomous Republic of Abkhazia, and negative consequences related to it. The article also reviews the approach of several countries to unconstitutional legislative omission and expresses an opinion on resolving this problem in the Georgian reality.

Keywords: legal gap, unconstitutional legislative omission, Constitution of Georgia, constitutional court, Autonomous Republic of Abkhazia

INTRODUCTION

The Autonomous Republic of Abkhazia is a territorial unit of Georgia, which territory, as a result of full-scale military aggression in August 2008, is occupied by Russian Federation and factually Georgian legislation is not implemented there. Legal authorities (both representative and executive body) of this autonomous unit are in exile and located in the capital of Georgia. Therefore, territorial integrity and de-occupation are the main problems of the Georgian state. The existence of a durable legal framework is very important for solving these problems. Unfortunately, we have a different picture. The Parliament of Georgia has been showing indifference and inaction for many years regarding the issue of Abkhazia. This inaction is, first of all, reflected in the legislative inaction, which violates the Constitution of Georgia because the constitution of Georgia requires the adoption of a constitutional law on the ARA, although this requirement has not been fulfilled for almost twenty years.

The article shows the large vacuum related to the legal regulation of this autonomy, and negative consequences related to it. The article also reviews the approach of several countries to unconstitutional legislative omission and expresses an opinion on resolving this problem in the Georgian reality. However, before moving directly to the issue of Abkhazia, it would be advisable to start by talking about the legislative gap and especially about unconstitutional legislative omission, as the problem addressed in this article is related to this issue.

1. LEGAL GAP AND LEGAL OMISSION

One of the problematic issues in law is a legal gap, which is defined as the case when “the issue demanded consideration and solution is not provided and regulated in any legal norm” [Intskirveli 2003, 169]. Any system of positive law, to one degree or another, has gap [Nersesiantc 2004, 429]. This provision does not contradict “Dworkin’s key proposition that law is a «gapless» system” [Wacks 2006, 41], because I am talking about a gap in positive law and not filling it with a court interpretation, which together (positive law, legal principles and case law) form a legal system. By the way, like Dworkin but unlike his reason, in the Soviet period particularly Soviet law factually was also considered “gapless.” Domestic lawyers tried not to mention gaps in the law. The explanation was simple: Soviet law was considered perfect and superior to all other. The terms “gap in the law” or “gap in laws,” as a rule, were not used. It used to say only about the absence of a norm regulated these or similar relations [Nersesiantc 2004, 429].

Legal gap can be visible or invisible. The reason for the visible gap may be that at the time of the issuance of the norm, the legislator could not foresight the situation arose as a result of the development of social relations, or the legislator simply “missed” the regulation of this issue. In contrast, the lawmaker knows an invisible gap, but it does not deliberately correct that flaw. An invisible gap is often calling as an “intentional imperfection of law” (qualified silence of lawmaker) [Khubua 2015, 217]. In such a circumstance, lawmaker refrains from enacting a norm and lets it be understood that the key to the resolution of the problem lies in ethics as opposed to the law (or another legal act).¹

Other terms are also used in the scientific literature. for example, invisible gaps are the same as “Oversights” and visible gaps – “Legislative Omissions.” Both of them are unified in the term “Legal gaps” – the same as “Incomplete Regulations” as it is called by Professor Radziejewicz [Radziejewicz 2019, 38–49]. The US scientists more prefer to use “Legislative Inaction” Instead of “Legislative Omission.”²

Our focus this time will be on Legislative Omissions Moreover Unconstitutional Legislative Omissions. The criteria of legislative omission are as follow: 1) an obligation to legislate a specific law or rules is required as it is explicitly set forth in the constitution or by adopting the necessary implications from the existence of a constitutional right; 2) there is a need for that legislation to render the constitutional rules executable or to protect constitutional rights; 3) the legislative branch intentionally fails or omits to carry out that obligation; 4) the failure or omission leads to constitutional violation [Al–Dulaimi 2018, 89–90].

¹ The Venice Commission, General Report of the XIVth Congress of the Conference of European Constitutional Courts on Problems of Legislative Omission in Constitutional Jurisprudence. The Bulletin. Strasbourg 2008, <https://www.venice.coe.int/files/Bulletin/SpecBull-legislative-omission-e.pdf> [accessed: 07.06.2021], p. 8–9.

² For example, see: Schapiro 1989, 231–50; Eskridge 1988, 67–137.

It should be mentioned, that two sorts of legislative omissions can generally be distinguished: absolute and relative omissions. Absolute omissions exist in cases of the absence of any legislative provision adopted with the purpose of applying the Constitution or executing a constitutional provision, in which case a situation contrary to the Constitution is created. Relative omissions exist when legislation has been enacted but in a partial, incomplete, or defective way from the constitutional point of view [Brewer–Cariás 2011, 125–26].

The law of some countries such as Brazil, Venezuela, Spain, Italy, Portugal etc. distinguishes unconstitutional omission from other legislative gaps and provides legal mechanisms for its elimination. Of course, the best way to overcome unconstitutional legislative inaction is a parliament with high legal awareness and responsible members. However, on the other hand, no less important is the existence of legislative mechanisms that will protect the Constitution from legislative omission. Several countries of the world show us such example.

In some countries unconstitutional legislative omission may be referred to by the constitutional control institution as improper execution of obligations named in the Constitution to enact legal regulation.³ The law of some countries recognizes the concept of unconstitutional legislative omission which is solely results “when the Constitution imposes on the legislator the need to issue rules of constitutional development and the legislator fails to do so.”⁴

The legal doctrine of Brazil further expands the concept of unconstitutional legislative omission. As Gilmar Mendes explains, unconstitutional omission presupposes the failure to comply with the constitutional obligation to legislate, which is based both in explicit directives of the Constitution and fundamental decisions under the Constitution identified in the interpretation process [Mendes 2008, 1–20]. It should be noted that according to the Brazilian Constitution, an unconstitutionality lawsuit can be brought before the Supreme Federal Court of Brazil in connection with unconstitutional inaction. According to the Article 103(2) of the Constitution, “When unconstitutionality is declared on account of lack of a measure to render a constitutional provision effective, the competent Power shall be notified for the adoption of the necessary actions and, in the case of an administrative body, to do so within thirty days.”

According to the Federal Supreme Court of Brazil, The Federal Supreme Court has considered that once the legislative process is initiated, no issue will be raised regarding unconstitutional omission by the legislator, although this does not mean that the consideration of the bill should be delayed indefinitely. By the decision of May 9, 2007, the Federal Supreme Court of Brazil declared that legislative process could also constitute omission that could be considered as unconstitutional, if the legislative bodies did not discuss the bill of law within a reason-

³ The Venice Commission, General Report of the XIVth Congress, p. 8.

⁴ Paper from the Constitutional Court of Spain, The Problems of Legislative Omission in Constitutional Jurisprudence, XIVth Conference of Constitutional Courts of Europe, Vilnius, https://www.confueuonstco.org/reports/rep-xiv/report_Spain_en.pdf [accessed: 07.06.2021], p. 27.

nable period of time. In this case consideration on the bill more than 10 years was recognized as unconstitutional legislative omission, which has led to many negative consequences over this long period [ibid.].

Like Brazil, the Constitution of Venezuela also recognizes unconstitutional omission. According to the Article 336(7), one of the functions of the Constitutional Division of the Supreme Tribunal of Justice is “to declare the unconstitutionality of omissions on the part of the municipal, state, national or legislatures, in failing to promulgate rules or measures essential to guaranteeing compliance with the Constitution, or promulgating it in an incomplete manner; and to establish the time limit and, where necessary, guidelines for correcting the deficiencies.”⁵ However, neither the Constitution nor the Organic Law of the Supreme Tribunal of Justice regulated any of the procedural aspects of said constitutionality for omission control, but it was limited to enunciate the competence of the Constitutional Chamber [Urosa Maggi 2011, 843–87].

Several European countries (Hungary, Portugal, Italy and Spain) exercise constitutional control over legislative omission, as well.⁶

Hungary is one of the countries that has recognized unconstitutional legislative omissions in its legal order. According to the Act on the Constitutional Court of Hungary of 1989 (was in force until January 1, 2012), if the Court established *ex officio* or on anyone’s petition that a legislative organ had failed to fulfill its legislative tasks issuing from its lawful authority, thereby bringing about unconstitutionality, it was able to set a deadline and instructed the organ that committed the omission to fulfill its task. The Court interpreted this competence expansively and practiced it not only in the cases of unconstitutional failures of fulfillment of legislative obligations resulting from particular legal authorization but also when the legislator failed to establish a statute necessary for the emergence of a fundamental right, designated in the Constitution. In this competence, the Court not only established the omission of legislation but also heard reference to what the contents of the norm to be adopted should be. In such cases, the unconstitutional situation was caused by the very lack of a provision with a specific content (typically making it impossible to exercise one of the fundamental rights) [Csink, Petrétéi, and Tilk 2011, 575–85].

While declaring legislative omissions was not unknown during the Sólyom (first president of the Constitutional Court of Hungary during 1990–1998) period (first ruling in 1990), it was more favored in the post-Sólyom era from 2003 to 2009 (54.3 percent of all omissions from 1990 to 2015). The Sólyom Court made use of declaration of omission rather in the second half of its functioning, but even from 1994 to 1998 omissions accounted for only 8.3 percent of all rulings per year on average. Omissions became quite constant elements of the Court’s

⁵ Constitution of the Bolivarian Republic of Venezuela of December 1999.

⁶ The Venice Commission, General Report of the XIVth Congress, p. 8–9.

rulings from 1999 to 2011 (12 percent per year on average) [Pócza, Dobos, and Gyulai 2019, 96-125].

It should be mentioned and is very interesting that the Sólyom Court transformed itself (with the exception of the year 1996) rather rarely into a positive legislator by declaring omission and giving some kind of positive prescription. After the Sólyom era, however, the most frequent form of omission turned out to be the “strong omission,” meaning that the HCC was strongly inclined to include in its rulings positive prescriptions on how unconstitutionality should be remedied, or it gave a strict deadline for unconstitutionality to be corrected [ibid.].

After constitutional reform in 2011 was adopted new Act on the Constitutional Court of Hungary (in force from January 1, 2012). According to the Section 46 (1) of this act, if the Constitutional Court, in its proceedings conducted in the exercise of its competences, declares an omission on the part of the law-maker that results in violating the Fundamental Law, it shall call upon the organ that committed the omission to perform its task and set a time-limit for that. Very interesting is Paragraph 3 of the same Section which provides that: “The Constitutional Court, in its proceedings conducted in the exercise of its competences, may establish in its decision those constitutional requirements which originate from the regulation of the Fundamental Law and which enforce the constitutional requirements of the Fundamental Law with which the application of the examined legal regulation or the legal regulation applicable in court proceedings must comply.”

How it is fairly mentioned in legal literature, to fill the legal gap created by ULOs, section 46(3) charges the constitutional court with more extended jurisdictions to exercise legislative powers. The constitutional court, by this jurisdiction, substitutes itself for the legislator by enacting the required constitutional requirements [Al-Dulaimi 2018, 123].

It should be mentioned Section 32(1) which stated that the Constitutional Court of Hungary shall examine legal regulations on request or *ex officio* in the course of any of its proceedings. The Constitutional Court used this power *ex officio* in its decision N. 6/2018. (VI. 27.). The court rejects the constitutional complaint against the ruling No. 36. Kpk. 45.927/2016/4 of the Budapest-Capital Administrative and Labor Court, but same time the Constitutional Court – acting *ex officio* – established the existence of a situation contrary to the Fundamental Law, violating Article II and XV (2) of the Fundamental Law, manifested in a legislative omission to regulate the procedure of the change of name of lawfully settled non-Hungarian citizens. Therefore, the Court called upon the National Assembly to meet its legislative duty by 31 December 2018.⁷

In Spain, for example, the basis for a constitutional claim may be legislative omission. According to Article 41 of the Organic Law of Spain “on the Constitutional Court,” initiating human rights proceedings (Amparo appeal) shall be available against violations of the rights and freedoms resulting from provisions,

⁷ Decision of the Constitutional Court of Hungary N. 6/2018 (VI. 27).

legal enactments, omissions or flagrantly illegal actions by the public authorities of the State, the Autonomous Communities and other territorial, corporate or institutional public bodies, as well as by their officials or agents.⁸ According to the same law, the Constitutional Court shall have jurisdiction in constitutional conflicts of jurisdiction between the State and the Autonomous Communities or between the Autonomous Communities themselves. Grounds for initiating conflicts of jurisdiction shall be Decisions, resolutions and acts by State bodies or by bodies of the Autonomous Communities or the omission of such decisions, resolutions or acts.⁹

Article 283 (“Unconstitutionality by omission”) of the Constitution of Portugal directly refers to unconstitutional legislative omission. According to this article, at the request of the President of the Republic, the Ombudsman, or, on the grounds of the breach of rights of the autonomous regions, presidents of the Legislative Assemblies of autonomous regions, the Constitutional Court shall consider and verify whether there is a failure to comply with the Constitution due to the omission of legislative measures needed to make constitutional norms executable. When the Constitutional Court verifies that an unconstitutionality by omission exists, it shall notify the competent legislative entity thereof.¹⁰ On this basis Portuguese legal theory distinguishes between legislative omission on the one hand, and unconstitutional, or constitutionally significant, legislative omission on the other. The distinction between them involves the type of constitutional rules towards which the legislative authorities have been disobedient or displayed inertia or passivity. This means that the majority of writers associate this topic with that of the typology of constitutional rules, and seek to establish their own classification, so as to then determine which types give rise to a constitutionally significant omission if the ordinary legislative authorities do not comply with them.¹¹

However, as underlined by Portuguese legal doctrine, the decisions regarding unconstitutionality by omission have no binding effect, purely providing a sort of formalized critical publicity on breaches of the Constitution [De Sousa Ribero and Mealha 2011, 721–33]. Despite all that, the pending of such a procedure in the Constitutional Court has been encouragement enough for legislative authorities to overcome the omission of legislative measures in question [ibid.].

Regarding Poland it’s constitution does not recognize the power of the Constitutional Tribunal to review legislative omission. Article 188 of the Constitution of Poland enumerates the normative acts that are subject to adjudication by the Constitutional Tribunal of Poland. Those acts in the catalogue must not be bro-

⁸ Organic Law of Spain “on the Constitutional Court” of 3 October 1979, Article 41(2).

⁹ Ibid., Article 2(c) and 61.

¹⁰ Constitution of the Portuguese Republic of 25 April 1976, Article 283(1–2).

¹¹ Portuguese Paper from the Constitutional Court, The Problems of Legislative Omission in Constitutional Jurisprudence, of XIVth Conference of Constitutional Courts of Europe, Vilnius, 2008, https://www.confeunconstco.org/reports/rep-xiv/report_Portuguese%20_en.pdf [accessed: 07.06.2021], p. 10–11.

adly interpreted and the Tribunal itself may not infer its powers [Radziewicz 2019, 38–49].

As Radziewicz mentions, in its jurisprudence, the Constitutional Tribunal has failed to carry out an in-depth analysis of the substantiation for the absence of grounds for a constitutional review of a legislative omission. However, the Tribunal limited itself in this respect to legislative oversights, in a principled way questioning the possibility of controlling for omissions [ibid.]. Radziewicz also notes that the constitutional review system that exists in Poland requires only a slight adjustment in order to be capable of coping effectively with infringements of the Constitution engendered by the legislator's inactivity. Therefore, he requires to add an additional subsection to Article 188 of the Constitution to directly vest the Constitutional Tribunal with power of control the constitutionality of a legislative omission [ibid.].

2. UNCONSTITUTIONAL LEGISLATIVE OMISSION IN THE LEGISLATION OF GEORGIA

Georgian legislation and legal doctrine do not recognize the concept of unconstitutional omission. Consequently, neither the Constitutional Court of Georgia has a power to consider the constitutionality of legislative omission.

The powers of the Constitutional Court of Georgia are established by the Constitution and by the Organic Law “on the Constitutional Court of Georgia.” The relevant articles of the mentioned acts do not confer the power to the Constitutional Court to conduct investigations of legislative omissions, consider their constitutionality and conduct a priori or a posteriori, concrete or abstract constitutional control. The Constitutional Court examines the conformity of a disputed act with the Constitution, but it exceeds the powers of the Court to consider the constitutionality of inexistence of the norm (legal omission) regulating certain legal relationship. If the object of the petition is an existence of a legal omission than the Court will not admit the case to be examined.¹² For Example, the Court declared the case “Citizens of Georgia – Nato Natriashvili, Djeneta Pataridze and Nino Gvardjaladze vs. the Parliament of Georgia” inadmissible and stated that it is not in the jurisdiction of the Court to consider the constitutionality of a legal omission.¹³

The Constitutional Court considers constitutional claims only in relation to the constitutionality of normative acts. However, throughout the consideration of

¹² Response of the Constitutional Court of Georgia, Problems of Legislative Omission in Constitutional Jurisprudence, The Problems of Legislative Omission in Constitutional Jurisprudence, XIVth Conference of Constitutional Courts of Europe, Vilnius, 2008, https://www.confueconstco.org/reports/rep-xiv/report_Georgia_en.pdf [accessed: 07.06.2021], p. 15.

¹³ Judgement N1/9/325 of 3 May 2005 of the Constitutional Court of Georgia on the case “Citizens of Georgia – Nato Natriashvili, Djeneta Pataridze and Nino Gvardjaladze vs. the Parliament of Georgia.”

a case, if the Court identifies certain legislative omission in legal acts it can give recommendations to the Parliament, but these types of recommendations of the Constitutional Court of Georgia are not mandatory.¹⁴

Thus, Georgian lawmakers may not pass a law even when it is explicitly required by the Constitution of Georgia. There is exactly the same case regarding the ARA. The Parliament of Georgia does not pass not only norm but also a whole law, which should determine powers of this unit.

In 2002, the constitutional law was amended to the Constitution of Georgia the main essence of which was to determine the status of Abkhazia as Autonomous Republic.¹⁵ Earlier, only “Abkhazia” was mentioned in the Constitution without a name denoting its autonomy. The same constitutional law had established that the status of the ARA would be defined by the Constitutional Law of Georgia “on the Status of the Autonomous Republic of Abkhazia.”

This situation lasted until 2017. In 2017–2018 Parliament of Georgia made substantial amendments to the Constitution of Georgia, but no qualitative changes were provided in terms of territorial arrangement and the main provisions remained the same. Only minor changes were made, which included the correction of individual terms and formation several norms regarding territorial arrangement in one article, previously were scattered in two different articles.

As a result of the amendments, the issue of territorial arrangement was formed in Article 7 (“Fundamentals of Territorial Arrangement”) of the Constitution. Paragraph 2 of this article states that “the powers of the Autonomous Republic of Abkhazia and the Autonomous Republic of Ajara, and procedures for exercising such powers shall be determined by the constitutional laws of Georgia that are an integral part of the Constitution of Georgia.” According to this provision, separate constitutional laws should determine the powers of the Autonomous Republics of Ajara and Abkhazia, but not their status as it was previously written in the Constitution. Legally, this provision is more correct because the Constitution of Georgia statuses of Ajara and Abkhazia are already defined – they are autonomous republics. However, what constitutes autonomy that is what kind of powers these republics will have in the state, must be determined by constitutional laws. There is such a law regarding the AR of Ajara,¹⁶ but the constitutional law, which would define the frames of powers of the ARA, has not been adopted. And this is when, as it mentioned above, the adoption of a law with similar content has been required by the Constitution since 2002.

Unfortunately, the society and the political elite that come to power in Georgia are constantly trying to change the constitution. The reason for this is the constant shortcomings in the constitution, its impracticality and the need for innovations [Gegenava 2017, 106–24]. However, the ambition of politicians obsessed with

¹⁴ Response of the Constitutional Court of Georgia, p. 16.

¹⁵ See Constitutional Law of Georgia “on Additions and Amendments to the Constitution of Georgia” of 10 October 2002.

¹⁶ See Constitutional Law of Georgia “on Autonomous Republic of Ajara” of 13 October 2017.

the idea of changing the constitution is not aimed at organizational, structural or political improvement of the basic law, to deal with challenges and rational solutions, but their real goal is to guarantee its power. For this reason, even in the pre-election promises of the parties, the issue of constitutional amendments is a necessary precondition for the Georgian political agenda [ibid.], but no one talks about abovementioned issue.

It is not an argument that abovementioned constitutional law is not or cannot be adopted due to the lack of the jurisdiction of Georgia over Abkhazia and that such a law will be adopted after complete restoration of the jurisdiction over the entire territory of the country. This argument is legally unjustified, because the Constitution of Georgia does not link the issue of the adoption of this constitutional law to the restoration of the jurisdiction of Georgia over ARA. There are some articles in the Constitution where certain events are linked to the restoration of territorial integrity. For example, according to the Article 37, “following the full restoration of Georgia’s jurisdiction throughout the entire territory of Georgia, two chambers shall be established within Parliament: The Council of the Republic and the Senate.”¹⁷ However, regarding to the constitutional law on the ARA, the Constitution demands adoption of this law without any condition.

Nor the existence of the Law of Georgia “on the Occupied Territories” justify such inaction because with other regulations, this law declares territory the ARA as an occupied territory and establishes a special regime here. However, it does not affect the status and powers, cancel or suspend neither the Constitution and legislation, nor the activities of the legitimate authorities of the autonomy.¹⁸

Thus, to be normative, the adoption of the Constitutional Law on the ARA is mandatory on the basis of Article 7(2) of the Constitution. In addition, Georgia, as a sovereign state, must declare its position on the powers of the autonomous entities. If the occupied Crimea is still included in the Constitution of Ukraine and the scope of autonomy is legally defined, why shouldn’t it be the same in the case of Georgia with regard to the autonomy of Abkhazia? [Goradze 2018, 101–16].

Adoption of such a law is also necessary to prevent legal nihilism, because if the lawmaker does not fulfill the duty imposed on him by a supreme legislative act and, therefore, shows disrespect for the constitution, then it is difficult for the ordinary citizen to respect the constitution and a law in general.

It is most important that the non-adoption of the abovementioned law has created a huge legislative vacuum, which has a negative impact on the legal security of Georgia. Especially, this vacuum enabled the Supreme Council (in exile) of the ARA to incorporate norms into the Constitution of the ARA that were in direct conflict with the Constitution of Georgia.

¹⁷ Constitution of Georgia of 24 August 1995, Article 37(1).

¹⁸ See Law of Georgia “on the Occupied Territories” of 23 October 2008.

3. WAYS TO RESOLVE AN UNCONSTITUTIONAL LEGISLATIVE OMISSION

The problem with Georgia can be considered on two levels: legislative omission in general and legislative inaction in relation to the ARA in particular. Let's start with a specific issue.

There are two problems with eliminating this constitutional inaction – political and legal. As it seems, the political problem is that the Georgian government does not have a specific vision, a specific plan for Abkhazia. Such a political vision was to some extent held by the government of 2004–2012, although it must be said that this vision was mainly manifested in political statements and never has the frames of law. It is true that the law on the Occupied Territories was adopted at that time (in 2008), but it was a legal confirmation of the fact of occupation and had nothing to do with the constitutional law on ARA, which was required by the Constitution of Georgia then and still requires today.

It is clear that the issue of Abkhazia is even highly dependent on international political processes too, but this does not mean that the sovereign government, the legislature of the sovereign state of Georgia does not express its political will and does not reflect it in the law. Therefore, the Parliament of Georgia has to adopt a law, which will state its territorial policy, will state the position of the Georgian state regarding the competence of the autonomy of Abkhazia.

As for the legal side, the fact is that in this case we are dealing with the so-called “Qualified silence of the legislator,” the same strong omission or non-adoption of a given constitutional law is intentional. The Parliament may prefer silence on certain political issues, but this should not violate the Constitution. If any law and, moreover, the Constitution requires the existence of a specific normative act, its non-adoption cannot be justified by political expediency. If we assume that the adoption of a normative act is not really politically expedient, then it can be done not at the expense of violating the Constitution, but there are two ways to do it: one, to amend the Constitution itself and remove the requirement or, second – to adopt such required constitutional law.

I think the second way is more correct. As the Constitution does not provide specific norms and regulations for this Constitutional Law, the legislator may adopt a constitutional law and take into account the provisions of the current Constitution of the ARA. In addition, the norm should be taken into account in the law, that this law will be revised after the de-occupation or so on.

As for the problem in general, as it was mentioned above, Georgian legislation does not recognize the concept of unconstitutional omission. Like Radziewicz, I also think that the ideal case would be a constitutional amendment that would increase the function of the Constitutional Court to have the right to exercise constitutional control over unconstitutional legislative omission. In such case, when the Parliament of Georgia has not been purposefully fulfilling the requirements of the Constitution of Georgia for almost twenty years, it would be good to be

amended an “unconstitutional omission” in the Constitution of Georgia, which could be reviewed by the Constitutional Court of Georgia. Decisions made by the Constitutional Court of Georgia in such cases, like its other decisions, shall be binding on any institution or official of the State, and relevant political or legal liability measures should be taken for non-compliance with such a decision. Legal security must be defended by the law. However, there is only one unanswered question: why would a parliament, which feels comfortable in the face of unconstitutional legislative omission, pass such a law? If so, there is another way as well – the Constitutional Court can show the courage and determine this competence itself.

The Constitutional Court of Georgia has a similar experience, when it separated the content of the norm and the norm itself, as a result of which the Constitutional Court began to assess the constitutionality not only of the norm, but also of its specific content [Gegenava and Javakhishvili 2018, 117–41]. In its decision of 22 December 2011,¹⁹ the Court first time repealed the content but not the norm of Paragraph 2 of Article 2 of the Law of Georgia on Military Reserve Service. According to the court, the problem was not the idea and essence of the military reserve system, the obligation established by law, but the rules of its passage and the established practice. A similar approach has been used by the Court many times, thus it has gone beyond the positive legal scope of the powers conferred on it and, through its own interpretation, has acquired new powers to examine the normative content of the norm. By increasing the competence of the negative legislator, by abstracting the normative content from the norm, the court in practice has also assigned itself the function of a positive legislator [ibid.].

CONCLUSION

The Constitution of Georgia is a supreme legal act implementation of which is the responsibility of everyone, including the supreme legislative body that adopts a constitution and other laws. The Constitution of Georgia requires the adoption of a constitutional law on the powers of the ARA and procedures for exercising such powers. The Constitution does not link this issue to the restoration of the jurisdiction of Georgia over ARA or any other event. Thus, it would not be right to blame such a legal policy on the actual situation on the territory of Abkhazia. On the contrary, the Parliament of Georgia as the supreme legislative body of a sovereign state, which “defines the main directions of the country’s domestic and foreign policies,”²⁰ is obliged to define the rights and responsibilities of one of its autonomous republics. Without this law, a vacuum has been existed in the Georgian legislative space, which has a negative impact on legal security.

In order to avoid ignoring the requirements of the Constitution of Georgia, it would be desirable to introduce the concept of unconstitutional legislative omi-

¹⁹ Judgement N1/1/477 of 22 December 2011 of the Constitutional Court of Georgia on the case “Public Defender of Georgia v. Parliament of Georgia.”

²⁰ Constitution of Georgia of August 24, 1995, Article 36(1).

ssion into the Georgian legislative space, and to equip the Constitutional Court of Georgia with the power to review lawsuits related to unconstitutional legislative omission. Decisions made in such cases must be enforceable.

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THE CONVERGENCE OF PROCESSES OF CONSTITUTIONALIZATION OF TAX LAW SYSTEMS IN POLAND AND UKRAINE

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Abstract. This study aims to compare the constitutional standards of Polish and Ukrainian tax law systems. The initial hypothesis has been adopted that there are significant similarities in the systemic solutions applied in both countries, which indicates the existence of processes of both the constitutionalization of tax law and the convergence of their legal systems. Considering that both processes are not yet completed, there is a need to establish systemic standards that are common and possible differences in their regulation. The research problem determines the choice of methods necessary to solve it. The dogmatic method will make it possible to determine the legal acts in force and their content. Whereas the comparative method enables comparison of the constitutional standards of Polish and Ukrainian tax law.

Keywords: constitutionalization, convergence, tax law, tax system

PRELIMINARY REMARKS

The Constitution is the foundation on which both the tax law system and the tax system are based. Undoubtedly, without tax law, there are no taxes. They constitute pecuniary performances with statutory characteristics, incurred in favor of a public law body.¹ The definition of a tax in the strict sense contained in the Tax Ordinance² begins with an indication of its public law character.³ This leads to the conclusion that taxes are legal institutions whose construction and functions are determined by the public interest and not by the individual interest of the entities obliged to pay them. Tax law belongs to a branch of public law, for which there is also a typical power of action of administrative bodies, which are superior to the addressees of tax responsibilities and have the power to use coercion to enforce those obligations. In every state of parliamentary democracy, tax issues are reflected in the content of the Basic Law. This is due to the essence of parliamen-

¹ For more on the doctrinal definition of tax, see comments by W. Wójtowicz [Wójtowicz 2020, 154–56].

² The Polish Constitution does not contain a definition of tax. The meaning of constitutional terms should not be limited to their statutory definitions. T. Dębowska–Romanowska noted that only some elements of the doctrinal and legal definition of tax were reflected in the Basic Law [Dębowska–Romanowska 2010, 138].

³ See Article 6 of the Act of 29 August 1997, the Tax Ordinance Act, Journal of Laws of 2020, item 1325 as amended [hereinafter: TOA].

tarianism aptly described by the rule without representation, there is no taxation. The imposition of taxes is a traditional prerogative of the legislature,⁴ and this arrangement is an expression of a kind of social contract. In a democratic state of law, taxpayers are voters whose votes influence the outcome of parliamentary elections and have an indirect impact on the functioning of the tax administration and the setting of tax policy objectives. Constitutional tax law is necessary because it interferes with persons and citizens' rights and freedoms. In this case, there is a conflict between fiscal objectives and individual interests. This should be resolved by establishing in the Basic Law the acceptable scope, form and content of interference in the sphere relevant for each individual and the whole society. The choice of legal solutions in the legislative process is not arbitrary but determined by constitutional axiology and system standards [Gorgol 2015, 50]. The provisions of the Basic Law protect the rights and freedoms of persons and citizens,⁵ and this is manifested, *inter alia*, in the determination of the material and formal prerequisites for admissible interference with these values.⁶ It is also important to assume that interference by public authorities in subjective rights and freedoms is an acceptable exception to the principle of public authorities refraining from such activities [Idem 2020b, 168–69]. This leads to the conclusion that the choice of specific tax instruments and their formalization should take into account both public and individual interests [Idem 2019, 139]. There is a need to look for solutions, which would implement the protection of both interests as much as possible. This also raises the question of research, what should be the relationship between an essential individual interest and the public interest in a field regulated by law? In theory, three constitutional solutions are possible: the primacy of the public interest, the supremacy of the protection of taxpayers' rights and freedoms, and the equivalence of both interests. This article will attempt to determine, based on an analysis of the constitutional standards of Poland and Ukraine, which of the theoretical models are reflected in the content of the basic laws of both countries.

The regulation of tax issues in constitutional provisions has positive consequences for the security of both public finances and the state and local government. Correctly, selected instruments and legal procedures for their application allow the body of public law to take the actions necessary to eliminate the events causing the violation of its fiscal interests or the negative consequences of their occurrence. The constitutionalization of the tax law causes its stabilization and predi-

⁴ Compare Article 120 in connection with Article 84, and Article 217 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483 as amended) [hereinafter: the Polish Constitution], and Article 85, and Article 91 of the Constitution of Ukraine adopted at the Fifth Session of the Verkhovna Rada of Ukraine on 28 June 1996 (The Official Bulletin of the Verkhovna Rada of Ukraine No. 30, item 141 as amended) [hereinafter: the Ukrainian Constitution].

⁵ Compare Article 30 of the Polish Constitution, and Article 21, and Article 22, and Article 64, and Article 157 of the Ukrainian Constitution.

⁶ Compare Article 31(3) of the Polish Constitution, and Article 22, and Article 64 of the Ukrainian Constitution.

ctability of the activities of tax authorities. The amendment of the Basic Law is more difficult than the revision or derogation of other national laws, as it requires a qualified majority of votes.⁷ The stability of the law is a systemic value, but it can be inconvenient when fast action by public authorities is needed. For this reason alone, constitutional tax law should be neither too detailed nor a complete, comprehensive regulation. The predictability of interference in the freedoms and rights of the taxpayer forces the formulation of minimum standards of the Basic Law and is one of the vectors of the constitutionalization of tax issues.

Countries have different systems of tax law.⁸ However, a convergence process can be observed, which makes the content of constitutional tax law more similar. In this paper, an attempt was made to compare the constitutionalization of the tax law systems of Poland and Ukraine. The choice of both countries is not accidental. They differ in the degree to which they meet their expectations of membership in the European Union, as Poland is the Member State and Ukraine is in the pre-accession stage of integration. It is worth noting that Ukrainian doctrine [Olinyk 2014, 101–102] aptly emphasizes that Ukraine has an active policy integration into international and European structures, and in this connection, one of the basic moments of Euro-integration policy is an approximation of legislation of the national legislation of Ukraine to the legislation of the European Union. Adaptation is the main way of approaching domestic legal norms to European standards. Poland and Ukraine also vary in the conditions of the political transformation process, the degree of Europeanization of tax law, the structure of society, the state of the national economy, and relations with Russia.⁹ However, they have common historical experiences and their legal systems show similarities. It should be stressed that despite these differences the fundamental laws of Poland and Ukraine were created at a similar time.¹⁰ The thesis of mutual inspiration by the systemic standards and the process of their cross-border penetration into national legal systems is already supported by the fact that the principles of the primacy of the Constitution and the direct applicability of the Constitution apply not only the same content in the basic laws of both countries, but are also placed in the same drafting unit, both in an article having the same number and in the section regulating the systemic general principles, starting the normative content of each of them.¹¹

⁷ Compare Article 235(1) of the Polish Constitution, and Article 64, and Article 155 of the Ukrainian Constitution.

⁸ The supporters of the positivist approach for the understanding of the tax law, as a result of the study of the tax-legal doctrine of modern Ukraine, consider that all post-socialist states have the same “post-Soviet model of the tax law” [Patsurkiv’s’kyy and Savkina 2017, 192]. This thesis ignores the obvious fact that each state has its own legal system and legal culture [Khudyk 2018, 13].

⁹ See for more Berenson 2018, 5–6 and 56–58.

¹⁰ The Polish Constitution was adopted on 2 April 1997. In turn, the Ukrainian Constitution was adopted earlier on 28 June 1996.

¹¹ Compare Article 8 of the Polish Constitution, and Article 8 of the Ukrainian Constitution.

1. CONSTITUTIONALIZATION OF TAX LAW SYSTEMS

The very name of the constitutionalization aptly indicates its connection with the constitutional law. On the one hand, it can be seen as a legislative procedure aimed at establishing constitutional laws. In the second perspective, its essence can be identified with the very result of the law-making process. From the point of view of the assumptions and research concept adopted in this article, constitutionalization will be considered in this final aspect.

As already mentioned, tax issues are a typical content of constitutional provisions in a democratic state ruled by law. The subject matter and scope of the constitutionalization of this sphere of social relations need to be clarified. For there is a doubt whether the basic law should regulate the tax system or the tax law system? The tax system is the total of taxes applicable in a given country and tax rules. This leads to the conclusion that its existence is not the same as the very fact of applying a tax. The concept of a single tax does not meet the systemic requirement of multiple taxes. What is more, the collection of taxes alone is also insufficient for the tax system to exist. Tax rules are its second indispensable element, which is necessary not only for the existence of this system but also to give it a specific structure and content. They may reflect current legislation or describe the ideal tax system.¹² Convergence is a process that brings together real national tax systems that, to varying degrees, can be in line with the doctrine's demand for ideal system features.

It should be emphasized that it is neither necessary nor possible to regulate the entire tax system in the Basic Law. The constitutionalization of the tax law of Poland and Ukraine confirms this standard, which may also be considered a sign of their systemic convergence. Tax issues are a normative matter of considerable quantitative and qualitative complexity. These issues have material, formal, and organizational aspects. The Constitution should regulate only fundamental issues for the functioning of the tax system and the application of tax law. Concerning the tax system, it should be emphasized that the Basic Law should primarily contain tax rules, not individual taxes. It is not possible to regulate all taxes by constitutional provision, because such a complex matter would not fit into a single legal act. Predictability and certainty of taxation force detail and precision of tax lawmaking. However, constitutional standards are only basic and general arrangements.¹³ Tax statutes play a fundamental role in the construction of the technical elements of individual taxes, but they also require the regulation of implementation issues in regulations and local legal enactments. Foreign factors also

¹² W. Wójtowicz identifies system rules with tax rules and makes their subjective division [Wójtowicz 2020, 172].

¹³ A. Khudyk even emphasized that the leading provisions present the highest degree of generalization and significance of the legal requirements for the regulation of public finances and determine the main directions and tendencies of the legal regulation of the financial system, lawmaking and enforcement [Khudyk 2015, 228].

make it necessary to apply supra-statutory acts, which are ratified international agreements¹⁴ and directly applicable in Poland the EU laws.¹⁵ As already mentioned, the full constitutionalization of tax law would be detrimental to the praxeology of its application. The highest level of constitutional standards in the system of national law favors their stability but makes it difficult to respond to the dynamic social, economic, and political changes. The tax law system, and not the entire tax system, should be the subject of constitutionalization because the provisions of the Basic Law go beyond that. They also apply to the establishment and application of this law.

The constitutionalization of substantive tax law can be seen as a process with different content and scope. This results from the different wording of the legal language used to construct the provisions of the Basic Law. Tax issues can be described in a more or less complex way, including more general terms than tax. In strict terms, only tax issues are subject to constitutionalization. Then, in the text of the Basic Law, the vocabulary typical of substantive tax law appears, that is, the noun “tax” and the adjective “tax.” In a broad sense, however, constitutionalization requires the use of wording whose scope of meaning includes, apart from tax issues, also the matter of other public duties. The Polish Constitution uses such terms as “tax,” “public imposts” and “responsibilities and public duties.”¹⁶ This means that the normative description of tax issues includes terms of varying degrees of complexity. Another narrow formula for the constitutionalization of the substantive tax law was introduced into the Ukrainian Basic Law. The lack of Polish equivalents of public imposts, responsibilities, and public duties implies the need to use terms typical for taxes. It is worth noting that the Constitution of Ukraine juxtaposes taxes with levies, which should be paid following the procedure and to the extent established by law.¹⁷ The notion of the levy is not clarified by indicating its public essence. It cannot be considered a broader term than or identical to a tax, since it as it is juxtaposed with it by the conjunction “and.” The two parts of the constitutional phrase have separate designations. Ukrainian doctrine stresses that the term „levy” has a different legal nature and number of meanings: first, forced transfer or confiscation of unpaid sums of levies within the prescribed period; secondly, a certain amount of money that has to be paid for damages; thirdly, penalties for the illegal activities [Vdovichen 2007, 873].

The choice of the method and level of detail in the regulation of tax issues in the Basic Law should be rational. The narrow or broad approach to the constitutionalization of tax law systems requires, first of all, to determine whether taxes

¹⁴ Compare Article 87(1), and Article 91 of the Polish Constitution, and Article 9 of the Ukrainian Constitution.

¹⁵ See Article 91(3) of the Polish Constitution.

¹⁶ Compare Article 84, and Article 217 of the Polish Constitution.

¹⁷ See Article 67 of the Ukrainian Constitution. A. Khudyk noted that this constitutional norm is a peculiar benchmark for all tax legislation, it shows the social and legal essence of the tax system, shows the most important legal features of taxes and fees, makes it possible to distinguish tax payments from other legal phenomena [Khudyk 2018, 16].

have such advanced individual features that they differ significantly from other public imposts. In Polish conditions, it is reasonable to settle taxes together with these performances.¹⁸ A comparison of the tax and charge already confirms that there is only one significant difference between the two public imposts. The taxes are free of charge and the fees are payable. The Polish Tax Ordinance defines the tax in both strict and broad terms.¹⁹ Tax in the broad sense also includes tax advance payments, tax instalments, fees, and non-tax budgetary dues. This leads to the conclusion that for the application of general tax law there is a need to introduce a more general notion concerning tax. In constitutional terms, this is precisely public imposts. The ambiguity of the vocabulary “ax” used in Polish tax law and the extension of its scope of meaning to charges and other public impost testifies to the low degree of occurrence of the tax’s characteristics in the strict sense and the domination of the characteristics typical for each levy. The validity of the Polish variant of broad constitutionalization is also confirmed by the existence of similar structural elements of taxes and fees and their typical basic fiscal function. In turn, the inclusion of public imposts in the scope of the general tax law makes the Polish Tax Ordinance an act of tribute law [Gorgol 2013, 3–15]. Since the tax is defined in this law in both strict and general terms and is the subject of a liability relationship, also the concept of tax obligation in the broadest sense is a tributary obligation.

The Ukrainian Tax Code contains a definition of tax and fees. The tax is a compulsory, unconditional payment to the appropriate budget charged from taxable persons under this Code.²⁰ However, the fee is also associated with the contribution. According to the code definition, it constitutes an obligatory payment to the relevant budget charged from the payers of dues on the condition they obtain a special benefit, including those in the form of an official act (Article 6(2) TCU). It should be stressed that there is no statutory definition of a fee in Polish law, which makes it difficult to apply the Tax Ordinance not only to public imposts. This is also the reason why the designer of the notion of “non-tax budgetary dues” is questionable. Its definition is negative because this wording means dues not being taxes or fees, which constitute income of the State budget or the budget of a territorial self-government unit, resulting from relationships under public law (Article 3(8) TOA). The Ukrainian tax law does not contain a legislative error in Polish law, manifesting itself in an unreasonable failure to define the fee. However, it is doubtful that the fee is identical to other public imposts, which is a social and health insurance contribution. In the Code’s definition of tax and fee, there is no direct reference to the pecuniary performance as a necessary feature of public imposts, but to the act of paying it. This leads to the conclusion that the

¹⁸ See for more Gorgol 2020a, 51.

¹⁹ Compare Article 6 and Article 3(3) TOA.

²⁰ See Article 6(1) of Tax Code of Ukraine adopted by Verkhovna Rada of Ukraine on 2 December, 2010 (The Official Bulletin of the Verkhovna Rada of Ukraine No. 30, item 141 as amended) [hereinafter: TCU].

tax in this approach is regulated in a less specific way than in Polish law. This may cause a blurring of its scope of meaning and hinder the application of tax regulations. The undoubted advantage of Ukrainian law is the definition of the tax system of Ukraine (Article 6(3) TCU). It is the aggregate of national and local taxes and fees, which are collected in a manner specified in the Tax Code of Ukraine. There is no such definition in Polish law, although its formulation would undoubtedly have a significant cognitive value and a system of public levies in order. In the code definition of the tax system, however, there is an error of too narrow scope of regulation of this institution. As already mentioned, the collection of taxes alone is not sufficient to construct a system [Orliuk 2003, 239; Voronova 2012, 364], as the second necessary element of the system, tax rules, has been omitted. As in Polish law (Article 5 TOA), the Tax Code of Ukraine also contains a definition of tax liability as an institution of general tax law (Article 14(1.156) TCU). This wording shall be used as the sum of money that a taxable person, including the tax agent, must pay to the relevant budget as tax or duty on the grounds under the procedure and within the time frame prescribed by the tax legislation, including the sum of money specified by the taxable person in the tax receipt and not repaid within the time frames prescribed by the law. This leads to the conclusion that this institution is covered in a broad sense. Other public levies than taxes may also be the subject of the liability relationship. Concluding this part of the considerations on the constitutionalization of the tax law of Ukraine, it should be emphasized that the omission of the tax in a broad sense in its content justifies the normative description of this process without public imposts and the more general formulation of “responsibilities and public duties.”

The constitutionalization of material and procedural tax obligations should be considered in the widest possible context, i.e., within the framework of regulating responsibilities and public duties. This is supported by the fiscal interests of the state and local government units and the requirements of decent legislation. From the point of view of the need to create an efficient system for meeting the financial needs of a public law body, the universality of paying public levies, which manifests itself in determining the widest possible subjective range of application, is of crucial importance. As already mentioned, the high degree of generality of the constitutional provisions requires that this obligation be shaped uniformly for public duties and thus without taking into account their specific characteristics. It would not be appropriate to multiply the number of regulations for the obligation to pay public impost by referring to each category of pecuniary performance separately since the subsequent regulations would differ very slightly. The content of the obligation would be the same, and its normative description would contain the object of the differential only in the form of a change in the nomenclature of the public levy.

The constitutionalization of the entitlements of tax entities requires the resolution of the dilemma to what extent the formula of human and civil rights and freedoms is capacious to tax law solutions? Can all entities be covered by this fo-

rmula? It is worth noting that the Polish Constitution contains the chapter named: “Freedoms, Rights and Obligations of Persons and Citizens.” It is placed after the first chapter titled “The Republic.” In turn, the first part of the Ukrainian Constitution is the “General Principles,” followed by “Human and Citizen’s Rights, Freedoms and Duties.” This shows the same, uniform, formal aspect of the constitutionalization of rights, freedoms, and obligations. These issues are important for the functioning of a democratic state ruled by law that respects, protects, and strengthens the freedoms and rights rightly obtained. The constitutional formula has clearly emphasized the subjective aspect. Freedoms, rights, and duties apply only to persons and citizens. Therefore, there are doubts whether these solutions apply to legal persons and organizational units having no legal personality? The findings of the linguistic and grammatical interpretation justify a positive answer to this question, and the results of the functional system interpretation contradict them. It is, therefore, necessary to postulate the elimination of these differences of interpretation in the explicit regulation in the Basic Law of freedom, rights, and duties of each subject regardless of his civil status and citizenship.

Constitutional tax law cannot ignore the issue of regulating taxpayers’ rights,²¹ but this can happen in two ways. First, subjective tax rights are treated as manifestations of a broader category of human and civil rights and freedoms. They are distinguished by the fact that they are related both subjectively to tax entities and subjectively to tax regulations and the matters contained therein. However, they are not so important distinctions that their regulation takes the form of introducing a separate category of economic tax rights to the traditional catalog of human and citizen’s rights and freedoms. The second solution emphasizes the need to create new, specific constitutional standards for the taxpayer’s rights, especially the right to predictable taxation [Gorgol 2017, 219–30] and the right to good tax administration [Idem 2018, 389–401]. In this respect, the system of rights and freedoms has too narrow scope of meaning and is inadequately structured with dynamic changes in tax regulations and the existence of unusual categories of recipients of tax obligations. Neither the Polish nor the Ukrainian Basic Law has any provisions whose *ratio legis* would only standardize the rights of tax subjects. From this fact, representatives of Ukrainian doctrine even conclude that the Constitution of Ukraine does not establish the rights of the individual in the tax legal relations [Khudyk 2018, 17]. This view is not valid as the taxpayer’s rights are determined by the interpretation of its provisions. For the same reason, there is also a controversial thesis that not including any of the rights of the individual in the tax relations directly into the Constitution of Ukraine undoubtedly negatively affected the extent of their constitutional protection in comparison with all other human rights directly recorded in it [ibid., 18]. In turn, the representatives of Polish doctrine emphasize that there is a need to introduce into the Basic Law the provisions regulating directly the subjective tax rights. However, even in the

²¹ This matter is one of the key issues of the constitution and is reflected in its construction.

current state of law, they are anchored in the provisions located outside of Chapter II of the Polish Constitution.

The issue of tax laws should not be reduced and should only apply to tax subjects. The constitutional tax law should also define the rights of a self-governing tax creditor. Their establishment in the Basic Law is connected with the division of public funds between the state and local government units, the standards of self-government, and financial independence of these units. For this reason, both the Polish and Ukrainian constitution guarantee the entitlements defined as a tax authority exercised in the field of local taxes and fees.²² This common element of the constitutionalization of tax law systems also proves their Europeanization. Both Poland and Ukraine have implemented the tax standards recommended in the European Charter of Local Self-Government.²³

2. MANIFESTATIONS OF CONVERGENCE OF CONSTITUTIONAL TAX LAW OF POLAND AND UKRAINE

The constitutional standard common to Poland and Ukraine requires that the obligation to pay tax shall be established in a statute.²⁴ As already mentioned, the addressee of this duty is everyone. The constitutional feature of the subjective universality of tax payments should not be understood as an injunction to set only general taxes or a prohibition to differentiate the subjective scope of particular taxes. This is due to the reference to the statute, which should define this aspect of taxation. The Constitution of Ukraine indicates the need for a statutory determination of both the procedure and the extent of the tax. The Polish Constitution, on the other hand, requires the statute to establish a tax. *Prima facie*, both regulations have different content. The Ukrainian solution seems to be more controversial, as its literal understanding would mean that every tax law should include the provision specifying a precise amount of tax to be paid. This would require only a lump-sum tax, a simplified form of taxation. Then the amount of tax would not be calculated but would result directly from the tax law. Undoubtedly, this type of abandonment of other non-flat-rate forms of taxation would be detrimental to the fiscal needs of the state and local government. It would also not be-

²² Compare Article 168 of the Polish Constitution, and Article 143 of the Ukrainian Constitution.

²³ The European Charter of Local Self-Government was drawn up within the Council of Europe by a committee of governmental experts under the authority of the Steering Committee for Regional and Municipal Matters on the basis of a draft proposed by the Standing Conference of Local and Regional Authorities of Europe (CLRAE), predecessor of the Congress of Local and Regional Authorities. It was opened for signature as a convention by the Council of Europe member states on 15 October 1985, and entered into force on 1 September 1988. As of 1 January 2010, the Charter had been ratified by 44 of the 47 Council of Europe Member States, including Poland and Ukraine. See Council of Europe, *European Charter of Local Self-Government and explanatory report*, https://www.ccre.org/img/uploads/piecesjointe/filename/charter_localselfgovernment_en.pdf [accessed: 08.01.2021].

²⁴ Compare Article 84, and Article 217 of The Polish Constitution, and Article 67 of the Ukrainian Constitution.

nefit the taxpayer, who would be deprived of the right to choose the most optimal form of taxation for him. A tax act is a source of tax liability, which is a general and abstract duty to pay tax (Article 4 TOA). The imposition of this liability should not be confused with the creation of a tax obligation. Such an obligation arises because of the transformation of the tax liability, which is the result of the delivery of a decision determining its amount or occurs under the statutory tax law now of the appearance of the event described in it. This leads to the individualization of the tax entity and the concretization of its amount, time limits, and place of payment [Gorgol 2020c, 182]. Usually,²⁵ the amount of tax is calculated using the technique of self-calculation by the taxpayer, calculation by the tax remitter or tax assessment. This is not just an accounting process, but a wider range of activities aimed at applying the tax law. It requires the establishment of the structural elements of tax and tax policy measures that apply to facts. For this reason, it is inappropriate to link the statutory determinability feature only to the result of the tax calculation and to omit those factors that affect the amount of the tax obligation. The Polish constitutional standard combines statutory determinations of tax, imposition of tax liability, subjective and subjective scope of taxation, tax rate, and rules of granting reliefs, remissions, and categories of taxpayers exempt from taxation (Article 217 of the Polish Constitution). This solution makes taxation, i.e., not only tax, more predictable, which increases the degree of taxpayer protection.²⁶

The Ukrainian Constitution includes a ban on holding a referendum on taxes. There is no equivalent to this in the Polish Basic Law (Article 84 of the Ukrainian Constitution). This lack of convergence is incomprehensible. The Polish solution is reasonable. A referendum is a means of direct democracy, implementing the principle of popular sovereignty²⁷. The Polish solution is reasonable. A referendum is a means of direct democracy, implementing the principle that the supreme power in the Republic is vested in the Nation. There is no justification for an absolute ban on conducting a referendum on any tax issue. It does not have to be of a law-making or binding nature for public authority. Citizens should have the opportunity to express their opinions on tax matters, initiate, or postulate changes in tax law aimed not only at establishing new legislation but also at repealing a legal act or some of its provisions. However, the modified ban on holding a referendum on taxes can be seen as a necessary instrument for the implementation of the constitutional standard of statutory determinability of taxation. Since the issue of the tax statute is reserved for the parliament, it cannot be replaced by a binding referendum. It is also worth noting that the constitutional principle of the legal order in Ukraine is the prohibition of forcing anyone to do what is not provided for in the legislation (Article 19 of the Ukrainian Constitution). This leads to the conclusion that the imposition of the obligation to pay the tax can only

²⁵ The exception is the typical lump-sum tax.

²⁶ This issue is particularly highlighted by T. Nowak. See for more Nowak 2020, 57–156.

²⁷ Compare Article 4 of the Polish Constitution and Article 69 of the Ukrainian Constitution.

be derived from the statutory tax law. It should be considered as a justified Ukrainian prohibition to hold a law-making referendum on the introduction or abolition of the tax,²⁸ the determination of the procedure for its payment, and the amount. However, there is no systemic justification for extending its scope to every referendum and all tax matters.²⁹

As already mentioned, a manifestation of the convergence of the Polish and Ukrainian tax law systems is the equipping of local self-government units with the tax authority to execute local taxes, and in Poland also local fees.³⁰ In the Polish Constitution, it is referred to as a right whose scope is defined by statute. The phrase “the right to set the level of local taxes and charges” refers to the content of this right. In turn, the Ukrainian Basic Law does not use this wording. Nevertheless, it follows from the essence of this constitutional standard that it grants and guarantees subjective public law. It is governed by the formula of a mandatory task, which is to determine taxes and collect them under the statute. The Ukrainian solution is more legitimate than the Polish one. It is a mistake to reduce the essence of the tax authority to only determine the amount of tax. Local self-government units have an influence on tax law-making and its application, including the collection of their income. Local legal enactments regulate, within the limits of statutory authority, certain structural elements of local taxes and tax policy measures. Such action, however, goes beyond the findings of the grammatical-linguistic interpretation of the tax authority regulation.

CONCLUSIONS

The basic laws of Poland and Ukraine contain standards of tax law with a significant degree of similarity in their content and regulation. These findings confirm the thesis that the legal systems of both countries were subject to both constitutionalization and convergence processes. Although the social, economic, and political conditions of these processes are not the same, they have not led to significant differences in their results in Poland and Ukraine. This leads to the conclusion that the decisive factor determining the course of constitutionalization and convergence was, and still is, the common goal of introducing and strengthening the solutions typical of a democratic state ruled by law. This paradigm inspired the search for systemic solutions that would constitute the foundation of the legal system, guarantee the financial security of the state, protect individual freedoms and rights, reflect the requirements of decent legislation, and facilitate the application of the law. Tax issues cannot be omitted from the constitution of a de-

²⁸ Without a tax liability, there is no tax, and statutory tax law only implies that liability.

²⁹ It should be noted that in the Ukrainian literature the prohibition of referendums on tax issues is regarded as one way of real protection of the individual's right to tax in societies where there is low as the general legal culture, and especially the tax and legal culture [Khudyk 2018, 19]. This argument is not persuasive because the prohibition itself is a negative interference with human subjective rights. Nor is there any evidence to support its effectiveness.

³⁰ Compare Article 168 of the Polish Constitution and Article 134 of the Ukrainian Constitution.

mocratic state ruled by law, but it is neither possible nor reasonable for it to regulate completely the tax system and the tax law system. Constitutional tax law introduces standards that are general and abstract. The nature of these provisions makes them determine the most fundamental systemic issues. Within the framework of the tax system, the fundamental law should regulate the matters of tax rules, not individual taxes or their entire aggregate. In turn, the tax law system should be shaped by giving the constitution the character of the supreme law that is directly applicable; indicating in it the sources of laws and their legal force; placing the obligation to pay tax; formulating the conditions for imposing other tax obligations; guaranteeing the protection of tax rights; establishing the minimum content of the tax law; regulating tax legislation, and even formulating the most important directives for applying the law.

Both the Polish and Ukrainian Basic Law implement the classical concept of rights and freedoms, which is subjectively related to persons and citizens. This solution does not take into account the broader scope of the addressees of tax payment obligations, which also includes legal persons and organizational units having no legal personality. Only among the constitutional regulations of obligations is there a standard that relates directly to tax issues. The Polish Constitution introduced an injunction for the statutory determination of responsibilities and public duties. The Ukrainian solution applies to taxes and levies. There is no provision in the constitutional law of both countries that establishes directly and exclusively the right for the taxpayer. Undoubtedly, this example of the convergence of the Polish and Ukrainian tax law systems and the current state of their constitutionalization confirm the thesis that both processes should be continued. Although representatives of Polish science formulate subjective tax laws based on the interpretation of the provisions of the Basic Law, it should be recognized that there is a need to specify in its content at least the right to predictable taxation and the right to good tax administration. The concept of rights and freedoms of persons and citizens should also be changed by adapting it to the specifics of a wide range of tax law subjects. In the Polish Basic Law, the interference of public authorities in rights and freedoms is an exception, not a rule. This means the existence of a constitutional standard of the primacy of individual interest over the public one. However, public authorities should strive to consider these interests as far as possible. There is no such approach in the Ukrainian Constitution, and the doctrine even formulates a thesis about the equivalence of public and private interests.

Without a statute, there is no tax. This common Polish and Ukrainian standard also reflects the achievements of European parliamentarianism. The stipulation of the statutory right to tax is necessary because it interferes with the sphere of subjective rights and freedoms. However, from the point of view of constitutional tax law, the application of this standard must make taxation more predictable for the tax subject. This issue should not be reduced to the determination of the amount of tax but should be considered broadly by stipulating that the tax statute sho-

uld regulate those tax construction elements and tax policy instruments that shape the obligation to pay tax.

The Basic Law of Ukraine formulates a ban on conducting a referendum on tax issues. It has no equivalent in Polish law. The Ukrainian solution is not justified, because the elimination of this instrument of direct democracy violates the principle that the supreme power in the Republic is vested in the Nation. Because of the principle of statutory determinability of taxation, it should be limited only to those referenda on tax matters, which are of a lawful nature and are incompatible with it. The present standard is too broad as it extends to all tax referenda, and this is for issues that do not only need to be regulated by statute.

The Polish Constitution correctly defines the tax authority of local self-government units as their right, and its scope extends to local taxes and fees. In Ukrainian law, however, its description takes the form of performing a public task. However, it is rightly connected not only with determining the local tax but also with its collection. The disadvantage of the Polish solution is also the connection of the tax authority only with the issue of determining the amount of public duty, and not with the formation of its constructional elements, determining the instruments of tax policy and the use of facultative reliefs in the repayment of tax obligation.

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THE EMPLOYMENT OF PEOPLE WITH DISABILITIES AS OFFICE EMPLOYEES IN THE PUBLIC ADMINISTRATION IN POLAND

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Abstract. Unemployment among people with disabilities of working age is a problem throughout Europe, including Poland. Here, the national employment rate is only 26.5%, almost twice as low as the European Union average. Private sector is the main workplace for people with disabilities in Poland. In the last decade, hope for improvement in the employment situation of this social group has been discerned in the public sector. Legislation obliging employers to employ people with disabilities and giving people with disabilities priority in public sector employment was expected to mobilize them. The article verifies the compliance of the state of practice with the current law within the framework of the title issue. The article presents basic legal regulations in the field of employment of people with disabilities in the public administration including civil service, both international and national. It then presents the recruitment procedure for civil servant positions in the public administration. The paper concludes with a presentation of the state of the practice of hiring people with disabilities in the public administration, distinguishing between systemic barriers, barriers on the part of public employers and barriers on the part of people with disabilities.

Keywords: disability, accessibility, employment, public administration, civil service, public sector

INTRODUCTION

Employment is an element that significantly improves the quality of life of a person with disabilities [Biel-Ziółek 2017, 30; Pawłowska-Cyprysiak, Konarska, and Żołnierczyk-Zreda 2013, 236; Borowiecki 2016, 82–85]. In this case, taking up employment provides a number of benefits, not only of an economic but also rehabilitation and socialization nature. Work for a person with a disability, in addition to economic benefits allowing to satisfy basic existential needs, also has a therapeutic function. It protects against depression, enhances self-esteem, self-confidence, improves physical fitness and body condition. It also counteracts isolation, marginalization, and social exclusion [Jaglarz 2017, 184–87].

Employment of people with disabilities is increasingly becoming a subject of public debate. Activity in this area has been promoted by the European Union for years. This is reflected in the legislative solutions adopted (e.g. the accession of the EU and the Member States to the United Nations Convention on the Rights of Persons with Disabilities,¹ the adoption of Council Directive 2000/78/EC of

¹ Convention on the Rights of Persons with Disabilities adopted in New York on 13 December,

27 November 2000 establishing a general framework for equal treatment in employment and occupation²) and long-term action plans such as the European Disability Strategy 2010–2020, one of whose priority areas is to increase the participation of people with disabilities in the labour market, where they are currently underrepresented.³ The organization also provides real financial assistance to member states from the European Social Fund to implement projects that promote the social inclusion of people with disabilities [Piechowicz 2016, 22]. Influenced by Poland's EU membership, a number of legal, institutional and financial regulations were adopted to facilitate access to the labour market for people with disabilities [Kryńska 2013, 25–38]. For years, the focus was on encouraging private sector employers to hire people with disabilities. Over time, it was recognized that public employers should be more involved in the process of vocational activation of people with disabilities. Their activity and involvement was to be an incentive and model for private employers in terms of employing people with disabilities and thus contributing to reducing unemployment in this social group [Kubiccki 2019, 38]. The assumption seems to be justified, especially that each year the public administration generates several thousand jobs.

The objective of this article is to analyse the legal status and practice in the field of employing persons with disabilities in the Polish public administration and their impact on the general state of employment in Poland. Against this background, a research problem emerges. The author verifies whether law provides sufficient guarantees for equality and accessibility in employment of persons with disabilities in public administration. If so, does the practice correspond with it? As a result of the formulated research problems, the author puts forward research hypotheses. First, it assumes that the law in the field of employment of persons with disabilities in public administration is appropriate, but practice does not keep up with it. In addition, it assumes that there is a need to develop solutions and make certain transformations that would allow to eliminate the discrepancies between the legal solutions and practice.

1. BASIC LEGAL REGULATIONS REGARDING THE EMPLOYMENT OF PEOPLE WITH DISABILITIES IN THE POLISH PUBLIC ADMINISTRATION

In Poland, the process of employment and provision of work by people with disabilities is regulated by an impressive number of legal regulations. On the one hand, they are intended to encourage and mobilize employers to cooperate with people from this social group. On the other hand, they are meant to stimulate vocational activity of people with disabilities and to ensure their safety and pro-

2006, Journal of Laws of 2012, item 1169.

² Official Journal of the European Communities L 303, 02/12/2000 P. 0016–0022.

³ European disability strategy 2010–2020, <https://ec.europa.eu/social/main.jsp?catId=1484&langId=en> [accessed: 02.01.2021].

tection in the process of employment and provision of work. The legal solutions adopted so far are a component of international and national regulations.

For over a century, the International Labour Organization⁴ has been creating international labour standards that are highly respected in the international community. Conventions and recommendations adopted within the framework of the ILO establish minimum standards of labour rights, the respect of which is a prerequisite for decent work and human respect.⁵ In the process of employment of persons with disabilities, Convention No. 111 concerning Discrimination in Respect of Employment and Occupation adopted in Geneva on 25 June 1958 is primarily important. Poland ratified the document in May 1961. In its Article 2 the ILO calls upon States to establish and pursue national policies in a manner to promote equality of opportunity and treatment in employment and occupation, with a view to eliminating all discrimination in this field.⁶ On the other hand, Convention No. 159 concerning Vocational Rehabilitation and Employment (Disabled Persons), adopted in Geneva on 20 June 1983, imposed an obligation on States Parties to develop and implement a national policy on vocational rehabilitation and employment of persons with disabilities. It also specified principles for such a policy, according to which it should, *inter alia*: ensure appropriate vocational rehabilitation measures accessible to all groups of persons with disabilities; promote the employment of persons with disabilities in the open labour market; respect the equal opportunities of workers with disabilities and other workers; respect the principle of equal opportunities and treatment of male and female workers with disabilities; adopt specific positive measures to ensure effective equal opportunities and treatment of workers with disabilities, which are not regarded as discriminatory towards other workers.⁷

The employment of people with disabilities is also regulated by the United Nations Convention on the Rights of Persons with Disabilities of 13 December 2006. In Article 5, the States Parties to the Convention recognize the equality before the law of all individuals, prohibit any discrimination on the basis of disability, undertake to ensure that persons with disabilities are protected against discrimination on all grounds and take appropriate steps to make rational accommodations.⁸ Furthermore, in Article 27, the signatories declared the recognition of the right of persons with disabilities to work, on an equal basis with others; the

⁴ Hereinafter: ILO.

⁵ International Labour Organization and Ministry of Labour and Social Policy, *Conventions and recommendations of the International Labour Organization 1919–2012*, Ministry of Labour and Social Policy, Warsaw 2014, p. 5–6.

⁶ Journal of Laws of 1961, No. 42, item 218.

⁷ Journal of Laws of 2005, No. 43, item 412, Article 2–4.

⁸ Rational accommodations are necessary changes in the work or work environment notified to the employer due to the special needs of an employee with a disability. They include working conditions and fringe benefits and all activities from the application process to the termination of the employment contract. Office the Government Plenipotentiary for Disabled Persons, <http://www.niepe.inosprawni.gov.pl/art,6,racjonalne-usprawnienia> [accessed: 05.01.2021].

protection and promotion of the exercise of the right to work by, *inter alia*: prohibiting discrimination on the basis of disability in all matters relating to all forms of employment, including conditions of recruitment, admission and employment, continued employment, career promotion and safe and healthy working conditions; protecting the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work; promoting employment opportunities and career development for persons with disabilities in the labour market; assisting persons with disabilities to find, obtain and retain employment and return to employment; promoting the acquisition of work experience by persons with disabilities in the open labour market and the employment of persons with disabilities in the public sector.⁹

The employment of people with disabilities in public administration is regulated primarily by national legislation. The Constitution of the Republic of Poland, dated 2 April 1997, regulates the general principles of respect for the rights and freedoms of all people, including people with disabilities. As in the above-mentioned Conventions, the Constitution also prohibits discrimination. According to Article 32(2) it is prohibited to discriminate against anyone in political, social and economic life, and on any other grounds. Such cause shall not be disability of any kind or degree. The Constitution also guarantees everyone the freedom to choose and pursue an occupation and to choose their place of work. On the other hand, it gives persons enjoying full public rights the right of access to public service on equal terms.¹⁰ An important direct (though very general) reference to people with disabilities is Article 69 of the Constitution. It has the construction of a programmatic provision, which on the one hand defines the tasks of the state and on the other indicates that the implementation of its provisions is determined by other specific legal acts [Hećma 2017, 7]. The wording of the provision indicates that public authorities are obliged by law to provide persons with disabilities with assistance in the adaptation to work.¹¹ The Polish Ombudsman explains that the scope of this task includes, *inter alia*, the creation of training and preparation programs and the introduction of incentives and facilitations in the process of taking up employment.¹²

Employment in clerical positions in the Polish public administration is governed by statutory provisions defining the rights and duties of civil servants, local government employees, and civil service employees. The three laws: the Act of 16 September 1982 on employees of state offices,¹³ the Act of 21 November 2008 on local government employees¹⁴ and the Act of 21 November 2008 on the civil

⁹ Journal of Laws of 2012, item 1169, Article 5 and Article 27.

¹⁰ Journal of Laws of 1997, No. 78, item. 483, Article 32(2), Article 65(1) and Article 60.

¹¹ Journal of Laws of 1997, No. 78, item. 483, Article 69.

¹² See <https://www.rpo.gov.pl/sites/default/files/Art%2069%20Konstytucji%20-%20dzialania%20RPO%202018-2019%20z%20ok%C5%82adk%C4%85.pdf> [accessed: 05.01.2021], p. 2.

¹³ Journal of Laws of 1982, No. 31, item 214 as amended [hereinafter: ESO].

¹⁴ Journal of Laws of 2008, No. 223, item 1458 as amended [hereinafter: LGE].

service¹⁵ include a provision with a similar wording from which it follows that if in an office/unit the employment rate of disabled people, within the meaning of the provisions on professional and social rehabilitation and employment of disabled people, in the month preceding the month in which the employment occurs/publication of a vacancy announcement, is lower than 6%, then a disabled person has priority in employment (if they meet the requirements for a given position or if they are among no more than five best candidates who meet the necessary requirements and most closely meet the additional requirements) (Article 3b ESO; Article 13a LGE; Article 29(1–2) CS).

Poland, following the example of other European countries (e.g. Germany, Greece, France, Slovakia), has introduced a quota system for the employment of people with disabilities in the form of a limited indicator [Koza 2016, 258]. The principles of its operation are set out in the Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Persons with Disabilities. Pursuant to Article 21(1), an employer who employs at least 25 full-time employees is obligated to achieve a minimum of 6% employment of persons with disabilities. If the employer fails to do so, he is obligated to make monthly payments to the State Fund for the Rehabilitation of Persons with Disabilities (in Polish: PFRON). The payments are calculated as the product of 40.65% of the average salary and the number of employees corresponding to the difference between the employment rate of 6% and the actual employment of disabled persons.¹⁶ In simple terms, the payment is the amount multiplied by 0.4065 of the average remuneration and the number of posts that are missing to achieve the required level of employment of persons with disabilities. Financial resources collected by the Fund are allocated to vocational rehabilitation of people with disabilities and to support undertakings in the field of social rehabilitation of people with disabilities. This principle introduces a paradox, as the more employers employ people with disabilities, the less funds flow into the Fund, which consequently worsens its financial resources [ibid.]. It also follows from the Act that the employer is obliged to provide necessary reasonable accommodation to a person with a disability who is in an employment relationship with the employer, participating in the recruitment process or undergoing training, internship, vocational preparation or apprenticeship or graduate training. Failure to do so is considered a violation of the principle of equal treatment in employment.¹⁷

Provisions favouring the employment of people with disabilities in public administration are also contained in the Act of 26 June 1974, the Labour Code. The Code declares unacceptable any direct or indirect discrimination in employment, *inter alia*, on the basis of disability. It also prescribes equal treatment with respect to establishing and terminating an employment relationship, terms and conditions of employment, promotion and access to training to improve professional qualifi-

¹⁵ Journal of Laws of 2008, No. 227, item 1505 as amended [hereinafter: CS].

¹⁶ Journal of Laws of 1997, No. 123, item 776 as amended, Article 21(1).

¹⁷ Ibid., Article 23a(1) and (3).

cations, *inter alia*, without regard to disability. Equal treatment in employment means not discriminating in any way, directly or indirectly, *inter alia*, on the basis of disability. This principle is breached when an employer makes a difference in the situation of an employee, for example, on the grounds of disability, which results in the refusal to establish an employment relationship.¹⁸

The Polish legal system contains many regulations that protect people with disabilities in the process of employment in the public sector. They prescribe equal treatment, prohibit discrimination and grant the right to request reasonable accommodation. Moreover, they oblige employers to cooperate with people with disabilities through the quota system and, under certain conditions, entitle people with disabilities to priority in employment. Have the legal solutions been followed by practice? Have they resulted in increased employment of people with disabilities in the public sector?

2. RECRUITMENT PROCEDURE FOR OFFICIAL POSITIONS IN POLISH PUBLIC ADMINISTRATION

Recruitment for civil servant positions in the public sector is a complex, lengthy process and not always directly regulated by law. It turns out that the aforementioned Act on civil servants does not regulate the recruitment procedure for civil servant positions, nor does it define any general principles. The guidelines in this regard are contained in the internal regulations of state offices. The essential role in the process of regulating recruitment for official positions is assigned to the already cited laws: on civil service and on local government employees [Dubowik 2016, 348–49]. Internal documents (regulations, instructions) and the practice of a given organizational unit of public administration are also important in this process. How the recruitment process for official positions is carried out depends on the type of position. At higher positions recruitment takes place by appointment or nomination (e.g. in the civil service) and selection or appointment (e.g. in local government). On the other hand, in the case of lower positions, recruitment takes place in an open and competitive manner through a competition¹⁹ (e.g. civil servants, local government employees) (Article 6(2) CS; Article 4(1–2)LGE):

The recruitment procedure for clerical positions in the Polish public sector will be presented on the example of procedures for recruiting civil servants and local government employees. This was determined by the fact that these are the most numerous group of official positions that are potentially more accessible than other positions, access to which, due to the recruitment procedure, is very limited. Moreover, as has already been indicated, in these cases recruitment is conducted in an open and competitive manner.

¹⁸ Journal of Laws of 1974, No. 24, item 141 as amended, Article 11³, Article 18^{3a}(1–2), Article 18^{3a}(2), Article 18^{3b}(1).

¹⁹ Judgement of the Supreme Administrative Court of 20 May 2014, ref. no. I OSK 1996/14.

The recruitment procedure for clerical positions involves three main stages. First, through a public job offer, the attention of the largest possible number of candidates is attracted, and then, using various techniques to select people with the highest knowledge, skills and select one who meets the requirements. This process may seem easy only on the surface. In reality, it involves a lot of work, is time-consuming, and requires recruiters to have versatile skills, including a reliable and objective assessment of candidates' knowledge, skills, competencies, strengths and weaknesses, observation, reasoning, communication skills, and openness to others.

According to the law, a civil servant can be a person who is a Polish citizen²⁰ and the holder of full public rights, who has not been sentenced by a final court decision for an intentional crime or an intentional fiscal crime and who has the professional qualifications required to perform work at a given position and has a good reputation (Article 4(1–5) CS). The same conditions must be met by a prospective local government employee. An additional requirement in this case is to have at least a secondary education or secondary vocational education.²¹ If the vacancy concerns a managerial position, the candidate must additionally have at least three years of work experience or at least 3 years of business activity consistent with the requirements for a given position and have a university degree within the meaning of the provisions on science and higher education (Article 6(1) and (3) and (4) LGE).

The head of the unit (in local government administration) or the director general (in the civil service) disseminates information about the vacant clerical position. The announcement is shown in the Public Information Bulletin of the office (in the case of the civil service also in the Public Information Bulletin of the Chancellery of the Prime Minister), at the seat of the office, e.g. on the information board (Article 13(1) LGE; Article 28(1) CS). The content of the announcement should contain the name and address of the organizational unit; indication of the position; requirements for candidates in accordance with the job description, specifying which of them are necessary and which are additional; scope of tasks to be performed at the position; information about the working conditions at the position; list of required documents and indication of the deadline and place for submitting the documents. It is also obligatory to indicate whether in the month preceding the date of publication of the announcement, the employment rate of people with disabilities in the office is at least 6%.²² Candidates should be

²⁰ A foreigner may become a local government employee on the conditions stipulated in Art. 5(1–2) CS; Article 11(2–3) LGE.

²¹ Obtained after graduating from a second-level industry school on the basis of a vocational diploma in the profession taught at the technician level (after passing the vocational examination in a given profession) and obtaining a secondary school-leaving examination certificate after passing the matriculation examination, see Act of 14 December 2016, the Education Law, Journal of Laws of 2017, item 59 as amended, Article 19(2)(5).

²² Judgement of the Voivodship Administrative Court in Lublin of 10 April 2014, ref. no. III SA/Lu 984/13.

given an optimum amount of time to prepare and submit their documents, and the time limit must not be less than 10 days after the announcement is made public. The information that a candidate submits under the regulations is public information (Article 13(3) and (4) LGE; Article 28(3) CS).

A candidate for a given position should carefully verify whether he/she meets all the necessary formal requirements indicated in the offer (such as job seniority, education). If they do not, they must take into account the fact that their candidacy will be rejected at the initial stage of the recruitment process. On the other hand, failure to meet additional, optional requirements is not an obstacle and does not block the possibility of passing to the next stage of recruitment. The candidate must properly prepare the offer documentation. Offices require in the recruitment process to submit, among others: CV, cover letter (hand-signed and dated), statement of no criminal record, copies of documents confirming education, qualifications, skills (certificates, diplomas). The required documentation may include questionnaires specially prepared by the office.²³ A person with a disability should also submit a copy of a document that proves it (Article 13(2b) LGE; Article 28(2b) CS). If all formal requirements are met, the candidate should receive information about passing to the next stage of recruitment. This stage consists in verification of the candidate's knowledge and skills regarding the position he/she applies for. During this stage, the knowledge of legal acts that are the substantive basis for future work is checked first of all. The tools used to verify the candidate's knowledge and skills may include: knowledge tests, practical test, interview. In practice, at least two of the indicated tools are used. First, a knowledge test is conducted, after which the results of all participating candidates are made public and a few persons are invited to the next stage, which is an interview.

The recruitment committee can select a maximum of five people who meet the necessary requirements and to the greatest extent fulfill the additional criteria. The candidates are presented to the head of the unit (in local government administration)/director general (in civil service) in order to employ the most competent person. If the group of the best candidates includes a person with disabilities and in the office, in the month preceding the date of publishing the vacancy announcement, the employment rate of people with disabilities within the meaning of the provisions on professional and social rehabilitation and employment of disabled persons is less than 6%, the priority in employment is given to the person with disabilities. This rule does not apply to employment on managerial official positions in local government administration (Article 13a(1–2) LGE; Article 29a CS). The decision on the results of the recruitment is communicated directly after the interviews or after several days.

²³ Public Information Bulletin, *Advertisement about the recruitment of an employee for a vacant sub-inspector in the Accounting Department*, https://www.bip.bialystok.pl/postepowania/nabor_na_stanowiska_urzednicze/podinspektor-w-departamencie-rachunkowosci-7.html [accessed: 05.01.2021].

Recruitment for a new position in the office ends with preparation of a protocol, which includes, among other things, names and surnames of no more than five best candidates, indicating whether there was a person with disabilities among them and the reason for the selection. The last step is to immediately post information about the result of the recruitment on the information board in the office and publish it in the Public Information Bulletin of the office for the period of at least three months²⁴.

3. PRACTICE IN EMPLOYING PEOPLE WITH DISABILITIES IN THE POLISH PUBLIC ADMINISTRATION

In 2017, 3,116 thousand people held a confirmed disability certificate issued by a competent authority. Among this group, 1,680 thousand people were in the economic working age (in Poland for women it is 18–59 years and for men it is 18–64 years), which constituted 7.1% of all people of working age in the country. Unfortunately, as many as 71.1% of people with disabilities, i.e. 1,194.5 thousand were outside the labour market.²⁵ The activity of public sector employers should contribute to reducing unemployment among this social group. Meanwhile, a report published in mid-2019 by the Supreme Chamber of Control²⁶ on the employment of disabled persons by public administration and state legal persons²⁷ confirms that the employment of people with disabilities in the public sector is unsatisfactory. NIK audited 35 units in seven voivodeships²⁸ in the scope of their activities from 1 January 2016 to 30 June 2018.²⁹

It should be recalled that Polish legislation requires employers who employ at least 25 full-time equivalent employees to attain at least a 6 per cent employment rate of people with disabilities. The results of the NIK report indicate that the average ratio in the audited entities in mid-2018 was only 3.05%, which resulted in a statutory obligation for employers to make payments to PFRON in the total amount of PLN 10.6 million.³⁰

²⁴ Judgement of the Voivodship Administrative Court in Lublin of 10 April 2014, ref. no. III SA/Lu 984/13.

²⁵ Supreme Chamber of Control [hereinafter: NIK], *Employment of disabled people by public administration and state legal entities, Information on the results of the inspection*, Warsaw 2019, p. 6.

²⁶ NIK is the chief and independent body of state control, which evaluates, among other things, the activities of government administration bodies, local government bodies, the activities of other organizational units and business entities (entrepreneurs) to the extent to which they use state or municipal property or funds (Act of 23 December 1994 on the Supreme Chamber of Control, Journal of Laws of 2019, item 489 as amended, Article 1–2).

²⁷ A state legal entity is a legal entity that has an economic connection exclusively with the state and therefore exclusively uses state property or in which the state has an exclusive share.

²⁸ The voivodeship is the largest unit of the territorial division of Poland. On the basis of the Act of 24 July 1998 on the introduction of a three level division of the country's territory, 16 new voivodeships were created. The voivodeship has legal personality, and is headed by a voivodeship marshal.

²⁹ NIK, *Employment of disabled people by public administration*, p. 38.

³⁰ Act of 27 August 1997 on vocational and social rehabilitation and employment of disabled people, Journal of Laws of 1997, No. 123, item 776 as amended.

In searching for an answer to the question of why this state of affairs exists, it is important to consider the barriers that prevent public employers from increasing the employment of people with disabilities. Analysis of sources leads to the conclusion that there are barriers on the part of the system, employers and the interested parties themselves – people with disabilities.

Among the systemic barriers, the need to hold competitions for positions as officials seems to be an important one. It is more difficult for a person with disabilities to get through the above-described procedure and, above all, to fully present their competences during an interview [Żebrowski 2019]. In order to overcome the high level of competition, education, knowledge and skills are needed in the first place. Data confirm that people with disabilities continue to be less educated than non-disabled people, so it is harder for them to compete in the open labour market. In the 2018/2019 academic year, 21,500 students with disabilities studied at Polish universities (out of a total student population of 1,230,300), which was approximately 1.8 percent of all those studying.³¹ Much has been done over the past decade to allow people with disabilities equal access to higher education. Students can apply for an individualized organization³² or an individual course of study,³³ can use exerts and numerous forms of material assistance. Moreover, the function of a representative for the disabled and alternative teaching and examination methods have been introduced. Nevertheless, the decision to undertake or continue specific studies is still limited by architectural, organizational and mental barriers. Not every university is prepared to admit students with special needs. Sometimes there is no free access to lecture halls, lifts, toilets, books or computer equipment. Another problem is the low social awareness of the functioning of people with disabilities. Indifference to their presence, ignoring important functions, oblivious creating of barriers result in exclusion and hinders integration with the academic community [Konarska 2014, 55–56]. This situation has an impact on the number of people with disabilities applying and hired.

The already mentioned provisions imposing a financial penalty for not fulfilling the obligation to employ persons with disabilities and giving priority to their employment also proved to be a barrier. The regulations were supposed to significantly improve the employment of people with disabilities [Kołodziejska 2012]. However, this did not happen, as evidenced by the amount of contributions paid

³¹ See <https://stat.gov.pl/obszary-tematyczne/edukacja/edukacja/szkolnictwo-wyzsze-w-roku-akademickim-20182019-wyniki-wstepne,8,6.html> [accessed: 05.01.2021]; <https://stat.gov.pl/obszary-tematyczne/warunki-zycia/ubostwo-pomoc-spoieczna/osoby-niepelnospprawne-w-2018-roku,24,1.html> [accessed: 05.01.2021].

³² Individual organization of studies is a special mode of organization of classes, which allows for individual determination of the methods of learning a given subject, selection of a training group, setting the dates of classes, in particular early leaving from classes, absence from some classes and individual determination of the date and manner of taking the exam/credits in a given subject.

³³ Individual course of studies consists in the selection of subjects in the scope provided for in a given field of study and in an additional scope, as well as in the student's participation in research, development and implementation works.

by public employers to PFRON. The repression in the form of a financial penalty was meant to mobilise. However, it turned out to be more effective in the case of private employers, due to the fact that they settle all liabilities from their own resources. On the other hand, public employers (especially the state administration) obtain funds to cover their obligations from the state budget and can foresee and plan their expenses also for PFRON. The situation is slightly different in the case of local government administration. Local governments have to think about savings, because, apart from subsidies, they rely on their own revenues. In this situation, perhaps the obligation to set aside such funds each time would be a motivating solution. For the time being, it seems that the statutory penalty for not achieving the 6 per cent employment ratio for people with disabilities is not always a penalty in reality, and employers prefer to make a payment to the PFRON instead of increasing their commitment to recruit an employee with disabilities [Radwan 2018; Stanisławski 2007].

A number of barriers to obtaining employment for people with disabilities lie in the behavior of public employers themselves. These are not eager to take additional measures to ensure that people with disabilities have the right to work and gain work experience on an equal basis with non-disabled persons. The NIK report shows that as many as 27 out of 35 audited units have not taken such measures. Employers did not establish cooperation with NGOs working for the benefit of people with disabilities. Neither have they taken steps to disseminate information about job vacancies on websites intended mainly for persons with disabilities. They also did not cooperate with universities to popularize information about employment opportunities or traineeships for students with disabilities. In the opinion of the NIK, inactivity with regard to the above initiatives has contributed to the low interest of people with disabilities in job offers in public administration or in state legal entities and has negatively affected the elimination of barriers on the part of people with disabilities. As a result, from the beginning of 2016 to mid-2018, in the audited units, only in 148 out of 1335 recruitments for official positions, 202 persons with disabilities applied, out of which only 33 were employed.³⁴

The information about violations of the Civil Service and Local Government Employees Acts by public employers is also deeply disturbing. The NIK reports that violation of provisions on priority in employment of persons with disabilities was detected in 3 units.³⁵ This shows that despite the legal obligation, employers have the courage to reject the candidacy of a person with disabilities. Such behaviour can be explained either by arrogance or fear, due to a lack of knowledge about particular disabilities and the stereotyped view, unchanged for years, that a person with a disability would be a poor employee. Polish employers are generally positive about employing people with disabilities but do not perceive them as potential employees in the organizations they manage. They are concerned,

³⁴ NIK, *Employment of disabled people by public administration*, p. 12.

³⁵ *Ibid.*, p. 12–13.

among other things, about the lower productivity of such an employee, frequent absence from work due to sick leave, communication or additional costs of adapting the building and the workplace to the needs of a person with disabilities [Kwiatkowska–Citucha, Załuska, and Grzeškowiak 2020, 19].

The construction of vacancy announcements for official positions is also a problem. Offers are written in incomprehensible language, are not sufficiently detailed and contain excessive requirements. The NIK notes that employers have included unreliable information in their job advertisements, which may be the reason for the low number of applications from people with disabilities. This practice indicates an unreliable performance of professional duties by those responsible for recruiting new staff and undermines trust in public institutions. In the case of state legal entities, in 10 out of 14 units, the lack of any rules and procedures for employment, including for people with disabilities, was diagnosed. Shortcomings have also been identified in the form of non-publication of recruitment information. In this case, it is difficult to speak of the transparency of the recruitment process or the assurance of equal opportunities for people with disabilities in obtaining employment.³⁶

The most striking data, however, concerns the level of accessibility of the buildings in which the audited units are located. The NIK checked 79 buildings, of which as many as 58 had barriers restricting or even preventing their use by persons with disabilities. Unfortunately, there are still offices and central administration units in Poland without any adaptations for people with disabilities. This state of affairs was found by the NIK in as many as 4 central offices.³⁷

The low rate of employment of people with disabilities in the public sector is also influenced by barriers on the part of this social group. It appears that the vast majority of people with disabilities do not seek employment. This is mainly due to low motivation to take up a job. Its sources are identified as health problems, low salaries, lack of jobs, insufficient qualifications and the attitudes of employers or colleagues. Thinking about taking up a job is also blocked by a certificate of inability to work, which does not exclude the possibility of employment. It is up to the doctor of occupational medicine to decide whether a person is fit to work. If there are no contraindications, there is no reason to resign from professional activity.³⁸ Low self-esteem and a lack of confidence in one's own abilities and skills are also not conducive to employment, creating a fear of competing with non-disabled people. This attitude causes people with disabilities to give up and not to seek or respond to job offers. It should be stressed that this attitude does not come from "out of the blue" either. On numerous Internet forums, people with disabilities say that there is no point in applying for a government job because a non-disabled person will eventually get one anyway. In addition, the way

³⁶ Ibid., p. 13.

³⁷ Ibid., p. 12–13.

³⁸ State Fund for the Rehabilitation of Disabled People, *Research on the needs of people with disabilities – Final Report*, Warsaw 2017, p. 13.

in which information about not hiring a person with a disability is communicated is often tactless and undignified. Such experiences have a destructive effect on the motivation to seek and obtain employment. Another important factor that blocks the professional activity of people with disabilities is their lack of knowledge about the rules for withholding social benefits if they become employed. The myth of the “disability trap,” that a person loses their benefit if they start work, is an unfounded and effective deterrent to people with disabilities trying to find employment. However, people with disabilities can receive social disability benefits and work and earn up to a legally defined income limit.³⁹

CONCLUSION

Practice shows that the employment status of people with disabilities in the public sector is not satisfactory. The legal provisions on the quota employment system and the right of priority in the employment of people with disabilities in the public sector adopted a decade ago have not changed much and require rethinking. In order to improve the employment of people with disabilities in the public sector, the NIK recommends increasing the cooperation of public employers with labour offices, non-governmental organizations related to the environment of people with disabilities and universities in the area of informing about job offers, internships and apprenticeships. The necessary step to improve the situation is the elimination of architectural barriers in potential employment places, which at the very beginning are the reason why a person with a disability resigns from applying for a job. Public employers should also ensure that the competition procedure is organized and executed in a lawful and reliable manner. Changes must also be made in the attitudes of managers and those conducting competitions for public office positions. Their activities should go beyond the implementation of the regulations (for example, posting competition announcements on disability-related websites). It is also necessary to eliminate mental barriers and stop giving in to stereotypes among employers. Specialised administration (Government Plenipotentiary for Disabled Persons' Affairs), labour market institutions, NGOs working for the benefit of the disabled community and the world of science should play a special role in breaking down and “disenchanted” the negative image of an employee with disabilities.

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³⁹ NIK, *Employment of disabled people by public administration*, p. 12–13.

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RECENTRALIZATION IN THE LOCAL GOVERNMENT – A CASE-BASED ANALYSIS OF CRITERIA

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Abstract. The subject of this article is recentralisation in local government. The aim of the study is to formulate and define the scope of the term “recentralization,” as well as an attempt to identify its criteria and effects concerning the functioning of the local government and meeting the needs of its residents. The starting point for discussion is the definition of the concept of recentralisation. The theoretical analysis was supported by the interpretation of the provisions that transfer competences from the decentralised structure to the central government administration bodies and justifications for the proposed changes. The effect of the conducted research is conclusions concerning the evaluation of the practice of recentralising local government’s tasks.

Keywords: recentralization criteria, self-government independence

INTRODUCTION

Pursuant to the Constitution of the Republic of Poland of 4 April 1997,¹ the territorial division of the Republic of Poland ensures the decentralization of public power (Article 15 of the Constitution). The principle of decentralization guarantees the right of the local government to participate in the exercise of public power. By statute, the local government discharges a substantial part of public duties in its own name and under its own responsibility (Article 16(2) of the Constitution). The constitution or other statutes do not reserve the discharge of such duties for other public authority bodies (Article 163 of the Constitution). Therefore, the constitution performs an initial diversification of public duties, which is subsequently specified in the ordinary legislation. The fact that the principle of decentralization is anchored in the constitution does not suffice as a protection of the local government against being deprived of competences associated with the performance of own assignments. If statutory regulations are passed which transfer the performance of and responsibility for assignments which have thus far been delivered by the local government to the government administration, then the local government is deprived of their performance. The doctrine emphasizes that recentralization is not a novel phenomenon. Apprehension connected with the phenomenon emerged directly after the restitution of the local government [Kulesza 1991, 86–90; Kulesza 1993, 42–47; Korczak 2018, 159–78]. Since 2015, the scope of recentralization has considerably broadened and the rate of

¹ Journal of Laws No. 78, item 483 as amended [hereinafter: Constitution].

changes noticeably accelerated. In light of the foregoing, based on specific cases, the present article will analyze recentralization in relation to the local government. The article will strive to identify the criteria of recentralization, determine the scope of the process, its impact in relation to the operation of the local government, and the capacity to satisfy the needs of citizens.

1. RECENTRALIZATION – THE MEANING OF THE TERM

Recentralization denotes the acquisition of duties which were previously performed by other entities, departments, or bodies operating within a decentralized structure, by supreme and central state bodies. The recentralization process encompasses the transfer of duties and competences from a body at a lower level to a body at a higher level. Alternatively, the performance of such duties may be retained in the decentralized structure while being subordinated to the higher level body to such an extent that the decentralized body loses self-governance granting the independence of the performance. As a consequence, recentralization constitutes the reverse of decentralization. The cases discussed further seem to acknowledge such constataions.

Recentralization constitutes a trend associated with the criticism of the local government. The criticism is based on a premise of a crisis in the local government institution. It is believed that the crisis is connected with a general dysfunction of the local government, pathologies within the local government administration, clientelism, and declining interest in elections. Legal institutions and organizational structures of the local government are deemed out-of-date and in need of a radical change. Such an argument serves as a basis for the transfer of duties and competences to the government administration, and as a manifestation of the state's modernization. Such arguments are offered in spite of the fact that public acceptance of the local government is much stronger than that of the government administration [Lipowicz 2019, 14–15]. Such a shift of duties and competences is incremental, location-based, and built upon selective changes in the substantive law. Depopulation, deindustrialization, nomadization and deinstitutionalization are offered as a justification for the processes [ibid., 26–27]. However, such changes violate the stability and continuity of public power [Szlachetko 2018, 54]. In addition, the lack of financial independence results in the local government's helplessness as regards the limited capacity to satisfy the needs of local government community members. Despite the fact that the principle of decentralization is associated with the transfer of the performance of public duties to decentralized local government bodies acting under the principle of self-governance, in practice, the scope of self-governance is limited by the legislator. As a consequence, the fact that the principle of decentralization does not determine the extent to which the legislator may regulate the performance of duties assigned to the local government seems potentially dangerous to the local government [Gromek 2020, 27]. It creates a loophole which enables duties and com-

petences to be shifted between the local government and government administration.

2. RECENTRALIZATION – CRITERIA

The distribution of duties and competences among the government and local government administration was conducted under the statutes of constitutional law and substantive administrative law. The legislator applied criteria which served as a basis for the categorization of duties. In addition, the doctrine also attempts to establish criteria for the distribution [Wiktorowska 2002, 120]. Due to the fact that recentralization constitutes a reverse of decentralization, further interpretation of the research field requires the criteria of decentralization to be determined. In addition, the criteria ought to be analyzed in terms of the capacity of the recentralization of duties to be decoded.

The following constitute the fundamental criteria of decentralization: a) criterion of the type of duties and means of their performance; b) criterion of territory; c) criterion of the material part of public duties; d) criterion of local interest; e) criterion of the satisfaction of local needs; f) criterion of finances.

As far as the first criterion is concerned, it may be argued that duties which require a uniform approach throughout the state ought to be performed by the centralized administration. The group encompasses duties such as those which pertain to regional or local affairs, but whose state interest is significant to such an extent that they are performed by state authorities or under strict state guidelines [Leidinger 1992, 54]. In addition, government administration ought to manage affairs which may not be adequately managed by the local government due to technical reasons [Szreniawski 1991, 67]. As regards the means for the performance of the duties: “If a specific duty or a competence is to be executed throughout the state in accordance with identical laws, standards, and in a formalized procedure, and additionally, by using its powers, the state confirms the correctness of and gives credibility to the action, then such a duty falls within the scope of the government administration. If both the above elements are absent, or at least the latter of the two is (authorization of the action by the state), then such a duty has or ought to (not all statutes under substantive law stipulate it) fall under the scope of the local government, which specifically pertains to the duties of servicing administration” [Stec 1999, 67]. The criterion of the type of duties and means of their performance executes the principle of subsidiarity. It is also associated with the criterion of satisfying local needs. If the duties are connected with satisfying the needs of local government community members, they ought to be performed by decentralized structures. In theory, recentralization may occur when, on the national level, local government units of a given level fail to perform assignments and fail to meet their statutory duties. However, under such circumstances, the action would be taken under the conditions of a (political, economic,

social) crisis. In a democratic state under the rule of law, such a scenario ought never to emerge.

Pursuant to Article 15(2) of the Constitution, the fundamental administrative organization of the state which considers social, economic and cultural ties, and which ensures local government units' capacity to perform their public duties, is determined by the Act of 24 July 1998 on the Fundamental Three-Tier Territorial Organization of the State.² Pursuant to Article 4(3) of the Act of 8 March 1990 on Municipal Self-Government,³ the delineation and the change of a municipality's borders are made in a mode guaranteeing the municipality's territory is as uniform as possible with respect to settlement and spatial systems, which include social, economic and cultural ties, and which ensure the capacity for the performance of public duties. Article 3(3) of the Act of 5 June 1998 on County Self-Government⁴ stipulates identical premises pertaining to the delineation of a county's borders. On the other hand, the Act on Voivodeship Self-Government of 5 June 1998⁵ has no direct counterpart of Article 4(3) A.M.S.G. or Article 3(3) A.C.S.G. However, Article 5a of the Act on the Fundamental Three-Tier Territorial Organization of the State stipulates that when a change is made to the borders of a voivodeship, the change ought to seek improvement in the performance of the voivodeship-related public duties as well as to maintain social, economic and cultural ties in the region. In connection with the territorial criterion, decentralized duties are performed within a limited territory. This is to translate into the effectiveness of their performance associated with the satisfaction of the citizens' needs and the level of accessibility. In view of this criterion, in the case of recentralization, the duty would need to lose the territorial limit and change the character into a duty performed universally within the whole state. This entails the adoption of the primacy of the nationwide interest.

Pursuant to the Constitution, by statute, the local government shall participate in the exercise of public power. The local government is empowered to discharge a substantial part of public duties. Such provisions denote that the local government community in a municipality, county and voivodeship ought to actively participate in the exercise of public power. Under the constitution, any restriction concerning public duties which would violate the discharge of the local government's substantial part of public duties is impossible. The recentralization and violation of self-governance would constitute, under the constitution, an inadmissible modification of the local government system [Lipowicz 2011, 185]. However, the term "substantial part" constitutes a vague concept. As a consequence, it is difficult to specify its exact scope and proportions. This may result in the emergence of abusive behavior if the government administration takes over certain duties. The execution of public duties falls under the responsibility of the

² Journal of Laws of 1998, No. 96, item 603 as amended.

³ Journal of Laws of 2020, item 713 as amended [hereinafter: A.M.S.G.].

⁴ Journal of Laws of 2020, item 920 [hereinafter A.C.S.G.].

⁵ Journal of Laws of 2020, item 920 as amended [hereinafter: A.V.S.G.].

local government administration. Therefore, citizens may demand such duties be exercised. However, it ought to be emphasized that public administration determines neither its duties nor has it any influence as to the scope of such duties. They emerge directly from legal regulations set forth by the legislator.

The specific character of the local government consists in the state's acceptance of the existence of local community interest, thus the existence of a bipolar model of the operation of public power. Such a constation denotes that, in certain cases, it is the local community which independently decides upon the management of certain public affairs by its specific bodies. In other cases, the affairs are managed by the government administration on behalf of the public in public interest [Kulesza 1986, 19]. The operation of local government units on behalf of the local or regional self-government community constitutes a consequence of the isolation of the local government from the state's structures. In light of the foregoing, public interest may be understood in broad terms as a national interest, and in narrow terms, as the interest of the local community (local interest) [Gardjan-Kawa 2007, 88]. When determining the competences of local government units, the legislator "must carefully balance national and local interests and distribute the competences of individual levels of the local government and government administration."⁶ When considering such a criterion as a criterion for recentralization, a change in the character of the interest associated with a specific duty would need to occur. The character would need to change from local to the one critical for the protection of national interests. If such a change emerged, the duty would be adopted by government structures.

When identifying public duties and distributing them, the legislator ought to specify the purpose of the execution of such duties. Local government statutes specify that own assignments ought to be executed in order to ensure a specific standard of existence of citizens. When designating local government duties, the legislator needed to identify the type of needs, subordinate them to a specific level of territorial organization and assess whether and to what extent the duty satisfies the needs. In connection with the satisfaction of needs, recentralization ought to include an assessment of an objective incapability of the satisfaction of needs by a specific territorial unit viewed at the national level.

The financial limitations of decentralization pertain to sufficient funds being granted for the execution of duties and competences. As a consequence, local government units are allocated a share of public income corresponding to their duties. The term "are allocated" denotes that public authorities are obliged to allocate a specific share of public income for the disposal of local government units [Banaszak 2009, 754]. Financial management in the local government is based upon own income generated by local government units. Pursuant to the provisions of specific statutes, the units set taxes and local fees to generate such income. In addition, local government units benefit from general and targeted subsidies from

⁶ Ruling of the Constitutional Tribunal of 12 March 2007, ref. no. K 54/05, OTK-A 2007/3, item 25.

the state budget. The criterion for the determination of financial self-governance of local government units includes not only the amount of funds at the units' disposal, but also the proportion of individual income to the total income of the unit, especially the ratio of own income to other types of income [Szołno–Koguc 2004, 212]. This is due to the fact that financial instruments may be employed by the state as a leverage in order to bring pressure on the operation of local government units so that the operation of a local government unit is in line with national priorities, state interest and state policy. Such an approach is to stimulate behavior the state deems appropriate [Wiktorowska 2002, 181]. Changes in the distribution of duties of local government units ought to entail changes in the distribution of public income. Otherwise, the solution would become a façade subordinating the execution of duties and competences to an arbitrary whim of the state or a necessity for the tentative acquisition of funds. Therefore, a prudent legislator ought to analyze the sources of own income of local government units of a certain level because the decentralization of a duty will entail the necessity of its execution and financing.

Meanwhile, changes detrimental to the finances of local governments can be observed, e.g. reduction of subsidies and grants, deindustrialization which results in the disappearance of taxpaying entities and the necessity of revitalizing certain sites [Lipowicz 2019, 225–26]. Such conditions encumber local government units with costs of reforms e.g. of the education system. Local government units have been encumbered with the cost of operation of hospitals. However, their main funding originates from the National Health Fund. In addition, the funding does not suffice to cover the costs of day-to-day operation of hospitals. This results in progressing debt of such institutions and petitions for further funds being submitted to the government administration [Sześciłło 2018, 7].

The aforesaid criteria aim to identify premises for the distribution of duties, all the more that the enumeration and indication which duties are to be executed by the government administration and which by the local government were excluded. The criteria relate to the decentralization of duties and were analyzed in terms of their applicability to decode premises for recentralization. In light of the foregoing, recentralization constitutes a reverse of decentralization. However, the criteria for recentralization cannot be developed as a direct opposite of the criteria for decentralization. Recentralization requires such criteria to be analyzed. The analysis ought to encompass criteria of a more specific character and associated with the type of duty to be recentralized as well as the outcomes of such a transition. As a consequence, decentralization criteria ought to be regarded as a type of guidelines to formulate recentralization criteria.

3. RECENTRALIZATION OF DUTIES – CASE STUDY

Changes discussed below constitute selected examples from various fields of the local government's operation. The examples seem to confirm the tendency

for the recentralization of local government's duties and a stronger impact exerted by the government administration upon duties which have thus far been executed territorially by decentralized structures. The impact may adopt various forms: from the consolidation of the role of government administration units in relation to local government units, to the adoption of duties and competences of the local government by the government administration. The analysis includes statements of reasons for statutes in order to determine criteria the legislator applied to justify recentralization.

The first group of changes pertains to the duties of the local government in relation to the education system. Gradual changes in the operation of the education system resulted in the consolidation of the role of the Education Superintendent Office and pertained to e.g. a change in the requirement of an opinion into the requirement of a positive opinion in the case of a liquidation of a school operated by a local government unit,⁷ introduction of a requirement of a positive opinion in the case of an establishment of a school or similar public institution by a legal person other than a local government unit.⁸ On 1 September 2019, an amendment was introduced pertaining to the network of public pre-schools operated by a municipality established upon a positive opinion of the Education Superintendent Office.⁹ Prior to the change, the competence belonged exclusively to the municipal council. The statement of reasons for the amendment concerning the establishment of public pre-schools argues that "recent years witnessed changes in the network of schools operated by local government units. The changes aimed to replace such schools with schools operated by other entities. Such actions were primarily motivated by economic factors and were designed to limit expenditures of the local government related to the operation of schools and similar public institutions (including the circumvention of the Teacher's Charter concerning e.g. guaranteed salaries). The proposition of the amendment [...] aimed to restore the supervision of the Education Superintendent Office over local governments units' actions concerning the prudent development of the network of public schools and pre-schools." In relation to schools or similar public institutions established by a legal person other than a local government unit, the change requires a positive opinion of the Education Superintendent Office. The amendment aims to consolidate the role of the office in developing the network of schools and to prevent "an attempt to replace a school operated by a local government unit by a public school operated by another entity, i.e. a school which, in principle, ought to supplement the network." In the case of a liquidation of a school, the statement of reasons laconically stipulates that the amendment "shall preclude the liquidation or con-

⁷ Compare Article 59(2) of the Act of 7 September 1991 on the Education System, Journal of Laws of 2004, No. 256, item 2572 and Article 89(3) of the Law on Education Act, Journal of Laws of 2020, item 910.

⁸ Compare Article 58(3) of the Act on the Education System and Article 88(4) of the Law on Education Act.

⁹ Article 32(4) of the Law on Education Act of 14 December 2016, Journal of Laws of 2020, item 910.

version of a school or a similar public institution operated by a local government unit without a positive opinion of the Education Superintendent Office.”¹⁰ Article 1(9) of the Act of 29 December 2015 on amending the Education System Act and Certain Other Acts¹¹ restored the obligation for the development of an action plan of public teacher-in-service training institutions to be reviewed by the Education Superintendent Office. The statement of reasons stipulates that the amendment is to “enhance the effectiveness of the influence of the Education Superintendent Office as a teaching supervisory body [...]”¹² The legislator argues that such changes shall protect students’ interests in terms of fulfilling the schooling duty and a one-year pre-school training. However, no details are offered as to the scale in which the schools operated by local government units are replaced by those operated by other entities. The justification for the amendment of regulations solely based upon the argument of restoring the Superintendent’s supervision or enhancement of the Superintendent’s influence as a supervisory body is insufficient. However, it ought to be noted that the operation of the local government is subject to verification by statutory supervisory bodies. The bodies are bound to take action in case a breach of law is detected.

Another group of changes pertained to the voivodeship funds for environmental protection and water management. Such institutions operate as local government legal persons managing finances on a self-governing basis. They finance expenses in connection with the execution of duties set forth in the act as well as operational costs from own resources and received income.¹³ The Act of 7 April 2017 on amending the Environmental Protection Law¹⁴ changed the composition of the funds’ members of supervisory boards. With the exception of the vice-chairman of the board, who is appointed by the regional assembly, the remaining members are appointed by the government administration. Prior to the change, the members of the supervisory boards of the voivodeship funds were appointed and removed by regional assemblies. Under present legal conditions, they are appointed and removed by the minister in charge of climate-related affairs (Article 400f E.P.L.). A change occurred concerning the composition of the funds’ management boards, specifically the reduction of the number of members whose appointment and removal is influenced by supervisory boards, whose composition, in turn, is subordinated to the government administration (Article 400j E.P.L.). Such a reduction was justified by the argument of reducing the cost of operation, simplification and acceleration of member appointment procedures, and consequently improvement of the bodies’ operational efficiency. The proce-

¹⁰ Statement of reasons for the Bill on amending the Act on the Education System and Certain Other Acts, form no. 106 Parliamentary Bill on amending the Act on the Education System and Certain Other Act, <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=106> [accessed: 24.03.2021].

¹¹ Journal of Laws of 2016, item 35.

¹² See <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=106> [accessed: 24.03.2021]

¹³ Article 400(2) and Article 400q of the Environmental Protection Law of 27 April 2001, Journal of Laws of 2020, item 1219.

¹⁴ Journal of Laws of 2017, item 898 [hereinafter: E.P.L.].

ture of the appointment of a 7-member supervisory board of funds was defined as inconsistent, complex, and extended due to the fact that the legislator granted the right to appoint and remove the members of the funds' supervisory boards to regional assemblies and simultaneously to the minister competent for environmental affairs.¹⁵ Such a change resulted in a bizarre situation whereby voivodeship funds for environmental protection and water management, operating as local government legal entities, are *de facto* managed by a government administration body. The criterion justifying recentralization is the capacity to reduce the cost of operation of the funds, and simplification and acceleration of member appointment procedures. However, an uncertainty arises concerning whether such a criterion is sufficient to justify recentralization. Based on the conclusions pertaining to recentralization discussed previously, it seems that it is not. The procedure of member appointment or the number of the body's members may have been changed without the need for the recentralization of duties. The legislator does not raise any other reservations concerning the operation of the funds.

A change also occurred concerning the determination of tariffs for collective water supply and collective wastewater treatment. Prior to the change, the matter was under the competence of the municipal council. The Act of 27 October 2017 on amending the Act on Collective Water Supply and Wastewater Discharge and Certain Other Acts¹⁶ deprived the municipality of the competence in favor of the regulating body, i.e. the director of the regional water management board of the National Water Holding Polish Waters.¹⁷ The director and deputy directors are appointed by the president of the holding,¹⁸ who, in turn, is appointed and removed by the minister competent for water management.¹⁹ The legislator raised the argument that the municipality clusters the entirety of competences concerning water supply and wastewater discharge, thus insufficiently protects end users (predominantly consumers). The legislator reasons that the change deprives local governments merely of supervisory powers associated with the establishment of tariffs. The legislator also emphasizes that under current legislation, local government units do not have unrestricted power in terms of the establishment of tariffs. However, the legislator believes that these powers insufficiently protect the interests of end users. As a consequence, the National Water Holding Polish Waters shall perform the function of a regulating body which acts *ex ante*. The approval of tariffs shall be the duty of the body.²⁰ The protection of consumers and end users has become a criterion for the change. However, the legislator argues in favor of the change in a vague and contradictory manner. On the one hand, the legislator indicates the need for a change. On the other hand, legal solutions ena-

¹⁵ See <http://www.sejm.gov.pl/Sejm8.nsf/druk.druk.xsp?nr=1127> [accessed: 24.03.2021].

¹⁶ Journal of Laws of 2017, item 2180.

¹⁷ Article 27a(1) of the Act of 7 June 2001 on Collective Water Supply and Wastewater Discharge and Certain Other Acts, Journal of Laws of 2017, item 328 as amended.

¹⁸ Article 245(1) of the Water Law of 20 July 2017, Journal of Laws of 2020, item 310 as amended.

¹⁹ Article 242(1)(2) of the Water Law.

²⁰ See <http://www.sejm.gov.pl/Sejm8.nsf/druk.druk.xsp?nr=1905> [accessed: 24.03.2021].

bling the prevention of unwarranted increase of tariffs are offered in the statement of reasons.

Pursuant to the Act of 23 January 2020 on amending the Act on the State Sanitary Inspectorate and Certain Other Acts²¹ the staroste (an official in charge of a county) was deprived of the competence to appoint and remove the state county sanitary inspector and deputy inspector upon the consent of the state voivodeship sanitary inspector. Under the new legislation, the inspectors are appointed and removed by the state voivodeship sanitary inspector upon the opinion of the voivode (an official in charge of the combined administration in a voivodeship) relevant in relation to the seat of the state county sanitary inspectorate. The state voivodeship sanitary inspector is appointed and removed by the Chief Sanitary Inspector upon the consent of the voivode relevant in relation to the seat of the applicable state voivodeship sanitary inspectorate. The amendment also established the state county sanitary inspector as a combined government administration body in the voivodeship. The legislator gives reason for the amendment by arguing that “a stronger subordination of State Sanitary Inspectorate bodies ensures effective operation in the public health domain in a uniform and coordinated manner, especially as regards crisis situations requiring rapid and coordinated actions. The amendment will contribute to the introduction of cohesion of actions among State Sanitary Inspectorate bodies as regards the standards of sanitary and epidemiological supervision. The amendment also satisfies the need for hierarchic management which will ensure an effective execution of uniform governmental strategy and policy as regards the protection of public health. It will also improve the operation of all State Sanitary Inspectorate bodies coordinated by the Chief Sanitary Inspector. By doing so, the operational performance will be improved.”²² The efficiency of operation constitutes the criterion for recentralization. The argument concerning a swift response to crises which require rapid and coordinated actions seems sensible. However, the introduction of a hierarchical management in relation to day-to-day operation seems dubious. The pursuit of a uniform governmental strategy and policy in the field of public health protection, as well as hierarchical management, are considered a priority by the legislator. No information as to the specific bodies in need of operational improvement was supplied. In addition, the legislator offered no information pertaining to errors in management or data indicating the extent to which previous organizational structures failed to perform.

The Act of 22 June 2016 on amending the Act on Agricultural Advisory Units²³ transformed voivodeship agricultural advisory services centers operating as local government voivodeship legal persons into voivodeship agricultural advisory services centers operating as state organizational units with legal perso-

²¹ Journal of Laws of 2020, item 322, 374.

²² See <https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=46> [accessed: 24.03.2021].

²³ Journal of Laws of 2016, item 1176.

nality.²⁴ Such a change also pertained to land under the perpetual usufruct of the centers. The land is the property of the voivodeship. However, voivodeship agricultural advisory centers operating as state organizational units are entitled to perpetual usufruct. The centers also retained their property which since the beginning has not been used for the performance of duties associated with agricultural advisory services. The statement of reasons for the act stipulates that “the amendment aims to transfer the subordination and supervision over voivodeship agricultural advisory services centers from the voivodeship board to the minister competent for rural development. The primary premise for the transfer of the subordination of the centers is the enhancement of competitiveness and development of agriculture and rural areas by the improvement of the execution of duties associated with the delivery of agricultural advisory services. The change was to ensure a uniform character of the centers’ operation in individual voivodeships and raise the expenditure efficiency of targeted state subsidies, which were to be linked with an annual action plan. In addition, the change of the subordination was to enable the operation of the centers to be monitored and controlled [...]”²⁵ The statement of reasons for the amendment indicates that the legislator deemed the enhancement of competitiveness and development of agriculture and rural areas by the improvement of the execution of duties associated with the provision of agricultural advisory services as the criterion for recentralization. The process is to ensure a uniform character of the centers’ operation in individual voivodeships. However, the uniform character of operation ought to stem from statutory regulations and does not require the change of subordination. The legislator raises the lack of uniformity in the operation of voivodeship agricultural advisory service centers in terms of drafting action plans and reporting activities as a further criterion for recentralization. However, the option of specifying the existing regulations in this respect was disregarded.

CONCLUSIONS

Pursuant to the constitutional principle of decentralization, local government units execute own assignments based on the principle of self-governance. The duties do not stand in opposition to the duties of the state. Such duties are those of the state as a whole but they are executed by decentralized structures. However, despite the fact that the government and local government administration are independent from each other, their coexistence assumes the need for collaboration and coordination of actions. Due to the fact that the legislator’s decisions concerning the division of duties manifest a degree of arbitrariness, it is vital that any shifts of duties are clearly and accordingly substantiated. The aforesaid criteria of decentralization ought to be considered as a type of guidelines for the formulation of recentralization criteria. Recentralization criteria cannot be automa-

²⁴ Article 2 of the Act on amending the Act on Agricultural Advisory Units.

²⁵ See <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=572> [accessed: 24.03.2021].

tically designed as a reverse of decentralization criteria. To repeat the constation made previously, recentralization requires the criteria to be analyzed along with the analysis of additional criteria of a more specific character which are connected with the type of duty to be taken over by the government administration as well as the evaluation of consequences such a change may entail. In addition, such an interpretation should not be made exclusively in relation to a single criterion but ought to include all of these because the criteria supplement one another. Moreover, the legislator must assess whether recentralization does not violate principles the local government system is based upon. An objective assessment of a specific situation ought to constitute the departing point. The assessment ought to encompass consultations and should not raise doubts as to the necessity of implementation of such changes. It ought to be noted that recentralization ought to constitute an ultimate solution, all the more so as it will affect all local government units of a given level in a country.

The statements of reasons for the amendments indicate that the legislator based the decisions upon the criterion of the protection of students' interests in relation to the fulfilment of the schooling duty and a one-year pre-school training, criterion of effectiveness, criterion of the enhancement of competitiveness and development of agriculture and rural areas by the improvement of the execution of duties associated with agricultural advisory services. Additional arguments were used which are connected with the consolidation of the role of a government administration's body, and improvement of supervision over the actions of a local government unit. The argumentation supporting such changes seems dubious as well. The application of vague references in the statements of reasons for amendments recentralizing duties and competences, e.g. "effectiveness," "uniform character of operation," "competitiveness," without specifying what the "effectiveness" or "uniform character" denote is insufficient. The statements of reasons also miss data, lists and calculations referring to the previous actions, which would justify the changes. They also disregard or merely touch upon the social aspect of recentralization, but highlight the development of hierarchical structures, subordination and procedures. The "consolidation of the role" of a government administration body in relation to the local government is also a faulty argument. The two structures ought to cooperate instead of compete with each other, or even worse subordinate one to the other. This stands in direct opposition to constitutional principles determining the operation of the state. Antagonizing the structures which, in principle, ought to supplement each other seems a dangerous approach. The legislator does not take into consideration changes of regulations in terms of an objective improvement of procedures or the operation of the local government but creates solutions restricting their self-governance. The legislator enlarges the group of government administration entities equipped with legal means which may bind local government units. Meanwhile, specific instruments are vested in supervisory bodies competent to take actions specified in legal regulations.

In conclusion, based on the case study, it ought to be noted that the recentralization of the aforesaid duties has not been sufficiently substantiated, and manifests political changes instead of changes mandated by objective and valid premises or criteria. It also diminishes the position of local government units. Due to the fact that the operation of the local government is based on several founding principles, recentralization cannot occur in isolation from the principles. The legislator ought to assess the outcome of such regulations in this aspect as well. The recentralization cases discussed in the article violate the principle of the local government's involvement in the exercise of public power, the principle of decentralization, subsidiarity, and the principle of self-governance of the local government. Despite the constitutionalization of the principle of decentralization, it does not offer the local government sufficient protection. As the legislative practice proves, the legislator may deprive the bodies of own assignments by means of an ordinary act. In addition, due to the fact that the local government in Poland does not act as an autonomous body, it does not dispose of legal means which would actually consolidate its legal status. Therefore, in practice, the self-governance of the local government is determined by the political will of the parliamentary majority.

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THE SUBJECT MATTER OF RESPECTING THE TIME LIMIT TO FILE AN APPEAL BY A PARTY NOT RECOGNIZED BY THE AUTHORITY AS A PARTY IN ADMINISTRATIVE PROCEEDINGS

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Abstract. On 1 June 2017, following an amendment to the Code of Administrative Procedure, the possibility to file a statement on waiving the right to appeal was introduced. In consequence – as of the date of serving the public administration authority with the statement of waiver by the last of the parties to the proceedings – the decision becomes final and legally binding. However, it is assumed by legal scholars and commentators and in the established line of judicial decisions that the right to file an appeal against a decision issued in the course of administrative proceedings extends not only to the parties that participated in the proceedings and were served the decision, but also to an entity which was not considered a party by the first instance authority, provided that the entity meets the statutory criterion of obtaining the status of a party to proceedings. The time limit for filing an appeal by the non-participating entity runs from the date of serving or communicating orally the decision to the parties to the proceedings, and in case the decision was served on different dates to more than one party – from the last date of serving the decision. With regard to the legal effect of the waiver of appeal, whereby the first instance decision becomes final and binding, a question arises as to how the waiver affects the possibility to file an appeal, within the original time limit, by an entity which was not considered a party to proceedings by the authority. The paper seeks to answer this question.

Keywords: appeal, waiver of appeal, legal interest, subjective public right, party to proceedings

INTRODUCTION

Pursuant to Article 127(1) in connection to Article 15 of the Code of Administrative Procedure,¹ an appeal serves a party as ordinary means of appeal against an administrative decision issued in the course of administrative procedure by a first instance authority. Pursuant to Article 129(2) of the Code, an appeal should be submitted within fourteen days of the day the decision has been served upon a party, and if the decision has been communicated orally – of the day the decision has been communicated to the party.

However, is commonly assumed by legal scholars and commentators as well as in the established line of judicial decisions² that the right of appeal against

¹ Act of 14 June 1960, the Code of Administrative Procedure, Journal of Laws of 2020, item 2546 as amended [hereinafter: the Code].

² See judgment of the Supreme Administrative Court [hereinafter: SAC] of 13 July 1999, ref. no. IV SA 703/97, Lex no. 47299 and the judgment of the Voivodship Administrative Court [herein-

a decision applies not only to the parties to the procedure who have received the decision, but also to the entity who was not considered a party by the first instance authority, should the entity meet the statutory criteria for acquiring the status of a party to the procedure [Adamiak and Borkowski 2017, 695–96; Wróbel and Jaśkowska 2018, 827–28].

The period for filing an appeal begins to run as of the moment the decision issued by the first instance authority is served or communicated orally to the parties involved. In the case of an entity that was not considered a party to the proceedings by the authority, but that meets the statutory criterion for obtaining the status of a party, the time limit for filing an appeal is counted from the date of serving or the date of communication to the party that took part in the proceedings, and in the case when the decision was served on more than one party on different dates – from the last date of serving [Adamiak and Borkowski 2017, 695–96; Gli-bowski 2017, 963]³.

As a result of the amendment to the Code, which entered into force on 1 June 2017,⁴ the institution of a waiver of the right to file an appeal was incorporated in the Code provisions.

Pursuant to Article 127a(1) of the Code, during the period provided for submitting of an appeal, the party may waive his right of appeal against the decision issued by the public administration authority. In turn, the provision of Article 127a(2), in connection with Article 16(1) and 16(3) of the Code, declares that as of the date of serving the public administration authority with a statement on waiving the right of appeal by the last party of the parties to the proceedings, the decision becomes final and legally binding.⁵

The research matter addressed in this paper, in the aspect of the already mentioned legal effects of a declaration of the waiver of the right to file an appeal refers to the issue of how the relevant filing of the waiver by the party who was effectively served with the decision as last – assuming that other parties that were served the decision also submitted such a declaration within a time limit or the time limit for filing an appeal expired, affects the right to file this legal measure within the original time limit of the entity which was not considered a party by the authority, and which believes that it should be granted such a status and therefore intends to exercise this right.

after: VAC] in Warsaw of 11 September 2008, ref. no. I SA/Wa 417/08 and VAC in Olsztyn of 10 May 2011, ref. no. II SA/OI 30/11, Central Database of Administrative Court Decisions [hereinafter: CBOSA], orzeczenia.nsa.gov.pl [accessed: 13.03.2021].

³ See judgment of the SAC of 13 July 1999, ref. no. IV SA 703/97, Lex no. 47299 and the judgment of the VAC in Warsaw of 11 September 2008, ref. no. I SA/Wa 417/08 and VAC in Olsztyn of 10 May 2011, ref. no. II SA/OI 30/11, CBOSA.

⁴ Act of 7 April 2017 amending the Act – The Code of Administrative Procedure and some other acts, Journal of Laws, item 935 [hereinafter: Amending Act].

⁵ Pursuant to Article 16(1) of the Code, decisions which are not appealable in the administrative course of instance or which are not subject to review, shall be final. In turn, pursuant to Article 16(3) of the Code, final decisions that are not appealable to the court shall be legally binding.

The research methodology adopted includes an analysis of the normative material of the Polish law. In particular, it covers selected institutions of the general Polish administrative procedure, regulated by the Code. The research was conducted by means of an analysis of regulations in force. The structure of the research includes analytical reflections on the question of the status of parties in the proceedings that were not included by the authority conducting the proceedings in the scope of entities of the proceedings.

The purpose of this study is to formulate general conclusions as a voice in the discussion on the status of parties that were for no reason left out of the scope of the proceedings in question in the context of a legal basis and principles of application of the institution of a waiver of the right to file an appeal.

1. THE STATUS OF A PARTY IN THE ASPECT OF AN ENTITY THAT WAS DEPRIVED OF THIS STATUS WITHOUT A JUSTIFIED CAUSE

Legal scholars and commentators assume that the definition of a “party” has been laid down in Article 28 of the Code [Matan 2007, 261], which provides that a party is each person whose legal interest or duty are the subject matter of the proceedings or who requests the authority’s action, due to his legal interest or duty [Wróbel and Jaśkowska 2018, 274–75]. In this context, it should be assumed that the basic element of the legitimation structure of proceedings adopted by the legislator is the notion of “legal interest” [Przybysz 2017, 137; Adamiak and Borkowski 2017, 230–31].

Identification of attributes of the notion of “legal interest” – with respect to the provisions of Article 28 of the Code – constitutes the achievements of Polish administrative law. This is due to the fact that the discussed notion, with regard to the Code and other acts, has not been clarified by the legislator. Regardless of different approaches presented, legal scholarship agrees that “legal interest” occurs when there is an objective and direct connection between the situation of a given entity and the substantive law norm being the source of this interest. Concurrently, it is emphasized that legal interest must be “one’s own,” “personal,” “individual” interest of the given entity and must be “real,” i.e. exist in the present and be directly related to the subject matter of administrative proceedings within the scope of which the authority is competent to pass an administrative act [Zimmermann 1967, 443; Kmieciak 2013, 19–35; Szustakiewicz 2013, 139–42; Turek 2011, 989–92].⁶

In reference to the above, legal interest is interest which is protected by the law, whereby the protection understood as the possibility to request the authority to take specific actions to ensure that the interest is enforced or to remove a threat to the interest [Zimmermann 1997, 609]. In consequence, on the grounds of admi-

⁶ Cf. resolution of the SAC represented by 7 judges of 22 September 2014, ref. no. II GPS 1/14, and judgments of the SAC of 5 April 2012, ref. no. II OSK 113/11; of 17 March 2016, ref. no. II OSK 1793/14; of 18 July 2018, ref. no. I OSK 2230/16, CBOSA.

nistrative procedure, legal interest is tantamount to, i.a., the possibility of an individual – or, in exceptional cases, a collective entity – to draw benefits in the form of procedural protection, which stems from a legally binding norm which connects the entity's situation with the competence of public administration authority [Duda 2008, 108].

However, administrative proceedings may be conducted with the participation of more than one party, and the broader subjective scope is associated with the institution of co-participation. There are two forms of co-participation: substantive and formal [Kędziora 2014, 459–60]. Substantive co-participation boils down to a situation where in a given case, the same in terms of substance and conducted as part of the same proceedings, a decision awarded shapes the legal situation of many entities at the same time. Therefore, the said substantive bond must be grounded in specific provisions of substantive administrative law. In turn, formal co-participation refers to the multiplicity of parties in a few separate administrative cases which are only formally jointly conducted in one procedure. Such cases are only formally identical in terms of substance, which results from the same factual and legal status.⁷

There are situations under substantive co-participation where two or more parties have a shared legal interest in the case. However, there may be parties in cases conducted according to the principle of substantive co-participation whose interests are conflicting. The conflicting interest is most often expressed in a situation where one of the parties requests initiation of proceedings to obtain a specific right, and the authority, in the course of deciding in the case, must act so that it does not violate the legal interest of other persons who – given the said interest and to ensure its due protection – enjoy the status of a party to the proceedings in this procedure [Stankiewicz 2018, 607].

Sometimes the dichotomous classification of parties is adopted by legal scholars and commentators and decision-making authorities to separate the categories of parties in the proceedings. The first category is formed by parties with the so-called main rights (directly interested), which usually include entities that requested initiation of proceedings to have rights granted to them. The second category are parties with the so-called reflective rights (indirectly interested), that is those whose rights or obligations somehow reflect from the main right which is to be the subject matter of ruling in a given case [Matan 2007, 287; Knysiak–Molczyk 2007, 266].

To specify the basis of participation in administrative proceedings of the so-called indirectly interested parties it is pointed out that their legal interest results from the so-called reflective right. The essence of this right consists in the fact that the subjective right exercised by the entitled entity may violate legal norms that are not irrelevant for the interests of a third party which substantiates the in-

⁷ See judgments of the VAC in Bydgoszcz of 14 September 2010, ref. no. II SA/Bd 575/10 and ref. no. II SA/Bd 576/10 and of 21 September 2010, ref. no. II SA/Bd 678/10 and ref. no. II SA/Bd 679/10 CBOSA.

terest of this party in providing them with legal protection. Therefore, the legal interest resulting from the reflective right does not by itself shape the right to administrative proceedings, but is a basis for participation in proceedings conducted *ex officio* as a result of a request to have one's public subjective right exercised, or proceedings initiated as a result of a request from an individual who holds a legal interest based on a norm of substantive law. A reflective legal interest of a third party, similar to a legal interest of the addressee of rights and obligations resulting from the decision, must be grounded in provisions of the substantive law in force [Matan 2007, 281–87; Maciołek 1992, 11; Kledzik 2018, 172–73].⁸

It must be emphasized that the legal interest – in the context of regulations of Article 28, Article 61(4) and Article 61a of the Code – is an objective category and the administrative authority each time at the preliminary stage of the proceedings is obliged to analyse the subjective scope of proceedings and establish the circle of entities which will be entitled to be the party in the proceedings.

Another form of procedural protection of legal interests, both of parties directly or indirectly interested, is the right to appeal against a non-final decision of the first instance authority issued in the course of administrative proceedings to an authority of higher level.⁹ This right is – in a democratic state of law – a subjective public right which, concurrently, shows that the principle of two-tiered administrative process is adhered to [Zimmermann 1996, 184–85].

Nevertheless, practice shows – in the context of prerequisites of the subjective scope of individual categories of rights, at the same time determined by their subject matter, relevant substantive law regulations and procedural regulations for i.a. initiation mode – that it is the parties classified as indirectly interested that are often groundlessly left out in a given procedure, and often are clearly denied the status of a party at the stage of proceedings conducted by the first instance authority.

Therefore – with regard to the notion of legal interest as a structural component that is the basis for the objective category of a party to the proceedings – an entity which has not been recognized as a party by the authority, also has the right to appeal against a decision, which is an expression of subjective public rights provided that the entity demonstrates that the case concerns the entity's legal interest, pursuant to Article 28 of the Code or specific provisions [Adamiak and Borkowski 2017, 695–96]. However, it is important here whether the fact that the entity not recognized as a party has a legal interest means that this right is granted autonomously or whether this right is relative (dependent) and is associated with the right to file an appeal that is enjoyed by the entity who was served the decision

⁸ An example of proceedings in which indirectly interested parties participate next to directly interested parties by operation of law are those cases that address investment processes, especially with regard to: environmental determinants of implementation of projects that may have an impact on the environment, conditions for land development and public purpose investments, as well as construction permits.

⁹ Cf. judgment of the VAC in Białystok of 13 December 2015, ref. no. II SA/Bk 570/16, CBOSA.

as last. The reference point for this discussion is the institution of the waiver of the right to file an appeal referred to in the introduction, in particular the legal effects of such a statement.

2. THE EFFECTS OF SUBMITTING A WAIVER OF THE RIGHT TO APPEAL

With reference to the provisions of Article 127a(1) and (2) of the Code, in the scope of the issues of the nature of the right to file an appeal by a party that is not considered a party (as discussed in the last part of the section above), the basic question that needs to be answered is whether the submission by all parties to given proceedings or by the party who was served the decision as last of a declaration of a waiver of the right to appeal before the expiry of the time limit for its submission by an entity considered a party by the authority, and being the last party to be served the decision – in a situation when the time limit for appeal has already expired for other entities considered parties, who were served the decision – may result in shortening of the time limit, and thus, deprive the entity that has a legal interest in the case and that was not granted the status of a party in the proceedings by the first instance court of the right to file an appeal.

In the light of the above, it is first and foremost worth noting that as pointed out in the Explanatory Memorandum to the Code Amendment Bill, which introduced to the CAP the institution of a waiver of the right of appeal, the latter measure takes into account the economy of proceedings, whilst emphasizing that Article 78 of the Polish Constitution¹⁰ does not prevent the application of statutory instruments that allow persons entitled to file the appeal to waive the right of appeal in order to shorten the course of the instance and obtain a binding decision in a shorter time. Moreover, as underlined in the Memorandum, the statement on waiving the right to appeal cannot be effectively withdrawn. The Memorandum asserts that if the waiver has been correctly filed, as of the moment it is served to the authority by the party (in case of multilateral proceedings – by all parties involved), it shall be deemed irrefutable.¹¹

At this point, the standpoints expressed by legal scholars and commentators and in the established line of judicial decisions of administrative courts pertaining to the essence and legal effect of the waiver of the right of appeal. Namely, the legal commentary provides that within the scope of the instrument of the waiver of the right to appeal, the linguistic interpretation corresponds with the pro-con-

¹⁰ The provision of Article 78 of the Polish Constitution of 2 April 1997 (Journal of Laws No. 78, item 483 as amended) provides that each party has the right to appeal against judgments and decisions made at first instance, and exceptions to this principle and the procedure for appeals shall be specified by the statute.

¹¹ Explanatory Memorandum to the Draft Act of 7 April 2017 amending the Act – the Code of Civil Procedure and some other acts, Sejm printed matter VIII.1183, p. 57–58, <https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1183> [accessed: 13.03.2021].

stitutional interpretation – an interpretative method that falls into the categories of systematic and purposive interpretation of law – and also the effects of scholarly interpretation that refers to the nature and significance of the structure of subjective public rights. It is demonstrated that the waiver of the right of appeal – understood as endowment of a public law entity with the right to eliminate the right from the legal sphere of a specific entity, thereby making it the entity which, in the legal system, has no right to file an appeal – would be tantamount to approving the entity’s capacity of depriving the legal norm of its effects from which this right, as all subjective public rights, arises. However, no one is able to “waive,” i.e. relinquish or renounce the effects of a legal norm. Here, it is emphasized that the “waiver of the right to appeal” may be constituted solely as intentional relinquishment of the subjective right. From the perspective of subjective rights of the qualifying person, waiver of the right to appeal is a structure linked directly to the procedural category of withdrawal of appeal as set out in Article 137 of the Code. However, while withdrawal of appeal is a demonstration of intentional relinquishment of the right to appeal after this legal measure was taken, the “waiver of the right to appeal” is a statement of no intention to exercise this right, i.e. expresses the absence of intention to take a legal remedy against the decision of the first instance authority. Therefore, in contrast to the withdrawal of appeal, a waiver is a demonstration of intent manifested without the “technicality” of filing an appeal [Jakimowicz 2018, 52].

The view presented above is also consistent with the approach of the present-day judicial decisions, which suggests that it is necessary for the authority to refrain from assessing the effectiveness of the waiver of the right to appeal until the end of the time limit set for filing an appeal by the entity which filed the waiver.¹²

It must be stated that sensible, uncontested views on the subject were expressed by legal scholars and commentators long before the instrument of a waiver of appeal was formally incorporated into Article 127a of the Code. It was argued that in order to protect individual and societal interests, it is reasonable to allow the party the freedom to withdraw an action, i.e. to waive the appeal through a later action, i.e. an appeal lodged within the period specified [Adamiak 1980, 134–36]. It was also argued that the entity – with regard to his procedural rights – may not exercise the right to appeal, but it must be recognized as an inalienable right of the party. Concurrently, it was underlined that relinquishing a legal interest or duty based on substantive law, in particular from the perspective of this law, is out of question. On the procedural plane, this must mean that waivers of appeal submitted by parties – although they may be considered a demonstration of standpoint, and they may also be seen by the parties as beneficial since they would expedite the finalization and enforceability of the decision – may not have any legal

¹² Cf. Judgments of the VAC in Wrocław of 26 September 2018, ref. no. IV SA/Wr 328/18, of the VAC in Bydgoszcz of 14 December 2018, ref. no. II SA/Bd 1173/18 and of 11 June 2019, ref. no. II SA/Bd 252/19, and the judgment of VAC in Cracow of 29 April 2019, ref. no. III SA/Kr 168/19, CBOSA.

effects. Hence, the period for filing an appeal continues to run and the party may still exercise his right [Zimmermann 1986, 85].

In turn, after the measure of the waiver of appeal was incorporated into Article 127a of the Code, the view was expressed that there are no rational grounds today for not admitting the withdrawal of a procedural action in the form of a statement on waiving the right to appeal through a later action, i.e. an appeal lodged within the time limit set. It has been pointed out that this view, corresponding with the opinion on the ineffectiveness of waiving “the right to file an appeal,” supports the above assertion that “the waiver of the right to file an appeal” may be solely understood as a demonstration of the intention not to exercise the subjective right, which can be withdrawn at any time within the statutory time limit for filing an appeal [Zimmermann 2017, 15].

In the context of the views presented by legal commentators, another approach claims that since the “waiver of the right to file an appeal” is, in its very essence, a statement expressing the intention not to exercise the right to appeal, which does not annihilate this right, it must be assumed that the 14-day time limit for filing an appeal specified in the statute is supposed to ensure that the party is given time to consider and reconsider its decision as to whether or not exercise the right. It is thus a statutory period which also serves the function of reassurance, which is inextricably linked to the essence of a formal subjective public right. It must be emphasized that the provisions of neither the Code, nor any other acts, provide grounds for shortening or extending the time limit by anyone, thereby reflecting the principle embedded in the nature of statutory time limits for procedural actions, and also determining the interpretation of Article 127a(2) of the Code [Jakimowicz 2018, 52].¹³

In view of the above, attention is due to the position expressed in the judicial decision, that a waiver of the right to appeal by the only party that has been served the first instance decision does not make the decision of the first instance authority final and binding as of the date of filing the waiver, and that an appeal submitted by an entity not considered a party to the proceedings in the first instance is inadmissible. Subsequently, it has been clarified that, in fact, pursuant to Article 127a(1) of the Code, during the time limit for appeal, the party may waive his right of appeal by filing a notice of appeal with the public administration authority which issued the decision. However, in the context of Article 127a(2) of the Code, it is beyond any doubt that since the right of appeal can be waived only by a party entitled to appeal, it is inadmissible for the effects of the waiver to affect the procedural rights of the parties which have not filed such a waiver. The circumstance of the time limit for filing an appeal for the party ignored by the first instance authority is connected with the time limit for serving the decision to the party to the proceedings points to the absence of connection between the waiver of the right

¹³ The opinion of Jakimowicz was fully approved by the VAC in Rzeszów, cf. judgment of 28 August 2019, ref. no II SA/Rz 702/19, CBOSA.

to appeal of the participating party and the right to appeal of the non-participating party. Since the non-participating party also has the right to appeal (any entity that demonstrates his legal interest in the case in the understanding of Article 28 of the Code), then it is the only party that can exercise this right. Statements of waivers of other parties cannot result in depriving the non-participating party of his fundamental procedural right.

CONCLUSIONS

The analysis of the content of the views of legal scholars and commentators and of judicial decisions on legal effects of a waiver of the right to appeal, in particular the circumstance of filing a statement of waiver by the party who was served the decision of the lack of previous effective filing of an appeal by other parties – as laid down in Article 127a(2) of the Code – demonstrates that the latter circumstance does not stop the running of the time limit for filing an appeal by an entity which was deprived of the chance to participate in the proceedings, despite the party having a legal interest and wishing to protect his interest through appellate proceedings.

This position should be considered appropriate and convincing. If another approach was to be accepted, in practice, it could lead to stripping the entities not recognized as parties to the proceedings in the first instance of the right to file an appeal, and concurrently, it could provide basis for conscious abuse of the instrument of a waiver of appeal.

The right to lodge an appeal is a subjective public right, the loss of which cannot be rectified by other legal measures, in particular, by measures connected with the initiation of extraordinary administrative proceedings.

The conditions for applying the appellate procedure and the reopening procedure clearly demonstrates that – despite the legal interest held by the entity – the appellate procedure is undoubtedly more beneficial for the entity that was left out in the first-instance proceedings. Therefore, one cannot accept the interpretation of provisions of Articles 127a(1) and 127a(2) of the Code with reference to Article 6, Article 7, Article 10, Article 15, Article 77, Article 127, Article 129(2) of the Code, that in cases in which the parties might have conflicting interests, determined by the provisions of substantive law, the procedural action of an entity, considered a party to the proceedings by the authority, may result in significant limitation of major procedural rights of other entities, which may have legal interests in the case. Such an interpretation is tainted with the risk of accepting a practice of filing a statement on waiving the right to appeal already on the day of being served the decision, which would deprive other entities of the possibility, if need be, to file an ordinary appeal. In fact, for such entities it would mean that the only way to verify the contested decision would be through the more strenuous extraordinary procedure.

In consequence, the appellate procedure and the reopening procedure cannot be reasonably treated as ensuring equal protection of interests to the party which, in its opinion, was left out during the identification of the subject matter of the proceedings, despite having a legal interest in the matter.

It is worth noting here that if an appeal is submitted by a non-participating entity within 14 days of the day when the first instance decision was last served – irrespective of appeal waivers having been filed by all parties to the proceedings – the question that should be determined by the higher-level body during the appellate process is whether the appellant has legal interest in the matter, as this is the prerequisite for being attributed the status of a party to proceedings. This circumstance determines whether it will be possible to deem whether – irrespective of the fact that the original time limit for appeal has been kept – the entity has the procedural legitimacy to file a legal action.¹⁴

This manner of interpretation of Article 127a and Article 129 in connection with Article 28 of the Code may naturally raise doubts in the question of validity and effectiveness of the application of the institution of a waiver of the right to file an appeal. Such a position may mean that the authorities would each time have to assume that there might be a person left out of given proceedings, who then as an effect might file a relevant appeal. In consequence, this might affect the speed of proceedings and the legal certainty in establishing how binding a given ruling is and to what extent the decision itself or another act are final. Therefore, it would be justifiable to consider a re-modelling of the institution of the waiver of the right of appeal, at least in terms of its objective scope. Such changes could be made by including application of this institution in specific provisions included in legislative acts that fall under substantive law. Particular emphasis should be given to exclusion of application of the institution of a waiver of the right to file an appeal in proceedings in which indirectly interested parties occur (especially were the authority awards the status of the party to individual entities on the basis of its own independent assessment of the meeting of statutory criteria that determine having the legal interest in the case). In turn, in the long run it would also be reasonable to introduce regulations in the Code that would differentiate the categories of parties of administrative proceedings, including recognition of the classification into directly and indirectly interested parties, which has essential practical importance.

¹⁴ The view that the filing of a waiver of the right to appeal within the statutory time limit by all entities which enjoyed the status of a party does not result in depriving the entity that was not recognized as a party of the right to appeal was expressed by the Local Government Board of Appeal in Gorzów Wielkopolski in a decision of 2 March 2020, No. SKO.Go/450-KP/1237/19 (unpublished), on which the author had the honour to be the chairman of the adjudicating panel and the rapporteur. The standpoint of the Board on the matter in question was approved by the VAC in Gorzów Wielkopolski, and next, by the SAC as part of the judicial review of the legality of the said decision. Cf. judgment in Gorzów Wielkopolski of 30 June 2020, ref. no. II SA/Go 211/20 and judgment of the SAC of 2 December 2020, ref. no. II OSK 2878/20, CBOSA.

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LEGAL POSSIBILITIES OF USING AI IN MEDICINE, WITH PARTICULAR EMPHASIS ON IMAGING DIAGNOSTICS AND RESPONSIBILITY OF MEDICAL ENTITIES – POLISH PERSPECTIVE

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Abstract. The method/practise of providing healthcare services has been significantly modified due to the development of the pandemic. In everyday medical practice, the use of telecommunication media has begun to be widely used, which enable the provision of healthcare services at a distance. The next step is the use of artificial intelligence during the planning, implementation and control of medical activities, which will support and even replace humans at various stages of medical activities. The article discusses issues related to the use of artificial intelligence in the process of medical activities, referring the above to the perspective of current legal regulations. Considering the nature of civilization diseases, the paper refers to the use of AI on the basis of imaging diagnostics constituting the basis for cancer diagnosis and therapy. The choice of this broad topic was motivated by the indications of the latest literature, which emphasize that malignant tumor is the most common cause of death in developed countries and it is estimated that the number of cases will continue to increase in aging populations. The article is one of the first attempts to analyze the principles of using AI in medicine and the principles of its liability for potential damage. The authors used the method of analyzing the applicable regulations, including regulations under European law, and also made a synthetic analysis of the position of the judiciary and doctrine. The article indicates that the liability for damage caused by AI should be identified with liability for a dangerous product. At the same time, the civil liability of the medical entity for damages resulting from the use of AI in the diagnostic imaging process will be subject to the general regime of tort liability.

Keywords: artificial intelligence, deep learning, machine learning; medical imaging, diagnostic imaging

INTRODUCTION

Considering the nature of civilization diseases, the paper refers to the use of AI on the basis of imaging diagnostics constituting the basis for cancer diagnosis and therapy. The choice of this broad topic was motivated by the indications of the latest literature, which emphasize that malignant tumor is the most common cause of death in developed countries and it is estimated that the number of cases will continue to increase in aging populations [Siegel, Miller, and Jemal 2019, 7–34; DeSantis, Miller, and Dale 2019, 452–67].

The study uses the method of analyzing the applicable regulations, as well as the literature relating to the subject matter. Particular attention was paid to cataloging AI as a medical device, as well as to the issues of qualifying legal liability for damages caused by AI during health services, which should be understood as actions aimed at preserving, saving, restoring or improving health, are health services (Article 2(1)(10) of the Act of 15 April 2011 on Medical Activity).¹

The creator of the term “artificial intelligence” is John McCarthy, who formulated this concept during the conference in Dartmouth in 1956 [Górski 2019]. Although there are many definitions of artificial intelligence at present, the definition presented by A. Kaplan and M. Haenlein deserves particular attention, according to which artificial intelligence is “the ability of a system to correctly interpret data from outside, learn from it and use this knowledge to perform defined tasks and achieve goals through flexible adaptation” [Kaplan and Haenlein 2019].

In the Communication from the European Commission of 25 April 2018 to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions, “Artificial Intelligence for Europe” defined artificial intelligence as systems that demonstrate intelligent behavior by analyzing the environment and taking action, to a certain extent autonomously in order to achieve specific goals.

In the context of the use of AI in medicine, the White Paper published on 19 February 2020 by the European Commission deserves attention. This document describes a new European approach to the evolution of artificial intelligence based on the criteria of excellence and trust. Despite the fact that the White Paper is not a legal act, but a collection of concepts and ideas, they may set the direction of future legislative changes in the field of artificial intelligence in the European Union. According to the Commission, the establishment of a legal framework that will ensure the ethical development of artificial intelligence and guarantee the supreme role of humans is necessary to maintain the security of this technology. The adoption of the excellence criterion is to lead to the creation of a single legal framework for Artificial Intelligence at the EU and national level. Developing the second criterion is to increase public confidence in Artificial Intelligence.

The creators of the Policy for the Development of Artificial Intelligence in Poland for 2019–2027 prepared by the Ministry of Digital Affairs clearly emphasize the importance of the concept of artificial intelligence focused on humans and their environment (HumanCentricApproach), the aim of which is to make human values key to the way in which systems artificial intelligence are developed, implemented, used and monitored.

The Resolution of the European Parliament of 16 February 2017 put forward the concept of “giving robots a special legal status in the long term,” and “granting the status of electronic persons responsible for repairing any damage that could be caused, and possibly the use of electronic personality in the event that ro-

¹ Journal of Laws of 2021, item 711 [hereinafter: UDL].

bots undertake autonomous decisions or their independent interaction with third parties.” The above aims to create a new legal category, different from natural persons or legal persons – “electronic persons.” At present, liability for damages caused by the broadly understood activities of artificial intelligence can be considered at the level of liability for the functioning of a dangerous product. If a medical entity uses AI equipment which, by its action, will directly or indirectly cause damage, that medical entity will be liable for damages, but it will be able to file a recourse claim to the entity that produced or placed the product on the market.

Although in this work the authors do not refer to the rules of criminal liability, it should be that this issue occurs naturally in connection with activities in the area of healthcare. Pursuant to the provisions of the Polish Criminal Code, only the person who commits an act prohibited under penalty by the law in force at the time of its commission is subject to criminal liability. The perpetrator of the prohibited act does not commit a crime if he cannot be guilty at the time of the act. There is no doubt that in the current legal state, criminal liability can only be assigned to a person and, in certain cases, to collective entities, on the basis of separate provisions. However, if you imagine the criminal liability of the robots, there would be problems with blaming them. In addition, it is necessary to answer the question whether, for the purposes of criminal law for AI, including robots, the negative prerequisites for attribution of blame. In the last context, one should refer to the possibility of assigning AI to insanity (e.g. in relation to a cyber attack) or recognizing that AI’s action was of a higher necessity (e.g. in the event that AI decides to perform the procedure in a wider scope than previously planned in order to protect patient’s health).

1. THE USE OF ARTIFICIAL INTELLIGENCE IN IMAGING DIAGNOSTICS

The literature emphasizes the legitimacy of using this AI in the area of healthcare, including the protection of public healthcare [Benke and Benke 2018; Niel and Bastard 2019; Hessler and Baringhaus 2019]. The use of AI is also possible on the level of fighting the pandemic – e.g. by performing initial, screening macro-scale health assessment, selecting diagnostics as well as monitoring the health of infected people who are quarantined and isolated [Mei and Lee 2020].

As indicated by the latest research [Mayo and Leung 2018], AI can provide significant support, among others, in imaging diagnostics by quickly identifying negative results of tests performed with the use of computed tomography and magnetic resonance imaging.

According to some authors, “it is evident that not many foresee the imminent replacement of radiologists by AI. The common thought is that radiologists will remain a central and crucial cog in the diagnostic process of image-based medicine, with AI acting as a «cognitive companion». It will likely improve patient outcomes and save money in the process” [Anderson, Torreggiani, and Munk, et al. 2020].

Some international studies show positive reactions to the willingness to integrate selected medical personnel with the use of artificial intelligence as a diagnostic support tool [Sarwar, Dent, and Faust, et al. 2019]. On the other hand, the media coverage of medical AI concerns mainly social progress and economic development, whereas the spheres of ethics, law and social trust are ignored in general [Frost and Carter 2019].

Below, reference is made to the use of AI in the process of providing health services financed from public funds. The conditions for using health services by a patient, including diagnostics, are set out in the Act of 27 August 2004 on healthcare services financed from public funds.² Bearing in mind the characteristics of civilization diseases, which include cancers, it is necessary to pay attention to the use of artificial intelligence in cancer diagnostics, taking into account the standard diagnostic procedure and the so-called “fast diagnostic path,” that is the Charter of Diagnostics and Treatment of Oncology.³

The Oncological Diagnostics and Treatment Card is a solution introduced from 1 January 2015, pursuant to an amendment to the Public Healthcare Act, for patients in whom a primary care physician or a doctor providing outpatient specialist services has made an initial diagnosis of a malignant tumour. The indicated patients are entitled to oncological diagnostics without a referral, based on the DiLO card issued (Article 32a USOZ). When a malignant tumour is diagnosed as a result of oncological diagnostics, hospital treatment or procedures performed as part of healthcare programs, DiLO is the basis for initiating oncological treatment without referral. The set of rules for the fast track diagnosis is known as “the set of oncological services” and is not subject to limits on the financing of healthcare services.

In 2019, the number of radiologists in Poland amounted to 3.7 thousand (in the field of radiology and imaging diagnostics and oncological radiology). Data on the number of employed medical personnel are presented in the publicly available Internet application of the Ministry of Health, “Maps of health needs. Effective Operation Through Mapping.” According to the information from 28 January 2021 obtained from the Ministry of Health, gained through the access to public information, the number of patients who were issued a DiLO card in individual years was: in 2015: 226.5 thousand; in 2016: 187.3 thousand; in 2017: 204.2 thousand, in 2018: 224.1 thousand, in 2019: 245.7 thousand.

The data presented above show that in 2015–2019, one radiologist provided medical care to approximately 58 patients. Although the indicated number of patients is not large, it should be emphasised that this estimate applies only to patients qualified for “the set of oncological services” with suspected malignant tumour. In the event that the patient’s health condition is not properly assessed, the person who has started the carcinogenic process cannot be qualified for the above-mentioned set of oncological services. According to the data collected and

² Journal of Laws of 2021, item 1285 [hereinafter: USOZ].

³ Hereinafter: DiLO.

processed by the WHC Foundation, the waiting time for an appointment with an oncologist for patients without a DiLO card (BkDiLO) and with a DiLO card (ZkDiLO) was, respectively: in September 2016 – 5.1 weeks (BkDiLO), 1 week (ZkDiLO); in January 2017 – 4.8 weeks (BkDiLO), 1.7 week (ZkDiLO); in May 2017 – 5.7 weeks (BkDiLO), 1.4 week (ZkDiLO); in September 2017 – 4.9 weeks (BkDiLO) 2 weeks (ZkDiLO).

Since the introduction of the DiLO card regulations, the waiting time for diagnostics by patients without the set of oncological services has been gradually increasing. In September 2015, the waiting time was 4.4 weeks, in January 2016 – 5 weeks, in May 2016 – 5.3 weeks, in September 2016 – 5.4 weeks, in January 2017 – 5.8 weeks, and in May 2017 – 6.5 weeks. The system of artificial intelligence is based on the concept of a machine that can affect the environment by making recommendations, predictions or decisions about a given set of goals. It operates by using input, whether acquired through machine learning or provided by human data: a. perceive real or virtual environments; b. summarizing such perceptions into models manually or automatically; and c. using model interpretation to formulate output options. As part of artificial intelligence, four basic technologies that can be used in the area of healthcare should be distinguished, including the following technology: algorithmic, where the programmer reads the expert's knowledge and codes it as programs; convolutional neural network – in this technology, knowledge is presented to the computer as a database in which the computer (machine) searches for dependencies between the data; generative adversarial network, which is able to generate new concept, ideas, images. Creative generative adversarial network can be used, *inter alia*, to create images of non-existent people or creative bone planning, e.g. in the craniofacial area; pure artificial intelligence, that is a program that independently searches for information and is able to use it creatively.

In Poland, the use of artificial intelligence in the area of healthcare focuses primarily on the use of convolutional neural network⁴ technology – e.g. for remote assessment of cardiac arrhythmias. CNN technology can also be used in the process of assessing radiological tests. The current legal conditions in Poland make it possible to describe a radiological examination only by a physician with the appropriate specialization. Performing the description of the study by artificial intelligence could accelerate the obtaining of the test result, as well as affect its accuracy and relevance, which results from the specificity of learning from convolutional neural network (machine learning). This is because CNN can read thousands of test results in a short time, which is the basis for acquiring the experience necessary to make an accurate diagnosis. In the case of humans, the cognitive process is significantly extended to the extent indicated. The use of artificial intelligence in imaging diagnostics may affect not only the accuracy of the description but also the time of its execution.

⁴ Hereinafter: CNN.

Recent studies have shown that AI is able to describe skin lesions (including melanoma) as accurately as experts in dermatologists [Shimizu and Nakayama 2020]. AI has also achieved a level of accuracy similar to that provided by medical professionals in interpreting breast cancer screening tests [Rodríguez-Ruiz and Lang 2019]. In addition, deep CNN was able to detect enlarged lymph nodes or colon polyps on computed tomography images [Roth, Lu, and Liu 2016]. The above is directly related to the minimization of healthcare costs and the elimination of costs related to the treatment of complications and adverse events resulting from not starting treatment at the optimal time for the patient.

2. THE CONCEPT OF ARTIFICIAL INTELLIGENCE IN LEGAL TERMS

Although the phenomenon of AI is widely discussed within the Polish political strategy of digitization, no uniformly binding definition of this concept has been established in law. The above gives rise to doubts in the context of legal classification. Thus, the question arises whether AI used in medicine, including medical diagnostics, should be classified as a medical device or a different type of product. In order for a computer program with artificial intelligence (“diagnostic tool”) to be considered a medical device, it must meet the requirements set out in the Act of 20 May 2010 on Medical Devices.⁵ Pursuant to Article 2(1)(38) UWM, it must be intended by the manufacturer for the use in humans for the purposes of a) diagnosing, preventing, monitoring, treating or alleviating the course of a disease, b) diagnosing, monitoring, treating, alleviating or compensating for the effects of an injury or impairment, c) testing, substitution or modification an anatomical structure or a physiological process, d) regulation of conception – which does not achieve the essential intended effect in or on the human body by pharmacological, immunological or metabolic agents, but whose action can be aided by such agents. The wording of this provision is a direct implementation of European legislation, in particular Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices (EU Regulation 2017/745).

The consequence of recognizing a computer program as a medical device is also reflected in the judgments of the Court of Justice of the European Union (CJEU). The CJEU ruled on 22 November 2012 (Case C 219/11) that software treated on its own is a medical device if it is specifically intended by the manufacturer to be used for at least one medical purpose specified in the definition of a medical device. However, the use of software by a healthcare entity for general purposes (other than strictly medical) will cause it to be considered a non-medical device. In another judgment of 7 December 2017 (Case C–329/16), the CJEU expressed the thesis that the software, of which one of the functionalities allows the use of patient data, in particular to detect contraindications, interaction with other drugs or the excess dosage, constitutes a medical device within the meaning of

⁵ Journal of Laws of 2020, item 186 as amended [hereinafter: UWM].

these provisions, even if such software does not have a direct impact on the human body. However, a software which sole purpose is to archive, collect and transmit data, will not be a medical device, such as software for storing medical data of a patient.

3. ARTIFICIAL INTELLIGENCE – A DANGEROUS PRODUCT

The regulation providing for strict liability for a dangerous product was introduced to the Civil Code of Poland⁶ by the Act of 2 March 2000 on the protection of certain consumer rights and liability for damage caused by a dangerous product, as a consequence of its implementation into the Polish legal order 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 (hereinafter: Directive 85/374/EEC). Considerations on whether the phenomenon of AI may be a dangerous product should be preceded by the meaning of the term “movable thing” as a single designate, or this phrase should be considered as separate designations: “thing” and “movable.” The first case is justified by a specific reading of the provisions contained in Article 449¹(2) CC. According to some researchers [Bosek 2019], the argument for including computer programs under the term “movable thing” is the fact that certain categories of intellectual goods (e.g. computer programs) are in the public market and it is difficult to deny them the quality of goods. There are purposeful reasons for this, as these goods can be a source of serious damage.⁷ In functional terms, however, there are claims that the legislator has envisaged a broad formula that allows to consider intellectual goods as a “product” e.g. computer programs, but also cases of such goods that due to the commercial way of functioning in trade or due to the danger they can cause to the environment, are similar in nature to typical goods that are dealt with by the regime of liability for a dangerous product.

A computer program is a work, an intangible manifestation of human creativity. It is indisputable that AI can be part of a computer program, and the latter can be an element or component of a product-thing (e.g. a car, computer or robot). When considering the issue of a “dangerous product,” understood as a material object into which a computer program is loaded, it will be assessed as a whole whether it exhibits any features of danger.

Neither Directive 85/374/EEC nor the Civil Code contain a catalog of dangerous products. As a rule, a product is dangerous, which, due to its features and certain properties, is already dangerous.

Whether a product is safe is decided by the circumstances at the time of placing it on the market, in accordance with Article 449¹(3) CC. Generally non-hazardous products are assessed according to the principle of normal and expected use of the product. By meeting these determinants, a product that is used in a comple-

⁶ Journal of Laws of 2020, item 1740 as amended [hereinafter: CC].

⁷ See commentary to Article 449¹, thesis no. 26 [Banaszczyk 2020].

tely normal, foreseen manner on a daily basis will not be considered dangerous, if it does not reveal dangerous features (due to its construction or the wrong quality components used in it). The legal regulation of “normal product use” is, however, one-sided. The thesis is valid that the Polish legislator too freely considered the implementation of the regulation contained in Article 6(1) of Directive 85/374/EEC that relates to the way in which the product can be used normally. In the doctrine [Kuznicka–Sulikowska 2013, 260] there are also opinions that the preamble to Directive 85/374/EEC refers to the assessment of product defect made not in terms of its suitability for use, but the lack of safety when society has the right to expect security. Such a purposeful formulation of the directive should be helpful in this regard. Even more so as the CJEU in its judgments (e.g. of 21 June 2017 Case C–621/15, and of 20 November 2014, Case C–310/13), clearly indicates that the system of liability for a dangerous product must be complete and effective, which consequently requires not only appropriate regulation, but also the application of principles, the application of which should implement the purpose of the directive, and that the application of national provisions must not compromise the effectiveness of Community law.

4. DAMAGE CAUSED BY AI

AI algorithms undoubtedly support medical activities, including the assessment of diagnostic imaging tests. When analyzing the use of AI in the process of healthcare services, it is necessary to answer the question: what is the responsibility for the incorrect functioning of the algorithm or the lack of security measures that will most likely eliminate the occurrence of damage? It should be taken for granted that a patient referred for a diagnostic examination expects that the medical equipment is trustworthy and works efficiently. The standard (according to the intended use, instructions and manufacturer's recommendations) use of computer hardware with defective software is burdened with the producer's responsibility, which results from the fact that the function limitations or algorithm error should be known to the producer from the beginning. It should also be concluded that a medical device containing a computer program may be assigned the features of a dangerous product, and responsibility may be assigned to the entity that produced the product or placed it on the market.

However, this regulation will not apply to a *per se* computer program that is used separately but in conjunction with medical equipment. An example of such a state of affairs would be a program installed on a computer (not supplied by the manufacturer of medical equipment) connected to the medical equipment in order to transmit, receive and read the data necessary to perform diagnostics. In such a situation, the liability of the entity granting the license to use the computer program will be a contractual liability towards the medical entity. The damage caused to a patient as a result of the use of such a computer program by a medical entity will be charged to that medical entity as the user of that computer program.

On the other hand, the healthcare entity will be able to file a recourse claim to the software provider, on the basis of Article 441 CC. It should be noted that the responsibility for a dangerous product does not exclude the liability of other people, based on other regulations (Article 449¹⁰ CC). At the same time, in order to avoid interpretation and exponential problems, computer programs or even some of their components, such as AI, should be legally objectified.

5. TORT LIABILITY OF MEDICAL ENTITIES

One should agree with the researchers [Bosek 2020; Wałachowska 2020], who argue that the current regulations are sufficient to assign responsibility to specific entities for damage caused by intelligent medical robots (also recognized as devices, equipment or apparatus with artificial intelligence, capable of performing diagnostics).

Both the provisions on tort and contractual liability will apply to the provision of healthcare services due to the legal relationship between the patient and the entity performing medical activities, as a consequence of the treatment contract. The law allows for the convergence of such a basis of responsibility, as a consequence of Article 443 CC, the more so as the parties to this legal relationship do not shape it arbitrarily, do not exclude the application of certain provisions shaping the rights and obligations, and even less do not affect the withdrawal from due diligence.

Entities performing medical activities are responsible for the use of medical equipment. If it is malfunctioning, these entities, in the event of being liable for the damage caused, may file a recourse claim against the entity that produced or placed the product on the market.

Entities performing medical activities are liable pursuant to Article 415, 416, 429 and 430 CC, depending on the actual state of affairs. For the medical staff, the healthcare entity (e.g. hospital) is responsible for the guilt in choosing based on Article 429 CC or liability for damage caused by a subordinate on the terms set out in Article 430 CC. These provisions will remain in line with Article 415 or 416 CC depending on whether it is possible to establish the individual guilt of the perpetrator or the guilt of an organ of a legal person.

However, the relation of Article 415 and Article 416 CC, due to the fact that both provisions impose an obligation to compensate for damage caused by human fault. Article 415 CC relates directly to the actions of the perpetrator of an act that can be attributed to his own guilt. In turn, Article 416 CC determines the operation of the authority, and in connection with Article 38 CC it should be referred to that action is taken on behalf of a legal person in the manner provided for in the law and in the statute based on it. Thus, the behavior of the perpetrator under Article 415 CC is the behaviour on its own account, and the behavior specified in Article 416 CC, is an action taken for the benefit of a legal person, within the framework of its authorization. It should be noted that legal persons are, for exa-

mple, independent public health care institutions in accordance with Article 50a(2) UDL.

In the case of legal persons and their collective bodies, it may be problematic to determine the guilt of individual members of this body for specific behavior. Judicature, such as the judgment of the Supreme Court of 11 May 2005 (Case III CK 652/04), in such situations has developed the concept of so-called “nameless guilt” or “anonymous guilt,” according to which the liability of medical entities can be linked to the detriment.

This applies to situations in which it is necessary to break the personal relationship between the activity or omission leading to the damage and the allegation of improper behavior, stopping at establishing that the competent authority or employee of the legal person has undoubtedly been at fault. Thus, the fault is related to the perceived defects in the operation of a team of people or the functioning of a specific organizational structure, assessed with the measure of diligence that should be required pursuant to Article 355 CC and comparing with this standard of actions that actually took place – for example, the judgment of the Supreme Court of 11 May 2005 (Case III CK 652/04).

Anonymous guilt may be related to the concept of “organizational guilt” manifested in neglect in terms of organization, safety, hygiene and patient care. It is irrelevant which of the hospital employees was negligent. If the personal guilt of the medical staff is not established, the principle of anonymous guilt is adopted, referring to, for example, failure to ensure the patient’s safety of stay, failure to provide appropriate treatment conditions, appropriate equipment, appropriate and qualified personnel (Judgment of the Court of Appeal in Szczecin of September 24, 2018, I ACa 222/18). With such an understanding of liability, it is sufficient to prove, at least on the basis of a factual presumption, that there has been a culpable breach of the principles and standards of dealing with the patient when providing health services, in order to recognize that the medical entity is liable for the damage sustained by the patient. Responsibility for anonymous or organizational guilt should be regarded as the responsibility for someone else’s guilt, regulated in the provisions of Article 429 and 430 CC.

Guilt in the choosing as defined in Article 429 CC assigns responsibility for the behavior of the perpetrator of the damage, who was entrusted with the performance of the activities. This entrustment does not have to result from a contract⁸ named or unnamed (rather from a civil-legal relationship than from an employment contract, e.g. a contract of mandate, provision of a service, treatment contract, etc.), and may also result from the actual situation. Assigning liability to the entrusting entity will become possible when the damage is the result of an unlawful act of the perpetrator entrusted with the performance of the activity, and there is a normal causal link between his action and the damage, which is functionally related to the entrusted activity. This means that for the obligation of compensa-

⁸ See commentary to Article 429, thesis No. 1–2 [Długoszewska–Kruk 2019].

tion to arise, the preparator must act in such a way that is characterized by behavior within the limits of the authorization (otherwise the contractor's personal liability will result from Article 415 or 416 CC), and the damage is the result of entrusting the activities, and not on the occasion of its performance.

As an example of the emergence of a compensation obligation resulting from the guilt in the choosing, it would be entrusting a doctor with a given specialization to perform activities in the field of another specialization, where the entrusting entity is aware of this, and what was the cause of the damage. When selecting a contractor, the entrusting entity should exercise due diligence.

The exculpatory premises⁹ include the lack of guilt in the choosing, entrusting the performance of the activity to a specialist, and the existence of a subordination relationship between the contractor and the entrusting entity. Proving these facts in order to free oneself from liability under Article 429 CC, rests with the entrusting entity, but it is enough to prove one of these three cases mentioned above. No guilt in the choosing is to exercise due diligence when entrusting activities to perform by a specific person – checking their predispositions, qualifications, knowledge and skills, including, for example, the right to practice a profession or having the right to perform certain activities. Releasing oneself from liability is also possible by showing that the activities have been entrusted to a specialist (a person, enterprise or establishment which, in the scope of their professional activity, performs such activities).

The exculpatory premises specified in Article 429 CC will apply when the aggrieved party demonstrates two facts: entrusting the activities and unlawful conduct of the contractor, which is causally related to the damage. On the other hand, the existence of guilt in the choosing is a presumption (rebuttable on the part of the entrusting entity), which the aggrieved party does not have to prove [Safjan 2020]. It should be noted, however, that in the event of direct and willful fault of the contractor, it may constitute a premise for joint and several liability of the contractor and the entrusting entity, pursuant to the wording of Article 441 CC. Exculpation of the entrusting entity, consisting in no guilt in the choosing, is not possible in the case of the anonymity of the contractor, unless the entrusting entity proves that they are not guilty in the choosing with regards all persons entrusted with the performance of the activities.¹⁰

Pursuant to Article 430 CC the contractor who was entrusted with the activity, and who is the perpetrator of the damage, must be subject to the management and follow the instructions of the entrusting entity (the premise of supremacy). Entrusting the performance of activities must take place on the entrusting party's own account. This type of tort refers to the person performing the entrusted activity, who will cause damage with their unlawful behavior. The premise of supremacy will usually apply here to employment contracts concluded between the entrusting party and the contractor, but it will mainly apply to the actual state of the

⁹ See commentary to Article 429, theses No. 6–9 [Safjan 2020].

¹⁰ See commentary to Article 429, theses No. 49 [Borysiak 2020].

supremacy exercised. At this point it should be noted that the contracting authority (e.g. medical entity) will be responsible for the contractor (e.g. medical personnel). The condition is exercising supervision, which is defined not as interference with the physician's autonomy in providing medical services, but rather based on the organisational relationship of subordination, the more so as this relationship does not oppose the physician's independence in carrying out the process of treatment, diagnosis and therapy – such as in the judgment of the Supreme Court of 26 January 2011 (Case IV CSK 308/10). The above reflexions regarding the guilt also apply to this provision.

In the cases specified in Article 429 and 430 CC additional provisions on the liability of an *ex contractu* may also apply, which results from Article 443 CC. Such a coincidence of application of the provisions applies, as indicated in the literature on the subject [Safjan 2020], to a situation when, for example, the patient's body is damaged in connection with a faulty medical treatment by a doctor with whom the entity performing medical activities concluded a medical service contract. Due diligence will be assessed taking into account of the professional character of that activity and specific tortious behavior, on the basis of an abstract state/stage and concrete comparison – whether the applicable procedures were complied with, whether the principle of the art of the profession was followed. The obligation of such an assessment results from the directive outlined in the provisions of Article 472 in connection with Article 471 CC and with regard to due diligence, outlined in relation to professionals (Article 355(2) CC). When assigning responsibility for someone else's guilt, one must also take into account the legal relationship between the medical entity and people who are medical personnel. Pursuant to Article 33 UDL in the case of medical activities performed by a physician as part of an individual medical practice only in a medical institution on the basis of an agreement with the medical entity running this institution or on the basis of an individual specialist medical practice only in a medical institution on the basis of an agreement with the medical entity running this institution, the physician and the medical entity shall bear joint and several liability for damages resulting from the provision of healthcare services or unlawful omission to provide healthcare services.

It should be noted, however, that liability for damages does not always have to be complete. It depends both on the ordinary effects of the action or omission of the person liable for compensation (Article 361(1) CC) and on the injured party's possible contribution to the increase or occurrence of the damage (Article 362 CC). It's worth noting that the injured party's contribution is his action and omission. The ordinary effects from which the damage resulted are assessed¹¹ on the basis of experience, knowledge and logical reasoning by the court, and consists, in a way, of recreating the past, based on the collected evidence of the course of events. In the case of damages caused by the fault of entities performing me-

¹¹ See commentary to Article 361, theses No. 5–7 [Banaszczyk 2020].

dical activities, the difficulty in determining the causal relationship is mainly due to the assessment of the omission. In the doctrine¹² and jurisprudence, it is assumed that in order to establish such a fact it is sufficient to settle for findings that if it had not been for the omission, the damage would not have occurred.

Bearing in mind the above analysis, it should be emphasized once again that responsibility for the use of a medical device, such as a computer program with AI, or a device with artificial intelligence, will be borne by the entity performing the medical activity, which will have the right to make a recourse claim against the manufacturer of this device in case it malfunctions.

CONCLUSIONS

Bearing in mind the considerations presented above, it should be emphasized that while the provision of healthcare services with the use of teleinformatic means has been directly provided for by the law (Article 3(1) UDL), the use of AI for the implementation of medical activities has not been regulated directly. Thus, it is necessary to create legal regulations that will organize the rules of using AI in medicine, and at the same time define the rules of liability for damages resulting from its functioning. Currently, Polish law does not even define a legal definition of a concept of artificial intelligence. Under Polish law, the term AI appears only in the Act of 17 January 2019 on the Future Industry Platform Foundation, as well as in the Regulation of the Council of Ministers of 7 June 2017 on granting the Scientific and Academic Computer Network the status of a state research institute. At the moment, the rules of civil liability for damages caused as a result of AI's actions should be considered from the perspective of the analogy legis. As indicated in the content of this paper, liability for damage caused by AI should be identified with liability for a dangerous product. At the same time, the civil liability of the medical entity for damages resulting from the use of AI in the diagnostic imaging process will be subject to the general regime of tort liability. Regardless of the need to regulate the legal aspects of the functioning of artificial intelligence and the rules of liability for damage caused by it, it is necessary to consider the ethical aspects of its use, especially on the grounds related to the protection of human life and health.

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¹² See commentary to Article 361, thesis No. 21 [Banaszczyk 2020].

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FREEDOM OF CONSCIENCE AS A HUMAN RIGHT AND CONSCIENCE CLAUSE AS A LEGAL INSTITUTION IN THE INTERNATIONAL SYSTEM OF HUMAN RIGHTS PROTECTION (SPECIAL FOCUS ON EUROPEAN CONTEXT)

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Abstract. The United Nations recognized the right to conscientious objection to military service only in 2004, with far-reaching restrictions. At the Council of Europe, interpretation for the purpose of issuing ruling was derived from the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, however it has never been given autonomous treaty-based legal regulation. Dispositions such as resolution 1763 (2010) of the Council of Europe or Strasbourg judicial decisions, respecting a recognition margin, could only call for recognition or observance of conscience clause by the states – parties to the Convention. These states, however, already as member states of the European Union – signatories of Treaty of Lisbon – although actually recognising Article 10 of the EU Charter of Fundamental Rights as specification of freedom of conscience, still retained a far-reaching autonomy in its legal configuration. This paper answers the following research questions: is recognition of freedom of conscience as a human right, justifying the right for conscientious objection, requisite for the necessity to adopt conscience clause into the international system of human rights protection, and, consequently, in the state legal orders; if so, is the “universal” mandate of transnationally recognized right for conscientious objection strong enough to overcome the arbitrariness of statutory solutions of state legal orders?

Keywords: right, conscience, objection, freedom, clause

INTRODUCTION

“The guardian of [...] freedom [of conscience] is the right to invoke the conscience clause and to refuse to perform an act contrary to one’s conscience. [...] It is impossible to genuinely protect inviolable rights of a human being without protecting their conscience. It is because freedom of conscience reflects human dignity. Its protection is necessary to guarantee the material content of certain fundamental rights, such as freedom to express one’s ethical, philosophical or religious beliefs. [...] The possibility of invoking conscience clause is considered to be a fundamental right which may be restricted only in exceptional circumstances” [Johann and Lewaszkiewicz–Petrykowska 1999, 21; Waszczuk–Napiórkowska 2012, 231–53].¹

The aforementioned view of the legal scholars and academics quoted in court rulings presents a close relationship between the guarantees of freedom of reli-

¹ Cf. judgment of the Polish Constitutional Tribunal of 7 October 2015, ref. no. K 12/14, OTJ ZU 9A/2015, sect. 143, items 3.3.1; 4.4.1.

gion and of respect for conscience and beliefs, nowadays most often expressed in a triple formula “freedom of thought, conscience and religion,” constituting the ground for international and regional human rights instruments, and a conscience clause – a legal institution recognizing the right to refuse to perform a legal obligation by invoking so-called conscientious objection.

Legal scholars usually do not contest the special role of freedom of conscience as the one to which the other freedoms of thought and religion refer [Lugli and Pistolesi 2003, 36–37]. Neither the so-called *freedom to believe* – using the classic *Bill of rights* of 1791 distinction – is contested, as nobody forbids anybody to hold certain beliefs. The so-called *freedom to act*, namely freedom to manifest one’s beliefs, is worded in various ways in different legal systems, due to different understanding of the restrictions necessary in a democratic society. Thus, not everyone sees the relationship between freedom of conscience as a human right and the necessity to introduce conscience clause to a legal system.

This paper answers the following research questions: is recognition of freedom of conscience as a human right, justifying the right for conscientious objection, a requisite for the necessity to adopt conscience clause into the international system of human rights protection, and, consequently, in the state legal orders; if so, is the “universal” mandate of transnationally recognized right for conscientious objection strong enough to overcome the arbitrariness of statutory solutions of state legal orders?

A legal dogma-based method was adopted for the research. The classical division into international, regional and supra-state levels has been applied. Based on the analysis of the UN legal provisions and standards, the author analyses the legal documents concerning the member states of the Council of Europe and the European Union. Due to the universal and doctrinal nature of the examined issues, the author acknowledges that the research results – limited to the European human rights system – may be considered representative, also for human rights systems other than European, regional and supranational. The author assumes that the conclusions of the analysis presented at the final part of the paper, should entitle the final thesis, presented as postulate for the future.

1. INTERNATIONAL LEVEL – UNITED NATIONS

Marek Piechowiak, analysing Article 1 of the Universal Declaration of Human Rights, stating, among others, that all people [...] are endowed with reason and conscience” points out that “law is based on the recognition of a human being as intrinsically moral, who, in their free and rational behaviour, is subject to cognisable, normative criteria of behaviour, independent of themselves” [Piechowiak 1999, 98].²

² *The Universal Declaration of Human Rights* (Paris, 10.12.1948) [hereinafter: UDHR], <https://www.un.org/en/universal-declaration-human-rights/> [accessed: 08.03.2021], Article 1.

Article 18 UDHR, recognising freedom of conscience together with freedom of thought and religion, states that “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 teaching, practice, worship and observance.” The provisions of Article 18 have been included, in the same or slightly modified wording, in various legal documents protecting human rights, having international, regional or supra-national range. It is because UDHR – a document which, in principle, does not have the force of a treaty – was supposed to proclaim human rights as international standard, at the same time indicating the basic content of the term “human rights” used in the Charter of the United Nations [Kędzia 2018, 14; Zanghì 2013, 24–29]. The intention of the writers of the UDHR regarding its nature had been explained by Chairperson Roosevelt who, introducing the project of the UDHR under debate, stated, among others, that UDHR was to serve as “a common standard to be achieved by all peoples from all states” [Kędzia 2018, 16]. Standards formulated in the document have been further elaborated on in treaties and *soft law* acts referring to the UDHR, adopted in the form of the United Nations resolutions [ibid., 14]. Thus, Article 18 UDHR may be considered a certain *matrix* for statutory provisions on freedom of conscience.

The intuitions contained in the UDHR have been developed in the form of a treaty as the International Covenant on Civil and Political Rights³ which stipulates in Article 18(1) that “everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.” The only limitations of such freedoms foreseen in Article 18(3) may be the limitations “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” For many years, the Human Rights Committee⁴ had been refusing to recognise the right to conscientious objection on the grounds of the right to freedom of conscience, as exemplified by the ruling of 1984 [Orzeszyna 2017, 20].⁵ A few years later, the Committee, in the context of refusal to commence military service, acknowledged the possibility to interpret the right to conscientious objection from Article 18 CCPR, with a proviso that military service may not be refused on the grounds of conscientious objection during peacetime [ibid.]. Only in 2004, while examining Morocco’s report, the Committee stated that: “the state party must fully recognise the right to conscientious objection in the hypothesis where military service is compulsory” [ibid., 22]. Hence, the Committee ackno-

³ International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49 [hereinafter: CCPR], <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [accessed: 12.03.2021].

⁴ Hereinafter: Committee.

⁵ Human Rights Committee, *LTK v. Finland*, Admissibility, Communication No. 185/1984, UN Doc. CCPR/C/25/D/185/1984, IHRL 2795 (UNHRC 1985), 9th July 1985.

wledges the right to conscientious objection to perform military service, also pointing out the issue of the provisions discriminating the objectors (refusing to perform military service on conscientious grounds), assigned to a substitute civilian service [ibid., 21]. However, the Committee does not consider it legitimate to invoke conscience when refusing to pay taxes on the grounds that the said taxes have been intended for military purposes [ibid., 22].

2. REGIONAL LEVEL – COUNCIL OF EUROPE

At Council of Europe, Article 18 UDHR has been further developed in Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁶ Dynamic interpretation applied in the rulings by European Court of Human Rights in Strasbourg – intended, at least in principle, to improve the effectiveness of the European human rights system – makes the history of interpretation of conscience clause in judicial decisions on the grounds of Article 9 ECHR impossible to be categorised as explicitly evolutionary.

The history of interpreting Article 9 ECHR based on judicial decisions and views of legal scholars and commentators, freedom of thought, conscience and religion is considered to entail three different freedoms, together constituting one law, however having slightly different scopes, hence allowed to be analysed separately. Recognition of freedom of conscience within the meaning of Article 9 signifies, first and foremost, that the state undertakes not to exert influence on any individual conscience and it will take into consideration the conscience-driven decision of individual citizens [Lugli, Pasquali Cerioli, and Pistolesi 2008, 70–71; Kubala 2012, 393]. Theoretical nature of this assumption has been verified in section 2 of Article 9, specifying the boundary of delimitative activities of the state in the scope of exercising by the citizens their right to freedom of thought, conscience and religion.⁷ Systemic implementation of these assumptions requires finding a balance between a guarantee of fundamental rights uniform for everyone and respect for specificity of various cultural and national backgrounds.

2.1. Conjunction between freedom of conscience and conscience clause in legal documents of the Parliamentary Assembly of the Council of Europe and the judicial decisions of the European Court of Human Rights

The oldest group of petitions where the petitioners were trying to derive their right to conscientious objection from Article 9 ECHR, were complaints regarding refusal to perform military service on conscientious grounds [Bielecki 2016, 107–28]. Legal action has also been taken in this context at the Parliamentary Asse-

⁶ The Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter: ECHR], https://www.echr.coe.int/Documents/Convention_ENG.pdf [accessed: 08.03.2021].

⁷ Cf. Article 9 and 14 ECHR.

mbly of the Council of Europe. Recognition of the right to conscientious objection in the context of refusal to perform military service was advocated, among others, in Resolution 337 of 26 January 1967 or Recommendation 816 of 7 October 1977.⁸ The Committee of Ministers of the Council of Europe have responded negatively to these documents [Banaś 2015, 71–80; Kubala 2012, 399–400]. The statement by European Commission of Human Rights of 5 July 1977 emphasised that ECHR does not guarantee any right to conscientious objection [Renucci 2004, 7]. It was only on 9 April 1987 that the Committee of Ministers of the Council of Europe adopted a Recommendation R (87) 8 presenting conscience clause as a legal proposal [Biesemans 1994, 16–18].⁹ In 1990, at a Copenhagen conference on safety and cooperation in Europe, many states – parties to the ECHR – signed the protocol containing a paragraph on conscience clause.¹⁰ In May 1993, during the meeting of Parliamentary Commission, a project of a conscience clause resolution was being discussed; it was, however, left without vote [Kubala 2012, 399–401]. A new protocol, containing conscience clause, have not been introduced to the ECHR so far.

In the light of the international legal documents of the Parliamentary Assembly described above, each State is free to recognise or not conscientious objection to military service and to possibly punish those who refuse such service [ibid., 401]. Recognizing the moral grounds for conscientious objection, the state had the right to impose an obligation to perform alternative civilian service on a conscript. Until 1998, that is until preliminary examination of a case depended on *European Commission on Human Rights* (before it was dissolved under Protocol 11 to the ECHR),¹¹ cases regarding conscientious objection to perform military service had hardly been brought to the European Court of Human Rights.¹² When dismissing the complaints, the Commission used the same arguments, highlighting the possibility to perform alternative service and the right of every state – arising from the ECHR – to recognise or not the conscientious objection in a particular case. This can be exemplified by the case *Grandrath v. Germany*, where the applicant – a Jehovah’s Witness – was convicted because being a “mi-

⁸ Council of Europe [Parliamentary Assembly], Resolution 337 (1967), *Right of conscientious objection*, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15752&lang=en> [accessed: 13.03.2021]; Recommendation 816 (1977), *Right of conscientious objection to military service*, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14850&lang=en> [accessed: 13.03.2021].

⁹ Recommendation No. R (87) 8 of the Committee of Ministers to Member States Regarding Conscientious Objection to Compulsory Military Service (Adopted 9 April 1987), <https://www.refworld.org/docid/5069778e2.html> [accessed: 13.03.2021].

¹⁰ *Dokument spotkania Kopenhaskiego Konferencji w sprawie ludzkiego wymiaru KBWE* (29.06.1990), <https://bisnetus.wordpress.com/2016/07/31/dokument-spotkania-kopenhaskiego-konferencji-w-sprawie-ludzkiego-wymiaru-kbwe/> [accessed: 13.03.2021].

¹¹ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, https://www.echr.coe.int/Documents/Library_Collection_P11_ETS155E_ENG.pdf [accessed: 09.03.2021].

¹² Hereinafter: ECtHR.

nister of the sect,” he objected not only to performing military service, but also to performing any kind of substitute service, comparing himself to Catholic or Protestant ministers who could refuse to perform military service [Jasudowicz 2013, 28].¹³ The Commission, invoking Article 9 and 14 in conjunction with Article 4 found no violation of the ECHR, deeming the order that the applicant perform military service or at least substitute civilian service justified, as well as stating the possibility of the court imposing sanctions on him in case of refusal [Banaś 2015, 74; Kubala 2012, 401].

The first judgment where ECtHR stated violation of Article 9 ECHR is commonly considered to be the judgment of 1993, in the case *Kokkinakis v. Greece*, regarding conviction of Jehova’s Witnesses for proselytism illegal in Greece [Renucci 2004, 62–65].¹⁴ Other cases where violation of Article 9 ECHR has been examined include the cases concerning the obligation to take a religious oath when accepting secular office [ibid., 71–73],¹⁵ cases concerning the relationship between freedom of religion and the right to education,¹⁶ as well as cases concerning termination of employment relationship for ideological reasons,¹⁷ or the display of religious symbols or wearing religious clothing in public [ibid., 56].¹⁸ ECtHR judgments falling into the aforementioned topic groups, define understanding of freedom of thought, conscience and religion in judicial decisions, helping to outline the grounds for revisiting the right to conscientious objection on the grounds of the provisions of the ECHR.

When it comes to deriving the conscience clause from the provisions of the ECHR based on judicial decisions, the judgment in the case *Bayatyan v. Armenia* is considered to have been a breakthrough [Banaś 2015, 82; Kubala 2012, 402]. The Armenian, a Jehovah’s Witness, Vahan Bayatyan, was sentenced to prison in 2001 for refusal to perform military service. A year before, Armenia joined Council of Europe and in January 2001 it undertook to introduce legislation on civilian substitute service and to release all those imprisoned for that reason. Therefore, the original sentence was all the more surprising – a year and a half custodian sentence – increased to two and a half years in prison, later upheld by Armenian Court of Cassation, following the prosecutor’s appeal claiming such refusal to be unfounded and dangerous [Bielecki 2016, 124; Kubala 2012, 42]. In 2009

¹³ Application no. 2299/64 by Albert Grandrath against the Federal Republic of Germany. Report of the Commission, [https://hudoc.echr.coe.int/eng#{"itemid":\["001-73650"\]}](https://hudoc.echr.coe.int/eng#{) [accessed: 13.03.2021].

¹⁴ Judgment of the ECtHR of 25 May 1993, case: *Kokkinakis v. Greece* (Application no. 14307/88), cf. the judgments of 25 May 1993, Series A no. 260–A, and 26 September 1996, *Reports of Judgments and Decisions* 1996–IV.

¹⁵ For example: judgment of the ECtHR of 18 February 1999, case: *Buscarini and others v. San Marino* (Application no. 24645/94).

¹⁶ For example: judgment of the ECtHR of 15 June 2010 [final 22 November 2010], case: *Grzelak v. Poland* (Application no. 15472/02).

¹⁷ For example: judgment of the ECtHR of 3 February 2011, case: *Siebenhaar v. Germany* (Application no. 18136/02).

¹⁸ For example: rejected case: *Dahlab v. Switzerland* (Application no. 42393/98), decision 15 February 2001, ECHR 2001–V.

ECtHR issued a negative judgment; however, following an appeal, the Grand Chamber, quoting universality of substitute military service arrangements and reminding Armenia of its international obligations, issued another judgment on 7 July 2011, acknowledging that Article 9 protects religious groups opposed to military service.¹⁹ ECtHR decided that punishing the applicant may not be considered an interference necessary in a democratic society within the meaning of Article 9.²⁰ Such arguments have also appeared for example in the judgment in the case *Erçep v. Turkey*.²¹

As Oktawian Nawrot reminds, quoting an excerpt from *Kokkinakis v. Greece* judgment: “acknowledging the need for state action to limit freedom of expression indeed leaves authorities a certain margin of appreciation in deciding whether and to what extent an interference is necessary. However, the actions of public authorities must always take into consideration the context of a democratic society and its axiology” [Nawrot 2014, 108]. In this context, judgments in the cases *Bayatyan v. Armenia* and *Erçep v. Turkey*, may be perceived as a courageous attempt to overcome the tension observed in Article 9(2) ECHR, consisting in reference of the rules of democratic society to human conscience as the axiological foundation organising the common social space for world-view expression [Kubala 2012, 403].

Such reasoning was presented by ECtHR in the judgments concerning cases where the applicants denied doctor’s right to invoke conscience clause, e.g. *Tysiśc p. Polska*,²² *R.R. p. Polska*,²³ *P i S. p. Polska*.²⁴ In those cases, ECtHR either did not refer to the structure of conscience clause, or directly highlighted the rights of healthcare worker to conscientious objection, pointing out that the organisers of healthcare system are obliged to provide the patient with access to legally admissible healthcare services [Nawrot 2014, 110].

2.2. McCafferty Report and the right to conscientious objection in Resolution 1763 (2010) of the European Council

On 20 July 2010, a report was presented, prepared by Commission for Social Affairs, Family and Health of the Council of Europe Parliamentary Assembly, led by Christine McCafferty (hence the name: *McCafferty Report*), presenting the draft resolution and the recommendations to be put to the vote at the sitting of the Council of Europe Parliamentary Assembly of 8 October 2010.²⁵ The authors of

¹⁹ Judgment of the Grand Chamber of the European Court of Human Rights of 7 July 2011, case of *Bayatyan v. Armenia* (Application no. 23459/03) [2011] ECHR 1095 [2012] 54 EHRR 15.

²⁰ *Ibid.*, p. 128.

²¹ Judgment of the ECtHR of 22 November 2011, case: *Erçep v. Turkey* (Application no. 43965/04).

²² Judgment of the ECtHR of 20 March 2007, case: *Tysiśc v. Poland* (Application no. 5410/03).

²³ Judgment of the ECtHR of 28 November 2011, case: *R.R. v. Poland* (Application no. 27617/04).

²⁴ Judgment of the ECtHR of 30 October 2012, case: *P. i S. v. Poland* (Application no. 57375/04).

²⁵ Cf. Social Health and Family Affairs Committee (rapporteur: Mc Cafferty), Doc. 12347: *Women’s access to lawful medical care: the problem of unregulated use of conscientious objection*,

the report express their worries over the excessive use of conscience clause by healthcare professionals. They hold the view that the institution of a conscience clause is inadequate and largely unregulated and, at the same time, they advocate balancing the right of conscientious objection with the right of each patient to access full medical care. There was also a demand to equate the right to conscientious objection with the right to health. One of the last postulates formulated in the document is suspending the right to conscientious objection in the so-called emergencies, such as danger to the patient's life or when referral to another healthcare provider is hindered [Kubala 2013, 115].

On 17 September 2010, *European Centre for Law and Justice* issued *Memorandum*, also referred to as *Puppinck's Report*, disputing the report of *Commission for Social Affairs, Family and Health*.²⁶ The document recalls Recommendation 1518 (2001) of the Council of Europe Parliamentary Assembly of 5 October 2005, stating: "The right of conscientious objection is a fundamental aspect of the right to freedom of thought, conscience and religion enshrined in the Universal Declaration of Human Rights and the European Convention on Human Rights" [Banaś 2015, 77].²⁷ The authors of *Memorandum*, mentioning a strong positive position of the right to conscientious objection, list the relevant regulations of the United Nations, international NGOs – such as *International Federation of Gynaecology and Obstetrics* and statutory regulations in individual states recognising the right to conscientious objection for health professionals. The authors of *Memorandum* indicate absence of legal grounds for the postulates of McCafferty Report and asking not to include it in the final resolution [Kubala 2013, 115–18].

Eventually, the resolution of the Parliamentary Assembly of the Council of Europe no. 1763 of 7 October 2010 includes the arguments presented in *Memorandum*, not McCafferty Report.²⁸ The adopted document reads that no person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which

<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12506&lang=en> [accessed: 13.03.2021].

²⁶ European Centre for Law and Justice, *ECLJ memorandum on the PACE report (Doc. 12347, 20 July 2010) on "Women's access to lawful medical care: the problem of unregulated use of conscientious objection"* Page 1 MEMORANDUM ON THE PACE Report, Doc. 12347, 20 July 2010 "WOMEN'S ACCESS TO LAWFUL MEDICAL CARE: THE PROBLEM OF UNREGULATED USE OF CONSCIENTIOUS OBJECTION" that will be discussed and voted in Strasbourg on 7th October 2010 [hereinafter: *Memorandum*], https://7676076fde29cb34e26d-759f611b127203e9f2a0021aa1b7da05.ssl.cf2.rackcdn.com/eclj/ECLJ_MEMO_COUNCIL_OF_EUROPE_CONSCIENTIOUS_OBJECTI_ON_McCafferty_EN_Puppinck.pdf [accessed: 13.03.2021].

²⁷ Council of Europe [Parliamentary Assembly], Recommendation 1518 (2001), *Exercise of the right of conscientious objection to military service in Council of Europe member states*, 23 May 2001, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16909&lang=en> [accessed: 13.03.2021].

²⁸ Council of Europe [Parliamentary Assembly], Resolution 1764 (2010) [final version], *The right to conscientious objection in lawful medical care*, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17909&lang=en> [accessed: 13.03.2021].

could cause the death of a human foetus or embryo, for any reason [Prieto 2012, 40–42]. Parliamentary Assembly emphasised the need to affirm the right of conscientious objection should come together with patient’s right to access lawful medical care [Nawrot 2014, 111]. While the said document does not impose any obligations on the Member States of the Council of Europe, its assessment of particular legislative solutions governing the issue of conscience clause in the Member States of the Council of Europe leads to the conclusion that these solutions are comprehensive and transparent, hence the recommendations to Member States contained in paragraph 4 of Resolution 1763 are intended to again remind Member States of the positively established standards for the application of the conscience clause [ibid., 112].

3. SUPRANATIONAL LEVEL – THE EUROPEAN UNION

The Treaty on European Union (consolidated version of 2016), in Article 6(2) states: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.”²⁹ Article 6(3) further stipulates: “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”

Regardless of the fact that the Union has not formally acceded the ECHR, it should be noted that the Court of Justice of the European Union³⁰ had previously referred to the judicial decisions by ECtHR [Marzocchi 2020; Zanghì 2013, 376; Wieruszewski 2008, 54–57], and that all Member States of the European Union are also members of the Council of Europe, i.e., parties to the ECHR. Thus, Strasbourg judicial decisions and those by ECtHR constitute a significant part of *acquis* in the field of human rights, or, in CJEU terms, *fundamental rights* (CJEU is consistent in using the term *fundamental rights*) [Sozański 2013, 119–21; Kubala 2015, 206].

A human rights document binding on the Member States of the European Union is the *Charter of Fundamental Rights*, dubbed “Declaration on European morals” at the Nice summit [Piechowiak 2003, 5]. The European Council decided to draw up this document in Cologne on 3–4 June 1999 and it was published already on 7 December 2000 (the document is now used in the version adapted to the Lisbon Treaty).³¹ CFR summarizes long tradition of reference to human rights in the states forming the European Communities, or European Union [Wieru-

²⁹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (Consolidated version 2016), Official Journal of the European Union 202.7.6.2016.

³⁰ Hereinafter: CJEU.

³¹ Charter of Fundamental Rights of the European Union (2012/C 326/02) [hereinafter: CFR], Official Journal of the European Union, C 326, 26 October 2012.

szewski 2008, 42–46, 52–53; Wyrozumska 2008, 26–27]. In Article 6(1) as amended by the Treaty of Lisbon (13 December 2007), the Treaty on European Union,³² states that “the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights [...] which shall have the same legal value as the Treaties.”³³

Thus, Article 10 CFR should be interpreted taking into account the aforementioned historic contexts of interpretation. The Article states in section 1: “Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.” *Explanations relating to the Charter of Fundamental Rights* published together with the CFR in the Official Journal of the EU, clarify the understanding of Article 10: “The right guaranteed in paragraph 1 corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52 (3) of the Charter, has the same meaning and scope. Limitations must therefore respect Article 9(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.”³⁴ Although such clarifications are not legally binding, they are providing a line of interpretation for Article 10 of the Charter, locating it in a wide context of interpretation of freedom of thought, conscience and religion based on judicial decisions and views of legal scholars and commentators, both for Article 9 ECHR and Article 18 UDHR and Article 18 CCPR [Zanghì 2013, 313–16, 380–83]. Therefore, we can assume also in the case of Article 10 that the freedoms expressed therein are three manifestations – of different scope – of one right. J.T. Martín de Agar proposes the following definition of scopes constituting Article 10 – the right to freedom of thought as the right protecting the individual in their cognitive search for truth; the right to freedom of religion as the right to a free, individual response to questions concerning transcendence (usually identified with God); the right to freedom of conscience as the right to distinguish freely between what is considered to be good or evil, right or wrong, what one should do and what one should avoid [Martín de Agar 2013, 975–77]. From the formal point of view, it should be noted that Article 10(1), lists freedoms of thought, conscience and religion and later describes the scope (manifesting, teaching, practice) of freedom to change religion or belief, not mentioning the freedom of conscience. The words translated in Article 10 CFR as *beliefs*, translates in the French version as *convictions* [Kubala 2015, 207–208].

³² Hereinafter: TEU.

³³ Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community signed at Lisbon 13 December 2007 (2007/C 3006/01), Official Journal of the European Union C 306 of 17 December 2012.

³⁴ Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), Official Journal of the European Union, C 303 of 14 December 2007, “Explanation on article 10 – Freedom of thought, conscience and religion” [hereinafter: Explanations CFR].

This conclusion is part of the interpretative tradition of Article 10 of the Charter, as this interpretation also leads to the conclusion that freedom of thought and religion would fall within a scope of freedom of conscience, especially given the fact that beliefs of a religious or non-religious nature may constitute the grounds for the person's moral actions [ibid.]. Thus, freedom of conscience, also in the meaning of Article 10, as was the case of Article 9 ECHR, should be understood as "capability to act in line with own beliefs or convictions, even if such action was contrary to particular legal norms" [Martín de Agar 2013, 981], meaning, in the first place, apart from the right to represent particular world-view (*forum internum*), the right to act according to one's conscience, right to freedom from coercion to act against one's conscience (*forum externum*) [Waszczuk–Napiórkowska 2012, 252–53]. In the light of the above, it should be assumed that defining the permissible scope of action by the legislator, in relation to the fulfilment of a citizen's right to freedom of conscience, within the meaning of Article 10(1) of the Charter, are those described in Article 9(2) ECHR. Therefore, another conclusion seems legitimate with reference to Article 10, based on, for example, ECtHR decisions in *Bayatyan v. Armenia* and *Erçep v. Turkey*, namely delimitative actions by the state, motivated by the principles of a democratic society, should refer to the human conscience as the axiological foundation of social interactions.

Such a strong positive mandate in Article 10(1) of the Charter, presumes the necessity to expressly state the right for conscientious objection, as it has been done in Article 10(2) of the Charter, stating: "The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right." It is further elaborated on in *Explanations relating to the Charter of Fundamental Rights*: "The right guaranteed in paragraph 2 corresponds to national constitutional traditions and to the development of national legislation on this issue." In this context, conscience clause should be considered a result of the development of constitutionalism and, in general, legislation of the member states of the European Union.

CONCLUSIONS

With particular focus on the European context, this paper proves that in the international human rights system, freedom of conscience is often treated as a sufficient basis for recognising – although with certain limitations – the right to conscientious objection as one aspect of freedom of conscience itself.

Although Article 18 UDHR, defining freedom of conscience and considered a certain doctrinal and defining matrix for freedom of conscience, has been developed in Article 18 International CCPR, the right to conscientious objection in relation to military service, with far-reaching limitations, was only recognised at the United Nations in 2004.

Although within the European Council, dispositions such as resolution 1763 (2010) of the Council of Europe or Strasbourg judicial decisions, respecting a re-

cognition margin, could only call for recognition or observance of conscience clause by the states – parties to the ECHR, these states, already as Member States of the European Union – signatories of the Lisbon Treaty – by recognising Article 10(2) CFR, actually recognised the conscience clause as a legal instrument which is a development or positive specification of freedom of conscience [Kubala 2015, 211].

Making the possibility of invoking conscience clause subject to national constitutional traditions and development of national legislation in Article 10(2) CFR, as well as – one might add – on the adopted additional protocols to the Lisbon Treaty (e.g. the Republic of Poland signed Protocol No. 30 to the Lisbon Treaty – the so-called *British Protocol* – an *opt-out* clause, restricting in its entirety the invocation of the Charter’s provisions by Polish and British citizens, although no longer relevant in the case of the latter) [Książniakiewicz 2012, 333–48], makes Article 10 CFR, perhaps, a somewhat fictitious provision, should the need to exercise the right to conscientious objection arise in a situation where no conscience clause has yet been provided for in a given state legal order or the right to conscientious objection has been prohibited in a given case.

Considering the above, it is justified – though a bit utopian – to postulate the future creation of a uniform – implementing the postulate of “universality” of human rights recognised on treaty level – interpretation standard for Article 10, legislatively binding on all the Member States of the European Union. Such standard of interpretation would actually force the necessity to recognize, at a national level, the right for conscientious objection as a fundamental right, being a part of the legal tradition of European countries. Argument supporting such a postulate might be, for example, introduction of EU citizenship in TEU (Article 9 TEU), which, although ancillary to and not replacing national citizenship, in view of the diversity of national legal solutions for the application of the right to conscientious objection, provides opportunity for potential violation of one of the core values of the Constitutions of the Member States, namely the equality of citizens before the law [Kubala 2015, 211–12]. Such attempt to uniformly oblige Member States, could be considered as a negation of the current trends in the international protection of human rights, which CFR is a part of, turning away from the ECHR’s striving towards narrow juridisation, which postulates – as M. Piechowiak writes – “avoiding formulas with open meaning, which certainly include provisions concerning values” [Piechowiak 2003, 29], in favour of a “holistic” [Kędzia 2018, 5–23] view of human rights, where universality of a provision guarantees it does not quickly becomes obsolete due to changing social conditions. Adopting such a holistic perspective makes it difficult, or even impossible, to specify and hold uniform axiological reference. On the other hand, if – according to some – such axiological consistency would neither be possible in the case of too narrow juridisation, as it is impossible to take into consideration all, often contradicting, points of view, a question arises, whether it is possible to call the right to freedom of conscience, and thus the right of conscientious objection, or all human

rights in general, as “fundamental” – that is, inherent in human by its very nature and therefore deserving independence from the arbitrariness of statutory state decisions.

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TAX ABOLITION RELIEF VS. TAX FAIRNESS

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Abstract. This article relates to the personal income tax relief, hereinafter referred to as the tax abolition relief, which has been applicable since 2008. On its implementation as well as during its further application, the tax abolition relief gave rise to numerous difficulties of interpretation. Consistently, the point of reference throughout the legislation process and the application of law has been the principle of tax fairness. This aspect has also been raised during the recent implementation of the amendments to this tax relief. The author analyses the origin justifying the tax abolition relief and its substance, considering the amendments that became binding since the beginning of 2021. The study material was based on the Polish legislation and doctrine and expanded by the aspects of international tax law.

Keywords: personal income tax, tax abolition relief, avoidance of double taxation methods, avoidance of double taxation contracts

GENERAL REMARKS

The issue of tax fairness constitutes a complex, multi-layered aspect that has been subject to specific evolution. Although the principle has not been formulated explicitly in the law, the definition of tax fairness is broadly analyzed in the doctrine of the tax law [Gomułowicz 2001; Idem 2013; Famulska 1996, Głuchowski 1999; Kurowski 1996]. It is worth mentioning that, despite different approaches of scholars, the doctrine of tax law has developed a specific formula of the tax fairness [Oniszczyk 2001]. It is based on two directives: a statutory formulation of the tax structure as a guarantee for its stability that provides legal security of the taxpayer, and an imperative for fair tax imposition on the taxpayers [Nita 2013]. The former is derived from Article 217 of the Constitution of the Republic of Poland and it has already been subject of the Constitutional Tribunal's consideration [Oniszczyk 2001; Gomułowicz 2003]. Nowadays, this concept should not raise any doubts in the doctrine. The latter, however, even though it is firmly established in the doctrine [Gomułowicz 1989; Idem 1995; Idem 2001; Szołno–Koguc 2016], it continues to generate the justified concerns due to the fact that, on one hand, it impacts the boundaries of the tax imposing process [Łączkowski 1992] and, on the other hand, it has to be related to the ability to pay that is grounded in the Constitutional principle of social justice.¹ Taking the above into considera-

¹ Article 2 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of No. 78, item 483 [hereinafter: the Constitution of Poland].

tion, the principle of tax fairness often becomes the point of reference for the establishment and evaluation of the several tax institutions² and, in this sense, constantly constitutes a current issue in the doctrine [Gomułowicz 2013]. It is, therefore, justifiable to mention it in the context of the so-called “tax abolition relief.”³

The introduction of the “tax abolition relief” to Polish personal income tax was justified by the notions of tax equality and tax fairness.⁴ The reasoning behind this legal concept was to counterbalance the discrepancies in both the means and results of the calculation of the foreign income tax in accordance with the different methods of elimination of double taxation. The essence of the tax abolition relief was to eliminate the financial outcome of the proportional deduction method in regard to the selected sources of income and to equalize the effective taxation with the financial outcome that is caused by the application of the exemption-with-progression method. Despite several obstacles at the preliminary stage of its implementation, the tax abolition relief has proved to be a beneficial solution for the taxpayers. After twelve years of enforcing this preference in personal income tax, the attempt to tighten the tax system along with the process of counteracting the aggressive tax optimization has led to the changes in the concept of the relief. Despite the initial plans, the tax abolition relief was not eliminated but instead a mechanism that limits its application has been introduced to the legal system. Not only the introduction of the tax abolition relief, but also the process of adjudicating the concerns that appeared during the years of its application along with its substantial changes were consistently justified by raising the notions of tax equality and tax fairness. The aim of this article is to present the origin and the substance of the relief, as well as practical problems connected with it, in light of interpretation of the recent amendments to the discussed issue. Consequently, it is crucial to state that, despite the fact that introduction of the tax abolition relief and its amendments to the legal system was justified by the concept of tax equality, the process of executing the law, including the application of inconsistent interpretation of the relief, can lead, in fact, to violation of this principle, especially in the aspect of tax equality.

² The principle of justice is the subject of doctrine work *inter alia* in regard to the tax reliefs and exemptions [Marusik 2018].

³ The term “tax relief” within the meaning of this article shall be understood in accordance with the doctrine of tax law as one of the forms of tax preference which results in reduction of the due tax [Nykiel 2002]. The abolition relief is applied in the construction of the personal income tax as a form of reduction of the tax calculated pursuant to Article 27g of the Personal Income Tax Act of 26 July 1991, Journal of Laws of 2020, item 1426 [hereinafter: The PIT Act].

⁴ Explanatory memorandum to the governmental draft amendment to the act on special solutions for the taxpayers obtaining certain revenues on the territory of the Republic of Poland (Sejm document no. 550, 6th term of Sejm) [hereinafter: Explanatory of the abolition act of 2008], <http://orka.sejm.gov.pl/proc6.nsf/0/2C03FCA1A46CB3A0C12577D1004F574B?OpenDocument> [accessed: 28.12.2020].

1. ORIGIN OF AND REASONS FOR IMPLEMENTATION OF THE TAX ABOLITION RELIEF

The 27 July 2008 Act on the Special Resolutions for the Taxpayers with Certain Sources of Income Obtained Outside the Territory of the Republic of Poland⁵ implemented not only the possibility of the short-term application of the general tax abolition in the form of remission of personal income tax for the years 2002–2007 in relation to foreign income, but also introduced permanent abolition relief (Article 14–16 of the Abolition Act; Article 27g of the PIT Act). Considering the meaning of the term “tax abolition”⁶ the concept “abolition relief” does not reflect precisely the merit of the relief itself and should be rather viewed through the lenses of the generally applicable so-called abolition act. The main reasoning behind the amendment was to minimize or even counteract the effects of “injustice” that were caused by implementation of the elimination of the double taxation method, namely foreign tax credit method (tax credits) specified in various treaties on avoidance of double taxation. The application of this method was not a new solution, however, its financial burden suffered by Polish residents emigrating in particular to the UK after Poland’s accession to the EU was regarded as over excessive in comparison to the credit method and therefore constituted injustice [Bartosiewicz and Kubacki 2008a].

It is also worth underlining that counteracting the abovementioned results did not aim at eliminating the reasons for the status quo. Those reasons have originated from the legal concept of international double taxation that results in the fiscal jurisdiction based on the principle of residency and the principle of source by the individual states [Radu 2012]. In accordance with the principle of residency, a state shall impose income tax and tax on entities with place of residence or place of establishment within its territory, irrespective of which state territory the income was generated on (regardless of the place of origin of the income) or of which state territory the assets are located in (in Polish income taxes: so-called unlimited tax obligation). The source principle, on the other hand, requires imposing taxes on income or assets generated or located on the territory of a particular state, irrespective of the entities’ place of residence or place of establishment. In this situation the legally significant criterion is based on the place of generating

⁵ Act of 27 July 2008 on the Special Resolutions for the Taxpayers with Certain Sources of Income Obtained Outside the Territory of the Republic of Poland, Journal of Laws No. 143, item 894 as amended [hereinafter: Abolition Act].

⁶ Tax abolition tends to be equivalent to tax amnesty defined as a period during which taxpayers (amnesty participants) may voluntarily disclose to the tax authorities their failure to comply with certain tax obligations. Simultaneously, the amnesty participants are not subject to any administrative, civil or criminal responsibility provided by the law of a given country [Kuchciak and Witczak 2011]. Tax amnesty may be defined as an agenda which stipulates legal requirements for actual reduction of declared or undeclared tax obligations and refers to a specific period [Purnomolastu 2017; Manziti 2005]. The reasons for and the scope of tax amnesty can be different. In some countries it relates to foreign income [Sayidah and Assagaf 2019].

the income or on the place of location of the assets being taxed (in Polish income taxes: so-called limited tax obligation). In their tax systems, most of the states adopt the synthesis of those two principles which results in conflicts of laws caused by double taxation on international level [Vogel and Fiszer 1989; Jamroży and Cloer 2006; Castagnède 2015]. This unfavourable phenomenon is eliminated by implementing mechanisms for income tax calculation referred to as the methods of avoiding double taxation. Most frequently, obligation for those mechanisms derives from the bilateral treaties entered by the states that are usually modeled on the agreement developed by OECD. The two most commonly used methods of avoiding double taxation are: the exemption method and the credit method (tax credits) [Gordon 1992; Dickescheid 2004; Lang 2021]. The application of an appropriate method depends on the provisions of the binding bilateral treaties on the avoidance of double taxation [Davies 2003; Kucia–Guściora 2019].

The credit method (tax credits) means that the tax paid in the state of source of the income (foreign income) is credited towards the tax due in the state of residence. The main premise of the method is that it obliges the state of residency to recognize the tax imposed in the state of the source of income as the tax due in the state of residency. Presently, the amount of tax credits is limited, therefore, it is impossible to deduct the full amount of the tax paid in the state of the source of income from the tax due in the state of residency. The foreign tax subtraction from the tax due in the state of residency cannot exceed a certain amount which is calculated as that part of the national tax in relation to the income generated in the state of its source. Thus, the state of residency applies the rules on taxation in accordance with its domestic law to the taxpayer's total income (foreign and domestic), and then allows to deduct the tax paid abroad but only within the limit of the part of the own tax related to the foreign income. The credit method may cause a so-called complementary effect. This means that the state of residency collects the tax that is the difference between the tax due and the tax paid abroad. Hence, the taxpayer who benefits from tax reliefs and other tax preferences in the state of the source of income which results in lowering that tax at the same time reduces the amount to be credited in the state of residency. It is also the result of lower taxation imposed in the state of the source of income in comparison to the taxes in the state of residency [Szafoni 2011]. Therefore, any privileges granted to taxpayers abroad do not have the desired result as the amount of the national tax is increased – the amount of the granted reliefs in the state of the source of income is added to it [Dickescheid 2004]. Furthermore, differences in the amount of the tax in the state of residency and the state of the source of income may affect in a negative sense the amount of the deduction which can lead to the need to “complement, supplement” income tax in the state of residency [Kucia–Guściora 2019].

The other method of avoiding double taxation, apart from the credit method, is the exemption method (exclusion). Its essence is based on the exclusion from the taxable base that part of the taxpayer's income which was generated as the source of income outside the state of residency. In this sense the state of residency

waives its tax claims within its own tax jurisdiction. The exemption method can be established as full exemption (exclusion) or exemption (exclusion) with progression. In the former case, the income from the foreign sources is not calculated in the taxable base of the state at all. In the latter case, an exemption of the foreign income applies; however, the state of the residency reserves the right to factor in the amount of foreign income for the purpose of calculating the tax rate that shall be applicable to the remaining amount of income included in the taxable base of the state of residency [Fiszler and Panek 2010]. In practice, this method may not completely eliminate double taxation either. However, the exclusion of the foreign income (oftentimes relatively high) constitutes a more favorable legal solution in comparison to the tax credit method. It is worth mentioning that the exemption-with-progression method can cause tax resistance as well and further on can trigger a sense of injustice in those taxpayers whose income is generated exclusively in the state of residence as it may be subjected to more severe tax obligations [Witak 2016]. Both methods are included not only in the Polish personal income tax law⁷ but also in the treaties on elimination of double taxation that Poland is party to.

Considering the inequalities in the levels of tax obligations for taxpayers obtaining the income from the sources outside the territory of Republic of Poland, the principle of equality before the law enshrined in the Article 32 of the Constitution was invoked in the process of introduction the abolition solutions to the legal system. It was pointed out that, even though the principle does not have an absolute character, admissibility of the different treatment of the subjects identified within the same class (category) requires an identification of the significant common factual or legal aspect that would justify the differentiation of the specific class from the general population. In reference to jurisprudence of the Constitutional Tribunal,⁸ it was raised that “with such an approach to equality, the assessment of its application is shifted to the criteria of differentiation of the particular groups of citizens whose legal affairs have been resolved in a different manner. The issue of whether or not the principle of equality before law was violated may be determined by selecting specific differentiating criterion; the criterion itself has to be adopted, however, in accordance with the remaining constitutional principles.”

While applying these considerations to the taxpayers with the place of residence in Poland and with total or partial income obtained outside its territory (a relevant condition determining the selection of a particular category of taxpayers), the aforementioned criterion of differentiating the legal situation of those subjects was, in fact, the location (state) of obtaining the income. At this point it is crucial to agree with the doctrine’s statement that, in the analyzed scope, the assessment of the abovementioned criterion in respect to its legal importance justifying diffe-

⁷ Article 27(8) of the PIT Act: the exemption method, Article 27(9) and Article 27(9a) of the PIT Act: the credit method.

⁸ Judgment of the Constitutional Tribunal of 20 November 2002, ref. no. K 41/02, M.P. 2002, No. 56, item 763.

rent treatment of the same subjects and derived from the interpretation of the jurisprudence of the Constitutional Tribunal leads to the conclusion that this criterion cannot constitute the relevant aspect [Dobaczewska 2010].

Therefore, the solutions of the 2008 Abolition Act were aimed at equalizing the tax obligations of Polish residents obtaining income from the sources located outside Poland that resulted from application of different methods of avoidance of double taxation, and that were drastically noticeable when foreign income constituted the only income of the taxpayer.⁹ The main purpose of introducing the so-called abolition relief was to lead to situation when, regardless of the international agreements on avoidance of double taxation that Poland entered into with the state of source of income, each taxpayer had equal tax obligations. Moreover, it was clearly indicated that the abolition relief shall apply also to relations not regulated by international agreements, namely to those cases in which income is generated in states with which Poland has not signed a treaty on avoidance of double taxation. According to the supporting documentation of the draft Abolition Act, those solutions were introduced based on the tax fairness principle that is implemented through universality and equality of taxation, and, at the same time, there was no assumption of complete “exemption” of the taxpayer from obligation to pay tax in Poland on the income obtained outside of its territory.¹⁰ However, it turned out that this solution did not stand the test of time, nor was it a remedy for the problems revealed in its execution [Bartosiewicz and Kubacki 2008b].

2. THE SCOPE OF ABOLITION RELIEF

The scope of the abolition relief needs to be analyzed in several aspects: subjective, objective, technical and formal. The subjective scope of the abolition relief identifies the recipients of the relief. In order to apply the relief three criteria need to be fulfilled cumulatively. The first criterion relates to the tax status of the taxpayer. The relief is applicable exclusively to Polish tax residents, i.e. taxpayers with the residence status in Poland,¹¹ which results in unlimited obligation in respect to personal income tax. The second criterion relates to the issue of obtaining income by the residents from criterion 1 strictly from the sources located outside the territory of Poland in the tax year. What is more, such foreign income must be taxed in accordance with the proportional credit method – tax credits (Article

⁹ In a situation that the taxpayer’s income is solely foreign (there is no domestic income), under the exemption method no tax obligation in Poland is evoked, while under the credit method tax obligation is invoked.

¹⁰ Judgment of the Constitutional Tribunal of 26 September 1989, ref. no. K 3/89, OTK 1989, No. 1, item 5 and the Explanatory of the Abolition Act of 2008.

¹¹ For tax purposes, Article 3(1) of the PIT Act considers a natural person to be a person residing on the territory of the Republic of Poland, who: 1) has a center of personal or economic interests on the territory of the Republic of Poland (center of life interests) or 2) resides in the territory of the Republic of Poland for more than 183 days in a tax year.

27(9) or Article 27(9a) of the PIT Act). It should be stressed that the application of the tax credit method results directly from the binding bilateral treaty on avoidance of double taxation¹² or refers to relations not regulated by international agreements where no bilateral treaty was entered into.¹³

Since 2019 as a result of so-called MLI Convention that amends the treaties on avoidance of double taxation that Poland is party to, taxation is shifted from the exemption-with-progression method to the tax credit method (tax credits).¹⁴ Therefore, the abolition relief also applies in these cases.¹⁵ The third criterion excludes foreign income located in the state or on the territories indicated in the Regulation of the Minister of Finance and defined as applying harmful tax competition.¹⁶ That is why, the objective scope of the relief does not concern all taxpayers but only those who fulfilled cumulatively the indicated conditions.

In regard to the subjective scope of the relief, it should be pointed out that its application is limited to specific sources of revenue that include employment of the governmental officials, employment based on work contracts, home work contracts and cooperative employment contracts (Article 12(1) of the PIT Act), revenue from economic activity carried out personally,¹⁷ non-agricultural economic activity (Article 14 of the PIT Act). Moreover, the abolition relief covers revenues from copyright and related rights within the meaning of separated regulations, from artistic, literary, scientific, educational and journalistic activities performed outside the territory of the Republic of Poland, except for the income (revenue) obtained from the use of disposal of such rights. The enumerated list of foreign revenue sources that are covered by the relief has its significance in the sense that it does not apply to all foreign sources of income. Apart from the abovementioned ones, the relief is not applicable to other non-listed revenues, such as pensions

¹² Treaties with the USA, Russia, the Netherlands, Iceland, Australia.

¹³ E.g., agreements with Brazil, Peru, Ecuador, Colombia, Nicaragua, Cuba.

¹⁴ Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting signed in Paris on 24 November 2016, Journal of Laws of 2018, item 1369.

¹⁵ It concerns from 2019 Slovenia and Austria, from 2020 the United Kingdom, Ireland, Finland, Israel, Japan, Lithuania, New Zealand, Slovakia, from 2021 Norway, Belgium, Canada, Denmark.

¹⁶ Regulation of the Minister of Finance of 28 March 2019 on the definition of countries and territories applying harmful tax competition in the field of personal income tax, Journal of Laws item 599.

¹⁷ Income from activities performed personally includes, pursuant to Article 13 of the PIT act, among others: income from personal artistic, literary, scientific, coaching, educational and journalistic activities, including participation in competitions in the fields of science, culture and art and journalism, as well as income from practising sports, sports scholarships granted under separate regulations and income of judges from conducting sports competitions; income from the activities of clergy, income from the activities of Polish arbitrators participating in arbitration proceedings with foreign partners; revenue received by persons performing activities related to the performance of social or civic duties, revenue of persons to whom a state or local government authority or administration body, court or prosecutor, pursuant to relevant regulations, has commissioned the performance of specific activities, revenue received by persons, irrespective of the method of their appointment, who are members of management boards, supervisory boards, committees or other bodies constituting legal persons; revenue from the performance of services under a contract of mandate or a contract for specific work, revenue received under business management contracts, managerial contracts or contracts of similar nature.

and social security payments, rent and lease, money capitals, or disposal of real estate or parts of it. According to the binding legal regulations until the end of 2020, the amount of foreign income is not taken into consideration at all.

The technical and formal scope determines the method of calculating the amount of the relief, and then the rules for its deduction from income tax. A taxpayer is allowed to deduct from income tax the amount that is the difference between the tax calculated using the credit method (pursuant to Article 27(9) or Article 27(9a) of the PIT Act) and the amount of hypothetical tax calculated using the exemption-with-progression method (Article 27(8) of the PIT Act). Thus, the taxpayer is obliged to calculate the tax on foreign (and domestic) income according to two applicable methods. As a result of this computation, the differences in the amount of Polish tax on the same amount of foreign income but calculated according to different methods can be revealed. At the core of the abolition relief lies the concept of levelling this particular difference, since it is the amount of the difference that is deducted from the tax in order to “equalize” the inequality and injustice of the credit method in relation to the exemption method.

In the process of implementing the regulations on the abolition relief, the question has been raised if the application of the relief depends on paying the income tax abroad, that is in a state of source of income, or on the territory where income was generated. As mentioned above, no such condition is invoked *expressis verbis* in the language of the Act. Unfortunately, this issue seems to be disputable in the process of implementing the relief by the tax authorities and administrative courts. During the 12 years of implementation of the relief, two opposite interpretations have been formed.

According to the first one, whenever the credit method is applicable, either directly pursuant to the provisions of bilateral treaty or if there is no bilateral agreement (in accordance with Article 27(9a) of the PIT Act), the payment of foreign income does not constitute the condition for applying the abolition relief. The case law of the courts indicates that in the language of the personal income tax law it is impossible to indicate the norm that conditions the applicability of the proportional deduction method on the payment of the tax in other state.¹⁸ What is more, according to the uniform jurisprudence, the interpretation of the tax authorities stating that the payment of the tax abroad is one of the most crucial conditions for applying the abolition relief is, in fact, in conflict with the unambiguous language of the personal income tax law,¹⁹ and it is unfounded in this particular case

¹⁸ Judgment of the Supreme Administrative Court in Warsaw of 13 June 2018, ref. no. II FSK 1160/17, Lex no. 252385; judgment of the Provincial Administrative Court in Wrocław of 16 March 2017, ref. no. I SA/Wr 1166/16, Lex no. 2328883; judgment of the Supreme Administrative Court in Warsaw of 18 January 2017, ref. no. II FSK 2273/15, Lex no. 2220977; judgment of the Provincial Administrative Court in Gdańsk of 18 September 2018, ref. no. I SA/Gd 749/18, Lex no. 2548477; judgment of the Provincial Administrative Court in Gdansk of 31 January 2018, ref. no. I SA/Gd 1621/17, Lex no. 2461140.

¹⁹ Judgment of the Supreme Administrative Court in Warsaw of 2 December 2015, ref. no. II FSK 2406/15, Lex no. 2067908.

to use the purpose method against the plain language rule of interpretation as it only leads to increase of the tax obligations.²⁰

The second approach, represented often by the tax authorities as well as part of the jurisprudence, states that the payment of the tax abroad is prerequisite in order for the abolition relief to be applicable. The arguments in this case are based on the purpose rule of interpretation that is used in situations in which the bilateral treaties are in force, as well as in those in which the bilateral agreements were not established at all. The courts' interpretation is based on the reasoning that if there is no double taxation by the state of source of income and the state of residency, then there are no legal grounds to apply the abolition relief.²¹ The payment of the tax abroad is one of the most crucial conditions for the abolition relief to be applicable.²² While interpreting the legitimacy of the abolition, the courts highlight the fact that the purpose of this institution is not to abolish the tax obligation completely but to counteract the heavy double taxation.²³ If a taxpayer has not paid tax abroad and Poland has not entered into a treaty on avoidance of double taxation with the country concerned, there should be no difference between the amount of tax calculated according to the credit method and the exemption method. Since there is no foreign tax paid to be deducted, the relief is not applicable to the taxpayer, as the tax cannot be calculated according to the credit method, which is a component of the abolition relief.²⁴ The jurisprudence stresses that all tax exemptions and reductions are exceptions and deviations from the principle of tax fairness, therefore, their application cannot be based on an expansive or restrictive rules of interpretation.²⁵ In general, the provisions introducing the tax privileges are interpreted in a strict manner.²⁶ Unfortunately, the analysis of the implementation of the abolition relief leads to a conclusion that there are significant differentiations between the taxpayers obtaining foreign income. This concerns not only differentiation of the methods of tax settlement in Poland (credit method vs exemption method), but also the differentiation of the situation of the taxpayers

²⁰ Judgment of the Provincial Administrative Court in Gdansk of 13 March 2018, ref. no. I SA/Gd 1756/17, Lex no. 2470914.

²¹ Judgment of the Supreme Administrative Court in Warsaw of 11 April 2018, ref. no. II FSK 818/16, Lex no. 2494637; judgment of the Supreme Administrative Court in Warsaw of 20 September 2016, ref. no. II FSK 1898/16, Lex no. 2111168.

²² Judgment of the Supreme Administrative Court in Warsaw of 14 October 2016, ref. no. II FSK 2133/15, Lex no. 2168319.

²³ Judgment of the Supreme Administrative Court in Warsaw of 20 October 2015, ref. no. II FSK 2272/15, Lex no. 1986416.

²⁴ Judgment of the Supreme Administrative Court in Warsaw of 23 February 2018, ref. no. II FSK 396/16, Lex no. 2449453; judgment of the Supreme Administrative Court in Warsaw of 29 October 2017, ref. no. II FSK 3163/15, Lex no. 2408626; judgment of the Supreme Administrative Court in Warsaw of 4 December 2015, ref. no. II FSK 2688/15, Lex no. 1988567; judgment of the Supreme Administrative Court in Warsaw of 8 March 2018, ref. no. II FSK 596/16, Lex no. 2495643.

²⁵ Judgment of the Supreme Administrative Court of 13 September 2000, ref. no. I SA/Wr 2611/98, Lex no. 44726

²⁶ Judgment of the Supreme Court of 7 May 1997, ref. no. III RN 22/97, OSNAPU 1998, No. 5, item 142.

that obliges them to apply the credit method (tax credit) in the context of their right to abolition relief. This dichotomy in the treatment of taxpayers is not counter-balanced by the standpoint of the Minister of Finance expressed in two different general interpretations.

In the general interpretation of 31 October 2016,²⁷ the Minister of Finance confirmed the possibility to apply the abolition relief regardless of whether the condition of payment of the tax abroad was fulfilled or not. It was pointed out that the premise that the tax payment in another state is the crucial condition for application of the proportional credit method is unacceptable. In addition, not a single element of this method requires that the tax payment constitute a prerequisite for its application. Failure to pay tax in the state of the source of income means only that the taxpayer is not able to deduct the foreign tax whilst applying the proportional credit method, since he/she has not paid any tax obligations in this respect. The issue under consideration, in connection with which the Minister's interpretation of the tax law provisions was issued, concerned especially seafarers with residence status in Poland who received income based on the contract work on boards of vessels operating in the international transport. In this case, within the meaning of the treaties on avoidance of double taxation, the seafarer's income is exempt from taxation in the state of the source of income based on tax exemptions regulated by the domestic law of that state of source of income (e.g. Norway). It is important to stress that this interpretation relates to Polish residents obtaining income in those states with which Poland has entered into treaties on avoidance of double taxation.

On the other hand, the second general interpretation of 31 October 2019 issued by the Minister of Finance²⁸ considers the possibility of applying the abolition relief by the seafarers with residence status in Poland who received income based on the contract work on boards of vessels operating in the international transport registered by the state with which Poland has not entered into treaties on avoidance of double taxation (as is the case with no bilateral agreement with Brazil). In such cases, though, the Minister has taken a completely different stance, pointing out the differentiation of the taxpayers' situations when the treaty on avoidance of double taxation with the state has been reached and the situation of the taxpayers where the said treaty has not been entered into. Consequently, it was concluded that the taxpayer who obtains income in the state with which Poland has signed a treaty on avoidance of double taxation and in a situation when the income tax has not been paid abroad, the taxpayer is not allowed to settle the tax obligation in Poland in accordance with Article 27(9) and (9a) of the Act. Therefore, the abolition relief is not applicable in this case. Unfortunately, the argumen-

²⁷ General Interpretation of the Minister of Finance of 31 October 2016, No. DD10.8201.1.2016. GOJ, Official Journal of the Minister of Development and Finance, item 12.

²⁸ General Interpretation of the Minister of Finance, Investments and Development of 31 October 2019, No. Dd4.8201.1.2019, Official Journal of the Minister of Finance, Investments and Development of 17 November 2019, item 21.

tation set out in the interpretation is not fully convincing and raises doubts of both dogmatic and axiological nature in the context of the principle of tax fairness. It is necessary to agree with the statement that the abolition relief is not conditioned on the tax payment in the state of the source of income whether or not there is a binding treaty on avoidance of double taxation with the state where the foreign income is generated. Legal provisions of the Act do not invoke this condition for the purpose of applying the relief. Nevertheless, it is worth noticing that within the general interpretation the Minister of Finance attempts to “inscribe” additional conditions previously not included on the list of conditions for application of the proportional credit method. Based on the literal meaning of the language of the Polish act it is evident that there is a possibility to calculate the tax according to the credit method also in a situation when the foreign tax was not paid in the state of source of income. It seems that in regard to the abolition relief a rule of interpretation has been used that violates the principle of justice. It can be concluded that the Minister of Finance has conducted faulty legal interpretation that focuses on the inaccurate understanding of the language and meaning of the provisions. Furthermore, it needs to be highlighted that as a result of incorrect application of the expansive rules of interpretation, new language of the said provision has emerged, the language that was not invoked in it before. Consequently, such action violates the binding constitutional standards that are fundamental to the doctrine of the principle of justice. It is worth mentioning that applying the expansive or restrictive rules of interpretation is unacceptable, unlawful and constitutes a symptom of overinterpretation of the conditions for allowing the taxpayers to apply the abolition relief.

Moreover, it should be noticed that in practice the instances with the most doubts for applying the abolition relief were the cases of the seafarers obtaining income based on the contract work on boards of vessels operating in international transport.²⁹ In addition, this aspect is vital in regard to the direction of the amendment of the abolition relief.

3. CHANGES IN THE CONSTRUCTION OF THE ABOLITION RELIEF SINCE 2021

After twelve years of generally stable, although questionable, legislation on abolition relief a decision to change them has been reached.³⁰ The initiators of the amendment emphasised that the change aims to limit the application of the relief, which is to tighten the collection of the personal income tax. The explanatory me-

²⁹ Individual interpretations of: the Head of Tax Chamber in Bydgoszcz of 14 April 2015, No. ITPB2/4511-31/15-2/ENB; the Head of Tax Chamber in Katowice of 15 July 2015, No. ITPB2/4511-39/15/MCZ; the Head of Tax Chamber in Warsaw of 11 February 2016, No. ITPB4/4511-4/16-2/JK.

³⁰ Act of 28 November 2020 amending the personal income tax act, the corporate income tax act, the lump sum income tax act on certain incomes earned by natural persons and certain other acts, Journal of Laws of item 2123 [hereinafter: Amendment 2020].

morandum to the amendment indicates that since the introduction of the abolition relief into the Polish tax system, the conditions justifying its application have undergone significant changes.³¹ Furthermore, in the memorandum several important arguments for limiting the scope of application of the abolition relief have been identified.

Firstly, it is assumed that there has been an increase in the awareness regarding the tax consequences of earning income in another country and the effects of using methods to eliminate double taxation of taxpayers who earn income abroad. Taxpayers with this knowledge are able to consciously contrive their tax status, avoiding negative tax consequences.

Secondly, international relations have emphasised that there has been a kind of evolution of the methods of double taxation avoidance in the international agreements since the so-called MLI convention was signed and entered into force [Franczak 2018; Kucia–Guściora 2020]. The continuing tendency after 2004 to move away from the credit method to the exclusion method in the provisions of the treaties on the avoidance of double taxation has been changed or even reversed. Generally speaking, to counteract aggressive tax optimisation, both Poland and other European and non-European countries have decided that the priority method of avoiding double taxation should be the credit method. This approach is the result of the OECD BEPS (Base Erosion and Profit Shifting) project aiming to identify and counteract the erosion of the tax base and profit shifting. It shows that the exemption with the progression method that entails exemption from taxation on income in the state of residence in a situation when in the second state the income benefits from a tax exemption under the domestic law of that state may result in double non-taxation of the income (in the state where the income was obtained based on the exemptions under the law of the state of source of the income and in the state of residence due to the progressive exemption method based on the provisions of binding international agreement). Such malpractices are prevented by the proportional deduction method, according to which income that can be taxed in the second state should also be settled in the state of residence, whereas tax paid abroad is proportionally deducted from tax in the state of residence [Jamroży 2018; Witak 2016]. Due to the ratification of the MLI convention, without the need to amend individual agreements on avoiding double taxation, the exemption method is replaced by the credit method. It is worth noting that even this argumentation can lead to the undermining of the legitimacy of functioning of the abolition relief.

Thirdly, negative consequences have been reported in relation to the application of the relief for aggressive tax policy, using the provisions of the treaties on the avoidance of double taxation, particularly in regard to so-called fiscally

³¹ Explanatory memorandum to the government draft act amending the personal income tax act, the corporate income tax act, the lump sum income tax act on certain incomes earned by natural persons and certain other acts (Sejm Document No. 642, 9th term of Sejm) [hereinafter: explanatory memorandum to Amendment 2020].

transparent companies. In this case, the effect of the application of the abolition relief is incompatible with its original objective, since, regardless of the amount of income earned based on the economic activity, the relief results in the double non-taxation of all income, even very high income, both in the state of obtaining income and in the state of residence.

Fourthly, the explanatory memorandum to the draft amendment makes an axiological argument – relating to the principle of universality and tax fairness. Pursuant to Article 84 of the Constitution of the Republic of Poland, it was indicated that the construction of the Polish tax system was based on the principles of tax justice and universality of taxation. The principle of fiscal justice is a particularization of the principle of social justice in the context of the fairness of citizens' fiscal obligations, but it does not grant equal rights and obligations to all citizens. An expression of this subjectively defined justice is the implementation of tax policies by the country through a system of tax preferences, aimed, among others, at supporting socially justified objectives, such as for example, people facing a difficult life, family, health or material situation. The data presented in the explanatory memorandum show that the income of taxpayers benefiting from the abolition relief is significantly higher than the average salary. Therefore, in the opinion of the project providers, this relief does not serve people facing their most difficult life situations. That is why, they do not see the relief as serving any purpose for the taxpayers under the most severe life circumstance. Thus, it is not justified to favour the situation of persons generating high income abroad over persons who achieve income on the territory of the Republic of Poland. The explanatory memorandum to the act indicates that in the process of settlement of income tax the latter group of taxpayers may only benefit from the statutory tax exemptions and reliefs, which also apply to income earned abroad. However, due to the abolition relief foreign revenues benefit from a further reduction in the tax obligation, which gives an unjustified privilege to the group of taxpayers who earn abroad.

Other considerations, defined as the behavioural function of tax law, were also the reason for the changes in the construction of the abolition relief. The initiators of the changes indicate that the abolition relief was an incentive to undertake economic activity outside the territory of the Republic of Poland, which often constitutes the first stage of permanent relocation of the place of residence abroad (changing tax residence). The new approach to the construction of tax law aims at gradual elimination of solutions favouring the relocation of residence or place of generating income outside of the country (e.g., abolition relief) and simultaneously at creating mechanisms encouraging people to stay in the country. And here, more clearly than it has been so far, the abolition relief takes the form of “relief for return to homeland.”

For the abovementioned reasons, since 2021 Article 27g of the PIT Act has been amended for the purpose of establishing a limit for the abolition relief. Taxpayers may deduct the amount of the relief from income tax, but the amount of

the relief shall not exceed 1360 PLN (Article 27g(2) of the PIT Act). Therefore, the existing objective of the abolition relief will be maintained: the tax obligations on the group of taxpayers who need it most will be reduced, while at the same time the abuses that occur when taxpayers with high foreign revenues benefit from the abolition relief will be eliminated. Some doubts in the interpretation of these limitations have appeared in the doctrine. A. Mariański and Ł. Porada point out that the language of the provisions introduced is erroneous, due to imprecise reference to the maximum amount of the deduction [Mariański and Porada 2019]. Hopefully, the process of application of those provisions in practice will resolve the doubts that have been raised.

The second change in the construction of the abolition relief allows an exception of restriction on the deduction based on the abolition relief, as stated earlier. The abovementioned limit for the deduction of the abolition relief shall not apply to income earned outside the territory of the Republic of Poland based on work or services (contract of mandate, a specific-task contract and managerial contracts), performed outside the land territory of the states. Taxpayers accounting for this income in Poland will, therefore, be entitled to deduct the full amount of the abolition relief. The scope of this exception is clearly addressed to the taxpayers who obtain income from sea and air transport. Nevertheless, this amendment, presumably beneficial to this group of taxpayers, raises doubts in terms of the principle of equality. It is necessary to note that quite an inaccurate term “work outside of land territory of states” was used. Based on the plain language rule of interpretation it may be concluded that this relates to contract work of the seafarer that is performed at sea and not on the land. However, after closer consideration of the provisions of the public international law in regard to the term “land territory” some doubts may be raised as to the work performed on the territorial waters, in ports and internal waters in general, in the exclusive economic zones and on the continental shelves as those zones constitute the part of the territory of the states (are either part of the territory of the states or are subject to special jurisdiction of the states) [Barcik and Srogosz 2019]. The meticulous analysis of those provisions may result in yet another differentiation of the tax status within this already privileged group of seafarers.

CONCLUSIONS

It seems that the considerations on the issue of abolition relief in the context of the principle of fiscal justice are fully legitimate. This is because at every stage of its functioning: from its the introduction into the Polish tax system, through the doubts raised in the process of interpretation and its application by taxpayers, to the stage of recent changes, reference is made to the principles of fairness, equality and universality of taxation. However, the use of this argumentation by the legislator, the tax authorities or the judiciary shows that application of the terms is very unstable. Exactly opposite assumptions are supported based on the crite-

tion of equity. The evaluation of the abolition relief in regard to fulfilling the criteria of justice is not unequivocal. Firstly, given the uniqueness and extraordinariness of the tax preferences in the doctrinal construction of the tax, it may be stated that every relief in its essence may be regarded as exception from the universality of taxation. Secondly, at the same time there is a well established position in doctrine of tax law that it is due to the reliefs and exemptions in the tax system that it is possible to apply the subjective approach toward tax obligations that works for the fulfilment of the principle of tax equality which includes the taxpayers' ability to pay and in this sense results in executing the principle of justice [Marusik 2018]. This concept is fully compatible with the present analysis of the special regulations in regard to taxation of the foreign income. In consequence, it seems that in this particular case some kind of mechanism to reduce "injustice" in the distribution of the tax obligations is necessary.

Both construction of the abolition relief that had been binding until the end of 2020 as well as its new version raise doubts. Unfortunately, the introduced amendments only provoke new questions rather than provide answers to the old ones. These doubts require a thorough analysis not only of Polish legislation, but also of the principles of international tax law. There is no doubt that the tendency to apply the credit method more extensively, without reducing its negative effects by providing full access to the abolition relief, has been confirmed.

As expected, the changes in the construction of the abolition relief binding since January 2021 have triggered emotional reactions of taxpayers. In most cases, these are indeed negative emotions based on criticism of new solutions. The taxpayers' arguments are based on a sense of subjective injustice due to the loss of current tax privileges. This, in turn, raises doubts in context of the principle of equality that constitutes the part of the tax justice. The taxpayers' reflections supported by the tax calculation may lead to the conclusion that limiting the scope of application of the abolition relief for many of them will mean *de facto* the elimination of this privilege. However, the problem is far deeper as new solutions encourage taxpayers to change their tax residence rather return from emigration to their homeland. The conclusion that the changes to seal the tax system are a global trend provides little comfort.

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PROTECTION OF THE INTERESTS OF CAPITAL COMPANIES IN SELECTED JUDGMENTS OF THE SUPREME COURT PERTAINING TO THE APPLICATION OF ARTICLE 210 (379) OF THE CODE OF COMMERCIAL COMPANIES

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Abstract. The paper aims to examine selected issues of representation of a company, which will be carried out on the basis of a special provision laid down in Article 210(1) (379(1)) of the Code of Commercial Companies. The objective of the provision is to protect the company's interests and the way to achieve this goal is through exclusion of the management board from representation in contracts and disputes between the company and a member of the management board. The paper seeks to examine the scope of application of Article 210(1) of the Code and to determine the legal nature and types of power of attorney that can be granted pursuant to the provision. The analysis is based on a rather complex factual case, and examines legal relationships in a limited partnership in which a limited liability company and a member of its management board are partners.

Keywords: company, representation of company in a contract with a member of the management board

INTRODUCTION

After thirty years of operations of commercial companies in free-market conditions in Poland and in the legal environment formed by regulations – first, the Commercial Code,¹ and since 2001, the Code of Commercial Companies² – a certain interpretation practice has been established with regard to the implementation of these regulations. An important issue addressed over this period by legal scholars and commentators and in judicial decisions involved proper representation of a company; in particular, representation carried out in a rather peculiar situation where contractual relations are established between the company and individuals who are members of the company's executive body, i.e. the company's management board.

The abovementioned situation comes under the hypothesis of Article 210(1) of the Code pertaining to a limited liability company³ and Article 379(1) of the Code, pertaining to a joint-stock company. In view of identical axiological assu-

¹ Resolution of the President of the Republic of Poland of 27 June 1934, the Commercial Code, Journal of Laws No. 57, item 502 as amended [hereinafter: CC].

² Act of 15 September 2000, the Code of Commercial Companies, Journal of Laws of 2020, item 1526 as amended [hereinafter: the Code].

³ Hereinafter: ltd. company.

mptions, the provisions were founded on and of the similarity of content, further discussion will focus on Article 210(1) of the Code. Conclusions drawn on that basis will apply also to Article 379(1) of the Code.

Pursuant to Article 210(1) of the Code, in a contract or a dispute between the company and a member of the management board, the company shall be represented by the supervisory board or an attorney appointed by the resolution of the shareholders' meeting. As both the legal writings [Strzępka and Zielińska 2015, 530; Popiołek 2015, 936; Szumański 2014, 504–505; Kuniewicz and Futrzyńska–Mielcarzewicz 2011, 113–17] and the judiciary⁴ assert, the goal of the discussed provision is to protect the interests of the ltd. company, and indirectly, also its partners and creditors in the event of conflict of interests, which may emerge in a situation where a member of the management board concludes an agreement with “himself,” and thus in a situation where the same persons are on both sides of the contract. A potential conflict of interests was solved by the legislator in favour of the company. In this case, the protection of the company's interests lies in eliminating the risk of members of the management board playing double roles: as representatives of the company's interests and as representatives of their own interests. It is worth noting that the regulations do not require the actual conflict of interest to take place; it suffices that there might be a potential conflict of individual interests of members of the board and the company's interests.

Ever since the provisions on the operations of companies became effective, one of the problematic issues and challenges has been to determine the effects of infringement of Article 210(1) of the Code, i.e. the prohibition to represent the company by members of the management board. It was commonly agreed that a contract concluded in violation of the provision was absolutely invalid, the normative basis for this sanction is provided in Article 39 or Article 58 of the Civil Code⁵ [Kuniewicz 1996, 68–70; Naworski 2001, 411–12; Kidyba 2015, 996; Szumański 2013, 680; Weiss and Szumański 2014, 466; Gniewek 2017, 86; Górczyński 2018, 254–57]. At present, this issue is no longer debatable thanks to the amendment to the Civil Code⁶ adopted in 2018, whereby the provision of Article 39 was amended. The amended provision brings in the sanction of suspended in-

⁴ Cf. judgment of the Supreme Court [hereinafter: SC] of 18 August 2005, ref. no. V CK 103/05, Lex no. 653638; judgment of the SC of 18 August 2005, ref. no. V CK 104/05, Lex no. 358805; judgment of the SC of 28 June 2007, ref. no. IV CSK 106/07, Lex no. 955036; resolution of the SC of 22 October 2009, ref. no. III CZP 63/09, OSNC 2010, no. 4, item 55; decision of the SC of 11 March 2010, ref. no. IV CSK 413/09, Lex no. 677902; judgment of the SC of 9 October 2010, ref. no. I CSK 679/09, Lex no. 622199; judgment of the SC of 15 June 2012, ref. no. II CSK 217/11, OSNC 2013, no. 2, item 27; decision of the SC of 14 November 2012, ref. no. I PK 212/12, Lex no. 1675355; judgment of the SC of 29 January 2014, ref. no. II PK 124/13, OSNP 2015, no. 4, item 52; resolution of 7 judges of the SC of 31 March 2016, ref. no. III CZP 89/15, OSNC 2016, no. 9, item 97; judgment of the SC of 3 February 2017, ref. no. II CSK 304/16, Lex no. 2284177.

⁵ Act of 23 April 1964, the Civil Code, Journal of Laws of 2010, item 1740 as amended [hereinafter: the Civil Code].

⁶ Act of 9 November 2018 on amendments to certain laws in order to implement simplifications for entrepreneurs in the tax and commercial laws, Journal of Laws of 2018, item 2244.

effectiveness of a contract concluded by a member of a body of a legal entity acting on its behalf without authorization. Thus, the solution adopted converges with the effects of the action of an attorney-in-fact who has no authorization or who exceeds the scope of the authorization (Articles 103–104 of the Civil Code) [Kuniewicz 2012, 154-164; Kubiak–Cyrul 2019, 93–94]. In fact, although the sanctions of absolute invalidity and suspended ineffectiveness differ in many ways, what is similar is that an act in law affected by either of them does not have intended legal effects [Radwański and Olejniczak 2015, 351–54].

1. THE MATERIAL SCOPE OF APPLICATION OF ARTICLE 210(1) OF THE CODE

Establishing legal effects of action taken by a member of the management board without the power of representation was not the only disputable issue with regard to Article 210 of the Code. A thorough analysis of judicial decisions, in particular the judgments of the Supreme Court, leads researchers to believe that the material scope of the provision in question still raises many controversies. It is not a secondary issue, since defining and establishing company representation is what decides about the effectiveness and, in consequence, the validity of the acts of representation. It should be noted that representation is inappropriate not only when, irrespective of the ban laid down in Article 210(1) of the Code, the company is represented by the management board, but also when as a result of erroneous interpretation of the discussed provision the management board is excluded from representation, even though it is authorized to act on behalf of the company with regard to a given matter [Kuniewicz 2020, 138].

To address the issue of the material scope of the application of Article 210(1) of the Code, i.e. to explain the meaning of the wording: “in a contract between the company and a member of the management board,” it must be asserted that the premise underlying the provision refers to both the purely obligatory contracts and obligatory organizational contracts [Leśniak 2017, 58–60; Kuniewicz 2020, 103]. The latter contracts lead to the establishment of specific types of legal entities, such as partnerships or capital companies.

Recently, some issues arose in the judicial decisions with regard to the application of Article 210(1) of the Code in the context of specific connections between entities, namely, in the context of legal relationships in a limited partnership in which a limited liability company and a member of its management board are partners. To be more specific, in this case, an ltd. company is a general partner in a limited partnership, while a member or members of the company’s management board act as limited partners in the limited partnership. In this case, the obligation to apply the rule of representation provided in Article 210(1) of the Code applies to not only the making of articles of a limited partnership but also to further legal transactions carried out between the ltd. company and a member of its management board, which arose in connection to the legal relationship, the source

of which are the articles of partnership. If, in particular, a member of the ltd. company's management board is, along with the company, a partner in a limited partnership, Article 210(1) of the Code applies to the ltd. company's statement of consent to amending the articles of partnership of a limited partnership (irrespective of the form in which amendment is made). Pertinent reasoning with regard to this issue was presented by the Supreme Court in the Resolution of 7 September 2018.⁷ In this situation, a contractual relationship between an ltd. company and the member of its board is subject to modification, therefore, application of the special provision is obligatory (Article 210(1) of the Code), regulating representation of a company [Kuniewicz 2020, 101–109].

However, certain doubts arise with regard to admissibility of the application of Article 210(1) of the Code on the grounds of legal relationships of a limited partnership in which the ltd. company is an entity and a party to acts in law. Just as a reminder, the normative construct of a limited partnership is required to have at least two partners (a general partner and a limited partner) with a different legal status (Article 102 of the Code). Not to delve into details of these differences, the important issue for this analysis is the representative function in a limited partnership. Pursuant to Article 117 of the Code, a partnership shall be represented by general partners who, under the articles of partnership or a final and unappealable court ruling, have not been deprived of the right to represent the partnership. On the other hand, a limited partner, as a partner, is not authorized to represent the partnership; he may represent it only in the capacity of an attorney in fact (Article 118(1) of the Code). In a case where a limited liability company is a general partner, it shall perform the representative function in a partnership, and in fact, the function is performed by a managing-executive body of the ltd. company, i.e. its management board. However, if a member of the board is a limited partner in the partnership, naturally, some doubt arises as to the application or non-application of the principle of representation set out in Article 210(1) of the Code. The doubt refers specifically to the application of the provision with regard to constructs undertaken not by partners of the limited partnership, i.e. ltd. company and the board's member, but by the partnership and the person who is a member of the management board of the ltd. company which is a general partner in the partnership.

This issue was resolved by the judgment of the Supreme Court of 11 December 2015.⁸ The facts of the case were complex, in particular with regard to personal changes which took place in the course of the operations of both companies, i.e. the ltd. company and the partnership company. These changes were elaborated on by the Supreme Court, so there is no need to examine them here. For the purposes of this paper, an important factual element involves the fact that a civil law agreement was concluded between the defendant—the partnership and the plaintiff—a member of the board of the limited company that is a general partner in

⁷ Ref. no. III CZP 42/18. The Resolution and the justification memorandum were published in OSNC 2019, no. 6, item 64.

⁸ Ref. no. III CSK 12/15, Legalis no. 1522514.

the partnership. The subject matter of the agreement was the plaintiff's obligation, for a consideration, to acquire a building permit, the beneficiary of which was the partnership.

In the factual case presented, the issue raising doubts is neither the legal nature of the agreement concluded, nor the admissibility of the agreement itself. The subject matter of the court dispute was the validity of the agreement since it was entered into between a plaintiff who is a member of the management board of the ltd. company and a limited partnership represented by a general partner—the limited liability company, which in turn was represented by another member of the ltd. company's board.

The first and second instance courts asserted that Article 210(1) of the Code is applicable to the said case. This article excludes the authorization of the management board to represent the ltd. company and non-compliance with this article results in the nullity of the agreement concluded.

In the statement of reasons for this judgment it was indicated that, pursuant to Article 117 of the Code, general partners have the right to represent the partnership. Since in this case an ltd. company was the only general partner, then, pursuant to Article 210(1) of the Code, representation of the ltd. by the management board in a contract with a board member is precluded. Moreover, the statement of reasons also provided reference to the principle of unlimited liability applicable to limited partnerships (Article 102 of the Code). Pointing to the close connection between the liability of the partnership and the liability of its general partner, the court of first instance asserted that allowing the conclusion of contracts between members of the board of the general partner's company and the partnership, represented by a general partner, who in turn is represented by another member of the management board would completely annihilate the protective purpose of Article 210(1) of the Code. In such a situation, the partners of the limited company should appoint an attorney-in-law to conclude a contract with the board member, so as to prevent any abuse of authority by the latter. In consequence, non-adherence to the principles of representation of a limited liability company stipulated in Article 210(1) of the Code – in the opinion of the adjudicating courts – causes absolute nullity of the act in law performed on the basis of Article 58 of the Civil Code.

In the extensive cassation appeal, the plaintiff raised a claim for infringement of substantive law and procedural law. The Supreme Court ruled only on the substantive issue, justly deeming it essential to the case. The issue can be narrowed down to the assessment of whether Article 210(1) can be applied to a contract concluded by a partnership with a member of the management board of a limited company which is also a general partner in the partnership.

Resolving the above dispute, the Supreme Court ascertained that there are no jurisdiction arguments to justify the application of Article 210(1) of the Code to a contract entered into by a member of the board of an ltd. company that is a general partner in a partnership. Although the statement of reasons is not very len-

gthy, it is based on precise and substantial premises. In the light of the argumentation, the crucial factor here is that every commercial company constitutes a specific type of company, regulated by the statute. Neither the Code of Commercial Companies (no need for comma here) nor the legal commentary based on the Code implies that provisions pertaining to one company type may be applied to a different company type. The only exception here are the regulations on registered partnerships, which pursuant to express provisions of the Code should be applied to commercial partnerships, including limited partnerships (Article 103(1) of the Code). To further the argumentation of the Supreme Court, it is worth adding that a limited partnership, just as any other commercial company has legal capacity (Article 8 of the Code), thus constitutes an organization unit referred to in Article 33¹ of the Civil Code. In accordance with Article 33(1) of the Civil Code, provisions on legal persons shall apply to organizational units which have no legal personality, but are granted legal capacity under the law. However, the provision invoked does not authorize the application of Article 210(1) of the Code to legal relationships in a limited partnership. The regulation of Article 33¹(1) of the Civil Code is part of the General Provisions of the Civil Code, hence reference it includes pertains to the application of general provisions on legal persons, and not specific provisions regulating given types of legal persons, e.g. a limited liability company [Kuniewicz and Kuniewicz 2014, 35].

Emphasizing the protective purpose – from the perspective of company’s interests – of Article 210(1) of the Code, the Supreme Court rightly noted that this provision is supposed to prevent the occurrence of a situation in which the same person, or other members of the management board the person collaborates with, appears on both sides of a construct in which a limited liability company participates.

In the adjudicated case the essential issue, overlooked by the courts of lower instances, is that the disputed contract was concluded between a limited partnership and a natural person who was a member of the ltd. company’s management board, and not between an ltd. company and a member of its management board. Therefore, if we assume, as it is commonly accepted, that Article 210(1) of the Code pertaining to an ltd. company is a special provision, the logical conclusion is that its application to legal relationships of a limited partnership is not admissible. It would be also against the ban on the widening of interpretation of special provisions. In consequence, it must be stated that a contract concluded by a partnership with a member of the ltd. company’s management board, a general partner in the partnership, was not a contract concluded “with oneself.” From a wider perspective that takes into account not only the limited partnership, but also other partnerships, admissibility of such contracts should be judged with reference to Article 108c of the Civil Code [ibid., 34–35]. Although the provision pertains to the power of attorney, it expresses the general principle of prohibition to perform acts in law “with oneself” if a conflict of interests arises.

2. POWER OF ATTORNEY GRANTED ON THE BASIS OF ARTICLE 210(1) OF THE CODE

The above arguments imply that Article 210(1) of the Code does not apply to contractual relationships between a limited partnership and a member of an ltd. company's board that is a general partner in the limited partnership. However, this provision should be applied to legal relationships established in the context of a limited partnership in which an ltd. company is a general partner, and a member of the company's board is a limited partner. Moreover, in such an arrangement of entities, a person who is simultaneously a limited partner in the partnership and a member of the ltd. company's board, pursuant to Article 210(1) of the Code, cannot be appointed as an attorney-in-fact by the shareholders' meeting since such a connection is against the nature of a limited partnership.

The above opinion was expressed by the Supreme Court in a resolution of 30 January 2019.⁹ The main issue the Supreme Court was presented with by the Regional Court pertained to the type of the power of attorney that can be granted on the basis of Article 210(1) of the Code. Specifying the legal doubt, the Regional Court formulated a question whether limited power of attorney should be applied to representing a limited liability company, i.e. pertaining to the conclusion of a specific contract or to the representation of the company in a specific dispute, or should "specific" power of attorney be admissible, and if so, can the specific power of attorney be granted and effective for an indefinite period of time.¹⁰

It should be emphasized that the questions capture a more profound issue, which is the effect of certain systemic premises that were adopted in Poland and refer to the nature of a legal power of attorney granted pursuant to Article 210(1) of the Code. In essence, if the questions posed refer to the concepts of limited and specific power of attorney, then it means that the inquiring entity is referring to the power of attorney as regulated in the Civil Code. However, this issue is not indisputable, and on the wider plane, it can be brought down to the issue of the relation of the provisions of the Code of Commercial Companies to the provisions of the Civil Code and the distinction between commercial and civil law [Frącko-wiak 2020, 13–23].

Although the legislator provided a clear opinion on that in Article 2 of the Code and expressly adopted the principle of unity of civil law, still voices are heard opting for separation (autonomy) of commercial law. This trend was echoed in the judgment of the Supreme Court of 15 June 2012,¹¹ which settled the issue of

⁹ Ref. no. III CZP 71/18, *Legalis* no. 1870561.

¹⁰ In the Polish legal system there are 3 types of power of attorney: general power of attorney, limited power of attorney granting powers to perform a specific act, and "specific" power of attorney, defined as "power of attorney granting powers to perform legal acts of one category" [Kierzkowska and Miller 2000]. The two types – limited and specific power of attorney – are often erroneously translated as "special power of attorney" and confused.

¹¹ Ref. no. II CSK 217/11. Resolution and the justification memorandum were published in *OSNC* 2013, no. 2, item 27.

the type of a power of attorney granted on the basis of Article 210(1) of the Code. The judgment ruled that the provisions of the Civil Code pertaining to the power of attorney do not apply to the power of attorney granted pursuant to Article 210(1) of the Code. In the opinion of the Supreme Court, a power of attorney granted to enable representation of the company in contracts and disputes with a member of the company's board are governed by a separate regulation. This "specificity" of the power of attorney comes from the fact that the attorney-in-fact is vested with powers under a special procedure, namely, on the basis of a resolution of the shareholders' meeting. Therefore, considering that source of authorization – the Supreme Court argued – an attorney-in-fact appointed by a resolution is not an attorney-in-fact of the company *sensu stricto*, since the authorization granted to him is not the result of the statement of intent of a board member as a body authorized to represent the company, but rather of a special representative referred to as the "corporate representative" or an "organizational representative." Since the shareholders' meeting does not have an autonomous competence for "external" representation – the statement of reasons attached to the judgment of the Supreme Court of 2012 argues – powers are given to the attorney-in-fact on the basis of a special act of an "internal board." In consequence, in the view of the Supreme Court, an attorney-in-fact appointed by the shareholders' meeting, plays the role of a "substitute manager," executing precisely defined acts which remain within the competence of the management board as a body of the company.

The stance of the Supreme Court and the justification provided are indeed interesting and might spark a discussion about the place of commercial law in the legal system. However, the attempt to prove the hypothesis that the Code of Commercial Companies provides autonomous regulation of the power of attorney granted by shareholders' meeting was deemed to fail. In the light of the regulation in force, there is no justification for the postulate that an attorney-in-fact appointed pursuant to Article 210(1) of the Code is not an attorney-in-fact, but a substitute manager. The Supreme Court's introduction of a rather obscure concept of "substitute manager" was met with critique from legal scholars and commentators [Kuniewicz and Czepita 2013, 677–80; Naworski 2013, 51–62; Kidyba 2015, 1001].

The issue is also addressed extensively in the justification memorandum of the resolution of the Supreme Court of 30 January 2019. To explain and unify existing jurisprudence, the Supreme Court questioned the argumentation presented in the 2012 Supreme Court judgment about the autonomy of the legal construct of the power of attorney pursuant to Article 210(1) of the Code with regard to the power of attorney based on the Civil Code. First of all, the basic premise was questioned, which was the grounds for the 2012 ruling, namely that the granting of the power of attorney by the shareholders' meeting is an "internal" or "organizational" act and does not apply to all external relationships of the company.

Despite the fact that, indeed, the power of attorney based on Article 210(1) of the Code demonstrates certain attributes that modify the standard model of repre-

sentation of a limited liability company, these do not suffice to contest the power of attorney regulated by the General Provisions of the Civil Code. Special attributes of this power of attorney include: first, the fact that the attorney-in-fact is appointed by the shareholders' meeting, and not the management board as a body vested with the general competence to represent the company; second, the scope of the power granted to the attorney-in-fact is limited since it extends only to contracts and disputes between the company and the board members; third, since the shareholders' meeting is usually a collective body, then a resolution is a collective act of will to appoint an attorney-in-fact. However, it should be noted that none of the attributes listed are significant enough to substantiate the postulate that they may be treated as a legal construct, separate from the legal construct of the power of attorney under the Civil Code (Article 95 et seq. of the Civil Code).

Nonetheless, the attributes of the legal construct of the power of attorney allow an answer to the question of what type of power of attorney can be used on the basis of Article 210(1) of the Code. Considering the attribute referring to the scope of the authorization, it should be ascertained that an attorney-in-fact appointed by the shareholders' meeting cannot be a general attorney-in-fact, since the authority given to the attorney-in-fact embraces solely ordinary acts of management. However, the question that remains open is about the type of power, i.e. is the limited power of attorney admissible, or rather, it is the specific power of attorney that should solely be applied (granting powers to perform acts in the law of one category). In terms of the functional criterion, the option to appoint a limited attorney-in-fact seems sensible. Since the legislator does not limit the power of attorney only to a single act, there are no grounds to conclude that the only authority that can be granted is the limited power of attorney. It must be said that the specific power of attorney for an indefinite period does not weaken the protection of the company's interests, and the protective function is the essence of Article 210(1) of the Code. Moreover, it is the partners themselves who decide about the scope of authority given to the attorney-in-fact and the period of time the authority can be exercised.

The nature of the power of attorney is that it is a legal relationship built on trust, and in the event the trust is lost, the shareholders can at any time revoke the power of attorney or change its scope. As it was aptly noted by the Supreme Court in the justification of the 2019 resolution, the decision on the scope of the authority granted to the member of the board to act on behalf of the company is taken by the company itself, after taking into consideration of potential benefits and risks connected to the role of an attorney-in-fact, as well as of the interests of the company and partners. If partners have appointed a limited attorney-in-fact and have not set any time limits, then it is simply an indefinite power of attorney. In addition, the admissibility of such a solution is supported by the functional aspect of running a company. This means that in companies with a relatively large number of shareholders, calling a shareholders' meeting to appoint an attorney-in-fact to perform just one single act is difficult and costly. It should also be under-

lined that a limited power of attorney may be limited not only by specifying the types of contracts under the power of attorney but also by defining, for example, maximum contract price or other premises that determine the scope within which the power of attorney operates.

CONCLUSIONS

Based on the arguments presented in this paper, a number of conclusions can be drawn about the application of Article 210(1) of the Code to a specific relationship between entities, i.e., a case in which a limited liability company and members of its management board are partners in a limited partnership.

Prohibition of representation of the ltd. company by the management board in contracts and disputes with a member of the board, arising from Article 210(1) of the Code, means that at the making of articles of partnership of a limited partnership between the entities listed above, the ltd. company cannot be represented by a member of its management board. What is more, the manner of representation of the ltd. company by an attorney-in-fact appointed by a resolution of the shareholders' meeting or a supervisory board, as set out in Article 210(1) of the Code, applies also to the limited liability company giving consent to any changes to the articles of partnership of a limited partnership.

However, Article 210(1) of the Code does not apply to contractual relationships formed by the partnership, in which the ltd. company acts as a legal entity, i.e. a party to the contract, whilst the other party to the contract is a partner in the partnership who is also a member of the ltd. company board, and represents the partnership as a general partner. This conclusion is justified by the fact that the discussed provision is a special provision, and since the above case does not pertain to a contractual relationship between an ltd. company and a member of its management board, an extensive interpretation of the provision is inadmissible.

The final conclusion is about the legal nature and the type of power of attorney referred to in Article 210(1) of the Code. In accordance with the principle of unity of civil law, the adoption of which result from the normative premise of Article 2 of the Code, it can be asserted that the power of attorney under Article 210(1) of the Code belongs to the conceptual category of civil law representation (Article 95 et seq. of the Civil Code). However, given the scope of the authority given to the attorney-in-fact, general power of attorney cannot be granted by the shareholders' meeting. Yet, pursuant to Article 210(1) of the Code, it is possible to appoint a limited attorney-in-fact to perform a given act in law and a specific attorney-in-fact to perform a certain category of acts; specific power of attorney can be granted for an indefinite period.

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RIGHT TO EDUCATION IN THE SLOVAK REPUBLIC*

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Abstract. The paper analyzes the extent of transposition of the requirements of the right to education into the statutory legislation on education in the Czech Republic and Slovakia. The author includes also the conclusions and opinions arising from the case law of the European Court of Human Rights.

Keywords: education, school, convention, court, constitution, discretion, proportionality

1. CONSTITUTIONAL AND INTERNATIONAL LEGAL FRAMEWORK FOR THE RIGHT TO EDUCATION

The basic legal framework of the right to education can be found in the Constitution of the Slovak Republic. According to Article 42 of the Constitution of the Slovak Republic “(1) Everyone has the right to education. School attendance is compulsory. Its period and age limit shall be laid down by law. [...] (2) Citizens have the right to free education at primary and secondary schools and, depending on their abilities and society’s resources, also at higher educational establishments. [...] (3) Schools other than state schools may be established, and teaching in them provided, only under conditions laid down by law; education in such schools may be provided for a payment. [...] (4) A law shall lay down conditions under which citizens are entitled to assistance from the state in their studies.”

In its provision the Constitution of the Slovak Republic regulates the relationship to the international agreements which have been ratified and announced by the law before its entry into force by the Slovak Republic. A similar mechanism establishes the Constitution of the Slovak Republic in relation to constitutional laws, which were also adopted before the legal moment of the entry to the force of the Basic Law of the Slovak Republic. According to Article 154c(1) of the Constitution of the Slovak Republic “International treaties on human rights and fundamental freedoms that were ratified by the Slovak Republic and promulgated in a manner laid down by law before this constitutional law comes into effect are a part of its legal order and have primacy over the law, if that they provide greater scope of constitutional rights and freedoms.”

Likewise, according to Article 152(1) of the Constitution of the Slovak Republic “(1) Constitutional laws, laws, and other generally binding legal regula-

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tions remain in force in the Slovak Republic unless they conflict with this Constitution. They can be amended and abolished by the relevant bodies of the Slovak Republic.”

In addition, the Slovak Republic is a party to the Convention for the Protection of Human Rights and Fundamental Freedoms. The right to education is also regulated by the Article 2 of the Additional Protocol no. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

The freedom of education and the freedom of academic scholarship are also governed by the Article 13 and 14 of the Charter of Fundamental Rights of the European Union. According to Article 13 of the Charter of Fundamental Rights of the European Union “The arts and scientific research shall be free of constraint. Academic freedom shall be respected.” According to Article 14 of the Charter of Fundamental Rights of the European Union “1. Everyone has the right to education and to have access to vocational and continuing training. [...] 2. This right includes the possibility to receive free compulsory education. [...] 3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.”

Finally, the Article 13 of the International Covenant on Economic and Social Rights regulates in considerable detail the right to education. Under this provision “1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. [...] 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: [...] (a) Primary education shall be compulsory and available free to all; [...] (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; [...] (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; [...] (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole

period of their primary education; [...] (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved. [...] 3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. [...] 4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.”

2. THE APPROACH OF THE STRASBOURG BODIES PROTECTING THE RIGHTS TO THE RIGHT TO EDUCATION

The creators of the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as “the Convention”) considered the right to education at the time of its adoption for rather a social than a legal category. This approach was not sustainable. However, in drafting the text of the Convention, the political arguments against the inclusion of this right into the European system of human rights protection have prevailed. Change occurred with the adoption of the Additional Protocol no. 1 to the Convention, which guarantees everyone the right to education. Therefore this right, together with the right to peaceful enjoyment of property and the protection of the electoral rights have been included by the States Parties to the Convention guarantees and promoted by the Council of Europe in the framework of the Additional Protocol no. 1 to the Convention This initiative stemmed mainly from the decision of the Committee of Ministers of the Council of Europe [Svák 2006, 953].

The wording of Article 2 of the Additional Protocol no. 1 to the Convention constitutes an expression of a compromise between the traditional liberal and conservative view on the human rights and the social-democratic view. Therefore that document established in two sentences the three components of the right to education, that is: a) the guarantee that the state shall not interfere with the exercise of the right to education so that his intervention would actually deny the exercise of this right; b) the right to choose any form of education and training, while the government is obliged to guarantee this right to the extent of its possibilities, which means it does not guarantee for any education that has been chosen by an individual; c) the right of parents to respect their religious and philosophical convictions in the education of their children.

The concept of education and teaching has been analyzed in the case of *Campbell a Cosans v. United Kingdom*. In the judgement of February 25th 1982 (application no. 7511/76) the European court of Human rights said, that the second sentence of Article 2 of the Protocol no. 1 to the Convention implies, that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded.

The general content of Article 2 of the Additional Protocol no. 1 to the Convention has been specified by the Court in connection with the case of the Belgian language (case relating to certain aspects of the use of languages in education in Belgium). According to the Strasbourg case-law the States Parties to the Convention do not recognize the right to education, which would require, at their own expenses finance and provide money for a particular type or brand of education, respectively a specific level of education. On the other hand, the States Parties have a positive obligation to ensure and respect the right to education as it is expressed by the Article 2 of the Additional Protocol no. 1 to the Convention.

The States Parties to the Convention have the obligation to guarantee to persons within its jurisdiction access to the right to education in the form of education existing at the concerned time. Convention does not provide for any specific requirement of promotion, organization or way of financing of the education. The right to education by its very nature calls for regulation by the State that is the regulation, which can vary in time and place according to the needs and resources of the society and individuals. It goes without saying that such a regulation must never injure the substance of the right to education and must not contradict other rights guaranteed by the Convention.

This approach has been confirmed by the Court in the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*.¹ In this decision, the European Court of Human Rights clarified States' obligations regarding the freedom of parents to educate their children according to their religious and philosophical convictions as guaranteed by Article 2 of Protocol 1 (P1-2) to the European Convention on Human Rights. The Court found that compulsory sex education in public schools does not violate parental freedom.

In 1970, Denmark introduced compulsory sex education in State primary schools as part of the national curriculum, the aim of which was to, *inter alia*, reduce the increased prevalence of unwanted pregnancies and promote respect for others. This change in the curriculum was introduced by a Bill passed by Parliament (Act No. 235). The Minister of Education then requested the Curriculum Committee prepare a new guide on sex education. Subsequently, two Executive

¹ Decision of the Commission for Human rights of 7 December 1976, no. 1 EHRR 711.

Orders were issued and a new State Schools Act (Act No. 313) introduced that did not change the compulsory provision of sex education in State schools. When the Bill went before the Danish Parliament, the Christian People's Party tabled an amendment according to which parents would be allowed to ask that their children be exempted from sex education. This amendment was rejected by 103 votes to 24.

The applicants, who were the parents of State primary school students, were not satisfied that the provision of compulsory sex education was in conformity with their Christian convictions. They considered that sex education raised moral questions and so preferred to instruct their children in this sphere. They petitioned on multiple occasions to get their children exempted from sex education. However these requests were not met, resulting in some of the applicants withdrawing their children from their respective State schools.

The Court was invited to judge whether the introduction of integrated, and consequently compulsory, sex education in State primary schools by the Danish Act of 27 May 1970 constitutes, in respect of the applicants, a violation of the rights and freedoms guaranteed by the European Convention on Human Rights, and in particular those set out in Articles 8, 9 and 14 of the Convention and Article 2 of the First Protocol.

The Court held by 6 votes to 1 that there had not been a breach of the Right to Education as guaranteed by Protocol no. 1 to the Convention. The Court noted that the right set out in the second sentence of Article 2 Protocol 1 is an adjunct of the fundamental right to education, and thus corresponds to a responsibility closely linked to the enjoyment and exercise of the right to education. In addition, the Court recalled that the provisions of the Convention and Protocol must be read as a whole; so that the right to education, private and family life, and freedom of religion, thought, conscience, and information are all respected as far as is possible. In conformity with guaranteeing parental freedom, and protecting other Convention rights, parents are free to have their children educated at home or to send them to private institutions, to which the Danish government pays substantial subsidies. Private schools in Denmark are required, in principle, to cover all the topics obligatory at State schools. However, sex education is not mandatory: "Private schools are free to decide themselves to what extent they wish to align their teaching in this field with the rules applicable to State schools. However, they must include in the biology syllabus a course on the reproduction of man similar to that obligatory in State schools since 1960." This guarantee of parental freedom, however, does not mean that State schools fall outside the ambit of Article 2 Protocol 1 ECHR. The Court asserted that the second sentence of the Article 2 of the Protocol no 1 to the Convention applies not just to "religious instruction of a denominational character," as Denmark claimed, but that "the State's functions in relation to education and to teaching, does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throu-

ghout the entire State education program. Arising out of reasons of expediency, the setting and planning of the national curriculum generally falls to the State. However, sentence two does not prevent States designing curricula that deal with philosophical or religious matters because most subjects have a philosophical or religious character, in one way or another. It follows that parents, for reasons of impracticality, cannot always object to the content of the curriculum. The religious and moral beliefs of the parents in this case were not altogether opposed to school education. The situation is more complex where religious beliefs are opposed to full-time formal school education. For example, where children are enrolled in religious schools and given religious instruction that is very different from the curriculum in a regular school. Different courts in different jurisdictions may hold differing views (i.e., such a practice should be exempted as a cultural right or it could be seen as a violation of a child's human right to primary education). A court's view in such a situation would depend on the Constitution and other legislation together with the cultural and political opinion of such education in that country or region.

Similar question as for the content of the education and teaching at the universities has been considered by the Court in the case *Leyla Şahin v. Turkey*.² A Turkish Muslim by the name Sahin alleged that the Republic of Turkey violated her rights and freedom under the Convention for the Protection of Human Rights and Fundamental Freedoms by banning the wearing of the Islamic headscarf in institutions of higher education. However the court came to the conclusion, that student's rights and freedom under the Convention for the Protection of Human Rights and Fundamental Freedoms are not violated when a secular country places a ban on wearing religious clothing in institutions of higher education.

The Council of Europe also stresses the key role and importance of higher education in the process of promoting human rights and fundamental freedoms and strengthening democracy. The instruments of enforcement are e.g. the Recommendation of the Committee of Ministers to member states no. R (98) 3 on access to higher education and the Recommendation of the Committee of Ministers to member states no. 1353 (1998) on access of minorities to higher education. Since the Convention and the case law to it recognized the higher education in the European area as a tool to develop skills and exceptionally rich cultural and scientific asset for both individuals and society. Therefore, the Strasbourg authorities argue, that it would be hard to imagine that higher education institutions would not fall into the scope of the first sentence of Article 2 of the Additional Protocol no. 1 to the Convention. Although that provision does not require the Contracting States to establish the institutions of higher education, each state has an obligation to ensure effective access to them.

² Decision of the European Court of Human rights of 10 November 1998, application no. 44774/98.

3. RIGHT TO EDUCATION IN CASE LAW OF THE CZECH AND SLOVAK COURTS

The Constitution of the Slovak Republic recognizes the legal restriction of the rights under Article 51 of the Constitution of the Slovak Republic. Under this provision “(1) The rights listed under Article 35, Article 36, Article 37, paragraph 4, Articles 38 to 42, and Articles 44 to 46 of this Constitution can be claimed only within the limits of the laws that execute those provisions. [...] (2) The conditions and scope of limitations of the basic rights and freedoms during war, under the state of war, martial state and state of emergency shall be laid down by the constitutional law.”

The method of claiming the protection under this law has been interpreted by the jurisprudence in the Czech Republic and in Slovakia. On the one hand, it concluded that a person may claim this right only in the limits of the laws, which implement its content. However, on the other hand, it refused the strict and formalistic approach that would require from the recipient of the right to education to point to a specific provision of the law implementing the content of the right to education. Such denial of a judicial or other legal protection on grounds of absence of the reference to specific statutory provision is a violation of Article 46 of the Constitution of the Slovak Republic, under which “(1) Everyone may claim his right in a manner laid down by law in an independent and impartial court and, in cases laid down by law, at another body of the Slovak Republic. [...] (2) Anyone who claims to have been deprived of his rights by a decision of a public administration body may turn to the court to have the lawfulness of such decision reviewed, unless laid down otherwise by law. The reviewed of decisions concerning basic rights and freedoms must not, however, be excluded from the competence of the courts. [...] (3) Everyone is entitled to compensation for damage incurred as a result of an unlawful decision by a court, or another state or public administrative body, or as a result of an incorrect official procedure. [...] (4) Conditions and details concerning judicial and other legal protection shall be laid down by law.” The idea that the recipient is in the exercise of the right to education before the state authorities are obliged to indicate the specific provisions of the legislation is disproportionate to the requirement to provide legal protection by the state authorities. It is therefore sufficient when the recipient of the right recalls a specific facts and legal grounds on which the application is built.³

Therefore the addressees of the right to education need not to argue with a specific legal provision, because the rule of law is the principles that the courts, as well as other state authorities know the legislation. If the addressee alleges the infringement of the right to education, the court or other state authority shall consider from the order set out in the Constitution of the Slovak Republic, whether

³ Judgement of the Supreme Administrative Court of the Czech Republic of 20 December 2005, ref. no. 2 Azs 92/2005–58.

there was a breach of “ordinary” law, which implements requirements of the Constitution of the Slovak Republic.⁴

Under the Article 13(4) of the Constitution of the Slovak Republic “When restricting basic rights and freedoms, attention must be paid to their essence and meaning. These restrictions may only be used for the prescribed purpose.”

For example, an individual may claim that during the admission procedure at the secondary school he was not given equal opportunity because of a failed concept test in mathematics, which did not reflect the different fields of study. In such a case it is the role of the authority of the State – particularly the court – to assess whether such allegations are true, and whether the resulting situation is contrary to the requirements of statutory legislation, the requirements of implementing rules and, where applicable to the requirements of the Article 42 of the Constitution.

Therefore the authorities cannot refuse to provide legal protection to individuals solely on the ground that his defense was not built on the specific provisions of the legislation. If the state does not follow this order, it may cause the violation of the right to education, because it did not fulfill the requirement of the Article 12(2) of the Constitution of the Slovak Republic, under which “Basic rights and freedoms on the territory of the Slovak Republic are guaranteed to everyone regardless of sex, race, color of skin, language, faith and religion, political, or other thoughts, national or social origin, affiliation to a nation, or ethnic group, property, descent, or any other status. No one may be harmed, preferred, or discriminated against on these grounds.”

4. POWER TO ISSUE THE STUDY PLANS AND SYLLABI

Czech jurisprudence has analyzed the issue of the power of the state authorities to prepare and to determine the content of the study plans and of the syllabi. The context of the case was the right of the parents to educate and teach their children. Parents of the children attending a certain school in Pardubice, Czech Republic objected the breach of their rights on the basis of the sexual education inclusion to the study plan of the ethic education. The school argued, that it had included into the syllabi on the ground of the Measure of the Minister of Education of the Czech Republic of 16 December 2009, no. 12586/2009–22. The parents objected, that the content of the subject actually prepared the children for their future sexual life. Parental arguments were built on the constitutional protection of the family. In the Slovak Republic the Article 41 of the Constitution of the Slovak Republic applies. Under this provision “(1) Marriage, parenthood and the family are under the protection of the law. The special protection of children and minors is guaranteed. [...] (3) Children born in and out of wedlock enjoy equal rights. [...] (4) Child care and upbringing are the rights of parents; children have the ri-

⁴ Judgement of the Supreme Administrative Court of the Czech Republic of 14 May 2009, ref. no. 1As 205/2008.

ght to parental care and upbringing. Parents' rights can be restricted and minors can be separated from their parents against their will only by a court ruling on the basis of law. [...] (5) Parents caring for children are entitled to assistance from the state. [...] (6) Details concerning rights under paragraphs 1 to 5 shall be laid down by law." The parents also argued with the content of the Article 3(2) of the Convention on the Rights of the Child, under which "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."

Under the opinion of the parents the content of the sexual education falls strictly within the scope of the constitutionally guaranteed right of the parents to raise their own children and the children's rights to be raised by their own parents. The Ministry of Education argued with the content of the Article 2 of the Protocol no. 1 to the Convention. It stated that the case law of the European Court of Human Rights interprets the content of the Article 2 of the Protocol no. 1 to the Convention in way, that it does not prevent States designing curricula that deal with philosophical or religious matters because most subjects have a philosophical or religious character, in one way or another. It follows that parents, for reasons of impracticality, cannot always object to the content of the curriculum. Therefore the Ministry presented the opinion that the mere fact, that the sexual education is introduced into the general education program cannot establish an inconsistency with the parents' right to education of children.

The Supreme Administrative Court of the Czech Republic therefore accepted the opinion, that the Constitutional regulations, the Convention on the rights of the child and the protocol no. 1 to the Convention create important correctives of the public interest of the State to carry out the obligatory school attendance. However, creating curricula, belongs to the powers of the State and that provision of the Additional Protocol no. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms does not prohibit the States to disseminate disputed information. The State may disseminate information in an objective, critical and pluralistic way. The Supreme Administrative Court of the Czech Republic further stated that that Framework Program was an internal act and therefore could not create rights, respectively obligation of external entities, such as school students.⁵

5. ESTABLISHMENT OF THE NON-STATE SCHOOLS

Under the Article 42(3) of the Constitution of the Slovak Republic "Schools other than state schools may be established, and teaching in them provided, only under conditions laid down by law; education in such schools may be provided

⁵ Judgement of the Supreme Administrative Court of the Czech Republic of 3 March 2011, ref. no. 1Ao 1/2011.

for a payment.” The case law has presented a relatively strict approach to the content of this provision. The constitutional regulations allow the private entities to establish the non-state schools. How, when establishing such schools, these entities have to fulfill the criteria set out by the law. When deciding on the inclusion of the proposed non-state school into the network of schools the Ministry has to consider the compliance of the conception of the proposed school with the long term intention of education and education network development. This material is an important instrument that forms the school system and education network. It names the basic directions and objectives of the future development of the education. It establishes the measure on the state level for the period of at least four years. Its objective is to unify the education policy of the regions with the education policy of the state. The basic principles on which it is based, is to improve quality and efficiency in education and to achieve competitiveness of the state.

Legislation classifies it among the strategic and policy documents drawn up by the Ministry. Private school, which in this case acted in a procedural position of the complainant considered this approach of the public authority unconstitutional and saw in it a breach of the right to education. However, the Supreme Administrative Court of the Czech Republic rejected the arguments of private school and commented that the assessment of the compatibility of the proposed concept of a private school with a long-term aim was a legal condition for the inclusion of a school into the school network. State authority saw the inconsistency with the concept of the proposed integration model schools of the Ministry of Education. In its decision it said that his intention was to include the exceptionally gifted students among peers in other classes in regular schools, not to exclude the talented students in specialized schools from the very beginning of their education, as foreseen in the concept of the proposed private school. When deciding the Supreme Administrative Court of the Czech Republic noted, that the view of the Ministry was defensible in terms of the conditions laid down by the constitutional regulations governing the right to education.⁶

CONCLUSION

The case law of the law enforcement authorities in Slovakia, but also and above all the judicial case law in the Czech Republic in a consistent manner reflects the conclusions of the case law and doctrine of the Strasbourg right protection organs. Implementation of safeguards for the protection of the right to education is perceived primarily through the principle of proportionality, and therefore in the adequacy of measures taken by public authorities to ensure the commitment no to deny addresses of the public authority their right to education.

Therefore the case law considers the practice of state, which establishes in the conceptual planning document the basic directions of the development of educa-

⁶ Judgement of the Supreme Administrative Court of the Czech Republic of 3 March 2011, ref. no. 7As 52/2007.

tion and then the given constraints laid down by law respects, when deciding on the issue of ensuring access to education for concordant and constitutionally lawful. Therefore, the specification of the general conclusions of the long-term strategy in particular case, according to the case law also lays also down the limits to the discretion of state authority when deciding on the inclusion or non-inclusion of the proposed school to school network. The same conclusions are accepted by the case law in the field of the study plans and syllabi creation.

The constitutional rules and the Convention Contracting States give the States quite a wide range of discretion in designing and applying the above documents. The limits of the protection of the right to education in relation to the individuals lay in an objective presentation of the information contained in those documents, respect for the rights of parents to bring up their children and equal access to education. If we wanted to generalize these conclusions, we would come to the conclusion that the nature of the right to education implies that it may be limited under the conditions laid down by law. However, a State performing its powers cannot make exercise of this right virtually impossible. The law must provide for clear, transparent and understandable terms of the provision of education. The reverse procedure of the State would then establish a situation of arbitrary decision-making.

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AGGRESSIVE BEHAVIOURS OF THE ELDERLY: LEGAL AND PSYCHOLOGICAL ASPECTS

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Abstract. The article aims to pinpoint the relationship between age and manifestations of aggressive behaviour in elderly people. In the opening part, the authors highlight the legal aspects of aggression in senior groups. They stress the need for research to determine the relationship between acts of aggression and delinquency in this age group (which is attributable to the limited number of similar analyses and the steady growth of the population of seniors). The second part of the paper casts light on the psychological aspects of aggressive behaviour in the elderly. In this context, the authors discuss the results of research involving 948 respondents and employing a tool known as the Psychological Inventory of Aggression Syndrome (IPSA) designed by Zbigniew Gaś. The results demonstrate a growing risk of emergence of three symptoms of aggression syndrome in seniors (60+): 1) aggression control disorders, 2) self-hostility, 3) hostility towards the environment. The closing part of the article offers some conclusions regarding the criminal policy. The authors recommend preventive measures that are likely to curb the manifestations of aggression among the elderly.

Keywords: aggressive behaviour, crime, hostility towards the environment, aggression control disorders, prevention of aggressive behaviour

1. LEGAL ASPECTS OF AGGRESSIVE BEHAVIOUR OF ELDERLY PERSONS

The World Health Organization (WHO) distinguishes the following categories of age groups above 50 years old: youngest-old (50–60), young-old (61–75), old-old (76–90), oldest-old (91–100) and long-lived (over 100). For the purposes of statistics (both in Poland and in other countries), an elderly person is assumed to be over 60 years of age. The same assumption is adopted in this article [Zamorska and Makuch 2018, 32].

Today, there are approximately 600 million people in the world who are 60 and more. Demography experts say that this number is likely to double before 2025, and 60+ citizens will account for 30% of the total global population [Michelis 2017, 1]. The situation in Poland is not different. According to the population forecast prepared by the Central Statistical Office, by 2050 the number of Poles aged 65 or older will have increased, including due to growing life expectancy. The forecast assumes that an average lifespan of a male born in 2050 will be 81.1 years (nine years more than in 2013). On the other hand, the average expectancy of life of females will be 87.5 years (6.4 years longer than in 2013).¹

Along with the ageing of the society, the number of offences committed by senior citizens also increases. Consequently, there is growing number of elderly people in Polish pre-trial remand centres and full-time correctional institutions. For example, in the early 1990s, the percentage of seniors among all inmates was 0.2%; the figure rose to 0.9% in 2008, to 1% in 2011, and to 4.3% in 2016 [ibid.].

As regards the relationship between age and criminal behaviour, the literature on the subject provides abundant data on seniors from the victimological perspective, whereas there is a lack of in-depth analyses of the nature of offences committed by individuals from this age group [Reisig and Holtfreter 2014, 325; Wolfe 2015, 427; Hirtenlehner and Kunz 2016, 394–405]. At the same time, the criminal policy notices an increase in unlawful conduct of seniors, also attributed to the process of population ageing. The phenomenon is already referred to as “geriatric crime wave” or “silver tsunami” [Feldmeyer and Steffensmeier 2007, 297–98; Kunz 2014, 7; Hryniewicz–Lach 2018, 31].

A much-telling example is the result of a 2016 study conducted at the request of the Commissioner for Human Rights on criminal liability of seniors aged 75+. According to data from July 2016, 74 individuals aged 75+ remained in various detention facilities (correctional institutions and remand centres). The most numerous group among them were persons suspected/convicted of committing offences against life and health. The second largest group was perpetrators of offences against property, such as theft, burglary, robbery, and fraud. Another most numerous group included offenders against family and duty of care (mainly guilty of abuses under Article 207 of the Polish Penal Code²). The suspected/convicted of offences against: freedom, freedom, and decency (especially against minors), safety in traffic, public safety, and jurisdiction were the smallest group.

The unlawful conduct indicated above shows that offences of aggressive nature are particularly significant in the senior population. Some other relevant risk factors in this regard are [Krahe 2005, 80; Wikström and Treiber, 2007, 252; Wikström and Svensson 2010, 408; Holtfreter, Reisig, and O’Neal 2015, 364; Wolfe 2015, 448–49; Hryniewicz–Lach 2018, 35–38; Niewiadomska 2019a,

¹ See http://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5469/1/5/1/progn_oz_a_ludnosci_na_lata___2014_-_2050.pdf [accessed: 01.03.2021].

² Act of 6 June 1997 Penal Code, Journal of Laws of the Republic of Poland of 1997, No. 88, item 840.

180–81; Gottfredson 2021]: 1) reduced ability to conform to social norms, e.g. as a result of health deterioration, personality changes, decreased criticism; 2) reduced behavioural self-control leading, for example, to interpreting some everyday situations as opportunities to commit an offence; if there is an alternative, proper self-control would prevent the choice of an unlawful action as inconsistent with the morality of the individual; 3) reduced tolerance to the destructive effect of psychoactive substances (e.g. alcohol, especially in combination with medications); the pharmacological effects of consumption of psychoactive substances are interpreted differently: a) the disinhibition hypothesis says that psychoactive substances have a direct effect on the brain centres that control aggressive behaviour; therefore, the substance unlocks aggressive impulses because it weakens the person's ability to suppress and avoid aggressive response; b) the arousal hypothesis points to the stimulating properties of psychoactive substances are responsible for encouraging aggression; b) the attention hypothesis says that psychoactive substances have only an indirect effect on provoking aggressive behaviour by reducing the capacity of attention, which makes it difficult to interpret contextual signals (this explains the influence of alcohol on committing unintentional offences in road traffic); 4) the sense of social exclusion: it drives the person's need to get engaged to be able to redefine their place in society; 5) increased social control (e.g. as a result of placement in a stationary care facility), which facilitates the identification and detention of an offender; 6) unlawful conduct at a younger age: if offensive conduct continues in the old age, the preferred forms of aggressive behaviour often evolve, which is referred to in the literature as "weakness-related offending;" aggression in the form of physical violence in younger individuals is likely to develop in seniors into: a) verbal aggression (e.g. insults), b) acts that do not require considerable physical effort (e.g. burglary may be replaced by shoplifting or receiving), c) behaviour directed against vulnerable individuals (e.g. sexual abuse of children).

All in all, when discussing the risk factors behind offences committed by seniors, it should be emphasized that no unlawful conduct has been found so far that would clearly differentiate this group of offenders from those of younger age [Hryniewicz–Lach 2018, 34–36]. An example of this is the risk of committing traffic offences. Based on the Police records for 2015 and previous years, driving seniors and the group of young drivers, who had just obtained the driving licence, i.e. persons aged 18–24, were found to be responsible for traffic incidents to a comparable extent. In the elderly traffic offenders, road aggression was caused, but not only, by such factors as: a sense of considerable experience, a need to demonstrate one's abilities, greater stress due to, for example, undesirable changes observed in the body, poor concentration and/or decreased driving skills. Drivers who display aggressive behaviour also often misinterpret other drivers' intentions, especially in conflict situations. For example, they believe that the actions of other road users are intended to cause harm, which in consequence, releases

verbal and/or physical aggression (e.g. offensive gestures) [Zbyszyński and Świderski 2016, 72–73].

2. PSYCHOLOGICAL ASPECTS OF AGGRESSIVE BEHAVIOURS OF SENIORS

There is no uniform position in the literature on the subject as to how to understand aggression. Yet, several approaches to explaining aggression have surfaced to date [Fraczek 2002, 43–55; Siemieniecki, Wiśniewska–Nogaj, and Kwiatkowska 2020, 13–17]: 1) in the evolutionary and biological view, aggression is seen as one of the basic adaptation “mechanisms” of adaptation, i.e. reactions contrary to escape or submission; 2) in the socio-humanistic view, aggression is treated as a type of behaviour, attitude, orientation and/or belief manifesting themselves in specific circumstances and of an acceptable but undesirable nature; it is defined against the background of culture-determined moral, legal and/or social standards; 3) in the socio-normative view, assessment of aggression is hinged on the social and ideological context, the position of conflict participants and expected consequences, e.g. assessment in terms of: good/evil, right/wrong; 4) in psychology, there are three prevailing views on aggression: a) aggression is an internal emotional and motivational condition of an individual (e.g. taking the form of such mental states as irritation, anger, infuriation) and their more permanent motivations (e.g. a desire to harm, hatred, hostility); b) aggression as a special type of social interaction between individuals and/or small social groups (interpersonal aggression); b) aggression as a personality variable.

An example of a psychological definition of aggression is any form of behaviour intended to harm or cause injury to another living being that does not wish to be harmed. Adopting such a broad definition helps find common ground for various typologies of aggressive behaviour, including based on the type (verbal aggression, physical aggression) and the quality of response (action, inaction), directness (indirect aggression, direct aggression), visibility (open aggression, hidden aggression), excitation (unprovoked action, retaliatory action), goal orientation (hostile aggression, instrumental aggression), type of damage (physical, mental), persistence of consequences (temporary, lasting effects of aggression), involved social actors (aggressive individuals, aggressive groups) [Baron and Richardson 1994, 7; Krahe 2005, 17].

As regards the question of whether the elderly (including the 60+ group) display specific signs of aggressiveness typical of age, studies were conducted to establish relationships between age and the severity of aggression syndrome. The analysis of the studied problem contains: the attributes of the surveyed, a description of a tool employed to measure the signs of aggression, explanation of the statistical analysis in place, the obtained results and conclusions regarding the signs of aggression as risk factors stimulating criminal behaviour in seniors.

Characteristics of the surveyed. The study covered 948 respondents, 666 females (70.3%) and 282 males (29.7%). The most numerous group was composed of respondents aged 56–65 (N=264, 26%). The next largest age brackets were: 46–55 (N=185, 19.5%), 36–45 (N=145, 15.3%), 66–75 (N=135, 14.3%), 26–35 (N=103, 10.9%), 18–25 (N=76.8%), and over 70 (N=57.6%). One person refused to give their age. The analysis also made a difference between respondents up to 60 (N=556, 58.7%) and over 60 years of age (N=391, 41.3%).

The vast majority of study participants were married (N=582, 61.5%). The remainder of the surveyed were: single (N=152, 16.1%), widowed (N=96, 10.1%), divorced (N=61, 6.4%), in cohabitation (N=45, 4.8%), and in separation (N=11, 1.2%). One person refused to provide information about their marital status.

Among the respondents, 62.7% were individuals with higher education (N=594), 24.5% (N=232) with secondary education, 10.1% (N=96) completed a vocational school, 2.5% (N=24) completed primary education, and 0.2% (N=2) completed junior high school.

As regards of the place of residence, the respondents were as follows: rural areas and cities with a population of more than 100 thousand – 33.5% of the sample (N=318), cities with a population between 51 and 100 thousand – 11% (N=104), cities with a population between 21 and 50 thousand – 10.9% (N=103), small towns (6–20 thousand inhabitants) – 7.6% (N=72), and towns below 5 thousand inhabitants – 3.4% (N=32).

The vast majority of the surveyed owned their own apartment/house (N=732, 77.2%). The remainder of the surveyed group reported the following housing status: 10% (N=95) live with family members, 9.4% (N=89) rent an apartment or room, 1.3% (N=12) stay in a residential care home, 0.5% (N=5) live in an apartment made available for use, 0.9% (N=9) have a different housing status, 0.2% (N=2) declare homelessness. Four individuals refused to answer this question.

Among the respondents participating in the study, 68.5% (N=649) regard their financial situation as good, 17.2% (N=163) find it difficult to determine their current financial situation, 9% (N=85) regard their financial situation as very good, 5.1% (N=48) regard their financial situation as poor, 0.2% (N=2) as very poor. One person refused to answer this question.

Measurement of signs of aggression: description of the tool. The Psychological Inventory of Aggression Syndrome (IPSA) by Z. Gaś was employed to investigate the problem. The method measures the general level of aggression severity and 11 factors of aggression syndrome: 1) propensity for retaliation, 2) propensity for self-destruction, 3) aggression control disorders, 4) displaced aggression, 5) unconscious aggressive tendencies, 6) indirect aggression, 7) instrumental aggression, 8) self-hostility, 9) physical aggression towards the environment, 10) hostility towards the environment, 11) reactive aggression. Scale reliability was verified using the method of estimation of absolute stability. In all cases, the obtained correlation coefficients were statistically significant at the level of 0.001 or higher [Gaś 1987, 1003–1016].

Statistical analyses employed. Pearson's parametric correlation test was used to analyse the relationship between age and the results obtained through the Psychological Inventory of Aggression Syndrome (IPSA II) by Z. Gaś for the entire group of the respondents (N=948). In order to determine preferences for different forms of aggression (measured with the IPSA II tool) among people over 60, a two-series single-point correlation test was employed.

The results. Table 1 shows the relationships occurring between the respondents' age (N=947) and preferences for 11 forms of aggression. Table 2 shows the forms of aggression most often chosen by seniors (people over 60).

Table 1. Correlations between age and signs of aggressive behaviour (measured using the Psychological Inventory of Aggression Syndrome (IPSA II) by Z. Gaś) in the studied group (N=948)

	Age
Propensity for retaliation	-0.025
Propensity for self-destruction	-0.307**
Aggression control disorders	0.083*
Displaced aggression	-0.070*
Unconscious aggressive tendencies	-0.238**
Indirect aggression	-0.029
Instrumental aggression	-0.283**
Self-hostility	0.048
Physical aggression towards the environment	-0.109**
Hostility towards the environment	0.019

** . Significant correlation at the level of 0.01 (two-tailed).

* . Significant correlation at the level of 0.05 (two-tailed).

Based on the results shown in the table, four negative correlations can be identified at the level of statistical significance between age and the manifestations of aggression, which means that the frequency of the following such acts of aggression decreases with age: 1) propensity for self-destruction ($r=-0.238$, $p < 0.001$), e.g. self-infliction of physical pain, self-mutilation, suicide attempts; 2) instrumental aggression ($r=-0.283$, $p < 0.001$), e.g. recourse to aggressive behaviour in order to achieve specific goals; 3) physical aggression towards the environment

($r=-0.109$, $p < 0.001$), e.g. physical attacks against other people: hitting, poking, jerking, kicking; 4) displaced aggression ($r=-0.07$, $p < 0.05$), i.e. a tendency to transfer aggressive behaviour from people to objects (e.g. vandalism or slamming door).

However, there is one positive correlation at the level of statistical significance between age and the signs of aggression in the area of aggression control disorders ($r=0.083$, $p < 0.05$). The obtained results show that older people struggle with controlling the signs of their aggressiveness, impulsiveness, and/or outbursts of anger.

Table 2. Correlations between the senior group and signs of aggressive behaviour (measured using the Psychological Inventory of Aggression Syndrome (IPSA II) by Z. Gaś) in the studied group (N=391)

	Senior (60+)
Propensity for retaliation	0.062
Propensity for self-destruction	-0.253**
Aggression control disorders	0.168**
Displaced aggression	-0.001
Unconscious aggressive tendencies	-0.205**
Indirect aggression	0.062
Instrumental aggression	-0.286**
Self-hostility	0.127**
Physical aggression towards the environment	-0.041
Hostility towards the environment	0.105**

** . Significant correlation at the level of 0.01 (two-tailed).

Attempts to identify relationships between age and the signs of aggression among the subgroup of people aged 60+ led to the conclusion (based on the presence of statistically significant negative correlations) that, compared to people under 60, seniors show reduced frequency of the following acts of aggression: 1) propensity for self-destruction ($r_{pb}=-0.253$, $p < 0.001$), e.g. self-infliction of physical pain, self-mutilation, suicide attempts; 2) unconscious aggressive tendencies ($r_{pb}=-0.205$, $p < 0.001$), e.g. tendencies to manifest seemingly non-aggressive

behaviour; 3) instrumental aggression ($r_{pb}=-0.286, p < 0.001$), e.g. using aggressive behaviour way to achieve specific goals.

At the same time, there are three positive correlations at the level of statistical significance between the age of 60+ and the signs of aggression. This means that, compared to people under 60, seniors show greater frequency of the following acts of aggression: 1) aggression control disorders ($r_{pb}=0.168, p < 0.001$), e.g. problems with controlling the signs of their aggressiveness, impulsiveness, and/or outbursts of anger; 2) self-hostility ($r_{pb}=0.127, p < 0.001$), e.g. a negative attitude towards oneself, exaggerating own faults or deficiencies, self-abasement; 3) hostility towards the environment ($r_{pb}=0.105, p < 0.001$), e.g. a negative attitude towards others, hostility towards the environment, lack of trust and/or suspicion against others.

Conclusions concerning the drivers of risk of criminal behaviour in seniors. The first conclusion is that the following signs and symptoms of aggression are not regarded as the drivers of risk of criminal behaviour in seniors: propensity for self-destruction, instrumental aggression, unconscious aggressive tendencies, physical aggression towards the environment, displaced aggression. The above-mentioned signs of aggression raise the probability of unlawful conduct in younger age groups.

Another conclusion is that three types of aggression increase the likelihood of unlawful conduct in seniors aged 60+. The following are the drivers of risk of criminal behaviour in this group: 1) aggression control disorders; 2) self-hostility; 3) hostility towards the environment.

1) Aggression control disorder as a risk factor for seniors' criminal behaviour is confirmed by the results of our studies which demonstrate that the perpetrators of aggressive acts display high levels of impulsiveness, irritability, and hyperactivity. The consequence of occurrence of these features are such signs and symptoms as excessive psychomotor agitation, anxiety, lack of concentration, seeking emotional stimulation, excessive number of risky behaviours, expecting immediate gratification for action taken. High intensity of aggression control disorders also translates into challenges in functioning in social life, especially when the internal moral norms are violated. This can often lead to job loss, homelessness, psychoactive substance abuse, joining deviant communities, perpetrating unlawful acts, and re-offending involving theft, fraud, drunk driving, violent acts, and/or sexual offences. Data on the features of re-offenders violating traffic rules is an interesting example. Such features include, among others, low self-control, emotional dysregulation, increased need for intense excitement, pressure to drive a vehicle at excessive speed and high aggressiveness [Baron 2003, 403–25; Gordon 2005, 108–109; Zaleśkiewicz 2005, 110; Niewiadomska 2007, 285–85; Hirtenlehner and Kunz 2016, 394–405; Hołyst 2018, 191–92; Niewiadomska 2019b, 240–41].

2) Self-hostility as a risk factor behind offences committed by people aged 60+ is also discussed in the literature on the subject. It was found that crimes of

aggression committed by younger age groups are driven by a negative attitude towards oneself and low self-esteem. Self-attitude largely reflects the way other people perceive the individual. Regarding someone as an outsider leads them to believe that they really are what the community think they are: someone strange, inferior, loser. This kind of self-definition of a rejected person is the underlying cause of their low self-esteem and an increased anxiety not to act in accordance with the label assigned by others or, in contrast, to act in accordance with the community expectations and behave in accordance with the assigned label. High influence of the factor in question on generating unlawful behaviour is also seen in the results of a study of prison inmates' self-image and self-esteem. Both in single and multiple offenders, their self-image is narrowed down. It is primarily limited to the emotional sphere and attitude towards other people. At the same time, prisoners struggle with verbalizing self-knowledge in terms of possessed qualities and competence. The negative self-image of inmates occurs in parallel with such factors as fear of the future, despondency, adaptation difficulties, mental disintegration in stressful situations, and defensive attitudes towards problems. Compared to one-time convicts, re-offenders reveal significantly more self-determinations which show that they perceive themselves as resourceless, failed and/or as victims of external factors, primarily turbulent past (e.g. an unhappy childhood), and/or some past circumstances [Arygle 2001, 221; Sztompka 2003, 412–13; Studen and Wrzesińska-Czapla 2005, 175–79; Niewiadomska 2007, 316–17; Hołyst 2018, 191–92].

3) The third risk factor existing in seniors' offending, namely hostility towards the environment, is another major driver of criminal conduct in younger age groups. Based on the analysis, the perpetrators of offences stemming from aggression are often suspicious, distrustful, and/or hostile towards other people. The mechanism that fuels a negative attitude towards the community is usually a sense of injustice. The sense of being wronged first arouses hostility and then a desire for revenge. In emotional terms, it provides a stimulus for action; in rational terms, it shifts focus on specific goals; and in functional terms, it helps develop the sense of security, increase self-esteem, compensate for losses suffered, and experience social justice as the effect of retaliation. The sense of injustice is particularly overwhelming in isolated re-offenders: 1/3 of them feel completely innocent, and 2/3 of them are convinced that their punishment is a kind of completely unjustified affliction. The tendency to assess one's own actions as "less evil" and the punishment as disproportionately severe in relation to the committed crime makes the prisoner develop a conviction that they are a victim of the great apparatus of injustice in which a penalty is an act of other people's hostility towards the inmate [Poznaniak 2006, 292; Niewiadomska 2007, 252; Maciantowicz, Witowska, Zajenkowska, et al. 2017, 252–52; Hołyst 2018, 191–92].

3. CONCLUSIONS REGARDING THE CRIMINAL POLICY

With regard to reducing the risk factors behind seniors' criminal behaviour, including aggression control disorders, self-hostility, or hostility towards the environment, attention should be paid to preventive action. Prevention of aggressive behaviour should involve various initiatives aimed to prevent unfavourable phenomena arising in the life of the elderly, including those causing disturbances in their somatic, mental, and social functioning. A variety of preventive approaches lays emphasis, on the one hand, on the need to strengthen personal competences (including those helping to build social relations and achieve life goals), and on the other, on organising the person's living environment in such a way that it is conducive to their personal development and offers the smallest possible number of stress-generating stimuli [Sęk 1993, 475–76; Urban 2004, 225–26; Schuck 2005, 448–49; Niewiadomska 2007, 98; Niewiadomska and Małek 2010, 407]. The results of a research commissioned by the Commissioner for Human Rights prove that preventive measures implemented in the senior population should focus mainly on [Błędowski, Szatur–Jaworska, Szweda–Lewandowska, et al. 2016, 16]: 1) ensuring a sense of physical security (e.g. care, assistance in everyday activities, health support services, protection against violence and abuse), welfare security (ensuring an adequate level of consumption), and social security (e.g. ensuring social participation); 2) helping seniors remain active and independent as long as possible; 3) forging informal social ties to create support networks (to be supplemented with formal aid only when necessary); 4) helping seniors remain/reside in their current living environment as long as possible; 5) shaping the seniors' living environment in a friendly way.

Due to a close link between crime and other social problems, prevention of aggression in seniors should take place at the level of the local environment, and preventive measures should be implemented through programmes dovetailed with the recipient's needs. Programmes preventing the occurrence of risk factors generating social problems are a long-term investment in the local community which requires a thorough problem diagnosis, skilful implementers, high-quality preventive strategies, financial outlays corresponding to the effort, and evaluation of achieved results. However, the most important prerequisite for success of such preventive programmes is the right attitude towards their addressees [Sierosławski and Świątkiewicz 2002, 15; Niewiadomska and Małek 2010, 408–409].

Any local action intended to diminish the signs of aggression in seniors requires careful application of axiological standards, as provided in United Nations Principles for Older Persons Adopted by General Assembly resolution 46/91 of 16 December 1991:³ 1) the principle of independence: older persons should (i) have access to adequate food, water, shelter, clothing and health care (through the provision of income, family and community support and self-help); (ii) have

³ UN General Assembly resolution 46/91, www.un.org/french/documents [accessed: 12.03.2021].

the opportunity to work (or to have access to other income-generating opportunities); (iii) be able to participate in determining when and at what pace withdrawal from the labour force takes place; (iv) have access to appropriate educational and training programmes; (v) be able to live in environments that are safe and adaptable to personal preferences and changing capacities; (vi) be able to reside at home for as long as possible; 2) the principle of participation: older persons should (i) remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being; (ii) share their knowledge and skills with younger generations; (iii) be able to seek and develop opportunities for service to the community and to serve as volunteers in positions appropriate to their interests and capabilities; (iv) be able to form movements or associations of older persons; 3) the principle of care: older persons should (i) benefit from family and community care and protection in accordance with each society's system of cultural values; (ii) have access to health care (to help them to maintain or regain the optimum level of physical, mental and emotional well-being and to prevent or delay the onset of illness); (iii) have access to social and legal services (to enhance their autonomy, protection and care); (iv) be able to utilize appropriate levels of institutional care (providing protection, rehabilitation and social and mental stimulation in a humane and secure environment); (v) be able to enjoy human rights and fundamental freedoms (when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives); 4) the principle of self-fulfilment: older persons should (i) be able to pursue opportunities for the full development of their potential; (ii) have access to the educational, cultural, spiritual, and recreational resources of society.

The principle of dignity: older persons should (i) be able to live in dignity and security and be free of exploitation and physical or mental abuse; (ii) be treated fairly regardless of age, gender, racial or ethnic background, disability, or other status, and be valued independently of their economic contribution.

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POLAND'S COMMITMENTS TO THE DECARBONIZATION OF THE ENERGY SECTOR

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Abstract. This article presents remarks concerning Poland's commitments to the decarbonization of the energy sector, from the perspective of compliance with the obligations arising from EU law and the directions set out in the EU energy policy. Due to national circumstances, the implementation of the decarbonization target for the energy sector, despite the declarations made as part of the national energy policy, raises some doubts, and limit the effectiveness of implementation of the sustainable development principle.

Keywords: European Union, decarbonization, energy sector, sustainable development

INTRODUCTION

Decarbonization of the energy sector is an important element of the European Union's policies, both in terms of the Union's energy and environmental policies and in general of all the activities related to the promotion and implementation of sustainable development. The European Union "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" [Nowicki 2019, 227]. This results, *inter alia*, in the integration of sustainability aspects into all EU economic policies, including energy policy. The normative basis for such action is Article 11 TFEU, according to which environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development. This provision creates specific legal obligations,¹ both for the Union institutions and the Member States [ibid., 232]. They should also be implemented in the energy sector.

¹ See the opinion of Advocate General Jacobs of 26 October 2000 in the case C-237/98 *PreussenElektra*, point 231 (ECLI:EU:C:2000:585).

For the purposes of the present study, by the term “energy sector” we understand the whole system of power and heat generation as two areas which, due to growing demand, are of significant importance for the state and its tasks. Energy, due to its economic, social, and political importance [Walaszek–Pyziół 2018, 141], is subject to special legal regulations. This sphere of economic activity is subject to a number of requirements, both in the area of creating energy security and the use of natural resources and other technologies, such as renewable sources, in the process of its production. The unique role of the energy sector is enhanced by its connection with the intensive economic development of modern countries, which results in increased energy demand. This in turn affects the issues of the state’s energy security, which is an element of internal security for which the state is responsible.² While energy security in the area of thermal energy provision is to a large extent based on dispersed sources and a dispersed system of its supply, the provision of electricity supply is covered by state action and is of a monopolized nature. A manifestation of monopolization is the functioning distribution system based on a power grid monopoly and the regulatory participation of the state in this market. However, the key issue is to ensure continuous development of the energy sector, which is caused by the broadly understood development of the state, both in the economic and social sense. Such development must, nevertheless, respect and implement the principle of sustainable development, which, among other things, necessitates the reduction of the energy sector’s emissions.

The considerations on the State's contribution to the decarbonization of the energy sector,³ within the scope of this study, will be limited to the power generation system and, more specifically, to the raw materials used in the power generation process. In order to analyse the decarbonization obligations of the power sector, two main groups of power generation technologies should be identified. In the case of renewable energy sources, account should be taken of the way in which energy is produced, in the context of the use of those gifts of nature which are regenerative in nature and which can be a source of energy. This characteristic clearly distinguishes these sources from energy production using non-renewable resources such as coal or lignite, oil, natural gas, or peat. In the case of the use of non-renewable resources in the energy generation process, there is the very negative impact of these processes (technologies) on the environment. For this reason, such technologies are referred to as high emission technologies. In view of the challenges of the 21st century and the global problems of today’s world, related to climate change, shrinking resources and the need to change the paradigm

² Pursuant to the disposition of Article 146(4)(7) of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended, ensuring the internal security of the state belongs to the Council of Ministers.

³ As the power industry we understand the two basic segments of this market, i.e. power engineering and heat engineering, and as a separate part of this industry we distinguish renewable energy sources.

of economic development, many countries and international organizations place great emphasis on low-carbon technologies for energy production.

Polish energy policy, which encompasses measures to reduce the negative impact of the energy sector on the natural environment, is the result of documents and legal acts adopted by the national legislator. It is also a result of the standards of the European Union laws in force in this respect, both those whose regulations have direct effect and those requiring their implementation into our legal system. The main national legal act determining the direction of the state's activities in the discussed scope are the provisions of the Constitution of the Republic of Poland, which introduce the policy of sustainable development as a fundamental political principle of the state⁴. The constitutional lawmaker, however, defines the principle of sustainable development very broadly, in at least a few provisions, referring to its constituent elements [Nowicki 2019, 221]: obliges public authorities to ensure health protection (Article 68(1) of the Constitution), to prevent the effects of environmental degradation (Article 68(4) of the Constitution) and to pursue a policy ensuring environmental safety for present and future generations, including supporting citizens' actions to protect and improve the state of the environment (Article 74 of the Constitution), or making the introduction of restrictions on the exercise of constitutional freedoms and rights subject to the necessity dictated, *inter alia*, by environmental or health protection (Article 31(3) of the Constitution). An important constitutional regulation is also a universal obligation to take care of the state of the environment and bear responsibility for the deterioration it causes (Article 86 of the Constitution). This matter is covered by many statutory acts, whose provisions impose on the addressees of their standards obligations related to the use of the natural environment and introduce administrative⁵ and criminal liability.⁶

In turn, the Energy Law Act,⁷ when defining the principles of shaping the state's energy policy, indicates a number of objectives of this regulation, which are directly related to the subject matter discussed. These include: creating conditions for sustainable development of the country, ensuring energy security, economical and rational use of fuels and energy, taking into account environmental protection requirements and obligations resulting from international agreements. In the Po-

⁴ Article 5 of the Constitution. However, the doctrine stresses that there is no uniform position on the legal nature of the constitutional principle of sustainable development, and positions are expressed which consider it to be a systemic principle, a directive on the interpretation of legal standards governing environmental protection, as well as a political principle [Rakoczy 2015, 36].

⁵ For example, see Section III "Administrative fines" of the Act of 27 April 2001, the Environmental Protection Law, Journal of Laws of 2019, item 1396 as amended. For more on administrative sanctions see Nowicki 2017, 649.

⁶ Examples of acts regulating criminal liability are: Act of 6 June 1997, the Penal Code (Chapter XXII), Journal of Laws of 2019, item 1950; Act of 16 April 2004 on Nature Conservation (Chapter 11), Journal of Laws of 2018, item 1614 as amended); Act of 27 April 2001, the Environmental Protection Law (Section II provisions from Article 330); Act of 13 April 2007 on Prevention and Remediation of Environmental Damage (Chapter VI), Journal of Laws of 2019, item 1862.

⁷ Act of 10 April 1997, the Energy Law, Journal of Laws of 2019, item 1655 as amended.

lish legal system, apart from the energy law in the strict sense, a number of other laws directly or indirectly related to the energy sector operate, whose regulations concern obligations to reduce the sector's emissions.⁸ Additionally, the issue of the decarbonization of the energy sector is reflected in government documents which define the obligations of the state and individual participants of this market in this area.⁹

1. THE EUROPEAN UNION LEGISLATION¹⁰ CREATING OBLIGATIONS FOR POLAND IN THE FIELD OF REDUCTION OF ENERGY SECTOR EMISSIONS

The legal issues of the energy market are based on the primary legislation of the European Union. The standards of the Treaty on European Union, defining the basic principles and objectives of the common market thus shape, *inter alia*, the rules of the energy market. In particular it is important to indicate here sustainable economic growth, price stability, a highly competitive social market economy, and a high level of environmental protection and improvement, which the EU legislator has listed as objectives of the European Union (Article 3(3) TEU). The EU's energy policy, like any other economic policy, therefore has its origins in the concept of the internal market, and is a reflection of both the concern for this market and the instrument for its construction. The regulations adopted by the EU institutions aimed at achieving stabilization of greenhouse gas concentrations in the air in such a way as to prevent dangerous anthropogenic interference with the climate system also result from the United Nations Framework Convention on Climate Change of June 1992 signed in Rio de Janeiro,¹¹ and the so-called Paris Agreement, i.e. the 21st United Nations Framework Convention on Climate Change of December 2015. Moreover, the provisions of Polish law, as well as European Union law, must comply with the obligations arising from relevant international law and international agreements.¹²

⁸ As an example, we can point out: Act of 20 February 2015 on Renewable Energy Sources, Journal of Laws of 2018, item 2389 as amended; Act of 20 May 2016 on Wind Power Plant Investments, Journal of Laws of 2019, item 654 as amended; Act of 20 May 2016 on Energy Efficiency, Journal of Laws of 2019, item 545 as amended; Act of 14 December 2018 on the promotion of electricity from high-efficiency cogeneration, Journal of Laws of 2019, item 42 as amended; Act of 8 December 2017 on the power market, Journal of Laws of 2018, item 9 as amended; Act of 6 December 2006 on the principles of development policy, Journal of Laws of 2019, item 1295; Act of 25 August 2006 on biocomponents and liquid biofuels, Journal of Laws of 2019, item 1155 as amended; Act of 24 July 2015 on preparation and implementation of strategic investments in transmission networks, Journal of Laws of 2018, item 404 as amended.

⁹ These documents will be further discussed.

¹⁰ When we use the terminology of the European Union law we understand it broadly and include in it EU legal acts and other sources referred to as *soft law*.

¹¹ This Convention was approved by the EU by Council Decision 94/69/EC of 15 December 1993 (OJ EU.L. of 1994 No. 33, p. 11).

¹² As an example, we can point out: The Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and related environmental aspects of 17 December 1994, Journal of Laws of

As far as EU primary law is concerned, energy market issues are more widely regulated by the provisions of the Treaty on the Functioning of the European Union. The EU legislator has decided that the internal market, environment, cross-border networks, and energy issues fall under shared competence between EU bodies and Member States (Article 4(2) of TFEU). At the same time, the TFEU indicates that the internal market ensures the free movement of goods, persons, services, and capital with a view to making sustainable progress in all sectors (Article 26 of TFEU). This also applies to the energy sector, which is regulated under Title XXI of the TFEU "Energy." Under Article 194(1) TFEU, in the context of the establishment and functioning of the internal market and taking into account the need to preserve and improve the environment, the Union policy on energy aims, in a spirit of solidarity between Member States, to ensure the functioning of the energy market; ensure the security of energy supply in the Union; promote energy efficiency and energy saving and the development of new and renewable forms of energy; as well as promote the interconnection of energy networks. Among other important regulations one should also include provisions introducing trans-European networks, *inter alia*, in energy infrastructure, in order to achieve the objectives of the internal market (Article 170(1) of TFEU). The trans-European networks are intended to be a system of open and competitive markets favouring the interconnection and interoperability of national networks and access to those networks (Article 170(2) of TFEU). However, in the opinion of the authors, the most important provision of Article 11 TFEU cited above, according to which environmental protection requirements must be taken into account in defining and implementing Union policies and activities, in particular with a view to promoting sustainable development, is of key importance for the area under consideration. This requirement served as the right signpost in the process of concretising the assumptions and objectives of the development of the energy policy of the European Union, in accordance with the principle of sustainable development, under the so-called EU secondary legislation.

The secondary legislation of the European Union, which is the basis for shaping the Polish energy market, including activities aimed at reducing the sector's emissions, also includes a number of legal acts, among which we may list:

1) Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC;¹³

2) Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, Euratom, Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006;¹⁴

2003 No. 105, item 985; Agreement on the International Energy Programme, drawn up in Paris on 18 November 1974, Journal of Laws of 2018, item 1367.

¹³ OJ EU L 140, p. 16 as amended.

¹⁴ OJ EU L 140, p. 114.

3) Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC;¹⁵

4) Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC;¹⁶

5) Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC;¹⁷

6) Regulation of the European Parliament and of the Council (EC) No 715/2009 of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005;¹⁸

7) Regulation of the European Parliament and of the Council (EC) No 714/2009 of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003;¹⁹

8) Regulation of the European Parliament and of the Council (EU) 2019/942 of 5 June 2019 establishing the European Union Agency for the Cooperation of Energy Regulators;²⁰

9) Decision of the European Parliament and of the Council No 2009/406/EC of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020;²¹

10) Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council;²²

11) Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009;²³

¹⁵ OJ EU L No. 211, p. 55.

¹⁶ OJ EU L No. 211, p. 94.

¹⁷ OJ EU L 315, p. 1.

¹⁸ OJ EU L No. 211, p. 36 as amended.

¹⁹ OJ EU L No. 211, p. 15 as amended.

²⁰ OJ EU L No. 158, p. 22.

²¹ OJ EU L No. 140, p. 136 as amended.

²² OJ EU L No. 328, p. 1.

²³ OJ EU L No. 115, p. 39.

12) Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013,²⁴

13) Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU.²⁵

This EU legislation is part of the so-called Third Energy Package, which aims to “develop an effective single European electricity and gas market, ensure transparency of retail markets to keep prices as low as possible, improve security of supply, raise the standard of services and strengthen consumer protection” [Czarnecka and Ogłódek 2012]. The aforementioned EU legal acts are the basis for shaping the Polish energy law and introducing mechanisms related to the reduction of emissions in the Polish energy sector. Within the framework of the state energy policy, an important role is played by the legal regulations on the support of renewable energy sources. An important EU document concerning obligations related to the creation and promotion of such sources is the Communication from the Commission Europe 2020. Strategy for smart, sustainable and inclusive growth (Brussels. 3.3.201, COM 2010), which was adopted in March 2010.

2. IMPLEMENTATION OF POLAND'S COMMITMENTS IN THE FIELD OF DECARBONIZATION OF THE ENERGY SECTOR

The figures adopted in the Polish energy system for the reduction of the sector's emissions must take into account the obligations arising from EU membership. According to the content of relevant legal acts and other documents, including the above-mentioned Europe 2020 strategy, the European Union has undertaken to reduce greenhouse gas emissions by 20% by the year 2020. The basis for calculating the reduction is the 1990 emissions.²⁶ The EU's emission reduction policy is to continue after 2020. The European Council set the objective of further reducing emissions by 40% by 2030. Among the tools used in the EU to reduce greenhouse gas emissions is the so-called European Union Emissions Trading System (EU ETS) [Jarno 2016, 125]. The adopted document indicates the division of economic sectors into those which have a significant impact on exhaust gas emissions (EU ETS) and those which have a marginal impact (non-ETS) and are excluded from the ETS. The assumption adopted at the EU level is to include the EU ETS sectors in the EU legislation, while activities related to the reduction of emissions in non-ETS sectors have been delegated to Member Sta-

²⁴ OJ EU L No. 156, p. 26.

²⁵ OJ EU L No. 156, p. 1.

²⁶ Which represents a 14% reduction compared to 2005.

tes' systems, including the choice of methods and tools used in these sectors to achieve the adopted objectives.

The EU legal acts and its other documents have become the basis for changes in Polish law in the field of energy law, including renewable energy sources, and have inspired the development of many national documents at government level. Such a document is the so-called *State Energy Policy until 2025*.²⁷ In defining the most important principles of the energy policy doctrine, the reduction was indicated, among other things, of the carbon footprint of the energy sector by supporting the development of Renewable Energy Sources (RES). One of the directions adopted in this document is to maintain stable support mechanisms for the use of renewable energy sources, including ensuring stability of mechanisms supporting the development of RES and creating conditions for safe investment. At the same time, it is guaranteed that any significant changes to these mechanisms will be introduced sufficiently in advance to guarantee stable investment conditions. Similarly, the issue of decarbonization of the energy sector, including the participation of RES in this process, is included among the objectives of the state's energy policy, which was adopted in the successive document: *Poland's Energy Policy until 2030* (Resolution of the Council of Ministers No. 202/2009 of 10 November 2009). Also in the draft document: *Poland's energy policy until 2050*, the operational goal is to reduce the impact of the energy sector on the environment, which will include, *inter alia*, increasing the use of renewable energy sources.²⁸ The latest government document is a draft document: *Poland's Energy Policy until 2040*, which was firstly published as a draft document on the website of the Ministry of Energy on 8th of November 2019, and was finally approved by the Council of the Ministers on 2nd of February 2021 (so-called PEP2040). It must be underlined that this is a significant step in the development of the fuel and energy sector.

The aim of PEP2040 is energy security, ensuring the competitiveness of the economy, energy efficiency and reducing the environmental impact of the energy sector, while making optimal use of Poland's own energy resources. As part of its implementation, the document assumes the reduction of carbon dioxide emissions by 30% by 2030 (in relation to the 1990 level), using renewable energy sources at the level of 21%–23% in gross final energy consumption in the same year. Both assumptions are linked. However, the increase in the share of RES PEP2040 is made dependent on granting Poland additional financial resources from the European Union. Nevertheless, PEP2040 still indicates hard coal as the basis for the national energy balance. The document also contains a statement which, depending on interpretation, may question the actual performance of Poland's emission reduction commitments. PEP2040 states that "Poland, as an EU Member State, will contribute to the objectives of the EU and other international

²⁷ Journal of Laws of 2005 No. 42, item 562.

²⁸ Website of the Ministry of Energy: www.me.gov.pl

commitments in accordance with its capabilities.”²⁹ Bearing in mind also the adopted assumption that in 2030 the total share of coal in electricity generation will be at the level of 55%–60%,³⁰ one may have justified doubts as to the effectiveness of Poland’s activities in this area. On the other hand, plans to develop a legal framework for the use of hydrogen, among other fuels in transport as well as in other sectors, and prospects for the implementation of nuclear energy seem promising (although not entirely realistic). As a result, the most desirable direction of development of the energy sector, from the perspective of its decarbonization, is the development of renewable energy sources, which was also described in PEP2040. However, an element of concern is its dependence on obtaining additional financial resources from the European Union, which is being justified by the so-called just transition. Facing the pandemic of COVID-19 and its consequences, PEP2040 plays also an important part in the National Recovery Plan, which is the basis for disbursement of funds under the Recovery and Resilience Facility.

CONCLUSIONS

Poland, being a Member State of the European Union, must comply with the obligations arising from EU law and follow the directions set out in the EU energy policy. However, due to national circumstances, the implementation of the decarbonization target for the energy sector, despite the declarations made as part of the national energy policy, may raise some doubts. Basing the national energy balance on hard coal, with the desire to protect the competitiveness of the economy in the sector in question, as well as political reservations as to the policy that burdens with the costs of transformation of this sector economies with a high use of coal fuels, are activities that may limit the effectiveness of implementation of the sustainable development principle. As a result, the most desirable direction of development of the energy sector, from the perspective of its decarbonization, is the development of renewable energy sources, which is also described in PEP2040. Nevertheless, this should be a goal pursued by the state regardless of the level of financial assistance from the European Union. The final beneficiary of a sustainable energy policy is every human being, and the transition to a low/zero emission economy is a matter for our health, life, and the survival of the whole species in general.

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²⁹ PEP2040, p. 18.

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RESEARCH DEVELOPMENTS ON LEGAL SOCIALIZATION

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Abstract. The research approach to the issue of legal socialization changes along with the development of science and the evolution of legal theory. The paper reviews and systematizes the most important approaches and perspectives of research on legal socialization over time, from the first in-depth studies up to 2020. It shows the research expansion of the last decade on a global scale, as well as its deficiency in Poland. By analyzing the factors of legal socialization, it is possible to reach a full understanding of the process, and to draw conclusions as to the future directions of research. Undoubtedly, there is a new perspective of research that takes into account the achievements of cognitive sciences, especially neuroscience.

Keywords: sociology of law, legal socialization, models of legal socialization, research directions

INTRODUCTION

Sociologists, psychologists, social anthropologists, theoreticians of law, ethicists, educators, and criminologists have a variety of approaches to the issue of legal socialization. Legal socialization is an important issue for the effectiveness of law, because knowledge of the mechanisms of legal standards internalization can allow to optimize the content of law. The process of legal socialization is also explained by criminologists who study the reasons for criminal behavior. Moreover – an in-depth analysis of socialization mechanisms can provide a basis for building educational programs for both children and adults for upbringing to legal values.

Thus, it is not surprising that for many years scientists have been conducting research aimed at developing a general theoretical model to explain the process of legal socialization. However, given the complex nature of this process, occurring at the psychosocial, neurological, legal, ethical, and also educational levels, building a generalized theory of legal socialization is extremely difficult, if not impossible. Showing the directions of research development on legal socialization, analyzing the changes in research approaches and, consequently, determining the potential future developmental trends of legal socialization research became the primary objective of this study.

In the subject literature, the most common is the elaboration of traditional research approaches of legal socialization, considered in opposing currents [Tapp and Levine 1974; Cohn and White 1990; Cohn, Bucolo, Rebellon, et al. 2010; Fine and Trinkner 2020; Borucka–Arctowa, Skąpska 1993; Pieniżek and Stefaniuk 2014]. However, there are no attempts to build a general scheme of the research development on legal socialization, or to indicate certain regularities in the historical and problematic perspective. Meanwhile, in order to understand the conte-

emporary approach to legal socialization, an in-depth analysis of research approaches in earlier years and understanding the regularities of their development is a necessity.

1. DEFINITIONS OF LEGAL SOCIALIZATION

There are various definitions of legal socialization in the literature, as different researchers emphasize different aspects of this process. Over the years, it can be noted that the definition of legal socialization has expanded and focused not only on the process of socialization but also on its causes and effects.

In the American literature, legal socialization is defined as “the process during which people develop their relationship with the law” [Trinkner and Tyler 2016, 3]. It involves the formation of values, attitudes, and beliefs about the law, as well as the institutions that make the law and the people who apply and enforce it [Trinkner and Cohn 2014, 602; Piquero, Fagan, Mulvey, et al. 2005, 267]. From a perspective of legal effectiveness, legal socialization is understood as a process that leads people to recognize the authority of law and as a guarantee of compliance with the law [Buss 2011, 329]. On the other hand, from the communicative point of view, legal socialization is understood as a development process of communicative competence, building the ability to participate in public discourse and exchange arguments to legitimize the existing legal order [Habermas 1999, 22].

In the Polish literature, the definition of legal socialization was developed by M. Borucka–Arcowa and G. Skąpska. Polish researchers indicate that legal socialization is: “a process of taking over, i.e. gradual assimilation and gradual reorganization by the subject – within its own system of perceptions and knowledge – of the elements co-creating the legal system prevailing in the society” [Borucka–Arcowa and Skąpska 1993, 29–30]. This is an approach that emphasizes the importance of internal socialization factors in the process of internalization of legal standards.

Recent studies on legal socialization go far beyond the internal process of understanding the law. Contemporary researchers pay attention to the underlying values and ideas of society concerning how the legal system should function [Trinker, Rodrigues, Piccirillo, et al. 2019, 3], as well as the individual-power relationship, as one of the processes through which people develop their views of law [Tyler and Trinkner 2018, 3].

In an attempt to build a definition of legal socialization that takes into account all the previous directions of research, it can be pointed out that legal socialization is “a process of building the relationship with the law, shaped and constantly refined through the natural maturation and cognitive-emotional development of a person (psychosocial and educational aspect), as well as through continuous direct and indirect experiences with the law and law enforcement bodies (legal and ethical aspect).” However, based on the research results of the last decade, more and more attention is paid to the environmental conditions that influence the de-

velopment of relationship between man and the legal system, and at the same time the research on the neurological processes occurring in the human brain has been further explored.

2. TRADITIONAL APPROACHES TO THE STUDY OF LEGAL SOCIALIZATION IN THE WORLD AND IN POLAND

In the American literature, there are two main approaches to the study of legal socialization: 1) cognitive and developmental [Tapp and Levine 1974; Cohn and White 1990; Cohn, Bucolo, Rebellon, et al. 2010], and 2) based on social learning theory [Cohn and White 1986]. It is quite characteristic that further studies and new approaches to legal socialization within the cognitive and developmental as well as social models do not overturn the existing theories, but show a different perspective of research and add some new elements, important for understanding the process, which makes the contemporary view of legal socialization show the issue on many levels.

Interestingly, in the Polish doctrine [Borucka–Arctowa and Skąpska 1992, 14; Staśkiewicz 2013, 327; Pieniżek and Stefaniuk 2014, 226; Ornacka 2013, 68] the main focus is on other traditional approaches to legal socialization: 1) normative and deterministic approach [for which representatives are considered: Hogan and Mills 1976] and 2) cognitive and interactive approach [represented by: Piaget 1932; Mead 1975]. These approaches are generally used to characterize opposing models of children's socialization [Corsaro 2011, 9ff].

In the normative and deterministic model, attention is paid to the adaptation of an individual to the system of standards and values, with its completely passive attitude. The most important thing is the order in the society, to which the socialized person must adapt. Law in this view is “a kind of tool, used to transform individuals in accordance with the current ideal, recognized by the political system” [Pawlak 2017, 776]. According to the normative and deterministic approach (adopted by theories of cultural anthropology, system and functional theories and psychoanalysis), a person completely adapts to the system of standards and values surrounding him [Staśkiewicz 2013, 328], as he is a “rule-following” animal, thanks to which he can survive. Understanding the socialization process according to this model, was the basis of research in the 1970s on the socio-psychological conditions that enable the use of law as an instrument of social reform [Hogan and Mills 1976], which may explain why in Poland this model was used as one of the possible perspectives of legal socialization. It is important to emphasize that American studies on approaches and idealization models of legal socialization do not take into account the normative and deterministic approach at all, which is another confirmation of the strong influence of existing state system on the determinants, manner and directions of research on law.

The cognitive and interaction model, on the other hand, adopted by Polish researchers to explain the process of legal socialization, is a conglomerate of some

assumptions of models known in the English literature as cognitive and developmental as well as social. According to the cognitive and interactive approach, a person maintains his individuality, autonomously and selectively assimilates social values and standards, and may contribute creative elements to this system [Borucka–Arctowa and Skąpska 1993, 12]. In this view, a person “matures” both individually and socially reaching the so-called “cooperative morality” [Selznick, Nonet, and Vollmer 1969, 18ff], and the legal socialization consists in a continuous interaction between the person and his environment.

Due to the fact that the Polish literature lacks theoretical elaborations on legal socialization and comprehensive research on this issue, in the following part of the paper a perspective on the research development on legal socialization based on models distinguished in English-language publications was adopted.

3. COGNITIVE AND DEVELOPMENTAL APPROACH

Research on legal socialization in the 20th century was dominated by the cognitive and developmental approach, in which the focal point of developing a relationship with the law is the maturation of an individual, which drives increasingly advanced cognitive processes that develop over the course of life. This model is based on classic psychological theories of cognitive [Piaget 1932] and moral [Kohlberg 1963/2008] development. In early approaches, legal socialization was closely related to the development of moral reasoning (later the aspect of legal reasoning was added). It was assumed that expectations of moral, good behavior are reflected and communicated through social rules and laws, and that as persons mature, their ability to judge, if a given behavior is moral or not, increases. In this view, it was assumed that the lower the level of moral reasoning individuals possessed, the more likely they were to violate laws [Trinkner 2012, 5]. Such assumptions were supported in later research on offenders’ levels of moral reasoning [Hains and Miller 1980, 21; Blazi 1980, 1ff].

4. LEGAL SOCIALIZATION AS A RESULT OF LEGAL REASONING

In-depth research on legal socialization conducted in the 1970s resulted in the introduction of an additional factor of cognitive development, namely legal reasoning. It was emphasized at the time that an increasing role of legal regulation in the life of societies made it necessary to take a look at the importance of law as a socialization instrument [Tapp and Levine 1974, 4]. The researchers described that, in addition to moral reasoning (related to making judgments on standards, values, rules, and customs), in the process of legal socialization, an individual develops legal reasoning, which allows defining, interpreting, and making decisions about rights and obligations [ibid., 19ff]. The authors then distinguished three progressive stages of legal reasoning: pre-conventional (I), conventional (II) and post-conventional (III) perspectives. The first stage, occurring most often in

young children, involves avoiding punishment and showing respect for the law treated through an instrumental prism. The conventional perspective (II) consists in accepting rules and obeying the law, which will ensure social order and maintain the status of a “good” citizen. The last stage (III) is characterized by a values-based approach to law and making judgments about law with an autonomous sense of justice. Research [ibid., 31] confirmed that the majority of society ranked at the conformist level (II). The model of legal reasoning, assumed that the higher the level of legal reasoning presented by an individual, the lower their approval of behavior that violates these rules. This thesis has been confirmed in later research on both American [Cohn and White 1990], Russian [Finckenauer 1995], and Mexican [Grant 2006] youth samples, confirming its supracultural nature.

5. ATTITUDES TOWARDS THE LAW AN ADDITIONAL FACTOR IN LEGAL SOCIALIZATION

A landmark paper in legal socialization research was published in 1990, which identified a third element of legal socialization, namely legal attitudes, in addition to moral and legal reasoning [Cohn and White 1990]. Research has shown that the relationship between legal reasoning and rule-violating behavior is intermediated by attitudes toward the law. The cognitive and developmental model of legal socialization from then on began to identify three basic elements: moral reasoning, attitudes, and legal reasoning. Indeed, Cohn and White identified two major attitudes that are important in this process: normative and enforcement status. Normative status refers to approval or disapproval of rule-violating behavior, while enforcement status focuses on people’s belief that rule-violating behavior should be punished accordingly. Research from those years showed that as legal reasoning evolved, approval of rule-violating behavior decreased while the belief that such behavior should be punished increased [Cohn, Trinkner, Rebellon, et al. 2012, 7].

The 1990 publication overcame some of the impasse that had taken place in legal socialization research. Cohn and White described three dimensions of legal socialization that were so important to future research. These dimensions were figuratively named: vertical, horizontal, and longitudinal. The vertical dimension refers to the influence of multiple levels of power and authority on a person (legally legitimized authority, but also socially legitimized authority such as parents, school, coach, caretaker, etc.). The horizontal dimension refers to the influence of subcultures and other reference groups on a person’s behavioral mechanisms, as well as intercultural variation in legal socialization mechanisms. The third dimension (longitudinal) emphasizes the importance of a person’s individual experiences over an extended period of time and the formation of different perspectives of power, in relation to different experiences of law enforcement on a daily basis [Cohn and White 1990, 5–6]. The authors conducted an experimental study of a dormitory-dwelling student community in terms of the third dimen-

sion, which resulted in a single study that included all of the measures of a full range of legal socialization effects known at the time – reasoning, attitudes, and behaviors.

6. ELEMENTS OF THE SOCIAL LEARNING MODEL

The publication by Cohn and White was also a breakthrough in the model approach to legal socialization. The authors described a new model of legal socialization – social learning, in addition to the then leading cognitive and developmental model. In their papers, the authors pointed out the need for research incorporating both approaches [Cohn and White 1986], and the results of their research supported a cognitive developmental theory based on legal reasoning and legal attitudes [Cohn and White 1990]. Since then, three directions of simultaneous research on legal socialization have been evident: 1) deepening the cognitive and developmental approach and resulting in the construction of an integrated model [Cohn, Bucolo, Rebellon, et al. 2010]; 2) based on the assumptions of cognitive and developmental approach, but emphasizing the role of environmental factors in the results [Fickenauer 1995; Grant 2006]; and 3) abandoning the cognitive and developmental approach towards the social approach, resulting in the development of an alternative model [Fagan and Tyler 2005; Fagan and Piquero 2007], then evolving to a model based on procedural justice.

The 1990s brought a wave of research on legal socialization in which increasing attention began to focus on the environment as a factor that has an important role in an individual's development of a relationship with the legal system. For example, Finckenauer (1995) in the course of research on the criminal behavior of Russian and American adolescents, found that in addition to legal reasoning and attitudinal factors for the construction of legal socialization, environmental factors are also important. In particular, the circumstance of believing that punishment would be imposed for a given behavior was a great deterrent to rule-breaking [Finckenauer 1995]. Also noteworthy is research conducted by H.B. Grant (2006), who found that when laws were enforced by legal authorities in a manner described as fair, Mexican adolescents were more likely to comply. This research influenced a turn toward a social approach to legal socialization, although for several more years the cognitive and developmental approach dominated, under which the so-called integrated model developed.

7. INTEGRATED MODEL (TRADITIONAL AND EXTENDED VERSION)

In the first decade of the 21st century, researchers based on the cognitive and developmental approach began to study another element of attitude (in addition to normative and enforcement status), namely: attitude toward the criminal legal system. A special scale of attitudes toward the criminal legal system (abbreviated as ATCLS) was developed by Martin and Cohn [Martin and Cohn 2004, 367ff],

which allowed them to investigate the relationship of ATCLS with rule-violating behavior and experiences with the criminal legal system. This scale has been used for further research on criminal behavior [e.g., Cohn and Modecki (2007) studied gender differences in attitudes toward criminal law]. The ATCLS measure was also used to build an integrated model of legal socialization that included the following measures of legal attitudes: normative status, enforcement status, and attitudes toward the criminal legal system. According to the integrated model of legal socialization, individuals with higher moral and legal abilities are more likely to approve of punishment for rule-violating behavior, have more positive attitudes toward the law, and therefore are less likely to engage in rule-violating behavior [Cohn, Bucolo, Rebellon, et al. 2010, 296].

The integrated model was expanded in 2012 when legitimacy of authority was added as a factor influencing legal socialization, in addition to moral and legal reasoning, attitudes toward the law [Cohn, Trinkner, Rebellon, et al. 2012, 385ff]. In the traditional integrated model – attitudes mediated between legal/moral reasoning and rule-violating behavior. The extended model argued that between legal/moral reasoning and normative status (attitudes indicating the degree of individuals' approval of rule-violating behavior) was further mediated by the legitimacy of police and parents. Thus, an individual's level of respect for legal authorities is an additional element of socialization. The extended integrative model attempts to incorporate into research rooted in the cognitive and developmental approach, the achievements of an alternative model of legal socialization built on the social approach.

8. APPROACH BASED ON SOCIAL LEARNING THEORY. BASIC ASSUMPTIONS

The measurement constructs of research based on the cognitive and developmental approach, were primarily based on internal abilities and attitudes about own behavior, rather than how individuals interact with the world around them. Social learning theory, on the other hand, focused on the environmental aspects that influence a person. This model was described in 1986 by Cohn and White, but at the same time, the authors argued more strongly in favor of the cognitive and developmental model [Cohn and White 1986, 206ff], which meant that for over 20 years research had been conducted based on established paradigms.

Under social learning theory, legal socialization takes place in the context of actual social experiences in which individuals respond to situations. This approach predicts a direct relationship between the individual and situational variables. According to researchers, differences in legal attitudes are evident depending on socialization conditions [ibid., 200]. Based on the social learning theory, the so-called alternative model of legal socialization was developed.

9. ALTERNATIVE MODEL

The model developed from social learning theory provides an alternative to the developmental and cognitive approach that dominated research on legal socialization for about 50 years. It began to study primarily external factors of legal socialization. This model was developed since 2005 by Piquero [Piquero, Fagan, Mulvey, et al. 2005] and researchers Fagan and Tyler (2005). In the initial phase, 2 external factors were analyzed: legal legitimacy, including the extent to which individuals believe that laws are right and appropriate, trust the law, and feel obligated to comply; and legal cynicism, i.e., the extent to which individuals have a negative attitude toward the law and legal authorities. Research conducted in the beginning of the 21st century on groups of adolescents, showed that if respondents believed that legal authorities treated them fairly, then they were more likely to perceive authorities as legitimate and had lower levels of legal cynicism, which in turn was associated with less frequent violations of the law by such individuals [Fagan and Tyler 2005, 219ff]. Other researchers [Fagan and Piquero 2007; Piquero, Fagan, Mulvey, et al. 2005] on large samples of adolescents have confirmed the thesis that views about how authority figures treat them influence degrees of legalism and cynicism, and it has been noted that high levels of legal cynicism were associated with low levels of legal legitimacy [Piquero, Fagan, Mulvey, et al. 2005]. The research resulted in a new model of legal socialization that takes into account the role of legal legitimacy and legal cynicism in predicting behavior that violates the law.

10. MODEL BASED ON PROCEDURAL JUSTICE/POWER RELATIONS

Researchers pointing to the strong dependence of the process of legal socialization on relations with authority figures are based on the assumption that young people's experiences with legal authorities result in the adoption of views about the purpose and role of the law [Tyler, Fagan, and Geller 2014, 751ff], and also influence the foster of beliefs about own position in society [Justice and Meares 2014, 159ff]. In this view, the authorities applying and enforcing the law are the main actors driving the internalization of law-related values and attitudes [Fine and Trinkner 2020, 9]. It is emphasized that the fair treatment of people by authorities acts as a tool in providing legal values and behavioral standards [Tyler and Trinkner 2018]. After all, treating members of society with dignity, respect, fairness, and integrity proves that they are valued members of the group and builds the belief that all members of society are entitled to such treatment [Justice and Meares 2014].

In the procedural justice view, people adopt two main attitudes: legitimacy and cynicism [Pawlak 2017, 780]. Legitimacy is related to trust in authorities and a sense of obligation to follow the rules set by that authority, which leads to recognition of their authority, when people perceive the authority as legitimate [Trin-

kner and Cohn 2014, 603]. Legal cynicism, on the other hand, refers to a person's attitude toward the social standards underlying the law. Therefore, in the initial stage of legal socialization, an attitude of cynicism is formed (through the internalization of standards associated with the law), which then allows for the recognition (or not) of the authority's legitimacy.

The results of numerous studies, mostly conducted on the American ground, prove that if state authorities make legal decisions and enforce laws in an honest way – then people are more likely to support and cooperate with them, thus increasing the legitimacy of legal authorities and decreasing cynicism towards them [Sunshine and Tyler 2003; Fagan and Tyler 2005; Piquero, Fagan, Mulvey, et al. 2005; Trinkner and Cohn 2014]. Contemporary attention in the United States has been drawn to the critical importance of interactions with authorities in the legal socialization process [Fine, Cavanagh, Donley, et al. 2017; Murphy 2015; Trinkner, Jackson, and Tyler 2018; Mazerolle, Antrobus, Cardwell, et al. 2019].

Two theories of legal socialization strategies have been developed from the procedural justice-based model: consensual and coercive [Trinkner and Tyler 2016, 11ff]. The coercive strategy is associated with building human motivation to obey the law through applied sanctions, strict control, command style and use of force. Members of such a society build a relationship with authority based on fear, which often results in a rejection of the authority of state bodies. In a consensual strategy, on the other hand, human motivation is built on values. In this case, the authorities emphasize negotiation and participation of society members in the process of making and applying the law, thus it is possible to inculcate positive legal values and induce voluntary respect of citizens towards the authorities.

Legal socialization in terms of procedural justice still requires further research [Trinkner and Cohn 2014, 603]. In particular, there is insufficient evidence to apply the model to countries other than the United States, and a recent study of South African adults questioned the usefulness of a procedural justice model of legal socialization when law enforcement has a strained relationship with the public and struggles to maintain a basic level of security [Bradford, Huq, Jackson, et al. 2014, 246ff].

11. NEUROLOGICAL DEVELOPMENT VS. LEGAL SOCIALIZATION

In 2018, the first book publication in 20 years entirely devoted to legal socialization by T. Tyler and R. Trinkner was published, which included a previously unnoticed aspect of the influence of neurological development on the legal socialization process [Tyler and Trinkner 2018, 110ff]. Over the past two decades, there has been an explosion of technology that has helped scientists understand the complex relationships between the brain, environment, and human behavior. Nevertheless, little attention has been paid to understanding the role of brain in the process of legal socialization. Yet biological factors with sociocultural factors in-

teract in complex ways in any socialization process [Grusec and Hastings 2015, 12]. Taking into account the output related to the neurological development of adolescents can bring researchers closer to fully understanding the process of legal socialization.

A map of networks developed by neuroscientists that influence reasoning abilities in adolescents may be helpful in exploring a complete model of legal socialization. The first network that fully develops in early adolescence is the “pure” reasoning ability, which is based on logic, abstraction, and rationality. The next important neural network is the social-emotional regulatory system, which is found in the limbic area of brain, responsible for emotional expression, arousal, and reactivity. The last important neural network is the cognitive control system, which uses advanced cognitive processes such as anticipation, planning, and impulse control, and therefore it is responsible for developing strategies to solve complex problems and decision making. The cognitive control system develops from childhood to early adulthood and is one of the last parts of brain to reach full maturity [Tyler and Trinkner 2018, 112ff, and literature cited therein].

Interestingly – the development of individual neural networks coincides with the developmental trajectory of legal reasoning described in the 1970s [Tapp and Levine 1974, 19ff]. Thus, it is likely that there are biological constraints on the development of legal reasoning abilities because a child at a given developmental level lacks the neurological capacity to work with complex information in an effective and efficient manner. Therefore, from a neuroscience perspective, there will be little success in trying to accelerate the development of legal reasoning in children by artificially confronting them with complex legal problems and decision making (as advocated by the cognitive and developmental approach).

Another area in which neuroscience results can be applied to legal socialization is the understanding of processes for regulating own behavior [Tyler and Trinkner 2018, 117ff]. Neuroscience research associates the development of self-regulation with changes in neural networks during childhood and adolescence. Statistics of crime frequency by age, indicate a surge in crime during early adolescence that coincides with an intensification of social-emotional system activity. The number of antisocial behaviors then slowly and gradually decreases with age until it stabilizes in early adulthood. This trajectory coincides with the development of cognitive control system and may explain why so many adolescents who commit crimes lead adult lives as law-abiding citizens.

Neurobiological approaches to legal socialization also question the efficacy of harsh punishments for adolescents, undermining the effectiveness of deterrence as a component of legal socialization [ibid., 119ff]. The still-developing adolescent brain makes it difficult to think about future consequences of behavior, especially potential punishments. As research indicates – legal punishments have lasting, potentially harmful effects on individuals who are still developing neurologically [Petrosino, Turpin–Petrosino, and Guckenburg 2010, 6].

Developments in neuroscience provide an opportunity to broaden horizons in the study of legal socialization as well. Cognitive science becomes increasingly important for legal science, including the study of the sociology of law. This is particularly evident at the empirical level of the relationship between law and neuroscience involving the analysis and interpretation of neuroscientific data [Pardo and Patterson 2013, 16–19; Brożek, Kurek, and Stelmach 2018, 185].

12. FUTURE DIRECTIONS FOR RESEARCH ON LEGAL SOCIALIZATION

Despite numerous studies, there are still many aspects that should be taken into account in future research on legal socialization. Indeed, it is a process that takes place on many levels, and to fully understand the phenomenon it is necessary to combine different approaches and perspectives, and to look at the issue in an interdisciplinary manner. So far, the research on legal socialization and the developed theoretical models have been dominated by the perspective of cognitive and developmental science as well as social psychology. It is only over the last 2–3 years that neuroscience research results have been integrated with the established approaches [Tyler and Trinkner 2018] to better understand the phenomenon at the level of human biology. However, this is only the beginning of using the field of neuroscience to study legal socialization, which may be surprising given that advances in the sciences of biology and neuroscience have already been influencing legal policy for many years [Scott and Steinberg 2018], or research on effective resocialization approaches [Petrosino, Turpin–Petrosino, and Guckenburg 2010]. It seems inevitable that research on legal socialization will be deepened by knowledge of how the human brain functions.

Moreover, as alleged by Trinkner and Tyler, research on legal socialization has so far ignored the importance of emotions, despite the fact that legal science increasingly recognizes the important influence of emotions on how people think and react to the law [Trinkner and Tyler 2016, 19]. Intensive research on the meaning and role of emotions from a sociological perspective was conducted as early as the 1970s, when the subdiscipline of emotional sociology developed [Turner and Stets 2009]. From a sociological perspective, the studies of emotions are placed in social contexts (such as family, personal, or work situations). Another perspective of emotion research should be the situation of entanglement in complex socio-legal relations. The extent to which emotions influence the process of legal socialization is indirectly evidenced by the results of studies conducted from a procedural justice perspective, which show that personal experiences with authorities have an exponential effect on the increase or decrease in legitimacy of legal authorities.

Integration of other disciplines would contribute significantly to a fuller view of legal socialization. In addition, there are a number of areas that require in-depth research in the already known perspectives. For example – representatives

of the social learning approach point to the need for additional research on younger populations, especially in the context of contacts with non-legal authority (e.g., parents, teachers), as well as in countries with non-democratic systems of power [Trinkner, Rodrigues, Piccirillo, et al. 2019, 4]. An important question for further research in the light of procedural justice may also be the way children deal with conflicting messages – e.g., the clash between the reality of children from poor backgrounds and the idealized vision of law and the state taught in schools, or the transition from a voluntary school environment to a coercive legal interaction [Trinkner and Tyler 2016, 20]. On the other hand – there is a definite lack of research on the process of legal socialization on a group of adults, with the aim to better understand the evolution of legal reasoning in relation to changing social roles in adulthood.

Another area that deserves attention is the possibility of future use of the research results on legal socialization. Some researchers, in more recent studies, associate the development of a relationship with the law with the behavior of individuals studied [Fagan and Tyler 2005; Trinkner and Cohn 2014]. In recent years, an increasing number of individuals, especially young people, have become involved in reform movements. Although it seems likely that the motivation that has led to this is rooted in processes of legal socialization, these connections have been neither identified nor explored [Trinkner and Tyler 2016, 20].

Finally, the current global situation surrounding the coronavirus pandemic offers new opportunities for research on legal socialization. Governmental efforts to combat the COVID-19 virus generate extreme reactions from citizens. On an unprecedented scale – people have become ensnared by a network of laws imposing numerous restrictions and prohibitions. Media reports indicate that the level of cynicism towards the authorities' actions has increased in recent months, and public attitudes are generally bad. The crisis situation and the associated necessity to temporarily reevaluate the priorities of social life, reflected in legal regulations, may also be evident in the process of legal socialization and affect the process of forming relationships with the law by both children and adults. The experience of pandemic brings a new perspective to the study of legal socialization, which on such a huge scale – probably will not be repeated in the near future.

CONCLUSION

Over the past 100 years, many important factors affecting the process of legal socialization have been found. The factors of legal socialization that have been analyzed are grouped historically and graphically presented in Diagram 1.

Diagram 1

Approximate diagram of the research development on legal socialization over time

Period of time	Discovered factor of legal socialization
First studies (from around the 1930s)	1. MORAL REASONING
The 70s of the twentieth century	2. LEGAL REASONING - pre-conventional - conventional - post-conventional
The 90s of the twentieth century	3. ATTITUDES TOWARDS THE LAW - normative status - enforcement status
The turn of the 20th/21st century	4. ATCLS (attitude toward the criminal legal system)
The beginning of the 21st century	5. LEGITYMACY OF AUTHORITY
The first decade of the 21st century	6. LEGAL CYNICISM
The second decade of the 21st century	7. RELATIONSHIP WITH THE AUTHORITY
2018	8. NEUROLOGICAL PROCESSES AFFECTING LEGAL REASONING

↓

Cognitive and developmental approach

Based on social learning theory approach

Source: Own elaboration

It should be emphasized that the developed diagram is not applicable to Polish realities, as the last research on legal socialization in Poland was conducted in the early 1990s [Borucka–Arctowa and Skąpska 1993]. It is only noticeable that there is interest in some of the factors of legal socialization such as the process of legitimization [Burdziel 2016, Kukołowicz 2016], or legal awareness (empirical research is mainly conducted for the legal profession). There is also a noticeable interest in the axiological aspect of legal socialization in terms of education through law [Stadniczeńko and Zamelski 2016], or the issue of law effectiveness [Giaro 2010]. However, there is a lack of empirical research that could bring the Polish science of sociology of law closer to understanding the phenomenon of legal socialization in contemporary Poland, which is an undoubted shortcoming in the Polish science of sociology of law.

Diagram 1 illustrates how the research approach has changed over the years from a cognitive and developmental one to the social. Nowadays, as a result of using neurobiologists' research results, there is another turn towards biological factors, which in the process of socialization overlap with socio-cultural factors in a complex system. Thus, it can be stated that we are now dealing with an inte-

grative approach. Research has evolved to an interdisciplinary approach, with a focus on neuroscience. Nowadays, due to open access to research results, the approaches to the study of legal socialization become more consistent and take into account the latest research results from related fields. Thus, the role of interdisciplinary research teams on legal socialization increases. Time will tell if the joint efforts of researchers will allow to build a universal model of legal socialization that can be applied in different complex systems of socio-legal life.

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THE SPACE OBJECTS RE-ENTRY – STATUS AND CHALLENGES OF INTERNATIONAL REGULATORY FRAMEWORK

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Abstract. The basis of the international space regulatory framework relied on the United Nations Outer Space Treaty 1967. The purpose of the paper is to present and assess the current regulatory and legal framework with regards to space security re-entry risks. The particular regulation related to space debris and re-entry may be inferred from the basic international space law (UN space treaties). As surviving fragments originating from a particular space object (usually linked to the owner) may endanger people on the ground or operating aircraft, they are directly linked to the Liability Convention 1971. Therefore nations, international intergovernmental organizations, executive agencies, and non-governmental entities maintain their efforts to create and implement hard and soft laws. Those regulations concern the space environment and its challenges, such as the proliferation of space debris, the increasing activity of space operations, the emergence of mega constellations, and its effects on re-entry characteristics. The entire material included in this article comes from dedicated conferences and seminars about Space security and policy, legal documentation, and literature review, which refer to re-entry in this subject. The research methods used in this article have comparative and analytical nature – based of the different sources of legislation.

Keywords: space security, re-entry, satellite, policy, space debris

INTRODUCTION

Since the beginning of the space era, i.e., the launch of Sputnik 1 spacecraft in 1957, space activities are concentrated around Earth's orbits. In spite of the fact that humanity performs, strengthens, and plans activities far beyond that is in deep space, Earth's orbits remain and will continue to dominate space activities in coming years as Earth's orbital space systems bring currently the greatest added value to societies and Earth's economy through communication, remote sensing or navigation services.¹ In the above context it is necessary to highlight that besides proper satellites, the orbital or space environment is predominantly both

¹ OECD. Background paper for the G20 Space Economy Leaders' Meeting. Measuring the economic impact of the Space Sector. October 7, 2020; OECD. The Space Economy in Figures: How Space Contributes to the Global Economy, OECD Publishing, 2019. <https://www.oecd.org/innovation/inno/measuring-economic-impact-space-sector.pdf> [accessed: 24.03.2021], p. 1–10.

oversaturated and concerned with space debris. In this sense, the orbital environment is a mix of all artificial objects, including fragments and elements thereof which currently or previously did, reside in an Earth-bound orbit, and space debris are considered as all artificial objects including fragments and elements thereof, in Earth orbit or reentering the atmosphere, that is non-functional.²

In recent decades orbital environment is affected by particular changes resulting from so-called “new space era” trends that will keep reshaping the space sector over the next decades. Among other factors, such as the decrease of launch costs, proliferation of launch and satellite technologies, new commercial and state entrants, commercialization of space, increasing number of space debris or more general democratization of space activities are significantly rebuilding the orbital environment. Moreover, one particular factor i.e., the creation of so-called large or mega-constellations mostly in the Low Earth Orbit (LEO) regime seems to play the predominant role soon.

Maintaining and developing of current space activities, and development of new ones, both in diversity (new services, in-orbit servicing, assembly, and manufacturing) and volume (large constellations) will demand to maintain and upgrade of space-related infrastructure enabling space economy growth (in a sustainable and safe manner) i.e. Space Situational Awareness systems (SSA). The main target of this system is to protect critical services (e.g., navigation, Earth observation) and to verify activities in the vicinity of a protected spacecraft avoidance of unexpected and unplanned “meetings” of satellites and proximity operations reducing the spread of space debris and costs of space operations [Jah 2020].

Moreover, the SSA system will tend to develop with new functionalities such as space traffic coordination (STC) or space traffic management (STM),³ which will be necessary to handle more and more space traffic safeguarding sustainability of the orbital environment and safety of operations. In general terms and more broadly the orbital environment may be considered as a finite natural resource influencing orbital and space economy needed to be properly managed to sustain growth without causing irremediable damages. In the context of the space environment and its policy, regulatory and technical aspects will be examined from the angle of the atmospheric re-entry as a final stage of post-mission disposal of mainly LEO (Low Earth Orbit) space objects.

² OECD Science, Technology and Industry. Policy Papers, *Space Sustainability: The Economics of Space Debris in perspective*, April 2020, No. 87; IADC Inter-Agency Space Debris Coordination Committee. Space Debris Mitigation Guidelines, IADC-02-01, Revision 2. 2020. <https://www.oecd-ilibrary.org/docserver/a339de43-en.pdf?expires=1617693388&id=id&accname=guest&checksum=4E999888BE5DF7AB4D755E8899EF349F> [accessed: 23.03.2021], p. 22–35.

³ ESPI (European Space Policy Institute) public Report 71. Towards a European Approach to Space Traffic Management, 2020, file:///C:/Users/m.polkowska/Downloads/ESPI%20Public%20Report%2071%20-%20Towards%20a%20European%20Approach%20to%20Space%20Traffic%20Management%20-%20Full%20Report%20(2).pdf [accessed: 23.03.2021], p. 31–33.

1. RE-ENTRY BASICS

Most of the spacecraft-related activities are performed in four phases – creation, launch, operation, and eventual disposal. Of course, during each of those phases many space debris may be released and at the end spacecraft usually becomes also dysfunctional/derelict and debris itself. Moreover, besides the nominal operation space systems may get to failures or even destruction which generate an additional amount of debris.

Besides the space debris generation, there are also sinks, both natural and artificial. The main natural mechanism to eliminate debris is the slow process of natural decay of space objects pulling them into Earth's atmosphere and its full or partial burn up there and eventual fall to the Earth's surface as an uncontrolled re-entry (approximately 70% of all re-entries). That process may be very long in terms of hundreds of years at high altitude over 1000 km and relatively fast, in terms of year below 600 km.

Besides uncontrollable mechanism there are controllable (or de-orbits) too consisting of the intentional and controllable direction of functioning space object into Earth's atmosphere to perform safe destruction and eventual safe fall of surviving elements into the inhabited area, generally located over the ocean (approximately 30% of all re-entries).

Two orbital regimes that are LEO and GEO (the Geostationary Orbit) are the subjects of particular attention where post-mission disposal usually aiming for the clearance from the permanent or quasi-permanent presence of non-functional space objects play an important role. In particular, at the LEO regime, the satellites and rocket bodies at the end of its operational phase should be maneuvered to reduce their orbital lifetime. The recent research allows complementing above mentioned processes there with the technology being lately developed that is an active way to eliminated space debris, so-called active debris removal (ADR). In its current form, there are two basic forms considered i.e., physical debris removal or concentrated energy debris removal. In the first case, Active Debris Removal (ADR) mission as European Space Agency's (ESA) ADRIOS mission led by ClearSpace or end of life (EOL) mission ELISA-d demonstration mission performed by Astroscale is envisaged. In terms of concentrated energy, it is considered to use laser technology to reduce the energy of small objects to trigger re-entry. Several studies indicate that to maintain the orbital environment in a stable form it is necessary to perform at least 5 large objects ADR missions yearly from a region with high object densities and long orbital lifetimes [Alior 2020].

2. POLICY AND FRAMEWORKS

The basis of the international space regulatory framework relied on the United

Nations Outer Space Treaty⁴ where the issue of freedom of access and operation in space is considered as a basic right. In this sense maintenance of the finite orbital environment allowing to conduct space operations in sustainable form should play a crucial role for all states (both in terms of established space nations and emerging ones) and continue indefinitely in the future in a manner answering to equitable access to benefits of the exploration, and use of outer space for peaceful purposes, for present and future generations. Therefore nations, international inter-governmental organizations, and executive agencies but also non-governmental entities maintain their efforts to create and implement hard and soft laws, regulations, norms, and standards aiming to deal with the orbital environment and its trends that is the proliferation of space debris, the increasing complexity of space operations, emergence of a large constellation and its effects to re-entry characteristics.

The particular regulation related to space debris and re-entry, in particular, may be inferred from basic international space law, that is Space Treaties (UN).⁵ As surviving fragments originating from a particular space object (usually linked to the owner) may endanger people on the ground or operating aircraft they are directly linked to the notations of the Liability Conventions 1971.⁶

Even though, despite many efforts, the binding legal consensus has not been reached yet there are many efforts coming from different organizations delivering guidance, recommendations, or technical standard aiming to preserve the space environment and shape space operation in a way minimizing space debris footprint. It is expected that nations seeking their presence in space with building up of its space capabilities following other nations example will also gradually introduce through national legislations specific norm and requirements through the licensing framework system to satellite owner/operator in all phases of satellite life.⁷

3. UN COMMITTEE ON PEACEFUL USES OF OUTER SPACE (UNCOPUOS)

One of the basic fora where the issues related to space debris and re-entries

⁴ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (The Outer Space Treaty) 1967 <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/outerspacetreaty.html> [accessed: 20.02.2021].

⁵ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (The Outer Space Treaty) 1967, The Rescue Agreement 1968, Liability Convention 1971, and Convention on Registration of objects launched into outer space 1975; <https://treaties.un.org/en> [accessed: 20.02.2021].

⁶ Convention on International Liability for Damage Caused by Space Objects, <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/intoliability-convention.html> [accessed: 30.03.2021].

⁷ Part 450: Streamlining of Launch and Reentry Licensing Requirements; This rulemaking arose from work by the National Space Council that led to Space Policy Directive-2 (SPD-2) in May 2018, directing the U.S. Department of Transportation to streamline the regulations governing commercial space launch and reentry licensing. Part 450 consolidates multiple regulatory parts to create a single licensing regime for all types of commercial space flight launch and reentry operations, and replaces prescriptive requirements with performance-based criteria, https://www.faa.gov/space/streamlined_licensing_process/ [accessed: 02.03.2021].

are being continuously discussed since 1994 is the Scientific & Technical Subcommittee of UNCOPUOS. This forum from 2016 works on successive versions of internationally agreed non-binding guidelines for the long-term sustainability of outer space activities with its latest version issued 2019.⁸ These guidelines recommend the policy and regulatory framework, the safety of space operations, rules of international cooperation, capacity-building, awareness, and scientific or technical Research and Development (R&D).

Even though the content of those guidelines is very much interdimensional nonetheless several are directly linked to the re-entry issue, i.e.: 1) take measures to address risks associated with the uncontrolled re-entry of space objects; 2) provide updated contact information and share information on space objects and orbital events; 3) improve the accuracy of orbital data on space objects and enhance the practice and utility of sharing orbital information on space objects.⁹

Based on the above guideline, re-entry, particularly hazardous objects should be closely monitored and examined in terms of associated risk and the information adequately shared between nations and international organizations to prevent or mitigate any hazards. Even though these guidelines are voluntary and not legally binding are written with the objectives to assist States and international inter-governmental organizations (individually and collectively) to prevent and mitigate risks associated with the conduct of space activities [Polkowska 2019]. In preparation and endorsement of those guidelines, the reaching of the international consensus plays a crucial role, particularly when the security aspects are involved.

4. INTER-AGENCY SPACE DEBRIS COORDINATION COMMITTEE (IADC)

As the issue of space debris has been pretty early recognized at the national level by Space Agencies and later on by the international aerospace community it has been found its attention through the creation of IADC in 1993 which was founded as a forum for technical exchange and coordination on space debris matter and can today be perceived as the one of leading international expertise body in the field of space debris. The body issued IADC Space Debris Mitigation Guidelines with its latest edition from 2020.¹⁰ IADC creates soft law necessary to fill the gap in the international standards referring to space debris. This forum is necessary to build international consensus on responsibility of states for their space activities.

The following recommendation with regards to post-mission disposal and re-

⁸ Nations United. Report of the Committee on the Peaceful Uses of Outer Space – Annex II Guidelines for the Long-term Sustainability of Outer Space Activities of the Committee on the Peaceful Uses of Outer Space (A/74/20). 2019, https://www.unoosa.org/oosa/oesadoc/data/documents/2019/a/a7420_0.html [accessed: 23.03.2021].

⁹ Long-term Sustainability of Outer Space Activities, <https://www.unoosa.org/oosa/en/ourwork/topics/long-term-sustainability-of-outer-space-activities.html> [accessed: 23.03.2021].

¹⁰ IADC Space Debris Mitigation Guidelines, <https://orbitaldebris.jsc.nasa.gov/library/iadc-space-debris-guidelines-revision-2.pdf> [accessed: 20.03.2021].

entry for space objects passing through the LEO region has been provided.

Spacecraft or orbital stages that are terminating their operational phases in orbits that pass through the LEO region, or have the potential to interfere with the LEO region, should be deorbited (direct re-entry is preferred) or where appropriate maneuvered into an orbit with an expected residual orbital lifetime of 25 years or shorter.¹¹

The probability of success of the disposal should be at least 90%. For large constellations, for example, a shorter residual orbital lifetime or a higher probability of success may be necessary. Retrieval is also a disposal option. If a spacecraft or orbital stage is to be disposed of by re-entry into the atmosphere, space debris that survives to reach the surface of the Earth should not cause any risk on the ground. This may be done by limiting the amount of surviving debris or confining the debris to broad ocean areas [Rosenkrans 2012].

Also, ground environmental pollution, caused by radioactive substances, toxic substances, or any other environmental pollutants resulting from on-board articles, should be prevented or minimized to be accepted as permissible. In the case of a controlled re-entry of a spacecraft or orbital stage, the operator of the system should inform the relevant air traffic and maritime traffic authorities of the re-entry time and trajectory and the associated ground area.¹²

5. THE U.S. FRAMEWORK

The United States has the most robust and detailed national space law and regulatory regime addressing the space activities of any nation. Many nations have modelled their laws on those of the United States [Smith 2020]. The U.S. possesses currently the most comprehensive and robust understanding of the orbital space environment through information gathered and processed by the United States military's Space Surveillance Network, which tracks over 23,000 space objects in Earth orbit. The US shares this information to allow spacecraft owner/operator to access the information, provide open access to basic services, and share the catalogue of an object in a semi-open manner. In terms of space debris policy aspects, the U.S. issued in 2018 Space Policy Directive 3 (SPD-3)¹³– National Space Traffic Management Policy and new US Space Policies¹⁴ constitute the fundament in terms of orbital environment and re-entry.

¹¹ IADC Space Debris Mitigation Guidelines, <https://orbitaldebris.jsc.nasa.gov/library/iadc-space-debris-guidelines-revision-2.pdf> [accessed: 09.06.2021].

¹² IADC Inter-Agency Space Debris Coordination Committee. Space Debris Mitigation Guidelines, IADC-02-01, Revision 2. 2020, <https://orbitaldebris.jsc.nasa.gov/library/iadc-space-debris-guidelines-revision-2.pdf> [accessed: 23.03.2021].

¹³ White House. Space Policy Directive-3, June 18, 2018, <https://www.whitehouse.gov/presidential-actions/space-policy-directive-3-national-space-traffic-management-policy/2018> [accessed: 02.02.2021].

¹⁴ National Space Policy of the United States of America. December 9, 2020, <https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/12/National-Space-Policy.pdf> [accessed: 23.04.2021].

Within the above documents need for utilization of space capabilities to stimulate economic growth and enhance the quality of life has been highlighted. In particular, the US new space policy mentions at the first place the principle that all nations shall act responsibly in space to ensure the safety, stability, security, and long-term sustainability of space activities and to execute this principle both nationally and through international cooperation. Moreover, in the marked part of the strategy, the U.S. commits to preserving the space environment for responsible, peaceful, and safe use, and with a focus on minimizing space debris the United States aims among others referring to re-entry the most are: 1) to remain active in international policy and guidelines fora and develop adequate standards; 2) to deliver free a charge basic SSA data and services including adequate re-entry notifications and develop necessary technologies and techniques; 3) to build up an open architecture data repository (OADR) based on data coming from various sources (public and private); 4) develop in coordination with allies and partner ADR technique.¹⁵

6. THE EUROPEAN FRAMEWORK

The EU, ESA, and their Member States from the mid-decade of 21st century started to get more engaged in space security and sustainability. The legal framework of the EU increases its space competencies by entering into force the Lisbon Treaty.¹⁶ In this context, the European institution and agencies have got wider competencies on space matters including space safety matters.

The issue of space debris and re-entries in Europe has been adequately tackled both in research/technologies ground and operationally by different mainly national Agencies CNES (French Space Agency), ASI (Italian Space Agency), DLR (German Space Agency), and ESA (European Space Agency) delivering different studies, tools and methods. Even though space activities led by the EU have been recognized from the early time the basic strategic document of the EU is the Space Strategy for Europe¹⁷ which has been issued only in 2016 when several programs and the main action has been already in place.

In particular, the Space Strategy paper in third of fourth strategic goals identifies: “Reinforcing Europe’s autonomy in accessing and using space in a secure and safe environment” where among others the particular attention is paid to “ensuring the protection and resilience of critical European space infrastructure.” In that sense, European Commission recognized space debris as the most serious risk to the sustainability of space activities, confirms the continuation of work on

¹⁵ As above: <https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/12/National-Space-Policy.pdf> [accessed: 23.04.2021], p. 14–15.

¹⁶ Lisbon Treaty <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12007L/TXT> [accessed: 23.04.2021].

¹⁷ DG-GROW EU. Space Strategy for Europe. 2016, file:///C:/Users/m.polkowska/Downloads/COM_2016_705_F1_COMMUNICATION_FROM_COMMISSION_TO_INST_EN_V12_PI_864471.PDF [accessed: 05.06.2020].

the implementation of the EUSST programme,¹⁸ stressed the need to improve the performance, and geographical coverage of sensors, and emphasize the need to extend the scope to other threat and vulnerabilities (besides SST). Moreover, the European Commission stressed the need to establish partnerships in particular with the U.S.¹⁹

As mentioned above, European Union (EU) and its Member States started the EUSST programme before the strategy- that is in 2014 throughout Decision No 541/2014 establishing a Framework for Space Surveillance and Tracking Support.²⁰ Based on that decision, so-called EUSST Consortium of EU Members States has been created by pooling together existing resources of Germany, France, Italy, Spain, Poland, Portugal, and Romania to collect data, process the information, and deliver three services Collision Avoidance (CA,²¹ Fragmentation Analysis (FG) and Re-entry Analysis (RE). In terms of re-entry service, it is aimed to deliver early warning of uncontrolled re-entry and estimation of time-frame and area of impact addressed mainly to governmental and national public authorities concerned with civil protection with an aim of reducing potential risk to the safety of UE citizens and mitigating potential damage to terrestrial infrastructure.²²

The source of EU need to establish and strengthen in terms of SST (Space Surveillance and Tracking) capabilities comes from the strategic aim to build autonomy in the domain, as the increasing number of European satellite both commercial and public domain (in particular Galileo Navigation System and Sentinel Earth Observation constellations) and the risk and hazard related to space traffic on the ground (re-entries) but also to allow Europe to contribute to global burden-sharing in the domain of SSA and to enhance its position in international discussions.

Moreover from 2018 European Union works on successive regulation “Space programme of the Union and the European Union Agency for the Space Pro-

¹⁸ The Space Surveillance and Tracking (SST) Support Framework was established by the European Union in 2014 with the Decision 541/2014/EU of the European Parliament and the Council (SST Decision). This Decision foresaw the creation of an SST Consortium of, initially, five EU Member States – France, Germany, Italy, Spain and United Kingdom – and then eight with the addition of Poland, Portugal and Romania in 2018. SST refers to the capacity to detect, catalogue and predict the movements of space objects orbiting the Earth.

¹⁹ EU. Space programme 2021-2027 and European Union Agency for the Space Programs – proposal. [Online] 2018–2021, [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2018/0236\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2018/0236(COD)&l=en) [accessed: 23.03.2021].

²⁰ EU Decision No 541/2014/EU of The European Parliament and of the Council of 16 April 2014 establishing a Framework for Space Surveillance and Tracking Support. 2014. OJ L 158, 27.5.2014, p. 227–34.

²¹ NASA Spacecraft Conjunction Assessment and Collision Avoidance Best Practices Handbook. December 2020, <https://www.nasa.gov/press-release/nasa-releases-best-practices-handbook-to-help-improve-space-safety> [accessed: 23.03.2021].

²² EUSST. 2nd EUSST Webinar: Operations in Space Surveillance and Tracking. [Online] 2020, https://www.eusst.eu/wp-content/uploads/2020/11/EUSST_2WBR_16_11_2020.pdf [accessed: 02.02.2021].

gramme” which among different space elements encompasses SST. In terms of services, Article 54(1)(c) defines re-entry and states that one of the services is the risk assessment of the uncontrolled re-entry of space objects and space debris into the Earth’s atmosphere and the generation of related information, including the estimation of the timeframe and likely location of the possible impact. It is needed that SST services are to be free of charge and available at any time without interruption.²³

7. INTERNATIONAL SAFETY STANDARDS

The policy documents and guidelines both international and national provide a framework for necessary action with no detailed implementation notations. That is why to adequately address issues related to re-entry there is a need to elaborate it properly through adequate technologies, regulations, behaviours and mostly norms answering primarily to the spacecraft engineering and operation. In these terms standards play an important role to improve and harmonize activities in the space sector, maintaining compatibility, interoperability, quality, safety, and repeatability. This standardization of activities is usually performed through major technical standardization bodies such as ISO, CCSDS, CEN/CENELEC, ECSS, and others.

In terms of SSA/STM, the ISO could be recognized as the most active standardization body issuing particular ISO norms (non-binding as all ISO standards) which take into consideration in-depth issues related to re-entry among others through the following norms are applicable: ISO 27852:2016 Space systems – Estimation of orbit lifetime, ISO 16164:2015 Space systems – Disposal of satellites operating in or crossing Low Earth Orbit, ISO 16699:2015 Space systems – Disposal of orbital launch stages, ISO 24113:2019 Space systems – Space debris mitigation requirements, ISO/TS 20991:2018 Space systems – Requirements for small spacecraft, ISO 27875:2019 Space systems – Re-entry risk management for unmanned spacecraft and launch vehicle orbital stages taking into account that certain of them are adopted also at European levels, such as ISO 24113 by ECSS.²⁴

The ISO standards, among others, refer to the EOL of the spacecraft and its disposal in LEO. According to it LEO satellites supposed to re-enter into should remain casualty expectancy below 1 to 10,000 (surviving fragments risk to injure or kill a person on the ground if the object re-enter 10,000 times). In this case, the object may gradually decay if that process will be shorter than 25 years. If the risk overpass the threshold, the object should be directed to an uninhibited area with minimal risk to people.

²³ ESA’s Annual Space Environment Report: https://www.sdo.esoc.esa.int/environment_report/Space_Environment_Report_latest.pdf [accessed: 02.02.2021].

²⁴ International Standards Organisation (ISO). Space systems – Estimation of orbit lifetimes, ISO TC 20/SC 14 27852:2016. 2016, <https://www.iso.org/standard/68572.html> [accessed: 24.03.2021].

At the moment to answer to above-mentioned norms, there are different software packages, usually available free of charge, enabling in particular spacecraft designer, owner, and operator modelling of various aspects of re-entry from orbital lifetime prediction to the assessment of the risk to people on the ground. Even though those packages attempt to answer to the multitude of different aspects of the re-entry in particular cases significant differences may occur. Among those different packages there it is worthy to mention: Orbital Spacecraft Active Removal (OSCAR) tool, Survival And Risk Analysis (SARA) and Spacecraft Atmospheric Re-Entry and Aerothermal Break-Up (SCARAB) of ESA AGI STK have also orbital lifetime calculation (analytical model) from the contraction of the orbit due to atmospheric drag such as AGI STK , Object Re-entry Survival Analysis Tool (ORSAT) and Debris Assessment Software (DAS) of NASA Orbital Debris Program Office, or Semi-analytic Tool for End-of-Life Analysis (STELA) and DEBRISK of CNES.²⁵

It is necessary to add that the variability of actual solar activity contributes to the uncertainty of any long-term orbital lifetime calculation regardless of the tool used. Moreover, in the case of elliptical orbit with apogees in LEO, there is a need to take into consideration solar-lunar perturbations. In terms of fragmentation of re-entering objects available software frequently render different results due to many uncertainties and fidelity of modelling.

8. RE-ENTRY AND RELATED RISKS

Each day different space objects perform re-entry e.g. debris, rocket stages, satellites re-enter Earth's atmosphere where usually burn up posing eventually a marginal risk to people, aviation, or infrastructure on the ground. Those objects enter the denser layers of the atmosphere with a speed of over 28 000 km/h at about 120 km of altitude. As usual, over the year there are only a few very large objects re-entering the atmosphere, such as heavy satellites. More frequently they are have rocket bodies or standard satellites re-entering the atmosphere typically once/twice a week or two catalogued objects twice a day.²⁶

The process of re-entry constitutes of the following phases: entry into denser regions of the atmosphere, atmospheric heating due to air resistance, increase of load to the melting point, and release of major parts (at altitude approximately 78 km) leading in the majority of cases to its destruction. If fragments survive the re-entry (typically in the case of large satellite, or compact design, or particular materials) they fall vertically from around 30 km altitude with possible horizontal added velocity coming from winds. Therefore, the cloud of fragments may have tens of kilometres wide and hundreds or even thousands of kilometres long. Each fragment falls at various speeds depending on its aerodynamic and mass chara-

²⁵ Space Debris User Portal, <https://sdup.esoc.esa.int/> [accessed: 23.03.2021].

²⁶ ESA. Reentry and collision avoidance, https://www.esa.int/Safety_Security/Space_Debris/Reentry_and_collision_avoidance [accessed: 06.06.2020].

cteristic. In most cases, it is estimated (if no further information was available on construction), that the mass of re-entry is approximately 10–40% of the satellite dry mass (reaching ground). The likelihood of hitting the surface depends on entry angle, shape, dynamics (e.g., tumbling), and material composition of the re-entering object.

Since around 70% of the Earth's surface is covered by water, the re-entry event is distributed, and relatively rare it happens that re-entering objects will land on the ground with relatively low probability and most lands on the water never be retrieved. Even though the likelihood of injury related to re-entry is low it is not negligible. Because of it the predictions of re-entry and associated risks rise in importance and demand. However, the predications have inborn uncertainty as tracking data usually scarce and re-entry phenomena complex (dependant among others on object shape, material, orientation, uncertain atmosphere modelling, and solar activity). To even better model and predict re-entry there is a need for adequate physical and geometric representation of all components of the object considering flight dynamic, aero, and thermal dynamic in principle heating and melting processes.

Uncertainty of these events goes down with time, but even 25 hours before the event the error may be at a level of few hours. As that object travels with a velocity of around 28,000km/h it implies that the last trajectory may result in an uncertainty of several thousand kilometres on Earth's surface what makes civil protection services difficult to react.

9. RISK ASSESSMENT

In the case of LEO orbit, the spacecraft designers should consider in particular the terminal phase of its life and associated risks to be prevented or minimized. Besides of design phase also in terms of re-entry, the operator of the system should inform the relevant Air Traffic and Maritime Traffic Authorities of the assumed time and trajectory and the affected ground area. As satellites re-entry, they disintegrated but some debris may survive the heat of re-entry and go down through the atmosphere bringing various kinds of risks which may be divided into “primaries” and “secondaries.”

The primary risk is related to direct harm to people on the ground through kinetic impact. As far as the secondary risk is concerned it is related to potential indirect human casualties through impacting infrastructures, such as a building, industrial plant (e.g. chemical), or a hit to the aircraft in flight directly influencing people safety on board. The other category of risk comes from the environment of the polluting substances on board the spacecraft (e.g. toxic, radioactive) or influencing the high atmosphere pollution coming from massive vaporization of material in the atmosphere related to routine maintenance of large constellation satellites (replacement of satellites).

CONCLUSION

As the re-entries risk may be typically reduced by either decrease of re-entry frequency or re-entry survivability, the main action must include the extension of satellite lifetime or broader utilization of “the design to demise” approach. Besides object-related approach, it is necessary to work out adequate “re-entry answer” through civil protection services to people on the ground or aircraft operators of those events (e.g. recommendation to stay in buildings).

Even though there is no international legally binding legal framework to regulate the issues of re-entries nonetheless current international efforts manifested by the set of guidelines and recommendations (such as LTS) are fortunately progressively transferred into national regulation and satellite licensing systems.

To maintain this process within the international community there is a necessity to continuously update and distribute knowledge related to re-entries related risks and hazards through adequate bodies such as UNCOUOS.

As the new space accelerates, those guidelines must be to be revisited and fine-tuned periodically to better reflect the challenges related to the orbital environment, its trends, and re-entries associated risks in particular. It is mainly concerned with the increase in the number and variety of satellite operators (the issues of best practice universality) and large constellation development (the issue of fine-tuning technical licensing requirements).

To support those actions, at the international and internal level, there is a need to develop very detailed standards based on adequate models and simulations in particular to better work out atmosphere and space weather models, ADR manoeuvres, re-entry physics, or “the design to demise” techniques. Moreover, the proliferation of large constellations bringing the obvious benefits to societies must be studied to better understand and estimate related risks with regards to re-entries. Those studies may significantly differ from the existing ones because of the scale and consequently different approaches to mitigation actions. On the one side, such aspects of re-entries of a large number of satellites and its effects on aircraft traffic safety must be better elaborated. Moreover, also less classical aspects as the “green” re-entries approach must be considered as widely as a large number of re-entries may influence Earth’s atmosphere pollution and climate (e.g. massive vaporization of aluminium and its effects on the warm of the atmosphere or degradation on ozone layer) as the re-entering mass may get increased from 8 to 32 times.²⁷

In this context besides regulatory and standard issues, there is also the problem of verifying and executing them – e.g. verification of disposal regulations and re-entries activities usually through monitoring of re-entries activities and proper, timely transfer of re-entry data and information among concerned parties. By that,

²⁷ See www.spacenews.com. Aerospace Corp. raises questions about pollutants produced during satellite and rocket reentry. [Online] 11 December 2020, <https://spacenews.com/aerospace-agureentry-pollution/> [accessed: 06.06.2021].

it is required to broaden observation and prediction capabilities with adequate data and information exchange to create more precise re-entry services and deliver necessary assistance in case of emergencies. That is why the delineation of military SSA from civil Space Traffic Coordination/ Space Traffic Management (STC/STM) is required.

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THE PRINCIPLE OF INDEPENDENCE AND AUTONOMY OF CHURCH AND STATE IN THE SOCIAL TEACHING OF THE ROMAN CATHOLIC CHURCH

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Abstract. According to the Pastoral Constitution on the Church in the Modern World *Gaudium et Spes*, the Church and the political community in their own fields are autonomous and independent from each other. Respect for the mutual independence and autonomy of the Church and State, is a guarantee of the normal relationships between the Church and the political community.

Keywords: political community, Church, autonomy, independence

INTRODUCTION

In the Pastoral Constitution on the Church in the Modern World *Gaudium et Spes*,¹ the Second Vatican Council Fathers solemnly resolved:² *Communitas politica et Ecclesia in proprio campo ab invicem sunt independentes et autonomae*, which can be rendered in English as, “The Church and the political community in their own fields are autonomous and independent from each other” (no. 76).

Recognition and respect for the mutual independence and autonomy of the Church and State, which, at the same time, work together for the benefit of all people, is a guarantee of the normal relationships between the Church and the political community. This normal relationship, however, is often regarded as a privilege, especially enjoyed by the Roman Catholic Church. Meanwhile, the principle of Church-State independence and autonomy, proclaimed at Vatican II and reiterated in the social teaching of the Church in the specific circumstances of time and place, was incorporated in the highest-order normative acts, i.e. Article 25(3) of the 1997 Constitution of the Republic of Poland,³ Article 1 of the Concordat between the Holy See and the Republic of Poland done in 1993 and ratified

¹ Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio Pastoralis de Ecclesia in mundo huius temporis *Gaudium et spes* (07.12.1965), AAS 58 (1966), p. 1025–115 [hereinafter: GS].

² “The College of Bishops exercises its power over the universal Church in solemn form in an Ecumenical Council.” See *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1–317 [hereinafter: CIC/83], Canon 337, para. 1.

³ “The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.” See the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended.

in 1998,⁴ and also Article 2 of the Act of 17 May 1989 on the Relations between the State and the Roman Catholic Church in the Republic of Poland.⁵ These instruments do not fall within the scope of this article, therefore they will not be discussed further below.

The article seeks to answer the following questions: What do the terms “independence,” “autonomy,” “Church,” and “State” imply? What is the origin of the principle of independence and autonomy of religious and political communities? How does the independence and autonomy of the Church and the political community influence the objectives of the two? What obligations arise from respecting the principle of independence and autonomy, both for the Church and State?

1. TERMINOLOGY

Before elaborating on the principle of independence and autonomy of the Church and State (both gathering the same people anyway, although for different reasons) and addressing the questions posed above, some clarification is needed of the terminological and substantive matters.

1.1. Independence

The Latin term for “independent” is *independens*. It is derived from a negative particle *in* usually used as a prefix [Plezia 2007b, 74] and the verb *dependeo*, *-ere*, *-i* understood as to be dependent on something [Idem 2007a, 92]. According to the dictionary of the Polish language, the adjective “independent” means not subordinate to someone or something, able to decide on their own, proving the lack of subordination to someone or something, not being designated, determined by something, expressing impartial opinions, not belonging to any of the opposing parties.⁶

Independence, therefore, is a factor that conditions the relationship of one subject to another, excluding both interference of one in the internal affairs of the other [Krukowski 2013, 138] as well as any mutual subordination of the two. In the literature on the subject also proposes a view that “independence” is one of the concepts of “autonomy” [Scharffs 2004, 1246–251]. Independence so understood implies, in the individual aspect, that in fundamental matters each person should manage his or her life in an unrestrained manner. In the institutional aspect, the mutual independence of the Church and State means that each of them operates in its own field of activity [ibid., 1248].

⁴ “The Republic of Poland and the Holy See shall confirm that the State and the Roman Catholic Church are, each in its domain, independent and autonomous, and shall undertake to fully respect this principle in mutual relations and cooperation for the growth of the human being and the common good.” See the Concordat between the Holy See and the Republic of Poland done at Warsaw on 28 July 1993, Journal of Laws of 1998, No. 51, item 318.

⁵ “In its own domain, the Church is governed by its own law; is free to exercise its spiritual and jurisdictional powers and manages its own affairs.”

⁶ See <https://sjp.pwn.pl/slowniki/niezale%C5%BCno%C5%9B%C4%87.html> [accessed: 13.07.2020].

1.2. Autonomy

The term “autonomy” comes from the combination of the Greek words *autos* (alone) and *nomos* (right). Therefore, autonomy is the right of a community to decide their own internal affairs and independence in making decisions about themselves.⁷ Autonomy is also the capacity of self-determination or abiding by one’s own laws [Kamiński 1995, 1159].

Autonomy, like independence, must be approached from an individual and institutional angle. Autonomy of the person comes from their unique place in the hierarchy of beings. They enjoy the inherent and inalienable dignity. Therefore, as an autonomous entity, nobody can be used as a means to achieve particular goals of other people or social groups [Krukowski 2013, 138; Kaminski 1995, 1160]. Human autonomy, however, is naturally limited by dependence on the Creator, in the first place. “A vision of man and things that is sundered from any reference to the transcendent has led to the rejection of the concept of creation and to the attribution of a completely independent existence to man and nature. The bonds that unite the world to God have thus been broken.”⁸ Second, the limitation is also attributable to a certain degree of dependence on social groups, e.g. such as the Church and State. Those who belong to a political community, although organically united among themselves as a people, maintain autonomy at the level of personal existence and of the goals to be pursued.”⁹

At the institutional level, to guarantee, recognize, and respect the autonomy of individuals is indispensable if they are to freely achieve their goals while not rejecting mutual cooperation.

1.3. Church

Founded by Jesus Christ, the Church is a divine and human religious community of the baptized administered by hierarchical bodies.¹⁰ The salvation of souls is the Church’s main goal and supreme law (Canon 1752 CIC/83).¹¹ The Church, as an autonomous body, is designated to carry out the saving mission in the world. The mission of the Church is universal because it does not exclude any person. According to the teaching of the Second Vatican Council, “[...] the mi-

⁷ See <https://sjp.pwn.pl/sjp/autonomia;2551312.html> [accessed: 13.07.2020].

⁸ Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, Wydawnictwo Jedność, Kielce 2005, no. 464. See also GS 30.

⁹ Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, no. 385. See also GS 74.

¹⁰ “Christ, the one Mediator, established and continually sustains here on earth His holy Church, the community of faith, hope and charity, as an entity with visible delineation [...] But, the society structured with hierarchical organs and the Mystical Body of Christ, are not to be considered as two realities, nor are the visible assembly and the spiritual community, nor the earthly Church and the Church enriched with heavenly things; rather they form one complex reality which coalesces from a divine and a human element.” See Sacrosanctum Concilium Oecumenicum Vaticanum II, *Constitutio dogmatica de Ecclesia Lumen gentium* (21.11.1964), AAS 57 (1965), p. 5–75, no. 8.

¹¹ “[...] the Church has a saving and an eschatological purpose which can be fully attained only in the future world” (GS 40).

ssion of the Church is not only to bring the message and grace of Christ to men but also to penetrate and perfect the temporal order with the spirit of the Gospel.”¹² Cardinal Stefan Wyszyński reiterated that in 1968, “Today, people are struggling for respect, liberty, freedom of outlook, freedom to express their opinions and judgments, freedom to make their lives rational and free, in accordance with the mission of the human person. Where does all this come from? Does it not come from the Gospel? And from the fact that the Church keeps reminding you about the high dignity of God’s children?”¹³

1.4. State

Cardinal August Hlond said, “The Church definitely accepts the State as a temporal need, as a necessary consequence of the fact that man created by God has a very specific nature. The State is therefore not of voluntary character, but it is a prerequisite for natural human development, which, without this institution, could not achieve worldly goals [...]”¹⁴ The Catholic social teaching points to the tripartite nature of the State: social, legal, and moral. The State is a community, i.e. an organized social group distinct from other social groups in terms of territory and population. It is endowed with the law and power and has a common goal of ensuing common good [Strzeszewski 1985, 493–94].¹⁵ The State is a natural community made by people to satisfy their temporal needs. “Men, families and the various groups which make up the civil community are aware that they cannot achieve a truly human life by their own unaided efforts. They see the need for a wider community, within which each one makes his specific contribution every day toward an ever-broader realization of the common good. For this purpose they set up a political community according to various forms” (GS 74). The State is the most developed, higher political community incorporating smaller groups. In the social teaching of the Church, the concept of “political community” is primarily equalized with “state.” The literature on the subject also suggests that the concept of “state” emphasizes the aspect of power, while in the concept of “political community” underlines intentional bonds linking its members with a view to achieving the same values [Krukowski 2013, 154].

¹² Sacrosanctum Concilium Oecumenicum Vaticanum II, *Decretum de apostolatu laicorum Apostolicam actuositatem* (18.11.1965), AAS 58 (1966), p. 837–64, no. 5.

¹³ Quoted after: Sitarz 2018, 145–46.

¹⁴ Quoted after: Strzeszewski 1985, 493.

¹⁵ The common good includes “all the conditions of social life in which people can more fully and more quickly attain their own perfection.”

2. THE ORIGIN OF THE PRINCIPLE OF CHURCH-STATE INDEPENDENCE AND AUTONOMY

Although solemnly proclaimed at Vatican II, the principle of Church-State independence and autonomy is not new. It stems from the Bible¹⁶ where the foundations of religious and political dualism were laid, as in the passage, “Give Caesar what is Caesar’s and give God what is God’s” (Matthew 22:17).¹⁷ In accordance with the position of the Congregation for the Doctrine of the Faith of 2009, the Second Vatican Council “neither changed nor intended to change this doctrine, rather it developed, deepened and more fully explained it.”¹⁸ This is also confirmed by the words of Pope Paul VI, “What Christ willed, we also will. What was, still is. What the Church has taught down through the centuries, we also teach. In simple terms that which was assumed, is now explicit; that which was uncertain, is now clarified; that which was meditated upon, discussed, and sometimes argued over, is now put together in one clear formulation.”¹⁹

3. DUTIES AND OBJECTIVES OF THE CHURCH AND STATE ENSUING FROM THEIR INDEPENDENCE AND AUTONOMY

Whereas the same people, although for different reasons, belong to both the Church and State, and given the fact that both the Church and State operate through visible organizational structures, yet they serve people, they have a different nature because of their distinct goals. The Church responds to the spiritual needs of Christ’s faithful, while the State, through its institutions, serves everything that falls under the temporal common good. Hence, their autonomy and independence are particularly evident with regards to their ends.²⁰ The Church, by reason of her role and competence, cannot be identified in any way with the political community and remains a sign and a safeguard of the transcendent character of the human person (GS 76).²¹ The mission of the Church is bound to no particular form of human culture, nor to any political, economic, or social system but by religion (GS 42). The Church demands freedom in the face of any political authority. This freedom is the fundamental principle in what concerns the relations be-

¹⁶ *Pismo Święte Starego i Nowego Testamentu w przekładzie z języków oryginalnych*, 5th edition of the Millennium Bible updated and revised, Pallottinum, Poznań 2003.

¹⁷ For more on the dualism of religion and politics, see Krukowski 2013, 16–19.

¹⁸ Kongregacja Nauki Wiary, *Odpowiedzi dotyczące niektórych aspektów nauki o Kościele* (29.06.2007), in: *Ustrój hierarchiczny Kościoła. Wybór źródeł 2*, ed. M. Sitarz, A. Romanko, U. Wasilewicz, et al., Towarzystwo Naukowe KUL, Lublin 2013, p. 445.

¹⁹ *Ibid.*

²⁰ Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, no. 424.

²¹ See also *Catechismus Catholicae Ecclesiae*, Libreria Editrice Vaticana, Città del Vaticano 1997 [hereinafter: CCE], no. 2245.

tween the Church and the whole civil order.²² Pope John Paul II, in his speech before the President of Zaire in 1980, pointed out that the Church demanded freedom to address consciences and provide the faithful with the possibility of professing, strengthening, and proclaiming their faith publicly.²³

The Church “[...] respects the legitimate autonomy of the democratic order and is not entitled to express preferences for this or that institutional or constitutional solution.”²⁴ However, as highlighted in the Pastoral Constitution on the Church in the Modern World, “at all times and in all places, the Church should have true freedom to preach the faith, to teach her social doctrine, to exercise her role freely among men, and also to pass moral judgment in those matters which regard public order when the fundamental rights of a person or the salvation of souls require it. In this, she should make use of all the means – but only those – which accord with the Gospel, and which correspond to the general good according to the diversity of times and circumstances” (GS 76). It is not the Church’s competence to recommend specific solutions in temporal matters, which God left to the free and responsible judgment of every human, but “It is, however, the Church’s right and duty to provide a moral judgment on temporal matters when this is required by faith or the moral law.”²⁵

Every person, both a Christian and layman, is “called to reject, as injurious to democratic life, a conception of pluralism that reflects moral relativism. Democracy must be based on the true and solid foundation of non-negotiable ethical principles, which are the underpinning of life in society.”²⁶ With regard to the autonomy of the State, during his speech in the Polish parliament in 1999, Pope John Paul II said, “While respecting the autonomy inherent in the life of a political community, you must also remember that it cannot be understood as independence from ethical principles.”²⁷ In other words, the autonomy or independence of the State cannot reject ethical or moral norms. The proper autonomy of temporal affairs cannot be approached while ignoring God. “For without the Creator the creature would disappear” (GS 36; see also CCE 2244).

²² Sacrosanctum Concilium Oecumenicum Vaticanum II, Declaratio de libertate religiosa *Dignitatis humanae* (07.12.1965), AAS 58 (1966), p. 929–46, no. 13.

²³ After: Strzeszewski 1985, 348.

²⁴ Ioannes Paulus PP. II, Litterae encyclicae Venerabilibus in episcopatu Fratribus Clericisque et Religiosis Familiis, Ecclesiae Catholicae Fidelibus universis necnon bonae voluntatis hominibus saeculo ipso Encyclicis ab editis litteris «Rerum novarum» transacto *Centesimus annus* (01.05.1991), AAS 83 (1991), p. 793–867, no. 47.

²⁵ Kongregacja Nauki Wiary, *Nota doktrynalna o niektórych aspektach działalności i postępowania katolików w życiu politycznym* (24.11.2002), in: *Kościelne prawo publiczne. Wybór źródeł*, ed. M. Sitarz, M. Grochowina, M. Lewicka, et al., Wydawnictwo KUL, Lublin 2012, p. 514–25, no. 2.

²⁶ Ibid.

²⁷ Jan Paweł II, *Przemówienie w Sejmie RP* (11.06.1999), in: *Kościelne prawo publiczne. Wybór źródeł*, p. 441.

CONCLUSIONS

The following conclusions can be drawn from the analysis of selected documents from the domain of the social teaching of the Church:

1. "The Church and the political community in their own fields are autonomous and independent from each other" as a principle is not new, although solemnly proclaimed by the Second Vatican Council. It stems from the religious and political dualism installed by Jesus Christ.

2. The members of the Church and State are the same people, although for different reasons. The Church and State serve people, and, therefore, they should enjoy freedom in performing their mission. Respect for mutual independence and autonomy is a guarantee of their cooperation in this service.

3. The independence and autonomy of the Church, which manifests itself in a special way through the activity of its members (both the clergy and laity), does not mean that she should remain indifferent to matters where the fundamental rights of the human person require otherwise (also when these matters concern the political order, e.g. legalization of abortion or denial of parents' right to raise their children in accordance with their own beliefs or transferring this right to state institutions).

4. The independence and autonomy of the State, although involving temporal matters and its goal being the common good of all citizens, should not be understood in isolation from God. Likewise, the autonomy of the State cannot be explained by moral relativism, and the human person, who is both a member of Christ's faithful and a citizen, should be guided by "one Christian conscience," whether operating in the political or ecclesiastical order.

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THE RIGHT OF CHRIST'S FAITHFUL TO THE HOLY SACRAMENTS DURING PANDEMIC CONDITIONS

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Abstract. Human rights, which are vested with both the citizens of the state and the faithful of the Church, are rooted in the inherent and inalienable dignity of the person. In all circumstances, especially in a pandemic, the institutions of Church and State, which are there to serve people, should guarantee, through their representative bodies, that these rights be exercised. The article discusses the legal basis of Christ's faithful's rights to the spiritual riches of the Church and the scope of exercising these rights, as well as addressing the scope of enjoyment of the right to the spiritual riches of the Church in Poland during the COVID-19 pandemic in 2020.

Keywords: pandemic, Church, state, human rights

INTRODUCTION

As citizens and the faithful, people enjoy certain rights. These rights mainly stem from the inherent and inalienable dignity of the person.¹ The person acquires them also through the sacrament of baptism, marriage, ordination as well as by the acquisition of citizenship or membership in an organisation. These rights are granted under God's law and man-made law implemented by competent ecclesiastical and state authorities. In all circumstances, especially in extraordinary conditions, such as the current COVID-19 pandemic, the institutions of Church and State, which are there to serve people, should guarantee citizens and the faithful, through specific nominated and competent bodies, the exercise of their rights. This article will address the right to the spiritual goods of the Church during pandemic circumstances.

¹ Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended, Article 30: "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."

1. LEGAL GROUNDS FOR THE RIGHT OF CHRIST'S FAITHFUL TO THE SPIRITUAL GOODS OF THE CHURCH

In promulgating the 1983 Code of Canon Law,² in Canon 213, Title I: Obligations and Rights of All Christ's Faithful, John Paul II declared, "Christ's faithful have the right to be assisted by their Pastors from the spiritual riches of the Church, especially by the word of God and the sacraments."³ The executive body of the Holy See, the Congregation for Divine Worship and the Discipline of the Sacrament, with the intent to explain the above statement, define its rationale, and encourage the exercise of this right, resolved as follows in the Instruction⁴ *Redemptionis Sacramentum* of 25 March 2004:⁵ "[...] it is the right of all of Christ's faithful that the Liturgy, and in particular the celebration of Holy Mass, should truly be as the Church wishes, according to her stipulations as prescribed in the liturgical books and in the other laws and norms. [...] the Catholic people have the right that the Sacrifice of the Holy Mass should be celebrated for them in an integral manner, according to the entire doctrine of the Church's Magisterium. [...] the Catholic community's right that the celebration of the Most Holy Eucharist should be carried out for it in such a manner that it truly stands out as a sacrament of unity [...]" (no. 12).

Christ's faithful can assert the the right by virtue of God's law. Because, according to Canon 840 CIC/83, "The sacraments of the New Testament were instituted by Christ the Lord and entrusted to the Church. As actions of Christ and of the Church, they are signs and means by which faith is expressed and strengthened, worship is offered to God and our sanctification is brought about. Thus they contribute in the most effective manner to establishing, strengthening and manifesting ecclesiastical communion [...]" The sacraments and other "liturgical matters by their very nature call for a community celebration, they are, as far as possible, to be celebrated in the presence of Christ's faithful and with their active participation" (Canon 837, para. 2). The overall activity of the Church should be focused on carrying out the work of evangelization and acting as the herald of salvation and God's grace. For "the sanctifying grace is the greatest treasure of mankind in this world; it cannot be compared with anything because the value of one grace surpasses all temporal values; it is life in itself which seeds God's life in us

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

³ "Ius est christifidelibus ut ex spiritualibus Ecclesiae bonis, praesertim ex verbo Dei et sacramentis, adiumenta a sacris Pastoribus accipiant."

⁴ Canon 34, para. 1: "Instructions, namely, which set out the provisions of a law and develop the manner in which it is to be put into effect, are given for the benefit of those whose duty it is to execute the law, and they bind them in executing the law. Those who have executive power may, within the limits of their competence, lawfully publish such instructions." For more, see: Sitarz 2008, 27–40.

⁵ Congregatio de Cultu Divino et Disciplina Sacramentorum, *Instructio de quibusdam observandis et vitandis circa sanctissimam Eucharistiam Redemptionis Sacramentum* (25.03.2004), AAS 96 (2004), p. 549–601.

and around us." Grace is embodied in a special way in individual sacraments, actual graces, and the graces of state and affects the entire temporal life; above all, it is a constant force that makes the Church and renders society physically and spiritually healthy. Even a temporary limitation or deprivation of access to the sacraments, to sanctifying grace, and to the spiritual goods of the Church is with the great detriment to the person, both in the spiritual and physical sense.

Therefore, the right to enjoy spiritual assistance sought from the pastors of the Church requires such administration of the preaching of the word of God, the sacraments, and all means employed to sanctify Christ's faithful that all these faithful can benefit from them by satisfying their needs in accordance with their specific vocation. Since the faithful have this right under God's law, the pastors have a duty to enable them to enjoy it. The highest ecclesiastical legislator says, "Sacred ministers may not deny the sacraments [under three conditions – M.S.] to those who opportunely ask for them, are properly disposed and are not prohibited by law from receiving them" (Canon 843, para. 1). The question is: Who among the clergy is obliged to assist the faithful?

2. OBLIGED ENTITIES

Canon 213 reads that the obligation to provide assistance from the spiritual riches of the Church in the strict sense rests with bishops and other members of the clergy with episcopal authority. In a broader sense, all the clergy are obliged according to their assumed office. This justly obligation (*ex iustitia*) rests with those members of the clergy who exercise an appropriate pastoral office (*ex officio*), e.g. bishop, parish priest, chaplain, or rector, and are obliged to perform certain ministries (Canons 387, 528, 530, 767, 771, 777, 986). On the other hand, other priests, whom the bishop has not entrusted any pastoral office, e.g. working at universities, in the judiciary or in ecclesiastical administration, are obliged to provide spiritual assistance to the faithful by virtue of Christian love (*ex caritate*).⁶

It is the obligation and inherent right of the Church, independent of any human authority, to preach the Gospel to all peoples. For this purpose, it can even use its own means of social communication because Christ entrusted to the Church the deposit of faith, so that by the assistance of the Holy Spirit, she might conscientiously guard revealed truth, penetrate it, proclaim it, and expound it (Canon 747, para. 1).

Hence, the question is whether this God's law (*ius not lex*) to demand the spiritual goods of the Church "independent of any human authority" can be limited by any human authority, whether ecclesiastical or state, and on what terms and to what extent, e.g. during a pandemic.

⁶ For more, see Krukowski 2005, 30–31; Cenalmor 1996, 91–98.

3. THE SCOPE OF EXERCISING THE RIGHT TO THE SPIRITUAL GOODS OF THE CHURCH

With regard to the scope of exercise by Christ's faithful of their inherent rights, in Canon 223 the highest legislator says, "§ 1. In exercising their rights, Christ's faithful, both individually and in associations, must take account of the common good of the Church, as well as the rights of others and their own duties to others. § 2. Ecclesiastical authority is entitled to regulate, in view of the common good, the exercise of rights which are proper to Christ's faithful."

There is a commonly shared opinion in the literature on the subject that the rights of the faithful may be limited by the ecclesiastical authority only on very serious grounds, such as: 1) common good and 2) the obligations of the faithful towards the rights of others. However, it should always be kept in mind that any limitation of subjective rights in the Church, enjoyed both under God's and human law, may be imposed exceptionally, based on profoundly serious and pertinent reasons and only by statute in order to be lawful.⁷

What follows, a question arises of whether the state of pandemic is a serious and pertinent reason for the ecclesiastical or state authority to curtail Christ's faithful's right to the spiritual riches of the Church, the Word of God and the sacraments. Each (authority body) which intends to limit this right should, first of all, take into account the following directions of CIC/83:

1) "The Church has the right always and everywhere to proclaim moral principles [...] in so far as this is required by fundamental human rights or the salvation of souls" (Canon 747, para. 2);

2) "The people of God are first united through the word of the living God, and are fully entitled to seek this word from their priests [...]" (Canon 762);

3) "Since liturgical matters by their very nature call for a community celebration, they are, as far as possible, to be celebrated in the presence of Christ's faithful and with their active participation" (Canon 837, para. 2);

4) "The ordering and guidance of the sacred liturgy depends solely upon the authority of the Church, namely, that of the Apostolic See and, as provided by law, that of the diocesan Bishop" (Canon 838, para. 1).

4. THE EXERCISE OF THE RIGHT TO THE SPIRITUAL GOODS OF THE CHURCH IN POLAND DURING THE 2020 COVID-19 PANDEMIC

The exercise of the right to the spiritual goods of the Church has been limited severely by both the ecclesiastical and state authorities.

On 20 March 2020, the Minister of Health issued a regulation declaring the state of epidemic in the territory of the Republic of Poland.⁸ On 31 March 2020, the Council of Ministers imposed certain restrictions and bans as well as issuing

⁷ For more, see Krukowski 2005, 41–42; Arrieta 1991, 29–30.

⁸ Journal of Laws, item 491.

instructions in connection with the epidemic.⁹ These decisions restricted the constitutional right to freedom of religion, which includes “the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching. Freedom of religion shall also include possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services” (Article 53(2) of the Constitution of the Republic of Poland). The 20 March 2020 regulation, in its para. 7, enforced a restriction that no more than 50 people in total, including all participants and ministers, can be present during a religious worship service in a specific area or site, both inside and outside the premises. In para. 1 of the regulation of the Minister of Health of 24 March 2020 amending the previous and aforesaid regulation,¹⁰ the number of participants in worship services was reduced to five, exclusive of the ministers or individuals employed by a funeral facility in the event of a funeral, until 11 April 2020. Another regulation of the Council of Ministers of 19 April 2020 establishing certain restrictions, orders, and prohibitions in connection with the state of epidemic¹¹ somewhat eased the ministerial limitations. Until 20 April 2020, during religious worship services, including religious activities or rites, one service participant per 15 m² was allowed in a public structure intended for religious practices, exclusive of the ministers. On the other hand, no more than 50 people, exclusive of the ministers, the cemetery personnel or funeral establishment employees, were allowed to attend a single burial ceremony in a cemetery (para. 9(1)). In the Regulation of the Council of Ministers of 16 May 2020 establishing certain restrictions, orders, and prohibitions in connection with the state of epidemic,¹² religious worship services in public places, including in buildings and other sites intended for religious worship, was suspended until further notice (para. 7(1)). In addition, as from 17 May 2020, during religious worship services, including religious activities or rites, one service participant per 10m² was allowed in a public structure intended for religious practices, with the exception of the ministers. The limitation did not cover buildings of an area less than 50m² in which five participants were allowed at the same time, exclusive of the ministers (para. 8(1)). Another regulation of the Council of Ministers of 29 May 2020¹³ removed that limitation. Pursuant to para. 25(8) of the Regulation of the Council of Ministers of 7 August 2020 establishing certain restrictions, orders, and prohibitions in connection with the state of epidemic,¹⁴ gatherings organized by religious associations were allowed in the so-called red zones up to the

⁹ Journal of Laws, item 566.

¹⁰ Journal of Laws, item 522.

¹¹ Journal of Laws, item 697.

¹² Journal of Laws, item 878.

¹³ Journal of Laws, item 964.

¹⁴ Journal of Laws, item 1356.

limit of 50% of the regular occupancy of the religious site, “that is with the exception of ministers or cemetery personnel or employees of a funeral establishment facility home in the event of a burial ceremony, and that all such participants meet the obligation of covering their mouth and nose” (excluding the ministers). Para. 28(8) of the Regulation of the Council of Ministers of 9 October 2020 establishing certain restrictions, orders, and prohibitions in connection with the state of epidemic¹⁵ provided that religious gatherings were allowed subject to the condition that a distance was maintained of not less than 1.5 m between the individual participants and that no more than 1 person could occupy 15 m² of the area of the site (until 29 November 2020, 1 person per 7 m² from 30 November 2020). The Regulation of 16 October 2020 amending the regulation establishing certain restrictions, orders, and prohibitions in connection with the state of epidemic¹⁶ resolved that religious gatherings could be held at religious sites (with a distance of not less than 1.5 m between individual worshippers) for “no more than 1 person per 4 m² of the site area in the yellow zone or 1 person per 7 m² of the site area in the red zone [...]” Another regulation of the Council of Ministers of 26 November 2020¹⁷ reduced the limit to 1 person per 15 m².

The above regulatory obstacles to access to the spiritual goods of the Church raised serious doubts. The main question was the lawfulness of the instituted measures, their proportionality, the real need, and the implementation procedure.

The relevance, necessity, and adequacy of the measures were assessed by a team of experts whose competence cannot be challenged. It is hoped that they approached the problem with utmost care and prudence. Yet, admittedly, the restrictions imposed on the Church and other commonly accessed facilities, such as shops or means of public transport, were evidently incommensurable and uneven, which calls the authorities’ policy into question. Bishop Edward Kawa aptly inquired, “Is the virus so pious that it goes to church but avoids supermarkets?” Also, in a letter to the Prime Minister of the Republic of Poland, the Chair of the Polish Episcopal Conference requested a more coherent and fair system of limiting the number of people in public space, including in temples. The Secretary General of COMECE pointed out that the reopening of temples must be carried out by the state authorities in dialogue with Church representatives and based on transparent and non-arbitrary rules. Also secular groups, both domestic and foreign, demanded that the right to the spiritual goods of the Church, as well as the freedoms guaranteed in national and international legal acts, be restored. The best example of this is the Federal Court’s ruling that the New York City authorities must allow churches to be opened and services to be held inside and outside temples on the same basis that mass street protests and access to shopping malls were allowed. The ruling was a consequence of a petition filed by the lawyers from the

¹⁵ Journal of Laws, item 1758.

¹⁶ Journal of Laws, item 1829.

¹⁷ Journal of Laws, item 2091.

Thomas Moore Association on behalf of several different religious groups. No Roman Catholic diocese or parish was a party to this lawsuit.

Under canon law, both the Holy See, the Chair of the Polish Episcopal Conference and the Presidium of the Conference, as well as individual diocesan bishops, issued many appeals, guidelines, as well as decrees and dispensations in which they fully adhered to the safety rules introduced by the Polish government during the pandemic.

CONCLUSION

In conclusion, during the COVID-19 pandemic in Poland, the right to the spiritual goods of the Church granted under God's law, especially to the Word of God and the sacraments, was restricted dramatically both by the ecclesiastical and state authorities. The Constitution of the Republic of Poland¹⁸ and the Concordat¹⁹ were violated, primarily the principles of the autonomy of the Church, freedom of worship, and equality before the law. Questionable is also the lawfulness of the prohibition of celebration of the sacraments and sacramentals by some bishops, as well as the granting of dispensation concerning God's law for an indefinite period of time, which, according to Canon 85 CIC/83, is the relaxation of a merely ecclesiastical law in a particular case.

Given the above facts and binding law altogether, on the 100th anniversary of Karol Wojtyła's birth, his words uttered at the beginning of his pontificate as John Paul II, "Open the door to Christ [...]," are still valid. The People of God have a legitimate right to keep calling out, "We want God [...];" we have the right under God's law to demand the spiritual goods held in the Church's deposit, especially the Word of God and the sacraments. Christ's words, "Give to Caesar what belongs to Caesar, and give to God what belongs to God" (Matthew 22:21) have not been invalidated. And Christ keeps asking international, state, and territorial authorities patiently, especially the contemporary successors to the apostles, "Let the children come to me" (Mark 10:14).

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BETWEEN INTERPRETATION AND THE NEED FOR NEW REGULATION OF HUMAN RIGHTS IN THE VIRTUAL WORLD

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Abstract. The subject of the study is to initiate a scientific discussion on the adequacy of human rights, their content and systematics. The reason for the concept of this topic is the fact that most of human activity is carried out in a virtual world built through the use of ICT devices. The aim of the study is to show the extent of increasing human activity in cyberspace. The second goal is to show the similarities and differences between the real and the virtual world. As a research hypothesis which was accepted is the claim, according to which the current wording of human rights does not fully correspond with human situation in the virtual world. This claim is even more justified in the perspective of dynamically developing artificial intelligence, which supports people in decision-making processes, but also displaces them from these processes. The study includes the following methods: the statistical method – thanks to which it was possible to analyze statistical data and the descriptive method – thanks to which the phenomena occurring in the virtual world were described. The result of the work is to demonstrate the need to start scientific research and discussion on human rights in virtual reality.

Keywords: human rights, virtual society, variable axiology, micro-communities, reinterpretation of human rights, the Internet

INTRODUCTION

Over the past at least three decades, human activity has largely moved from the real world to the virtual world (VR) created on the basis of ICT devices. The level of development of new technologies and electronic devices means that the boundary between these two worlds is slowly blurring. The human being's immersion into this new reality is getting deeper and deeper. Human activity is supported and even replaced by intensively built and slowly ubiquitous artificial intelligence (AI). The most popular model of this intelligence is the so-called intuitive operation of devices or programs that replace human thinking. It is intuitively constructed algorithms that subconsciously suggest to a person what will be best for him or her [Siwak 2016, 355–88].

The level of human activity participation on the Internet can be proved mainly by the statistical data for 2019 obtained from Eurostat. It should be noted that this is pre-Covid-19 data.

The most important figure is that 98% of the EU population has access to the Internet. For comparison, in 2013, the average access to the Internet in the EU Member States was 79%. As much as 86% of the EU citizens use the Internet,

84% of which use the Internet regularly at least once a week. Similarly, in Poland it is 80% and 78%. In turn, 73% of the EU citizens use the Internet to send and receive e-mails, in Poland it is 65%. 54% of the EU citizens use social messaging, and 53% in Poland. Almost 66% of the EU citizens look for information on services and objects on the Internet, 62% in Poland. Over 24% of the EU citizens look for software other than games on the Internet, 15% in Poland. About 50% of the EU citizens systematically look for information on health and methods of treatment on the Internet, 47% in Poland. Banking services are used by 55% of the EU citizens, and in Poland by 47%.¹

In compare to the above-mentioned data, the issue of selling goods and services looks rather weak, as only 18% of the EU citizens use such opportunities. In Poland, it is only 14%. Data on looking for a job via the Internet are at a similar level. In the EU, this possibility is used by 16% of the inhabitants and in Poland it is 12%. A relatively small percentage of the EU citizens use the opportunity to participate in online courses or organize such courses. These data are at the level of 8–10%, while in Poland it is at the level of 5%. However, it should be taken into account that these are data from 2019, i.e., from the period before the Covid-19 pandemic. This pandemic forced the transfer of education, including university education to the Internet. The data for 2020 and 2021 will most likely show that such education options are used by over 50% of the EU citizens.²

E-commerce is an extremely important area of human activity on the Internet. Almost 56% of EU citizens shop online. In 2019, over 15.7 million Poles aged 16 to 74 (it is 53.9% of the population) made purchases via the Internet.³

Communication with public offices is also an important area of people's activity on the Internet. In this respect, on average 53% of the EU citizens communicate with public offices via the Internet, while in Poland it is 40%. Denmark deserves special attention, where as many as 90% of the citizens communicate with public offices via the Internet. Estonia is in second place – 80%. The issue of citizens' participation in public consultations or Internet voting looks worse. In the EU it is only 10%, while in Poland it is 6%.

Summing up the list of data collected by Eurostat proving the presence of European Union citizens, including Polish citizens, on the Internet, averaging them, it can be said that over 50% of human activity in our part of Europe already takes place on the Internet. It is not the task of this study to compare these data with other parts of Europe, such as Russia and the world, such as Asia. However, it can be said with certainty that, with some variation, also in other parts of the world the situation is similar.

¹ The data comes from EUROSTAT, <https://ec.europa.eu/eurostat/data/database> [accessed: 13.02.2021].

² Ibid.

³ Ibid.

1. THE IMPACT OF VIRTUAL REALITY ON THE REAL WORLD

ICT devices connected to each other through an advanced interface create a realistic environment in human consciousness, a space defined as cyberspace. The computer universe consists of an unlimited amount of data which is multiplied exponentially and the possibilities of actions and interactions of entities (participants), objects or phenomena. Users present in cyberspace can travel almost unlimitedly on virtual highways [Sitek and Such-Pyrgiel 2018, 201ff; Zheng, Chan, and Gibson 1998, 20–23].

A Virtual Reality user using visual and audio output devices can consider themselves part of this environment. The world generated with the use of ICT devices can be a model of an object taken out of the real world, such as a workplace, but it can also be an abstract model that does not exist in the real world. The user can modify the synthetic environment by creating the illusion of interaction with the environment. From this perspective, one can speak of a real or simulated experience of human subjectivity [Riva 2006, s.v. Virtual reality].

The technological possibility of creating a new or alternative reality in which human being functions must raise the question of the content and shape of human rights. The existing acts of international law concerning human rights, ranging from the Universal Declaration of Human Rights of 1948 to the Charter of Fundamental Rights of 2000, were shaped on the basis of experience, doctrine views and various ideologies created on the basis of the behavior of the individual and entire societies which are set of these units – individuals. It all happened in the real world [Orzeszyna, Skwarzyński, and Tobaszewski 2020, 67ff].

The quoted, in the first section of this study, statistical data and the development of ICT devices force a scientific reflection on the content and shape of human rights moving in cyberspace [Zawisza 2015, 403ff].

It follows from the concept of human rights that they are universal rights resulting from the nature and inherent dignity of human being. Already in the preamble to the Universal Declaration of Human Rights, it was stated that this document collects and organizes the achievements and postulates of a human being who, for many hundreds of years, has been fighting an unfinished fight for his or her freedom and dignity. Thus, the authors of this document clearly define the area of application and respect for the rights defined therein. And in the solemn formula of the Declaration, the obligation to promote human rights through education and training was imposed on all peoples and all nations. It was the peoples and nations, in the intention of the authors of the Declaration, who were to guarantee its universal and effective recognition and application. M. Piechowiak rightly notices that such solutions included in the preamble to the Declaration are the result of the traumatic experiences of humanity in the institutionalized state system of the extermination of people by the communist and fascist regime in Germany [Piechowiak 1999, 14; Alfredsson and Eide 1999, XXVII]. The Decla-

ration is so far the only act of international law of a global nature. All subsequent international human rights legislation is only regional in nature.

The regional legal acts include the European Convention on Human Rights of 1950, in which there was quite a significant change in the definition of entities obliged to ensure the universal and effective application of human rights. According to the preamble to this Convention, these entities are the governments of European countries. A similar narrative is used in the preamble to the EU Charter of Fundamental Rights or in Article 1(1) of the 1969 the American Convention on Human Rights.

The problem, however, is that concepts such as “peoples,” “nations” and “states” are typical of the real-world order. In the virtual world, these concepts do not have their referents. Cyberspace is not a global world in which states, peoples or nations continue to play a significant role. In the global world, human being is part of the reality.

In cyberspace, the role of the state in the traditional sense is significantly limited or even marginalized. Even the control measures implemented by China and Russia are not able to take control of cyberspace or stop its development. It is not the political authorities of individual countries who have the greatest impact on the functioning of the virtual community, but the operators of individual ICT devices or systems with the help of which cyberspace is created. It is the operators who create their own system of operating standards which can effectively limit the decisions of even the most economically and militarily powerful states. An example of this is the permanent ban on Snapchat of the President of the United States of America – D. Trump. This prohibition was not issued on the basis of a judgment of a common court of a particular state, but on the basis of the rules and decisions of the authorities of a private company [Fung 2021]. The motive for blocking the President’s account was the finding of “a clear violation of the rules” formulated by a private company. The rationale behind the decision was concern for “public security.” However, the important thing about Snapchat’s position is that it is not known who exactly made this decision? Was there any procedure in which the other party affected by the sanction could take a position or comment? Therefore, the Snapchat’s decision is final and cannot be appealed. At the same time, this decision contradicts the principles of a democratic state, is completely non-transparent and is contrary to the human right to a fair trial. In the end, the owner of this application, Snap Inc., usurps the right to set standards to which the head of one of the most powerful militarily and economically state in the world must comply. What is most puzzling, however, it is that this new situation is widely accepted. It is virtual reality or the entities operating in it which have a real impact on the fate of the real world and will de facto change it.

2. THE IMPACT OF VIRTUAL REALITY ON HUMAN RIGHTS

The Internet and World Wide Web, remote learning and remote work, vision of a global communication network integrating the Internet, cable network, telephony and other electronic media (Information superhighway), electronic surveillance, it means home, company and loved ones being monitored, legal wiretapping, ubiquitous cameras and other electronic, digital and audiovisual means, and finally, it is possible to profile consumers, it means - collecting detailed information about the target market through in-depth insight into the preferences of your customers. S. Woolgar claims that nowadays all aspects of social, cultural, economic, and political life, but also the life of an individual, are “infected” by electronic technologies which make up the virtual world [Woolgar 2002, 1–2].

Even in the latest studies dedicated to human rights, the impact of the transfer of significant areas of human activity to the virtual world is not recognized. One of the most recent studies on human rights deals with the problems of their violations from a traditional perspective, while the influence of cyberspace on the content of human rights is not noticed. An example of such a study is the article by V.N. Jha, who analyzes quite interesting data, for example, religious intolerance. In 1951, Pakistan had 21% of religious minorities, today there are only 4%. Various methods are used to combat minorities, such as persecution, forced conversions to Islam or forced marriages [Jha 2021].

Hence, the main issue is to look for an answer to the question of whether the transfer of significant human activity to the virtual world can and does indeed have an impact on the content of human rights? Undoubtedly, the virtual world creates a virtual society. This is an area where people interact with their actions. Participants of the virtual society communicate using various types of applications, make new friends, perform legal actions, participate in various types of social campaigns, run businesses, learn and educate, but also act to the detriment of the others for example by hating. However, it is worthy to ask the question – are these activities the same as those which were analogously performed in the real world? The environment of human activity in cyberspace is also changing. A human being can move around the virtual world with only a small amount of control, most often perform by the rules established by IT network operators. Of course, many more questions can be asked. They will be presented in subsequent studies, which will be the result of my research [Marcinkowski 2019, 167ff].

It should also be stated that the existence of two parallel worlds side by side certainly does not change the well-established belief that the source of human rights is the inherent dignity of human beings, as mentioned above. Anyway, as rightly claims, *inter alia* by J. Donnelly, the source of human rights is the fact of being human and his or her human nature [Donnelly 1982, 391]. J. Donnelly’s views are largely consistent with the teachings of the Catholic Church, especially Pope John Paul II. In the light of his views, human rights are related to personal dignity. In encyclicals such as *Redemptor hominis*, *Laborem exercens* or *So-*

llicitudo rei socialis, John Paul II repeatedly emphasized that human rights are objective and inviolable [Rauscher 1993, 71].

Thus, from the ontological point of view, the content of human rights cannot be variable or dependent on whether a person acts in the real or virtual world. Regardless of the extent to which a person functions, his or her rights should be guaranteed and duly protected [Sitek 2016a, 71ff].

This position, however, raises further questions. Does the content of individual human rights remain unchanged and independent of the dimension in which a person acts? Should the types and systematization of human rights be changed and depend on the dimension in which a person operates, or is it enough to slightly modify the existing provisions of law, including international law? Currently, the systematization of human rights proposed by K. Vasak, a French lawyer of Czech origin, is widely recognized. According to him, human rights are divided into three generations, it means – fundamental rights, economic rights and solidarity rights [Wellman 2000, 639]. M. Sitek, in turn, proposed a new taxonomy of human rights based on the pyramid of needs of A. Maslow. This is so far the only attempt to re-systematize human rights based on natural human needs [Sitek 2016b, 38].

3. THE NEED FOR A RE-DISCUSSION ON HUMAN RIGHTS, THEIR CONTENT AND MAY CHANGE OF THE CONVENTION AND THE DECLARATION OF HUMAN RIGHTS

The questions posed in the above point require a broad discussion on the shape of human rights in cyberspace, or rather in a virtual society. The argument for this discussion is the question of axiology, it is the question of the system of values which modern civilization lives and is guided by, functioning in the real world. We should agree with E. Fromm's statement that we are dealing with the decay of social systems. It is a common phenomenon, and it has been accompanying humankind since at least the times of the ancient Roman empire. This phenomenon is the result of the lack of adaptation of social structures to changing conditions [Fromm 2017, 47].

Changes in the modern world have been happening faster and faster for at least 100 years. Globalization processes have largely moved from the real world to the virtual world. The changes which are taking place are most visible in the transformations taking the place in the sphere of axiology. The world ceases to be divided into Christian, Muslim or secular. Various kinds of communities are created in the virtual world. Sociologist M. Szpunar was looking for an answer to the question about the possibility of the formation and functioning of virtual communities, analogous to those in the real world, already in 2004. The author's research was aimed at demonstrating the ethos of members the Internet community [Szpunar 2004, 95–135].

There is no doubt that there is already a virtual community built on the basis of social media which transcends geographic and political boundaries in order to achieve common interests or goals. Most often, the subject of these communities is not to build a community of interests based on a specific system of values, but on changing, often short-term needs or interests. This new virtual community is therefore a collection not so much of individuals, but rather of various groups emerging on the basis of some rapidly passing idea. There is a rapid fluctuation in these ideas. However, they do not provide an opportunity to build a holistic value system. In this virtual community, citizenship, nationality, religion or even social or civil status do not matter [Gerards 2012, 173–202].

Already in the period after World War II, when the phenomenon of globalization intensified, the humankind entered a new epoch defined in various ways. The terms used by Z. Bauman, who wrote about postmodernity or fluid reality, have become the most well-established in the literature [Bauman 2012, 18]. In understanding of this philosopher, however, it is not about defining a specific epoch defined by dates, but about the time of losing confidence in building one system of values. Neither the human rights system has not become such a system. Evidence of this is the emergence of a large number of regional conventions or declarations of human rights. It should also not be forgotten that in many countries human rights are not respected at all with the general acceptance of the rest of the countries, for example in China, Russia, North Korea or Myanmar [Sittek 2016b, 8–9].

The above considerations allow us to refer to the questions posed by many thinkers, including E. Fromm, *Where are we going?* [Fromm 2017, 54]. This question becomes even more relevant today in the perspective of the dynamic development of works on and application of artificial intelligence, which not only supports, but also replaces the human being in his or her decisions. S. Tafaro in his yet unpublished work refers to the statement given by Elon Musk during the World Government Summit in Dubai in 2017. The American entrepreneur and philanthropist stated that the relationship between human being and machines (cyborg) is becoming more and more real in the future [Tafaro 2020, 10]. How should human being and his or her rights be treated in this perspective?

The problems outlined above in this point show possible fields of discussion about what is happening in the virtual world. Different approaches to these new problems can emerge here. However, due to the adopted goal of this study, the most important thing is to discuss the rights of human being understood as an individual and as a person living not in a specific community, but in a virtual world or virtual reality. This discussion should concern not only the issue of basic human rights, but above all, it should be discussed about individual human rights in the context of changes which have occurred as a result of the virtualization of human life. The effects of this discussion should be compared with the currently applicable international and national laws and regulations. This methodological procedure should result in the assessment of the current legal regulations in terms of

their suitability for the new, not only global, but above all virtual reality. Therefore, it is appropriate to ask the questions – is it enough to interpret the current legal regulations, especially done by the European Court of Human Rights or the Inter-American Court of Human Rights, or is it necessary to redefine human rights taking into account the new virtual reality?

FINAL CONCLUSIONS

The current international and national human rights law is an infamous aftermath of World War II and the globalization processes which accelerated in the 1950s. The end of the 20th century was, however, the time of the IT revolution. Thanks to tele-information devices, it has become possible to create a virtual reality to which a large part of human activity has moved. On the one hand, the boundaries between the real world and cyberspace are becoming more and more blurred, on the other hand, however, it is a world completely different, as it has no geographical or political boundaries. Micro-communities in a virtual society are based on different values.

Based on this, a fundamental question arises about the role of human rights in this new dimension of reality. Is their current content or interpretation made by jurisprudence or doctrine appropriate to the situations in which a person is in the virtual world? Is the institutional system adjusted to these new requirements? Or maybe it is necessary to develop new solutions in the form of a convention or declaration of human rights in the virtual world? In order to find answers to these and other questions contained in this study, I will be looking for an answer by conducting research in this direction.

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THE ACTIVITY OF THE PARENT COMPANY SUPERVISORY BOARD CHAIRMAN IN TERMS OF TRUTH, TIME AND COOPERATION*

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Abstract. The aim of the article is to present the mission of the parent company, the capital group, the supervisory board of the parent company and its chairman. In the author's opinion, chairman of the supervisory board of the parent company is one of the most important part of the chain of corporate governance that is responsible for the appropriate functioning of the capital group with the main business target – the maximization the long-term company's value. The authors have attempt to assess the potential of the chairman of the supervisory board of the parent company in the following areas – truth, time and cooperation.

Keywords: compliance, corporate governance, corporate law, capital group, supervisory board

INTRODUCTION

Issues related to the functioning and organization of the work of the Supervisory Board are a constant inspiration for research [Skuza and Lizak 2018, 51–63; Skuza and Lizak 2020, 549–65]. In this publication our attention is focused on the area of activity of the chairman of the supervisory board in the parent company. There are several reasons for us to address this issue. First of all, we point to the need to supplement the existing knowledge contained in the literature on the subject [Dobija 2011; Postuła 2013; Koładkiewicz 2013; Bilewska 2018]. This publication is another part of our research in the area of compliance and corporate governance. The above-mentioned issues in Poland should be considered as areas under development. Moreover, in the future, the competitive advantage of an organization will depend, to a large extent, on its ability to adapt and use compliance and corporate governance in a dynamically changing environment. Secondly, the chairman of the supervisory board of the parent company seems to be a key link in the corporate governance chain, responsible for keeping the parent company and the entire capital group in compliance with the mission, vision, values, strategy,

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business challenges, risk management and internal control system. Thirdly, we attempted to assess the capacity of the parent company supervisory board chairman in the following areas: 1) making factual findings about the situation in the parent company, its subsidiaries and the capital group; 2) temporary involvement in the function of chairman of the supervisory board of the parent company; 3) cooperation of the chairman of the supervisory board of the parent company with the corporate environment. From our standpoint, it is important to present the chairman of the supervisory board of the parent company in three terms – truth, time and cooperation.

1. THE ESSENCE AND PURPOSE OF FUNCTIONING OF THE PARENT COMPANY AND THE CAPITAL GROUP

The essence of business activity is based on maximizing the long-term shareholder value. The above is the basis for the structure and corporate governance, which together form an integral part of the whole system forming the organization. The achievement of the above-mentioned goal is possible only on the basis of true and reliable information, because fundamentally reliable information used in good time determines the right management decision.

From the literal wording of the definition of the parent company contained in Article 4(1)(4) of the 2000 Commercial Companies Code,¹ it can be concluded that the parent company is a superior company to the subsidiary and has grounds to exert influence on its activity. Therefore, apart from the main purpose of the dominant company's operation, which is to maximize its value, i.e. such as in the case of each company, the dominant company performs an additional task, consisting of conducting the policy of the capital group, *inter alia*, by exerting influence on the activity of subsidiaries.

It should be noted that the CCC not only lacks a definition of a capital group and the legislator has not even used such a notion, but also does not regulate issues related to the operation of holdings in the generally applicable law. In the Best Practice for GPW Listed Companies 2016,² although the concept of a capital group was used three times, it is not sufficient to state that the document recognizes the essence and purpose of the functioning of the capital group. The literature review shows that the essence of the capital group seems to be a formal or informal association of at least two companies in order to exercise control of one company over another in all areas of activity, enabling more effective implementation of a jointly defined economic objective.

¹ Act of 15 September 2000, the Commercial Companies Code, Journal of Laws of 2019, item 505 as amended [hereinafter: CCC].

² See https://www.gpw.pl/pub/GPW/files/PDF/GPW_1015_17_DOBRE_PRAKTYKI_v2.pdf [hereinafter: Best Practice] [accessed: 05.05.2021].

2. THE NATURE AND PURPOSE OF THE OPERATION OF THE SUPERVISORY BOARD OF THE PARENT COMPANY AND ITS CHAIRMAN

In the CCC, solutions have been adopted in the capital company system, to separate the management from the supervision. In view of the above, the management board and the supervisory board are separate bodies of the company with separate competences, and the members of these bodies may not perform functions in them simultaneously. The basic task of the management board is to manage the company and the supervisory board to exercise permanent supervision over the company's operations in all areas of its activity.

The institution of supervision includes two elements, i.e. control as an examination of the compliance of a given proceeding with a given pattern and the possibility to interfere in the decision-making process. Control can be considered as a process which consists of examining the actual state of affairs and its comparison with a given standard or a specific standard of conduct (execution vs. designation), analysis of possible differences and formulation of conclusions. Surveillance should take place on a continuous basis and cover activities already completed, ongoing or planned.

The review of the CCC shows that the provisions concerning the chairman of the supervisory board are not very extensive, as his or her duties include convening a meeting, resolving in the case of equality of votes and opening a general meeting. The Best Practice makes no reference to the function of the chairman of the supervisory board, unlike best corporate practices in other countries such as Belgium, the UK, Austria and Germany. The literature most often indicates that the role of the chairman of the supervisory board boils down to being an administrator, organizer, leader, arbitrator, etc. This cannot be argued against, but we believe that the essence and purpose of the chairman of the board should be identified with similar values in the area of the board. Therefore, the constitutive task of the board of supervisory directors and its chairman is to make factual findings. Therefore, the fundamental task of the supervisory board of the parent company and its chairman is to seek information on the actual state of affairs of the parent company and its subsidiaries, and ultimately to present this information to the general meeting. The sum of summaries, the essence of the functioning of the supervisory board of each capital company and its chairman is to obtain reliable information as soon as possible. From our standpoint, the natural areas which can support the activities of the supervisory board and its chairman are audit, compliance and internal control, which are elements of the three-line defense model. The common feature linking the above-mentioned bodies and units is the essence and purpose of their functioning, i.e. making factual findings.

3. ANALYSIS OF THE ACTIVITIES OF THE CHAIRMAN OF THE SUPERVISORY BOARD OF THE PARENT COMPANY FROM THE PERSPECTIVE OF THE RESPONDENTS – THE QUESTIONNAIRE SURVEY METHODOLOGY

The survey carried out for the purposes of this publication was conducted in two stages. In the first stage, the CCC was reviewed and a set of best corporate governance practices in Poland and worldwide, as well as the literature on the subject. The aim of the above review was to determine the essence of the functioning of a company, a capital group, a supervisory board of both – a company and the capital group, and finally the role of a chairman of the supervisory board in a parent company and in the whole group. The findings of the first stage, important for this publication, were included in the previous part, i.e. the introductory issues. In the second stage, on the other hand, a questionnaire survey was conducted among twelve so-called full-time members of supervisory boards of parent companies, who were given numbers from one to twelve, according to the chronology of filling in the questionnaire. The survey was aimed at gaining knowledge, especially concerning practical aspects.

Due to the subject matter of the study (the activity of the chairman of the supervisory board of the parent company), we decided that in the case of this publication it is appropriate to select a research sample on the basis of their own knowledge of the studied population and the research objectives. Therefore, they decided to use the non-probability sampling. Although we are aware that such selection of the research sample reduces the representativeness of the sample for the entire population of persons acting as chairpersons of supervisory boards of parent companies in Poland, such selection of the sample was justified because it enabled access to the most valuable information, as it comes from outstanding experts operating in the area of corporate governance.

The questionnaire consisted of three parts and successively concerned the chairman of the supervisory board of the parent company, the practice of his activities in the structure of the company and the capital group, as well as collecting opinions on its current state and proposed changes in the scope of exercising permanent supervision in the company and the capital group. The survey was conducted from May to October 2019. Due to the anonymity of the survey participants, the names of companies will not be disclosed. Twelve current or former members of the supervisory boards of the parent companies, although operating in the area of corporate governance, with different education, knowledge and professional experience and representing different business environments and areas, participated in the survey. Below we present information characterizing the respondents: 1) the respondents performed an average function: 2.2 times chairman of the supervisory board, 1.75 times the chairman of the supervisory board of the parent company, 6 times a supervisory board member, 3.6 times a supervisory board member in the parent company; 2) the respondents performed an average function

in years: 5.3 times a supervisory board chairman, 3.8 the chairman of the supervisory board in the parent company, 7.8 member of the supervisory board, 5.9 member of the supervisory board of the parent company; 3) the respondents served as the chairman of the supervisory board of the parent company in the capital group of which it was part: 1 to 10 subsidiaries – in the case of seven surveyed companies, from 31 to 40 subsidiaries – in the case of two surveyed companies, from 41 to 50 subsidiaries – in the case of one surveyed companies, over 51 subsidiaries – in the case of the two surveyed companies.

Although the number of respondents participating in the survey is not large, they had considerable experience. The respondents have a total of 72 supervisory boards and a total of 93.6 years of experience in this function.

4. THE PRACTICAL ASPECTS OF THE CHAIRMAN OF THE SUPERVISORY BOARD OF THE PARENT COMPANY IN TERMS OF TRUTH

There is no doubt that knowledge about the company is of key importance to the essence of the functioning of the supervisory board. Therefore, it seems reasonable to ask the question about the sources of such knowledge available to the chairman of the parent company's supervisory board.

Permanent supervision is not possible without access to information on the company and the activities of the management board. Although the chairman of the supervisory board of the parent company does not have his own administrative apparatus, he can request the company's management board at any time and in any case to submit specific reports or provide explanations. An exception is made for management reports on the company's activities and financial statements for the previous financial year, which are submitted annually. It follows from the review of the CCC regulations that the legislator has made it optional for the chairman of the supervisory board of the parent company to have access to all information in the company, but only at his request, and the above-mentioned annual reports are an exception. This means that the chairman of the supervisory board is obliged to request each time information he is interested in. At this point, it seems appropriate to draw attention to the principle III.Z.4 of the Best Practice, which states that at least once a year the person responsible for internal audit and the management board shall present their own assessment of the effective functioning of systems and functions to the supervisory board, including internal control, risk management, compliance and internal audit, together with an appropriate report. Therefore, the authors of the Best Practice saw the need to extend the supervisory board's mandatory access to information other than that specified in Article 219(3) and Article 382(3) of the CCC.

When asked whether an explanation was ever received from members of the management board of the parent and the subsidiary when acting as chairman of the supervisory board of the parent company at the request of the respondent, res-

pondents replied that in the case of the parent company, all members submitted such a request and in the case of the subsidiary eight respondents replied positively; in the case of two negative answers, respondents added that members of the management board of the parent company provided information on the activities of subsidiaries.

When asked whether an explanation was ever received from representatives of the parent company other than management board members at the request of the respondent, eleven respondents responded, including ten positive and one negative answer. The respondent who answered negatively added a comment that there was no such need. For the same question, but with regard to a subsidiary, eleven respondents replied, of which four were positive and seven were negative.

When asked whether documents from the parent and the subsidiary were ever made available at the request of the respondent, all respondents replied. In the case of the parent company, eleven answers were positive and one negative, and in the case of the subsidiary, eleven respondents replied, of which six were positive and five were negative.

In response to the question whether in his or her function as chairman of the supervisory board of the parent company, the respondent undertook other activities related to gaining knowledge about the parent company and the capital group, in addition to familiarizing himself or herself with the documents submitted by the management board of the parent company, all respondents answered, including ten positive and two negative answers, and indicated as examples: 1) commissioning an opinion to an auditor, and external advisor; 2) receiving explanations from middle management responsible for a given area of the company's operations, e.g. finance, legal, audit, strategy, corporate governance; 3) receiving explanations from employees responsible for a given area of the company; 4) receiving explanations from supervisory staff, i.e. those responsible for internal control, risk management, compliance and internal audit; 5) interviews with employees of the Chancellery of the Prime Minister responsible for exercising ownership supervision over companies with Treasury shareholding; 6) becoming familiar with the key performance indicators; 7) receiving explanations from the Workers' Council and Trade Union Chairmen; 8) evaluation of the Investment Committee documentation and procurement procedures; 9) review of concession rounds documentation and applications; 10) participating in risk mapping; 11) participation in the creation of internal regulations and amendments to the statute(s) and by-laws for the parent company and the group (e.g. concerning silent and managerial shares, remuneration of the managerial group); 12) open source review; 13) to get acquainted with information from the company's customers.

The last question in this section concerned the participation of the chairman of the supervisory board of the parent company in the meetings of the management board of the parent and subsidiary. All respondents replied. In the case of the parent company, nine answers were negative and three positive, and in the case of the subsidiary, eleven were negative with one positive. In this question, six

respondents added a comment that there was no such need, and another pointed out that it had not been delegated to the individual supervision of the parent joint stock company, so there was no legal basis for a representative of the parent company's supervisory board to participate in a meeting of the subsidiary's management board.

Although the chairman of the supervisory board of the parent company has access to all information in the company, but only at his request, with the exception of the annual accounts, it appears from the replies given that they are quite active in the case of the parent company, in particular as far as they are concerned: 1) receiving explanations from representatives of the parent company other than the board members; 2) undertaking other activities related to gaining knowledge about the parent company and the capital group, apart from getting acquainted with the documents submitted by the management board of the parent company; 3) participation of the chairman of the supervisory board of the parent company in meetings of the management board of the parent company. Particular attention is drawn to a wide range of other activities related to acquiring knowledge in the parent company.

The situation is slightly different in the case of activity of the chairman of the supervisory board of the parent company in the field of acquiring knowledge in subsidiaries. The survey shows that the majority of the respondents did not receive explanations from the representatives of the subsidiaries, only half of them got acquainted with the documents from the subsidiaries, and finally only one of the respondents took part in a meeting of the subsidiary's management board. The chairman of the supervisory board of the parent company focuses his attention mainly on acquiring knowledge from the parent company, although it is not so that the acquisition of knowledge from subsidiaries by the chairman of the supervisory board of the parent company is completely ignored.

5. PRACTICAL ASPECTS OF THE ACTIVITIES OF THE CHAIRMAN OF THE SUPERVISORY BOARD OF THE PARENT COMPANY ON A TEMPORARY BASIS

Companies often operate in complex legal, business or geopolitical circumstances, which requires significant time commitment on the part of all participants in corporate governance, especially the chairman of the supervisory board of the parent company. This has been recognized by the creators of the UK Corporate Governance Code,³ which includes substantive criteria for the election of the chairman of the supervisory board, in particular that the candidate has sufficient time to perform his or her duties on an ongoing basis, as well as to recognize his or her availability in the event of a crisis situation. It cannot be ruled out that many board chairpersons hold other, often time-consuming functions simultaneously.

³ The UK Corporate Governance Code, Financial Reporting Council, United Kingdom.

For example, the board of a parent company operating in the financial market should ensure that its operations comply with corporate law, generally applicable national and international law, as well as the law of other countries (e.g. FCPA, Bribery Act, FATCA). In addition, the company should operate in accordance with the guidelines of at least eighteen market regulators at home and abroad, for example, the FSA, ESMA, FCA, SEC. The supervisory board of the parent company is obliged to assess the company's activity in all areas of its activity, and the above example actually refers to only one of them, namely the legal one.

In the Anglo-Saxon model, the chairman of the board of directors, as CEO, is much more capable of influencing and supervising the company than the chairman of the supervisory board in the continental model, which is due to one of the fundamental differences between the Anglo-Saxon and continental models. Research carried out by T. McNulty, A. Pettigrew, G. Jobome and C. Morris shows that factors such as time commitment, greater experience and knowledge of the company are crucial here [McNulty, Pettigrew, Jobome, and Morris 2011, 91–121].

According to the survey, seven out of nine of the respondents, while holding the position of chairman of the supervisory board of the parent company, were also members of at least one of the above-mentioned committees. The respondents served on the following committees: the respondent No. 1 – audit; the respondent No. 2 – nomination, strategy; the respondent No. 3 – audit, nomination, risk, remuneration, corporate social responsibility (Corporate Social Responsibility, CSR), corporate governance and strategy; the respondent No. 4 – risk, audit, nomination, remuneration and strategy; the respondent No. 5 – audit; the respondent No. 6 – audit and strategy; the respondent No. 7 – audit and strategy; the respondent No. 11 – strategy, risk and remuneration; the respondent No. 12 – audit.

Respondents, in addition to holding the position of chairman of the supervisory board of the parent company, including nine of them as a member of at least one of the committees, also held other functions or were professionally involved: the respondent No. 1 – member of the supervisory board; the respondent No. 2 – President of the Management Board or member of the Management Board; the respondent No. 3 – academic employee, president or member of the management board, own business; the respondent No. 4 – academic employee; the respondent No. 5 – academic worker; the respondent No. 6 – own business activity; the respondent No. 7 – President of the Management Board or member of the Management Board; the respondent No. 8 – person holding a managerial position in the state; the respondent No. 9 – employee of the company with State Treasury shareholding; the respondent No. 10 – a state administration employee, President of the Management Board or member of the Management Board and a researcher; the respondent No. 11 – a state administration employee and the President of the Management Board or a member; the respondent No. 12 – academic employee.

In the questionnaire, we formulated a question to the respondents whether the time they spent as a member of the supervisory board of the company was sufficient to exercise permanent supervision over the activity of the parent company and the capital group in all areas of their activity. Eleven respondents answered this question, including the following: a) two of the respondents that they definitely did; b) six of the respondents, that they probably did; c) two of the respondents, that's hard to say.

Eleven respondents answered the question whether the chairman of the supervisory board of the parent company should perform such a function only: a) five, that they'd rather not; b) three, that's hard to say; c) two that they definitely should; d) one that they would rather do so.

The respondent No. 1 stated that exercising effective supervision requires independence from the company and its management. The full-time function of the chairman of the supervisory board would be contradictory to this requirement. He added that a possible exception could apply to very large and complex companies/structures. A similar position was taken by the researcher No. 9, according to whom the full-time remuneration could be applicable and depend on the size of the capital group and the scale of its operations.

According to respondents 2, 8, 9 and 12, full-time remuneration is a good solution. The former stated that the amount of remuneration should depend on the size of the capital group measured by turnover, employment or market share or a combination of these factors, the latter proposed that the remuneration of the chairman of the supervisory board of the parent company could range between 50–75% of the remuneration of the members of the management board of the parent company, the third considered the regulations contained in the Act of 9 June 2016 on the principles of shaping the remuneration of persons managing certain companies as appropriate, and the latter proposed that the remuneration should be determined by the general meeting and its amount should be 10% of the remuneration of the member of the management board.

Actually, all the respondents considered that they spend a sufficient amount of time as a member of the supervisory board of the parent company. Moreover, it has been established that they are persons who simultaneously perform other functions than just the chairman of the supervisory board of the parent company. Many of them seem to perform more time-consuming tasks simultaneously. This means that holding the position of chairman of the supervisory board of the parent company is, for those surveyed, an additional job among many others, which may affect the effectiveness of their work. Although the respondents believe that they perform their functions properly, the effectiveness of their work can still be questioned, as only a smaller half of them have stated that the chairman of the supervisory board of the parent company can also perform other functions.

6. PRACTICAL ASPECTS OF THE ACTIVITIES OF THE CHAIRMAN OF THE SUPERVISORY BOARD OF THE PARENT COMPANY IN TERMS OF COOPERATION

Despite the separation of the management and supervisory functions in capital companies, the activities of the management board and the supervisory board are closely related, and harmonious cooperation determines the good condition of the company, hence the importance of maintaining partnership and cooperation. There is no doubt that the chairman of the supervisory board of the parent company is largely responsible for this harmonious cooperation. Based on a review of his or her tasks, such as: a) creating interaction between the management board and the supervisory board; b) setting the schedule and agenda of meetings; c) time management and discussion at board meetings; d) to mediate communication with the corporate environment, as well as the need for contact with the bodies and entities that constitute the corporate environment, such as: a) the supervisory board; b) the board; c) the shareholders; d) subsidiaries; e) employees of the parent company and its subsidiaries; f) external auditors, advisors, experts, etc., it can be concluded that the chairman of the supervisory board of the parent company acts as a kind of coordinator of group supervision.

In our opinion, there is still a postulate gap in the CCC preventing cooperation between the parent companies and their subsidiaries, supervisory boards of the parent companies with the supervisory boards of the subsidiaries and respectively the chairmen of the supervisory boards of such entities. To some extent, the reporting and accounting area of the company is an exception, which is regulated by Articles 4a, 55 and 63c of the 1994 Accounting Act.⁴

To sum up the above considerations, the supervisory board of the parent company has a mandate to supervise only the activities of the parent company and the supervisory board of the subsidiary only the activities of the subsidiary. Therefore, the supervisory board of the parent company may not interfere at any time and in any activity of the subsidiary and its supervisory board. The supervisory board of the parent company shall also not be able to exercise permanent supervision over the activities of companies in the capital group, including: a) reviewing the books and documents of subsidiaries; b) request information from subsidiaries, including their supervisory boards; c) to receive explanations from representatives of subsidiaries; d) concluding agreements with supervisory boards of companies in a group of companies, as in the case of management boards, which makes it impossible to create corporate governance mechanisms to exercise permanent supervision.

⁴ Act of 29 September 1994, the Accounting, Journal of Laws of 2019, item 351 as amended.

7. THE ASSESSMENT OF THE CURRENT LEGAL STATUS AND CORPORATE PRACTICES AND PROPOSALS FOR CHANGES

The research in this part began with an attempt to determine the percentage of time, in three dimensions, i.e. past – present – future, devoted to exercising permanent supervision over the activity of the parent company. The answers given by ten respondents indicate that the average time spent was as follows: past – 24.5%; present – 40%; future – 27.5%.

The respondents were also asked whether the current powers and pragmatics of corporate governance allow for efficient and effective exercise of constant supervision over the activities of the parent company and the capital group. All respondents provided answers, including the following: nine that they probably do; two that they definitely do; one that it's hard to say.

The respondents were given the opportunity to submit their own proposals for changes or to add comments which in their opinion could strengthen the efficiency and effectiveness of permanent supervision in the parent company. The respondents presented the following proposals: 1) to start work on the introduction of the holding company law; 2) allowing information to be requested from subsidiaries. This request was made by three respondents. One of them added that currently the management boards of the subsidiaries refuse to provide information on the grounds of the company's secrecy or inability to issue binding instructions to the management board regarding the company's affairs. In response, the chairman and members of the company's supervisory board emphasize the performance of the function of members of the subsidiaries' management boards being dependent on providing the requested information, arguing that it is impossible to exercise permanent supervision within the capital group; 3) raising the knowledge of chairmen and members of supervisory boards. This demand was made by two respondents; 4) increase the remuneration of chairmen and members of supervisory boards; 5) strengthen the position of the internal auditor and intensify his or her contacts with the chairman of the supervisory board; 6) to regulate the issue of independence in the selection of members and the verification of their qualifications; 7) introduction of an obligation to submit an individual report on the performance of the function of chairman or member of the supervisory board upon termination of the function; 8) introducing criteria to account for the responsibilities of chairmen and members of the supervisory board; 9) enabling the chairs and members of the supervisory boards of the parent company to participate in the general meeting of shareholders of the subsidiaries.

8. DISCUSSION

The survey led to the conclusion that the chairman of the supervisory board's access to information on the company is limited only by his will, willingness and involvement. However, it should be noted that due to the collegiality of the super-

visory board of a joint stock company, information can only be requested by the supervisory board as a body. In practice, this would mean that the information provided to the chairman of the supervisory board would be received simultaneously by all members of the supervisory board. The situation is different in the case of a limited liability company, where each member of the supervisory board, including the chairman of the board, may independently exercise supervisory rights, unless the articles of association state otherwise.

The study also shows that it is reasonable to consider the introduction of a full-time remuneration for chairmen of supervisory boards of parent companies, but only for large and complex structures.

The survey also allowed us to conclude that the actions taken by the supervisory boards of the parent companies are not only of a retrospective nature, but also include an examination of current operations, as well as plans and intentions of the management board.

Moreover, we concluded that the effectiveness and efficiency of cooperation between the chairman of the supervisory board of the parent company and the corporate environment of the capital group largely depends on the individual predispositions of the chairman himself or herself.

No less important is also the understanding by the chairman of the supervisory board of the parent company of the essence and role of the functioning of the supervisory board and its functions, including the important role played by the chairman himself or herself, which can no less be described as the coordinator of supervision over the activities of the capital group, especially in the area of risk, compliance and corporate governance.

CONCLUSIONS

The above findings lead to the conclusion that under the current circumstances the chairman of the supervisory board of the parent company has a fairly broad scope of activities and in practice can use these opportunities to exercise permanent supervision of the parent company. The exception to this is the lack of holding law, which makes it impossible to properly reach knowledge about the subsidiaries and thus a holistic assessment of the entire capital group. This makes it impossible to achieve the essence and purpose of the functioning of the supervisory board, i.e. to make factual findings. Therefore, our proposal is to introduce to the CCC the wording of the normative definition of a group of companies contained in the draft amendment to the CCC and the 1997 National Court Register Act.⁵ According to the aforementioned definition, a group of companies is “a parent company and its company or companies or its subsidiaries, which are in an actual or contractual permanent organizational relationship and have a common economic interest.”

⁵ Draft amendment to the CCC and the 1997 National Court Register Act, 22 March 2010.

The survey made it possible to present a number of *de lege ferenda* conclusions, of which the following deserve special attention: the introduction of holding law, the continuous improvement of knowledge of supervisory board members and the strengthening of cooperation between the chairman of the supervisory board of the parent company and the entire supervisory board within the areas of companies responsible for audit, internal control and compliance. As M. Romanowski pointed out aptly, “[...] a Supervisory Board member should act in accordance with his standard of due diligence if he undertakes in good faith – using the best market practices and his knowledge – to act in the interest of the company in a manner appropriate to the profile and size of the company.”⁶ The greater the supervisory board members’ knowledge, the higher the level of protection of the company’s interest will be.

In conclusion, it is worth quoting the comment of one of the respondents, who stated that efficient and effective supervision requires high competences and the introduction of a motivation system for the management board that eliminates conflicts of interest and ensures building the company’s value in a long-term perspective. He added that if the motivation system is based on the adoption of a short-term perspective (short-termism), then moral gambling is created, and then constant supervision is justified. In our opinion, this commentary refers to the fundamental problem of exercising permanent supervision over the company’s activities in all its fields of activity. If the compliance and corporate governance mechanisms are properly applied, the supervisory board and its chairman may focus their activities only on prevention, and thus not on retrospective action, which in turn facilitates the achievement of the objective of running a business, i.e. maximizing the value of the company in the long-term.

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LEGAL GROUNDS FOR FORMING AND ALTERING THE BASIC TERRITORIAL DIVISION OF THE STATE

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Abstract. The issue of territorial division of a state has been subject of the science of administrative law for years. The aim of territorial division is to introduce certain order in human activity in a given area. This refers in particular to general territorial division, which has most significance and plays the most important role in functioning of state and society. Thus, the issue of legal regulations concerning the prerequisites for shaping this order and the conditions for making alterations to it remains topical. The author presents the issue of legal regulations regarding the premises this order and the conditions for its transformation as still topical and being rather a long-term process than a single undertaking. It stems from the tension present in the science of administrative law between assuming that the territorial division of the state should be characterised by relative stability, and the simultaneous projection of its alterations in the face of changing conditions forcing transformation in the functioning of public administration. The current model of the basic territorial division is based on the concept laid down in the Constitution of 2 April 1997, assuming that the territorial division of the state must take into account the social, economic or cultural ties, at the same time ensuring that the territorial units are capable of performing public tasks. Moreover, the formal criterion for alterations to the basic territorial system is introducing them by means of an Act. The paper also presents the modern tendency to change the perspective and gradual, however constant, move from the analysis of the territorial division of the state as an element of effectiveness of public administration to the emphasis of the significance of territorial division as the real framework of local and regional self-governance and the areas of social activity.

Keywords: territorial division, administrative law, territorial units, public administration

INTRODUCTION

The issue of territorial division of a state has been subject of the science of administrative law for years. It mainly stems from the fact that territorial division of a state is considered a “very important element of public administration’s efficiency and plays an important role in the overall functioning of the state” [Szreńniawski 2002, 127]. It has been emphasised in the literature that territorial division plays a very important role not only from the point of view of how the state functions, but also from the perspective of its citizens [Lemańska and Małecka-Łyszczek 2002, 330]. In the science of administrative law, territorial division is considered to be a generally fixed division of the state area, or “the relatively permanent fragmentation of state space” made for the local and regional state units (bodies) or nonstate entities, executing public administrative functions [Leoński 1977, 370]. It is assumed that the division of labour principle requires each territorial body to have own scope of action limited by its territory [Iserzon 1968,

149]. It is due to the fact that it is not possible to effectively manage all public issues from a central level, i.e., by a body whose range extends to the whole territory of the state [Piecha 2019, 241].

The literature in administrative law distinguishes three types of territorial division of a state: basic, auxiliary and division for special purposes. Basic division, the most significant one, is the general territorial division, created due to necessity to perform state (public) tasks in a given territory, significant from the perspective of the fundamental state objectives and the rules of functioning of the state. Auxiliary territorial division plays supplementary role in relation to general division and in the current conditions it is considered to be a division made from the perspective of local-government bodies or some public administration bodies. Division for special purposes is made for the purposes of bodies that do not belong to the system of general government administration or to a local government.

In general, it may be stated that the aim of territorial division is to introduce certain order in the human activity in a given area [Kulesza 1996, 3–4]. This refers in particular to the main territorial division, which has most significance and plays the most important role in functioning of state and society.

Thus, the issue of legal regulations concerning the prerequisites for shaping this order and the conditions for making alterations to it remains topical. The grounds for the current system had been formed in two stages. First, in 1990, local government was reinstalled at the communal level, without making alterations to the system remaining from the previous era. During the second stage, in 1998, the system of territorial structure was expanded based on a reformed structure of a general territorial division – the number of provinces was reduced from 49 to 16 and districts were established.

In the following years, despite retaining the general framework of the main territorial division, further changes of fragmentary or corrective nature have been made, without serious alterations to the “state architecture” [Izdebski 2016, 52–64]. At that time, many postulates have been made regarding big or small-scale alterations, e.g., the concept of *Inicjatywa Pomorza Środkowego*, Elbląg’s pursuit to change the location within the province [*województwo*] [Szreniawski 2004, 515]. Moreover, in 2019, new concepts were formulated regarding further decentralisation of structure and functioning of the state (“The Republic of Poland decentralised,” “Poland of local self-governments” and “21 postulates for Poland by local governors”), referring to the issue of administrative and territorial construction of the state [Mażewski 2020, 7–18]. Such projects include political initiatives of the ruling party aimed at division of the current mazowieckie province into two provinces – a draft amendment to the legislation in this area was announced to be presented in January 2021. Simultaneously, numerous changes to the territorial division are executed at a local level (communes [*gminy*] and districts [*powiaty*]) every year. This means the issues raised herein not only are important, but also remain topical.

1. THE PREMISES FOR FORMING TERRITORIAL DIVISION

The premises for forming territorial division are considered the conditions which are, or should be, taken into account when shaping particular model of territorial division. Modern territorial divisions usually refer to traditions of the past territorial structure of the state and historically formed cultural identity of the specific areas. Making a territorial division for administrative purposes is “an eminently creative operation that should be influenced by a multitude of different moments” [Iserzon 1968, 150].

The shape and size of the units of territorial division are affected by a number of factors, especially geography, demographics [including national and professional structure of the population], culture, history, politics, economy, degree of urbanisation and communications. At the same time, such units should be fairly homogeneous, while suited for the performance of public tasks in a best way possible [Giętkowski 2009, 227]. Territorial division as an important element of the state system is shaped mainly by history, geography, nationality, military and, recently, also economy, social factors, religion, linguistics and communications [Lemańska and Małecka–Łyszczek 2002, 316].

Nowadays, attention is being drawn to the role of division as a framework for self-government and social activity, which leads to the proposal that the division should take into account the specific features of the operation of a local self-government [Leoński 1995, 45]. It is also reflected in the quest for optimal model of the division of tasks and competence between the units of territorial division, especially in the context of emergence of new types e.g., creation of a self-governing district and a self-governing province in 1998 [Martysz 1999, 220]. On the other hand, the national issues, including territorial division, fall outside the legislative competence of the bodies constituting the local government units.¹ Pursuant to the position of the Constitutional Tribunal, expressed in the statement of reasons to the judgment of 27 November 2000, the main territorial division of the state and the main alterations to this division are the concepts of a state-wide dimension; not only, however, as from the perspective of “the bonds and feelings of the inhabitants, the liquidation of a given unit (its abolition) appears to be a fundamental change.” Constitutional Tribunal also emphasises that it would be arbitrary to make major changes to the territorial division of the state by means of statutory provisions, without prior consideration for the opinions of the residents of the communities affected by those changes, as “the will and opinion of the residents must have a proper place in the political system.”²

It was assumed in the mid-war period that the state “should, in its system, organisation and action of its authorities, take into consideration the diversity of specific individual conditions of its area” [Langrod 1931, 11–12]. For example,

¹ Decision by Supreme Administrative Court of 13 November 2019, ref. no. I OSK 732/18, CBOSA.

² Judgment of the Polish Constitutional Tribunal of 27 November 2000, ref. no. U 3/00, OTK 2000/8, item 293.

the systemic solutions of this nature had been sought in the first years of systemic transformation following 1989, through the analyses of cultural values of Polish space made during the works of the “Government Team for elaboration of the concept of changes in the territorial organisation of the State,” including the existing administrative divisions and proposals put forward by institutions, scientific centres and private individuals. It allowed to create a preliminary concept of a new territorial division of the state which later became a basis for development of a government draft of the Act of 1998 (the concept assumed creation of 12 regions), but the legislator has made major corrections to the project [Wysocka 1992, 203–18]. The views on the appropriate size of the units of territorial division had already been formulated earlier, indicating that the unit should be optimally small and, at the same time optimally large [Iserzon 1968, 150]. It is not easy to materialize such principle.

The literature assumes that spatial divisions carry cultural traditions, creating the general framework of social life and expressing specific beliefs and political doctrines [Kościński and Wysocka 1993, 3]. Strengthening social and cultural bonds is a fixed process, which may affect, among others, implementation of the tasks of a local self-government in the field of cultural heritage [Pawłowska 2016, 199–213].

2. SUSTAINABILITY AND CHANGES TO THE BASIC TERRITORIAL DIVISION

The science of administrative law assumes that territorial division of a state should be relatively stable, as it may not be subject to constant changes, eventually leading to chaos in the functioning of public administration [Piecha 2019, 242].

Already in the mid-war period, J.S. Langrod pointed to the transformation in spatial conditions, emphasising that there is “nothing more wrong than attaching the characteristics of constancy to all territorial conditions” as “the state must take those changes into account and foresee them in due time” [Langrod 1931, 12]. Further literature on the subject emphasises the expensive (both in social and financial terms) and risky nature of the reforms of territorial division. It should be the ultimate measure for raising the effectiveness of administration, only applied upon considering the possibility of obtaining similar effects using other, less expensive and risky measures [Elżanowski 1982, 52–55]. On the other hand, the inevitable nature of socio-economic changes, forcing constant alterations to the territorial division and adaptation of the division to new needs, has been pointed out. Moreover, territorial division created under the influence of various factors has either positive or negative impact on different areas of social and economic relations [Szreniawski 2002, 128]. In particular, transformation in the structure of functioning of administration should occur all the more frequently as the pace of civilisational and organisational change increases [Sakowicz 2012, 129–52].

Changes to the basic territorial division may be of different nature. The literature distinguishes changes within the framework of systemic reforms, i.e., changes of fundamental and systemic nature, as well as those fragmentary in nature, concerning specific areas, but significant both for this area and the whole territorial system of the state, as well as the changes constituting fragmentary corrections, irrelevant in terms of the whole architecture of the state [Izdabski 2016, 53–55].

It should also be emphasised that even the serious changes in the functioning of the government do not always mean alterations to territorial division, e.g., the objective of the authors of the draft act on the metropolitan district of the Upper Silesian agglomeration was to preserve the existing basic three-tier territorial division of the state [Dolnicki 2014, 5–17].

3. CONSTITUTIONAL PRINCIPLES FOR FORMING THE BASIC TERRITORIAL DIVISION

The literature points out that reinstatement of local government in Poland has taken years, had a number of stages and witnessed major systemic changes. Local government has created structure which provided support to the citizens in fulfilling their needs [Lipowicz 2015, 6–16]. Alterations to basic territorial division were a significant element of this systemic transformation.

The fundamental principles of the new territorial division of Poland were outlined in the Constitution of the Republic of Poland of 2 April 1997³ and specified in more detail in 1998, at the level of general legislation. They had been negotiated by experts, politicians and local governors [Kulesza 2000, 81]. Diversity of views on the premises of shaping the division was reflected in the concept of the Constitution of the Republic of Poland of 2 April 1997, which was a certain compromise. Its basic assumption is the balance between the criterion of efficiency/effectiveness in completing public tasks (ability to perform public duties by territorial units) and the criterion of local or regional identity, expressed in the existence of social, economic and cultural ties (Article 15(2)). It should however be noted in this regard that the term “identity” comprises both the objective aspect, i.e., the identity of a given region, commune or district, and the subjective aspect, i.e., the sense of identity [Sługoński 1990; Idem 1997]. Identity of the communities of citizens, from the perspective of the research problem of the axiological foundations of public administration is considered an important value in administrative law [Cieślak 2000, 63]. Polish Constitutional Tribunal highlighted these aspects, claiming that although local governments are legal creations, this fact may not overshadow the existence of “natural historic, economic and cultural bonds which determine that a particular group of inhabitants of a given territory considers themselves to be a political and territorial community to a higher extent than others.” According to the Constitutional Tribunal, “existence of those bonds

³ Journal of Laws No.78, item 483 as amended.

is decisive in assessing the degree of cohesion of that community, its self-awareness and ability to formulate its own collective tasks and public objectives.”⁴

A clear relation between local government system and the issue of territorial division is noticeable especially in Article 16(1): “The entire population of a basic territorial division constitutes a self-governing community by law.” Emphasising the importance of the question of territorial division is associated with recognition of the principle of decentralization of public authority which should be ensured by the territorial system of the state (Article 15(1)) understood as obliging the legislator to shape territorial division in a way fostering decentralization of public authority [Giętkowski 2009, 227].

The basic territorial division should take into consideration “social, economic or cultural ties” and provide “the territorial units with ability to perform public tasks.” In the opinion of the Constitutional Tribunal, this means that the fundamental territorial division of the State must take into consideration the social, economic or cultural ties and must ensure that territorial units are capable of performing public tasks.⁵ Moreover, the formal criterion for alterations to the basic territorial system is introducing those alterations by means of an Act.⁶

Legal scholars and commentators express negative views on the scope of regulations at a constitutional level, stating that the Constitution is very general in this regard, due to the fact that at the time of its adoption there was no precise position on the model of local self-government and local government administration. Due to recognition of the determination of the particular form of the basic division as a statutory matter, the provisions of the Constitution are implemented by the Act of 24 July 1998 on the introduction of the three-tier basic division of the state.⁷ This Act reformed the territorial division of Poland. Since 1 January 1999, the units of basic territorial division have been as follows: communes, districts and provinces.

The current territorial division of Poland has the following units of territorial division: 16 provinces, 314 districts, 2,477 communes in total (including 66 cities with status of a district – communes with urban status, executing the tasks of districts): 1,523 rural, 652 urban-rural, 302 urban (report for 2021).

Province is a unit of public administration execution (state and local) and, at the same time, a regional local community. The basic unit of the basic territorial division of a state is a commune, as a local self-governing community. The current boundaries of communes were established before adoption of the Constitution (mostly in the second half of the 70s). Districts were created in 1998 and district self-government constitutes a second tier of the local self-government

⁴ Judgment of the Polish Constitutional Tribunal of 26 February 2003, ref. no. K 30/02, OTK ZU 2003, no. 2A, item 16.

⁵ Judgment of the Polish Constitutional Tribunal of 8 April 2009, ref. no. K 37/06, OTK-A 2009/4, item 47.

⁶ Judgment of the Polish Constitutional Tribunal of 10 December 2002, ref. no. K 27/02, OTK-A 2002/7, item 92.

⁷ Journal of Laws No. 96, item 603 as amended.

which means the district's residents form a local self-governing community. The importance of this systemic structure is highlighted by the fact that the unit of auxiliary division of the communes (e.g., village [*sołectwo*], municipal district [*dzielnica*]) may not be considered a local community as this term is reserved in Article 16(1), Article 166(1) and Article 170 of the Constitution for the units of basic territorial division of a state, i.e., communes, districts and provinces [Izdebski 2011, 95–110].

The Act of 1998 introduced a three-tier territorial division of the Republic of Poland, regulating only the issues related to establishing 16 provinces and the issue of defining the districts and provinces was left to be regulated by means of a regulation by the Council of Ministers. Alterations to the borders of communes, districts and provinces were to be specified in the same manner.

Judgment of the Polish Constitutional Tribunal of 14 December 1999, specified the expiry date of i.e., Article 5 of the Act of 24 July 1998 on the introduction of the basic three-tier territorial division of the State as of 30 September 2000 as a result of recognition its inconsistency with Article 92(1) of the Constitution in that the authorisation to issue regulations contained therein does not specify the guidelines regarding the content of those acts.⁸

Pursuant to the provisions of Article 7(1) of the Act on the introduction of the basic three-tier territorial division of the State, the Sejm, the Senate and the Council of Ministers were obliged to perform, no later than on 31 December 2000, the evaluation of the new basic territorial division of the state.

At the first stage, the government formed its evaluation in the form of conclusions contained in the "Evaluation of the new basic territorial division of the State," adopted by the Council of Ministers on 12 December 2000. Subsequently, the Polish Senate referred to this issue in its resolution of 11 January 2001 on the evaluation of the new basic territorial division of the state,⁹ stating, among others, that the new basic territorial division of the state is correct and meets the assumptions of the public administration reform and the disposition of Article 15(2) of the Constitution. According to the Senate, there are no premises for introducing changes to the basic assumptions of the basic territorial division and the amendments introduced to this division in the near future should have the form of corrections, leading to acknowledgement of the existing social roles and the will of the local environments. In turn, the resolution of the Sejm of 11 May 2001 on the evaluation of the functioning of the basic territorial division of the state,¹⁰ considered the new basic territorial division of the state correct; it was emphasised, however, that this evaluation did not apply to the districts created by the regulation of the Council of Ministers, and thus it is inefficient and ineffective. According to the Sejm, introduction of a new public administration reform, district and

⁸ Judgment of the Polish Constitutional Tribunal of 14 December 1999, ref. no. K 10/99, OTK 1999/7, item 162.

⁹ M. P. No. 2, item 24.

¹⁰ M. P. No. 16, item 249.

provincial local governments and new territorial division provides opportunity for effective public administration and may foster the construction process of a civic state.

This official evaluation was commonly considered overly optimistic. The literature emphasised the complexity of conditions of the new territorial organisation of Poland [Chojnicki and Czyż 2000, 261–77]. It has been pointed out that the scale of the introduced changes was so big, that it was impossible to avoid wide critical discussion on its criteria, rules and effects of implementation [Kachniarz 2011, 167–75]. The discussions question, among others, the efficiency and effectiveness of the new administrative structure, mainly the fact that decentralisation of public finance does not keep up with decentralisation of tasks and competences [Hardt 2003, 89–106]. Similarly, social consequence of altering the system of local self-government raise many controversies, referring to the balance of the reform of the Polish local governments, the issues of functioning of the local governments, the evaluation of the course of discussion devoted to the announced alterations [Nowak and Śliwa 2017, 241–52].

The reforms of 1998 referred mainly to the general framework of territorial division and the issue of the current changes switched to the regulation of the local self-government system acts, i.e., commune and district¹¹ local governments.¹² The regulations issued by the Council of Ministers on the basis of these acts raise a lot of controversy. The competence of the Council of Ministers also comprises outlining the procedure for determining changes, e.g., the procedure for submitting proposals for creating, merging, dividing, abolishing and determining the boundaries of districts, as well as for determining and changing the names of the districts and the seats of their authorities and the documents required in these matters.¹³ The Tribunal raised that regulating this procedure is related to the scope and manner of expressing the position in this regard by the residents, which means it also has “political significance, particularly in terms of extinguishing or minimizing the conflicts which accompany such change.”¹⁴

Polish Constitutional Tribunal has criticised such regulation a number of times. For example, in the judgement of 27 November 2000,¹⁵ as well as in the judgement of 5 November 2001,¹⁶ the Constitutional Tribunal declared the provisions of the Regulation of the Council of Ministers on the establishment of the borders of certain communes to be inconsistent with Article 4(1) of the Act of 8

¹¹ Act of 8 March 1990 on communal and municipal self-government, Journal of Laws of 2020, item 713.

¹² Act of 5 June 1998 on district local government, Journal of Laws of 2020, item 920.

¹³ Regulation of 9 August 2001, Journal of Laws of 2013, item 1208.

¹⁴ Judgment of the Polish Constitutional Tribunal of 27 November 2000, ref. no. U 3/00, OTK 2000/8, item 293.

¹⁵ Ibid.

¹⁶ Judgment of the Polish Constitutional Tribunal of 5 November 2001, ref. no. U 1/01, OTK 2001/8, item 247.

March 1990 on communal self-government to the extent that they concerned the establishment of the borders of communes.

In turn, in the judgment of 10 December 2002, the Constitutional Tribunal emphasised that the formal criterion for changes in the basic territorial division is to introduce them in the form of an Act.¹⁷ Similarly, in the judgement of July 18 2006, it was decided that the basic territorial division of the state established based on the indicated criteria should be introduced by an Act.¹⁸

A number of rulings addressed to the Sejm and the Council of Ministers were also formulated in relation to the regulations of the Council of Ministers on changes in the basic territorial division of the state, signalling the occurrence of defects and gaps in the law, elimination of which is necessary to ensure the cohesion of the legal system of the Republic of Poland.¹⁹

The literature points out that those rulings, issued by the Council of Ministers, may be considered a special type of executive acts which are not subject to evaluation in terms of its compliance with the scope of the governing Act. Such regulation by the Council of Ministers is characterised by being complementary to the Act and its purpose should be to implement the Act, thus it may not contain any content “competitive and autonomous” with respect to the Act [Mączyński 2020, 153–65].

Legal scholars and commentators pointed out to the necessity of treating such regulation in a uniform manner, as a legislative act, establishing the standard of conduct for particular categories of recipients. The choice of such legal form by the legislator may be treated as a certain presumption that the provisions of the Regulation are of exactly such a nature [Dolnicki 2017, 56–64].

The controversies regarding the nature of legal acts concerning establishing the borders of the communes were addressed in the signalling judgment by the Constitutional Tribunal of 2018, specifying “remarks on is the identified systemic error of law consisting in the fact that that Article 4 of the Act of 8 March 1990 on municipal self-government [Journal of Laws of 2019 item 506] by providing for the form of a Council of Ministers regulation as a means of creating, merging, subdividing and abolishing communes and establishing their boundaries, prevents carrying out any control of such acts.”²⁰ The said judgment states that the discussed regulation of the Council of Ministers is of normative nature, as they provide for solutions which are not exhausted in a single application and have a direct and relatively permanent impact on local authorities, public authorities

¹⁷ Judgment of the Polish Constitutional Tribunal of 10 December 2002, ref. no. S 27/02, OTK–A 2002/7, item 92.

¹⁸ Judgment of the Polish Constitutional Tribunal of 18 July 2006, ref. no. S 5/04, OTK–A 2006/7, item 80.

¹⁹ Judgment of the Polish Constitutional Tribunal of 5 November 2009, ref. no. S 6/09, OTK–A 2009/10, item 153.

²⁰ Judgment of the Polish Constitutional Tribunal of 12 June 2019, ref. no. S 1/19, OTK–A 2019, item 33.

and citizens at several levels, thereby laying down rules of conduct of an abstract nature [Gubała 2020, 151–60].

Changes to territorial division at a local level refer to creating, merging, dividing, abolishing and determining the borders have multifaceted effects. For example, merging the communes is a relatively strong intervention in the basic territorial division of the state, as it leads to changing its existing structure [Bujny and Kudra 2015, 95–104]. According to Supreme Administrative Court, “when changing the borders of the commune, ownership of the property is transferred to the acquiring commune, since, in order to perform new tasks, that commune must be provided with public utility property in the commune whose scope of tasks have been reduced.”²¹

Consequences of the alterations causing the change in the structure of affiliation of residents to specific local communities’ concerns, among others, the right to vote. The Act of 5 January 2011, the Election Code²² includes a separate chapter (section VII chapter 5), devoted to the territorial transformation of the State, which implies the legislator’s awareness that the need for such changes is inevitable [Ozimek 2013, 23].

The Election Codes stipulates that the election to the new commune or district council should be ordered and carried out within 90 days from the date of creating a new commune or district [Baranowska–Zajac 2018, 82–99].

4. THE ISSUES OF PARTICIPATION OF THE LOCAL COMMUNITIES

The issue of participation of local communities in the procedures concerning changes to territorial division is a significant element of these considerations. According to the Polish Constitutional Tribunal, “in a democratic state governed by the rule of law, citizens may participate personally in the conduct of public affairs. Democracy assumes possibly wide inclusion of the citizens – in various forms – into the processes of political decision-making [...] Undoubtedly, the legislator, regulating the procedure of altering the borders of a local government, is obliged to provide those units and their citizens with the possibility to present their opinion.”²³

The literature emphasises that the fundamental role of territorial division of the country is defining the territorial scope of the citizens’ participation in the public affairs, as it creates spatial foundations for articulation of public interest, social integration, economic development and serves many other important functions in organising social and economic life, as well as the private life of the citizens [Kulesza 1996, 3–4]. The science of administrative law advocates materia-

²¹ Decision by Supreme Administrative Court of 15 June 2010, ref. no. I OSK 1734/09, Lex no. 595285.

²² The Election Code Act of 5 January 2011, Journal of Laws of 2020, item 1319.

²³ Judgment of the Polish Constitutional Tribunal of 18 February 2003, ref. no. K 24/02, OTK 2003, no. 2, item 11.

lization of the forms of participatory democracy: referenda and local election, as well as public consultations [Kasiński 2009, 141–53]. With regard to changes in the fundamental territorial division of the state, the regulations concerning, among others, the local referendum, should be taken into consideration.²⁴ Social sciences, in turn, emphasise that there is a visible tension between two values in the Polish conditions: namely, the tension between the need for autonomy on the one hand and the need for national cohesion on the other [Swianiewicz 2015, 29–35]

The interpretation of European Charter of Local Self-Government,²⁵ expressed by Polish Constitutional Tribunal in numerous judgments had significant impact on the shape of legal regulations concerning the changes in the basic territorial division of the state. According to the Constitutional Tribunal, the Charter explicitly stipulates the obligation of the competent state authorities to consult the public concerned on changes to the boundaries of a local community. Although the Charter leaves a high degree of freedom to the states in terms of choosing the form of these consultations, it excludes discretion, as the solutions adopted in a given country must provide for a real opportunity for the local community to express its opinion.²⁶ The criteria resulting from the provisions of the Charter are of directional nature, as they aim to be as representative as possible when it comes to listening to the voice of the local community.²⁷

The judgments of Supreme Administrative Court followed similar direction, stating that “the change in the borders, including the change involving the abolition of a given unit must always be preceded by consultations with the public concerned, carried out in such a way as to ensure that they are as representative (universal) as possible, and may be preceded by a local (municipal) referendum, which shall be treated as a special form of consultation with the public and whose results will reflect the attitude of the local public to the proposed changes to the borders.”²⁸

CONCLUSIONS

The review of the views of legal scholars and commentators, legislation and judicial decisions concerning the legal grounds for formulating and altering the basic territorial division of the state contained in this paper indicate constant presence of these issues in the modern thought of the science of administrative law. This is mainly due to the role of this issues as an important element of the significant systemic transformation, initiated in 1997–1998, still developed by the

²⁴ Act of 15 September 2000 on the local referendum, Journal of Laws of 2019, item 741.

²⁵ European Charter of Local Self-Government, drawn in Strasbourg on 15 October 1985, Journal of Laws of 1994, No. 124, item 607 as amended.

²⁶ Judgment of the Polish Constitutional Tribunal of 18 February 2003, ref. no. K 24/02, OTK 2003, no. 2, item 11.

²⁷ Ibid.

²⁸ Decision by Supreme Administrative Court of 7 August 2013, ref. no. I OSK 1371/13, Lex no. 1371979.

legislator and judicial decisions regarding constitution and judicial review of public administration. At the same time, there is a visible tendency to change the perspective and gradually move from the analysis of the territorial division of the state as an element of effectiveness of public administration to the emphasis of the significance of territorial division as the real framework of local and regional self-governance and the areas of social activity.

The important role of the Constitutional Tribunal in recognising various aspects of the constitutional concept of the basic territorial division, obliging public authorities to consider not only the requirement to ensure the ability to perform public tasks, but also to maintain and develop social, economic or cultural ties, should also be emphasised. Undoubtedly, the Tribunal's influence on improving the legislation in this regard may hardly be overestimated and is expressed in the emphasis not only of the objective (material) aspects of the identity of self-governing communities functioning within the units of the basic territorial division, but also in the recognition of the need to take into consideration the subjective (personal) aspect in the form of legal forms (consultation, referendum) facilitating the conditions for expression of a sense of local and regional identity.

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ROLE OF EXPERTS AND THEIR OPINIONS IN ADMINISTRATIVE PROCEEDINGS IN LIGHT OF CURRENT JUDICIAL DECISIONS

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Abstract. Due to the increasing specialization in various areas of our life and science and the extremely rapid development of technology and civilization, it is necessary to consult an expert with special knowledge in administrative proceedings. Therefore, expert's opinion is an important means of evidence in administrative proceedings and its importance is constantly growing. Unfortunately, the institution of experts in administrative proceedings is currently under-regulated in the provisions of the Code of Administrative Proceedings, which raises a number of factual and legal problems. They concern not only who can be an expert, but also what is the subject of an expert opinion, what is the significance of an expert opinion in administrative proceedings, in what form it should be prepared and what elements it should contain. Due to the lack of legal regulations, these issues are resolved by the case law, which achievements could be the basis for legal regulations. The role of an expert in administrative proceedings is to provide professional assistance to administrative authorities in cases that require special knowledge. However, the opinion of an expert appointed in administrative proceedings is not binding on the authority conducting the proceedings, but like other evidence, is the subject of free analysis by the authority taking into account all the evidence collected in the case. It is the authority, not the expert, to decide the case.

Keywords: expert, opinion, administrative proceeding, evidence proceeding

INTRODUCTION

Hearing of evidence is a major part of administrative proceedings, designed to clarify facts influencing decision in a case. The duty to collect and consider entire evidence is incumbent on an administrative authority, charged with active searching for evidence to arrive at objective truth. The legislation binds an authority to use all and any lawful means of establishing facts of a matter, including assistance of individuals with specialist knowledge in a field where an authority's knowledge is insufficient.

Facts in a case are to be established and evidence to be collected properly by an authority that conducts proceedings and decides if an expert opinion is necessary and, if so, to what extent.¹ Expert opinions and assessments are sometimes required by regulations in place [Kurek 2011]. In any case, possession of special knowledge is required to take evidence in this manner. Since expert evidence is

¹ Judgement of the Supreme Administrative Court [hereinafter: SAC] in Warsaw of 14 October 2016, ref. no. II OSK 3358/14, Legalis no. 1534501.

very vaguely regulated in the Code of Administrative Proceedings,² this study will analyse the institution of experts in depth, stressing their role in administrative proceedings on the basis of current judicial decisions.

1. EXPERTS AS PARTIES TO EVIDENCE HEARING

A number of entities take part in administrative proceedings. The doctrine distinguishes those whose presence is prerequisite to instigation of proceedings. These entities are termed “obligatory participants” [Gołaszewski 2018; Chorąży, Taras, and Wróbel 2002, 40] and they include a party and a public administrative authority. Entities whose presence is not a condition for proceedings to be conducted are the other group. They may but do not have to take part in administrative proceedings. These entities are known as “entities as parties.” The third group comprises “other participants in proceedings” [Gołaszewski 2018] who take part in certain stages of preliminary investigations, as a rule called by an authority. They participate in hearing of evidence, having certain rights and duties, yet are not interested in results of proceedings [Kmieciak 2003, 109]. This group encompasses witnesses and experts, their roles in administrative proceedings vary, however. Witnesses supply information about facts based on what they have heard and seen, whereas experts provide information based on their special knowledge and practical experience [Knysiak–Molczyk 2015, 575; Ereciński 2006, 510].³

If a witness possesses special knowledge and has observations about facts essential to a case, their statements remain information about facts they have noted and assessed. Rationality of these assessments, however, requires expert opinions to be submitted in a format that allows parties to control and influence methods of presenting specialist issues present in a case. An individual with special knowledge who has observations inaccessible to others should normally be heard as a witness, whereas duties of an expert should be entrusted to another person who has had no earlier contact with facts important to resolution of a case.⁴

Expert evidence is unique in that facts requiring special knowledge cannot be substituted with other evidence, e.g. gathered from witness statements.⁵ In spite of these differences between expert and witness evidence, provisions on hearing

² Act of 14 June 1960, the Code of Administrative Proceedings, Journal of Laws of 2020, item 256 as amended [hereinafter: CAP], governs expert evidence solely in the provisions of Article 84.

³ Judgement of the Court of Appeals in Cracow, 1st Civil Division of 5 June 2019, ref. no. I ACa 87/19, Legalis no. 2285076.

⁴ Judgement of the Supreme Court of 8 November 1976, ref. no. I CR 374/76, OSNC 1977, No. 10, item 187, and judgment of the Court of Appeals in Lublin, 1st Civil Division of 28 May 2013, ref. no. I ACa 124/13, Legalis no. 1025088.

⁵ Judgment of the Supreme Court Civil Chamber of 24 November 1999, ref. no. I CKN 223/98, Legalis no. 46185.

witnesses apply to experts as appropriate.⁶ Due to the above: 1) persons unable to perceive or communicate their observations; 2) persons bound to keep confidential any secret information who are not released from the duty of confidentiality by way of prevailing regulations; 3) religious ministers as to facts subject to the seal of confession are incapable of serving as experts (Article 82 CAP).

As a rule, an individual appointed an expert cannot refuse to present their opinion. As provided for by Article 83(1–2) CAP, an expert may refuse to submit an opinion or to answer specific questions. In addition, pursuant to Article 84(2) CAP, an expert may be exempted under Article 24, that is, like employees of an authority. This exemption is based on likely circumstances that may give rise to doubts about impartiality of an expert. The Regional Administrative Court in Warsaw is of the opinion, though, it is sufficient for these circumstances to arouse doubts as to an expert's impartiality and thus to an uncertainty whether such expert will discharge their duties impartially.⁷ It is no longer necessary to demonstrate the expert is in fact partial.

Both facts and legal circumstances can be evaluated with regard to an expert's impartiality. As a matter of principle, any circumstances can be raised connected with an expert's relation to a case in administrative proceedings involving the expert. Whether this will be an effective reason for exclusion and if doubts as to an expert's impartiality are reliable are other questions.⁸ Infringements on the principle of impartiality undermine citizens' trust in public authorities.⁹

2. CONDITIONS OF APPOINTING AN EXPERT

Administrative proceedings are conducted by specialised authorities. Nevertheless, they can rely on a variety of evidence to determine certain occurrences, including expert evidence. Experts can be appointed under Article 84(1) CAP, according to which a public administrative authority may request experts to issue opinions where special knowledge is required that is outside the routine competence of authorities.¹⁰

Judicial decisions assume special knowledge may comprise knowledge in the fields of construction, agriculture, water management, nature and environment protection, engineering, medicine, arts, art history or radiesthesia.¹¹ Admini-

⁶ Judgment of the Regional Administrative Court [hereinafter: RAC] in Warsaw of 30 November 2006, ref. no. VII SA/WA 1072/05 and in Cracow of 23 November 2007, ref. no. II SA/KR 965/06, Legalis no. 270245.

⁷ Judgments of the SAC of 31 January 2018, ref. no. I OSK 613/16, Legalis no. 1731793 and of 11 May 2018, ref. no. I OSK 1589/16, Legalis no. 1790755.

⁸ For instance, working for a party to proceedings can be objectively seen by another party as casting reasonable doubt on an expert's impartiality (ref. no. I OSK 1589/16).

⁹ Ref. no. VII SA/Wa 1072/05.

¹⁰ Judgment of the SAC of 12 December 2008, ref. no. II GSK 361/08, Legalis no. 219681 and of 14 January 2014, ref. no. II GSK 1681/12, Legalis no. 909883.

¹¹ Judgments of the RAC in Poznań of 12 October 2011, ref. no. IV SA/Po 731/11, Legalis no. 870888 and of 23 October 2012, ref. no. I SA/Bd 763/12, Legalis no. 544646.

strative courts emphasise this is knowledge not possessed by staff of authorities,¹² since this unique knowledge is beyond the general standard of education.¹³ This is not only scientific knowledge in particular disciplines that can be acquired as part of specialist studies of a subject, but also practical expertise based on years' worth of experience.¹⁴

Occurrence of such circumstances is determined by an authority conducting proceedings, which is literally worded in Article 84(1) of the CAP and its expression 'an authority may' appoint an expert. Thus, the provision leaves to an authority's discretion determination whether an opinion is necessary. It is only an authority that is capable of assessing whether its knowledge is insufficient for solution to a given factual problem in a case whose solution is necessary for the case to be resolved.¹⁵ Everything depends on circumstances of a given case, that is, the extent of preliminary investigation to be undertaken.¹⁶ The fact an authority resolving a case has two sets of contradictory evidence does not predetermine the need for expert evidence, either.¹⁷

It is assumed in the doctrine expert evidence should be admitted only where a full evaluation of evidence requires a more in-depth knowledge of rules prevailing in a field [Wróbel 2016, 494; Bochentyn 2020, 18]. Even where an authority possesses specialist knowledge, therefore, requesting an expert to submit an opinion for the purpose of a more complete clarification of facts is not excluded.¹⁸ This corresponds to the principle of determining evidence collection by an authority by way of selecting appropriate means of gathering evidence, as adumbrated in Article 77(2) CAP. This implies the legislation does not introduce obligatory taking of expert evidence even where explanation of a case requires above average knowledge in a field.¹⁹

An authority's freedom of expert appointment is restricted by the principle of objective truth, which implies an authority is bound to take all steps necessary for a thorough clarification of facts, collection and review of entire evidence.²⁰ The view of the doctrine and judicial decisions that, in complex cases that can only be

¹² Judgment of the SAC of 24 March 2015, ref. no. I GSK 407/13, Legalis no. 1310922.

¹³ Judgment of the RAC in Olsztyn of 28 November 2013, ref. no. I SA/Ol 646/13, Legalis no. 872808; judgment of the SAC of 9 January 2019, ref. no. I GSK 3363/18, Legalis no. 1876449, and of 15 January 2020, ref. no. II OSK 442/18, Legalis no. 2287615.

¹⁴ Judgment of the RAC in Lublin of 29 January 2010, ref. no. I SA/Lu 601/09, Legalis no. 221397.

¹⁵ Judgments of the SAC of 6 December 2017, ref. no. II GSK 16/17, Legalis no. 1698462; of 15 January 2019, ref. no. II OSK 2667/17, Legalis no. 1882157, and of 15 May 2018, ref. no. II OSK 2765/17, Legalis no. 1812861; judgment of the RAC in Cracow of 18 May 2018, ref. no. II SA/Kr 313/18, Legalis no. 1782607.

¹⁶ Judgment of the SAC of 23 May 2019, ref. no. II OSK 1707/17, Legalis no. 1951157.

¹⁷ Judgment of the SAC, Szczecin Branch of 31 January 2002, ref. no. SA/Sz 1731/00, Legalis no. 98495.

¹⁸ *Ibid.*

¹⁹ Judgment of the SAC Court of 26 October 2016, ref. no. II OSK 950/15, Legalis no. 1554109.

²⁰ Cf. Articles 7 and 77(1) CAP and judgment of the SAC of 5 August 1997, ref. no. V SA 1926/96, Legalis no. 41124.

explicated with the aid of special knowledge, an authority is obliged to resort to expert evidence, should be upheld, therefore.²¹ Omission of such evidence may result in gathering of incomplete evidence, which violates the principle of objective truth. It should be also remembered the duty of admitting expert evidence can also arise from special legislation.²² A decision without prior submission of an expert opinion is a gross violation of law then and grounds for finding a decision invalid.²³

An expert may be appointed *ex officio* or at a party's request. The latter is not binding on an authority, though, which shall consider the request under Article 78(1) CAP, i.e. accepting it only where evidence related to circumstances is essential to a case [Kędziora 2014, 599].

Judicial decisions stress public administrative authorities are not bound by parties' requests for expert appointments if a given circumstance can be explicated by means of other evidence or statements.²⁴ If an authority determines a party's demand relates to a circumstance that has been exhaustively established beyond any doubt on the basis of other evidence collected in a case, the demands will be rejected. An authority should object to requests of parties which are not substantiated. Otherwise, it might lead to protracted and obstructed proceedings.²⁵ An authority is bound by such a request only where specialist information needs to be verified in order to properly establish facts of a case.

In view of the above, a complaint against an administrative decision cannot be effective only because an authority has not resorted to expert assistance. Only incorrect establishment of facts can provide reasons for a complaint.²⁶ Failure to take advantage of an expert opinion does not prove facts of a case have not been accurately clarified, however.²⁷ Lack of expert evidence can only be evaluated with regard to whether an authority has clarified all circumstances essential to a case. Not every absence of a request for expert opinion can be treated as a violation of law, therefore.²⁸ Lack of expert opinion is a defect of administrative proceedings that can affect outcome of a case only where facts are not properly established and an expert opinion may be of use in this respect.²⁹ On the other hand,

²¹ Ref. no. I SA/Lu 601/09; judgments of the SAC of 23 May 1997, ref. no. SA/Lu 1487/95, Lex no. 30247; of 24 October 1997, ref. no. I SA/Po 492/97, Lex no. 30890.

²² Article 130(2) of the Act of 21 August 1997, the Real Estate Management, Journal of Laws of 2020, item 1990, according to which value of compensation for expropriated real estate can only be determined upon valuation by a real property expert appraiser, is an instance of such provisions.

²³ Judgment of the Supreme Court of 4 June 1998, ref. no. III RN 38/98, OSN 1999, No. 6, item 194.

²⁴ Judgment of the SAC of 27 April 2012, ref. no. I GSK 197/11, Legalis no. 778240, and judgment of the RAC in Wrocław of 11 April 2013, ref. no. IV SA/Wr 794/12, Legalis no. 796100.

²⁵ Judgment of the RAC in Wrocław of 22 January 2013, ref. no. II SA/Wr 534/12, Lex no. 1330354.

²⁶ Judgment of the SAC of 1 February 2006, ref. no. II FSK 512/05, Legalis no. 74059.

²⁷ Ref. no. II OSK 442/18.

²⁸ Judgment of the SAC of 6 December 2018, ref. no. II OSK 104/17, Legalis no. 1869466.

²⁹ Judgment of the SAC of 6 March 2019, ref. no. II OSK 3323/18, Legalis no. 1898650.

an authority's view appointment of an expert is redundant should be based on evidence collected in a case and then reflected in stated reasons for a decision.³⁰

An expert is appointed by force of a decision and only such a formal appointment involves an expert in proceedings. This is an authority that elects an expert and determines the object and extent of their opinion. A decision to appoint an expert may also include detailed questions that must be addressed in the opinion to be presented [Guzek 2003].

3. ENTITIES THAT CAN BE APPOINTED AS EXPERTS

The Code of Administrative Proceedings does not envisage formal conditions to be fulfilled for someone to act as an expert. Thus, an individual educated in a given field, holding specific and legally certified qualifications, as well as persons with actual expertise needed by an authority to resolve a case may become experts. They have appropriate knowledge and experience to submit opinions as ordered by an authority.³¹ This is corroborated by judicial decisions that stress experts are persons possessing special knowledge. They are not necessarily listed with specific authorities, though. Everyone with specialist knowledge may be appointed an expert in a case, unless special regulations designate a specific category of individuals [Suwaj 2005, 76].³²

Verification whether an appointed expert has the required knowledge is the responsibility of an authority³³ whose selection needs to be guided by object of the opinion to be compiled by the expert. The Code of Administrative Proceedings does not contain a detailed regulation that would instruct authorities to appoint specific individuals in a given area of science [Kmieciak 2008, 196]. It is generally assumed a private individual, not a research institute, can become experts. The Supreme Administrative Court has found, though, an opinion from a research institute corresponds to an expert opinion as its object may encompass a set of facts belonging in special knowledge [Chmielewski 2019].³⁴

No connection to a case in question is another condition of expert appointment. It is important, therefore, that an individual appointed as expert have no material or legal interest in the case as well as issue of an opinion. Since only individuals possessing special knowledge can be appointed experts, appointment of

³⁰ Judgment of the SAC of 29 October 1996, ref. no. SA/Łd 975/95, *Legalis* no. 52607.

³¹ Judgment of the Supreme Court of 24 June 1981, ref. no. IV CR 215/81, *OSPika* 1982, No. 7, item 121, glossed by W. Siedlecki.

³² Experts in areas of science are governed by special regulations. Construction experts, occupational health and safety experts, and fire safety experts can be distinguished. Ref. no. I SA/Lu 601/09.

³³ Judgment of the Court of Appeals in Lublin, 1st Civil Division of 12 October 2020, ref. no. I AGa 90/19, *Legalis* no. 2496477.

³⁴ Judgment of the SAC of 7 February 2018, ref. no. II OSK 896/16, *Legalis* no. 1740493 [Chmielewski 2019]. The Code of Administrative Proceedings stipulates otherwise, pointing out clearly the court can request an opinion of an appropriate scientific or research institute (Article 290).

someone without such knowledge and admission of their opinion as evidence is a defect of proceedings.

4. OBJECT, FORM, AND NATURE OF EXPERT OPINIONS

Dictionaries define opinions as convictions about something, views on a matter, the way others see someone, specialist decisions on a subject [Drabik and Sobol 2007, 504]. Specialist literature notes an expert opinion is a view expressed by an individual unconcerned with a case under administrative proceedings who can provide an authority with special information for the purpose of determining circumstances of a case as they have specialist knowledge and professional experience [Ochendowski 2014]. Article 84 CAP states it is an expert opinion issued by someone appointed as expert by an administrative authority as part of proceedings. An opinion issued prior to proceedings does not have this function, even if ordered by an authority and required by legal regulations.³⁵ In this sense, an opinion drafted by someone who does possess special knowledge but who is not appointed as expert by an authority and has compiled their opinion as requested by a party is not an expert opinion [Wróbel 2000, 492].

The legislation provides for the possibility of admitting expert evidence yet fails to designate its specific form. Judicial decisions point out absence of regulations in this respect means an expert may present their opinion orally or in writing.³⁶ Minutes are drafted of oral expert evidence which are then read and submitted to be signed by the expert (Article 67(2) part 2 CAP and Article 69(1) CAP). Any authorial corrections should be permanent and confirmed by the opinion author.³⁷

The legislation fails to identify essential parts of an opinion, either, which it does with reference to the civil procedure [Jaśkowska, Wilbrandt–Gotowicz, and Wróbel 2021]. Judicial decisions indicate³⁸ a correct expert opinion in a case should designate and clarify reasons for its conclusion so that an authority is able to assess the motivations without going into specialist knowledge. If an opinion fails to answer questions set, therefore, an authority conducting proceedings should require it to be supplemented, particularly if parties raise specific objections to the same opinion.³⁹ A party is entitled to criticise an expert opinion and fight any available evidence.⁴⁰

In addition, judicial decisions are right to note an expert opinion should con-

³⁵ Judgment of the SAC of 24 September 1992, ref. no. I SA 807/92, Legalis no. 2474951.

³⁶ Judgment of the SAC of 24 May 2001, ref. no. II SA/Gd 233/99, Legalis no. 123137.

³⁷ Judgment of the RAC in Gliwice of 20 July 2016, ref. no. II SA/GI 375/16, Legalis no. 1541579.

³⁸ Judgment of the RAC in Rzeszów of 28 March 2012, ref. no. II SA/Rz 1172/11, Legalis no. 471779.

³⁹ Judgment of the RAC in Poznań of 4 December 2013, ref. no. IV SA/Po 419/13, Legalis no. 950224. The requirement of an oral or written addition to or clarification of an opinion, as well as additional opinion from the same or other experts is explicitly provided for by the CAP in Article 286.

⁴⁰ Judgment of the SAC of 22 May 2014, ref. no. I OSK 2706/12, Legalis no. 1042866.

tain reasons for its position, indicating research undertaken and clarifying any doubts.⁴¹ Its wording should be comprehensible to parties, authorities, and court, who do not possess special knowledge reserved for experts.⁴² Lack of clear reasons for conclusions in an expert opinion prevents an adequate evaluation of its probative value and causes a decision based on such an opinion to be issued in violation of discretionary evaluation of evidence.⁴³ Therefore, an authority should dismiss an expert opinion without a statement of reasons.⁴⁴

The doctrine also assumes an expert should indicate what they were guided by, what sources they used, and what literature they relied on when providing reasons for their opinion [Daniel 2013, 169–70]. Therefore, an authority presented with an opinion full of general statements, without scientific assessments of the problem or identification of source materials to help evaluate its theses, as well as containing declarations the problem is hard and complex and conclusions appended with ‘it seems’ should either instruct its author to supplement their opinion or appoint another specialist to appraise the problem in a scientific manner that does not give rise to doubts.⁴⁵

Expert evidence must be reliable, concrete, correct as to its substance, exhaustive, with logical reasoning, and thus convincing and comprehensible [Kosmalska 2016].⁴⁶ Circumstances related to facts of a case are objects of expert opinions. An expert opinion is not designed to establish facts of a case, though, as this is the job of an authority. Even more so, an expert opinion cannot evaluate evidence gathered by an authority or suggest a case resolution.⁴⁷ An opinion should only contain an expert’s statement including special knowledge that can be utilised by an administrative authority to properly establish or assess facts [Szalewska and Masternak, 2010]. An expert opinion should facilitate evaluation of evidence where special knowledge is needed to this end. Legal qualification of facts⁴⁸ and application of law⁴⁹ are the sole competence of an authority charged with making a decision. An expert appointed by an authority cannot make de-

⁴¹ Judgment of the SAC of 19 February 1999, ref. no. II SA/Wr 1452/97, ONSA 2000, No. 2, item 63; judgments of the RAC in Warsaw of 6 January 2006, ref. no. IV SA/Wa 1697/05, Lex no. 196467 and of 1 June 2006, ref. no. IV SA/Wa 440/06, Legalis no. 286858. Such a statement of reasons is an obligatory part of an opinion in civil proceedings, meanwhile.

⁴² Judgment of the RAC in Rzeszów of 3 December 2015, ref. no. II SA/Rz 676/15, Legalis no. 1399534; judgment of the SAC of 18 January 2007, ref. no. II OSK 761/06, Legalis no. 230233; judgment of the RAC in Rzeszów of 15 November 2017, ref. no. II SA/Rz 1148/17, Legalis no. 1699378.

⁴³ Judgments of the RAC in Szczecin of 29 April 2015, ref. no. I SA/Sz 18/15, Legalis no. 1274566 and in Gliwice of 6 July 2016, ref. no. IV SA/GI 1069/15, Legalis no. 1541518.

⁴⁴ Judgment of the SAC of 30 June 1981, ref. no. II SA 33/81, ONSA 1981, No. 1, item 65.

⁴⁵ Judgment of the RAC in Warsaw of 30 November 2005, ref. no. I SA/Wa 2084/04, Legalis no. 97210.

⁴⁶ Judgment of the RAC in Łódź of 26 June 2014, ref. no. I ACa 30/14, Legalis.

⁴⁷ Judgment of the RAC in Cracow of 25 August 2020, ref. no. II SA/Kr 576/20, Legalis no. 2467798.

⁴⁸ Judgment of the SAC of 13 October 2020, ref. no. I OSK 2858/18, Legalis no. 2488807.

⁴⁹ Judgment of the RAC in Gliwice of 6 February 2017, ref. no. I SA/GI 1015/16, Legalis no. 1597419; judgment of the SAC of 19 December 2013, ref. no. II OSK 1817/12, Legalis no. 1413054.

clarations about this subject matter and if they do, this part of their opinion is not binding on an authority [Pachnik 2010].⁵⁰

Judicial decisions are consistent in decreeing an opinion may not concern applicability or interpretation of law [Daniel 2013, 169–70].⁵¹ Thus, a legal opinion is not an expert opinion under Article 84(1) CAP.⁵² This view acknowledges the traditional concept of the expert's role in administrative proceedings as someone with specialist knowledge about some facts of a case and of an authority as a legal expert who must know legal regulations and interpret them in an independent capacity. Law requires special knowledge, in possession of an authority. An authority avoiding a legal evaluation and relying on an expert is deemed inadmissible. In the event, an expert opinion would replace decision of a competent authority, which should not be the case.

An isolated decision can be cited, though, that admits an expert opinion on law in administrative proceedings. It is assumed a detailed legal opinion by an independent lawyer specialised in a given area of law is acceptable as evidence that helps to assess circumstances essential to resolution of the case.⁵³ This view rests on the assumption an authority has limited specialist knowledge about all areas of law. It cannot be shared, however, since an expert opinion concerns facts of legal import to a case, not its legal status [Adamiak and Borkowski 2019].

Although an expert opinion may be executed in writing, it is universally assumed expert evidence is personal, not documentary. There are views, though, claiming an opinion in writing is documentary evidence. This is the case where legal regulations require documentation of certain facts by submission of a specialist opinion in a given field without appointing an expert pursuant to Article 84 CAP. Judicial decisions point out documentary evidence also includes expert opinions submitted by parties, expert appraisals, reports drafted by experts prior to administrative proceedings and included by an authority as evidence in a case.⁵⁴ Documentary evidence can be taken if it exists when an authority decides to admit such evidence in a case. If an authority becomes convinced as part of proceedings an expert opinion needs to be sought, the evidence should be taken by force of Article 84 CAP, not in order to compile a document to be included into evidence [Szalewska and Masternak 2010, 797].

Such a document certainly cannot be treated as official, though, given the notion of official documents in provisions of the CAP does not provide grounds for qualifying expert opinions as official documents. The subjective criterion in the definition of the official document under Article 76(1–2) CAP, according to

⁵⁰ Judgment of the RAC in Wrocław of 11 March 2010, ref. no. II SA/Wr 545/09, Legalis no. 617512.

⁵¹ Supreme Court = Administration, Labour and National Insurance Chamber judgement of 1 July 1998, ref. no. I PKN 203/98, Legalis no. 43898 and judgment of the SAC of 23 April 2008, ref. no. II OSK 1845/06, Legalis no. 140290.

⁵² Judgment of the SAC of 17 May 2017, ref. no. II GSK 2610/15, Legalis no. 1629512.

⁵³ Judgment of the SAC of 19 February 1999, ref. no. I SA/Lu 43/98, Legalis no. 1442863.

⁵⁴ Judgment of the RAC in Warsaw of 9 July 2007, ref. no. IV SA/Wa 15/07, Lex no. 362515; ref. no. I SA 807/92.

which official documents can only be executed by competent state or local authorities or by entities acting as part of individual cases they are instructed to conduct by force of law or agreements which are resolved by way of administrative decisions or certifications, is the key obstacle. It must be finally concluded an expert should be treated as an autonomous source of personal evidence and their opinions as autonomous evidence [Wartenberg–Kempka 2003].

5. EVALUATION OF EXPERT OPINIONS BY AUTHORITIES

An expert opinion is expected to assist an authority with resolving questions of fact and facilitate proper assessment of evidence where special knowledge is required in a case [Wierzbowski and Wiktorowska 2020].⁵⁵ This is ultimately an authority who resolves these issues in its own name. This is affirmed by the doctrine and judicial decisions, which concur opinion of an expert appointed in administrative proceedings is not binding on an authority conducting such proceedings but, like any other evidence, is subject to discretionary assessment an authority undertakes with regard to the entire evidence in the case.⁵⁶ An expert is merely an ‘assistant’ with case resolution that requires special knowledge. Thus, an expert’s role is not to replace an authority in its decision-making capacities, since this is the latter who resolves a case, possibly with the aid of an opinion. An authority may therefore accept an expert opinion if it is found apposite but can dismiss it in part or in full and accept another opinion of its own, based on science or experience.⁵⁷

An expert opinion can only be questioned in obvious cases where it can be demonstrated to have been prepared in breach of the law or if it contains evident errors that undermine its value as evidence.⁵⁸ It can be attained by means of evidence to the contrary or requiring appointment of another expert.⁵⁹ An authority cannot then expect a competitive opinion compiled out of administrative proceedings but must take evidence from another expert opinion or hear the case with participation of the current expert.⁶⁰ It does not mean, however, an authority is bound to appoint experts until their opinions comply with expectations of a party. This would be contrary to the principle of objectivity and violate principles of objective proceedings.⁶¹

⁵⁵ Judgment of the SAC of 12 June 2013, ref. no. II OSK 380/12, *Legalis* no. 763735.

⁵⁶ Judgments of the SAC of 5 March 2002, ref. no. I SA 1978/00, *Legalis* no. 75116; of 5 October 2009, ref. no. I OSK 1444/08, *Legalis* no. 211846, and of 29 August 1997, ref. no. III SA 93/96, *Lex* no. 31598; judgment of the RAC in Warsaw 5 March 2002, ref. no. I SA 1978/00, *Lex* no. 81669.

⁵⁷ Judgment of the SAC of 22 November 2016, ref. no. II GSK 1017/15, *Legalis* no. 1577246.

⁵⁸ Judgment of the SAC of 17 March 2020, ref. no. II OSK 428/19, *Legalis* no. 2390893.

⁵⁹ Judgment of the SAC of 30 June 1986 r., ref. no. III SA 554/86, *Legalis* no. 41908, judgment of the RAC in Kielce of 26 July 2018, ref. no. II SA/Ke 350/18, *Legalis* no. 1819502 and in Gdańsk of 6 December 2017, ref. no. II SA/Gd 539/17, *Legalis* no. 1711944.

⁶⁰ Ref. no. I SA 1978/00.

⁶¹ Judgment of the SAC of 18 August 2017, ref. no. II OSK 2939/15, *Legalis* no. 1694387.

Probative value of an opinion, its reliability and utility to case resolution must be evaluated by an authority, although it is claimed expert opinions are the only evidence not to be assessed for reliability, only accepted or dismissed by public administrative authorities [Widła 1992, 84–89].⁶² When evaluating an expert opinion, an authority cannot limit itself to citing a conclusion to the opinion and should review reasons for the conclusion and verify the expert's reasoning for logic, practical experience, and correct argumentation in the statement of reasons [Ise-rzon and Starościak 1970, 178–79].⁶³ Correctness of conclusions must be assessed in view of evidence in the case and without going into specialist knowledge.⁶⁴ Evidence should be analysed and comments on evidence should be incorporated in reasons for a decision.⁶⁵

An administrative authority cannot undertake an independent evaluation of issues requiring special knowledge,⁶⁶ however, broaching on substance of an opinion and its foundations, since it does not possess the special knowledge available to an expert. It does not mean, though, the authority is released from the duty of assessing probative value of an opinion and its utility to case resolution. An authority is additionally obliged to address and respond to charges raised by a party. An opinion must be evaluated in conjunction with the remaining evidence collected. Should a party raise objections to contents of an opinion, therefore, an authority should present the charges to the expert in order to address them [Terlikowska 2017].⁶⁷ Only after a party's objections to an opinion are clarified and full evidence is gathered can an authority establish facts and form assessments required to make a resolution.⁶⁸

Evaluation of an opinion is also formal, which means an authority should verify it is compiled and signed by an authorised person, whether it contains required elements and is free from ambiguities, errors or omissions that should be corrected or supplemented for a document to serve as evidence.⁶⁹ An authority is

⁶² Judgment of the SAC of 22 September 2016, ref. no. I OSK 1120/16, Legalis no. 1534089.

⁶³ Judgment of the SAC of 12 December 1983, ref. no. II SA 1302/83, ONSA 1983, No. 2, item 106 and judgment of the RAC in Cracow of 4 October 2018, ref. no. II SA/Kr 1143/18, Legalis no. 1834084; judgment of the RAC in Cracow of 28 March 2019 r., ref. no. II SA/Kr 34/19, Legalis no. 1895410; judgment of the RAC in Warsaw of 14 February 2007, ref. no. VIII SA/Wa 67/07, Lex no. 386409; of 14 February 2007, ref. no. VIII SA/Wa 75/07, Lex no. 372556; judgment of the RAC in Lublin of 4 November 2010, ref. no. II SA/Lu 507/10, www.orzeczenia.gov.pl

⁶⁴ Judgment of the SAC of 29 November 2017, ref. no. I OSK 174/16, Legalis no. 1727307.

⁶⁵ Judgment of the RAC in Bydgoszcz of 18 December 2007, ref. no. II SA/Bd 807/07, Legalis no. 271681.

⁶⁶ Judgment of the RAC in Poznań of 30 January 2019, ref. no. IV SA/Po 1053/18, Legalis no. 1878903.

⁶⁷ Judgment of the RAC in Szczecin of 9 May 2012, ref. no. II SA/Sz 1398/11, Legalis no. 556377.

⁶⁸ Judgment of the RAC in Rzeszów of 7 March 2017, ref. no. II SA/Rz 1199/16, Legalis no. 1601864; judgment of the RAC in Białystok of 10 June 2014, ref. no. II SA/Bk 265/13, Legalis no. 1058010.

⁶⁹ Judgment of the RAC in Warsaw of 21 February 2008, ref. no. I SA/Wa 259/07, Legalis no. 271103; judgment of the RAC in Warsaw of 14 March 2007, ref. no. VIII SA/Wa 67/07, Legalis,

also authorised and bound to verify whether an opinion is complete, logical and reliable and possibly to require it to be supplemented.⁷⁰ In particular, an authority has the duty of addressing major differences between opinions of experts appointed in a given case. If an authority has received divergent opinions and evidence suggests only a single expert opinion cannot be relied on, contradictions between the opinions should be clarified by jointly reviewing such expert opinions or requiring additional opinions from other experts.⁷¹ The very nature of such evidence implies a resolving authority is obliged to compare and contrast different assessments by various experts in the same case.⁷² One opinion cannot be rejected and another accepted without examining the other, therefore, and an authority should explain why its resolution relies on one and why another has been found unreliable.

An administrative authority's negligence in this respect would constitute a major infringement on regulations that would affect outcome of a case.⁷³ If an authority convincingly argues in its decision why it has accepted one expert opinion and dismissed another, the authority's position cannot be effectively undermined for this sole reason, charging a resolution is based on defective determination of facts and their faulty legal evaluation.⁷⁴ These principles are of particular importance where proceedings are initiated *ex officio* to impose a duty on a party.⁷⁵

CONCLUSION

As a result of progress in knowledge and technology, reliable clarification of cases commonly requires expert opinions. Although this evidence, like any other, is subject to discretionary assessment of an authority and does not enjoy an *a priori* prevailing probative value, its dominant role in administrative proceedings is increasingly noticeable. Expert evidence is of major importance as its correct taking can contribute to explication of an administrative case and is occasionally a condition of resolving cases that require special knowledge.

Unfortunately, the institution of experts and their opinions are not fully governed by provisions of the CAP, like they in e.g. the Code of Civil Proceedings, which is highly negative. The CAP's regulation in this respect is limited to normalising situations where experts should be appointed and the capacity to act as an expert. Doubts concern not only who can be an expert, though, but also object

and of 2 February 2007, ref. no. IV SA/Wa 2383/06, Legalis no. 271640; judgment of the SAC of 28 February 2019, ref. no. I OSK 996/17, Legalis no. 1887754.

⁷⁰ Ref. no. IV SA/Wa 1697/05; ref. no. IV SA/Wa 440/06.

⁷¹ Judgment of the SAC of 19 February 1997, ref. no. SA/Sz 189/96, Lex no. 28534 and of 17 October 2019, ref. no. II OSK 1217/19, Legalis no. 2266570.

⁷² Judgment of the SAC of 26 June 1997, ref. no. SA/Sz 484/96, Lex no. 30819.

⁷³ Judgment of the SAC of 30 December 1980, ref. no. SA 645/80, Legalis no. 34455.

⁷⁴ Judgment of the SAC of 18 April 1984, ref. no. III SA 113/84, Legalis no. 35283 and ref. no. III SA 554/86.

⁷⁵ Judgment of the RAC in Warsaw of 12 May 2011, ref. no. I SA/Wa 2524/10, Legalis no. 365731.

of expert opinions, their role in administrative proceedings and forms of their preparation. Given the absence of legal regulations, these issues are currently resolved by judicial decisions, which could provide foundations for regulations.

Regulations of the Code of Administrative Proceedings need to be more accurate, following the model of the civil procedure, therefore, by regulating requirements of experts, indicating format and elements of opinions, and the option of requesting their supplementation and clarification, among other things. The option of receiving oaths from individuals to become experts in administrative proceedings needs to be considered as well.

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SECURITY OF PUBLIC FUNDING AND TRANSFORMATION OF CONTEMPORARY EUROPEAN UNIVERSITIES

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Abstract. The genesis of the European university dates back to the Middle Ages. It was then that the original university models that would be transformed in the subsequent centuries were developed. It seems that we are currently observing yet another stage of this ongoing transformation entailing challenges that result from the progressing, multifaceted process of verifying the model of W. von Humboldt's classical university. There is a trend indicating that after the common reception of the idea of enterprising university, European universities are now faced with the need to adapt to the reality of knowledge-based economy. Undoubtedly, one of the key aspects related to the direction of said changes revolves around the security of academic financing. There is a growing pressure on universities to become active participants in the process of developing knowledge-based economy. Under these new circumstances, universities seem, on the one hand, predestined to play a significant role in the same, and on the other, faced with the threat of decline resulting from the gradual limitation of access to public financing. They now find themselves at the centre of the financial game of budgetary subsidisation. Public spending in this sphere is strongly affected by the given country's overall financial standing and the adopted public spending policies. In ageing Europe, politicians cannot afford to ignore the needs of a wide group of voters who are more inclined to support arguments advocating increased financing of e.g. the healthcare system, rather than young people's education. In this context, it becomes apparent that universities must take active steps towards securing additional financing from the so-called third revenue stream, primarily the private sector. The research financing target of 3% GDP, adopted in the Lisbon and Barcelona Declarations (over 20 years ago), has yet to be achieved in Western Europe, despite intensive reforms implemented to that end. In this context, European universities continue to trail significantly behind their North American counterparts. At the same time, in order to maintain their historically high social standing and prestige, such institutions must not ignore relevant social and economic expectations.

Keywords: higher education reform, public financing, enterprising university, the idea of the European university, W. von Humboldt

1. ORIGINS OF THE EUROPEAN UNIVERSITY IDEA

One cannot discuss universities – communities of learners and teachers – without first considering their origins [Laskowska 2012, 30; Hutnikiewicz 1994, 40–41]. It is commonly accepted that the university as we know it was “invented” in

the Middle Ages, although some authors trace certain prototypes of the academia back to the Antiquity [Czeżowski 1994, 13; Idem 1946, 5]. It is often concluded that the classical notion of a university draws upon the traditions of ancient schools (in particular Plato's Academy and Aristotle's Lyceum), early medieval corporations (guilds), as well as autonomous, republican urban communities that emerged in northern Italy between the 10th and 12th c. [Sowa 2009, 11–12; Cwynar 2005, 46]. In this ideological, philosophical, and historical context the paradigm of seeking truth, goodness, and beauty within and for the sake of the community was ultimately developed [Sowa 2009, 13].

Ever since their first establishment, European universities generally sought to advance such values as: truth, autonomy, pluralism, freedom, and universality, which were all intertwined in the overall effort to uncover the real nature of the world. To deny those values would undermine the very foundation of the academic idea [Brzeziński 2006, 9; Idem 2011, 9–16; Skarga 2007, 9; Gieysztor 1998, 11; Brzeziński 1998, 91; Hutnikiewicz 1994, 40; Krapiec 2014, 77–95; Bollinger 2003; Iskra–Paczkowska 2012, 150]. Such conclusions stem even from a rudimentary, semantic analysis of the term *universitas*, which is clearly rooted in the notions of community and universality [Wyrozumski 1998, 16, 18–19; Furmanek 2006b, 142; Idem 2006a, 131; Hutnikiewicz 1994, 40; Starnawski 2007, 6], entirety, comprehensiveness, and shared character [Wenta 2011, 92; Czeżowski 1994, 16; Idem 1946, 8]. The core concept of *universitas* lies in a community of people (a corporation of students or teachers and students) brought together by a common goal – the pursuit of truth [Markowski 2005, 17; Michaud–Quantin 1970, 35; Huff 2003, 133; Twardowski 2018, 233; Baszkiewicz 1997, 35]. This koinonia of teachers and learners – masters and students (*universitas studiorum*) was to be a response to the complex problems of the contemporary and future world [Laskowska 2012, 30; Szmyd 2016, 47; Ziemiński 1997, 21]. Universities contributed to the great European community of learning that gathered individuals devoted to the creative pursuit of truth, based on the foundation of mutual respect and friendship [Sławek 2008, 87–88].

The term *universitas* first emerged and gained prominence in the medieval schools of Bologna and Paris, considered to have been the most thriving institutions of their kind at the time. A university was a voluntary, collective, homogenous community, an autonomous corporation of students – scholars, or teachers and scholars, active in the area of didactics and governed by its own applied laws [Markowski 2003, 71–72]. Only elite corporations of teachers, employing the highest standards of educations, could hope to attain the status of *universitas magistrorum et scholarium*. Such a corporation was governed by its own laws, was not subject to any external supervision, secured its own social backing, and enjoyed the privilege of organisational and legal autonomy. Student associations, particularly in the Bolognese university model, closely guarded their interests against the machinations of city officials, fought for university autonomy, and had a real impact on both the financial policies and curricula of their institu-

tions [Baszkiewicz 1997, 40].

2. UNIVERSITIES IN THE MODERN PERIOD, W. VON. HUMBOLDT'S REFORM

The medieval university has to be recognised as a fundamental civilisational accomplishment. Unfortunately, in later centuries the institution faced a wide spectrum of difficulties that challenged the very core of its concept. Already in that early period, universities had to master the art of adapting to the ever changing reality. One of the phenomena that deeply influenced the nature of universities was e.g. the emergence of rationalist thought in Europe, which challenged medieval concepts of the world and our place within it. This, in turn, necessitated evolution of the concept and role of universities in their turbulent social milieu. The idea of the university changed against the backdrop of momentous discoveries and scientific advances [Cwynar 2005, 50]. The nature of this progress as such did not undermine the continuity or significance of academic traditions. However, efforts were made to redefine the place of the university in the social, economic, and political spheres [ibid., 51].

Modern rationalist thought aimed to free universities from the burden of the medieval *universitas* model. To this end, in the early 18th century, higher vocational schools and academies began to emerge. Universities stopped conducting research due to, in equal measure, lack of social obligation to do so and absence of dedicated financing. It ought to be mentioned that in the aftermath of the Napoleonic reforms, foundations were laid for the university whose sole purpose was to educate future public administration staff. Consequently, it became more akin to a higher vocational school managed by public authorities than a university per se [Cwynar 2005, 51]. As observed in the doctrine, the uniformization of curricula and centralisation of the administration significantly limited universities' autonomy, leading to ossification of the institution and its central idea [Cwynar 2005, 52].

The mentioned ideological and organisational framework proved inadequate to the challenges faced by universities in the 19th century. It therefore became necessary to revitalise their concept and allow them to once again become active participants in the changing world. In the context of German academic structures, an attempt to do just that was made by Wilhelm von Humboldt. His proposed vision of a classical university [Zakowicz 2012, 62] advocated reforms of the overall education system that would stem from creative and practical implementation of German Enlightenment thought, in particular the Kantian idea of the university [Kant 2003, 12]. Immanuel Kant's concept, presented already back in 1798, posited a considerable autonomy of the academia from both the state and church authorities. The philosopher postulated freedom of scientific research, without prejudice to the state's prerogative of supervising the education process. This laid the foundations for the so-called liberal (free) university [Kant 2003, 55; Cwynar 53].

Humboldt strongly emphasised the need to return to full academic autonomy. He advocated greater independence from the state, freedom of scientific research and education. It was a rather radical and novel notion. The author argued that the concept of university should be rooted in: “unity of knowledge,” “unity of research and education,” and “unity of the academia and students.” All academic disciplines were to exist and interact in parallel [Zakowicz 2012, 62]. The goal of science was to pursue truth, which could only be accomplished by a university committed to the unity of research and education. Moreover, students and professors alike needed to contribute to the development and maintenance of the academic community (*universitas magistrorum et scholarum*) dedicated to the collective discovery of truth in the spirit of scientific unity (*universitas litterarum*). One key aspect of said autonomy pertained to independence in terms of financing and directing research [Sauerland 2006, 92]. The research process was to be free of the confusion brought by ideological or political interference [Zakowicz 2012, 63]. W. von Humboldt’s concept offered a challenging and creative compromise between theory and practice, between universities’ autonomy and their service to the state and society [Bloom 1987, 291]. The idea was not to merely reinstate the notion of *universitas* [Cwynar 2005, 54]. Instead, Humboldt aimed to restore the true and fitting place of the university in society in a way that would grant it freedom to pursue its goals.

Humboldt’s idea was widely embraced by many intellectual centres throughout Europe. And even though the author was not able to see his vision fully realised [Proctor 1991], his concepts became a key point of reference for modern universities, a model that is commonly evoked to this day. However, it is now becoming apparent that contemporary European universities are faced with new pressures and challenges that directly affect their evolution far beyond the framework of Humboldt’s vision.

3. A NEW VISION OF THE UNIVERSITY

In the current age of constant flux, the contemporary university must re-establish its place in the changing socioeconomic milieu. Indeed, opinions have been voiced calling for the complete redefinition of its role. However, one would argue that the optimum path entails neither a simple negation of its classical traditions, nor full acceptance of the university-as-mercantile-corporation model [Readings 2017, 196]. Instead, one ought to strive for the “golden mean” of a model that would allow universities to stay true to their mission and ideological foundations, while at the same time shedding the ossified weight of the past to dynamically and effectively respond to the needs of contemporary societies and economies.

The narration pertaining to the need for a reform entailing redefinition of the university’s role first emerged in the early 20th century. After WWII, Humboldt’s concept was reevoked by Karl Jaspers, who emphasised the continuously ongoing process of university evolution and called for the preservation of its timeless, in-

herent values in the process of reshaping its framework [Gadacz 2017, 13]. The same was to be facilitated, among other aspects, by the state's commitment to provide adequate funding [Jaspers 2017, 165]. However, critical opinions were also voiced in this context, e.g. by Hansa–George Gadamer [Sosnowska 2018, 181], who claimed that the return to the original model was no longer feasible. Main reasons for the same included the permanent trend towards universal availability of academic education, and decomposition of the professor-student relationship, defragmentation of the concept of scientific unity in favour of a sharply accentuated trend towards narrow specialisation [Gadamer 2008, 245; Sosnowska 2012, 132]. José Ortega y Gasset observed that in the current situation, short-term solutions will prove inefficient and that only an in-depth reform of the university can provide a new, viable framework for its activity and redefine its mission [Gasset 1978, 712].

The most radical vision professing failure of Humboldt's model was presented by Bill Readings, who concluded that we can currently only observe a smouldering ruin of the former university model. Scientists are becoming bureaucrats, universities – technocratic organisations, and students – consumers of knowledge as a commodity [Werner 2017, 7–8]. As universities are increasingly “Americanised” in this age of global culture [Readings 2017, 18], they are fast evolving into business organisations whose primary focus is on the efficiency of research and education, rather than discovery of the nature of things [Werner 2017, 8].

The discourse regarding the place of universities in the contemporary world is ongoing and indeed intensifying in the face of the current economic, social, and technological changes taking place worldwide. On the one hand, it is argued that “a university is a powerful, complex, demanding, and competitive business requiring continuous, large-scale investment” [Kwiek 2010, 97–98] which, as a dynamic organisation, is inadvertently bound to the rules of market interactions. On the other hand, however, the concept of the university's “market infusion” has many vocal opponents. It has been pointed out that treating universities as institutions merely rendering educational services and focused solely on offering specialist knowledge stands in direct opposition to the core purpose of their existence. In that, they become providers of commercial (rather than public) services, fully dependent on market forces and political influences [Nearly and Saunders 2011, 347; Sławek 2002, 27; Marcel 1986, 58]. In the context of some American universities and their experience, wherein the financial aspect determines the directions of the conducted studies, it has been argued that science is now becoming a commodity, its creative potential declining, which results in the atrophy of the university's real, causative power in social life [Simpson 1995, 163; Inman 2009; Sławek 2002, 130; Hancock 2010, 48–49].

It seems that between the fairly widespread criticism of the concept of the business-oriented university treated as a player on the predatory market of commercial services, and the recognition of the contemporary reality wherein it is forced to operate, one has no choice but to seek a path towards a certain compromise.

The same was proposed in the late 1990s with Burton Clark's vision of the enterprising university [Olechnicka, Pander, Płoszaj, et al. 2010, 20; Kwiek 2010, 189]. In this concept, entrepreneurship is achieved in parallel, simultaneously on two distinct levels. Firstly, the university itself (or more specifically, its competent bodies) ought to undertake a number of activities aimed at improving its innovativeness and operating efficiency. Secondly, academic staff should aim to effectively use their knowledge and research results with a view to developing final products suitable for market applications. All of this is to facilitate a competitive advantage vis-à-vis other scientific centres, and to bolster cooperation with the university's economic milieu. The key characteristics of the enterprising university as identified by Clark included: modern management, enhanced collaboration with the environment, search for new sources of financing, adequately adapted organisational structure, and development of a culture of entrepreneurship [Kwiek 2008, 193–202; Olechnicka, Pander, Płoszaj, et al. 2010, 20]. A particularly important aspect in this context is the ability to diversify sources of financing. It is expected that apart from the primary pool of governmental funding, a university should strive to secure other sources of so-called "third stream revenue." In the wealthier OECD countries, the tendency towards this particular vision of university financing is already fairly well established [Kwiek 2010, 247].

The enterprising university is to constitute a strong intellectual centre, open to economic progress and ongoing social changes, but at the same time autonomous and free with regard to the directions of scientific research conducted [Denek 2013, 18; Boulton and Lucas 2011, 53, 58–60; Sójka 2008, 122–23; Łazuga 2008, 178; Woźnicki 2007; Szafranski 2013, 10]. This concept has attracted a number of advocates who firmly emphasise that the values, tradition, and mission attributed to universities are not merely outdated platitudes [Salmonowicz 1998, 60; Denek 2013; 8], but at the same time recognise the merits of healthy competition and professionalisation of the conducted activity. A university must become an active market player, capable for securing new, diversified sources of financing and accepting responsibility for its own financial standing [Goćkowski 1998, 25]. This becomes even more pressing given the evident worldwide trend towards limiting university funding from public resources in favour of alternative revenue sources [Kwiek 2010, 247].

4. THE NEED FOR REFORM. DIAGNOSIS OF THE MAIN PROBLEMS AND TRAJECTORY OF CHANGES

For a number of years, there has been a strong pressure from West European governments on the aspect of comprehensive accountability for any funds provided to the academia [Pachociński 2004, 13]. This tendency closely relates to a whole range of problems (e.g. related to globalisation, demographics, crisis of public finance and the public service sector) faced by European states. Undoubtedly, the emerging difficulties will also strongly affect institutions such as

universities. The ongoing socioeconomic changes strongly necessitate adequate and in-depth reforms [Altbach, Reisberg, and Rumbley 2009; Kwiek 2010, 19]. On a continental scale, the directions of change were delineated e.g. by the European Commission in the Lisbon Declaration adopted on 23–24 March 2000. The document identified the development of competitive and dynamic knowledge-based economy as the main priority. In practical applications, the premise of the Lisbon Strategy provided guidelines for the efforts made by individual universities, particularly with regard to financing research. Evident shortages in this area were recognised. However, the implementation of the thus adopted programme would require a considerable increase in resources allocated to this area (both public and from the private sector). Although EU Member States vary considerably in terms of research-related expenditures, and in some countries relatively high levels thereof were already reached in the previous decade, overall, the European Union continues to trail behind the USA or Japan in this respect. For this reason, a goal adopted in the Declaration was to increase research financing to the level of 3% GDP within the subsequent decade – which was to be accomplished with considerable involvement of the commercial sector. Indeed, the anticipation that entrepreneurs would contribute to the achievement of the planned 3% threshold was directly expressed in the document, with the increase in private sector spending expected to reach 55% by 2001 and 66% by 2010. Two years after adopting the Lisbon Declaration, the European Committee confirmed its commitment to allocating 3% of its GDP to research and development in Barcelona. Notably, the second document underlined that the burden of such spending should be borne primarily by entrepreneurs. It was agreed that two thirds of the financing expenditures were to be covered by the private sector, and only one third from public resources [Okoń–Horodyńska 2003, 13–28].

Undoubtedly, contemporary universities are forced to operate under increasingly difficult conditions. The financial standing of the entire higher education system is directly dependent on the overall condition of public finance in a given country, as it is that situation and the adopted policy of redistributing public resources that determine the level of funding allocated to this sector. The same underlines the need to develop methodologies that would facilitate the capacity to quickly adapt to the ever changing circumstances, be it economic, social, or legal [Kwiek 2008, 182–85]. One cannot but subscribe to the opinion that the experience of recent decades clearly points towards a tendency, observable in the ongoing debates and undertaken reforms, to negate the concept of a university as a social institution with a certain unique value, deserving a privileged position within the public sector. Indeed, it has even been argued that in most of Western Europe, the specific grace period enjoyed by universities (for over half a century) has long ended. This fact is not without severe consequences for the academia. European universities have long been (and still are) dependent on public funding [Idem 2010, 30]. At the same time, attention has been also drawn to the alarming phenomenon of reforms introduced on a “returning wave” basis, which results in

a situation where none of the subsequent reforms actually leads to the final stage yielding a fully transformed university. Hence, the relationship between the state and the higher education system remains in permanent flux, which generates continuous tensions. Paradoxically, this fact has now become an immanent, if unwelcome, feature on the social, economic, and legal milieu in which universities are expected to operate [Idem 2013, 248–51].

5. LEVEL AND SCOPE OF FINANCING. DOMINANT TRENDS

Reflexions on the complicated situation of contemporary universities are found not only in texts published by the academia. Alarming reports (particularly in the context of our region of Europe) [Dobbins and Kwiek 2017, 519–28; Antonowicz, Kohoutek, Pinheiro, et al. 2017, 547–67] have also been presented by e.g. the World Bank, European Commission, OECD, or UNESCO [Pachociński 2004, 45–57]. Already two decades ago, the respective elements of the unfavourable situation were thoroughly analysed (in particular the poor condition of public finances) and it was concluded that the same would be a long-term situation related to the exacerbating demand for increased financial outlays in the entire public sector [Kwiek 2010, 31].

Under the observed circumstances, one is faced with the pressing problem of not only maintaining the present level of university financing but – given the new demands related to knowledge-based economy – actually significantly increasing the same. Such questions are particularly dramatic in European countries that only relatively recently turned the corner towards systemic transformation and are now faced with a plethora of economic problems – including a severe crisis of the public sector. Literature offers a number of potential solutions to this dilemma, including the already mentioned concept of the enterprising university which met with widespread interest as one of the possible ways of facilitating universities' effective adaptation to the new socioeconomic circumstances. However, the same is not treated as the sole panacea for the contemporary difficulties. The aforementioned idea of knowledge-based economy is also considered as the expected next stage in the ongoing evolution. The aforementioned perspective shaped a range of new expectations, particularly that universities will not only “produce” knowledge but also facilitate its transfer to the economy (e.g. via specialised incubators, centres, etc.). Moreover, the process of innovation as such is also being rethought with a view to it becoming considerably more inclusive and interactive. This is to strengthen the network of associations between respective partners, including universities which are expected to engage in relationships with the most highly developed and innovative economic operators. Additionally, universities are to become creators of local development and facilitators of a development- and innovation-friendly environment for local entrepreneurs [Olechnicka, Pander, Płoszaj, et al. 2010, 20; Kwiek 2010, 16–17; Idem 2008, 200–202].

In Western Europe, in-depth reforms of the higher education system have been intensively ongoing for several decades now. However, literature and various published reports (e.g. by the European Commission, OECD) firmly stress that the same are still far from complete and will likely have to continue in the coming years. The current transformation is commonly perceived as an “inevitable” or even “permanent” phenomenon. It seems that the introduced reforms are, in a way, harbingers of further necessary changes aimed at developing a new kind of relationship between the university and the state financing the same [Altbach, Reisberg, and Rumbley 2009, 165; Kwiek 2010, 12]. In this context, it may be interesting to briefly discuss the evolution of higher education, directions of changes and trends observed to date. At the threshold of the new decade, a number of collective reports pertaining to this context have been prepared, e.g. by OECD.¹ With regard to issues related to financing higher education institutions, it was noted that direct state funding remains the dominant revenue stream for universities. Other sources such as student tuition fees, grants, donations, commercialisation of knowledge (patents, licenses), as well as various services (e.g. lease, conferences) are still of secondary importance. It seems, therefore, that in the global perspective the situation has not significantly improved compared to the previous decade. Naturally, this in no way negates the fact that universities make considerable efforts to seek and secure other (alternative to the governmental stream) sources of financing. One has to agree with the opinion that this trend is not temporary, but rather a permanent inclination towards diversification and definition of new revenue sources [Kwiek 2010, 54].

Even though a number of key difficulties faced by universities in this context are similar and common to all the institutions, there are also many hurdles that are characteristic of respective regions or countries. Alongside the main trend of transformation (e.g. within the framework of the aforementioned Europeanisation of problems or the processes of globalisation), specific differences at the national level are also a factor, mainly stemming from particular local circumstances, e.g. historical, social, or economic. Notably, this tends to be true for the overall policy of higher education financing. It will be worthwhile to discuss some of the phenomena and tendencies observed in this context over the last decade. The aforementioned OECD reports draw particular attention to the level of spending measured as percentage of the GDP. As already discussed, in the model adopted by the Lisbon and Barcelona Declarations, this value was expected to reach 3%. Meanwhile, inclusive of all relevant government spending as well as contributions from private investors and market revenues, on average, OECD countries spend 1.5% of their GDP on higher education (the value is between 1 and 2% for respective countries). This stands in clear contrast to healthcare spending which, in 2018,

¹ See: *Education at a Glance 2019: OECD Indicators* [hereinafter: OECD 2019], <https://doi.org/10.1787/f8d7880d-en> [accessed: 02.02.2021]; *Resourcing Higher Education: Challenges, Choices and Consequences, Higher Education* [hereinafter: OECD 2020], <https://doi.org/10.1787/735e1f44-en> [accessed: 02.02.2021].

reached the average level of 8.8% GDP, varying between 4.2% and 17% in respective countries. There also continues to be an observable gap between the level of financing in the USA and Canada on the one hand, and European countries on the other (OECD 2020).

The dominance of state funding in the overall financing streams of higher education institutions has been almost a given for many years now. However, also in this area, considerable discrepancies can be observed between respective countries. Such differences are present both in the transcontinental perspective, and in the narrower European context. For instance, the percentage of financing from private sources varies between the lowest values observed in Norway, Austria, Sweden, or Finland on the one hand, and up to 50% contribution reported for Chile, Japan, Australia, and the UK. In turn, the percentage contribution of state funding varies between 30% in the UK and over 90% in Norway, Finland, and Austria (OECD 2019).

Notably, in many cases it was observed that it was the decrease of public funding that triggered the simultaneous increase in the inclusion of private sources of financing (e.g. in Australia, Belgium, Ireland, Spain, or the USA). It should be added that many countries adopted different formulas of publicly funded support for students (public-to-private transfer) with a view to improving accessibility of higher education for lower income students. In OECD countries the allocation in this area fluctuates around 9%. Usually, countries with the highest tuition fee levels also offer the most extensive student support (financing). In Australia and the UK, the same reaches over 20%. At the other end of the spectrum, in countries where the tuition costs are the lowest, e.g. the Czech Republic, Estonia, Lithuania, Portugal, Slovenia, Sweden, or Turkey, such financial support does not exceed 1%. On the other hand, there are also countries where a high percentage of private sector revenues is not accompanied by the provision of public support, e.g. Chile, South Korea (OECD 2019).

As a sidenote, it could be added that the high percentage contribution (in most OECD countries) of state financing is even more evident at lower levels of education. In the case of primary, secondary, and postsecondary education, 90% of the resources available are obtained through state funding, whereas in the case of higher education, the same, in the perspective of several years, averaged at approx. 66% (the contribution of private sector revenues to the financing structure depended on the adopted tuition fee system). Simultaneously, over 60% of overall private sector contribution was associated with only a handful of states, including: Australia, Chile, Japan, South Korea, the UK, and the USA (OECD 2019).

Interesting conclusions also follow from a comparison of the general pool of public resources allocated to the entire sector of education and the portion thereof allocated to higher education. As indicated in the OECD reports, in 2016, OECD states spent on average 5% of their GDP on all education sector institutions (including higher education). At a closer look, however, the particulars of the same reveal substantial discrepancies. On average, funds allocated to lower-tier educa-

tional institutions (primary, secondary, postsecondary) corresponded to approx. 3.5% GDP, i.e. considerably more than applicable to higher education (1.5% GDP). It is noteworthy at this point that the private sector plays a significantly greater role in the financing of higher education (on average, roughly 1/3 of the spending, which corresponds to 0.5% GDP), as compared to approx. 1/10 of the overall spending applicable to lower tier education (0.4% GDP). Between 2010 and 2016, the entirety of expenditures made in the sector of education (including all tiers, from primary to higher) relative to the GDP decreased by nearly 2/3 (in OECD and partner states), despite the simultaneous increase of the GDP, which grew more dynamically than said spending. Relative to the GDP, education financing varied between approx. 6% in Chile, Israel, New Zealand, Norway, the UK, and the USA, and approx. 3–4% in the Czech Republic, Ireland, Italy, Japan, Lithuania, Luxemburg, Russia, and Slovakia. A number of contributing factors could be considered in this context, including e.g.: the number of students, length of university programmes, or efficiency of the funds' distribution. In the case of higher education, the level of spending is affected by the criteria of accessibility, number of students in respective sectors and areas of study, and scope of research investments (OECD 2019).

It should be added that the spending structure was strongly affected by the global economic crisis of 2008. The entire system of education financing continues to experience its aftermath. The education spending started to increase in 2010, with the simultaneous but lower increase observed in terms of the GDP. Due to the above, the level of said spending had to be adapted to the current budgetary situation. Given the slower GDP growth between 2010 and 2016, the average financing level in OECD countries decreased by approx. 7%. In the context of higher education, around 1/3 of OECD states increased their spending (between 2010 and 2016), while at the same time maintaining or even reducing the level of spending allocated to lower-tier education (OECD 2019).

6. FINAL REMARKS

There can be no doubt that over the last several decades, an intensive and necessary process of higher education reform has been ongoing in Europe. One can observe a tendency suggesting that after the fairly universal reception of the idea of the enterprising university, European academia now faces yet another challenge – the need to adapt to the reality of the rapidly developing knowledge-based economy. In fact, this is the direction in which the idea of the new, contemporary European university is now evolving. It seems that in their essence, the concepts of the enterprising university and knowledge-based university are mutually inclusive. Indeed, they seem to complement each other fairly well. Clearly, contemporary universities cannot (and do not) restrict their evolution and adaptation to ever changing circumstances solely to the formula of the enterprising university developed by Burton Clark back in the 1990s.

If they wish to maintain their historically high social status and prestige, European universities must not ignore the economic expectations expressed in their context. There is a growing pressure on universities to become active (even leading) contributors to the process of developing knowledge-based economy. This, however, requires the implementation of in-depth reforms whose scope and subject matter go beyond any changes introduced so far. Under these new circumstances, universities seem, on the one hand, predestined to play a significant role in the same, and on the other, faced with the threat of decline resulting from the gradual limitation of access to public financing. They now find themselves at the centre of the financial game of budgetary subsidisation. Undoubtedly, the financial standing of the entire higher education system is directly dependent on the condition of state finance. After all, public outlays made in this sphere depend on the overall national budget. In this context one has to pose a key question that regards not so much the theoretical diagnosis of the necessary directions of economic development, but rather the actual capacity of governments to provide adequate financing to higher education institutions. In ageing Europe, politicians cannot afford to ignore the needs of a wide group of voters who are more inclined to support arguments advocating increased financing of other public sectors (e.g. healthcare), rather than young people's education. At the same time, in the context of the complex global economy, severe crises, and the pressing need for numerous reforms in the public sector, the governments of respective European countries are faced with a relatively limited ability to increase budgetary spending.

In this context, one should highlight the clearly observable problem of funding university activities solely from public resources. It is now becoming increasingly difficult to question the need for universities to engage in various activities aimed at securing additional sources of financing, the so-called third revenue stream. The latter refers primarily to funds obtained from the private sector. For over 20 years now (and despite intensive reforms implemented in Western Europe), the planned funding of scientific research at the level of 3% GDP has not been reached. Based on an analysis of data provided in the discussed OECD reports, one arrives at the alarming conclusion that even despite ongoing diversification of financing sources, European universities still trail far behind their North American counterparts in this respect.

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VIOLENCE AS A SOCIO-LEGAL PHENOMENON AND PROBLEM

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Abstract. Searching for search results in the reconstruction and construction of scientific research results, must go hand in hand with the results of scientific research, the results of moral research, social reform, activities related to academic activities, as well as economic activities, in search of data on people – his humanity, raise the delay and culture society. We must learn to be in front of each other in the human-human relationship. It should be emphasized that the regression of humanity cannot be stopped with punishments and fear. He will restrain himself with a wise, demanding, responsible and consistent love.

Keywords: violence, development, personality, humanity, family

INTRODUCTION

Certain issues have been chosen for analysis, with the awareness that this is only an exemplification of the problems, and not their comprehensive presentation. The term violence is most often understood as relations between people characterized by the use of force, both verbal and non-verbal – harming and violating personal dignity. It is a phenomenon, behaviour and situation that violates basic social standards, disorganizes the social order, and the functioning of social institutions constitute a negative fact, causing great loss and social-psychological damage. Many people have no idea how their own lives reflect the rapid changes in our world.

The problem of violence has been widely discussed in the Polish literature as well. There are fewer supporters of the thesis that violence concerns a certain social margin, social pathology, or people with personality disorders – it is confirmed by the practice of, among others, lawyers and courts. At the same time, it is possible to encounter persons with immature personality, egoistic, irresponsible, toxic, aggressive, dishonest, narcissistic, willing to live at someone else's expense, not guided by ethical and moral principles. There are individuals who are characterized by an inability to have emotional relationships with other people, objects of attitude to sexual life, lack of guilt, shame and responsibility, as well as inadequate antisocial behavior, self-destructive lifestyle, failure to distinguish the boundary between reality and fiction, truth and lies, lack of fear, frequent blackmail suicide and self-damaging tendencies. From generation to generation there is more and more emotion and less love in the world. The number of aggression and other disorders of human ties increases, which has been long reported by scholars of various countries. These problems are clearly interdisciplinary.

It is known that social standards cannot be enforced by laws. Compliance is their *a priori* assumption. However, making a law is accompanied by trust in its addressees and the hope that they will obey it. Laws not calculated to be effective are pointless and immoral. The state has an apparatus of execution and repression, but repression has its limits. Once they are breached, the law loses its meaning. Trust and hope in the legislature's view are also important as protection against the citizen being perceived as a potential criminal. Some assume that the law will cure society, remedy its ills, separate the good from the bad, make it possible to settle accounts with the past. In these expectations, the law grows to the role of an instrument of happiness. Man is no longer perceived as a subject of law, but as someone who still needs to be regulated.

1. HUMANITY AND DIALOGUE

K. Lorenz, in a book entitled "The Regress of Humanity," wrote "In the present era, the prospects for the future of humanity are extremely sad, if not killed by nuclear weapons or environmental poisoning, they are threatened by a gradual regression of all the qualities and achievements that constitute their humanity." He believes that the mind becomes the enemy of the soul and leads to perdition. He writes that "today's youth is in a particularly critical position. In order to avoid the threatening apocalypse, it is necessary to reawaken among the young the sense of value, beauty and goodness suppressed by scientism and technological thinking" [Lorenz 1986, 77, 170, 190].

The world we live in is characterized by a new way of social and cultural organization. How, then, will man function in this system. However, it is a distinctly different world from the one envisioned by classical social theory. A. Elliott has critically discussed many of the major perspectives in contemporary social theory. He points out that "social theory deals largely with issues of repression, oppression, and humiliation resulting from asymmetrical social relations: it is a strongly political, sometimes melancholic, but deeply human critique of the social forces that are responsible for the self-destructive pathologies in modern societies. The devastation of human life today is so serious that, according to many social theorists, only by confronting the worst and most painful aspects of contemporary global realities is it possible to hope to create viable social and institutional alternatives" [Elliott 2018, 12ff].

We should create laws that bring to the fore the security of human rights, that support human political activism, that hold the powers of government in check, and that in criminal cases emphasize the victim's right, the accused's right, a liberating, activating law, a law enacted not "against," the famous anti-bullying laws, but enacted "for" the sake of human beings. If to recognize the inherent rights of man, and at the root of these rights the inherent dignity of man, then it is thereby assumed that a life worthy of man is possible. A democratic legal state is built on this assumption. Neither maximalism nor minimalism, but realism. The

law is to protect the human being in such a way to allow the person to be himself. To be a man endowed with great imagination and the creative power of his own life. There is a field of activity of those groups and communities which show the good, mobilize for its realization, direct the use of freedom, assimilate the ability of valuing, integrate people, make people aware of their dignity, indicate the sense of life and strengthen the meaning of this sense. This cannot be achieved by law alone; behaviors, phenomena and situations should be covered by organized educational, preventive and curative activities.

Neither the state nor law can determine what kind of man should be, but literature, philosophy, art and religion, especially Christianity, try to suggest it. The Christian religion and the democratic legal state are based on the same assumption that man can succeed in his humanity. Affirmation of man is the ideological foundation of this relationship. The state, built from the bottom up on the basis of the people's basic rights, lives from the activity of the citizens and depends on them. Basic human rights are perceived not statically, but dynamically as a system of social communication. The private, family and community life of a human being is an area of dynamic changes and, at the same time, of research of various sciences.

Concepts have been formulated over the centuries, which have guided thinking about man and the family at successive stages of development of a given discipline, leaving behind various myths and stereotypes. Violence and especially aggression was considered as one of many forms of behavior in everyday life. Therefore, violence is not a new thing. Historically it was used as an acceptable way to exercise control and power. Violence against children, for example, has been found in educational ideas and practices [Siejak 2016; Badinter 1998; Balcerek 1986; Marrou 1969; Ariès 1995; Tazbir 2001].

There have been attempts at the level of social policy and law to distinguish socially acceptable violence and abuse of violence. The phenomena under discussion is one that has always accompanied human history. A. Kępiński, J. Aleksandrowicz, B. Suchodolski and others have written about the progressive dehumanization of life. E. Fromm devoted his works to this issue in the West. He warned against the growing phenomenon of human reification, against the denigration of man. But did societies and politicians draw any conclusions from these warnings? No! K. Obuchowski at one of the conferences stated, "The entire 19th century, a large part of the 20th century, thinkers of all those times, thought that in order to create something new, something better, it is necessary to destroy what is bad and old. Sigmund Freud thought so, Ch. Darwin thought so, K. Marx thought so, very many contemporary scholars thought so, that in the struggle the new is hardened, in the struggle something better is created. The good is created through the destruction of bad. We live in a time when more and more people are challenging this view. I wonder if it is not the case that from bad comes only bad. Destruction only leads to destruction. On the ruins of bad, flowers of good do not bloom. On the ruins of bad, flowers of bad bloom. It's just the way it is."

E. Fromm wrote that human nature becomes inhuman, that love disappears, but he did not lose hope that such a state of affairs can be changed. He argued that there are real possibilities for transforming society, among others, by influencing politics, changing the style of political life from aggressive, antagonistic to cooperative, devoid of hostility [Fromm 1968]. It seems that Fromm is right. Indeed, without influencing politicians' attitudes it is impossible to stop the process of dehumanization of life. They create social policy, establish laws and control their implementation. It is from them that aggression flows into the society in various forms, modeling social attitudes and infecting social relations. In places saturated with it, just any spark is enough to explode with uncontrollable hatred. It can be observed, e.g., on television or on the Internet, as well as in everyday life.

The regression of humanity is a process. Only the process consisting of consistent actions of governments and societies is capable of stopping it, not laws, conventions, codes or punishments. During one of the conferences, M. Łopatkowa (Senator of the Republic of Poland) stated: "Without removing aggression from the political scene, building a civilization of love, which John Paul II encouraged, seems to be impossible. This civilization can only be built together – governments and societies, believers and non-believers, children, youth, adults – who know how to love. And in order to know how to love, it is necessary to take at least as much care of the development of higher feelings in a child as we try to take care of his physical development."

It was once assumed that the world could be fixed by fixing institutions. It was believed that man is better the better he performs tasks. It is man the object, man the tool. Today we already know that man cannot be fixed by changing institutions. The world can only be changed by man, by changing the "I" and changing the concept and understanding who I am.

There are different concepts of human regression, among others, which claim that the human graph consists in the fact that people do not perform what they have been asked to do or they do not know what to do at that time. There is a conception in which the human regression is that a person thinks of himself as a part of this world rather than simply being his world. That man has no concept of himself. He does not know who he is. He is not a subject. And in order to be a subject, the essential Criteria must be met. It is necessary to know who we are, and therefore we must have our life goals, establish them, understand the meaning of life. Life programs should result from these goals, and not from someone telling us something. All this must be done in a wise and responsible way taking into account certain external circumstances. Thus civilization exists only where there are subjects.

Mindfulness is a fundamental feature for the reflection on the legal subjectivity of a person in the sense that the concept of person can only refer to someone having a mindful nature [Hervada 2008, 435]. Furthermore, mindfulness is the basis for ordering human conduct. The correctness of human conduct is measured by determining its conformity with reason. Hence *recta ratio* (right reason)

is the principle regulating and determining the proper order of human personal actions. Mindfulness is the measure of every single rule of conduct or the totality of human conduct [ibid., 440]. Brutalization of political life, domination of rape, terror, violence, is also a factor that reduces the sense of stability, certainty of man and stimulates negative emotions. At the same time, the degree of risk and uncertainty of life is increasing in all modern societies, which is partly due to the complexity of social life, to the fact that we all depend more and more on some anonymous large technical systems, the functioning of which we do not fully understand, which becomes second nature, becomes necessary for survival – many people in this situation are lost or powerless. A factor that increases distrust, uncertainty, a sense of instability, the globalization of social life, i.e. the fact that our fate depends increasingly on events so distant as to be inconceivable in the sense that we have no influence on it.

K. Lorenz writes that “the ability to love and make friends, along with all the accompanying feelings, arose in the same way in the course of human phylogeny as the ability to count and measure. This is true, but in order to develop the ability to love or the ability to count, the right conditions must be created. Someone has to teach it. If *Homo amans*, the loving man, is to save us from *Homo sapiens atrox*, the cruel and rational man, there is no other way. We should all, and in all areas of life, develop and protect positive interpersonal emotional bonds, and not allow aggression and violence to develop” [Lorenz 1986, 129]. This task should be treated as one of the most important to be undertaken by parents, educators, scientists, artists, lawyers, clergy, politicians and journalists then hopefully it would be possible to stop the regression of humanity. The process of becoming human lasts as long as we exist. To become human not only in a purely biological sense, but to become human in the full meaning of the word, it is necessary in our lives to refer to higher values or ideals.

As S. Chrobak rightly notes, “[...] conscious and free actions taken by man are directed to the world of values, here he makes a rational cognition and choice of values that enrich his spirituality. In personalism the principle of values is the integral and ordered human nature, it is the foundation of value formation, while the person is the proper ontic subject of values and constitutes their existential background. Values are constituted through the personal act; the experience of transcendence is given as the experience of a person’s transcendence in the act. The transcendence of freedom comes in the transcendence of morality. Its axiological value revealed in the deed, through the deed finds its ultimate reason in the self-fulfillment through the deed” [Chrobak 1999, 196–99].

Who the man is – this answer is related to the reflection, on his operative abilities, these in turn can be understood through the study of human actions [Krapiec 1992, 146]. Reflection on who the man is must take into account and explain his subjectivity, manifested in a particular culture, individual history and personal choices [Piechowiak 1999, 316ff; García Cuadrado 2010, 76ff].

Gradually before our eyes, but still we are not fully aware that new concepts of the human being are emerging. They are born with such difficulty because it is becoming increasingly clear that we have two radically different concepts of man. Every person has dignity and they want to have that dignity. There are more and more of these people today. Every person wants their life to be valuable and to get something out of it. There have always been such people, but today it is on a mass scale. Every person must know something about himself in the future, have some perspective, know something. A person must be helped to understand. A man who is afraid cannot look into the future. No one wants to live a crummy life. Every person would like something important to happen in their life. Human rights are rooted in the dignity of human person, in his goodness. The consequence of regarding man as a person is characterized by reference to inherent dignity, natural freedom and radical equality. The thesis of the primacy of person in decision-making processes, characteristic of the anthropoarchival conception of law, means that the findings of the scope of anthropology are taken as the starting point for the analysis of these processes' results.

Man is defined by the term "person" to emphasize that he does not allow himself to be reduced to what is contained in the notion of "individual of species," that there is something more in him "fullness and perfection of being" [Wojtyła 1985, 24].

In K. Wojtyła's philosophical anthropology, the issue of subjectivity of the human person is fundamental. Moreover, he notes that this problem "imposes today as one of the central worldview issues which stand at the very foundation of human «praxis», at the foundation of morality, [...] at the foundation of culture, civilization and politics" [Wojtyła 1976, 5–39], as well as at the foundation of law. K. Wojtyła indicates that the subordination of free action to the truth concerning the good is fulfilled through consciousness understood as "an essential and constitutive aspect of the whole dynamic structure constituted by person and deed" [Idem 1985, 40]. It should be noted that the author gives a specific meaning to the concept of participation, with reference to the various nuances of meaning that this concept has in traditional and modern philosophy. According to the author, participation means: the capacity of man to act "together with others," in which he not only realizes all that arises from the community of action, but precisely by doing so, he realizes all that defines the personalistic value of his act, and therefore his own fulfillment, as well as the transcendence and integration of the person that is included in it; the use of this ability. He emphasizes that without participation, acting "together with others" deprives the person's acts of their personalistic value [ibid., 333–36]. He points out that the proper subject of existence and action also when it is realized together with others is always the human being – the person [ibid., 342–43].

According to M.A. Krąpiec, openness in relation to the world is realized through cognitive actions, while in relation to persons it is realized through love [Krąpiec 1982, 34; Idem 2007, 42]. Man is a social being not only in the sense that he

is able to interact with other people. Man's social nature is not exhausted in his openness to relationships with others for functional benefits such as a simple division of roles or tasks in society [Bañares 2005, 57]. A person is social in his deepest ontological status, he is radically a being for another. And coexistence with others from the cognition and identity point of view, and touching the deepest personal dimension, enables a person to know himself – thanks to finding out that the other person is the same person as him, and in the sphere of intimacy of the other it is possible to capture with sufficient depth what is common to each person and what is individual [ibid., 22; Piechowiak 2005, 19ff].

Dialogue has become an important problem of contemporary intellectual culture. It is necessary to understand conversation as “such a form of linguistic communication, which assumes the direct presence of two or more participants, co-creating and co-sustaining a mutually accepted focus of visual and cognitive attention” [Piętkowa and Witosz 1994, 197]. M. Buber called the philosopher of dialogue claims that the human is a dialogical being, the relations “I – You” are personality-forming [Buber 1993]. In a dialogical relationship, some sphere is created, connecting the two subjects, which can be called “between.” It is not any auxiliary construction, but an actual place bearing human “becoming.”

M. Buber advocates a dialogue symmetrically conceived, based on the equality of partners. He claims that we can learn a lot from our students and even from animals. According to E. Lévinas, a contemporary philosopher, dialogue has an asymmetrical character. Of particular note is the term dialogue used by E. Lévinas, who claims that dialogue is a conversation that people have with each other face to face [Lévinas 1972]. The face-to-face contact [Idem 1991, 48ff], the recognition of the other as a person like me, unique, with his personal freedom and individual history, requires at the same time a certain way of arranging the relationship: one that respects the dignity of the other. This relationship is expressed in action which is a consequence of such recognized status. As K. Wojtyła puts it, this proper way of recognizing, relating to and treating the other is unconditional respect, which can be defined as the basis of love. It is the proper way of treating the one who is recognized as an end in himself, and can never be a means to other ends [Wojtyła 1986a, 30ff, 67ff].

From the action point of view, love is the only proper attitude and way of action of a person towards a person. Love *sensu stricto* is possible only in relation to the person [Krapiec 1974, 382; Dec 2011, 141ff]. Due to the absolute value of the person, no more valuable action is possible than the one which consists in supporting another person in his process of self-improvement [D'Agostino 2002, 23ff].

As a result of self-control, the person has the ability to make decisions and to act, this is the result of free human action, not merely the product of external or internal forces or impulses that would control the person, but on the contrary: it is the result of decisions and makes possible the responsibility of the person [Wojtyła 1985, 205]. K. Wojtyła distinguishes between the interpersonal dimension

and the social dimension of community. The interpersonal dimension of community can be expressed by the pronoun “I – You,” “I – Other” and allows to capture the problem of participation at its very center. It is about participation in the humanity of others, about discovering the “neighbor” in the “other.” “It also seems that only then can we follow the full specificity of that community which is proper to the inter-personal system «I – You»” [Wojtyła 1976, 26]. The social dimension of community is expressed by the pronoun “we” denoting the multiplicity of persons [ibid., 29ff]. K. Wojtyła emphasizes the relevance, primacy and priority of the interpersonal dimension of “I – You” in “the whole vast territory of the existential action of human being together with others” [Idem 1986b, 6–19] thus indicating that “community, society, groups of people, programs or ideologies” precisely in this dimension and through it “show their value in the end. They are human insofar as they actualize” this dimension [ibid., 17].

The human must, according to him, be considered in its integral dimension, in all its one and “unique reality of being and action, consciousness and will, conscience and «heart», [...] in all the truth of its existence and being personal and at the same time «community» and at the same time «social».”¹

Article 1 of the Universal Declaration of Human Rights, second sentence, clearly reveals the transition between knowing how a person is and how he should act: “All human beings are born free and equal in their dignity and their rights. They are endowed with reason and conscience and should act toward others in a spirit of brotherhood.” An important element of the characteristics of a person is the description of a relationship between the spiritual dimension of man, which determines intellectual cognition, and the material and physical dimension [Poczobut 2007, 130ff].

It should be noted that this division, which is in modern thought a continuation of the Cartesian distinction between *res extensa* and *res cogitans*, no longer expresses the basic dichotomy in relation to nature, everything that can be said about a person refers to it in its totality and unity. An integral dimension of the person’s corporeality is its dimension of sexuality: the person is as a woman or a man. Also, this way of being is their internal structure that shapes the person [Bañares 2005, 28]. M. Piechowiak points out that human as a person is a being in relation, in which the given perfections and the way of giving them are what is specifically personal and human. This giving is closely related to the acquisition of perfection in the existential aspect – the more giving, the stronger being [Piechowiak 2005, 19]. K. Wojtyła stated “the more sense of responsibility for the other person the more true love” [Wojtyła 1986a, 47].

¹ Ioannes Paulus PP. II, Litterae encyclicae *Redemptor Hominis* (04.03.1979), AAS 71 (1979), p. 257–324, no. 77–78.

2. MATURITY AND RESPONSIBILITY AND VIOLENCE

It is worth noting that the statement of immature personality in the course of divorce or separation proceedings as well as canonical proceedings for nullity of marriage often reflects the presence of disorder already during the marriage bonding period, but sometimes it may obscure the factual image. A person with such a personality is not able to fulfill the essential obligations of marriage contract. Negative expressions of immature personality are visible in the concluded marriage and from the very beginning, as a result of which the spouses are not able to establish a deep emotional bond with each other, conduct a dialogue, satisfy their needs, communicate properly. Emotional immaturity is expressed by a lack of differentiation of emotional reactions, both in their too little or too much intensity and a weak ability to experience and express higher feelings. Interpersonal relations are sometimes hindered by clearly outlined egoism and egocentrism, as a consequence of which these people are not able to fulfil important duties resulting from the welfare of spouses and offspring. In the case of immature personality, there is a subjectivization of the system of values and mental insensitivity to higher values – moral, egocentrism in interpersonal relations, as well as emotional lability, or unstable behavior, high anxiety and the use of immature defense mechanisms, sometimes using camouflage, often violating moral standards, not violating the standards of criminal law. Toxic people also appear in various forms, betraying their negative attitude. People who pose a threat to the mental, emotional and physical health of others really exists.

Violence, aggression as confirmed by A. Adler already in the 1920s, is an expression of stupidity, lack of opportunity for a positive solution or lack of skills, the result of helplessness. They are unable to solve the problem otherwise, yet had a strong involvement in the problem. The loss of ability to think and act rationally and responsibly is one of the major mechanisms of failure. Calling for punishments. Calling for prohibitions will not accomplish anything. Today's world differs from the old world in that the old world clearly informed us what was right and what was wrong. It was a clear message. However, today's world presents man with more opportunities, challenges, and does not indicate which is good.

Various sociological and psychosocial indicators show significant symptoms of a violation of this basic social fabric, which is the family and trust. A certain normative chaos, which means a sense of instability of regulations, rules, both legal and moral, customs, a certain feeling of being lost in what is right and what is wrong, what is good and what is bad, an excess of incoherent expectations of various institutions, public bodies towards people, results in the disappearance of a sense of clear signposts in own life. There are new circumstances that increase the sense of risk, uncertainty, confusion, a certain chaos, which are already associated with the direct effects of breakthrough and with the process of so-called political transformation that we are going through. New areas of risk and uncertainty, just to mention a few, such as unemployment, inflation, competition,

the rise of new forms of crime, or the current pandemic, are some of the many factors which over the last few years have had a clear impact on the general feeling of trust which has been broken down in the society.

Lack of trust leads to the fact that people are constantly trying to control others and constantly try to gain power in the form of violence in order to satisfy their own expectations. Conversely, when people feel that others do not trust them, that they are constantly checking them, controlling them, have no area of autonomy recognized by others, these are factors which lead to cynicism, hostility, suspicion, constant anxiety as well as to the phenomena of aggression, violence and brutality. It is necessary to emphasize the fact that violence is an omnipresent phenomenon which occurs in different environments and different spheres of life. In the modern world it is an increasingly visible and disturbingly growing phenomenon.

Violence is understood as an act that interferes with an individual's personal freedom and forces them to behave against their will. It is also present at work, at school (peer violence), on the Internet, in the family, etc. and is a common phenomenon, regardless of culture, religion, environment, education, intellectual level or membership in a social group. Violence can be: instrumental, i.e. as a mean to achieve certain goals; disinterested, i.e. as a search for satisfaction in the abuse of others; collective and individual [Kmiecik–Baran 1998, 366].

In literature, various classifications of violence can be found. The most frequent classifications include physical, psychological, sexual, economic and neglect-related violence. Physical violence is often found in schools, homes and families, on the streets and institutions, e.g. children's homes and social care homes. Physical violence is a violation of physical integrity, intentional bodily harm, inflicting pain or threat of bodily harm (e.g. pulling, kicking, pushing, overpowering, strangling, pushing back, holding, slapping, pinching, beating with an open hand, fists, various objects, burning with a cigarette, etc.). The results of such violence may be bodily harm – injuries, wounds, fractures, contusions, scratches, bruises, burns; the following consequences: illnesses as a result of complications and stress, post-traumatic stress disorder, living in chronic stress, sense of threat, fear, anxiety, panic attacks, insomnia, psychosomatic disorders, etc.

Psychological (emotional) violence involves the violation of personal dignity. Unfortunately, contemporary axiological destabilization shows, among others, in the impoverishment of social morality, signaling a lack of respect for the human person, betraying the basic moral standards, i.e. respect for human dignity. However, the criteria of the sense of dignity and recognition of the dignity of others are: treating a person as a subject, compliance of own conduct with the system of values, satisfaction from pursuing the good [Urbanik 2011, 17–18]. In psychological harassment there are more camouflaged methods of abuse, and psychological abuse, according to I. Pospiszyl, “is often hidden under the mask of honesty, care, which seemingly nothing can be accused of” [Pospiszyl 1994, 102].

Emotional violence is expressed by e.g. ridiculing opinions, views, beliefs, religion, origin, imposing own opinion, views, constant evaluation, criticism, telling others about mental illness, isolating, controlling, limiting contacts with other people, forcing obedience and submission. The effects of its use can be, for example, reduction or destruction of the victim's sense of power, self-esteem and dignity, making it impossible to undertake any actions inconsistent with the principle of obedience, weakening of mental and physical abilities to resist and forming a conviction of its futility, isolation from external sources of support, total dependence of the victim on the persecutor, permanent fear, loss of hope and psychosomatic diseases, etc.

Sexual violence in the most general sense is sexual contact undertaken without the consent of the victim. In turn, sexual violence against children is involving dependent, developmentally immature and incapable of giving full consent children or adolescents in sexual activity that violates social taboos and rules of family life [Nowak and Pietrucha–Hassan 2013, 13]. This violence is revealed by forcing sexual intercourse, unacceptable sexual caresses and practices, forcing sex with third parties, sadism in intercourse and may result in physical injuries, pain in the whole body, reduced self-esteem and self-respect, loss of attractiveness and dignity, sexual disorders and frigidity.

Material subordination of the partner or others makes them feel dependent on the abuser's income or assets, or makes them responsible for supporting the family. Money or material values are thus used as an instrument, a tool for building up an overt or covert dominant position, and become a kind of bargaining chip in the victim's everyday life situations. Due to the characteristic mechanisms used in economic violence, according to D. Dyjakon [Dyjakon 2015, 1–3] several types of perpetrators can be distinguished: psychopathic type (preying), sadistic type, narcissistic type, compulsive type (frugal), hidden type (dissatisfied), immature type (helpless). This violence may be expressed by e.g. taking money, not paying for living expenses, making it impossible to get a job, not meeting the basic material needs of the family, blackmailing, taking loans and credits without the victim's knowledge and consent. The result of this form of violence can be total financial dependence, failure to meet the basic needs of life, poverty, destruction of self-esteem and dignity, ending up with no means to live and no sense of security.

The awareness of how economic violence can occur is quite low – every third Polish person (34%) considers giving money away and controlling their spouse's spending as a sign of thriftiness.²

Another form of violence is neglect, which is often a failure to satisfy the basic biological and psychological needs of children and is a hidden form of violence. Two types of neglect can be distinguished: 1) emotional and intellectual neglect: lack of understanding, lack of physical and/or verbal expression of feelings, lack

² See https://www.niebieskalinia.pl/spaw/docs/wyniki_badan_20071113_obop.pdf [accessed: 04.05.2021].

of emotional support, lack of cognitive stimulation; 2) physical neglect: lack of protection, inadequate hygiene and lack of medical care, failure to provide means of subsistence, deprivation of food, clothing, shelter, lack of help in case of illness, etc. More often it is possible to encounter the term “structural violence” or “environmental violence,” which refers to violations of human rights in institutions, e.g. in social or educational institutions, health care institutions.

The literature also includes the concept of “instrumental violence,” the basic feature of which is that it takes place directly in interpersonal relations and is recognizable by those affected. The opposite of instrumental violence is structural violence, which is voiceless and invisible. Its sources are in social structures and consciousness, standards and customs as well as socialization processes existing in a given community and culture. It is usually perceived as something normal and does not have to include physical or psychological aggression.

From instrumental violence comes symbolic violence, also called cultural violence, which is related to imposing the meanings and interpretations of symbols of the existing culture [Jabłoński, Kusek, and Hanuszewicz 2021a; Idem 2021b]. This violence is one of the forms of soft violence, which occurs to some extent with the victim’s consent. It consists in gaining by various means the influence of dominant or privileged groups on the whole society in order to impose on them a certain conception or form of behaviour, thinking or perception of reality. In this way the subordinated perceive their reality in categories organized by the dominating groups in order to legitimize their dominating position.

The philosophy of dialogue is one of the contemporary currents in European philosophy – revealing, because it takes as an initial point of consideration another human being (You, the Other) much different than systematic philosophy, which, both in the form of realism and idealism, placed an individual in “ontological” solitude [Sartre 2007, 297].

According to J. Jastrzębski “[...] in a culture that is both globalized and localized at the same time, meanings and significance often become an object of trade or/and political manipulation. The constant confrontation of standards and patterns of behaviour and ways of life results in confusion and loss of faith in the unshakable axiological order of the world” [Jastrzębski 2004, 22]. The occurrence of violence often means disturbed interpersonal relations and violation of human rights also in public institutions. These behaviors violate the personal dignity of a person, his welfare and rights. Personal dignity or a sense of dignity is realized especially when one is in a threatening situation, facing violence, incapacitating fear or objectification. Dignity is thus recognized most easily when a value is threatened, in various social situations [Marianiński 2016, 279–80].

According to phenomenologists or philosophers of dialogue, such as M. Scheler, N. Hartman, F. Rosenzweig, M. Buber, H. Jonas or E. Lévinas, the concept of responsibility ceases to mean merely taking on the consequences of own conduct, but becomes a source experience of man, constituting him as a person [Filek 2003, 11]. Man’s life is a continuous response to a variety of issues which result

in the fact that “responding to [...]” becomes “responding for [...]” [ibid., 12]. Responsibility is thus at the core of ethical human action, respecting the autonomy of the subject. It points to the fundamental references of responsibility for own actions and responsibility for the world, which is particularly evident in the age of globalization. E. Lévinas notes in this context that “responsibility is that which weighs on me and which, as a man, I cannot reject. This burden is the highest dignity of man” [Lévinas 1998, 101].

There has been a new reading of responsibility. It is not responsibility understood merely as the consequences of an action. In the words of H. Jonas, it is purely formal (the perpetrator of a harmful act bears civil or criminal responsibility, depending on whether the damage committed by the perpetrator is a misdeed or a crime). Moral responsibility, broadly conceived, is found in a new light. Meanwhile, there is also a need for responsibility that arises not post factum, but comes beforehand and obliges the person to act responsibly. Hans Jonas calls this type of responsibility “material responsibility” and emphasizes its positive character [Jonas 1996, 171–72].

Central categories of issues related to the pedagogy of law deserve our attention – from dialogue to respect [Stadniczeńko and Zamelski 2020]. They make up the outline of E. Lévinas’ thought, in which they find their original development and are suitable for critical use in the concept of pedagogy of law. E. Lévinas points out that the world becomes inhumane if there is no space in it to develop and act in such a way as to realize an ethical order in which one can be responsible. As E. Lévinas notes this is why the asylum, this discontinuity in space, seems to function by contrast. He emphasizes – we leave disorder where everyone existing is anxious about their existence. To enter the order where at last the visible is another person. Ethics, concern for the other, is not something given but inflicted. It does not end in initiation, it demands knowledge and its constant deepening. Asylum gives hope to stop violence, but it is also a place of teaching and learning to live without violence, a place where dialogue takes place.

E. Lévinas points out that human relations constitute the subject. “Being ‘I’ is a privilege. To say ‘I’ is to occupy a unique place in the face of a responsibility in which no one can replace me and from which no one can absolve me” [Lévinas 1998, 297]. The subjectivity of “I” can only be captured in relation to the “Other” “You” emphasizes that “I” becomes truly unique and irreplaceable through dialogue with “You.” The relationship with the Other has the value of constituting our humanity. From the work of Lévinas comes the fundamental conclusion that there is no human world, no subjective world, without an encounter with the “Other.” Depriving ourselves of dialogue, we create an inhuman world.

CONCLUSION

The existence of society requires the existence of moral ties, and these ties underlie both individualism and social relations. I. Wojnar writes: “an urgent need

is moral – social education consisting in the liberation of good, and thus stimulating pro-social attitudes and behaviors, the culture of feelings, respect for the weaker people, training altruism and empathy” [Wojnar 1998, 37]. The regression of humanity cannot be stopped by punishment and fear. It can be stopped by wise, demanding, responsible and consistent love. Efforts in the reconstruction and construction of a truly democratic society must go hand in hand with educational efforts, with the effort to morally reform society, with both academic and media activity, to instill those fundamental values concerning the person – his humanity, to raise the consciousness and legal culture of society. It is necessary to learn to face one another in the relationship between man and man.

Personalism emphasized the ethical dimension of man in the fullest way by treating a person as a complete and autonomous being, material and spiritual, and placing him on the plane of action. In a rational and freeway, man creates the world of culture, which in turn creates different kinds of higher values: truth, goodness and beauty, which he discovers in himself and around him. Responsibility is inseparably related to freedom – readiness to accept the consequences of own choices, and the responsibility is most visible in the moral aspect, because man is an entity open to values for which he is responsible, and since he is also a value, he is responsible for his own value [Chrobak 1999, 421–39].

It is important to be aware of the fact that civilizational changes are made by means of social engineering. Motivated by ideology – as M. Peeters writes, “the art and science of directing individuals, groups and even whole societies, cultures and finally civilization. [...] The art of engineering involves making sure that at no stage in the process is it realized that a certain agenda is being imposed from outside” [Peeters 2010, 97].

Nowadays we live in the conditions of a global electronic economy, to which the ideas of K. Marx, M. Weber and E. Durkheim still apply to some extent. How to protect common aspects of social life under conditions of intense individualization processes. Studying the social situation in the context of violent behavior means analyzing on both a cultural and a personal level, thus looking at how the public is intertwined with the private. As a result, issues of identity, desire and emotion become one of the most important topics – intertwining the social and erotic, symbolic and unconscious, cultural conditions and experiences, the attachment of the global and local. Today a young person needs help to control himself, to control his emotions in contrast to those who are not able to offer them anything and, for fear of being influenced, do not demand anything from them.

It is necessary to raise awareness of the limit and teach respect for the limits of others, these symbolic barriers protect from the dangers of the outside world, they can also save many young lives from the trap of existential emptiness and axiological conflict leading only downwards. The lack of awareness of own value as a subjective being in relation to the surrounding reality is the basis of moral pathology, which is reflected in an escape into alcoholism or drug addiction, crime, violence and aggression. Therefore, it is important to harmoniously develop

in a young person the capacity for effort and a sense of responsibility, which will help him to become in control of his own freedom.

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BEST OF THE BEST OF THE BEST? HOW INTERNATIONAL ARE TOP INTERNATIONAL LAW JOURNALS REALLY?

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Abstract. This paper reports a pilot study on publication patterns in the twelve top international, single-subject law journals. It has been found that these journals almost exclusively publish US law school-affiliated authors, with foreign-based lawyers authoring less than 5% of all the papers published in these journals. This outcome contrasts heavily with the outcomes for the control group of multidisciplinary science journals, where authorship distribution conformed with the number of scientists working in three macro-regions (US, EU, and China). The results of this study indicate that law journals are most probably jurisdiction-focused, and the number of citations relies more on the size of a jurisdiction covered by the journal than on the international appreciation of the texts. Furthermore, it may indicate that bibliometric factors used to measure scientific output cannot be applied 1:1 to measure the quality of legal research.

Keywords: SCOPUS, bibliometry, research evaluation

INTRODUCTION

We live in a world of metrics [Muller 2018]. Everything should have its value, price, and performance indicators. The same goes for academic research. Governments want to have their money well-spent, and to achieve this, governments introduce various research performance valuations based either on peer review or an elaborate set of metrics. Despite the well-known danger of transforming metrics into objectives, this is still one of the simplest and most cost-effective methods of checking if public money is used for a good purpose [Hicks 2012; Jonkers and Zacharewicz 2018; Zacharewicz, Lepori, and Reale 2018]. It has been suggested by Harzing that an analysis of research quality of British universities conducted with Google Scholar leads to almost identical results as costly and burdensome peer review done within the framework of the Research Excellence Framework [Harzing 2018]. So, the use of metrics and automated methods of performance measurements is a quite attractive choice if we look at it from the government perspective. Universities are held accountable, and the government can prove that the taxpayer's money is not wasted. So, we will all be numbered, weighed, and divided at the end of the day.

Mene, mene, tekel, upharsin.

This pilot study is a forerunner of a broader research project aimed at assessing the validity of current research assessment methods of law faculties. One of the main problems connected with existing ways of assessing law schools is the va-

lidity of bibliometric data for this purpose. Some legal systems base their research evaluation solely on peer review and expressly forbid the use of metrics in case of law,¹ or, as in earlier versions of the REF, allow panels not to use it [Mac Sithigh 2019, 31]. Some use a simplified method of calculating scores of particular journals [Letto–Vanamo 2018, 218–19], while other rely heavily on bibliometric data and metrics like Impact Factor, SNIP, or SCIMAGO Journal rank [Hojnik 2018, 341]. The Polish research evaluation system belongs to the latter. Each law journal on the government list of “scientific” journals has an assigned number of points calculated using the above-mentioned metrics. The assumption behind this method is that the sciences, social sciences, and humanities follow the same publication and citation patterns, and thus can be assessed with the same set of standard metrics [Fransen and Wouters 2019; Sivertsen 2009, 56–57; Verleyesen and Weeren 2019]. This position has been challenged by some authors who argue that in the humanities and some social sciences, including law, publication practices differ significantly from those used in hard sciences. In particular, law and humanities put more weight to publishing books than journal articles and that they tend to publish in languages other than English. Last but not least, the citation rates for law papers are significantly lower than, e.g. in physics, which makes bibliometric research evaluation systems prone to manipulation (e.g. lawyers start to publish outside their discipline or even act as courtesy coauthors with physicists or biologists) [Biagoli and Lippman 2020]. The fact that metrics for law journals are significantly lower than for hard sciences may also indicate different publication and citation practices. This particular fact has not yet been analysed to my knowledge. Proponents of the bibliometric system focus instead on proving that lawyers publish in non-native languages or that it is possible to publish humanities and social science research in English even for non-native English speakers etc. [Kulczycki, Engels, Pölönen, et al. 2018; Kulczycki 2019]. They use for this purpose data from Poland and some relatively small jurisdictions, e.g. Slovenia, Flanders, and the Czech Republic, that, due to their size, do not represent the whole of legal academia.

This study hypothesises that law differs significantly from other fields of research and has its distinctive authorship and publication patterns, which means that legal scholarship cannot be assessed with the use of the same metrics as other arts and sciences. The null hypothesis is that the Polish government is right and there are no significant differences between law and other arts and sciences, so the current research evaluation system is valid.

To test the validity of the hypothesis, I have analysed the authorship structure of top single-subject law journals worth 200 points a paper according to the government classification.

If the government assumption is correct, authorship distribution by country should be similar to that in top science journals or, at least, reflect all major legal

¹ *Index of revisions to the ‘Panel criteria and working methods’ (2019/02)*, https://www.ref.ac.uk/media/1450/ref-2019_02-panel-criteria-and-working-methods.pdf [accessed: 21.03.2021], p. 50–51.

families. If, on the other hand, legal sciences follow their own publication path, the data should show that and provide us with at least some information as to the authorship distribution and validity of SCOPUS-based metrics as a tool to evaluate research quality in law.

1. METHODS AND QUALITY OF THE DATASET

This is a descriptive statistical study using data from the SCOPUS database regarding affiliations of authors publishing in law journals. For this pilot study, I decided to limit the sample to top international single-subject law reviews. Journals belonging to this group have been identified using two basic criteria: inclusion in the Polish list of top-tier (200 points) law journals and identification of said journals as single-subject by SCOPUS. The Polish list, although SCOPUS-based, employs a somewhat strange system of ascribing journals to various research disciplines, so almost no law reviews are identified as single-subject, and many interdisciplinary hard science journals like *Nature*, *Science*, or *GigaScience* were, classed by the Polish Ministry of Education and Research as law reviews.² On the other hand, SCOPUS identifies quite a few of these journals as single-subject, and an inspection of the contents of these journals confirms that they publish solely texts written by lawyers and for lawyers. Both lists agree as to the identification of the top law reviews, so it was possible to identify a set of 12 top single-subject law reviews from this group.³ This has led to exclusion of the Harvard International Law Review from the set because SCOPUS classes it in two categories: law and political science. All journals included in this pilot study are US-based law schools' flagship reviews.

The study covers 10 years, from 2010 to 2019, so the results are pre-COVID-19 and free of any potential deformation by any eventual pandemic era changes in publication patterns. The data have been hand-picked from the SCOPUS analytics module covering many publications and institutional and national affiliations of the author. The sample is small enough to make this method of data collection feasible, yet large enough (all top-tier journals and publication data covering a decade) to be a good indicator of publication patterns. Two multidisciplinary journals, *Nature* and *Science*, which publish mostly hard- and natural science research, have been used as a control group.

Since SCOPUS is commonly considered a reliable source of data maintained by a respectable publisher, I assumed that no corrections will be necessary. However, while analysing the data I have noticed an unusually high number of texts

² God knows why, the nature and structure of this classification remains a mystery wrapped up in an enigma.

³ *California Law Review*, *Columbia Law Review*, *Georgetown Law Journal*, *Harvard Law Review*, *Michigan Law Review*, *Stanford Law Review*, *Texas Law Review*, *UCLA Law Review*, *University of Chicago Law Review*, *University of Pennsylvania Law Review*, *Virginia Law Review*, *Yale Law Review*.

with affiliations from several countries like Colombia, Georgia, and Israel. That has led to more detailed scrutiny of national and institutional affiliation and detection of some somewhat hilarious results. The Israeli affiliations were correct and reflected the level of US – Israeli research cooperation (see below). Some other national affiliations were incorrectly identified. Persons entering data to the SCOPUS database often identified the Columbia University Law School in New York as a Colombian entity, which is somewhat understandable given the similarity of names. Much to my surprise, however, two papers written by Columbia University lawyers published in the *Virginia Law Review* were identified as co-authored by Colombian and French (!) authors.

Another (un)usual suspect is Georgia, which is the name both of a country and a US state. Thus, papers from the University of Georgia, Georgia State University, and Emory University (GA) were classified as Georgian. Similar mistakes were made in the case of the University of New Mexico (identified as Mexican, why bother checking?), The University of Alabama located in Birmingham, USA (identified as a UK university), and University of California Hastings (well, it must be the UK, battle of Hastings, no?).

Another paper written by a Georgetown lawyer has been identified as Canadian (yes, there are four places named Georgetown there). The last misattributed place in this set was Moscow, Idaho, the hometown of the University of Idaho and its law school. It is somehow understandable that SCOPUS clerks decided that Idaho is probably a suburb of Moscow, Russia, and marked one of Idaho's papers as Russian. Surprisingly, all South American affiliations, including Colombian, in *Texas Law Review* were correct.

Other mistakes were less obvious. Berkeley, Lewis & Clark, Stanford, Yale, Duke, and Notre Dame universities were sometimes identified as French entities. Hamline University and Denver University appeared in two cases as Vietnamese institutions and the latter in one case was classed as a UK institution. The University of Chicago was in one case classed as a Japanese law school. In the case of two papers identified by SCOPUS as the UK and Australian respectively, all authors came from US law schools marked as such. One Chinese paper and one Taiwanese paper were erroneously identified as law papers published in the *Virginia Law Review*, although they were published in *Science Advances* and *Transportation Journal* respectively.

It should however be noted that SCOPUS corrects such errors on the go, although there is no register of changes available. That explains the mysterious disappearance of 13 papers from the Georgetown University Law Centre marked initially as originating in Guyana (its capital is by pure chance called Georgetown). Unfortunately, this practice makes the dataset less reliable and the results less reproducible. It should also be noted that though such errors and omissions are negligible in the case of multidisciplinary journals publishing hundreds of papers annually, they are nonetheless crucial in the case of law journals covered by this research, publishing on average 38 papers a year and with the number of non-

US texts not exceeding 20 in a decade. For instance, in the case of the *Harvard Law Review*, 4 out of 15 texts identified by SCOPUS as written by foreign authors were published by academics from first-tier US law schools. An error rate over 30% is quite a lot, so, in the case of journals publishing relatively low numbers of foreign texts, a manual verification of data on foreign affiliation was required. For the sake of clarity data presented in this study are in the corrected form.

2. RESULTS

I assumed that top international law journals should have a distinct and diverse portfolio of authors hailing from various parts of the world. Three major players in the science world are the US, EU, and China. In the time covered by the research, the UK was still in the EU, so I decided to include it in the EU section. If we consider the EU countries without the UK, the total number of EU texts drops from 41 to 16, i.e. to less than 0.5% of all texts published in top “international” journals. On average, a top international law journal publishes slightly more than one non-US affiliated paper per year.

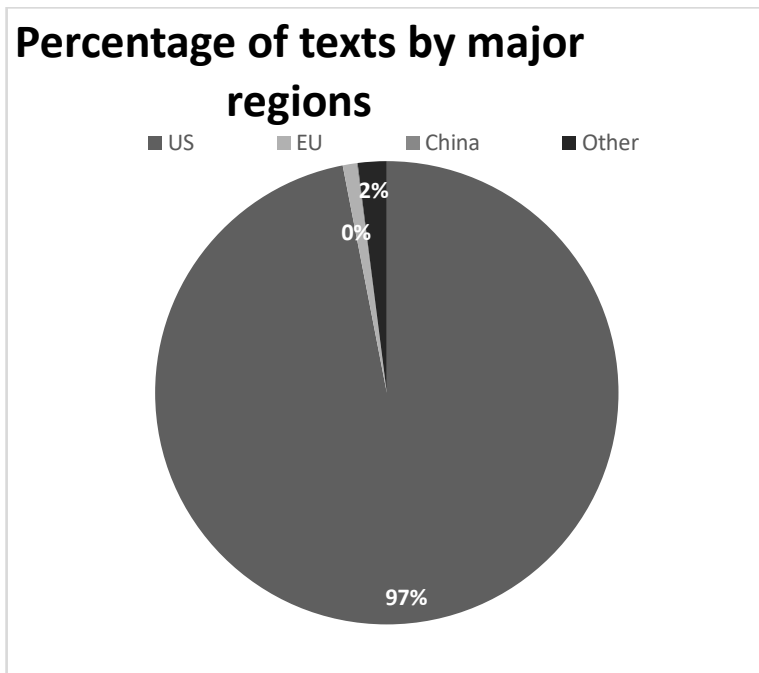


Fig. 1: percentage of texts affiliated by major regions based on SCOPUS data

Another way of looking at the distribution of foreign-affiliated texts is to group them by jurisdictions: Common Law, Civil Law, Mixed, and Other. This classical comparative classification is a standard one, and there will be no problem with identifying most of the countries in the study as belonging to one of

them. I decided to put together predominantly common law countries that have territories having their system based on the civil law (Quebec in Canada, Scotland in the UK) because the mixed component of these jurisdictions was not visible in SCOPUS. Classical mixed jurisdictions in the sample were South Africa [Van der Merwe, Du Plessis, De Waal, et al. 2012] and Israel [Rivlin 2012; Barak 2002]. In the case of the Philippines, I decided to class it as “Other” because in the modern literature it is defined as a “hybrid” legal system, not fitting in a classical common-civil-mixed divide [Mahy and Sale 2015]. China has its distinctive legal system, and legal identity of Taiwanese law is currently a part of a legal and political dispute [Lewis 2019].

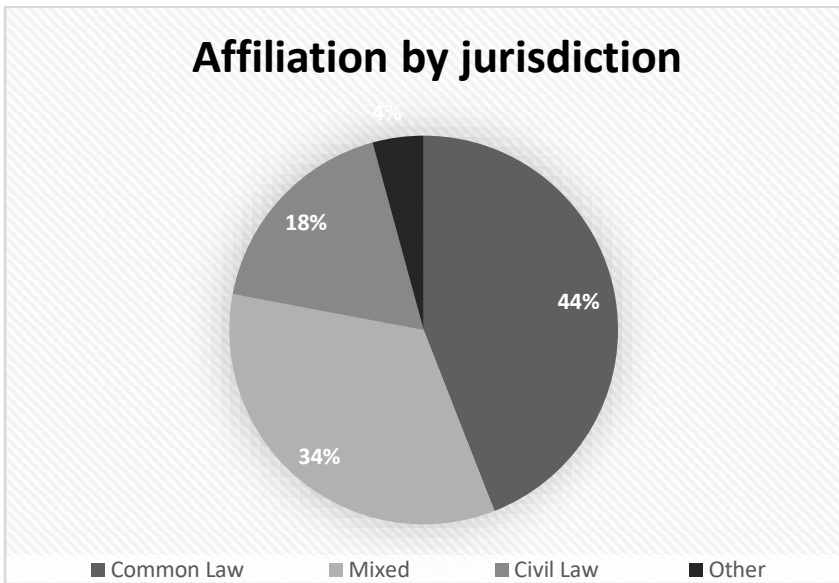


Fig. 2: Distribution of affiliations by major legal families (jurisdictions)

Foreign text authorship structure is also worth analyzing. Let us look at the number of papers co-authored with a US-scholar or authored by persons with dual, US and non-US affiliations compared with the number of texts authored solely by authors with non-US affiliation.⁴

Country	US and non-US affiliation	Non-US affiliation	Total
Argentina	0	3	3
Australia	5	0	5

⁴ Number of affiliations may not equal the number of texts due to multiple affiliations and co-authorship of some of the texts. Affiliations were hand-picked from SCOPUS.

Brasil	1	0	1
Canada	10	11	21
Chile	0	1	1
China	2	1	3
Colombia	0	2	2
Denmark	1	0	1
France	1	0	1
Germany	4	2	6
Israel	28	11	39
Netherlands	1	2	3
Philippines	0	1	1
South Africa	0	1	1
Spain	1	0	1
Switzerland	1	1	2
Taiwan	1	0	1
United Kingdom	11	15	26
TOTAL	67	51	118
% of papers	56.77	43.23	100

Table 1: distribution of authorship by country and by co-authorship or double affiliation

If we look at the distribution of institutional affiliations, we notice that in each of the twelve cases, a majority of texts come from “homies” or rather “inbred” authors connected with the law school that publishes any given journal. On average, c.a. 34.7% of texts published in these journals were inbred, but the actual number of such texts varied from 7.8% in the case of the *Texas Law Journal* up to 54% in the case of *Columbia Law Review*.

The data from our control group show a completely different authorship distribution system. Unlike in the case of law reviews, *Nature* and *Science* are truly international journals, both of them having published authors hailing from 159 countries compared with representatives of 19 countries publishing in “top international single-subject law reviews.”

The following table shows how well global players, i.e. the EU, the US, and China, representing respectively 22.2, 16.7, and 19.1 percent of the global pool

of scientists are represented in both *Nature* and *Science*.⁵ Since multiple affiliations are possible, the number of affiliations does not necessarily reflect the number of papers published in both journals.

Journal name	No. of papers	US affiliation	EU affiliation	CN affiliation	Other affiliation	Total number of affiliations
<i>Nature</i>	284-8	10881	12501	1228	8256	32866
<i>Science</i>	23748	10609	9903	1058	1257221	2178

Table 2. Authorship distribution in *Nature* and *Science* in the years 2010-2019 (source: SCOPUS)

The top number of papers (1064) in *Nature* comes from the Howard Hughes Medical Institute and in *Science* from the MIT (799). Both numbers of papers are not even remotely close to the number of top authors' affiliations represented in the law journal sample.

If we look at the distribution of authors compared to the share of each of the regions/countries in the global pool of scientific talents, the numbers are as follows:

Journal name	Total	US affiliation	EU affiliation	CN affiliation	Other affiliation
<i>Nature</i>	100	33.1	38.03	3.73	25.11
<i>Science</i>	100	44.67	41.7	4.45	9.17
<i>Percentage of the world pool of scientists</i>	100	16.7	22.24	19.1	42

Table 3. Authorship distribution as a percentage of the total number of national affiliations (SCOPUS)

As we can see, the US and the EU dominate the research scene with a similar number of publications both in the *Nature* and *Science*, with China being a strong runner-up. This contrasts with the number of US-affiliated texts published in top international law reviews presented above.

⁵ UNESCO Science Report (05.10.2020), <https://en.unesco.org/unescoscience-report> [accessed: 27.03.2021].

3. DISCUSSION

As we can see, this preliminary analysis shows that top international, single-subject law journals can hardly be called “international.” Contrary to the common belief shared both by many governments and by the general public, law reviews tend to follow publication patterns other than those in hard-science-based journals. This pilot study has proven that even top law journals are “local,” if not parochial, in the sense that they are jurisdiction-oriented and focus mostly on one legal system. This is reflected also by the distribution of authors, with most hailing from one jurisdiction with a minority of foreign authors, most of them having a connection with the dominant jurisdiction. So, the best chance to publish in a top international, single-subject law review is to be a US-based law professor, with being a Canadian, British, or Israeli scholar providing second best chance. Having a US-based co-author also helps, but not as much as one would assume. The number of texts with double affiliation or being co-authored with a US-based author in proportion to the number of foreign authorship-only texts is 6:4, so having a US-based co-author does not increase significantly the chance to have the research published.

This contrasts heavily with the affiliation structure of papers published both in *Science* and *Nature*. As we can see, both journals have a truly international pool of authors, with the number of texts coming from each of the major players, i.e. US, EU, and China, comparable with the proportion of scientists in each of the regions. Moreover, contrary to the top law reviews, no identifiable leading institutions are publishing 30% or more papers in any of the journals.

As far as a possible interpretation of these data goes, one may start with two of the most extravagant, if not preposterous ones: editor’s bias and bad, non-US science. It could be argued that student editors of top US law schools are simply biased against any non-US research, either considering US universities the only ones producing first-class legal scholarship or treating non-American lawyers as intellectually inferior and unable to produce publishable results. Nothing, however, suggests the existence of a systemic bias or an inclination towards cultural colonialism in law reviews’ editorial teams that are as diverse as the US population.

Another explanation, this time following the Polish government’s way of thinking, would be that only authors coming from the best universities of the world get the chance to be published by top international law journals. So, by the principle of “inherited prestige,” if you do not publish there, you are not worthy. This is the tricky one because by adopting this way of thinking we commit a *post hoc, ergo propter hoc* fallacy. It is hardly imaginable that only one research discipline is so underdeveloped all over the world and that, excepting the US, only a handful of foreigners passes high US law review standards. Furthermore, it is hardly imaginable that even “model” comparative jurisdictions like Germany and France have but a handful of law professors able to publish top-quality papers every ten

years or so. The same goes for the Chinese and Indian lawyers – 2 billion people, two nations with several thousand years of history, not able to educate law professors talented enough to publish a paper abroad, but able to produce hundreds of scientists publishing in *Nature* or *Science* – that is both improbable and impossible.

There is, however, third and in my opinion more plausible explanation of the results. Namely, that law is country, jurisdiction, and language-oriented, so, in a natural way, lawyers tend to publish in their national outlets and publish texts pertinent to their national jurisdiction. The fact that there are specialist law reviews focusing on legal theory, comparative or supranational law (e.g. international or European), or other law-in-context topics do not probably change much. And even if so, this study focuses on “top international journals” defined by citation metrics, and even well-known and respected *American Journal of Comparative Law* with 100 points does not even come close to the top. This view is supported by the data on the affiliation of non-US authors publishing in the journals covered by this study. They come from two common law jurisdictions (Canada and the UK) which have strong ties with the US and, more importantly, have their law based on the common core. The case of Israel is slightly more complicated – it shows both importance of US-Israeli relationships and an unusually high proportion (2:1) of texts written by the authors with double affiliation or written with a US-based co-author. In the case of two other major contributors, the proportion is close to 1:1.

So, how can we explain the unusually high position of parochial journals, publishing a high proportion of papers by authors coming from one law school both in SCOPUS and Polish government ranking? Well, I think that there are two possible answers to this question. One is based on the size of the jurisdiction, another one on Anglocentrism of SCOPUS.

Since all top “international” law journals are US-based and publish mostly US-relevant texts, their unusually high rank in SCOPUS may be also explained by the size of the jurisdiction itself. According to the data supplied by the American Bar Association (ABA), 1.33 million lawyers were practicing in the US⁶ and there are 199 ABA-Accredited law schools.⁷ In comparison, there are ca. 70,000 practicing lawyers in Poland (advocates, attorneys, and tax advisors)⁸ and only 58 law schools, according to the government portal studia.gov.pl. Thirty-five of them are ranked by the “Rzeczpospolita” daily ranking. The rest of these schools are either too young to be ranked (no graduates so far) or enrolling a homeopathic number of students. Even if we include notaries, judges, and public

⁶ See https://www.americanbar.org/content/dam/aba/administrative/market_research/total-national-lawyer-population-1878-2020.pdf [accessed: 27.03.2021].

⁷ See https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/ [accessed: 27.03.2021].

⁸ See <https://biznes.interia.pl/finanse/news-na-rynku-jest-coraz-wiecej-adwokatow-radcow-prawnych-i-dorad,nId,4339679> [accessed: 27.03.2021].

prosecutors, the number of lawyers qualified to practice law in Poland will be probably less than 10 percent of the number of practicing US-based lawyers. This sheer fact should raise suspicions as to the validity of citation-based metrics as a tool for assessing the quality and impact of law journals.

It should also be noted that SCOPUS indexes mostly, although not exclusively, English-medium journals, so anything that is not published in English easily drops off the radar. It is natural for French or German lawyers to publish in the vernacular, and when seeking an analysis of, say, a new Swiss law, you will look for it in the *Schweizerische Juristen-Zeitung* / *Revue Suisse de Jurisprudence* rather than in the *Harvard Law Review*. None these texts are included in the database, so we do not know if *Harvard Law Review* is one of the world's most-cited journals, one of the US most-cited journals, or simply one of the most cited English medium law reviews. Possibly the metrics are flawed because they are calculated with the use of the incomplete dataset.

CONCLUSIONS

It is hardly a surprise that “top international, single-subject law journals” are perhaps “top” by means of metrics, but hardly “international” in respect to author affiliations. This study has shown that law reviews tend to be parochial and connected with one particular jurisdiction. That explains the different distribution of authors' affiliations in law and science journals. Stern metrics achieved by US-based journals may be due to the size of the US jurisdiction, not to super quality or international relevance of published texts.

This paper contains data from a pilot study comprising top single-subject law journals, so further research as to authorship and citation practices in legal academia will be required before we decide if SCOPUS/WoS-based metrics should be abolished as the sole criterion of Polish research evaluation for law school further research. The fact that US-based journals do not publish international authors does not prove that the same will be true for law journals from other, smaller jurisdictions, thus the next step will be to analyze lower-tier journals and mixed (law and other disciplines) journals. And, even if the home boys-and-girls-first publishing pattern is true for other jurisdictions, it would still be possible to use citation metrics, provided that they will be normalized, e.g. by the size of the jurisdiction. So far, this research indicates that there is a minimal number of non-US lawyers publishing in top (200 pts) law journals, and that, contrary to a common belief, not all scientific disciplines follow the same publication patterns.

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INSTRUCTIONS ON PROCEDURAL ACTIONS TO PARTIES IN THE ENFORCEMENT PROCEEDINGS TAKING INTO ACCOUNT THE ACKNOWLEDGMENT OF THE DECISION TO AWARD THE BID

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Abstract. Instructions in civil proceedings have an important role in the possibility of the parties to exercise their rights. The legislator paid attention to the importance of instructions, while striving to create templates for instructions, which will ultimately not happen. It is similar in the enforcement proceedings. It will be paid attention to the nature and significance of instructions in this proceeding, with particular emphasis on the refusal to award the bid, which affects the property relations of the parties.

Keywords: instructions, enforcement proceedings, award the bid, refusal to award the bid, lack of instruction

INTRODUCTION

Advices on procedural actions to parties in the course of civil proceedings, including enforcement proceedings, is of significant importance as it involves providing the parties with the possibility of taking effective and appropriate procedural steps at a given stage of the proceedings. The legislator expressed this by pointing to the need to create templates of instructions in the amendment of 4 July 2019¹ in order to correctly implement the related obligations. In the justification of the draft under the Code of Civil Procedure² of 2019, the need to standardize the instructions that the courts provide to the parties in writing during the proceedings was justified by the need to adapt the legal language to non-lawyers [Marszałkowska–Krześ 2019, 8]. Ultimately, this was waived in the shield regulations due to the inability to introduce such a large number of templates.³ Also the addi-

¹ Act of 4 July 2019 amending the Act – Code of Civil Procedure and certain other acts, Journal of Laws, item 1469.

² Act of 17 November 1964, the Code of Civil Procedure, Journal of Laws of 2020, item 1575 as amended [hereinafter: CCP].

³ Act of 19 June 2020 on interest subsidies for bank loans granted to entrepreneurs affected by COVID-19 and on simplified proceedings for approval of an arrangement in connection with the occurrence of COVID-19 (Journal of Laws, item 1086), i.e. Shield 4.0; Article 71 of this Act indicates that in the Act of 4 July 2019 amending the Act – Code of Civil Procedure and certain other acts (Journal of Laws, items 1469 and 2089) in Article 1(2) was repealed, which the Minister of Justice was to define, by way of a regulation, for model instructions that the code requires in writing, bearing in mind the need to ensure communication. Therefore, in the end, there will be no pattern set.

tion of the Act amending Art. 763¹ CCP imposing the obligation to provide instructions to the bailiff. Hence, the literature emphasizes the need for an active attitude of the authority in informing the parties about their rights. The jurisprudence indicates that the fact that a party acts without a professional legal representative does not automatically determine the justified need for such instructions, and whether the provision of such instruction must be justified in a given situation depends on the judgment and discretion of the court. The instruction requires the assessment of the circumstances of the case and becomes the duty of the court only in completely exceptional situations, when there is a need to prevent inequality of the subjects of the pending proceedings.⁴ Similarly, in the field of enforcement proceedings, applying to circumstances, emphasis is placed on the possibility of informing participants in the proceedings, the more so as the introduced regulations indicate a significant importance and effects. For this purpose, an analysis will be presented to what extent the instruction of the parties in the course of enforcement proceedings is relevant and what effects it may have. It will be underlined particular attention to the importance of not providing instructions that caused a refuse to award the bid due to breach of the rules of proceedings in the course of the auction especially in the context of the recent Supreme Court resolution.

1. THE SCOPE AND EFFECTS OF INSTRUCTIONS IN ENFORCEMENT PROCEEDINGS

Pursuant to Article 5 CCP in connection with Article 13(2) CCP, where reasonably required, the court may give essential advice on procedural actions to parties to and participants in proceedings who appear in the case without professional representative [Manowska 2021]. It is for the court to assess whether there is a justified need to provide instructions⁵ when it is convinced that there is such a justified need.⁶ The mere lack of a professional attorney cannot be regarded as such a need, but e.g. such awkwardness of a party that the lack of instruction would lead to a violation of its procedural guarantees for fair hearing of the case by violating the principle of equality of the parties, as well as the particularly complex nature of the case.

The bailiff may also provide the parties and participants of the proceedings with relevant instructions. The instructions are to apply to procedural actions performed by the parties, in particular the time, place and manner of performing them, as well as the legal consequences of these actions and their negligence. It

⁴ The judgement of the Supreme Court [hereinafter: SC] of 28 August 2020, ref. no. III CSK 333/19, Lex no. 3063115.

⁵ See among many judgements of the SC of 4 April 2014, ref. no. I UK 363/13, Lex no. 1482341; of 11 October 2013, ref. no. III UK 139/12, Lex no. 1463907; of 10 May 2013, ref. no. I CSK 495/12, Lex no. 1365592; of 16 February 2012, ref. no. IV CZ 113/11, Lex no. 1217226; of 12 September 2014, ref. no. I CZ 55/14, Lex no. 1521314; of 27 June 2013, ref. no. III CZ 33/13, Lex no. 1360264.

⁶ The judgement of the SC of 27 September 2012, ref. no. III CSK 13/12, Lex no. 1224681.

is assumed that these instructions may be informative (e.g. regarding the activities that the party may or should perform), as well as corrective (e.g. explaining that the party has performed an inappropriate procedural act) [Pietrkowski 2020]. As at the stage of examination proceedings, instructions may be given by the bailiff when the parties act without professional representatives – an attorney or legal advisor, when the parties act without help or when the party is represented by another representative, e.g. parents, spouse, siblings. Instructions may be provided only in the event of a “justified need” [Kunicki 2019c]. This is a vague concept, therefore the procedural authority is left to assess whether such a need exists in a specific case and it will be justified if the party is helpless, when it encounters difficulties or obstacles beyond its control. that could lead to an unfavorable situation for her.⁷ Instructions are necessary when without them a party who is not replaced by an advocate or legal advisor would be deprived of influence on the course of the proceedings and could not exercise his/her rights.⁸ The jurisprudence indicates that the mental state of the party and the ability to perform procedural actions in connection with it are of significant importance.⁹

The provision of Article 5 CCP introduces the possibility of the necessary instructions to the parties only as to procedural steps. This means that they may not, under any circumstances, concern substantive issues or such procedural steps which, in fact, include legal advice. The instruction is provided by the court (or – according to the stage of the proceedings – by the chairman) in each instance, but only in case of justified need. They relate to the procedural activities performed by the parties, in particular the time, place and manner of their performance, the legal consequences of these activities and their negligence [Bodio 2020]. The instructions are related to the admissibility of performing certain procedural steps at a given stage of the proceedings, i.e., for example, submitting an application for exemption from court costs or appointing an *ex officio* attorney (Article 117 CCP).¹⁰

The instructions may only concern procedural acts, e.g. the advisability of submitting an application for exemption from court costs or an application for the appointment of an attorney. The court, under the instructions under Article 5 CCP, however, there is no obligation to act on behalf of the parties and to determine *ex officio* the proper meaning of applications or pleadings submitted by the parties.¹¹

⁷ Among others the judgements of the SC of 14 February 2007, ref. no. II CSK 436/06, Lex no. 358777, of 28 October 2003, ref. no. I CK 185/02, Lex no. 328989, of 13 May 1997, ref. no. II UKN 100/97, OSNP 1998, No. 4, item 133, of 30 April 1997, ref. no. II UKN 79/97, OSNP 1998, No. 2, item 58.

⁸ The judgement of the SC of 30 June 1999, ref. no. II UKN 21/99, OSNP 2000, No. 18, item 695.

⁹ Among others the judgements of the SC of 27 March 1974, ref. no. I PZ 13/74, Lex no. 14247, of 28 September 1999, ref. no. II CKN 269/99, Lex no. 39112, of 7 July 2005, ref. no. II UK 271/04, OSNP 2006, No. 5–6, item 95.

¹⁰ Judgment of the Court of Appeal of Gdańsk of 22 March 2018, ref. no. III AUa 1402/17, Lex no. 2514384.

¹¹ Judgment of the SC of 21 December 1998, ref. no. III CKN 985/98, OSNC 1999, No. 5, item 104.

Letters addressed to the parties or participants of the enforcement proceedings also contain instructions. The instructions speak not only of the rights they are entitled to, but also of their obligations. M. Uliasz points out that the announcement on the date of the auction contains a number of other information and instructions, such as the price of calling, the amount of the warranty, which may be questioned in a complaint against the bailiff's actions [Uliasz 2016]. For example, before the start of the tender, the bailiff advises the bidders that the tender is conducted orally; that the bid increment may not be less than 1% of the call price, rounded up to full zlotys, that the offered price ceases to be binding when another bidder offered a higher price; that after the cessation of the bailiffs, the bailiff, notifying those present that after the third announcement no further bids will be accepted, will announce the last offered price three times, close the tender and replace the highest bidder; that after the tender is closed, the court in the person of the judge under whose supervision the auction takes place shall issue a decision in open court as to the award of the bidder who offered the highest price, after hearing both him and the participants present; that the decision to award the award will be announced by the court immediately after the tender is completed; however, the announcement may be postponed for a maximum of one week, if a complaint has been filed, which cannot be resolved immediately, as well as for other important reasons; that the person to whom the adjudication was granted obtains, if he fulfills the conditions of the auction, the right to award him ownership of the real estate; that after the confirmation of the bidding and performance by the buyer of the bidding conditions or the decision on the determination of the purchase price and payment of the entire price by the State Treasury, the court issues an order awarding ownership; that a legally binding decision on awarding ownership transfers ownership to the buyer and is the title to disclose to the buyer the ownership right in the real estate cadastre and by an entry in the land and mortgage register or by submitting a document to the collection of documents; a legally binding decision on awarding title is an enforceable title to bring the buyer into possession of the real estate and to empty the premises located on the real estate without the need to give it an enforcement clause; whether from the moment the decision on awarding the title to the buyer becomes final, he owns the benefits of the real estate; recurring public tributes related to the property from the date of validity of the decision on awarding the title to the property shall be borne by the buyer; The non-recurring public law benefits shall be borne by the buyer only if their payment is due on or after the date on which the decision on awarding title becomes final [ibid., 392].

Failure to be informed may have far-reaching consequences, especially in the context of breach of the rights of defense. However, the Supreme Court in the resolution of the combined Civil Chambers and the Chamber of Labor, Social Security and Public Affairs of November 22, 2011,¹² emphasized that “failure to ins-

¹² Ref. no. III CZP 38/11, OSNC 2012, No. 5, item 56.

truct or incorrectly instruct a party operating without an attorney, legal advisor or patent attorney about admissibility, the date and manner of filing an appeal shall not affect the commencement of the period for lodging such an appeal.”

2. SPECIAL INSTRUCTIONS IN ENFORCEMENT PROCEEDINGS

In the enforcement proceedings, the legislator also provided for regulations imposing on the authorities the necessity to provide instructions. Unless the indicated instructions provided pursuant to Article 5 CCP are general in nature, the others are regulated by instructions on the rights and obligations to take specific actions – e.g. Article 761(3), Article 791(3), Article 881(3), Article 1046(9) CCP [Pietrkowski 2020].

Pursuant to Article 763¹ CCP, the bailiff instructs the parties and participants of the proceedings who are not replaced by an attorney, legal advisor, patent attorney or the General Prosecutor’s Office of the Republic of Poland about the manner and time limit for challenging the actions. If these people are not present, the instruction follows the notification of the activity. In each case of performing an action, the bailiff is obliged to provide such instruction in order to enable participants to appeal against this action even in a situation where it is not possible to file a complaint against the bailiff’s actions [ibid.]. The Minister of Justice specifies, by way of a regulation, the template and method of providing the official complaint form, taking into account the statutory requirements for this letter, the need to provide the necessary instructions on how to fill in the form, submit the letter and the consequences of not adjusting it to the statutory requirements, as well as the need for free providing forms at bailiff offices, court offices and the Internet in a form that allows for convenient edition of the form content.¹³

It is also important to provide instructions regarding the initiation of enforcement, the more so as there are far-reaching effects in this respect. Pursuant to Article 796(4) CCP, the Minister of Justice shall define, by way of a regulation, the model and manner of providing the official form of an application for the initiation of enforcement, having regard to the statutory requirements for this letter, the need to include the necessary instructions on how to fill in the form, submit a letter and the consequences of not adjusting it to statutory requirements, as well as the need to provide the forms free of charge at bailiff offices, court offices and the Internet in a form that allows for convenient editing of the form’s content.¹⁴ At the first enforcement action pursuant to Article 805(1) CCP, the debtor is served with a notice of the commencement of enforcement, with the content of the writ of execution and the manner of enforcement, as well as information on the

¹³ Ordinance of the Minister of Justice on the specimen and method of providing access to the official complaint form against the activities of a bailiff of 23 November 2018, Journal of Laws, item 2296.

¹⁴ Regulation of the Minister of Justice of 30 November 2018 on the specimen and method of making available the official form of the application for the initiation of enforcement addressed to the bailiff, Journal of Laws, item 2307.

possibility, date and manner of bringing an appeal against the decision granting the enforcement clause. This is illustrated by an extensive range of instructions [Jarocha 2020]. Due to the possibility of recording enforcement activities with the use of video and sound recording equipment in accordance with Article 809¹(1) CCP, also in this regard, the bailiff shall stop recording the course of action at the debtor's or a third party's place of residence, if the debtor or that person objects to what these persons should be instructed about. At the request of the person who objected to the recording of the activities, the bailiff starts recording the activities again, about which these people should be instructed [Kunicki 2019b, 57; Studzińska 2019].

The legislator also regulates specific instructions, e.g. in Article 893¹(2) CCP regarding the attachment of a saving contribution, in Article 913(3) CCP. The bailiff instructs the creditor in the case without a professional attorney about the right and method of submitting an application for disclosure of the debtor's assets, and the debtor applying in the case without an attorney, legal advisor, patent attorney or counselor of the General Prosecutor's Office of the Republic of Poland about the consequences of disclosing assets or estimating real estate (Article 948(1¹) CCP). The particular scope of the instructions may be important in electronic bidding. As Kunicki points out, most of the provisions of the Code of Civil Procedure, such as Article 867¹(2–3), Article 867²(2), Article 869(2), Article 870, 872, 874 and 879 CCP does, however, apply, sometimes with some modifications, to electronic bidding and it seems reasonable to inform the bidders about their content. However, there is no legal basis for this information to be included in the notice on electronic bidding (Article 879⁶ CCP) [Kunicki 2019a].

A special regulation in this regard is contained in Article 975 CCP indicating that if several real estate or several parts of one real estate are to be sold, the debtor has the right to indicate the order in which the tender of individual real estate or parts is to be conducted. As M. Krakowiak points out [Krakowiak 2019], a situation is regulated here when the subject of one auction is several real estate of the debtor (Article 926 CCP) or several parts of the real estate, and Article 975 CCP does not apply if several auctions of the debtor's various properties are to take place on one day [Korzonek 1934, 1043]. As in the case of Article 926 CCP, the purpose of Article 975 CCP is the protection of the debtor's interests, in line with the general purpose of the auction, i.e. to satisfy the creditor, as enforcement measures must be applied proportionally to the purpose of enforcement [Krakowiak 2019]. Therefore, effective enforcement should be carried out in the least burdensome manner for the debtor (see Article 799(1) and Article 979 CCP). Therefore, the debtor has the right to decide on the order (order) of the enforcement sale of individual parts of the real estate or individual real estate.

H. Pietrzowski, interpreting Article 975 CCP indicates that the debtor should be informed about his entitlement, and then requested to mark the order of sale, pursuant to Article 5 in connection with Article 13(2) CCP [Pietrzowski 2020]. Similarly, A. Adamczuk expresses the view that when the bailiff appoints a sepa-

rate auction for each of the seized real estate or part of the seized real estate, the debtor, instructed by the bailiff, has the right to indicate the order in which auctions involving his real estate or separated parts of one or more real estate will be designated [Adamczuk 2021].

To sum up, the court, acting as part of judicial supervision, may instruct the parties and participants in the proceedings in the scope of serving activities. Since, as part of supervision, the judge supervises the correct course of the auction and may issue orders to the bailiff aimed at ensuring its proper course, removing observed deficiencies (Article 759(2) CCP) and immediately adjudicating orally submitted during the auction until the tender is closed complaints against the bailiff's actions (Article 986 CCP). may also advise on the admissibility of merging enforcement proceedings or in accordance with Article 975 CCP the seizure of several properties of the debtor, or when proceedings are combined where enforcement is directed against different parts of the same property. This may also apply to the case where several parts of one of the debtor's real estate have been separated, assuming that the prices of calling these parts of the real estate will be sufficient to cover the enforced benefits along with the costs of enforcement.

3. ADMISSIBILITY OF REFUSAL TO AWARD THE BID DUE TO LACK OF INSTRUCTION

The adjudication is a necessary condition for the buyer to be able to award the title to the buyer [Świeczkowski 2019, 85–95]. The decision on the adjudication is tantamount to a statement that the activities carried out prior to its execution turned out to be lawful [Żyżnowski 2015]. Since the Code of Civil Procedure in Article 991 provides for the conditions that prevent the awarding of the award, the court is obliged to hear the bidder and the present participants before issuing the order. The purpose of such a hearing is to determine whether there are any factual obstacles to the bid of the property. This does not mean, however, that the lack of objections from the buyer or participants will result in a positive decision of the court. The court should take into account the obstacles to the adjudication *ex officio* [Ciepła 2018]. The reasons justifying the issuance by the court of the refusal to adjudicate are specified in Article 991 CCP. There is no unanimity in the literature as to whether the enumeration of the reasons for issuing such a decision is exhaustive. It is expressed, *inter alia*, the view that violations of the enforcement procedure standards other than those indicated in this provision may constitute the grounds for refusal to award an award, if they could have a significant impact on the tender result [ibid.].

Some representatives of the doctrine indicate that the reasons for the refusal to award were listed exhaustively due to the fact that the participants in the proceedings have sufficient procedural means at the pre-auction stage to protect and defend their rights and it would be pointless if, after carrying out burdensome and costly enforcement actions, such like, among others description and assessment,

announcements about the auction, tender, the legislator would allow the possibility of raising such allegations even after the end of the auction, which the participants could have reported at an earlier stage of the execution [Krakowiak 2019]. Another argument is the fact that defective activities of a bailiff may be corrected by means of a complaint against the bailiff's actions and judicial supervision exercised over the bailiff by the district court pursuant to Article 759(2) CCP, and raising such deficiencies that occurred in the earlier stages of enforcement against real estate only at the stage of bid would be delayed in the light of Article 767(2) CCP [Hahn 1936a, 627; Bartz 1934, 538; Zedler 1995, 316; Romańska 2014, 825; Sitkiewicz 2001, 74; Krakowiak 2019].

The second view that the enumeration of the reasons for the refusal to adjudicate is exemplary and the court may refuse to adjudicate on the basis of procedural errors occurring in the earlier stages of enforcement is based on the assumption that Article 991(1) CCP it does not emphasize the restrictive nature of this provision, and adopting a view that allows a refusal to grant a bid on the basis of deficiencies arising before the auction would not imply the right to appeal to final decisions [Świeboda 1980, 106; Wengerek 2009, 579; Pietrkowski 2020; Flaga-Gieruszyńska 2019]. In the justification of the decision of 3 July 1998,¹⁵ the Supreme Court indicated that the wording of Article 991(1) CCP gave rise to a discussion in the doctrine whether the court may refuse to adjudicate in the event of deficiencies at an earlier stage of the enforcement proceedings (before the auction) and indicated that the position should be divided, according to which the enumeration of the reasons for refusal to adjudicate should be treated as an example and, consequently, the basis for the refusal to adjudicate may also be defective proceedings arising before the auction. One cannot only raise objections as to legally resolved issues. The basis for a complaint against the award may therefore be the allegation of violation of Article 962(1) CCP.

Examples of violations of the provisions of the procedure in the course of enforcement, which may have a significant impact on the result of the tender, include incorrect definition of the warranty,¹⁶ failure to submit a warranty by the enforcing creditor,¹⁷ start of the auction before the set date or with a long delay, unlawful removal from the auction of persons entitled were to participate in it, failure to submit a warranty by the bidder for whom the bidding is to take place,

¹⁵ Ref. no. I CKN 1066/97, OSNC 1998, No. 12, item 224.

¹⁶ "Determining the amount of the warranty contrary to Article 962(1) of the Code of Civil Procedure constitutes a breach of the provisions of the procedure referred to in Article 991(1) of the Code of Civil Procedure. However, the refusal of the award may take place only when the significant influence of this failure on the tender result is proven." Decision of 3 July 1998, I CKN 1066/97, OSNC 1998, No. 12, item 224.

¹⁷ "Failure to submit a warranty by the enforcing creditor who submitted an application for taking over the property for ownership is the same as a failure to provide a warranty by the bidder for whom the bidding is to take place. The court, finding such a breach, should refuse to adjudicate (Article 991(1) of the Code of Civil Procedure)." Decision of 22 April 1998, I CKN 1084/97, OSNC 1998, No. 12, item 215.

designation of too low calling price, if the purchase price as a result did not reach the correctly established calling price, preventing a person who could act as an auctioneer from bidding, auctioning the real estate in a different order than indicated by the debtor (Article 975 CCP), continuing the auction despite obtaining a price sufficient to satisfy the creditors from the sale of a part of the real estate (in terms of bid real estate that should not be sold – Article 979 CCP), taking into account the incorrect procedure, which turned out to be the last (Article 978 CCP), closing the tender after the second announcement of the offered price (Article 980 CCP) [Cieplą 2018].

Failure to notify a participant in the auction procedure only then constitutes a basis for refusing the award, if the obtained purchase price is not sufficient to satisfy his receivables. On the other hand, the indication of a too high calling price, too low calling price, if the bids exceeded the correctly determined price, failure to provide a warranty by the bidder who failed in the tender are indicated as irrelevant defects in the auction; taking incorrect steps followed by further steps [Wengerek 2009, 580]. The reasons for the refusal of the award are taken into account *ex officio* by the court and assessed from the point of view of the possible impact of the irregularity on the result of the tender.¹⁸

J. Łopatowska–Rynkowska points out that the dominant view is that the enumeration of the grounds for refusal to adjudicate is exhaustive, because the linguistic and purposive interpretation do not provide grounds for its extensive interpretation [Łopatowska–Rynkowska 2007, 166]. In support of this position, the argument that the correction of defective activities of the bailiff is served by judicial supervision by the court pursuant to Article 759(2), Article 960 and 972 CCP and the possibility of submitting a complaint against the actions of the bailiff. In the resolution of October 4, 1972,¹⁹ the Supreme Court emphasized that enforcement against real estate consists of several chronologically successive phases, both in terms of activities before and after the auction. Irregularities in the course of an auction (Articles 972–986 CCP) may be removed by means of a complaint against the bailiff's actions (Article 986 CCP). In the next stage of the proceedings (the award regulated in Articles 987–997 CCP), in which, after the tender is closed, a court order to award the award is issued, a legal remedy is also provided in the form of a complaint against the court's decision to award the award (Article 997 CCP).

CONCLUSIONS

Despite the lack of an unequivocal position, the dominant view is that the enumeration of the reasons for the refusal to grant a confirmation in the light of Article 991 CCP it is exhaustive. The lack of information on the possibility of submitting an application for a combination of enforcement proceedings was not di-

¹⁸ Decision of the SC of 19 April 1999, I CKN 73/99, unpublished.

¹⁹ Ref. no. III CZP 69/72, OSNCP 1973, No. 5, item 74.

rectly indicated in Article 991 CCP and such a request may be submitted earlier, i.e. before the auction starts, but also during the auction. Failure to inform about the possibility of joining the proceedings may affect the proper compliance with the provisions of the procedure within the meaning of Article 991 CCP. It would be pointless if, after carrying out onerous and costly enforcement actions, such as description and assessment, notices about the auction, tender, the legislator would allow the possibility of raising such allegations even after the end of the auction, which the participants could have reported at an earlier stage of the execution. Defective activities of a bailiff may be corrected by means of a complaint against the bailiff's actions and judicial supervision exercised over the bailiff by the district court pursuant to Article 759(2) CCP. Moreover, providing the parties with instructions is not obligatory and, in the light of the provisions of the civil procedure, there is no provision requiring the court to inform the parties about the possibility of submitting an application for joining the proceedings.

In a legal issue to the Supreme Court, in which the Court refused to adopt a resolution²⁰ regarding the significance of the instruction, the District Court doubted whether the lack of instruction by the bailiff or the judge supervising the execution against the cooperative ownership right to the debtors' premises, appearing in the case without an attorney or counselor legal, on the possibility of submitting an application for merging into one proceeding of enforcement directed at shares in a cooperative right to a dwelling (Article 5 CCP in conjunction with Article 13(2) CCP) may constitute the basis for a refusal to grant a confirmation. In this case, the debtors were not instructed about the possibility of submitting an application for a combination of enforcement proceedings. However, it is not clear whether the possibility of exercising this right was known to them, and the more so that the debtors did not raise any statements or allegations in their complaints in this regard. Thus, when analyzing doubts and regulations on the basis of enforcement proceedings, it should be indicated that instructions in enforcement proceedings are of the same importance as in examination proceedings and may involve enabling participants to exercise their rights.

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²⁰ Decision of the SC of 5 December 2019, ref. no. III CZP 33/19, Lex no. 2749464.

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THE ECONOMIC NETWORK OF THE THREE SEAS REGIONS AS A LEGAL INSTRUMENT OF MACRO-REGIONAL DEVELOPMENT

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Abstract. This article deals with the Economic Network of the Three Seas Regions as a legal instrument of macro-regional development. The author, referring to the acquis of administrative law and EU law, highlights new opportunities arising from legal solutions in the field of regional development law. To attain the research objective, the author has analysed the legal prospects of macro-regional development in the Three Seas Initiative area. Based on that analysis, a conclusion has been formulated that the use of network administration processes, which will ultimately lead to establishing the Economic Network of the Three Seas Regions, can serve as a legal instrument fostering regional development in the reference area. While the reference Network will likely intensify international local-government cooperation, it will notably function as an instrument of the European network administration. The development of network administration connected with the Three Seas Initiative will contribute to shaping the sustainable regional development law for that area, covering most of its regions.

Keywords: network administration, sustainable regional development law, international local-government cooperation

INTRODUCTION

The issue of legal aspects of regional development in the macro-regional dimension is not a subject widely discussed in scientific studies. A significant gap in legal sciences can, in particular, be seen as regards the aspects of regional development in the Three Seas area. Literature on the subject-matter contains publications on the Three Seas Initiative, but in the vast part they concern economic [Popławski and Jakóbowski 2020] and political matters [Kowal and Orzelska-Stączek 2019]. It, therefore, appears even more significant to combine legal forms of macro-regional development in the European Union with bottom-up processes emerging as part of the Three Seas Initiative. The purpose of this article is to analyse legal prospects of macro-regional development in the Three Seas Initiative. The research hypothesis is that the use of network administration processes, which will ultimately lead to establishing an Economic Network of the Three Seas Regions, can serve as a legal instrument fostering regional development in the reference area. This research issue will be analysed using the dogmatic legal method as well as, thought to a lesser extent, the historic and legal comparative methods.

1. THE THREE SEAS INITIATIVE IN THE REGIONAL DEVELOPMENT PROCESS

The Joint Statement on the Three Seas Initiative was signed in 2015. The signatories recognised “the importance of connecting Central and Eastern European economies and infrastructure from North to South, in order to complete the single European market, given that so far, most efforts served to connect Europe’s East and West [...] Convinced that by expanding the existing cooperation in energy, transportation, digital communication and economic sectors, Central and Eastern Europe will become more secure, safe and competitive, thus contributing to making the European Union more resilient as a whole [...], [they] have endorsed the Three Seas Initiative as an informal platform for securing political support and decisive action on specific cross-border and macro-regional projects of strategic importance to the States involved in energy, transportation, digital communication and economic sectors in Central and Eastern Europe.”¹ The above declaration makes it clear that the establishing of cooperation within the Three Seas Initiative was intended to foster the creation of an integrated regional development concept for the reference area.

One of the major projects implemented within the framework of the Three Seas Initiative involves building Via Carpathia – a transnational highway network connecting two important ports: Klaipėda in Lithuania with Thessaloniki in Greece [Kurecic 2018]. Via Carpathia constitutes the core of the Three Seas Initiative as it will provide transport connections between the Baltic Sea, the Black Sea and the Adriatic Sea. The development of north-south transport networks in Europe is expected to strengthen economic development in this part of the continent. It is worth stressing that the Three Seas Initiative was established as an informal forum with the aim of promoting closer cooperation in the fields of transport, business, digital communication and energy. Attempts to strengthen political bonds and to develop joint macro-regional projects constitute one of its objectives [Górka 2018]. In addition, the Initiative supports the realisation of a vision of truly united and self-sufficient Europe, economically and geopolitically independent of Russia [Zbińkowski 2019]. Of note is the fact that member countries of the Three Seas Initiative “have the sense of separateness which stems from their shared history and communist heritage. Obviously, the Three Seas Initiative member countries cannot compete against the European Union (and they belong to the Community), but the group’s consolidation as regards the idea of international security (within NATO) contributes to the development of the Euro-Atlantic cooperation and integration of its member states around the Three Seas concept” [Wojtaszak 2020]. The factors presented above clearly define the goals to be pursued within the Initiative. It is worth noting that the activities implemented to date

¹ The Joint Statement on the Three Seas Initiative, 25–26 August 2016, Dubrovnik, <https://www.prezydent.pl/aktualnosci/wizyty-zagraniczne/art,105,wspolna-deklaracja-w-sprawie-inicjatywy-trojmorza.html> [accessed: 16.02.2021].

within the framework of the Three Seas Initiative have been centred around transnational activities taking the form of presidential summits. However, from the point of view of its further development, it seems of utmost importance to foster local-government cooperation at the interregional level.

International local-government cooperation is an essential component of regional development, and it is pursued primarily through cross-border relations (engaging neighbouring regions) and transnational ones (regions that are not immediate neighbours). It is possible to pursue international local-government cooperation in the European Union thanks to Union's mechanisms applying to regional development at the macro-regional level. There are currently no legal instruments dedicated specifically to the international local-government cooperation in the Three Seas Initiative area, which would streamline its functional aspects. However, some initiatives have emerged out of the expanding transnational cooperation in the Three Seas regions, facilitating the development of that international local-government cooperation.

Attention should be paid to the survey results collected from local-government bodies, indicating that "establishing a development strategy for the Three Seas Initiative area, comprising many key issues, including the construction of the Via Carpathia transnational highway network" would be an element indispensable for developing international local-government cooperation [Szewczak, Bis, Ganczar, et al. 2019]. The conducted surveys resulted in launching activities focused on economic cooperation between the Three Seas regions.² These activities marked the beginning of the regionalisation process of the Three Seas Initiative which was expected to ultimately lead to creating the appropriate legal instrument.³ Unfortunately, the ongoing epidemic of SARS-CoV-2 hindered subsequent activities in this field, but the proposed legal solutions eventually took shape, giving rise to creating a tool that was presented to representatives of local-government bodies from member countries of the Three Seas Initiative.⁴ The proposed legal instrument strengthening the process of macro-regional development in the Three Seas Initiative area met with approval, its practical implementation depending on the epidemic situation.

² See M. Szewczak, *Prawne formy rozwoju obszaru państw Inicjatywy Trójmorza. Case Strategia Dunaju [Legal forms of development of the Three Seas Initiative member countries]*, a speech given at the conference entitled "Prospects of economic cooperation between the Three Seas Regions", 6 December 2019, <http://irst.lubelskie.pl/aktualnosci/perspektywy-wspolpracy-gospodarczej-regionow-trojmorza/> [accessed: 11.04.2021].

³ Resolution of the Assembly of the Lubelskie Voivodeship No. XIV/237/2020 of 24 February 2020 on the Lublin Statement on Establishing the Economic Network of the Three Seas Regions (more detail on this instrument is presented later in the article, in Section 3).

⁴ See M. Szewczak, *Sieć Gospodarcza Regionów Trójmorza jako instrument współpracy regionów. Perspektywy rozwoju i dobre praktyki [The Economic Network of the Three Seas Regions as an instrument of regional cooperation]*, a speech given at the conference entitled Cooperation between the Three Seas Regions, Lublin, 3 December 2020, <https://congress.lubelskie.pl/konferencja-wspolpraca-regionow-inicjatywy-trojmorza-3-grudnia-2020-r/> [accessed: 11.04.2021].

To sum up, the development of the international local-government cooperation within the framework of the Three Seas Initiative is the core element for the success of both the entire Initiative and individual measures undertaken at the regional level.

2. LEGAL FORMS OF MACRO-REGIONAL DEVELOPMENT IN THE EUROPEAN UNION

To date, based on the European Commission data, the implementation process of the following four macro-regional strategies (MRS): the European Union Strategy for the Baltic Sea Region,⁵ the European Union Strategy for Danube Region,⁶ the Maritime Strategy for the Adriatic and Ionian Seas,⁷ and the European Union Strategy for the Alpine Region⁸ has engaged nineteen Member States of the European Union Member and nine countries that are not members of the EU.⁹ The basis for the functioning of these macro-regional strategies is provided by Article 174 of the Treaty on the Functioning of the European Union which refers to the EU territorial cohesion, to reducing disparities between the levels of development of various regions, and to supporting cross-border regions.¹⁰ The above strategies constitute the EU mechanism of strengthening macro-regional development.

Based on the Commission's report, although "their priorities are shaped according to the specific challenges and opportunities of the relevant regions, all four MRS have three main, broad, interconnected priorities in common: environment and climate change; research and innovation, and economic development; and

⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – the European Union Strategy for the Baltic Sea Region, Brussels, 16 June 2009, COM 2009, 248 final, https://ec.europa.eu/regional_policy/sources/docoffic/official/communic/baltic/com_baltic_en.pdf [accessed: 12.03.2021].

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – the European Union Strategy for Danube Region, Brussels, 8 December 2010, COM 2010, 715 final, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52010DC0715> [accessed: 12.03.2021].

⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Strategia the Maritime Strategy for the Adriatic and Ionian Seas, Brussels, 30 November 2012, COM 2012, 713 final, https://ec.europa.eu/regional_policy/sources/docoffic/official/communic/adriatic/com_2012_713_en.pdf [accessed: 12.03.2021].

⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – the European Union Strategy for the Alpine Region, Brussels, 28 July 2015, COM 2015, 366 final, https://ec.europa.eu/regional_policy/sources/cooperate/alpine/eusalp_communication_en.pdf [accessed: 12.03.2021].

⁹ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of EU macro-regional strategies, Brussels, 23 September 2020, COM (2020), 578 final, <https://eur-lex.europa.eu/legal-content/> [accessed: 10.03.2021].

¹⁰ The Treaty on the Functioning of the European Union, OJ C 115, 09.05.2008.

connectivity (transport, energy, digital networks).”¹¹ These priorities are consistent with the of the European Green Deal, complementarily covering also competences related to regional development. These issues, however, are not the underlying objective of this article as our focus is on the legal aspects connected with creating instruments to facilitate governance in the macro-regional development context.

From the point of view of the EU macro-regional strategies, it may prove useful to first analyse the administrative governance process. The governance structure of the EU macro-regional strategies features three levels: political, coordination and implementation.

At the political level, the participating countries are “generally represented by the Ministers of Foreign Affairs and, in some cases, the ministers or authorities in charge of EU funds. Moreover, the role of the rotating presidency is growing in all strategies, as the participating countries realise its importance in driving the strategic direction of the macro-regional strategies. The coordination of the strategies within and between participating countries is done by the national coordinators. Finally, the implementation level is based on the activities of various groups, referred to as thematic, priority, policy steering or action groups, which are the drivers of the day-to-day implementation of action plans at lower implementation levels.”¹² The administrative governance of macro-regional strategies is based on substantial collaboration of action plans and can be considered a model worth transposing into the domain of the Three Sees Initiative, which will not be fully functional without the appropriate administrative governance.

In its report, the European Commission formulated recommendations regarding macro-regional strategies governance. This should focus on: “a) providing strong strategic guidance; b) ensuring coherence between the macro-regional strategies and other territorial/sectorial national and transnational strategies and policies; c) ensuring that all national and thematic macro-regional strategy coordinators are duly empowered and provided with a clear mandate and adequate resources; and d) reinforcing multi-level governance through the effective involvement of regional/local stakeholders, civil society, including young people, in implementing the macro-regional strategies.”¹³ Moreover, the Commission suggests providing a technical support structure reflected in supporting rotating presidencies and national coordinators, as well as ensuring coordination within and across individual macro-regional strategies. In particular, the Commission calls for setting up high-level initiatives in the region such as the EU-Western Balkan summits and other regional cooperation initiatives. These would allow for better coordination of regional cooperation.¹⁴ The above-recommendations facilitate multi-level governance while making use of network administration processes.

¹¹ Report from the Commission to the European Parliament, p. 3.

¹² *Ibid.*, p. 8–9.

¹³ *Ibid.*, p. 12–13.

¹⁴ *Ibid.*, p. 813.

In analysing the governance process of EU macro-regional strategies and their coordination with other regional cooperation initiatives, it is worth stressing the major significance of cooperation with the Three Seas Initiative area. Notably, the geographic area of the Three Seas Initiative greatly corresponds to the four macro-regional strategies implemented in the European Union. This implies that the measures taken with a view to putting individual macro-regional strategies into practice should take into consideration the existence of the Three Seas Initiative, given especially that the objectives assumed by its member countries are at many points consistent with the objectives of these strategies. In addition, work connected with establishing the fifth EU macro-regional strategy – and more specifically the Carpathian Strategy – is now in progress [Grosse 2016]. It seems advisable to consider the combination of the processes launched through the macro-regional strategies with those ongoing within the framework of the Three Seas Initiative. Moreover, the fact that the development of contemporary public administration is also reflected in the emergence of new proposals of macro-regional policy development is also worth noting. One of these concerns transnational clusters which could foster cross-border cooperation by supporting international partners for clusters.¹⁵ This is an element of administrative governance of the entire regional development process. The EU macro-regional strategies are undoubtedly instruments which shape regional development in a tangible way, and their implementation can be complementary to the objectives pursued by the Three Seas Initiative that could, in turn, benefit from some institutional solutions governing the accomplishment of the goals formulated in these strategies.

3. THE ECONOMIC NETWORK OF THE THREE SEAS REGION

The development of international local government cooperation depends on the legislation governing it and the processes involved in developing the concept of administrative networks.

Formal and legal regulations shaping the development of international local government cooperation in Polish law have their basis in the Constitution of the Republic of Poland, according to which local government units have the right to join international associations of local and regional communities and cooperate with local and regional communities in other countries (Article 172). In turn, the constitutional authorisation to establish and implement international cooperation by local government units has been implemented in local government system acts¹⁶ and in the Act of 15 September 2000 on the principles of accession of local

¹⁵ Opinion of the European Committee of the Regions – Macro-regional strategies, such as the Danube: a framework for promoting transnational clusters, 2019/C 404/01 of 29 November 2019, Lex 2021 [accessed: 12.03.2021].

¹⁶ Act of 8 March 1990 on communal self-government, Journal of Laws of 2020, item 713, Act of 5 June 1998 on county government, Journal of Laws of 2020, item 920, Act of 5 June 1998 on province self-government, Journal of Laws of 2020, item 1668.

government units to international associations of local and regional communities.¹⁷

It is worth drawing attention to an important legal problem, which influences the degree of development of international self-governmental cooperation and its macro-regional approach, namely – the conditions for joining associations. According to the Act, voivodship self-governments accede in accordance with the Voivodship's foreign cooperation priorities, while powiat and gmina self-governments accede in accordance with Polish internal law, the country's foreign policy and its international obligations (Article 2(1–2)). It seems that it would be desirable to introduce as a *de lege ferenda* postulate a statutory obligation to prepare a strategy for the development of international cooperation of a voivodeship. It would replace the Priorities of foreign cooperation of the voivodeship and its scope would oblige not only the voivodeship's self-government but also local governments. The functioning of such a document would organise activities especially in the field of cross-border but also transnational cooperation. The introduction of the above proposal would improve the process of joining international associations by activating self-governments to act in the field of international cooperation. In relation to the analysed legal area, the functioning of the above mentioned strategies would improve self-governmental international cooperation in terms of macro-regional strategies and, at the same time, would strengthen network administration processes in the context of.

Processes involved in developing a new form of public administration, i.e. administrative networks, are clearly distinguishable in the administrative and European Union legal science. The functioning of administrative networks in the European Union results from the processes involved in multi-level cooperation of Union's administration. It is worth stressing that legal basis for such cooperation is provided by the Treaty of Lisbon. More specifically, the Treaty highlights the significance of effective implementation of Union's law by Member States, and administrative cooperation among the Member States, and between them and the Union (Article 197 of the Treaty). Administrative networks function within various areas of EU policies thanks to which they altogether form the European administrative space. It is worth stressing that these networks are among the most innovative and characteristic solutions in the EU administration [Supernat 2016].

The processes fostering network administration in the European Union also relate to issues of its macro-regional development. Diversified networks can be found within the existing macro-regional strategies. In addition, measures taken by the regions with a view to establishing the fifth EU macro-regional strategy – the Carpathian Strategy also exhibit activities related to networking processes.

It thus seems that these administrative networks, in various configurations, form a permanent element of macro-regional development in the European Union. The proposed form of international cooperation of regions, referred to as

¹⁷ Journal of Laws of 2000, No. 91, item 1009.

the Economic Network of the Three Seas Regions is a *de lege ferenda* postulate which combines two areas. First, the Three Seas Initiative area for with the Via Carpathia transnational highway network acts as a common element. Second, all the countries through which the highway network is planned to run, together with all its branches, belong to the European Union and most are engaged in establishing the Carpathian Strategy. The postulate for creating the above legal instrument arises from the conducted surveys,¹⁸ which have indicated the need of taking measures to this end [Szewczak, Bis, Ganczar, et al. 2019].

Measures to establish a new legal instrument – the Economic Network of the Three Seas Regions are taken by the Lublin Voivodeship Government and cooperating entities.¹⁹ Based on the applicants' assumptions, "the Network's objective will be to pursue cooperation in the field of sustainable and responsible economic development of the countries within the Three Seas Initiative area, oriented towards: a) closing the infrastructure gap in Central and Eastern Europe resulting from economic transformation experience, b) building interregional cooperation constituting a local-government and local component of the Three Seas Initiative, c) acting as an important drive for local-governments based on cooperation and building permanent relationships in the areas of infrastructure, transport, digitisation and innovation, and d) providing a tool for more efficient use of EU programmes dedicated to Central and Eastern Europe, and the Three Seas Fund."²⁰ The above objectives cover a wide range of processes involved in creating a regional development concept.

It is worth noting that the network initiators refer to historic regulations of international local-government cooperation, claiming that they "intend to cooperate to jointly build the economic power of Central and Eastern Europe based on integrated and coordinated activities aiming at sustainable and responsible development of its individual regions in the European Union. By commencing implementation of the provisions laid down in the Agreement on the construction of the Via Carpathia transport corridor and the Łańcut Declaration, the signatories to this Declaration express their intent and willingness to take measures to establish a stable and durable partnership of the regions situated between the Baltic Sea, the Adriatic Sea and the Black Sea, covered by the Three Seas Initiative."²¹

¹⁸ These surveys were carried out within the framework of two research and implementation projects: *The Polish-Hungarian model of international self-government cooperation* (2019) and *The concept of Polish-Hungarian local-government cooperation as an instrument of regional development* (2020), conducted by the author of this article.

¹⁹ Resolution of the Assembly of the Lubelskie Voivodeship No. XIV/237/2020 of 24 February 2020 on the Lublin Statement on Establishing the Economic Network of the Three Seas Regions was developed by a team of representatives of the Lublin Voivodeship Government and the Institute for the Development of the Local Government of the Lublin Voivodeship, which the author of this article represents.

²⁰ Appendix to Resolution of the Assembly of the Lubelskie Voivodeship No. XIV/237/2020 of 24 February 2020 on the Lublin Statement on Establishing the Economic Network of the Three Seas Regions.

²¹ *Ibid.*

As can be seen, this is another step in pursuing international local-government cooperation in the analysed area.

The newly-established legal instrument aiming to foster development of international local-government cooperation will comprise a proposal for triangular cooperation, also covering the private and NGO sectors. More specifically, “the parties declare to take joint measures to establish the Economic Network of the Three Seas Regions with its seat in Lublin, and to extend it by inviting new partners representing local governments, economic institutions, universities and other entities based in member countries of the Three Seas Initiative.”²² The above assumption is consistent with processes accompanying the EU macro-regional strategies intended to shape networking processes with the widest possible scope of application. The Network’s functioning as an instrument will entail building mutual partnerships based on applicants’ declarations, which will lead to “maintaining and establishing multi-dimensional contacts, while the Parties will support one another in developing, implementing and promoting joint projects, including those financed from the EU budget.”²³ Multidimensional partnerships are the underlying added value which stems from transnational regional development, through which they contribute to its sustainable character. It is, therefore, worth stressing that the Network, as a proposed legal instrument, can be considered innovative as there have been no such projects conducted to date.

CONCLUDING REMARKS

This analysis leads to some crucial conclusions on the regional development of the Three Seas Initiative component and on the establishing of the appropriate legal instrument.

First, attention should be paid to the administrative legal prospects of regional development in the Three Seas Initiative area. If the activities connected with the development of the Three Seas Initiative are moved from the presidential level to the regional level, this will significantly influence the possibility of using legal forms of international local-government cooperation while facilitating performance of joint cross-border projects.

Second, an essential factor is using the prospects offered by international local-government cooperation in the EU macro-regional strategies, and especially in the currently developed Carpathian Strategy [Paruch 2017], which will also partly cover the Three Seas Initiative area. Judging by the previous macro-regional strategies implementation experience, this instrument will significantly influence transnational regional development.

Third, the Economic Network of the Three Seas Regions is an essential instrument of regional development within the framework of that Initiative. It will form part of the network administration, giving rise to an international association

²² Ibid.

²³ Ibid.

of local-government bodies, centred around the Via Carpathia transnational highway network project.

Fourthly, the introduction of a statutory obligation to prepare a strategy for the development of international cooperation of the voivodship, which would be complementary to macro-regional strategies.

The Economic Network of the Three Seas Regions will facilitate the implementation of the macro-regional concept of regional development in the Three Seas Initiative area. It will become an efficient instrument of international local-government cooperation which will make contacts between regions more efficient and easier, while enabling the conduction of joint activities. Activities connected with transnational regional development will constitute one of the key elements of sustainable regional development law.

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PRINCIPLES DETERMINING THE SYSTEM OF LOCAL GOVERNMENT IN POLAND

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Abstract. Local government has become a constant part of the state system. It must be therefore founded on principles that determine the system in an appropriate manner that conforms to legal regulations. Decentralisation and subsidiarity are the basic principles. They make direct references to an individual's situation, fundamental rights and freedoms. This is the individual who should have maximum control over their position in both private and public legal dimensions. The systemic issues seen in this light are connected to the participative model of public administration, which assumes active civic involvement in the process of making resolutions. This paper will analyse positions of the doctrine and judicature concerning fundamental principles determining local government, i.e. of decentralisation, subsidiarity, and participative democracy.

Keywords: state political system, local governments, decentralisation, subsidiarity, participation

INTRODUCTION

The concept of local government is not clearly defined by the science of administrative law. As B. Dolnicki notes, local government in its legal (corporate) sense is understood as decentralised discharge of public administrative tasks for which entities separate from the state are responsible, whose duties are not in any way subject to state interference [Dolnicki 2016, 21]. Local government is part of public power that covers populations and territories determined by the general territorial division of the state [Ura 2015, 191]. The notion and essence of local government are made more specific by designating principles based on which this local government operates. They determine discharge of public duties and rules of local government authorities and institute stable patterns of behaviour. J. Smarż points out local government in Poland has a long tradition. To begin with, the institution was a form of the society's participation in power – certain communities made decisions regarding their own affairs. In time, that cooperation required legal institutionalisation of communities, which gave rise to corporations and associations [Smarż 2021, 62].

The public administration system of the Republic of Poland is determined by constitutional principles as its 'foundations' and 'guidelines' for activities of the legislature and public administration, on the one hand, and by the remaining legal norms, of secondary function and complementing the system with detailed solutions, on the other hand [Szlachetko 2018, 45]. Public administration is operated by the state (or its distinct entities as authorised by the state) and realises the

common good, or public interest, to bring some benefits to the public (community, state). It also cares for individual needs, representing interests of the entire society or community with regard to universally shared values [Zimmermann 2016, 29–32]. This paper will analyse positions of the doctrine and judicature concerning fundamental principles determining local government, i.e. of decentralisation, subsidiarity, and participative democracy.

1. DECENTRALISATION OF LOCAL GOVERNMENT

Decentralisation of power was initiated in 1990 and resulted in a three-tier structure of local government.¹ The science of administrative law defines decentralisation in various ways and using diverse terms. This is a basic principle of organising public administration which commonly refers to legal construct of local government. J. Starościak states legally defined independence in discharge of public tasks is the essence of decentralisation [Starościak 1960]. S. Fundowicz refers to this theory in his research into decentralisation of public administration in Poland and follows N. Achterberg, who claimed decentralisation is “distribution of administrative duties (actions) among a variety of organisations which are public legal entities” [Fundowicz 2005, 28]. Despite the number of definitions, decentralisation is always seen to result in distribution of administrative tasks (actions) from the centre to lower-level bodies, including public legal entities [ibid.]. Decentralisation may be territorial or material. In the former, an entity is charged with public tasks relating to a part of a state territory. Material decentralisation, meanwhile, consists in an entity being tasked with discharge of public duties concerning an area of affairs [Przybysz 2020]. It is expressed, therefore, as distribution of tasks and competences among administering entities [Kurzyńska-Chmiel 2020, 7–15].

Decentralisation has also been the object of the Constitutional Tribunal decisions, which declared “the concept of decentralisation means the process of a continuing expansion of competences of lower-level public authorities by transferring to them tasks, competences, and necessary resources;” it has also pointed out “the existing notion of decentralisation, to which the Constitution refers, is a multi-dimensional concept comprising the prohibition against concentrating power, on the one hand, and the requirement to seek the most effective structural solutions, on the other hand.”²

¹ The basic legal framework for organisation and operation of local government in Poland are currently provided by: Act of 8 March 1990, the Local Government, Journal of Laws of 2020, item 713 as amended; Act of 5 June 1998, the County Government, Journal of Laws of 2020, item 920 as amended; Act of 5 June 1998, the Regional Government, Journal of Laws of 2020, item 1668 as amended.

² Judgment of the Constitutional Tribunal of 18 February 2013, ref. no. K 24/02, OTK–A 2003/2, item 11.

Decentralisation is systemic [Niżnik–Dobosz 2018, 148]. This principle is adumbrated in Article 15(1) of the Polish Constitution,³ according to which the territorial structure of the Republic of Poland provides for decentralisation of public power. The overall territorial division of the state that addresses social, economic and cultural links and provides territorial units with the capacity for discharge of public tasks is defined by legislation. Article 16(2) states, meanwhile, “local government participates in wielding of public power. The substantial portion of public duties accorded to local government under legislation is executed on its own behalf and at its own responsibility.” These provisions should be interpreted jointly, since independence is a principal expression of decentralisation [Zydel 2020, 110–17]. Granting a local community the right to wield public power in its own name and to institute prevailing norms of local law as stipulated in legislation represents the conviction local authorities best recognise needs and conditions of their regions, which helps them to apply the most adequate means to satisfaction of these needs.⁴ “Independence” of entities demonstrates the essence of decentralisation of public power [Szlachetko 2018, 45–55].

Decentralisation of public power is also a principle named in the preamble to the European Charter of Local Self-government),⁵ and the construct of this self-government is a consequence of the principle. The preamble notes “existence of local communities provided with real rights creates conditions for effective administration which is in close contact with citizens.” Article 3 ECLSG says local government means not only the right but also the ability of local communities to direct and manage “a principal share of public affairs in the interests of their populations.” It is therefore the object of decentralising efforts to streamline discharge of duties by the administrative apparatus in direct contact with citizens and to satisfy collective needs of local populations [Husak 2009, 256].

2. THE PRINCIPLE OF SUBSIDIARITY

As T. Bąkowski notes, the principle of subsidiarity, seen in the perspective of the national legal order, has enjoyed the status of constitutional principle for more than two decades. Its spirit can be traced in various section of the constitutional law and it is additionally directly cited in the key fragment of the preamble: “we enact the Constitution of the Republic of Poland as the fundamental law of the state based on respect for freedom and justice, cooperation of authorities, social dialogue, and the principle of subsidiarity, which reaffirms rights of citizens and their communities” [Bąkowski 2020, 9–19]. The Constitution names the principle

³ Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, No. 78, item 483 as amended.

⁴ Judgement of the Regional Administrative Court in Wrocław of 19 October 2014, ref. no. II SA/Wr 287/03, Lex no. 578764.

⁵ *European Charter of Local Self-government* drafted in Strasbourg on 15 October 1985, Journal of Laws of 1994, No. 124, item 607 as amended [hereinafter: ECLSG].

of subsidiarity in its preamble. It is therefore a fundamental principle of the system. Its placement in the introduction to the Polish Constitution instructs the legislature to enact the principle in ordinary laws [Bandarzewski 2002, 49–50]. In light of the principle of subsidiarity, the state should only fulfil some care or supplementary functions in relation to its citizens without substituting them in caring for themselves [Wojtyła 2020, 190].

The principle is also expressed in Article 4(2–3) ECLSG, which declare “local communities shall enjoy, within the law, full freedom to act in any matter which is not excluded from their competences or is not part of competences of other authorities. Public affairs are generally the responsibility of those authorities that are closest to citizens. When these functions are entrusted to other authorities, scope and nature of duties and requirements of effectiveness and economy shall be taken into consideration.”

E. Olejniczak–Szałowska points out “the principle of subsidiarity in its legal aspect assumes legal regulation of the situation of citizens and their groupings should assure maximum independence and participation in discharge of public tasks. The state and other communities should be auxiliary to individuals, families and smaller communities without taking over any principles that can be realised there” [Olejniczak–Szałowska 2016, 177–78]. The nature of the principle of subsidiarity, like B. Dolnicki emphasises, is to attempt the most rational distribution of power among its particular levels based on the criterion of effectiveness [Dolnicki 1993, 27]. Thus, the principle applies to the local government above all else [Adamczyk 2003, 5–15]. What is more, it plays an important part in the entire administrative law by defining the regulatory role of the state and acceptable extent of its interference with citizens [Lipowicz 1998, 43–45]. It is intended to respect rights of citizens and communities they are part of, not to petrify existing resources of these rights [Chmielnicki 2005, 57–58]. The principle of subsidiarity can be observed and function successfully where there are sufficient resources of social capital, closely associated with civic activity, since people, groups and larger or smaller communities are assumed to be willing to solve problems in their local environment independently (actively). To achieve this state of affairs, it is a good idea to promote notions of civil society, whose commitment builds local welfare and thereby the welfare of a region and country [Śwital 2019, 46].

The principle of subsidiarity is expanded by the Polish Constitution by instituting “the presumption of competences (presumption of tasks) for the entire local government” (Article 163) and subsequent presumptions for the benefit of local communities (Article 164(1–3)) The constitution framers charged the local government with public duties which are not reserved by the Constitution or legislation to the competences of other public authorities. The principle of presumed competence of local government comprises realisation of “tasks of public nature” that serve to satisfy needs of local communities and are undertaken in order to realise the common good [Przywora 2016, 82–91]. The preamble to the Polish Constitution regards the principle of subsidiarity as a fundamental princi-

ple of Poland's legal order, with the subsidiarity reaffirming rights of citizens and their communities. The principle is expected to determine both mutual relations between central administration and local government and between citizens and their organisations with their local communities and their bodies.⁶ The principle of subsidiarity implies a prohibition against taking over duties individuals are capable of discharging themselves and assistance only when individuals are no longer self-sufficient in situations of crisis.⁷

As noted by H. Izdebski, "the subsidiarity in its horizontal sense consists in competent public authorities assuring realisation of public tasks in such a way that this is effected, to a maximum degree possible, with the aid of civil society institutions. Without abandoning responsibility for a field of affairs, in particular, welfare (social work, education, healthcare, culture, etc.), competent public authorities ought to transfer as many matters as possible, even financing full cost of realisation, to non-government organisations if only the latter are capable of effective discharge of tasks entrusted to them as part of their statutory activities" [Izdebski 2020, 87–91].

The principle of subsidiarity in discharge of public duties consists in such a distribution of public tasks that the state as a whole carries out only those that cannot be realised by citizens themselves, their communities or organisations. It should be remembered 'the state' in the above formulation refers equally to central public authorities and local government and state administration, which in turn means public duties which are responses to existing needs of populations should first of all be realised by themselves. The state undertakes discharge of tasks only where no civil structure is capable of performing them [Gilowska, Kijowski, Kulesza, et al. 2002, 35]. A local community, the starting point for any discussion of local government, can be a 'beneficiary' of subsidiarity on the one hand and can be of assistance itself, on the other hand. Subsidiarity can in no way be identified with support for local government alone [Waldziński 1999, 97–98].

It must be stressed the principle of subsidiarity is closely associated with personalism, founded on Christian thought. That position acknowledges primacy of a person over things and priority of a person before any type of communities. Personalists believe every community serves man who is a person, a conscious and free subject capable of self-determination. Assisting a man with personal development is a basic task of a community [Kowalczyk 2005, 260]. In his encyclical *Centesimus annus* (1991), John Paul II taught "a higher-tier community should not interfere with internal affairs of a lower-tier community, depriving the latter of its competences; instead, it should support the latter if needed and assist with coordinating its actions and tasks with actions of other social groups for the

⁶ Judgment of the Supreme Administrative Court of 4 June 2001, ref. no. II SA/Kr 911/01, Lex no. 53651.

⁷ Judgment of the Supreme Administrative Court of 26 June 2009, ref. no. I OSK 1458/08, Lex no. 563281.

sake of the common good.”⁸ In John Paul II’s opinion, functioning of a number of variously interrelated, autonomous groups is necessary for vitality of a society. Pointing to the need for “intermediate communities,” the Pope claimed they, as communities of persons, reinforce the social tissue and prevent a range of social degenerations. It should be assumed, therefore, the idea of subsidiarity is founded on a philosophy of man and society, in particular, the role and status of the human person in society. As an independent being, man creates a social organisation to the extent and in a form required to assist human persons. All organisations and communities should serve and help to realise objectives and interests of individuals, respecting their autonomy and enabling self-fulfilment [Millon–Delsol 1994, 42–43].

3. THE PRINCIPLE OF PARTICIPATIVE DEMOCRACY

The nature of relations between the state and individual has for ages been the object of study for prominent thinkers and scholars. Continuing attempts at establishing an optimum model of mutual links and dependences have given rise to a variety of solutions, with the concept of the common good worthy of particular attention [Machocka and Śwital 2016, 135–38]. Forms of social participation have evolved considerably during the 30 years of local government in Poland. Aside from decision-making forms, there are those of consultation, opinion-giving, and a unique, previously unknown semi-decision-making nature. They are a specific form of civil decision-making, not independent, but forming part of decision-making competences of local government authorities, which are – depending on form of social participation – bound by these decisions to varying degrees [Jaworska–Dębska, 2020, 49–64].

Participative democracy is a broader category of political representation than direct democracy. It combines features of deliberative, direct, and indirect democracy [Marczewska–Rytko 2002, 31–44]. Article 4(2) of the Polish Constitution identifies indirect forms of civic participation in this aspect of socio-political life and adopts – following a majority of present-day constitutions – the principle of representative democracy, which grants nations the right to choose their representatives to legislative bodies in general elections relying on programmes to be realised in performance of mandates entrusted to these representatives [Skrzydło 2002, 17] without omitting direct forms of power wielded by sovereigns. The idea of involving residents of a local community in the process of direct decision-making is not a new construct. The science of administration attempts to evaluate this phenomenon with regard to improvements to public administration, especially in the context of individuals and formal and informal social groups taking part in making decisions and discharge of public tasks [Giełda 2015, 181]. Participation of civil society in making decisions and discharge of public duties is an

⁸ Ioannes Paulus PP. II, *Litterae encyclicae Centesimus annus* (01.05.1991), AAS 83 (1991), p. 793–867.

expression of administrative policy and a method of exercising power by democratically constituted bodies. It is also an expression of care for the common good from participants in public life [Niżnik–Dobosz 2014, 25–26].

Public participation is effected via forms of direct democracy in its broad sense, inclusive of institutions that specialist literature occasionally refers to as semi-direct democracy and which constitute an intermediate category between direct and indirect democracy. In light of this division, the sovereign's ability to make final decision is the principal characteristic of direct democracy [Uziębło 2004, 300]. Participation denotes taking part in decision-making processes of administration by potential addressees of its actions. "Public causes of the participation include the desire of social organisations and groups and of citizens to participate in the earliest possible phases of decision-making processes" [Lipowicz 1991, 122]. Public commitment may take the forms of: consultation, creation of opinion-giving and consultation councils, public hearings, realisation of public tasks by non-public actors, including non-government organisations, to improve quality of the tasks; electoral (political) participation, understood as active or passive participation in elections or referenda at various levels of power; and compulsory (obligatory) participation, defined as compulsory civic activities for functioning of the political community and discharge of basic duties by the state [Gliński and Palska 1997, 365–66].

Local democracy is regarded as a major part of the democratic system. It allows for articulation of the needs and preferences closest to private life of a citizen, values and environment of a local community. At this level, participation by means of personal interactions, combinations of interests and local groups, and direct solving of local problems. Participative democracy should be interpreted in a wider sense of democracy. It means various paths of citizens' 'choices', from a system of representation (chiefly via political parties) to formal and informal ways of direct civic participation [Śwital 2019, 28–30]. As community members exhibit meagre interest in direct participation in power, activities of a local community continue to be identified primarily with activities of its authorities, including, as laid down in Article 11a of the Local Government Act, community councils and town mayors/presidents [Lewicki 2013, 143, 150–52].

Members of a local government community should be legally guaranteed – by virtue of their community membership – participation in "management and administration" of activities performed by a community to satisfy needs of its members [Olejniczak–Szałowska 1996, 8–9]. E. Olejniczak–Szałowska points out each resident of a local area is entitled to certain rights, such as: 1) the right to participation in management of community affairs as their fundamental and general right that includes: the right to take part in making decisions about local matters and to work with community bodies to realise public tasks; 2) the right to information about community affairs and actions of local community bodies and to public control of these actions; 3) the right to direct and exclusive resolution of community affairs (appointment and dismissal of community council and deci-

ding about key affairs of a community by way of a referendum); 4) the right to articulate and support their interests, by means of both individual and group actions; 5) the right to protect their interests against violations by local community bodies, including the right to submit complaints against resolutions and other actions or inaction of these bodies to administrative courts (Articles 101 and 101a of the Local Government Act); 6) the right to specific performances from a community, in particular, to welfare [ibid.].

Citizens' right to participate in crucial decision-making processes that affect them personally is the essence of democracy. This is an expression of empowerment of local communities, which are not only subjects of law but are also capable of regulating and managing, at their own responsibility and in the interest of their populations, the bulk of public affairs. Dialogue at both central government, regional and local levels should result from a considered vision and strategy of its utilisation for the purpose of effective policies intended to improve quality of governance and more democratic life [Sura 2015, 9–15].

CONCLUSION

Independence derived from the practised principle of subsidiarity is the essence of local governance. Experience of the past 30 years reaffirms accuracy of the reforms and systemic assumptions for the sake of decentralisation and development of self-government. Local governments have become part of the system and continuing support for public participation is in the general interest. Introduction of certain solutions to state or local government activities most frequently relies on clear normative foundations. A correctly formed system of a state and thus of local government must be based on properly standardised principles grounded in laws set out both in the Polish Constitution and ordinary legislation. They set limits to operation of public administrative bodies and affect civil involvement in decision-making procedures. Development of democracy and local government provides local populations with opportunities for exercising power and independent decision-making in affairs of local communities. Constructing frameworks for citizens to take an active part in management of their local communities is an instrument of building the civil society.

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FISCAL BARRIERS TO TRADE WITHIN THE EU INTERNAL MARKET

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Abstract. The article deals with the EU rules on prohibition of fiscal barriers within the internal market, and the free movement of goods. Prohibition of fiscal barriers which form an obstacle to free movement of goods are regulated by prohibition of customs duties and prohibition of discriminatory taxation. Both these fiscal levies must follow the non-discrimination principle, i.e. the way these levies are applied must respect the principle of prohibition of discrimination based on nationality. It is also important to make difference between the prohibition of customs duties and prohibition of discriminatory taxation as they are subject to different legal regime.

Keywords: Internal market, anti-discrimination taxation, direct discrimination, indirect discrimination, taxes, similar product, competing product

INTRODUCTION

According to the Article 28 TFEU,¹ the European Union (EU) shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries. Customs union is a matter of exclusive competence of the EU (Article 3(1)(a) TFEU), i.e. only the EU may legislate and adopt legally binding acts and the Member States are able to do so only if they are empowered by the EU or if they implement the EU acts.

Single European Act² was the first significant amendment of the Treaties. It set an objective to establish the internal market by 31 December 1992. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capita is ensured.³ The practical result of internal market is that the controls on the movement of goods within the internal market have been abolished and the EU is now a single territory without internal frontiers. The abolition of customs tariffs promotes trade between member states, which accounts for a large part of the total imports and exports of the member

¹ Treaty on the Functioning of the European Union, Official Journal of the European Union, C 202, 7 June 2016 [hereinafter: TFEU].

² Official Journal of the European Communities, L 169, 29 June 1987.

³ Article 26(2) TFEU: “The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.”

states [Tichý, Arnold, and Zemánek 2009]. The Treaties specify the conditions under which these freedoms shall be realized. The free movement of goods is established on: a) customs union (Article 30 TFEU); b) prohibition of quantitative restrictions between member states (Articles 34 and 35 TFEU); c) prohibition of discriminatory taxation (Article 110 TFEU); d) competition policy, i.e. rules applicable to undertakings (Articles 101 to 109 TFEU).

1. NON-DISCRIMINATION PRINCIPLE

Article 18 TFEU⁴ provides a general prohibition of any form of discrimination based in national origin. It is applied to goods or persons⁵ and this concept is crucial for internal market functioning [Tridimas 2009]. Difference in treatment is not tolerated between the EU member states and within the internal market [Karas and Králik 2012]. Article 18 TFEU has a broad application and the Court of Justice insisted that the principle of non-discrimination has a direct effect.⁶

EU anti-discrimination legislation defines both direct and indirect discrimination [Varga 2011], whereby the direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation (Article 2(2)(a) of the Directive 2000/78/EC). Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 2(2)(b) of the Directive 2000/78/EC). This means, that the indirect discrimination may be objectively justified, what may be described by the famous *Cassis de Dijon*⁷ or *Gebhard*⁸ case. The prohibition of discrimination is

⁴ “Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”

⁵ See judgment of the Court of 2 February 1989 C-186/87, *Ian William Cowan v Trésor public* (ECLI:EU:C:1989:47), point 14: “Under Article 7 of the Treaty (now Article 18 TFEU) the prohibition of discrimination applies ‘within the scope of application of this Treaty’ and ‘without prejudice to any special provisions contained therein’. This latter expression refers particularly to other provisions of the Treaty in which the application of the general principle set out in that article is given concrete form in respect of specific situations. Examples of that are the provisions concerning free movement of workers, the right of establishment and the freedom to provide services.”

⁶ See judgment of the Court of 21 June 1974 C-2/74, *Jean Reyners v Belgian State* (ECLI:EU:C:1974:68), point 14 and 30.

⁷ See Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, Judgment of the Court of 20 February 1979 (ECLI: EU:C:1979:42): “Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.”

⁸ See case C-55/94, *Reinhard Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* (ECLI: EU:C:1995:411); point 37: “It follows, however, from the Court’s case-law that natio-

not limited to intentional discrimination, but also to unintentional provisions that have as their effect restrictions of imports or exports [Foster 2011]. The current case does not limit the restriction on free movement of goods to the prohibition of discrimination, but to any provisions that form an obstacle to the free movement of goods, including the prohibition covered by Article 110 TFEU.

2. METHODS OF INTEGRATION

Negative integration brings deregulation as it consists in outlawing the national laws that constitute an obstacle for the internal market.⁹ Negative integration provisions are contained in the TFEU regulating each freedom of the internal market and have a form of ban of all national provisions that form a restriction [ibid.]. TFEU on the other hand, establishes statutory exceptions fulfilment of which does not constitute a restriction to the internal market functioning. The method of negative integration does not bring new legislation, but removes the obstructive laws to the free movement. Negative integration has been highly supported by the Court of Justice of the EU as it declared direct effect of the TFEU de-regulatory provisions that prohibit the member states to adopt laws that constitute an obstacle for the internal market. The direct effect supports the individuals from private enforcement of their rights [Stehlík 2012] that are guaranteed by EU law against the member states [Bobek, Bříza, and Komárek 2011].

On the other hand, positive integration method brings new legislation on EU level. Its purpose is to regulate specific issues on EU level. It introduces new institutions, but also includes adoption of harmonization legislation and approximation of national laws by replacing the national divergent rules by common EU provisions [Foster 2011]. This is achieved by the Treaty provisions that enable to adopt a special legislation in specific areas of internal market¹⁰ or by general legal bases provisions.¹¹

nal measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.”

⁹ The Article 18 TFEU that prohibits discrimination on grounds of nationality is also considered as provision belonging to negative integration method.

¹⁰ E.g. in the area of free movement of workers the Article 46 TFEU that “European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers.” In the area of free movement of services the Article 59(1) TFEU: “In order to achieve the liberalisation of a specific service, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall issue directives.”

¹¹ Approximation of laws provision (Articles 114–118 TFEU) and the so called flexibility clause (Article 352 TFEU) that contains a provision allowing the EU to adopt an act necessary to attain objectives laid down by the treaties when the latter have not provided the powers of action necessary to attain them.

3. REGULATORY BARRIERS – PROHIBITION OF QUANTITATIVE RESTRICTIONS

Articles 34 and 35 TFEU prohibit quantitative restrictions on imports and exports and all measures having equivalent effect between member states [Craig and de Búrca 2011.]. Charge having equivalent effect is defined as all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.¹² Further case law developed the interpretation of the term quantitative restrictions, including the principle that any product legally manufactured and marketed in a one member state in accordance with its fair and traditional rules, and with the manufacturing processes of that country, must be allowed onto the market of any other member state.¹³ This principle of mutual recognition is applied even in the absence of harmonisation measures on EU level.¹⁴ The application of Article 34 TFEU is limited by the Keck judgment that concerns the selling arrangements which must be applied in a non-discriminatory way.¹⁵

4. FISCAL BARRIERS – PROHIBITION OF INTERNAL CUSTOMS

The EU shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between member states of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries (Article 28(1) TFEU). The provisions regulating the customs union shall apply to products originating in member states and to products coming from third countries which are in free circulation in member states (Article 28(2) TFEU). TFEU provides a general prohibition of customs duties and charges having equivalent effect. This prohibition is applied to goods which cross internal frontiers and from the settled

¹² Case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville*, judgment of the Court of 11 July 1974 (ECLI:EU:C:1974:82), point 5.

¹³ Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, judgment of the Court of 20 February 1979 (ECLI:EU:C:1979:42), point 15.

¹⁴ *Ibid.*, point 8: “Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.”

¹⁵ Joined cases C-267/91 and C-268/91, *Bernard Keck a Daniel Mithouard* (ECLI:EU:C:1993:905), point 16: “By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 [1974] EC R 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.”

case law it is clear that the Court of Justice of the EU is concerned with the restrictive effect on trade between member states and not the purpose of the charge that must be paid.¹⁶ Products coming from a third country shall be considered to be in free circulation in a member state if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that member state, and if they have not benefited from a total or partial drawback of such duties or charges.

The EU law prohibits customs duties on imports and exports and charges having equivalent effect. This prohibition shall also apply to customs duties of a fiscal nature, i.e. a broad definition of customs is applied in EU law.¹⁷ The Common Customs Tariff duties shall be fixed by the Council on a proposal from the Commission (Article 31 TFEU). When a tax is caught by EU law then it is *per se* unlawful and there are no exemptions in EU law.¹⁸

¹⁶ Case 24/68, *Commission of the European Communities v Italian Republic*, judgment of the Court of 1 July 1969 (ECLI:EU:C:1969:29): “6. In prohibiting the imposition of customs duties, the Treaty does not distinguish between goods according to whether or not they enter into competition with the products of the importing country. Thus, the purpose of the abolition of customs barriers is not merely to eliminate their protective nature, as the Treaty sought on the contrary to give general scope and effect to the rule on the elimination of customs duties and charges having equivalent effect, in order to ensure the free movement of goods. 7. It follows from the system as a whole and from the general and absolute nature of the prohibition of any customs duty applicable to goods moving between Member States that customs duties are prohibited independently of any consideration of the purpose for which they were introduced and the destination of the revenue obtained therefrom. The justification for this prohibition is based on the fact that any pecuniary charge, however small, imposed on goods by reason of the fact that they cross a frontier constitutes an obstacle to the movement of such goods. 8. The extension of the prohibition of customs duties to charges having equivalent effect is intended to supplement the prohibition against obstacles to trade created by such duties by increasing its efficiency. The use of these two complementary concepts thus tends, in trade between Member States, to avoid the imposition of any pecuniary charge on goods circulating within the Community by virtue of the fact that they cross a national frontier.”

¹⁷ In judgment of the Court of 5 February 1976, case 87/75, *Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze* (ECLI:EU:C:1976:18), point 9, the Court of Justice defined broadly any charge having an effect equivalent to a customs duty: “Consequently, any pecuniary charge, whatever its designation and mode of application, which is unilaterally imposed on goods imported from another Member State by reason of the fact that they cross a frontier, constitutes a charge having an effect equivalent to a customs duty.”

¹⁸ In judgment of the Court of 10 December 1968, case 7/68, *Commission of the European Communities v Italian Republic* (ECLI:EU:C:1968:51) the Court of Justice rejected the argumentation of Italy on justification based in Article 36 TFEU which is unavailable in case of fiscal barriers: “The defendant relies on Article 36 of the Treaty as authorizing export restrictions which, as in this case, are claimed to be justified on grounds of the protection of national treasures possessing artistic, historic or archaeological value. By reason of its object, scope and effects, the tax in dispute is claimed to fall less within the provisions of the Treaty relating to charges having an effect equivalent to customs duties on exports than within the restrictive measures permitted by Article 36. Consequently, in view of the difference between the measures referred to in Article 16 and Article 36, it is not possible to apply the exception laid down in the latter provision to measures which fall outside the scope of the prohibitions referred to in the chapter relating to the elimination of quantitative restrictions between Member States. Finally, the fact that the provisions of Article 36 which have been mentioned do not relate to customs duties and charges having equivalent effect is explained by the fact that such measures have the sole effect of rendering more onerous the exportation of the pro-

5. FISCAL BARRIERS – PROHIBITION OF DISCRIMINATORY TAXATION

Article 110 TFEU respects tax regimes of EU member states. However, it applies in situations when foreign goods are subject to internal taxation and a different tax regime is applied for foreign and domestic products. Article 110 TFEU is not absolute and the restriction applies to indirect taxation of competing foreign products.

From the text of Article 110 TFEU it is clear, that it recognizes two categories: 1) discrimination against similar foreign products (Article 110(1) TFEU) and 2) discrimination against competing foreign products (Article 110(2) TFEU).

Article 110(1) TFEU stipulates that no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. This provision prohibits taxation that would protect similar local products. Article 110(2) TFEU stipulates that, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products. This provision prohibits taxation that would indirectly protect other products.

Article 110 TFEU regulates two situations. The Article 110(1) TFEU applies if there is a discrimination of similar foreign product and Article 110(2) TFEU applies to imported products that are in competition with domestic products [Weatherill 2010].

5.1. Similar foreign products

The breach according to the Article 110(1) TFEU covers direct or indirect discrimination of similar foreign products. The prohibition of discrimination applies to domestic taxation that may cover different situations, e.g. different rates for tax for foreign and domestic products, different basis for assessment or different rules or regimes for tax payments for foreign or domestic products.

Article 110(1) TFEU requires that the taxation is equal for foreign products and domestic products. The key question is which products are “similar.” Over the years, the Court of Justice has used to tests to determine similarity [Barnard 2010, 55]. Firstly, a formal test is applied which examines whether the product falls within the same fiscal, customs or statistical classification. Subsequently, the Court of Justice adopted a broader test which is a combination of factual comparison of the products with an economic analyses of their use [ibid., 56].

In judgment 106/84¹⁹ the Court of Justice was dealing with the question what constitutes a similar product (fruit wines and wines made from grapes in this case). From the judgment it is clear that the similarity of products does not mean

ducts in question, without ensuring the attainment of the object referred to in that article, which is to protect the artistic, historic or archaeological heritage.”

¹⁹ Judgment of the Court of 4 March 1986, Commission of the European Communities v Kingdom of Denmark (ECLI: EU:C:1986:99).

that the products are strictly identical, but also include similar products that have a comparable use. The Court continued: In order to determine whether products are similar within the terms of the prohibition laid down in the first paragraph of Article 95 (now Article 110 TFEU) it is necessary to consider, whether they have similar characteristics and meet the same needs from the point of view of consumers. The Court endorsed a broad interpretation of the concept of similarity and assessed the similarity of the products not according to whether they were strictly identical, but according to whether their use was similar and comparable. Consequently, in order to determine whether products are similar it is necessary first to consider certain objective characteristics of both categories of beverages, such as their origin, the method of manufacture and their organoleptic properties, in particular taste and alcohol content, and secondly to consider whether or not both categories of beverages are capable of meeting the same need from the point of view of consumers.²⁰

However, if the products are produced from the same ingredients, that does not mean, that they are similar. The Court of Justice was of opinion that the raw materials must be presented in the product in more or less equal proportion in order to be considered as similar. In case 243/84 (Johnnie Walker case) the Court of Justice had to deal with similarity of whisky and fruit wine of the liqueur type. It stated that the two categories of beverages exhibit manifestly different characteristics. Fruit wine of the liqueur type is a fruit-based product obtained by natural fermentation, whereas Scotch whisky is a cereal-based product obtained by distillation. The organoleptic properties of the two products are also different. The fact that the same raw material, for example alcohol, is to be found in the two products is not sufficient reason to apply the prohibition contained in the first paragraph of Article 95 (now Article 110 TFEU). For the products to be regarded as similar that raw material must also be present in more or less equal proportions in both products. In that regard, it must be pointed out that the alcoholic strength of Scotch whisky is 40% by volume, whereas the alcoholic strength of fruit wine of the liqueur type, to which the Danish tax legislation applies, does not exceed 20% by volume.²¹ The contention that Scotch whisky may be consumed in the same way as fruit wine of the liqueur type, as an aperitif diluted with water or with fruit juice, even if it were established, would not be sufficient to render Scotch whisky similar to fruit wine of the liqueur type, whose intrinsic characteristics are fundamentally different.²² The answer must therefore be that products such as Scotch whisky and fruit wine of the liqueur type may not be regarded as similar products.²³

²⁰ Case 106/84, *Commission of the European Communities v Ireland*, judgment of the Court of 4 March 1986 (ECLI:EU:C:1986:99), point 12.

²¹ Case 243/84, *John Walker & Sons Ltd v Ministeriet for Skatter og Afgifter*, judgment of the Court of 4 March 1986 (ECLI:EU:C:1986:100), point 12.

²² *Ibid.*, para. 13.

²³ *Ibid.*, para. 14.

In case 184/85²⁴ (*Commission v Italy*) the Court of Justice was dealing with similarity between bananas and peaches and pears. It was taking into account the characteristics of the product on one hand and the consumer needs on the other hand. It stated that whether bananas and other table fruit typically produced in Italy have similar characteristics and meet the same consumer needs. Consequently, in order to assess similarity, account must be taken, on the one hand, of a set of objective characteristics of the two categories of product in question, such as their organoleptic characteristics²⁵ and their water content, and, on the other hand, whether or not the two categories of fruit can satisfy the same consumer needs.²⁶

5.2. Competing foreign products

The breach according to the Article 110(2) TFEU covers the protectionist effect of domestic taxation. This provision also applies to situations where the level of taxation is the same, but the difference is in applying tax provisions to the effect of which is to grant as regards excise duty on spirits, beer and made wine, benefits to Irish producers in respect of deferment of payment which are refused to importers of the same products from other Member States.²⁷ Article 110(2) TFEU covers a situation if the goods are not sufficiently similar but are in competition with each other, even if indirectly or potentially. It is applied if the tax provision of a member state has a protectionist effect to the detriment of imported goods that may be in competition with domestic goods. The key question is if the products are substitutable or interchangeable by each other. The aim of Article 110(2) TFEU is to prove that the tax has protectionist effect to the detriment of imported competing products. If the domestic goods benefit from some kind of indirect fiscal protectionism, the prohibition of Article 110(2) TFEU applies.

The Court of Justice of the EU has used several tests to discover whether the goods are in competition. Elasticity in demand is also reflected, especially in case if specific product is substituted by another product, e.g. if there is an increase in

²⁴ Judgment of the Court of 7 May 1987, *Commission of the European Communities v Italian Republic* (ECLI:EU:C:1987:207).

²⁵ I.e. sensory characteristics of food or other substances that create an individual experience via the senses – including taste, sight, smell, and touch. With respect to bananas on one hand and other fruits on the other hand the Court of Justice stated: “It must be observed in this case that the two categories of fruit in question, that is to say, on the one hand, bananas, and, on the other, table fruit typically produced in Italy mentioned above have different characteristics. As the Commission has conceded, the organoleptic characteristics and the water content of the two categories of product differ. By way of example, the higher water content of pears and other fruit typically grown in Italy give them thirst-quenching properties which bananas do not possess. Moreover, the observation of the Italian Government, which has not been challenged by the Commission, that the banana is regarded, at least on the Italian market, as a foodstuff which is particularly nutritious, of a high energy content and well-suited for infants must be accepted.”

²⁶ Case 184/85, *Commission of the European Communities v Italian Republic*, judgment of the Court of 7 May 1987 (ECLI:EU:C:1987:207), point 9.

²⁷ Case 55/79, *Commission of the European Communities v Ireland*, judgment of the Court of 27 February 1980 (ECLI:EU:C:1980:56), point 14.

price. Other factors, like manufacture, composition of the product, consumer preference are also taken into account.

Probably the most famous and most important was the case 170/78²⁸ (wine and beer) in which the Court of Justice considered imposing higher duties on imported wines as a protectionist measure. This measure indirectly protected beer which was a domestic product over imported still light wines. The Court of Justice was considering the nature of the competitive relationship between wine and beer and, secondly, the selection of a basis for comparison and the determination of an appropriate tax ratio between the two products.

The Court of Justice emphasized that Article 110(2) TFEU applies to the treatment for, tax purposes of products which, without fulfilling the criterion of similarity laid down in Article 110(1) TFEU, are nevertheless in competition, either partially or potentially, with certain products of the importing country. In order to determine the existence of a competitive relationship it is necessary to consider not only the present state of the market but also possible developments regarding the free movement of goods within the EU and the further potential for the substitution of products for one another which might be revealed by intensification of trade, so as fully to develop the complementary features of the economies of the Member States.²⁹ As regards the question of competition between wine and beer, the Court considered that, to a certain extent at least, the two beverages in question were capable of meeting identical needs, so that it had to be acknowledged that there was a degree of substitution for one another. It pointed out that, for the purpose of measuring the possible degree of substitution, attention should not be confined to consumer habits in a Member State or in a given region. Those habits, which were essentially variable in time and space, could not be considered to be immutable; the tax policy of a Member State must not therefore crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to respond to them.³⁰ In view of the substantial differences in the quality and, therefore, in the price of wines, the decisive competitive relationship between beer, a popular and widely consumed beverage, and wine must be established by reference to those wines which are the most accessible to the public at large, that is to say, generally speaking, the lightest and cheapest varieties. Accordingly, that is the appropriate basis for making fiscal comparisons by reference to the alcoholic strength or to the price of the two beverages in question.³¹

If the Court of Justice finds that the tax law of a member state has a protectionist effect to the detriment of imported goods that may be in competition with domestic goods, the member state may either lower the tax on imported product or

²⁸ Case 170/78, *Commission of the European Communities v United Kingdom*, judgment of the Court of 12 July 1983.

²⁹ *Ibid.*, point 7.

³⁰ *Ibid.*, point 8.

³¹ *Ibid.*, point 9.

raise the tax on domestic product, in order to eliminate the protection of domestic product.

6. DISTINCTION BETWEEN FISCAL BARRIERS AND REGULATORY BARRIERS

From a legal assessment it is necessary to make difference between charges having equivalent effect and taxes. In case *Reprographic Machines*³² the Court of Justice was considering the levy charged on copy machines in order to compensate the breaches of copyright. The levy was charged on copy machines because they are often used for breach of copyright. Only very few copy machines were produced in France and the levy seemed to be thus discriminatory. However, the Court of Justice held the levy to be a genuine non-discriminatory tax.

The charge having equivalent effect covers any charge exacted at the time of or on account of importation which, being borne specifically by an imported product to the exclusion of the similar domestic product, has the result of altering the cost price of the imported product thereby producing the same restrictive effect on the free movement of goods as a customs duty.³³ The essential feature of a charge having an effect equivalent to a customs duty which distinguishes it from an internal tax therefore resides in the fact that the former is borne solely by an imported product as such whilst the latter is borne both by imported and domestic products.³⁴ The Court has however recognized that even a charge which is borne by a product imported from another Member State, when there is no identical or similar domestic product, does not constitute a charge having equivalent effect but internal taxation within the meaning it relates to a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products.³⁵ Those considerations demonstrate that even if it were necessary in some cases, for the purpose of classifying a charge borne by imported products, to equate extremely low domestic production with its non-existence, that would not mean that the levy in question would necessarily have to be regarded as a charge having an effect equivalent to a customs duty. In particular, that will not be so if the levy is part of a general system on internal dues applying systematically to categories of products according to the criteria indicated above.³⁶

The Court of Justice accepted that the levy in issue forms part of a general system of internal dues and the levy in issue forms a single entity with the levy imposed on book publishers by the same internal legislation and from the fact, too,

³² Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, judgment of the Court of 20 February 1979 (ECLI:EU:C:1979:42).

³³ Case 90/79, *European Commission v France*, judgment of the Court of 3 February 1981 (ECLI:EU:C:1981:27), point 12.

³⁴ *Ibid.*, point 13.

³⁵ *Ibid.*, point 14.

³⁶ *Ibid.*, point 15.

that it is borne by a range of very different machines which are moreover classified under various customs headings but which have in common the fact that they are all intended to be used for reprographic purposes in addition to more specific uses.

If a charge is imposed on imported or exported goods by a member state and that charge is a non-discriminatory tax levy, it cannot be a charge having equivalent effect. Such charge is caught by Article 110 TFEU and as a tax underlies a different regime in comparison to the regime of prohibition of quantitative restriction under Articles 34 and 35 TFEU. The member states are free in establishing their own system of taxation which they consider to be most suitable for them. However, such system of taxation must be non-discriminatory to similar foreign products or competing foreign product according to Article 110 TFEU.

It is necessary to make difference between a charge having equivalent effect and taxation. These different charges underlie a different regime and different legal bases is applied on charges having equivalent effect (Articles 34 and 35 TFEU) and on taxes (Article 110 TFEU), i.e. they are mutually exclusive categories. It is not possible, that both articles may be applied on one and the same charge. The Court of Justice held that the essential characteristic of a charge having an effect equivalent to a customs duty, which distinguishes it from internal taxation, is that the first is imposed exclusively on the imported product whilst the second is imposed on both imported and domestic products. A charge affecting both imported products and similar products could however constitute a charge having an effect equivalent to a customs duty if such a duty, which is limited to particular products, had the sole purpose of financing activities for the specific advantage of the taxed domestic products, so as to make good, wholly or in part, the fiscal charge imposed upon them.³⁷ Where the conditions which distinguish a charge having an effect equivalent to a customs duty are fulfilled, the fact that it is applied at the stage of marketing or processing of the product subsequent to its crossing the frontier is irrelevant when the product is charged solely by reason of its crossing the frontier, which factor excludes the domestic product from similar taxation.³⁸ Financial charges within a general system of internal taxation applying systematically to domestic and imported products according to the same criteria are not to be considered as charges having equivalent effect. This could be the case even where there is no domestic product similar to the imported product providing that the charge applies to whole classes of domestic or foreign products which are all in the same position no matter what their origin. The objective of Article 110 TFEU is to abolish direct or indirect discrimination against imported products but not to place them in a privileged tax position in relation to domestic products. There is generally no discrimination such as is prohibited by Article 110 TFEU where internal taxation applies to domestic products and to previously imported products on their being processed into more elaborate pro-

³⁷ Case 78/76, *Steinike & Weinlig v république fédérale d'Allemagne*, judgment of the Court of 22 March 1977 (ECLI:EU:C:1977:52), point 28.

³⁸ *Ibid.*, point 29.

ducts without any distinctions of rate, basis of assessment or detailed rules for the levying thereof being made between them by reason of their origin.³⁹

In another case, the Court of Justice was also dealing with the necessity to make the distinction between a charge having equivalent effect and internal taxation. The Court of Justice confirmed its case law and stated that any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier and which is not a customs duty in the strict sense, constitutes a charge having an equivalent effect and such a charge escapes that classification if it constitutes the consideration for a benefit provided in fact for the importer or exporter representing an amount proportionate to the said benefit. It also escapes that classification if it relates to a general system of internal dues supplied systematically and in accordance with the same criteria to domestic products and imported products alike.⁴⁰ The Court continued that it is appropriate to emphasize that in order to relate to a general system of internal dues, the charge to which an imported product is subject must: a) impose the same duty on national products and identical imported products, b) impose the duty at the same marketing stage and c) the chargeable event giving rise to the duty must also be identical in the case of both products.

To exempt a charge levied at the frontier from the classification of a charge having equivalent effect when it is not imposed on similar national products or is imposed on them at different marketing stages or, again, on the basis of a different chargeable event giving rise to duty, because that charge aims to compensate for a domestic fiscal charge applying to the same products – apart from the fact that this would not take into account fiscal charges which had been imposed on imported products in the originating Member State – would make the prohibition on charges having an effect equivalent to customs duties empty and meaningless.⁴¹

CONCLUSIONS

Internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. Effective functioning is based on the prohibition of discrimination based on nationality [Mazák and Jánošíková 2011]. The prohibition of discrimination based on nationality is applied both to fiscal barriers (prohibition of discriminatory taxation and prohibition of customs) and regulatory barriers (prohibition of quantitative restrictions between member states). The article analyses the Article 110 TFEU and the two situations it covers: 1) discrimination against similar foreign products (Article 110(1) TFEU); 2) discrimination against competing foreign products (Article 110(2) TFEU).

³⁹ Ibid.

⁴⁰ Case 132/78, SARL Denkavit Loire v France, administration des douanes, judgment of the Court of 31 May 1979 (ECLI:EU:C:1979:139), point 7.

⁴¹ Ibid., point 8.

The Court of Justice makes difference between those goods that are similar and those goods that are in competition. From the cases law it is clear that the Court of Justice adopted a globalized approach to Article 110 TFEU considering both paragraphs of Article 110 TFEU together. It may happen that the Court considers the products not to be similar within the meaning of Article 110(1) TFEU, but these products still may be regarded as being in partial competition within the meaning of Article 110(2) TFEU. The article explains the difference between prohibition of charges having equivalent effect (Articles 34 and 35 TFEU) and prohibition of discriminatory internal taxation (Article 110 TFEU).

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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

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Abstract. This article discusses a situation in which international conventions that include norms of private law are applicable in situations other than those stipulated by norms that define their scope of application (*ex proprio vigore*). This involves various cases in which the domestic, EU or international legislator refers to the provisions of a given international convention (in a different international convention) and also cases in which provisions of an international convention are applied by virtue of the will of the parties to a civil law relationship. The author analyses individual situations searching for an answer to the question about the nature of provisions used and thus – adequate rules for their interpretation or for filling of gaps. In some situations, they retain their international law nature, while in others they become part of the domestic or EU law or a certain standard form contract which profiles the civil law relation.

Keywords: uniform law, reference, designation of substantive law

INTRODUCTION

The essence of international conventions that include uniform norms of private law and the essence of any international agreement imposes an obligation on countries which have ratified them to ensure the effectiveness of unfirming arrangements [Całus 2005, 383]. Courts of individual countries-parties to conventions are obliged to apply them *ex proprio vigore* regardless of the will of the parties to a legal relationship they concern, only if there are premises for applying them that result from internal provisions. The obligation to apply international conventions is independent of whether conflict of law rules contained in the above-mentioned legislative acts say that the law of the state-party to the convention applies. As has been noted in the literature, rules that outline the scope of application of international conventions themselves have the nature of conflict of law rules [Czepelak 2008, 184ff; Clarke 2009, 17].

However, irrespective of the application of international conventions that contain uniform rules *ex proprio vigore*, these conventions are applied in other situations. The basis for the application of provisions contained in the conventions may be the will of the domestic legislator who, in domestic legislative acts, refers to the content of international conventions as the source of regulation of internal relations, the will of the EU legislator or the will of the parties to a private rela-

relationship who, by exercising the principle of autonomy of the will of the parties, subject this relationship to provisions of an international convention, even though it does not apply by virtue of its own provisions. Provisions of international conventions may be also applied by virtue of references contained in other conventions. Application of these conventions to the so-called hypothetical contracts is a particularly interesting case.

Each such case of application of conventional provisions raises specific problems. The aim of this paper is to identify them and to attempt to find possible ways of solving them. The methods employed in this study involve an analysis of the law in force and legal comparison with regard to international conventions that contain uniform rules of private law and refer to other legislative acts of the EU and domestic law. The analysis of legal acts and of judicial decisions of national courts and the European Union are the research methods applied by the author. Views expressed in the literature are also taken into account in order to obtain the broadest possible picture of the discussed issue.

1. REFERENCES TO INTERNATIONAL CONVENTIONS IN DOMESTIC LEGISLATION

Provisions of the Polish Maritime Code¹ and the Aviation Law² are examples of references to international conventions that contain uniform rules of civil law as a source of law for regulating also domestic relations. Benefits of such a method of regulation are not solely confined to ensuring that the text of a legislative act is brief or even that instruments regulated in such act are consistent with parallel measures in international transactions. They also involve the possibility of enjoying the achievements of judicial decisions (including international case-law) and law scholarship which accompany the legal force of a given international convention [Wesołowski and Dąbrowski 2017, 547].

An international convention to which domestic legislation refers, although for internal relations, retains its international character. It remains a certain micro-system that is autonomous towards other systems, including the system that incorporates it. This has its consequences in relation to, *inter alia*, interpretation of the rules of conventions [Gebauer 2000, 683–705; Czepelak 2008, 395; Ambrożuk, Dąbrowski, and Wesołowski 2019, 153–55] or to filling of gaps [Dąbrowski 2018a, 89–99]. This means that it is the text expressed in the authentic language or languages of the convention³ that should be the subject of application and inter-

¹ E.g. Article 41(1), Article 97, Article 181(1), Article 272, Article 279 of the Maritime Code of 18 September 2001, Journal of Laws of 2018, item 2175 as amended.

² E.g. Article 208 of the Aviation Law of 3 July 2002, Journal of Laws of 2020, item 1970 as amended.

³ This often escapes the attention of persons solving particular problems, including experienced judges of the Supreme Court. An example here may be the judgment of Supreme Court of 22 November 2007, ref. no. III CSK 150/07, OSNC–ZD 2008, no. 2, item 53 with the commentary by K. Wesołowski, LEX/el.2010.

pretation. At the same time such interpretation should be in line with rules of interpretation of provisions of international conventions, in particular with directives for interpretation resulting from the Vienna Convention on the Law of Treaties.⁴

Various problems of references to international conventions can be noted in domestic law. Sometimes the law invokes a convention that addresses a specific problem without a clear identification but with a reservation that it is a convention binding on the country whose law refers to such convention (e.g. Article 208 of the Aviation Law). Such a tactic has the advantage of automatic incorporation to the domestic law of all amendments and supplementations of the convention binding on the date of entry into force of a referring provision. This also applies to an entirely new international convention that addresses a given matter in the case where a country making a reference becomes party to it. The second way consists in a reference to a specific international convention with a reservation that the reference includes further amendments or supplementation of this convention promulgated in an appropriate manner, but that they will become legally binding after entry into force of the referring provision, (e.g. Article 41(1), Article 97 Article 272 or Article 279 of the Maritime Code). Such an incorporation technique allows automatic inclusion to a domestic law of subsequent protocols and conventions that amend and supplement the convention specified in the referring provision. However, when a new convention that addresses the same subject-matter is ratified, incorporation of this convention requires that the referring provision be amended. The third way involves indicating a specific convention without a reference to subsequent amendments and supplementations which may be effected after entry into force of the referring provision (Article 181(1) of the Maritime Code). This tactic requires that the referring rule be amended where the convention is amended. Failure to implement such an amendment may result in duality of the state of law – the convention in the amended or supplemented form will be applied to international relations that fall within the scope of its application, whereas in internal relations – the convention in the form it was referred to in the referring rule will apply.

2. IMPLEMENTATION OF PROVISIONS OF CONVENTIONS IN THE EU LAW

Inclusion of these provisions in the EU law creates a specific situation in the application of provisions of conventions. Such regulations pertaining to carriage of persons which are a basis of the EU system of passenger protection are exam-

⁴ Vienna Convention on the Law of Treaties of 23 May 1969 (United Nations, Treaty Series, vol. 1155, p. 331) [hereinafter: VCLT]. For rules of interpretation of international conventions that contain uniform rules of civil law see [Wesołowski and Ambrożuk 2017, 165–76].

ples here. This system results from a number of EU regulations,⁵ which, however, do not include a comprehensive regulation of issues relating to a contract of carriage of passengers. They only correct and supplement regulations in the conventions-based law. These regulations were largely incorporated into EU law. Therefore, the measures resulting from international conventions form an integral part of this system.

Various techniques for including provisions of international conventions in the EU law were put to work. Therefore, even though air regulations do refer to the Montreal Convention (MC),⁶ they do not actually implement its provisions. However, MC is an element of EU law since the EU acceded to this convention.⁷ In turn, pursuant to Article 216(2) TFEU,⁸ agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. This means that both the provisions of the Montreal Convention (irrespective of whether a given country is party to it) and the provisions of EU regulations that modify and supplement the regulation contained in the Convention are applicable in “Union” relations. The application of MC as a Union system of passenger protection is not significantly dissimilar to its application in other relations. Nevertheless, the role of the Court of Justice of the European Union in the process of interpretation of such conventions must be emphasized.

In the case of rail transport and inland waterway transport this question looks quite different. Even though the EU acceded to COFIT⁹ and to the Athens Con-

⁵ The following regulations (broken down by individual branches of transport) are the core of the EU passenger protection system: 1) Regulation (EC) No. 2027/97 of the Council of 9 October 1997 on air carrier liability in respect of the carriage of passengers and their baggage amended by Regulation (EC) No. 889/2002 of the European Parliament and of the Council of 13 May 2002; 2) Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No. 295/91; 3) Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air; 4) Regulation (EC) No. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers’ rights and obligations; 5) Regulation (EC) No. 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents; 6) Regulation (EU) No. 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004; 7) Regulation (EU) No. 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004.

⁶ Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) of 28 May 1999, OJ L 194, 18.07.2001, p. 39–49.

⁷ Council Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), OJ L 194, 18.07.2001.

⁸ Consolidated version of the Treaty on the Functioning of the European Union of 25 March 1957, OJ C 326, 26.10.2012, p. 47–390.

⁹ Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 (United Nations, Treaty Series, vol. 1396, p. 2, 1397, p. 2).

vention in the wording of the 2002 Protocol¹⁰ (with the effect resulting from Article 216(2) TFEU), before it did so, the EU implemented the CIV convention¹¹ (by Regulation No. 1371/2007 – railway regulation) to a large extent by including an extract from this convention in Annex 1. Regulation No. 392/2009 (inland water regulation), in turn, served the same purpose for the Athens convention. However, this implementation does not cover some of the provisions of the convention (i.a. jurisdiction-related provisions were left out on account that such issues are EU's sole competence).

Such reference in EU regulations to provisions of conventions means that in relations resulting from said regulations these provisions are not applied as provisions of an international convention, but as provisions of Union law. This has specific effects, especially for interpretation. Irrespective of the slightly different rules of interpretation or axiology adopted, languages that are official EU languages but not authentic languages of the texts are becoming more important¹² (for interpretation of provisions of Union law see [Radwański and Zieliński 2007, 476–78]). Naturally, this does not mean that the body of views of legal scholars and commentators and judicial decisions developed in the process of application of these provisions as rules of conventions must be disregarded in the process of interpretation of such provisions. It may be concluded that creation of a new legislative act, even if its content is very similar to the provisions of the applicable international convention, does not allow full enjoyment of the advantages of a referral. EU law as a rule is created in all official languages of the European Union. Nevertheless, this does not solve the problem of inconsistencies between individual language versions of a regulation either. It causes problems pertaining to the order of application of provisions, that is not always solved *expressis verbis*.

As a rule, international agreements executed by the European Union have priority over secondary legislation.¹³ This would mean that in the case of international carriage performed in the European Union an international convention

¹⁰ The European Union acceded to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea by Protocol of 2020, on the basis of two Council Decisions of 12 December 2011.

¹¹ Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV) – Appendix A to the Convention concerning International Carriage by Rail (COTIF).

¹² On the contrary [Dąbrowski 2018b, 55], referring to recital 14 of the preamble to Regulation 1371/2007 that contains an intent of building a system of compensation for passengers created by this regulation on the basis of uniform provisions of CIV, postulates that the rule of interpretation of EU legislative acts be rejected in the interpretation of provisions of annex I to Regulation 1371/2007 and that the French language version be given primacy.

¹³ Such a position substantiates, first, the requirement of compatibility of an international agreement with primary legislation, because international agreements not compatible with the Treaties cannot enter into force, unless the Treaties are revised (see Article 218(11) TFEU). Second, the fact that such agreements have priority over secondary legislation is an expression of binding the institution of the EU by international agreements executed by it. Cf. stance of the Court of Justice of the European Union expressed in point 52 of the judgment of 3 June 2008 in the *Intertanko* case (C–308/06, OJ C 183, 19.07.2008, p. 2–3).

should be applied first, followed by a regulation in a supplementary role. On the other hand, certain logic would ask to apply the laws in the opposite way in this case.¹⁴ This issue was regulated in such a way for railway law. Provisions of the Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail (OTIF) on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) show that if international carriage is performed between European Union states, Regulation 1371/2007 shall apply in the first place and CIV uniform rules may be applied in a supplementary role [Freise 2009, 1237–238]. This rule results from Article 2 of this Agreement and also from recitals 7 and 8 thereof.

3. APPLICATION OF CONVENTION PROVISIONS BY VIRTUE OF THE WILL OF THE PARTIES TO A LEGAL RELATIONSHIP

Yet another situation occurs where the parties decide to include in the content of the legal relationship between them the provisions of an international convention that is not applicable in this case *ex proprio vigore*. This may pertain to inclusion of provisions of a convention that is not yet in force or provisions of a convention that has already come to operation and addresses a given kind of legal relations but does not apply in a specific case because requirements pertaining to e.g. place of residence (seat) of the parties (or one of them) or to a carriage relationship or other conditions for applying the convention *ipso iure* are not met. This way of application of provisions of international conventions often occurs in the case of contracts of carriage, especially carriage by sea and carriage by road, on the basis of the so-called paramount clause. In the case of sea transport it is dictated by the narrow scope of application of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924,¹⁵ amended by the Protocol of 23 February 1968¹⁶ and the Protocol of 21 December 1979 (referred to in practice as the Hague Rules or, after the 1968 amendments mentioned above, the Hague-Visby Rules) and by the marginal application (due to the small number of ratifications, especially among the so-called biggest flag states) of the United Nations Convention on the Carriage of Goods by Sea of 31 March 1978¹⁷ (the so-called Hamburg Rules). In the case of carriage by road, it concerns mainly carriage performed in the territory of one country, thus without an international angle. In given carriage within national borders (especially in the case of cabotage, that is transport by a carrier without a registered seat or branch in the country in the territory of which the carriage is per-

¹⁴ M. Koziński seems to suggest such hierarchy with reference to acts of maritime law [Koziński 2010, 31].

¹⁵ Journal of Laws of 1937, No. 33, item 258.

¹⁶ Journal of Laws of 1980, No. 14, item 48.

¹⁷ Poland did not ratify this convention.

formed), the parties often decide to refer to CMR as a convention they are more familiar with than domestic law.

As much as the practice of carriage by sea does not trigger major legal doubts (no imperative regulations *ipso iure* applicable to a given type of international carriage or the broadly applied principle of freedom of contract in domestic legislations, that could be applicable), reference to CMR with regard to domestic carriage may do so. This results from the fact that domestic legislation pertaining to road transport applicable in given carriage is often mandatory. CMR's provisions included by virtue of the will of the parties to the content of a contractual relation may, therefore, be contrary to domestic legislation applicable to a given contract. Such a situation occurs, *inter alia*, in Polish legislation where it is assumed that provisions of the Transport Law of 15 November 1984¹⁸ are imperative, at least with regard to provisions on rules for the carrier's liability, on determining compensation or on redress. This raises a question about the convention's applicability in such a situation.

An answer to such question depends on the realisation of the nature of the reference to an international convention contained in civil law agreements.

Contrary to what is often assumed in practice, it is not a conflict-of-law choice of law, but the so-called designation of substantive law [Pazdan 1995, 105–19]. Provisions of a convention are not then treated as provisions of the law, but as an element that forms the content of a civil law relationship by virtue of the will of the parties (sometimes it concerns the content of the agreement [ibid., 110], though this approach seems to be a certain simplification). Provisions of conventions, then, have the function similar to the function of a standard form contract that does not derive from any of them. As a consequence, their applicability depends not only on the content of legal norms that enforce their own competence¹⁹ or *orde public*, as is the case in the exercise of the autonomy of the will of the parties pertaining to the choice of law, but also on mandatory rules.

The literature shows that applicable provisions should be subject to interpretation according to rules relevant for interpretation of contractual provisions that result from the internal law applicable to a given relationship, not rules for interpretation of provisions of the law [ibid.]. It seems, however, that such a firm stance on the matter is unfounded. It is because one cannot overlook the obvious fact that neither of the parties formed the content of individual provisions of the convention. Even if a convention is applied by virtue of the will of the parties on the basis of a paramount clause, when interpreting a standard form contract, it is difficult to ignore the fact that it comes from an entity (independent of the parties) who certainly tried, when wording individual provisions, to weigh the interest of the parties of the regulated legal relationship. It is also difficult to disregard views

¹⁸ Journal of Laws of 2020, item 8.

¹⁹ For norms that force their competence see Mataczyński 2005.

stemming from judicial decisions and literature that have been formed on the basis of a convention to which the parties referred in their agreement.

An interesting solution can be found in Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM) which forms Annex B to COTIF. These provisions are applicable only when the place of taking over of the goods and the place designated for delivery are situated in two different Member States (in the sense of belonging to OTIF, of which COTIF signatories are members), irrespective of the place of business and the nationality of the parties to the contract of carriage (Article 1(1) CIM). However, pursuant to Article 1(2) CIM, Uniform Rules shall apply also to contracts of international carriage of goods by rail when the following condition is met: only one of the countries (of taking over of the goods or of delivery) is a Member State and the parties to the contract agree that the contract is subject to these Uniform Rules. Such a solution was dictated by the wish to approximate two international systems of the carriage law (COTIF and SMGS, which covers former states of the Eastern Bloc) [Godlewski 2007, 23]. However, at this point we are interested in the nature of the arrangement made between the parties to the contract of carriage. It seems that it escapes the differentiation between conflict of law choice of the law and the designation of substantive law. The latter is a reminder in this respect that it does not apply to national law. On the other hand, however, it needs to be assumed that the applied CIM/COTIF provisions maintain their normative (not contractual) nature. An arrangement, though it does resemble a paramount clause, is in fact a condition for the application of the convention *ex proprio vigore* with all resulting consequences.

4. APPLICATION OF INTERNATIONAL CONVENTIONS TO HYPOTHETICAL LEGAL RELATIONS

The content of one convention may at times determine the application of another specific international convention. An interesting reference can be found in two carriage conventions, that is in Article 2 of the Convention on the Contract for the International Carriage of Goods by Road (CMR)²⁰ and in Article 26 of the Rotterdam Rules,²¹ which are supposed to regulate transport by sea in the future along with carriage by other means of transport accompanying the sea segment.²² In both cases there is a reference to unspecified international conventions,²³ appli-

²⁰ Convention on the Contract for the International Carriage of Goods by Road and Protocol of Signature done at Geneva 19 May 1956 (United Nations, Treaty Series, vol. 399, p. 189) [hereinafter: CMR].

²¹ Hereinafter: RR.

²² United Nations Convention of 11 December 2008 on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122. This convention is called "Rotterdam Rules." The convention has not yet entered into force due to insufficient number of required ratifications. The convention requires to be ratified by 20 countries before it enters into operation (Article 94(1) RR).

²³ In the case of CMR national regulations may also be considered [Wesołowski 2013, 152–55].

cable in other branches of transport, pertaining to carrier liability for damage resulting from carriage that employs more than one mode of transport.²⁴ A special solution was applied here which involves establishing rules of carrier liability through reference to a legal system other than the one resulting from the referring convention, one that is relevant for the mode of transport during which the damage occurred. It is about a regime that is not applicable to the entire carriage, but one which would be applicable if separate contracts were executed for individual segments of carriage. Literature treats such cases as reference to a hypothetical contract of carriage [Bombeek, Hamer, and Verhaegen 1990, 134; Czapski 1990, 173; Hoeks 2010, 167; Sturley, Fujita, and Ziel 2010, 65–66; Ziegler, Schelin, and Zunarelli 2010, 148].

The very structure of reference to a hypothetical contract is similar in both these conventions. Their provisions order to apply a system which would be applicable “if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage” (Article 26 RR) or “if a contract for the carriage of the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport” (Article 2(1) CMR). However, there are differences between the measures prescribed in both of these conventions. Let us leave out the fact, irrelevant to this discussion, that Rotterdam Rules refer only to another act of international law, while Article 2(1) CMR may be understood as reference to domestic legislation. What is more compelling, is that the provision of Article 26 RR refers only to those provisions of other international conventions that are applied “automatically,” are imperative or semi-imperative in nature (their application cannot be excluded to the detriment of the sender) and only pertain to carrier liability, limitation of his liability and limitation periods. In the case of CMR the question of the nature of the provisions referred to is not unambiguously standardized. It is not quite clear whether provisions referred to by Article 2(1) sentence 2 CMR are peremptory norms (as suggested by the French version of CMR “*dispositions impératives de la loi*”) or default rules (as the authentic English text of the convention can be read: *the conditions prescribed by law*) [Czepelak 2008, 420–21; Hoeks 2010, 168; Bombeek, Hamer, and Verhaegen 1990, 141; Clarke 2014, 49; Basedow 1997, 912; Lojda 2015, 162; Ramberg 1987, 29–30]. Moreover, the dispute concerns whether the reference pertains solely to provisions applied by virtue of the law itself or to provisions applied by virtue of the will of the parties.²⁵ This issue is crucial from the practical point of view since this provision applies primarily in the case of transporting a car along with the goods by a sea ferry, where the question of is-

²⁴ With CMR it is about the so-called piggy-back ride, that is a situation where a vehicle loaded with goods is carried by a different means of transport, e.g. a ferry, in a segment of the carriage route.

²⁵ Controversies that arose around the selected problems lead to the regulation of Article 2 CMR to be named the *English nightmare* in the literature [Theunis 1987, 256].

suing a consignment note, and in effect – application of the Hague-Visby Rules *ex proprio vigore*, may always trigger doubts.

However, it does not seem that the discussed discrepancies cause a different assessment of the nature of provisions of the convention referred to, even if a broad nature of a reference under Article 2 CMR were to be assumed. These provisions are applicable by virtue of the will of the international legislator as a reference included in another international convention. This means that even if the court concluded that in a specific case of a hypothetical contract they were to be applicable as a universally applied paramount clause rather than *ex proprio vigore*, one would still need to conclude that it is about the application of a legislative act and not only a standard form that stipulates the content of a legal relation by virtue of the will of the parties. Provisions that employ such a structure include, in fact, certain conflict of law rules. Their specific character lies in the fact that they do not employ traditional connectors that designate applicable national law but refer to other international conventions which are relevant to the branch of transport. What is more, application of Article 2(1) sentence 2 CMR and Article 26 RR requires that suitable conflict of law rules be applied which set out the scope of application of conventions that establish uniform law.²⁶

5. APPLICATION OF AN INTERNATIONAL CONVENTION THROUGH CHOICE OF THE LAW OF THE COUNTRY-PARTY TO THE CONVENTION

Some focus must be given to a situation in which an international convention were to be applicable to a given civil law relationship by designating the law of the country-party to the convention as applicable by means of conflict of law rules. This naturally concern cases where the evaluated legal relationship has attributes of “internationality” within the meaning of a given convention but not all requirements of its application *ex proprio vigore* are met. Such a situation is expressly stipulated in Article 1(1)(b) of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980.²⁷ This convention is principally applicable to contracts of the sale of goods executed between parties whose places of business are in different states that are contracting states (Article 1(1)(a) CISG). However, pursuant to Article 1(1)(b), the convention is also applicable “when the rules of private international law lead to the application of the law of a Contracting State.” A view on such a possibly of applying an international convention that includes uniform rules is also voiced with reference to other conventions which lack an analogical provision [Basedow 1997, 873].

The provision of Article 1(1)(b) CISG may raise doubts, especially if it is referred to a situation in which a convention were to be applied on its basis by a co-

²⁶ For a different angle see Czepelak 2008, 91.

²⁷ United Nations, Treaty Series, vol. 1489, p. 3 [hereinafter: CISG].

urt of a state that is not its party and, as a consequence, which is responsible under international law for the application of its provisions. This is why it is criticised in the literature [Pazdan 2001, 58]. Therefore, the situation regulated by it should be treated as exceptional and not subject to expanding interpretation. This is also why this article should not be applicable in a situation in which the law of the state-party to the convention does not result directly from conflict of law rules but from a conflict of law choice of the law made by the parties to the contract of sales on the basis of these rules.²⁸ Irrespective of this, a norm expressed in this article should not be generalized or referred to international conventions which do not provide for such a measure.

CONCLUSIONS

Provisions of international conventions that contain uniform rules of private law may be applied also in situations that do not directly result from a conflict of law rule interpreted from its own provisions and specifying its own scope of application. The manner of application of an international convention may then differ from the typical cases of application of international conventions *ex proprio vigore*. These differences are not always noticed in judicial practice. On the other hand, legal scholarship sometimes overemphasises the different nature of convention provisions in such situations, equating them with contractual provisions. This results in an unwarranted demand to interpret such provisions in a manner appropriate to declarations of intent. Therefore, each case of application of provisions of international conventions containing private law rules, in circumstances other than those arising from its own provisions, must be analysed separately, taking into account the context and circumstances from which it arises.

When applied on the basis of references in other systems of law (Union or domestic), provisions of conventions maintain their character and their autonomy towards other systems of the law with all related consequences that concern, *inter alia*, interpretation of or filling of gaps in the law. The same applies to a situation in which a given international convention is applied as a reference contained in another international convention, also if this is done by using the structure of a hypothetical contract.

The situation is different where provisions of international agreements that contain uniform law are implemented to the domestic or Union legislation, even if the implementation is expressed through a mechanical transposition of these rules to a given system (e.g. in the form of extracts from conventions as annexes to acts of Union law). Such provisions become a law of the system into which they are implemented and are therefore subject to rules of application and interpretation relevant to this body of laws. Views formed in the study of law and judicature

²⁸ A contrary view in: Pazdan 2001, 59.

addressing the same convention may be considered to a limited degree and must take into account a different character of the rules interpreted.

The case is yet different in a situation when the application of provisions of an international convention is determined by the will of the parties expressed as a rule in the so-called paramount clause. Such provisions must not be treated as provisions of the law. This does not mean a complete resignation from using the views of legal scholars and commentators and judicature when interpreting such provisions. However, such a situation must be distinguished from one in which the will of the parties is only one of the conditions of application of a convention by virtue of its own provisions.

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PERSONALIST FOUNDATIONS OF THE COMMON GOOD. VIEWS OF MIECZYŚLAW A. KRĄPIEC AND KAROL WOJTYŁA

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Abstract. This paper aims to draw attention to the personalist meaning of the category of common good. The discussion begins with consideration of possible interpretations of the fact of society and principal foundations of the philosophical concept of common good. The person's structure, the most perfect form of being in light of the personalist theory, is shown against this background. It is also a fundamental common good of each social structure. The reflection will be guided by two main proponents of Polish philosophical personalism, who present an interesting theory of man and society which is important to contemporary culture: Mieczysław Albert Krąpiec and Karol Wojtyła.

Keywords: person, society, participation

INTRODUCTION

In Poland, “the common good” is a basic constitutional value. The preamble to the Constitution of the Republic of Poland of 2 April 1997 contains the following words: “We, the Polish Nation – all citizens of this Republic, both believers in God as the source of truth, justice, good, and beauty and those not sharing this belief and deriving these universal values from other sources, equal in their rights and obligations to the common good – Poland.” Article 1 of the Constitution stipulates: “The Republic of Poland is a common good of all the citizens.”¹ The Polish legislator regards the common good as an essential part of the democratic order that acknowledges the primacy of rights and liberty of every individual. Thus, the Constitution defines the nature of the state and its authorities as subservient to citizens.

“The common good” is a key notion of social philosophy. Although it is universally accepted as the objective and constituent principle of every society, both the theory and practice of the issue are experiencing a crisis. It appears, therefore, study of this institution is not only reasonable but also necessary given the rank and value of the common good. This paper is an attempt at exploring philosophical foundations of the common good. The reflection will try to discover those conditions of *bonum commune* that constitute its deepest meaning from the perso-

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

nalist point of view and thereby the *raison d'être* of both society and its prevailing laws. As far as the title is concerned, it should be added for the sake of clarity it is inspired by the personalism of the Lublin philosophical school and its most prominent representatives, Mieczysław A. Krąpiec and Karol Wojtyła. Their analyses provide the main framework for this discussion.

1. A PERSON IN THE WORLD OF PERSONS: WHAT IS A COMMUNITY?

Classification of theories of societal life in the history of philosophical and social thought is rather complicated. Some theories claim the community is exclusively a sum total of individuals that can be fully reduced to its elements and, as such, does not create a higher-level quality. Only an individual counts, their needs and interests, since they are the sole subjects of free behaviour. Any higher-level structure is a mere fiction [Stróżewski 2002, 239]. An opposing concept stresses the role of community as the only fully autonomous being. It sees a person's autonomy as non-existent. An individual is fully constituted and formed by society and, as such, should be treated as a dependent part of an overriding structure. Only the community is sovereign, particularly the state, which endows the community with an appropriate structure [ibid.].

M.A. Krąpiec identifies two principal approaches as starting points for discussions of society: genetic-evolutionary and causal – finalist [Krąpiec 1986, 178].

1.1. The genetic-evolutionary Concept

Followers of the genetic-evolutionary view accept results of natural sciences to adopt the concept of man as the most perfect stage in the evolution of nature. Man is thus ultimately explicated with reference to laws of nature and its necessary development. As such, he is not a privileged part of nature. Formed by the evolutionary sequence of developments, he appeared in the group of "primates" who performed some activities together and gradually attained awareness and self-awareness. According to supporters of this theory, group life preceded man as the subject aware of himself and his tasks [ibid., 188]. Man owes everything in his nature to the group: self-awareness, language, tools. Man not only cannot live outside society but cannot even be conceived independent from society [Krąpiec 2005, 79]. Such an interpretation of societal being is characteristic of Karl Marx, who wrote: "Like society itself produces man as man, man produces society" [Marks and Engels 1960, 579]. The German philosopher maintains society is not a collection of individuals. Individuals do not exist prior to the community. An individual arises as part of a group, is "produced" by society, therefore his roots can only be explained with reference to community [Kowalczyk 2005, 36]. Only an individual integrated into a collective is human [ibid., 39].

As man developed, means of production and social classes arose. Owners of these means, including other men, were the first class. In this way, dictates of the ruling class, that is, holders of means of production, became the law. This in time

led to the class struggle. Regardless of his class, however, man's consciousness and personality have always been shaped by the group he belonged to [Krapiec 1986, 178–79].

The foregoing analysis is of course far from exhaustive. It only aims for a summary presentation of a certain type of thinking. In the genetic-evolutionary concept of man and community, the common good as the basis of prevailing laws denotes the good of a specific ruling class or interest of a party in power at any given moment, not the welfare of all citizens. As Krapiec notes, once man is seen exclusively as a product of nature and community, the common good no longer provides reasons for emergence of society and binding force of law [ibid.].

1.2. The cause-finalist Concept

The causal – finalist theory is the other approach to explanation of the facts of society and law. Its adherents also present the emergence of man and society in natural terms. Man and communities he forms and in which he lives are natural creations. However, man is fundamentally distinct from the entire nature in his reason and the possibility of free choice. Man is conceived as a person. He has objectives with a view to which he undertakes actions and suitable means to attainment of the objectives. Man is also a being endowed with potential, open to development. The development is impossible without assistance of others. Therefore, an individual needs other people, an adequately organised society, to reach any objective, both indirect of improving the particular powers, and the final objective of personal perfection [ibid.]. This applies to every single man and entire generations who take advantage of achievements of earlier generations. According to this position, the fact of communities is grounded inside a potential-endowed person [ibid.]. M.A. Krapiec and K. Wojtyła largely base their consideration of the person-society relation on this conviction.

a) M.A. Krapiec centres his thinking about the man-society relation on analysis of its ontic conditions and seeks an answer to the question, does the community guarantee a person's development and if so, on what conditions? According to Boethius' classic formula, accepted by personalism, a person is *rationalis naturae individua substantia* ("individual substance of reasonable nature"). Here, "nature" is used in its metaphysical sense of the unchangeable essence of man. Man is reasonable by his nature. He is by nature a social being as well. This means a person, an accidental and potential-endowed being, is unable to realise its "nature" other than through specific actions and with participation of other persons. Full development of personal life is only possible in society, i.e. in the world of persons [Krapiec 2005, 330]. Society is a niche that allows for man's biological, psychological, and personal development [ibid., 332]. As Krapiec says, an independent human individual "creates itself" as part of multi-sided and multi-dimensional interactions among persons. It is a "being in itself," a "separate," self-sufficient and complete being insofar as it is also a "being for the other" and a social being at the same time [ibid., 331].

In light of philosophical personalism, community is a relational being, or an assembly of people linked by means of relations. As Krąpiec says, relations binding people are not in themselves “relations constituting entitativity in the substantial order, but relations that constitute *social – relational entitativity*, which *encompasses* individual subjects as essential reasonable beings” [Krąpiec 2005, 332]. A social being is not substantial, as only a person is. The former is a relational being that can be understood as a unity of relations among persons. Krąpiec goes on to specify a community is a bond of categorical relations that “bind human persons so that they can develop their potential-endowed personalities in as versatile a manner as possible (not each individual in all respects, but various individuals in different respects) in order for each human person to realise the common good” [ibid., 333]. Accordingly, a community is a natural creation necessary to realise the common good. The notion of “social being” refers both to small social groups like a family and to any group including states and supranational organisations [ibid., 334].

b) Similar pronouncements about the person-community relation can be found in K. Wojtyła’s analyses. The Cracow-based thinker seems to desire to “dive” even deeper than Krąpiec into the person’s subjective structure to find there grounds for explicating the fact of their being and acting jointly with other persons. He is convinced the foundation of an individual’s participation in a variety of societal relations is part of their internal condition [Wojtyła 2019, 82]. Wojtyła situates his position against the background of a critique of individualism on the one hand and of objective totalism (collectivism) on the other hand [Idem 1994a, 313]. He writes that individualism “proposes an individual’s welfare as the supreme and basic good to which any community and society must be subordinated” [ibid.]. The objective totalism advances the opposite principle – “it totally subordinates an individual and their good to the communication and society” [ibid.]. Rejecting the extremes of both individualism and collectivism, Wojtyła maintains a person and a community are solely appropriate to each other. “The feature of society, or community, is branded into the human existence itself” [ibid., 302]. He suggests, therefore, man’s social nature should be explicated not only at the level of human nature but above all at the level of a person. Thus, Wojtyła tends towards the personalist thinking on man.

K. Wojtyła identifies the foundation of a person’s participation in being and acting jointly with others as a specific property of a person itself, which he names “the capacity for participation”. Harking back to the concept of participation, known in philosophical tradition, he accorded it a meaning other than the everyday association with taking part in undertakings together with others. He understands participation as “a property of the person themselves, internal and homogeneous, which determines the fact a person, by being and acting *jointly with others*, is and acts as a person” [ibid., 310]. Owing to the capacity for subjective being in a community, a person adds a personalist dimension to being and acting among other persons. In this way, a man-person “is not lost” in a community, to

the contrary, he reaffirms and realises himself as someone “personal.” Wojtyła, aware of the sheer diversity of interpersonal relations, specifies participation means “not only various forms of referring a person to others, an individual to society, but also [...] the very foundation of these forms, inherent and appropriate to a person” [ibid., 310–11].

To Wojtyła, a person’s capacity for participation is key to explaining both the fact of human intersubjectivity and of communities created by man. A person, together with other persons, creates a variety of communities. The participation may take diverse forms there. An individual contributes the richness of their personality as well as their shortcomings and limitations to communities, therefore, exchange of personal gifts is necessary in each community [Wojtyła 2016, 29]. In the Cracow philosopher’s view, each and every community is about constituting a “we” with a distinct subjectivity of its own. This can only be achieved by a shared aspiration to the common good [Wojtyła 1994b, 411].

The idea of common good as the foundation of communities is present in the causal-finalist concept of man and community. The common good is seen as the goal of a man’s-person’s aspirations and actions [ibid.]. It is of paramount importance from the perspective of philosophical personalism. M.A. Krapiec and K. Wojtyła expand the finalist concept of common good with a subjective aspect. In their personalism, a human person and their comprehensive development in a community of persons is the primary common good.

2. THE ISSUE OF THE COMMON GOOD

A philosopher approaching the issue of the common good looks for answers to two important questions: what is the common good? and what is its essence? The notion of “the common good” itself (Latin *bonum commune*), like a number of other key concepts in philosophy and other sciences, derives from ancient Greece and Rome. It was already Plato in his *Republic* who wrote: “Law is not after making any type of men exceptionally happy but after this condition for the entire state by harmonising citizens by ways of persuasion and compulsion to make them share that utility any one can bring to the common good” [Platon 1958, 519]. Aristotle found the aspiration to ensure individual happiness of citizens the state’s objective, and thus its common good. He wrote in *Politics*: “It is therefore beyond any doubt the best system is by necessity the one where every single person without exception feels best and lives happy” [Aristoteles 2003, I, 1,8]. For the Stagira thinker, the state is a natural community that exists for the sake of man and is necessary for citizens to attain happiness.

The notion of the common good played a major role in the medieval socio-political thought as well. The term *bonum commune* appears several hundred times in Thomas Aquinas’s texts. Aquinas claimed every law worthy of this name aims for the common good [Piechowiak 2003, 23]. According to Thomas’s classic definition, “a legal norm will be a reason’s ruling promulgated for the common good

by an entity caring for a community.”² Consideration of the common good is regarded as a major part of law by Aquinas. Any law is a reason for human action contained in its objective. The common good, as the objective of law, is the principle of legal order and law-making efforts [Piechowiak 2003, 23].

From the philosophical point of view, an objective is the reason for any action as part of the system of practical reason. Happiness is the final objective of human life. Hence law must be primarily intended to strive for happiness.³ Thomas, like Aristotle, maintains the state is a natural, complete, and self-sufficient community. He sees individual happiness in the context of what is naturally needed for its achievement, that is, of state community. However, Thomas, as distinct from the Stagira philosopher, had at his disposal the concept of person that treated freedom as a major perfection of man. This concept implies a definite understanding of a person’s happiness and perfection, which is of fundamental significance to understanding of the common good. In the subjective respect, this good is happiness reached in a community, while objectively, conditions that lead to it [Piechowiak 2003, 27].

M.A. Krąpiec proposes, by approaching the issue of the common good in philosophical terms and presenting its essential features, to analyse its two components: “good” and “common.” Since the common good is assigned to the human person, the reflection must consider the concepts of human nature and human person, for whom it is the object of action and an objective. What is the good and what is the good of a particular being, that is, man?

The Greek *αγαθός* (*agathos*) and Latin *bonum*, “good,” have a number of meanings. One of the most basic qualifications of good, possibly the most common in everyday understanding, is concerned with economic values. In this sense, good is a value qualifying things or their states and whatever has value: hence valuable objects are named goods [Stróżewski 1981, 220]. One can therefore speak of goods that have been produced and acquired by purchasing or inheritance. Another meaning of “good” relates to moral qualification of deeds. Thus, somebody’s action or decision may be good.

The problem of the essence of good has found two solutions in the history of philosophy. The first says good is the so-called transcendental property of being. The other reduces good to values. The former tradition is referred to as metaphysical, the latter, axiological [ibid.]. Both the traditions are meaningful to this discussion, given the nature of the common good. However, good and its essence are ultimately explained by metaphysics.

Realist philosophy understands good as a transcendental property of being, an expression of things being as good-objective [Maryniarczyk 2000, 84]. In the beginning of *Nicomachean Ethics*, Aristotle wrote: “All art and all exploration, like any actions and resolutions, seem to tend towards a good, therefore good is rightly

² “Lex est quam quaedam rationis ordinatio ad bonum commune, et ab eo qui curam communitatis habet, promulgata,” Thomas Aquinas, *Summa theologiae*, I-II, q. 90, a. 4.

³ Ibid., q. 90, a. 2.

defined as the object of all aspiration” [Arystoteles 2011, 77]. The concept of good adopted by Aristotle is known as finalist, or positing good as the end of aspiration, particularly reasonable aspiration proper to man. Only good can serve as the foundation for explicating the fact of human action in both its objective and subjective respects. Krąpiec explains: “The fact man acts for an end can only be explicated by the object of aspiration emerging before man as desirable – as a good. And man desires it, *wants* it, only for the sake of this good” [Krąpiec 1986, 180–81].

In line with the general distinctions introduced by the finalist theory, good is an object of human will as well as the ultimate reason for each man’s action. Man lives among goods he desires and chooses from. Considering the social aspect of human nature, good is an object of human action which can become an individual end of each personal aspiration and, in this sense, can be shared by all persons in society [ibid.]. In his *Summa theologiae*, Thomas Aquinas offers the following analysis: “Actions are always individual and detailed, but this is such actions that can be referred to as the common good, which is shared, though not in the way a species or kind is shared, but as a shared end-oriented cause, therefore a shared end can be called the common good.”⁴ When commenting on these words, Krąpiec points to the possible rational conception of the common good as the basis for explicating human action in general and law in particular or, to be more accurate, human action insofar as it is guided by law. Human action is only explained with good, both for objective and subjective reasons [Krąpiec 1986, 181].

Thus, the common good is the foundation on which a community can be constituted. It is the reason for its creation and end to which it aspires. There are various communities, however. Both natural (i.e. family and nation) and man-made (local, professional, political, religious) communities are hierarchic structures. Each community consists of a multiplicity of individuals guided by occasionally contradictory aspirations, which inevitably exposes them to internal conflicts. Each has a common good of its own, too. The question arises, therefore, is there a good that would be in fact shared, that is, going beyond individual values and needs? Can a universal common good be defined that would comprise ends of particular, sometimes diverse communities?

The personalist concept distinguishes two major components of the common good: internal and external. The former is ontological-axiological. The common good means integral development of a human person and a set of values necessary for this development. The other element is societal-institutional in nature. It encompasses a set of structures, institutions, economic and legal conditions necessary to realise the common good [Kowalczyk 2005, 236]. The subsequent sections of this paper will expand this idea and answer the above questions.

⁴ *Thomas Aquinas, Summa theologiae*, I–II, q. 90, a. 2, ad 2.

3. PERSONAL GOOD AS THE COMMON GOOD (M.A. KRĄPIEC'S VIEW)

The personalism of M.A. Krąpiec relies on the anthropological views of Thomas Aquinas. In his doctrine of the so-called natural inclinations (*inclinaciones naturales*) that govern dynamics of human life and are uniquely connected with personal human life, the Doctor Angelicus identified the aspiration to personal development by taking reasonable action as man's basic natural inclination.⁵ Since increasingly full actuation of potentialities of man's nature is his good, he desires to perfect himself [Krąpiec 2005, 337]. This tendency to self-improvement varies, but is analogous in each individual case. The Lublin-based philosopher writes: "Increasingly full (and appropriate to an individual's natural potentialities) realisation of living aspirations in respect of cognition, loving, free self-determination is an *attractive force*, the good which is the *raison d'être* and a reason for action of each human person and thus, that is, in the sense of analogous identity of objectives, constitutes the common good" [ibid.]. Man as such is a limited and potential-endowed being who does not currently have the perfections needed for complete development. The essential incompleteness causes a unique "hunger" for good in man. To fill this deficit, man takes actions intended to deliver an appropriate good and a human being is thus supplemented in the variety of their aspects' [ibid., 338].

What appropriate good is meant here? Krąpiec answers the nature of the good that can be shared by all people is determined by human personality itself. Personal good in its proper meaning is in line with actuation of the uniquely human powers of intellect and free will. Therefore, there is no contradiction between the good of an entire community and good of its individual members as part of the order of the purely personal good, attained by means of intellect and will [ibid.]. Accordingly, Krąpiec expresses the principle "increasing good of a particular person is in parallel with an increase in the common good of the whole society" [ibid., 339]. Increasing wealth of an individual man enriches the society.

In conformity with this principle, the fullest possible realisation of the common good, or unlimited provision of conditions conducive to personal actuation to all members, is the fundamental objective of all communities [ibid.]. One of these conditions is access to material means, i.e. food, accommodation, technical facilities, etc. All of these material goods, both jointly and separately, cannot be regarded as the common good in its proper meaning, however, or as reasons for social and legal order. Material means are solely means, occasionally necessary, but always just means to the objective proper [ibid.].

In the spirit of realist philosophy, Krąpiec points to a hierarchy of material goods: there are lower and higher-order goods of lesser and greater value. Accordingly, man's vegetative life, being integrated into personal living, is more valuable than vegetative life of animals. There is both a hierarchy of beings and a hie-

⁵ Cf. Thomas Aquinas, *Summa theologiae*, III, q. 94, a. 2.

rarchy of goods in the order of nature. It is identified with a view to objectives inherent in particular things. Fair good (*bonum honestum*) is of a greater value to man than useful good (*bonum utile*) or good serving to satisfy his pleasures (*bonum delectabile*). In Aquinas's system, the Supreme, Absolute Being, known to religion as God, is the common good shared by each person and the entire society. Enabling attainment of that Good is the *raison d'être* of a society, and thus of law prevailing in such a society [ibid., 340].

Actuation of personal good, including the supreme Good, requires not only access to material means but also adequate legal remedies. Man as a being endowed with potential has the right to full personal development. Since common good is the *raison d'être* of every community, none should issue laws that would obstruct or prevent man's full personal development [ibid.]. Legislation and regulations should allow every human person to reach their principal right, that is, matching the common good through development of their personal potentialities [ibid.].

It should be noted in conclusion M.A. Krąpiec tends towards the finalist (teleological) explanation of the common good. Recognised as the objective of actions, it appears to man as his own personal good he comprehends with his reason and to which he tends freely with his will. Man relates to this good from inside, not, like in totalism, by means of external, irrational order that ultimately turns into moral violence. In the Lublin thinker's opinion, the essential nature and meaning of the common good should be noted in order to comprehend it. To perceive that value of the common good, though, one must first understand the value of a person themselves. It is therefore the role and task of society to educate man in such a way that he is able to perceive and appreciate "from inside" the value of the common good, of himself and every other person as participating in that good [ibid., 341].

4. THE COMMON GOOD AS THE PRINCIPLE OF PARTICIPATION (K. WOJTYŁA'S CONCEPTION)

K. Wojtyła focuses above all on the "horizontal" dimension of the common good. To begin his analysis, he notes the core of every community is in the relation of many *I's* to the common good. By joint aspiration to the common good, a certain social *we* is constituted. That good does have an objective dimension outlined by the end to which a given community has organised itself, yet man realises and reaffirms his subjectivity by identifying with this good-end and actuates his personal subjectivity by free, creative aspiration to that objective [Szostek 2014, 70]. For Wojtyła, the dimension of participation present in a man-person, or the moment of a person's subjective action in relation to other persons, is key to explicating the issue of the common good and its deepest essence. He believes an end of joint action understood objectively and materially has something of a common good yet without quite fully constituting it. Wojtyła writes:

“the common good cannot be defined without considering in parallel the subjective moment of action in relation to acting persons” [Wojtyła 1994a, 320–21]. Therefore, “the common good is not only the end of action conducted in a community understood in purely objective terms, but also, and even primarily, what conditions and somehow releases participation in persons acting jointly, thereby forming in them a subjective community of action” [ibid., 312]. It should be accordingly recognised the common good matches the social nature of man [ibid.].

According to Wojtyła, the fundamental common good of each community is what releases in its members the moment of fully subjective commitment for the community’s sake. Therefore, the most profound meaning of the common good is related to participation as a person’s property. The moment of participation triggered in persons being and acting jointly makes a community oriented towards realisation of an external objective a subjective community of the same action. In this manner, each person, by taking certain actions as part of a community, finds and reaffirms their own subjectivity. Therefore, the author of *Person and Act* regards the common good as “the principle of proper participation.” This principle safeguards the personalist structure of human existence in any community man belongs to [ibid., 321]. All social entities should therefore be organised in such a way that processes taking place in them lead to development of subjectivity in their members.

As part of this sense of the common good, K. Wojtyła distinguished two types of attitudes a person can adopt in relation to a community. He called them authentic and inauthentic attitudes. An attitude of solidarity that realises the dimension of a person’s participation is essentially authentic. It consists in a subject accepting the common good as their own. Wojtyła maintains solidarity is a person’s natural response to the fact of being and acting together with others. This is the basic form of participation and its chief expression. He wrote: “Solidarity means a continuing readiness to accept and realise the part assigned to everyone as members of a given community. A solidary man not only fulfils their part due to membership of a community but also does it for the good of the whole” [ibid., 323–24]. The attitude of opposition is also authentic and realising the dimension of participation. It is a function of someone’s own perception of a community and its common good. Opposition concerns the way the common good is perceived and actuated. Whoever opposes in the name of the common good does not abandon readiness to realise it, on the contrary, they seek confirmation of their presence in a community by way of authentic participation [ibid., 324]. Opposition is an authentic attitude as it expresses a person’s need of active being in a community. A subject expresses their opposition as they find a realisation of the common good adopted by a community to be inappropriate. In Wojtyła’s view, the possibility of diverse forms of opposition in a community is a condition of its adequate system [ibid., 325].

Devoid of values, the personalist authentic attitudes become inauthentic. They are dangerous insofar as they imitate authentic attitudes: conformism is similar to

solidarity and evasion to opposition. They differ from the authentic attitudes in a subject's stance towards the common good. Wojtyła identifies conformism as lack of solidarity combined with avoidance of opposition [ibid., 327]. This is an attitude of merely external presence in a community. A conformist is deprived of a fully personal conviction in their actions and choices. They do not take part in creating a community but are passively "carried on by the community." Wojtyła claims whoever adopts a conformist attitude deprives a community of themselves and lets a community "deprive them of themselves". Therefore, conformism is a negation of participation. Participation and care for multiplying the common good are replaced with apparent participation and make-believe care that ultimately lead to indifference [ibid., 328]. Conformism is expressed as acceptance of common ways of building and multiplying the common good not because a subject recognises the good as objectively important, but because they see opportunities for individual advantage in the path they choose [Szostek 2014, 70].

Another inauthentic attitude identified by Wojtyła is evasion. It also jeopardises realisation of the common good. Like conformism avoids opposition, evasion shies away from conformism. This is utter withdrawal from a community. Like conformism, evasion is a person's resignation from self-fulfilment as part of a community. By evasion, an individual attempts to remove themselves from a community as they are convinced community takes them from themselves. In the case of conformism, they maintain the outward appearances of being in a community, whereas evasion abandons even the appearances [Wojtyła 1994a, 329]. Both the inauthentic attitudes are destructive of community and personal life. By adopting the inauthentic attitudes of conformism and evasion, a person deprives themselves of the subjective being in a community, that personal dimension of participation, as their property by which they find and fulfil themselves in a community as persons [ibid.].

It can be noted the theory of participation proposed by Wojtyła arises out of the conviction man and the entire wealth of his personality are the supreme good of each social entity. That conviction set the main stream of Wojtyła's social thought when a pope. That 'personality argument' recurs in each of his social encyclicals and in its name John Paul II calls for the subjective nature of participation in every type and dimension of man's social commitment [Szostek 2014, 72]. Wojtyła as pope argued societies would be alienated as long as a variety of societal mechanisms hindered or prevented full personal development of their members.

CONCLUSION

It should be concluded the personalist model of person-society relations advanced by both M.A. Krąpiec and K. Wojtyła is rational. Rooted in the common good, it avoids the error of individualism, which has individuals care solely for their own good and interests, and of totalism, which subordinates individuals to society (state) and deprives them of any initiative of their own. In the perspective

of both the authors' philosophical personalism, the common good is more than the good of a community in its objective dimension. Accepting society is necessary for a person's adequate development. They also point to the primacy of a person over the communities they belong to. This approach leads to an affirmation of personal and state rights. Any attempts at reversing this order of individual-society relations inevitably leads to personal alienation.

The common good may be referred to a range of social entities, namely, the common good of a family, local community, state or a supranational community. Both Krapiec and Wojtyła indicate its broadest possible foundations. This is the universal common good, available to everybody and diverse types of communities.

The principal difference between the conceptions of the common good by Krapiec and Wojtyła seems to consist in the latter attempting to stress the more profound and basic dimension of the common good than the end of joint actions alone. He pointed to a specific property of a person, expressed in their capacity for subjective presence in every type of social commitment, which is their fundamental good. Wojtyła's social thought was founded on the conviction every individual human person is the greatest shared good of society and state. In fact, for Krapiec man's good is an increasingly full actuation of his nature's potentialities which becomes a shared good of a community, however, he tends to emphasise the teleological orientation of a person's activities towards whatever constitutes their good. Krapiec's thought follows Thomas Aquinas and ultimately concentrates on the vertical dimension of the common good. Wojtyła, endowing the notion of participation, known in the philosophical tradition, with a new meaning, enriches Aquinas's theory, upholding the role of a dynamic human nature at the person's level. The Cracow philosopher's analysis of the common good highlights its horizontal sense.

It should finally be pointed out Krapiec's and Wojtyła's texts are not treatises on economics or political theory, but philosophy. Their ideas invite readers to join their thinking. They are addressed above all to all those responsible in practice for public life: national and local politicians, economists, lawyers, entrepreneurs, etc. Their analysis is rooted in a shared thought: any social structures, particularly those created by the state, should be formed in such a way that they do not a priori change or distort natural human inclinations and that they secure a person's transcendent character. They should all serve both man's versatile development and become spaces where his personal potential is released. Only then can the common good be actually realised.

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THE LAW REGULATIONS OF INDIVIDUAL DEBT RATIO IN THE TIME OF THE COVID-19 PANDEMIC

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Abstract. The new rules governing debt limits were introduced in 2014 (Articles 242–244 of the Act on Public Finance) and immediately became a major difficulty in planning and managing local finances in territorial self-government units. The next four years proved many defects and inconveniences in implementing new norms, while “creativity” of the financial sector of local authority units demonstrated that they were quite easy to evade. The structure of the maximum ratio limiting obligations due to titles specified by the lawmaker, due in a particular year, is closely related to the provisions of the Act on Public Finance. For the first time it was used in evaluating the budgets passed for 2014. The essence of this legal regulation consists in comparing two ratios, presented in form of an equation (formula). In order to pass the budget local authorities need to obtain a relation in which the left side of the formula (annual debt repayment ratio) is lower than or equal to the right side (maximum debt repayment ratio). The ratio of the annual repayment ratio to the maximum repayment ratio (the debt repayment ratio) is presented in the debt forecast, which constitutes part of Long-Term Financial Forecast (LFF). This is justified by the requirement derived from APF that the board of a territorial self-government unit simultaneously present the draft of the budget and the draft of the resolution on LFF, and then both these documents are passed simultaneously.

Keywords: public finance act, public debt, individual debt ratio, public sector

INTRODUCTION

Since 2020 every territorial self-government unit planning an amendment to the budget can exceed the relation specified in Article 242 of the Act on Public Finance¹ by the amount of planned deficit in income due to the COVID-19 pandemic.² This means that current expenditure can exceed current income by the expenses incurred when performing tasks related to prevention of COVID-19 in a part in which they were financed with own means. This relation concerns rules of limiting debt – at present planned expenditure cannot exceed planned current income increased by revenues from surpluses from previous years, repayment of loans granted in the past and unused cash on the current account. A similar overdraft of the budget was allowed at the end of the year, after the unit makes a bud-

¹ Act of 27 August 2009 on Public Finance, Journal of Laws of 2019, item 869 as amended [hereinafter: APF].

² Act of 2 March 2020 on specific solutions related to prevention, counteracting and fighting COVID-19, other infectious diseases and crisis situations they cause, Journal of Laws of 2020, item 374 [hereinafter: AC].

get report. The law clearly defines the deficit of income. This stands for decrease in income calculated as a difference between tax income of the unit, increased by the health resort and local fee and incomes showed by the unit in its financial report for the first quarter of 2020 planned in the budget amendment due to COVID-19. This decrease is decreased when the unit receives income supplement amounts from the general subvention reserve. The mitigation of the fiscal rule consists in excluding from the limitation concerning debt repayment specified in Article 243(1) APF (individual debt ratio) the amounts for buyout of securities, repayment of loan and credit installments together with due interest and discount, respectively issued or contracted in 2020 to the amount of the actual decrease in income of the unit resulting from COVID-19. These obligations, contracted in connection with decreased income, need an opinion of Regional Audit Chamber, concerning the possibility of their repayment and effect on performance of public tasks. The contraction of an obligation cannot threaten the performance of public tasks by a local self-government unit in a particular budget year and in the next years. In addition, when establishing – for 2021 and next years – the relation limiting the amount of debt repayment, the local authority will decrease current expenditure in its budget by detracting current expenditure incurred in 2020 for the performance of tasks related to fighting COVID-19. This solution widens the options local authorities have in debt repayment. Due to the necessity of maintaining financial security of a local authority unit, an additional mechanism was introduced, in the shape of a one-year limit of the local self-government debt at the level of 80% of the unit's income. The limit concerned only 2020, and as an exception it does not have to be achieved by units which observe the limitation concerning repayment of debt specified in Article 243(1) APF, not taking into account the exclusion specified in the Act on specific solutions related to prevention, counteracting and fighting COVID-19, other infectious diseases and crisis situations they cause on specific solutions related to prevention, counteracting and fighting COVID-19, other infectious diseases and crisis situations they cause [Wołowiec 2019].

1. METHODS AND METHODOLOGY

Legal sciences use typical methods found in the field of social sciences and humanities, i.e. examination of documents (legal acts and judgments of administrative courts), comparative methods (examination of expert opinions, legal opinions, analyzes resulting from linguistic, grammatical and historical interpretations) and case studies. New statements or theories are the result of cognitive research. On the other hand, the result of research for the purposes of economic practice is to determine whether and if the existing theories and theories regarding the functioning of the individual debt ratio are useful to support investment processes of local government units.

Induction was used as the main research method. It consists in drawing general conclusions or establishing regularities based on the analysis of empirically established 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 legal situations. Inductive methods include various types of legal acts, analyzes, expert opinions and scientific documents used in social research.

2. THE FINANCIAL SITUATION OF POLISH LOCAL AUTHORITIES IN 2013–2019

In 2019 the local self-government sector witnessed a dynamic growth of capital expenditure. This was due to the implementation of numerous projects co-financed with the European Union funds. Since there were many commercial projects implemented by construction companies, many investments planned by local authorities for 2018 were put off until 2019 or 2020.³ In 2020 we can see a significant decrease in budgets of local authorities compared to 2019 as far as capital expenditure and total amount of new debt are concerned. This is the result of formal requirements related to creating planning documents in self-government units. Another problem (burden) is the education subvention received by self-government units, which allowed in 2019 to cover, on average, only 60% of expenses on education (there are no signs that in 2020 the funds for education will be increased). It is also worth emphasizing that some of incurred and planned costs resulted from the implemented reform of the education system. The growing disproportion shows that the costs of financing the reform were shifted to the municipalities, which is particularly visible in municipalities with the smallest budgets. Another challenge faced by some self-government units is the necessity to settle obligations contracted in the current year, related mostly to the implementation of numerous capital investments. Since 2013 we have been observing the improving terms of debt repayments for units of all levels. In 2013 the average period of debt repayment, assuming that local authorities allocate their whole operational surplus, was 4.8 years. In 2017 the value of this ratio fell to 3.25 years. Taking into account the acceleration of the implementation of expenses co-financed with the EU funds, a significant growth of debt was planned for 2019–2023. The value of the analyzed ratio will increase to 6.61 years due to this reason.⁴

Current income of self-government units grew from PLN 163 billion in 2013 to PLN 239.5 billion in 2019, which shows that the compound annual growth rate CAGR⁵ reached 5.64%. The difference between current income and current expe-

³ See *Raport roczny 2019 (syntetyczny skrót analizy). Sytuacja finansowa jednostek samorządu terytorialnego*. Raport INC Rating Sp. z o.o. i Związku Banków Polskich, Poznań 2019, p. 4–10.

⁴ Ibid.

⁵ CAGR is the average annual growth rate, or put differently, compound annual growth rate. It is a measure which reflects the average annual growth of a particular value, over a given period. The

nditure (operational margin) ranged from 5.47% to 10.35% of current income, reaching the average value of 9.17% for the period. It should be noted that the lowest value was in 2019, the year which is still burdened with the requirement of careful planning. The lowest actually achieved average value was 8.79% from 2013. Total debt of all self-government units in 2013–2019 grew from PLN 69.2 billion to PLN 86.6 billion and at the end of 2019 accounted for approximately 36.15% of their current income. Since 2013 the average annual debt repayment level was PLN 9.5 billion. The decreasing operational surplus that we saw in 2019 results from careful planning in the 3rd quarter, but on the other hand, changes in the personal income tax and growing financial burden connected with financing education and the statutory rise of salaries led to difficulties in generating own capital for further investments. From the point of view of the banking sector it might, therefore, be necessary to change the repayment schedules which are offered as a standard to local authorities, from 8–12 years to 15–20 years, for debt contracted in 2020–2023. There is no doubt that in 2013–2018 the operational surplus was quite a stable item, showing some growth trends and that plans included in Long-Term Financial Forecasts (LFF) were often formulated too optimistically.

To conclude: the most important sources of income for self-government units are general subventions from the country budget and share in personal income tax. Both these sources accounted for 63% of average income local authorities had in 2013–2018. Local taxes, purpose subsidies for commissioned tasks and subsidies for investment tasks along with share in corporate income tax accounted for over 78% of average income in the analyzed period. In 2014 and in 2018–2019 local authorities' obligations were growing, which was connected with the noticeable investment cycle related to obtaining funds from the EU. In 2015–2017 debt decreased. The real picture, reflecting indirect obligations, not included in reports (concerning debt of related companies or contracts of support⁶) shows much greater dynamics of obligations in the self-government sector. This is a negative signal, and at present the average growth rate equals 5%, exceeding average GDP in the analyzed period (4.3%).

Polish name of this method is not very accurate. It does not reflect the essence of CAGR, which stems from applying the theory of the value of money in time, and more precisely, the principle of compound interest. The formula used for calculating the compound annual growth rate is presented in a number of ways. Regardless of the presentation, CAGR is calculated in each case in a very similar way. Possible differences in calculation are due to the choice of data, not due to the fact that in specific cases a different formula is used.

⁶ Non-standard financial operations – other than credit, bank loan, issuance of bonds – operations aimed at obtaining external returnable financing are especially: lease-back, reverse sale, payment in installments, forfeiting, factoring and restructuring operations (subrogation, assignment of liabilities, debt restructuring contract, agreement on debt). Non-standard operations generating debt are in particular: lease-back contracts, reverse real estate sale contracts, liabilities assignment contracts, subrogation contracts, forfeiting contracts, payment in installments. See Supreme Chamber of Control, information on results of control number 25/2016/P/15/014/KBF, 2016; Gonet 2011.

Budgets of municipalities. Current incomes of communes in 2013–2019 grew from PLN 73.61 billion in 2013 to PLN 115.24 billion in 2019, which means that the compound annual growth rate (CAGR)⁷ was at the level of 7.8%. The operational margin ranged from 5.16% to 10.89%, with average value of 9.51% for the period. The lowest value was burdened with reserves and careful planning in 2019 – excluding the current year the lowest value was reached in 2017 – 9.68%. Tax income of municipalities accounted for 34.2% to 39.5% of current income. On average 47.9% of tax income was local tax. The most important elements in municipality income were current transfers and income from personal income tax (66% of average income that municipalities had in 2013–2019). Total debt of municipalities in 2014–2017 was falling (to the level of PLN 23.9 billion in 2016), but in 2018 it grew to the level of PLN 30.1 billion and in 2019 – PLN 34.8 billion. The ratio of direct debt to own income fell from 68.67% in 2013 to 62.3% in 2019 (58.5% in 2018). Expenditure on servicing direct debt in 2019 accounted for 9.25% of own income and were 4% higher than in 2018. The average cost of debt for municipalities in 2019 was 3.0%.

Budgets of cities with district rights. Current income of cities with district rights grew from PLN 56.69 billion in 2013 to PLN 83.05 billion in 2019, which means that the compound annual growth rate (CAGR) was at the level of 6.57%. The operational margin ranged from 4.17% to 9.32%, with average value of 7.97% for the period. Tax income of cities with district rights accounted for 43.51% to 45.60% of their current income. On average 32.42% of tax income was from local taxes. Total debt of cities with district rights in 2013–2019 was PLN 33.2 billion, reaching the level of 43% of current income. A significant increase of PLN 5 billion is planned in 2020. Expenditure on servicing direct debt in 2019 accounted for 8.20% of own income and was 5% lower than in 2013. The average cost of debt for cities with district rights in 2019 was 3.03%.

Budgets of districts. Current income of districts grew from PLN 21.32 billion in 2013 to PLN 26.5 billion in 2019, with compound annual growth rate (CAGR) of 3.7%. The operational margin oscillated from 5.29% to 9.23%, with average value of 7.42% for the analyzed period. Tax incomes of districts accounted for 17.2% to 23.3% of their current income and has demonstrated a growing trend. Total debt of districts in 2013–2019 grew from PLN 5.6 billion in 2015 to PLN 6.5 billion in 2018. In 2019 we observed a slight increase to the value of PLN 6.8 billion. This accounts for 25.6% of planned current income. The ratio of total debt to own income was decreasing from the level of 90.06% in 2013 to 67.45% in 2019. Expenditure on servicing direct debt in 2019 was 12.6 of own income and was 2.5% higher than in 2018. Average cost of district debt in 2019 was 3.15%.

⁷ Compound Annual Growth rate (CAGR) – an indicator used in calculating average annual growth of some value over a given period, for example average growth of profits, capital value or level of employment in an enterprise in a period of time divided into years. When calculating the value of growth using the CAGR model we assume that average annual growths in an analyzed period are added to the base value in the next year.

Budgets of province self-governments. Current income of provinces in the analyzed period increased from PLN 11.55 billion in 2013 to PLN 14.68 billion in 2019 – compound annual growth rate (CAGR) reached 4.08%. Operational margin was between 13.1% and 22.50%, with average value of 16.98% for the period. Tax income provinces obtained ranged from 44.3% to 57.51% of current income. Average capital expenditure was 37.27% of total expenditure (the biggest share of all self-government units). Therefore we can describe budgets of province authorities as flow-investment ones. The most important elements of province income were the money from corporate income tax, current transfers, subsidies for investment tasks and money from personal income tax. Total debt of provinces in 2013–2019 grew from PLN 6.6 billion to PLN 7 billion in 2019, which accounts for 47.65% of current income (the highest percentage of all self-government units). The ratio of total debt to own income fell from 110.99% in 2013 to 77.31% in 2019. Expenditure on servicing direct debt in 2019 reached 15.23% of own income. The average cost of province debt is 2.6%.

A major and quantifiable threat to the finances of self-government units (including the calculation of Individual Debt Ratio – problem with own income) can be seen in amendments to the Act on Personal Income Tax, which generate the decline of own income for the whole sector of public finance at the level of PLN 13.3 billion annually, with self-government units losing as much as PLN 6.6 billion. Lowering tax progression in personal income tax from 18% to 17% will result in annual loss of PLN 7.3 billion in income of the whole sector of public finance. The total share of all levels of self-government in personal income tax is 49.93%. This means that local authorities in Poland will experience a decrease of PLN 3.6 billion in their income. Moreover, increased costs of obtaining revenue will result in lower income of the whole sector of public finance obtained from personal income tax. The loss will equal PLN 3.9 billion. The total share of all levels of self-government in personal income tax is 49.93% (the loss of income in self-government units in Poland will reach PLN 2.0 billion). Additionally, exempting persons under 26 from the income tax obligation will generate an annual loss of PLN 2.1 billion. The total share of all levels of self-government in personal income tax is 49.93%, therefore the income of self-government units will decrease by PLN 1.0 billion.

3. LAW REGULATIONS OF OPERATIONAL SURPLUS AND ITS CRITICISM

In 2014 the lawmakers introduced a structure limiting the level of repayment of financial obligations, expressed in Article 243 APF, thus abandoning the fixed ratio formula which had been used by self-government units for many years. The current formula establishes the limit of repayments that can be planned in the budget year, for obligations indicated in Article 243 APF. The lawmakers based it on the category of operational surplus, which – in their opinion – honestly charac-

terizes the financial situation of a self-government unit. In order to obtain greater reliability of the result, the lawmakers decided that when calculating the self-government unit's ability to repay debt (maximum repayment ratio) data is taken for a few years preceding the budget year for which we determine the maximum repayment ratio. For relations determined for 2019–2025 this is a three-year period, and for those for 2026 and the next years financial values will be related to seven previous budget years (2019–2025). It should be remembered that in the relation specified in Article 243(1) APF the lawmakers excluded the possibility of adding to current income in a given year revenues from previous years (for example due to budget surplus), which is contrary to the solution adopted in Article 242 APF. Therefore it is possible that the passed budget will maintain the relation described in Article 242 APF, but the annual value of the ratio used in calculating the maximum repayment ratio will be negative [Wołowicz 2020, 25–40].

The current regulations – the formula

According to the current valid regulation, included in Article 243(1) APF, the decision-making body of the self-government unit cannot pass the budget whose execution will cause that in the budget year and in each year following the budget year the relation of total amount due in the budget year of: 1) repayment of installments of credits and loans specified in Article 89(1)(2–4) and Article 90 APF, along with interests on credits and loans due in a given year, as specified in Article 89(1) and Article 90 APF; 2) buyout of securities issued for purposes specified in Article 89(1)(2–4) and Article 90 APF, along with due interests and discount on securities issued for purposes specified in Article 89(1) and Article 90 APF; 3) potential repayment of amounts resulting from granted guaranties and warranties to planned total budget income will exceed an arithmetic mean from calculated for the past three years relations of its current income increased by income from sale of assets and decreased by current expenditure, to total budget income, calculated according to the following formula:

$$\left(\frac{R+O}{D}\right)_n \leq \frac{1}{3} \times \left(\frac{Db_{n-1} + Sm_{n-1} - Wb_{n-1}}{D_{n-1}} + \frac{Db_{n-2} + Sm_{n-2} - Wb_{n-2}}{D_{n-2}} + \frac{Db_{n-3} + Sm_{n-3} - Wb_{n-3}}{D_{n-3}} \right)$$

where:

R – planned for a budget year total amount for repayment of credit and loan installments, specified in Article 89(1)(2–4) and Article 90 APF, and buyout of securities issued for purposes determined in Article 89(1)(2–4) and Article 90 APF.

O – planned for a budget year interest on credit and loans specified in Article 89(1) and Article 90 APF, interest and discount on securities issued for purposes specified in Article 89(1) and Article 90 APF, and repayments of amounts due to guaranties and warranties.

D – total income of the budget in a given budget year.

Db – current income.

Sm – income from selling capital (assets).

Wb – current expenditure.

- n – budget year for which the relation is determined.
- n – 1 – year preceding the budget year for which the relation is established.
- n – 2 – year preceding the budget year by 2 years.
- n – 3 – year preceding the budget year by 3 years.

The relation expressed in Article 243(1) APF assumes that we compare two values – annual debt repayment ratio (left side of the equation) and maximum debt repayment ratio (right side of the equation). Debt repayment covers both expenses and disbursements. The latter include: repayment of credit, loans and buy-out of bonds, expenditure comprises payment of interest and discount on the above obligations and additionally interest and discount on credit, loans and securities which finance the transitional budget deficit of self-government units. Credit, loans and securities as money claims are debt titles. Potential expenses due to guaranties and warranties granted by self-government units are different, because these obligations do not constitute a component of state public debt, but, as intended by the lawmakers, they are reflected in the subject relation on the left side. Expenses due to guaranties and warranties granted by self-government units must be included in the plan of current expenditure in the budget resolution, according to Article 122(1)(7) APF. It should be remembered that budget planning does not comprise the whole amount that was covered with guaranty or warranty, but only expenses to be paid in a given budget year, as in the concluded contract. If the contract of the credit (loan) guaranteed by the self-government unit stipulates that in the situation when the client stops repaying their debt, the sum of unpaid credit or loan becomes due immediately and the self-government unit should secure in its budget the whole amount of guarantee (in the plan of expenditure). This amount of guarantee must be taken into consideration when calculating annual debt repayment ratio [Walczak 2019].

4. CHANGES IN THE SCOPE OF THE MAXIMUM DEBT REPAYMENT RATIO SINCE 2020 – THE FORMULA MODIFICATION

Beginning with budgets and LFF passed for 2020 the maximum debt repayment rate forecasted for 2026 and further years will be established as arithmetic mean (from the past 7 years) from the calculated relation of its current income (D_{bei}), decreased by current expenses (W_{bei}) to the current income of the budget. In addition to prolonging the period for which the arithmetic mean is determined (from 3 to 7 years), the lawmakers modified the formula by eliminating income from sales of property and total income replaced the category of current income (as well as on the left side). Moreover, all parameters on the right side of the relation are subject to the following modifications [Wołowiec 2018, 129–40]: 1) the amount of current income – D_{bi} (the denominator of the formula on the right side of the relation) – to which the difference between current income and current expenditure is referred, is subject to decrease by subsidies and means allocated to current goals (the amount of current income defined in

this way is used in calculation, beginning from 2020); 2) the amount of current income decreased by current expenditure – D_{bei} (the numerator of the formula on the right side of the relation) – is decreased by subsidies and current means for implementation of a program, project or task financed with participation of means specified in Article 5(1)(2) APF (the amount of current income defined in this way is used in calculation, beginning from 2020); 3) the amount of current expenditure – W_{bei} (the numerator of the formula on the right side of the relation) – is decreased by: current expenses due to repayment of obligations contracted in connection with the debt title, other than credits and loans (Article 243(2)(3a) APF), current expenditure on servicing debt and current expenditure on implementation of a program, project or task financed with participation of means specified in Article 5(1)(2) APF. The amount of current income defined in this way is used in calculation, beginning from 2020, but decreasing current expenditure by amounts of current expenditure due to repayment of installments of obligations included in the debt title, other than credits and loans, concerns exclusively obligations contracted after 1st January 2019. The amounts of current expenditure when calculating the relation for 2020–2025 is not decreased by current expenditure on servicing debt (decreasing by current expenses on servicing debt will take place when determining the relation beginning from 2026).

When preparing LFF for 2020 and the next years, each self-government unit must establish the relation of the repayment of obligations applying two methodologies. According to the content of Article 9(1) APF, for the 2020–2025 period the determined relation of total amount of repayments and buyouts due in a given budget year to planned current budget income cannot exceed the arithmetic means for the relations between current income, increased by income from sale of property and decreased by current expenditure to current income of the budget, calculated for the past 3 years.

Therefore, it should be emphasized that ultimately self-government units will determine the relation of the repayment of obligations following the formula below:

$$\frac{(R + O)}{Db} \leq \frac{1}{7} \times \sum_{i=1}^7 \frac{(D_{bei} - W_{bei})}{D_{bi}}$$

where:

R – planned for a budget year total amount for repayment of installments of obligations included in the debt title, as specified in Article 72(1)(2) APF, and buyouts of issued securities, excluding amounts of repayment of credits and loans and buyouts of securities contracted or issued for the purpose specified in Article 89(1)(1) APF and obligations defined in Article 91(3)(1) APF.

O – planned for a budget year current expenditure on servicing debt, including interest on obligations included in the debt title, as specified in Article 72(1)(2) APF, interest and discount on securities and repayment of the amounts resulting from granted guaranties and warranties.

Db – planned for the year for which the relation is determined, current income of the budget, decreased by subsidies and means allocated to current goals.

D_{bei} – current income in the year preceding by i -years the year for which the relation is determined, decreased by subsidies and current means for the implementation of a program, project or task financed with participation of the means specified in Article 5(1)(2) APF.

Dbi – current income in a year preceding by i -years the year for which the relation is determined, decreased by subsidies and means allocated to current goals.

Wbei – current expenditure in a year preceding by i -years the year for which the relation is determined, decreased by current expenditure due to repayment of the installments of obligations included in the debt title, as specified in Article 72(1)(2) APF, current expenditure on servicing debt and current expenditure on the implementation of a program, project or task financed with participation of means defined in Article 5(1)(2) APF.

When designing the budget for 2020 and LFF for 2020 and the next years we need to establish the relation of the repayment of obligations using two methodologies. According to the content of Article 9(1) APF, for the 2020–2025 period the determined relation of total amount of repayments and buyouts specified in Article 243(1) APF in the wording given in the amended APF, to planned current budget income cannot exceed the arithmetic means for the relations between current income, increased by income from sale of property and decreased by current expenditure to current income of the budget. This means that: 1) the amount of repayments (left side of the relation) does not include the amounts connected with repayment of installments and servicing other obligations classified as credit and loans on the basis of Article 72(1a) APF if these obligations were contracted before the implementation of the new provisions (from 1st January 2019); 2) the amount of current income, to which the amount of repayments is referred (the annual repayment rate – left side of the relation) will be decreased by the amounts of subsidies and means for current goals; 3) the amount of current income (the denominator of the formula on the right side of the relation), to which the result of the calculation from the numerator ($D_{bei} - W_{bei}$) is referred, will be decreased by the amounts of subsidies and means for current goals; 4) the amount of current income, increased by the amount of income from selling property, from which the amount of current expenditure is deducted (the numerator of the formula on the right side of the relation) will be decreased by the amounts of subsidies and current means for the implementation of a program, project or task financed with means specified in Article 5(1)(2) APF; 5) the amount of current expenditure deducted from the amount of current income, increased by the amount of income from selling property (the numerator of the formula on the right side of the relation), will be decreased by: a) current expenditure on the implementation of a program, project, or task financed with the means specified in Article 5(1)(2) APF, b) current expenditure due to repayment of installments classified as credit and loans, as far as they are obligations contracted after the implementation of the Act on Public Finance; 6) for the year preceding the budget year for which the relation is determined, we adopt the planned values shown in the report for three quarters on the execution of the budget of a self-government unit, and after the annual report is made – the values for this year, provided that in order to calculate the relations for the previous two years we adopt the values obtained, as given in the annual reports.

When determining the relation of repayment of obligations for 2020–2025, self-government units still use budget values for three years preceding the budget

year for which the relation is determined. Moreover, in the formula, on the right side (the numerator) income from property is still reflected. Starting from 2020, when determining the relation of repayment of obligations for 2026 and the next years, self-government units will use a completely new method of calculating this relation, in the subject relation (on the left and right sides) there will also be amounts related to other obligations classified as credit and loans on the basis of Article 72(1a) APF only as far as the obligations contracted after the implementation of the APF are concerned (since 1st January 2019). At the same time, provisions concerning exemptions from limiting repayment of debts (Article 243(3) and (3a) APF) will remain unchanged.

CONCLUSIONS

According to Article 31, when determining the relation limiting the amount of debt repayment in 2020–2025, current expenditure of the self-government unit's budget will be decreased by current expenditure on servicing the debt. The adoption of this solution is connected with increasing the possibilities of contracting and repayment of obligations by local authorities. However, it seems that this change will not result in significant support for finances of self-government units and increasing financial potential of municipalities. This is because only current expenditure on servicing debt is exempted. This will, in most cases, be interest on credit and loans. A more effective solution for 'loosening' the individual debt ratio seems to lie in excluding – while determining this ratio – the amounts resulting from repayment of installments of the credit and loans contracted by self-government units or repayment of installments of other obligations of self-government units classified as debt titles, which were contracted out of the necessity to finance activities aimed at counteracting COVID-19.

Therefore it is possible to make an earlier repayment of the debt if the local authorities have financial means from repayment of a loan granted earlier, free cash, income from privatization or surplus from previous years. The Act states that we can exclude from the ratio only earlier repayments, that is repayments which have been originally planned for the future budget years. Repayments planned for the budget year must meet the limitation requirement.

It is possible to restructure the debt, that is to replace one debt with the new one, provided the costs of the new debt are lower than the costs of the restructured debt. The biggest disadvantage of the ratio specified in Article 243 APF has been eliminated since 2020. Now the creditworthiness is calculated as an arithmetic mean of three annual ratios, which are made up from sums of current surplus and sale of property related to total income. This structure accounts for the fact that the higher property subsidies (an element of total income, which is the denominator of the fraction), the lower creditworthiness (that is the value of the percentage constituting the allowable repayment in a particular year). This is in spite of the fact that subsidies should not in any way affect cre-

ditworthiness of self-government units. Beginning with budgets for 2020, the right side of the formula is calculated as average from 3 last years of annual ratios, which constitute a ratio of the sum of current surplus and sale of property to current income for a given year, decreased by current subsidies from the EU. In addition, current surplus in the numerator of this fraction will be corrected to reflect both income and expenditure due to current subsidies of the EU. After this change, EU subsidies (both current and capital ones) will have no influence on creditworthiness. The left side of the formula is calculated as a relation to current income decreased by current subsidies from the EU.

In 2020–2025 the sum of current surplus and property sale will be referred to current income. In 2022 a significant amendment will be made in Article 242 APF – so far the requirement of this Article that current income should be higher than or equal to current expenditure could be met by adding any free means at the disposal of the self-government unit. Free means, according to the Act, denote means from credit that were contracted earlier and have not been spent.

In 2026 major changes will take place. Firstly, the period on the basis of which the average operational surplus is calculated, will be prolonged to 7 years, while the arithmetic mean will be replaced with weighted mean, secondly, the numerator on the right side will be deprived of capital income from selling property and expenditure on servicing debt will be excluded from current expenditure on the right. Since 2026 the ratio will be calculated on the basis of weighted mean from the past 7 years, while the first 4 years will have the weight of 40% and the last three – 60%. Budget results for 2019 will be entered into the ratio for 2026 with the weight of 6%, and the consecutive ones with weights of 9%, 11%, 14%, 17%, 20% and 23%.⁸

Taking into account the needs of self-government units and the anticipated effects of the pandemic, it seems necessary to pass further legislative changes. Lawmakers should consider modifying the method of determining the individual debt ratio of self-government units. What is needed in this scope is to exclude those debt titles which increase the individual debt ratio of self-government units, contracted in order to finance the deficit caused by expenditure caused by the virus or expenditure for which there are no means in the budget due to the virus. The necessity to contract further debt obligations is connected, *inter alia*, with lower income from personal tax. Municipalities have lower incomes also due to the activities taken with the aim of supporting local entrepreneurs, for example, redemption of real estate tax or rents.

The current structure of the ratio does not fully meet the challenges posed by current problems. Many municipalities will not have the possibility of contracting a new credit or another debt obligation. It seems that these obligations should be temporarily neutral for Individual Debt ratio (IDR), firstly, due to specific circumstances and role of municipalities in fighting the effects of the epidemic, and

⁸ Quoted after Gołaszewski 2018, 57–58.

secondly, due to the purpose for which they are contracted. This postulate could be fulfilled as in the content of Article 243a APF, according to which revenue bonds are not included in the calculation of IDR.

It also seems necessary to implement changes in income of self-government units by increasing it (especially as far as vertical transfers from the state budget are concerned). The problem of insufficient financing of public tasks could be partially relieved by increasing the share of transfers from the state budget (for example general subventions) in self-government unit's income, especially in these areas of expenditure which require specific financing (for example education – by increasing the education part of the general subvention).

It seems that it would also be helpful to create a complex system of refinancing the already contracted obligations in order to finance the deficit of self-government units. Such a system could be created by state financial institutions (state-owned corporate bodies, funds which have capital ties with the Treasury, BGK, etc.).

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REDUNDANT AND USELESS FRAGMENTS OF LEGAL TEXTS. BASIC DEFINITIONS AND PRELIMINARY TYPOLOGY OF CASES

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Abstract. The theory of rational lawgiver uses an assumption of normativity of legal text. The authors propose several definitions to express theoretical possibility and to show real cases of non-normative fragments of integral (articulated) parts of legal texts and normative fragments of other parts of legal text. Three types of normativity are defined: the broadest, broad, and strict. The notion of normativity is connected with notions of redundancy and uselessness of legal texts. The authors examine in this context five elements constituting legal system: (1) legal provisions – basic element of the integral (articulated) part of a normative act, (2) fragments of legal provision, (3) elements of the non-integral (non-articulated) part of a normative acts, (4) normative acts in their entirety, (5) judgements of the constitutional court as sui generis interventions in the current legal text. The analyze leads to showing four basic types of errors in legal provisions, which are dubbed: “doubles,” “widows,” “orphans,” and “botches.” In closing remarks the authors signal perspectives of formulation of a complex theory of redundancy and uselessness of legal text.

Keywords: normative act, legislation, legal text, normativity, normative change, redundancy, uselessness

INTRODUCTION

We shall begin with a pharmaceutical metaphor. In any tablet, pharmacists distinguish the active substance as well as fillers, lubricants or binders which do not have curative properties. Among these other substances, there are plain “fillers” (*massa tabulettae*) as well as substances which aid the absorption of the medicine into the body. We can look at a legal act with the eye of a pharmacist. The role of a legal act is to influence human behaviour. Already at first glance, it can be seen that every genuine legal act is heterogeneous. Just like the tablet, an act contains an integral (articulated) part, in which instructions for behaviour are formulated within successively numbered sentences (articles, paragraphs), and also non-integral (non-articulated) parts, such as the title of an act, its preamble, footnotes, and so on [Malinowski 2012, 182ff].

Of legislators wishing to write a perfect¹ text expressing a legal norm, we have the following to say: a text should be created in such a manner that the entirety of the normative content is contained in the integral part of the act; the non-integral parts should perform a purely auxiliary function. However, when reading normative acts, doubts as to their being drawn up perfectly grow. We consider that it is justified to ask the most general questions regarding the theoretical possibility and practical examples, firstly, of non-normative statements in the integral part of normative acts, and secondly, of normative statements in their supplementary parts [Wróblewski and Zajęcki 2012, 303–304]. The category of normative statements is also, in our opinion, not homogeneous. Normative statements feature redundant and useless elements, too.

The aims of this paper are to broaden the conceptual framework applied in jurisprudence, and to describe in consistent terms a range of specific examples.² We treat the legal system as a set of legal norms decoded from legislative acts and their logical or instrumental consequences. This set has the nature of a system, as it is rationalised on the basis of using collision rules to remove inconsistencies within the set of currently valid norms. A consequence of the assumptions adopted is the relativisation of all concepts with regard to the given (accepted within a concrete legal order) set of rules for the writing and interpretation of the law. In addition, when, within a given legal culture, there is no unanimity as to the form of the rules for the proper writing and interpreting of the law, that relativism goes even further – the definitions we formulate must be related individually to each of the competing concepts of jurisprudence.

This paper is based on our studies which have already been partially presented in published texts, and partially are still in preparation for publication. We deliberately reduce the level of technical detail and examples contained in the article. Instead, we focus on presenting the very notions of redundancy and uselessness of legal text. Our aim here is to show clearly the rationale for broadening legal terminology. In that sense, this paper introduces a research programme which we

¹ Assumptions regarding the linguistic correctness of legal texts were formulated in the Poznań-Szczecin School based on Leszek Nowak's idealised concept of a rational lawgiver [Nowak 1973]. The linguistic knowledge of rational lawgiver includes, among other things, "knowledge of the nature of the language of [...] legal texts, as well as of the accepted methods of formulating norms in legal regulations" as well as "knowledge of the accepted rules of interpreting legal texts within a given legal culture" [Wronkowska 1990, 123]. "The assumption of the factual knowledge of a rational lawgiver is treated in this construction as stronger than the assumption of his/her linguistic knowledge. [...] The assumption of the axiological rationality of a lawgiver is stronger than the assumption of his/her linguistic rationality" [ibid., 132–33].

² In contrast to M. Kłodawski, the main focus of our interest is not linguistic issues [Kłodawski 2012a; Idem 2012b; Idem 2013]. Unlike T. Grzybowski, we do not put the primary emphasis on the practical exercise of justice, but the work of legislators and those who write legal texts [Grzybowski 2013]. For further details see [Wróblewski and Zajęcki 2017, 126ff].

already have started³ and which will culminate, as we hope, in a systematic presentation of ideas and their applications in Polish and international jurisprudence.

1. *NORMATIVITY SENSU LARGISSIMO, SENSU LARGO AND SENSU STRICTO*

We shall limit our terminological considerations to the area of law. We shall go on to look exclusively at those contexts of the use of the term normativity which refer to the processes of creating and applying the law. In this way, we shall avoid the broad range of non-legal uses of the concept of normativity (in ethics, social philosophy, logic, etc.) [Brożek, Brożek, and Stelmach 2013].

Normativity in its broadest legal sense (normativity *sensu largissimo*) is associated with the common usage of the word “normative” in the sense of “legal;” in this meaning, a normative text is one which directly expresses, or is essential for the correct understanding (interpretation) of the norms of behaviour – both legal norms (general-abstract) and norms formulated in the process of applying the law (individual-specific, individual-abstract and general-specific norms). In this broadest sense the texts of court judgements, civil law agreements, administrative decisions, and so on are normative [Wronkowska 2005, 32]. Other examples of normative elements are – if a given legal culture regards their use as essential to interpretation – preparatory materials, explanations of verdicts, and so on.

Normativity in the broad sense (normativity *sensu largo*) is attributed to a given fragment of a normative text *sensu largissimo*, and means that taking into consideration (i.e. using in interpretation) that particular fragment is essential for the successful decoding of a legal norm (a general-abstract norm) from the text. Strictly speaking, taking into consideration a given fragment of a text in the process of interpretation is insisted on, or accepted by the interpreter of the normative concept of legal interpretation, in order to achieve correct decoding of the legal norms written in the text by the lawgiver. **Normativity in its strict sense (normativity *sensu stricto*)** is attributed to a given fragment of a normative text *sensu largo*, and means that a given fragment of a text expresses a legal norm or its part (specifies the range of those encompassed by the legal norm, its sphere of application or the scope of its normalising function).⁴

“Legal text” is a technical term [Zieliński 1972, 24] and in our further considerations we shall use it only in the following sense: **a legal text of a given state is the aggregate of all the fragments of all the normative acts of that state.**⁵ The proposed understanding refers to the so-called material concept of normati-

³ Three papers have been already published [Wróblewski and Zajęcki 2012; Idem 2017; Idem 2021]. Two more papers are currently in preparation.

⁴ Cf. examples: Wróblewski and Zajęcki 2017, 126ff.

⁵ The term “text of a legal act” may refer to the text of a given legal act, so in addition to the texts of normative acts it includes texts such as court judgements, administrative decisions or civil law agreements.

vity, which makes ascribing normative character to a legal act dependent on the kind of norm expressed within it, and not on the variety (name) of the act [Kosiorowski 2010, 35–36].

Alongside the fragments of normative legal texts *sensu largissimo*, *sensu largo* and *sensu stricto*, it is essential to distinguish yet another category – **fragments of legal text which are not normative in character**: 1) which do not express norms (neither general, nor individual) or their fragments; 2) which were intended by the legislator to express a norm or its fragment, but in which the properties of the text make it impossible to rationally apply.

The placing of non-normative expressions in a legal text may be a result of a mistake made by the legislator (in the second example), but also (as in the first example) a deliberate ploy aimed at legitimising or improving the effectiveness of a given act, or even of the entire legal system. Such a fragment, although not usable in decoding legal norms, may be used to analyse the so-called “ideological level of legal text” [Jabłoński 2020].

2. ASSUMPTIONS REGARDING THE NORMATIVITY OF LEGAL TEXTS

The foundations of the Polish theory of statutory interpretation contain the **assumption of the normativity of the integral part of the text of normative acts**. J. Wróblewski’s conviction that the legislator does not use superfluous phrases from the point of view of the process of establishing the meaning of regulations is reflected in the rules of linguistic interpretation: “It is inadmissible to establish the meaning of a norm whereby certain phrases in it are treated as superfluous” [Lang, Wróblewski, and Zawadzki 1986, 444]. In cases where establishing the meaning of a norm with the aid of a particular directive means that a particular phrase used in that norm turns out to be superfluous, and the use of other directives would not lead to that occurring, then those other directives need to be used in establishing the meaning of the norm [Wróblewski 1959, 405]. These theses have been frequently, and with approval, referred to by Polish experts in jurisprudence [Ziemiński 1980, 283; Wronkowska and Ziemiński 2001, 166], as well as specialists from the field of legislative technique [Wronkowska and Zieliński 2012, 90–91; Wierczyński 2010, 180, 629]. A more detailed view of the general assumptions is found in J. Wróblewski’s typology of regulations on account of the theoretical assumptions regarding their normative sense.⁶

⁶ We can speak of the normative character of a text in five basic senses. An element of a legal text is normative if: (1) it is a regulation directly setting out the behaviour of a specific addressee, (2) it is a regulation directly or indirectly setting out the behaviour of a specific addressee, (3) it appears in a legal norm constructed on the basis of existing law, (4) it is contained in a legal text *ex definitione*, (5) the idea behind the adopted directive for applying or interpreting the law influences the process of applying or interpreting the law [Wróblewski 1965, 23]. In our proposed conceptual framework, regulations of types (1), (2) and (3) are normative *sensu stricto*, the status of regulations in (4) depends on the theoretical assumptions adopted, whereas type (5) regulations are normative *sensu largo*.

Another method of approaching the assumptions of normativity of legal texts was adopted by M. Zieliński: the interpretation of a legal text is based on a strong metalinguistic assumption: “The basic assumption of the normativity of expressions which lawyers are especially interested in is the assumption of the normativity of legal regulations. It is an assumption allowing legal regulations to be regarded as expressions that verbalise the norms, regardless of whether they do not normally directly verbalise those norms. This assumption also constitutes a common principle that lies behind the application of the linguistic rules for decoding a legal text [...] distinct from the functioning rules for decoding them which use other assumptions” [Zieliński 1972, 24]. “There arises [...] the question on what descriptive basis formulated legal texts are supposed to be read at the level of directives, and thus how the norms of behaviour are expressed in them. The answer to that question is widely accepted. The basis for such a reading of legal texts is the assumption of their normativity” [Idem 2012, 105].

Legal texts almost never express norms directly (which is acceptable in J. Wróblewski’s typology), but always in a *quasi*-idiomatic manner. In the process of deriving them, the interpreter must reconstruct the norm from multiple fragments of legal texts, taking into account the fact that plural, supplementary and modifying regulations appear in legal texts. All the regulations of the text of a normative act must be taken into consideration in their entirety in the process of reconstructing legal norms.⁷ In the proposed language, the assumption of normativity in M. Zieliński’s version states that a legal text is normative *sensu stricto*.⁸

3. CONCEPT OF VALIDITY OF STATUTORY LAW

The concept of validity of statutory law is weighed down by various connotations [Wróblewski and Zajęcki 2017, 130]. Providing a quasi-definition is essential because, as indicated in the introduction, our point of reference for the analysis is the system of interpreted law, understood as the **system of valid legal norms**. It is thus not possible to refer to the problem of the irreducible vagueness of the term “validity”, as the lack of precision here would affect the entire analysis. We shall begin with the definition of validity of a legal provision.⁹ A legal provision is “a grammatical sentence (from full stop to full stop, or from full stop to semi-colon, or from semi-colon to full stop) usually clearly graphically distinct

⁷ It does happen that the rules for decoding cause that certain phrases used in regulations (e.g. the modal verbs “must,” “should” etc.) do not appear in the reconstructed norm.

⁸ “every legal regulation serves to interpret at least one of the substantive elements of legal norms” [Grabowski and Hermann 2006, 69].

⁹ One should mind at that point that the term “validity” will be used differently when associated with provisions, acts, and norms. This may be regarded as a quite severe inconvenience of Polish legal terminology, but we claim that this is methodologically correct way of proceeding, because some scientific notions can (and do) change meaning when associated with different elements described by sciences [Zajęcki 2012].

in a legal text, and usually identified within it as an article or paragraph” [Zieliński 2012, 4].

Intuitively, a provision is valid if it is passed following the conventions established by the validating rules of a given legal system. This is the most formal definition for the validity of a provision, related to the ideas of Hans Kelsen.¹⁰ For our purposes in this paper we want to be a bit more specific, though. Let us start with a quasi-definition of a valid normative act, after which we will clarify the notion of a valid legal provision, and a valid fragment of a legal text. Finally, we will formulate a sketchy definition of a valid legal norm.¹¹

A normative act A is valid at time t when the final conventional act necessary for its passing into force took place no later than at time t , and: 1) the act A has not expired automatically as a result of triggering self-derogating clause, or 2) the act A has not been derogated, or 3) no court judgement declaring act A to be as a whole in contravention of the constitution has been delivered, or 4) has not been identified as temporarily non-binding at time t , or 5) no special cases of derogation of an implementing legislation took place.

Provision P is valid at time t when it is included in the integral part of a normative act A enacted no later than at time t , and: 1) the act A has not been derogated as a whole, or 2) the provision P has not expired automatically as a result of triggering self-derogating clause, or 3) the provision P has not been derogated, or 4) has not been identified as temporarily non-binding at time t , or 5) no court judgement declaring provision P to be in contravention of the constitution has been delivered.

The definition of validity of fragments of a normative act (which include elements of non-integral parts of normative acts) is analogous, so we shall not formulate it *in extenso*. It is assumed that only the current legal text forms the basis for establishing the current law (the set of valid norms).¹² **The current legal text (at time t)** is the set of all fragments of normative acts valid at time t . Using the definition of the current legal text, we can formulate a definition for the validity of the norms of statutory law (or, more precisely, the skeleton of such a definition,

¹⁰ In our studies, we do not follow Kelsen’s ideas directly, but refer to L. Nowak’s concept [Nowak 1966, 97]. The definition omits the conditions for a regulation coming into force. From the moment a regulation comes into force, it represents a “fully legal” element of the legal system, on the basis of which all actions shaping that system. In particular, a regulation can be amended, overturned, be referred to in consolidated texts, become the basis for issuing secondary legislation, become a statutory instrument for a court.

¹¹ The definitions presented here are sketchy; they are discussed in a more elaborate and systematic fashion in [Wróblewski and Zajęcki 2017, 130–33]. Therefore, all the clarifications given here are, at best, quasi-definitions, with a number of simplifications.

¹² The practice of so-called “interpretative application of a new law,” i.e. taking into account regulations in their new form when interpreting laws that have long since been in force, is contrary to the principle of retroactive operation of the law, and it is permissible only when it is possible to attribute the will for such an interpretation to be made to an axiologically rational legislator. For more, see Grzybowski 2013, 212, 222.

which would need the details to be filled in [Patryas 2016, 214ff], but this task lies outside the scope of this text).

A norm of statutory law N is valid at time t , when: a) it can be decoded using the rules of exegesis from the current legal text at time t , or b) it can be deduced from the statutory norms valid at time t using the rules of legal inference, and 1) it does not conflict with the norms valid at time t , which, on the basis of the accepted rules of conflict, take priority at time t , or 2) there are no factual obstacles (e.g. *impossibulum nulla obligatio, desuetudo*), or 3) there are no axiological obstacles.¹³

4. CURRENT, HISTORICAL AND POTENTIAL LEGAL TEXTS

The terminological discussion enables us to precisely define the concept of normativity. In each of the meanings highlighted (*sensu largissimo*, *sensu largo*, *sensu stricto*), the normativity of current, historical and potential texts can be discussed. Consequently, one needs to refer to the current, historical and potential interpretations of legal norms, respectively. Examples of these kinds of texts are shown in a tabulated form below [Wróblewski and Zajęcki 2017, 133–34]:

	normative text <i>sensu largissimo</i>	normative text <i>sensu largo</i>	normative text <i>sensu stricto</i>
current text	valid testament	Preamble to the United Nations Charter (1945)	text of a currently valid act
historical text	earlier testament	Preamble to the Covenant of the League of Nations (1919)	text of an abolished act
potential text	draft testament	draft of a preamble to a constitution	draft text of an act

Distinguishing current, historical and potential texts is relational in nature. In each case, it is necessary to identify, even implicitly, the moment of interpretation. A given text may currently be historic, but depending on the selection of the moment of interpretation, it could become a current or even potential text.

¹³ For details and comments, see Wróblewski and Zajęcki 2017, 132–33.

5. NORMATIVE CHANGE

Using the terminological framework, we can define the concept of normative change. Based on the general-theoretical assumptions cited here, we can define the technical terms used in our further analysis.

Normative change (normative innovation) refers to any change in the set of valid legal norms. A normative change can take place as a result of a change in a legal text, but also as a result of other circumstances (e.g. *desuetudo*, a change in the rules of interpretation, inference or conflict) [Grzybowski 2013, 41; Wróblewski and Zajęcki 2017, 134–35].

We also take into account the case in which a normative change occurs without the activity of the lawgiver (and also the “negative lawgiver” – the constitutional court) on the current legal text. This **type of case is termed an extra-textual normative change**. It is a result of changes occurring in the social reality, and especially in the rules for interpreting the normative concept of the legal source [Zwierzykowski 2005, 94–95]. It is conceptually possible to distinguish a category of changes to the legal text which do not lead to a normative change. We shall use this category to define the concepts of redundancy and uselessness of the legal text.

6. REDUNDANCY AND USELESSNESS OF LEGAL TEXT

A change in a legal text does not necessarily lead to changes in the set of existing legal norms.¹⁴ This conclusion has serious consequences not only for justifying interpretative decisions when making an operative interpretation, but also for numerous issues in jurisprudence which use assumptions about the normativity of legal texts. Let us suggest two notions which express the conclusion.¹⁵

A fragment of a legal text is redundant if its removal does not lead to a change in the set of extant legal norms (it would be a redundant change to the legal text).

A redundant change to the legal text is a change in the legal text that does not lead to a normative change. A legal text, in addition to expressing legal norms, fulfils a range of other pragmatic functions. We permit, for the time being purely theoretically, a situation in which a legislator creates or maintains a redundant text in the legal system which performs a significant pragmatic function (for example, it helps improve the communicability of the text). We additionally consider that redundancy and normativity (in its strict sense) are not antonyms. It is easy to imagine a situation in which the current legal text expresses a norm (i.e. is normative in the strict sense), but in which the interpreted norm adds nothing new to

¹⁴ This conclusion is of enormous practical significance. It decides, at least on the level of the practice of interpretation and application of the law by Polish courts, the controversy over the status of assumptions about the normativity of changes to the legal text [Grzybowski 2013, 70ff].

¹⁵ A suggested distinction appears in the literature under a variety of names [Wróbel 2003; Zaręba 1987; Zwierzykowski 2008]. See also Wróblewski and Zajęcki 2017, 135–36.

the legal system. The reverse situation may also occur: a text may be non-normative, strictly speaking, and yet not redundant. These considerations allow us to define the final term used in our conceptual framework.

A fragment of a legal text is useless if its removal would not lead to a normative change (i.e. would not change the legal state), and neither would it impair other important pragmatic qualities of the legal system. The uselessness of a legal text is a particular variety of the redundancy of a legal text. **A useless change to the legal text** is a change that does not lead to a normative change, so the new legal text is not practically improved in any way.¹⁶ The evaluative term “other important pragmatic qualities of the legal text” encompasses a broad range of situations which, for the purposes of constructing a conceptual framework, can be specified as follows.¹⁷ A fragment of a legal text is not redundant if (1) it makes **the correct preparation** of a legal text easier, or (2) it makes **the correct interpretation** of a legal text easier, or (3) it makes **the justification of the correctness of an interpretation** of a legal text easier.¹⁸

All other cases of redundancy of a legal text are, therefore, examples of uselessness of a legal text. The most important example, from the practical point of view, of a redundant but not useless change is an “**explicatory change**” [Grzybowski 2013, 163ff]. A second important reason why not all superfluous expressions are useless, is **simplifying the reconstruction of the phase of interpretation** by “shortening the time looking for related regulations” [Kłodawski 2013, 41].

Both redundancy and uselessness of legal texts represent features which can be removed. A given fragment of a redundant text may, at a certain moment, become “necessary” as a result of changes introduced by the legislator forming its interpretational context. The same may apply to useless text. Furthermore, it is possible for the condition of redundancy or uselessness to disappear without cha-

¹⁶ This would be an example of “dysfunctional redundancy” [Kłodawski 2012b, 162]. For examples see Wróblewski and Zajęcki 2017, 136–37.

¹⁷ We are discussing the problem from the point of view of a lawyer. A more extensive typology of functions of linguistic superfluity may be constructed by referring to the latest linguistic findings. For example, M. Kłodawski proposes identifying the following functions of superfluous text [Kłodawski 2012b, 161]: (1) improving text comprehensibility, (2) resolving ambiguities, (3) stressing (identifying) features, (4) emphasising or intensifying meaning, (5) creating a style (including the style characteristic of legal language), (6) forming fixed phrases or proper nouns, (7) improving text cohesion. See also the explicatory, strengthening and specifying functions [Kłodawski 2013, 47–48].

¹⁸ The third case is by far the most problematic, as there is no consensus among theoreticians of legal interpretation about the “proper” way of interpretation. Actually, the very case of such controversy is also controversial [sic!], with some scholars claiming that the notion of “proper interpretation” is a legal myth. In a recent paper, P. Jabłoński showed that there was a controversy on how to understand the so-called “ideological level of legal text” [Jabłoński 2020, 49–52]. If we follow the hermeneutical way (based on the ideas proposed by P. Ricouer), non-normative ideological elements in legal texts should be qualified as useless (in our proposed technical meaning). If we follow the analytical way (as proposed by Z. Ziemiński), such non-normative elements in legal texts, though redundant *sensu stricto*, should not be qualified as useless (in our proposed technical sense) [Zajęcki 2017, 263ff].

nges to the legal text – exclusively as a result of *desuetudo* or change to the interpretive rules.

The conceptual distinction of normativity, in its strict and broader senses, poses the question of whether an analogous distinction might also apply to the categories of redundancy and uselessness. We think this is the case, as long as we specify the concept of normative change to a legal text as follows [Wróblewski and Zajęcki 2017, 137–38].

Normative change *sensu stricto* of a legal text refers to a change that alters the verbal form of the normative fragments *sensu stricto* of the legal text and, as a result, leads to a normative change. **Normative change *sensu largo* of a legal text** refers to a change that alters the form of the normative fragments *sensu largo* of a legal text and, as a result, leads to a normative change.

Alongside the distinction made between “redundancy” and “uselessness,” one can refer to normativity either in the strict sense (fragments of a text expressing elements of norms) or in its broader sense (fragments used indirectly in the process of interpretation). The ensuing conceptual framework should contain the relevant distinctions [ibid.]. **Redundant text *sensu stricto*** is a fragment of a legal text expressing, either in its entirety or in part, a legal norm, whose removal would lead to a change in the set of extant legal norms. **Useless text *sensu stricto*** is a fragment of a legal text expressing, either in its entirety or in part, a legal norm, whose removal would not lead to a change in the set of extant legal norms, nor would it impair other relevant pragmatic properties of the legal system. **Redundant text *sensu largo*** is a fragment of a legal text which must be taken into consideration when decoding the text of legal norms, but whose removal would not lead to a change in the set of extant legal norms. **Useless text *sensu largo*** is a fragment of a legal text which must be taken into consideration when decoding the text of legal norms, but whose removal would not lead to a normative change, nor would it impair other relevant pragmatic properties of the legal system.

Examples taken from [Wróblewski and Zajęcki 2017, 138–39]:

	normative text <i>sensu stricto</i>	normative text <i>sensu largo</i>
redundant text	<ul style="list-style-type: none"> --- repetition of a fragment of a legal text expressing a legal norm to improve the interpretation of a normative act --- a “house cleaning” regulation repealing a non-valid normative act on account of a silent derogation 	<ul style="list-style-type: none"> --- a phrase indicating the existence of exceptions --- titles of sections of a normative act not used in interpreting that act, but improving its comprehensibility (communicativeness) --- a preamble not containing any content essential for the correct interpretation of the regulations in the integral part of the normative act, but making the application of the law easier

useless text	--- a modifying provision for which a central provision does not exist (or is not valid) --- a legal definition which is not used in a legal text --- rules for performing conventional activities by non-existent subjects	--- a phrase suggesting the existence of exceptions which actually do not exist --- titles of sections of a normative act not improving the level of comprehensibility (communicativeness)
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In the typology proposed by J. Wróblewski “redundant regulations” are divided into: (1) regulations which are not repealable via detailed derogation, (2) unapplied regulations, as the conditions for their application do not exist, (3) unapplied regulations, despite the conditions for their application existing [Wróblewski 1985, 316–17].

Our version is more generalised and includes those types. The first case in J. Wróblewski’s typology concerns the so-called **implied (silent) derogation**. There is no doubt, as stressed in the latest literature on jurisprudence, that this phenomenon occurs and leads to normative changes (i.e. changes in the set of valid norms) [Kanarek 2004; Hermann 2012]. We take this case into consideration in conceptual terms by adding to the definition of a valid norm the criterion of eliminating conflicts with valid norms. As a result, a fragment of a legal text (or even entire normative acts) may turn out to be redundant, as they express norms regarded as non-binding due to their silent derogation.

In the second case of J. Wróblewski’s typology, one comes across the situation in which “particular factual conditions” arise which justify regarding a given norm as non-binding. This results in recognising the regulations as redundant. An example of that redundancy is the expression in a legal text of norms from a permanently empty class of addressees or area of application.

The third example described by J. Wróblewski causes the most difficulty. On the basis of the definition used by us for the application of a norm, it would correspond to the situation where particular factual (*desuetudo*) or axiological conditions arise (a clearly unjust refusal to apply the law). J. Wróblewski perceives the controversiality of referring to this type of case and argues that on the basis of his rational model for the creation of the law it is difficult to find a legal basis for removing such regulations from the legal text via legal “house cleaning” procedures (through a declaratory act).

7. PRELIMINARY TYPOLOGY OF ELEMENTS OF POLISH LEGAL TEXTS WITH RESPECT TO THE NOTIONS OF REDUNDANCY AND USELESSNESS

An initial perusal of the qualities of the Polish legal language [Wróblewski and Zającki 2021] leads to the identification of five basic areas warranting further investigation: (1) legal provisions – basic element of the integral (articulated) part of a normative act, (2) fragments of legal provision, (3) elements of the non-in-

tegral (non-articulated) part of a normative acts, (4) normative acts in their entirety, (5) judgements of the constitutional court as *sui generis* interventions in the current legal text.

The above list was created on the basis of an initial overview of the properties of Polish legal texts. In a different cultural setting, that list might look somewhat different. Since there is no space here for an in-depth analysis of all the meanders, we shall only present a sketchy typology of the elements listed above in points (1–5). This will validate, at least intuitively, the thesis that any actual legal text contains a range of elements which (actually or only seemingly) infringe on the assumption of the normativity of the integral (articulated) part and the non-normativity of the non-integral (non-articulated) parts of acts.

(Ad 1) In the paper [Wróblewski and Zajęcki 2021], we investigate several types of legal provisions whose normativity either is or might be questioned in Polish jurisprudence, including: internal preambles, regulations using empty names, duplicated regulations, legal definitions, regulations indicating the subjective and objective range of a normative act, legal principles, programming and task provisions, meliorating provisions.

(Ad 2) In the paper that we are currently working on we seek to analyse several typical occurrences of redundancy in fragments of legal provisions. We follow here the analyses of the late M. Kłodawski [Kłodawski 2017] by introducing into our conceptual framework the notions of pleonasms, tautologies etc.

(Ad 3) Our research (currently in progress) is extended to include elements of the non-integral parts of a normative act. We scrutinise the possibility of normativity of such elements as: preambles, titles of normative acts, titles of sections of normative acts, attachments and elements typically included in them (e.g. tables, mathematical formulas, deictic definitions), footnotes.

The notions of redundancy and uselessness of such elements must be thoroughly scrutinised. Transposition of our definitions (which refer to legal provisions) to this realm can be done (this work is currently in progress), but it is not automatic, and several theoretical and dogmatic controversies should be addressed in depth.

(Ad 4) Our analyses can be generalised, and most of the notions defined in our text can be applied to the whole normative act. We claim that in a given legal system one might potentially find: normative acts *sensu largissimo*, *sensu largo* and *sensu stricto*, non-normative legal acts, redundant legal acts, useless legal acts.

Let us highlight here that special scrutiny should be devoted to the procedures of issuing consolidated texts and emendations. Both phenomena have created substantial controversies (both theoretical and dogmatic) in the Polish literature.

(Ad 5) Since the constitutional court in Poland can act as a “negative law-giver” by declaring non-conformity of legal acts with the constitution, we should also discuss the potential redundancy and uselessness of such resolutions.

8. FOUR IMPORTANT TYPES OF LEGISLATIVE MISTAKES: DOUBLED, WIDOWED, ORPHANED AND BOTCHED PROVISIONS

Our typological analyses show that the notions of redundancy and uselessness of legal text are quite complex, and hence many special cases must be taken into account. To make our analyses more accessible for the practitioners of legislation and interpretation of law, we define four typical cases [Wróblewski and Zajęcki 2021]. We have named them metaphorically, using typographers' terminology as a source of inspiration.

A legal provision in a given legal act is a double when it repeats word-to-word a provision which is part of the same normative act, or which is part of another normative act of the same hierarchical power [ibid., 210–13]. The fact of being a doubled provision does not necessarily lead to the uselessness of such a provision. There are cases when doubling normative content is both permitted and promoted by Polish rules of legislative technique. Nevertheless, many cases of so-called normative superfluity occur in Polish texts when such repetitiveness is redundant *sensu stricto*, and – very often – useless.

A legal provision is a widow when it encodes a legal norm which is permanently undoable because the norm contains a permanently empty name, i.e. a name that does not denote anything that exists (either now or in any future times) in reality.¹⁹ As a result, obligations are impossible to fulfil [ibid., 213–14]. This technical notion of widowed provisions can be generalised to include all cases covered by the Latin dictum *Impossibile nulla obligatio est*.

A modifying legal provision is an orphan when it encodes a modification of a legal norm, but this norm is no longer valid because its central provision has been derogated [Wróblewski and Zajęcki 2021, 214–17]. This usually happens when a careless legislator amends a legal text without paying attention to the relations between provisions which may be, and very often are, split either syntactically or with respect to their content. Resolutions of the constitutional court can also generate orphaned provisions in legal texts.

A legal provision is a botch when its linguistic form has been either composed wrongly from the beginning in the process of law-making, or became such as a result of subsequent amendments. An error in the linguistic form of a botched provision prevents the interpreter from decoding any meaningful norm from it [ibid., 217]. This is an extreme case of legislative error, when standard tools of statutory interpretation (i.e. non-linguistic methods of exegesis) fail. In such cases, an interpreter should abandon the assumption of normativity of the legal text.

¹⁹ By referring to “reality,” we do not confine ourselves to physical reality. A typical legal name, say, “limited liability company,” is an abstract name, and therefore it is empty with regard to the physical world. Nevertheless, limited liability companies “exist” in the institutional reality of the legal world [Matczak 2019], and norms which refer to such entities are not widowed.

CONCLUSIONS

Resigning from an assumption of normativity *sensu stricto* without exceptions in the integral parts of normative acts opens up a field of interpretative decisions which might be considered lawless.²⁰ In our opinion, on the basis of the concept used in Poland for the interpretation of the law, that danger is only superficial. Each interpretation is based, *inter alia*, on linguistic directives, but where their consistent application leads to undesired effects, it is possible to appeal to the assumptions of the axiological rationality of the legislator and the functional “repair” of the legal norm. In particular, such a “repair” procedure is accepting that a legal text *docet, non iubet* in a particular place. Of course, the burden of proving that such a case has occurred lies with the body applying the law and justifying their interpretational decision. The question of whether the Polish legislator’s practice of “assisting” interpreters of the law by introducing redundant fragments is deserving of praise or criticism can be answered by carrying out a detailed analysis of a legal text subjected to a given legal order.

It is worth noting that the problem was very often marginalised by Polish theoreticians of law. For example, W. Patryas states that the problem of redundant/useless changes in legal texts occurs very rarely, and he refers to such cases as “curiosities” [Patryas 2016, 199–201]. Our plan is to analyse several theoretical frameworks in which Polish authors tackle the issue. Here, we can remark that W. Patryas’ approach is very instructive, as the author removes the problem of erroneously written legal texts by assuming counterfactual qualities of the “ideal norm-maker” [ibid., 34–38]. This procedure is valid and quite fruitful from the theoretical point of view [Zeifert 2019, 72], but its side effect is that rarer phenomena – such as redundant/useless changes in legal texts – are removed from their analyses.

We began our text with a pharmaceutical metaphor. Let us finish it with a medical metaphor. We were looking, figuratively speaking, at the “pathomorphology” of legal texts – we described the situations in which actual legislators deliberately choose a less than ideal solution, or simply make a mistake. Having diagnosed such “pathologies,” one must now think of reformulating the directives of interpretation of legal texts to include special cases in which the text lacks some normative aspects usually presupposed by lawyers.

We are working on a paper aiming to analyse all cases of redundancy and uselessness in the light of leading Polish theories of interpretation of legal texts. Our aim in this research programme is to propose additional directives of interpretation to aid in dealing with non-normativity, redundancy and uselessness of certain elements of legal texts.

²⁰ See Mularski 2008, 26 where the author warns about “[...] delegation of competence to the body conducting the interpretation to define which fragments of a normative act are used, and which are not used, to interpret legal norms.”

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

² PWBI, 8–9 (1999), p. 30–31.

³ PWBI, 5 (2001), p. 22.

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

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

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

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

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

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

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

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

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

In its judgment, the Court of Appeal in Katowice ruled that “to assign responsibility to the State Treasury pursuant to Article 417(1) CC it is necessary to prove the damage. It may be a non-pecuniary damage, a so-called personal injury, or a property damage. The Constitution of the Republic of Poland⁹ provides for a number of other rights and freedoms, for example, the active electoral right. This does not mean that a violation of this type of law, for example, when a particular person is omitted from the electoral roll, means a personal interest infringement justifying a claim for compensation.”¹⁰ Therefore, we could legitimately ask whether people with disabilities could claim compensation from the State Treasury for damage caused by acts or omissions of circuit electoral commission members? The Court of Appeal in Łódź stated in one of its decisions: “Since the assessment of an infringement of personal rights is objective in nature, the spe-

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

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

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

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

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

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

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

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

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

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

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

¹¹ Ref. no. I ACa 1372/16.

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

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

¹⁴ Ref. no. V CSK 519/12.

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

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

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

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

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

¹⁷ Ref. no. I ACa 345/18.

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

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

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

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

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

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

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

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

Pursuant to Article 181a(1) of the Electoral Code²¹ in each voting circuit are to be appointed: 1) a circuit electoral commission – in elections to the Sejm and the Senate, presidential elections, elections to the European Parliament held in the Republic of Poland, and supplementary elections to the Senate, as well as in elections to organs of local government units carried out during the term of office, excluding re-election to the bodies of these units; 2) a circuit electoral commission for the conduct of voting in the circuit and a circuit electoral commission for the determination of voting results in the circuit – in elections to the bodies of local government units carried out in connection with the expired term of councils and in re-election to the bodies of these units. Pursuant to Article 181a(2) EC, in the case of the elections referred to in paragraph 1 point 1, the tasks provided for in the EC for the circuit electoral commission for the conduct of voting in the circuit and the circuit electoral commission for determining the results of voting in the circuit are performed by the circuit electoral commission referred to in paragraph 1 point 1. As pointed out by Sokala, each circuit electoral commission (in permanent circuits voting) is to have nine members appointed by the electoral commissioner (and not the head of the commune or the territorial electoral commission – as it has been the case) from among the candidates proposed by electoral proxies or persons authorized by them [ibid., 51]. According to W. Hermeliński, “the legislator assumed that the grounds for notifying persons who are to be members of circuit commissions is the relationship of trust that individual election committees have in them. This is one of the statutory guarantees of fair elections” [Hermeliński 2020, 15]. This statement can hardly be contested. Pursuant to Article 182(1) EC, “the circuit electoral commission shall be appointed from among the voters, no later than on the 21st day before the election day, by an electoral commissioner, subject to the provisions of Article 183.” However, the commissioner undertakes many other activities in relation to the creation of circuit electoral commissions. He conducts the draw,²² completes the composition

²⁰ Journal of Laws of 2018, item 130.

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

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

of electoral commissions – obligatorily²³ or optionally,²⁴ convenes the first meeting of the circuit electoral commission immediately after it has been appointed (Article 182(9) EC).

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

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

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

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

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

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

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

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

the participation of one person in the committee indicated by the commune head, mayor and city president must suffice” [Jaskółka 2005, 115]. It was argued that the amendment should account for a more responsible submission of candidates for circuit electoral commissions. It was pointed out that electoral committees of political parties should name candidates to circuit electoral commissions who would understand the electoral procedures [ibid., 116]. In 2007 attention was drawn to the fact that some people are motivated by the desire to obtain a flat-rate daily allowance and not the correct performance of electoral tasks.²⁸ In 2009 it was argued that “people with different knowledge of the legal procedure or qualifications participate in the electoral process.”²⁹ We should recall that the National Electoral Commission in its letter of 21 January 2019³⁰ called for the introduction of a requirement that the chairpersons and deputies of circuit electoral commissions should be individuals who had obtained a certificate confirming their competence to perform this function. Thus, the above statements emphasize the importance of adequate preparation for membership in circuit electoral commissions.

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

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

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

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

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

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

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

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

CONCLUSIONS

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

³² Ref. no. II CSK 364/12.

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

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

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

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