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FIXED ELEMENTS IN THE PROMOTION OF SACRAMENTAL MARRIAGE AND CATHOLIC FAMILY. ANALYSIS IN THE LIGHT OF THE 1983 CODE OF CANON LAW

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Abstract. The analysis covers the main determinants of the legal doctrine of the Roman Catholic Church that pertain to the dignity and greatness of matrimonial vocation and the Catholic family. They are: a) establishment of a deep communion of the married couple and family life on the sacrament (i.e. covenant); b) the generous procreation and upbringing of children in the Roman Catholic faith. They are based on the incorporation of this family into the same Church, as well as on respecting her laws, which integrates the community of faith on the way to salvation. Hence, the 1983 Code of Canon Law contains a system of requirements (i.e. the so-called obstacles, as well as powers or indications) to protect marriage and exclude situations in which the interest of the Catholic faith or of prospective spouses would be threatened.

Keywords: Church; crisis; doctrine; family; promotion

INTRODUCTION

"The institution of Catholic family is under the protection of the Church and its law" [Ziółkowska 2018, 20].[1] This is the *status quo* for the analysis undertaken here. The point is that it might seem "at least in the normative field that defining such a common term «family» should not pose any difficulties. The legal reality is, after all, different. Indeed, there are considerable discrepancies in the way this concept is understood and defined. Depending on the adopted criteria and axiological premises, it is described in multiple ways" [Zubert 2011, 404]. Thus, it is not surprising that among many questions (which the Catholic Church, as a community of faith, asks itself today) there appears to be also the one concerning the presence in its normative doctrine of those elements that translate into pastoral ministry when

[1] "Pastors have the duty to ensure that their own ecclesial community provides assistance to the faithful, by means of which the married state preserves the Christian spirit and made it improve", *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1-317 [hereinafter: CIC/83], can. 1063.

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it comes to the promotion of sacramental marriage and the Catholic family in the form of: "reception, discernment, accompaniment, support, integration," etc. That is to say, following the model, as Pope Francis puts it in his exhortation *Amoris laetitia*, which came about as the fruit of two synods of bishops on marriage and family held in Rome in 2014 and 2015.[2]

The Catholic Church, in order to protect the Catholic family and, before that, Catholic marriage, and "to exclude situations in which the welfare of the public or the contractors themselves would be endangered" [Maj 2017, 36], among numerous norms and arrangements, has also identified numerous canonical obstacles. These are gathered (primarily) in the Code of Canon Law, as well as have a rich (scientific, systematized) literature. The aim of this analysis is to find their deeper – moral and theological sense, which is not a restriction (i.e., some kind of hindrance), but the promotion and protection of marriage, as well as the Catholic family, as a still valid value with a supernatural dimension of life and happiness.

The following four determinants will be the focus of this analysis. They are related to the thesis that if the Catholic family is called to a profound community of life, i.e., to be supportive and loving, fertile, etc., it is because: a) it is built on the sacramental relationship of marriage (sanctifying and empowering); b) the essence of such a relationship is to be open to procreation; c) the mission of this relationship is to raise offspring in the Catholic faith; d) its validity is based on the Catholic faith, and on the (resulting from this faith) intention of the nupturient.

1. NO DEFINITION OF FAMILY OR SEPARATE FAMILY LAW IN THE 1983 CODE OF CANON LAW

Although in the CIC/83 is possible to notice the lack of a definition or determination of the family and a separate family law, and "the Church legislator uses the term «family» extremely sparingly" [Sokołowski 2013, 294], nevertheless, the various elements of legal and theological doctrine present in the Church's Magisterium allow to constate what the Catholic family is, what it is built on, and what its vocation consists of. It is possible to establish the so-called certainties, i.e. fixed elements that constitute its internal structure, as well as those that affect the way it is protected and promoted. Some authors distribute the emphasis here as follows: a) dispersion of family law norms in canon law; b) canon norms that protect marriage and the family directly; b) canon norms that grant rights directly to spouses

[2] Franciscus PP., Adhortatio post-synodalis de amore in familia *Amoris laetitia* (19.03.2016), AAS 108 (2016), p. 311-446, no. 226ff.

and parents, but indirectly to the family; c) the problem of the family's legal subjectivity [Sztychmiler 2017, 152].

The Church in its teaching (as a rule) under the term Catholic family refers to "the entire community of life, based on the sacramental marriage of a man and a woman, arising from the birth or adoption of a child."[3] It is about an institution based on God's vocation, where the good of man and the Church is bound in such a way that it is already realized through Holy Baptism, (and other sacraments), but also through the entire material, moral, cultic, spiritual, social, etc. reality. A "profound community of life" is formed here – Catechism of the Catholic Church (no. 1603);[4] "established and endowed with rights by the Creator," "by virtue of the marriage covenant, i.e. irrevocable personal consent" – Apostolic Constitution *Gaudium et spes* (no. 48);[5] "a community of love and solidarity," "a place where different generations meet" – Charter on the Family Rights[6] (B, E–F); "domestic church," etc.

Hence, in the normative teaching of the Church, there is a closely related terminology to which it is possible (in the present issue) to refer. Such as: "marriage covenant," "sacramental marriage"; "fertile conjugal love"; "the family arises from marriage" (GS 48) [Ziółkowska 2018, 17]. And for example: "breaking obstacles," "marital consent," "form of marriage," "mixed marriage," "secret marriage," "separation of spouses," "separation and nullity of marriage" (can. 1083-1165 CIC/83). But there are also such concepts and analyses that indicate the need for further deepening of the subject matter covered here. E.g.: "towards the family definition" [Pryba 2014, 38-39], "definitions of the family" [Szymczak 2002, 151-65], "about changes in defining the family" [Biernat 2009, 36], "modern family models," etc.

It is also worth adding that it is (above all) the Catholic family that promotes its dignity and greatness when it bears witness to a successful and happy Christian life. I.e., when: "its first task is to live faithfully the reality of communion in constant action, for the development of a true community of persons"[7], and when: "this love and communion takes on a variety

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[3] John Paul II, *The family as a community of life and love*. Homily during Mass in front of the Sanctuary of St. Joseph – 1997, https://opoka.org.pl/biblioteka/W/WP/jan_pawelii/homilie/kalisz04061997.html [accessed: 07.03.2022].

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

[5] 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 [hereinafter: GS].

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

[7] Ioannes Paulus PP. II, Adhortatio apostolica de Familiae christianae muneribus in mundo huius temporis *Familiaris consortio* (22.11.1981), AAS 74 (1982), p. 81-191 [hereinafter: FC], no. 18.

of forms due to the reciprocal relationships between members not found in other communities: between spouses, between parents and children, between siblings, between grandparents and grandchildren, and between close members of a given family and distant relatives" [Wagner 2002].

Hereby, if the stage that underpins the establishment of a Catholic family is a validly concluded sacramental marriage relationship, it does not (i.e., at least automatically) provide a guarantee of success in the fulfillment of such assumptions, which still depend on many other conditions of individual and community life. Therefore, in the doctrine of the Church, in addition to the canonically described obstacles to marriage, there are also norms that determine the correctness or not of other stages, events and phenomena, such as preparation for marriage (closer and further). It is also about the crisis, the breakdown of marriage, fertility, infertility, widowhood, entering into a new marriage, "free" or "partnership" (single-sex) relationships, which are part of the secular gender culture. These phenomena are very dynamic, i.e., constantly evolving, thus even if they broaden the perspective of the Catholic Church's canonical concern, e.g., with difficult (crisis) situations with regard to sacramental marriage and the Catholic family, they also unfortunately cause (it should be emphasized) understandable difficulties in defining them.

However, if this may seem to be one of the more important reasons justifying the lack of a precise definition of the Catholic family in CIC/83, already in the 2019 *Lexicon of Canon Law* ("Leksykon Prawa Kanonicznego" edited by Miroslaw Sitarz) it is possible to find the claim that: "not every relationship between a man and a woman forming a community can be called a family; a relationship the cause of which is not marriage, but cohabitation, or a relationship contracted only in civil form […] constitutes according to Church law a form of life similar to a family" [Szczot 2019, 2535]. Moreover: "A family-like community can become a family in the canonical sense only after the parents have entered into a marriage that will allow their children to be legitimized (can. 1139). The community formed between an unmarried mother and her child cannot be defined as a family as long as the abnormal relationship between the parents continues" (ibid.).

2. THE CATHOLIC FAMILY AS A PROFOUND COMMUNITY OF LIFE BASED ON THE SANCTIFYING AND EMPOWERING SACRAMENT OF MARRIAGE

The classic wording of coincidence occurring between the concept of the Catholic family and marriage can be found in can. 1055 § 1 CIC/83. It states that "the matrimonial covenant by which a man and a woman form with each other a community of the whole of life, directed by its nature to the welfare of spouses and the begetting and upbringing offspring, has

been raised between the baptized to the dignity of a sacrament by Christ the Lord." Marriage, and the family that arises from it (as a further consequence), are thus "a gift and work of God himself."[8] Man and woman are called to accept this gift, which is God's task for them, but also a gifting and sanctification (sacrament). It was "by the Creator's design that a relationship – a sacramental covenant – was created so that (two subjects, a man and a woman with a wealth of diversity and otherness) could strive together for mutual growth and development, both mentally, spiritually and physically" [Kasprzak 2017, 165].

Therefore, it should also be added that according to the *Instruction of the Polish Episcopate on Preparation for Marriage in the Catholic Church* (13.12.1989) – "For a baptized person, every validly contracted marriage is at the same time a sacramental marriage, and no baptized person can enter into a valid marriage that is not at the same time a sacrament. Sacramental marriage and family are the smallest salvific community in the Church."[9] However, now according to can. 1055 § 2 CIC/83, which emphasizes (the meaning of the contract entered into – "between" the baptized, and not – "for" the baptized), it is possible to speak of a valid non-sacramental marriage, for example, in a situation of relationship between a Catholic and a Muslim (with adequate provisions for dispensation from differences of faith [Janczewski 2007, 35-49].

Marriage, as a response to God's call, thus means that by cooperating "with God's grace and the Church, the spouses and later the parents should strive to achieve, to the best of their ability, the fullest realization of God's intention" (IEP/1989, no. 3). As the canonical entitlement that if "all may marry," only those "who are not forbidden by the law to do so" belong to this set (can. 1058 CIC/83). In addition to freedom from various canonical impediments, the "lawfully expressed" consent of the parties is therefore required for a valid marriage (can. 1057 § 1 CIC/83); i.e., an act of will "in which a man and a woman, in irrevocable covenant, mutually give and receive each other for the purpose of forming a marriage" (can. 1057 § 2 CIC/83). It is necessary here to respect the qualities of the unity and indissolubility of marriage (can. 1056 § 2 CIC/83), and its purposes. The very misconception of the *bonum continuum*: i.e., unity, fidelity, doctrine, sacramentality,

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[8] Francis, *Pope: sacramental marriage is a gift and work of God*. Speech at an apostolic meeting with the Apostolic Tribunal of the Roman Rota (21.01.2023), https://kosciol.wiara.pl/doc/8063607.Papiez-malzenstwo-sakramentalne-jest-darem-i-dzielem-Boga [accessed: 28.01.2023]; "The spouses enter into union through voluntary consent, but it is only the Holy Spirit who has the power to make the man and woman one", ibid.

[9] Polish Bishops' Conference, *Instruction of the Polish Bishops on Preparation for Marriage in the Catholic Church* (13.12.1989) [hereinafter: IEP/1989], https://opoka.org.pl/biblioteka/W/WE/kep/kkbids/malzen stwo113121989.html [accessed: 13.03.2023], no. 2.

mutual support, etc., determining the will of the parties, becomes a condition for its validity (can. 1099 § 2 CIC/83) [Sztychmiler 2016, 85-105; Góralski 2020]. This good is explained as "mutually giving and receiving" (can. 1057 § 2 CIC/83), and "perfect and sanctify each other" – by the grace of sacrament.

In order to enter into such a relationship, it is necessary that at least one party be one who has been baptized in the Catholic Church or has been received into it by a formal act. It is also important how the nupturients understand the rights and obligations arising from the good that constitutes the marriage being contracted, i.e. *bonum coniugum*, *fidei*, *sacramenti*, *prolis*. Their scope is understood differently by canonists. Thus, not only their rejection by a positive act of will, but also physical as well as mental incapacity to undertake the essential duties of marriage, is a title for declaring a marriage invalid (can. 1095; 1101 § 2 CIC/83). What is at stake is the possession of good personal predispositions, i.e., providing a guarantee to build a profound community of the whole life (GS 48) [Kasprzak 2017, 164]. Indeed, no one "can legally commit to what he or she cannot do or cannot perform," but also on the fact that marriage means "giving oneself completely and sacrificially working together for the mutual good" [Stawniak 2005, 45].

In addition, "although consensus is the causal cause of marriage, it must, according to the will of the church legislature, be expressed in accordance with the law" [Majer 2015, 136]. This means that "only those marriages are valid which are concluded in front of the assisting local ordinary or pastor, […] and also in front of two witnesses, according to the rules expressed in the canons and taking into account the exceptions" (can. 1108 § 1 CIC/83). That is, (in exceptional situations, such as when it concerns mixed marriages – cf. can. 1127 § 2 CIC/83) for the sake of spiritual, moral, etc. of the assumed relationship, the Catholic party may get a dispensation from observing the canonical form of marriage. Here what is meant is that "if the fiancées (baptized) choose the civil form of marriage, and the Ordinary grants a dispensation, the marriage thus contracted becomes valid in the face of the Church, and therefore sacramental and indissoluble, regardless of whether or not the parties later wish to complete the religious ceremony" (IEP/1989, no. 93).

Moreover, if even the subject literature provides a thesis regarding the so-called inconsistency of Catholic doctrine on the sacramentality of marriage [Strzelczyk 2016, 106-19], there is no doubt that the Church in its doctrine places the dignity of marriage sacrament, as well as the welfare of the Catholic family, in an extremely important place, in the order of care and attention it directs to all communities that exist. This can be seen in the content of can. 1055 § 2 CIC/83, which applies the validity of marriage covenant (i.e., its sacramentality) also to other faiths, such as Protestants as baptized

people. And even if its content arouses surprise among some canonists that it does not respect the freedom of conscience of separated brethren [Zubert 2011, 399-408], the Church is consistent in its teaching here. Indeed, the encyclical – Pope John Paul II's *Veritatis splendor*[10] – speaks of the sin of those who, as so-called non-believers, in defiance of the freedom of their conscience implicit in synderesis, commit grave transgressions such as abortion or euthanasia. The same freedom of conscience can (or even should) be sought with regard to the sacramentality of marriage among Protestants.

Thus, if in the canonical doctrine of the Catholic Church there is a specific system of obstacles, as well as dispensations, it was created to protect the dignity of marriage sacrament, as well as the Catholic family built on it. It is also clear that their use is understood in a pastoral way, i.e. as a desire to have a positive (enriching) effect on the state of consciousness and faith of the nupturients, but also of the entire community of God's people.

3. THE CATHOLIC FAMILY AS A PROFOUND COMMUNITY OF LIFE BASED ON A RELATIONSHIP OPEN TO PROCREATION

Within the definition of the Catholic family is a responsibility for conveying life that flows from a holistic conception of human life. This is expressed especially in the Catholic attitude of faith, hope and love, which are not only ideals for building a deep community of marriage and family life, but also virtues that grow out of the daily practice of Christian life. The matter of fertility should (hereby) be considered in a spirit of responsibility and generosity for God's call to holiness [Adamczyk 2022, 87]. Therefore, the conclusion of a sacramental marriage, which by its nature is aimed at having offspring, would be invalid when it contains, (undertaken by at least one of the parties[11]) a positive act of will to exclude such a goal (can. 1101 § 2 CIC/83) [Ryguła 2018, 124-48]. For fertility is the gift and goal of marriage (CCC 2366).

Such invalidity of the marital relationship is based on the title of (partial) marital consent simulation [Wąsik 2013, 215-53]. It can consist of such elements as: exclusion from conjugal life of fertile acts, i.e. offspring understood as the fruit and purpose of the relationship [Bałdyga 2018, 183], but also *exclusio bonum prolis*. This "means that the contracting party reserves exclusively to himself the right to decide if and when offspring will be born from

[10] Ioannes Paulus PP II, Litterae encyclicae cunctis catholicae Ecclesiae episcopis de quibusdam quaestionibus fundamentalibus doctrinae moralis Ecclesiae *Veritatis splendor* (06.08.1993), AAS 85 (1993), p. 1133-228.

[11] The law includes in its provisions situations related to the age of nupturient and their fertility.

the marriage relationship. Thus, the unconditional right granted by the parties to each other during the sacrament of marriage to conjugal acts directed by their nature to the begetting of offspring thereby is subject to limitation, as the nupturient places himself in the role of arbiter of the exclusive source of conjugal rights and obligations" [Chanowska-Dymlang 2022].

It should be added here that a valid marriage between the baptized is only concluded if it has not been completed. It is, on the other hand, concluded and completed if the spouses have undertaken a conjugal act by themselves capable of giving birth to offspring (can. 1061 § 1 CIC/83). The nupturient, free from coercion by an act of will, have an influence on the formation of marriage, but on its nature and purpose no longer. Thus, impotence or infertility are also impediments referred to in the context of marriage's goal of having offspring by the Church's legal order (can. 1084 § 1 CIC/83). Firstly, it is a matter of (prior or permanent) inability to perform the marital relation; secondly, concealment from one of the parties of this essential fact.

And what if the nupturient present gender identification disorders [Sowiński 2019, 149-84]. These include such phenomena as homosexuality (by which is meant here, in general, a constant sex drive directed toward persons of the same sex) or transsexualism (understood as an irresistible desire to change sex regardless of any associated consequences) [Stawniak 2019, 85-115]. Accordingly, the main titles (exclusion of homosexuals from the right to sacramental marriage relationship) include lack of discernment (or rather, recognition) of the essential rights and duties of marriage and mental incapacity to undertake the essential duties of marriage (can. 1095 CIC/83) [Góralski 2020]. There is also an obstacle of incapacity to perform sexual intercourse (can. 1084 § 1 CIC/1983). The impediment of ignorance that "marriage is a permanent community between a man and a woman, directed to the begetting of offspring by some sexual intercourse" (can. 1096 § 1 CIC/83) comes into play. Finally, there is the impediment of marital consent simulation, as well as (according to some canonists) the unrealized "right to marital acts that are aimed at begetting offspring" [Wąsik 2013, 215-53].

The Church also denies a transsexual or transgendered person, i.e., a person who believes he or she has changed his or her gender through a surgical procedure, the opportunity to marry as one who could not have changed his or her genetic (chromosomal) structure. Surgical "correction" of gender does not change the nature of a person. Such a person is not capable of fulfilling the sexual act specified – according to can. 1061 § 1 CIC/83 [Stawniak 2019, 85-113]. It is a matter of performing the conjugal act in such a way that it is capable of giving birth to offspring. In addition, for the validity of marriage relationship, a gender difference between the nupturient is necessary. Only a man and a woman can form a community of whole life, which is directed

to the good of spouses and to the begetting and upbringing offspring (can. 1055 § 1 CIC/83). And only an act of will of a man and a woman (having in its content the qualities and goals of Catholic marriage) can constitute a marriage consensus (can. 1057 § 2 CIC/83). These truths are supplemented (can. 1094 § 1 and indirectly can. 1084 § 1 and 1089 CIC/83) [Podgórski 2009]. Thus, is it valid to marry in a configuration where both nupturients are transgender. It would seem that the requirement of the presence of a man and a woman for the validity of a relationship is fulfilled here, however (as an obstacle) remains the possible impotence of one of the parties [ibid.; Stawniak 2019, 85-113].

This exclusionary canonical position of the Catholic Church has its justification in the anthropological premises present in its doctrine of human sexuality. According to these premises, human sexuality is a gift from God. It encompasses the personality of the whole human being and penetrates both his physical, mental and spiritual spheres. This is stated, for example, by the Congregation for the Doctrine of the Faith in its declaration of December 29, 1975, *Persona humana*[12]: The human person, "is so profoundly permeated by sexuality that it must be considered one of the main formative factors of human life." Similar is the Apostolic Exhortation of John Paul II: "sexuality, through which a man and a woman give themselves to each other in proper and exclusive conjugal acts, is by no means a purely biological phenomenon, but concerns the very inner essence of the human person as such" (FC 11; cf. CCC 2361) [Podgórski 2009].

4. THE CATHOLIC FAMILY AS A PROFOUND COMMUNITY OF LIFE BASED ON A RELATIONSHIP AIMED AT THE CATHOLIC UPBRINGING OF THEIR CHILDREN

The concept of the Catholic family means a profound community of the whole of life, "in which it is possible not only to give birth to a human being, but above all to continuously improve" [Stępień 2021, 205]. Being a special relationship of persons, i.e. based on an indissoluble (grace-enabling) sacrament, but also on an act of good and free will: "are you willing to receive and catholicly raise the offspring with which God will bestow upon you?" (GS 48), is called to realize such goals as love, fidelity, unity, faith, sanctification, having offspring, building up the People of God (can. 1135; 1055; 1056 CIC/83). Hence the thesis that "fertility of conjugal love also includes the fruits of moral, spiritual and supernatural life" (CCC 1553)

[12] Sacred Congregation for the Doctrine of the Faith, *Declaration on Certain Questions of Sexual Ethics* (29.12.1975), https://www.vatican.va/romancuria/congregations/cfaith/documents/rccon_cfaithdoc19751229_persona-humana_en.html [accessed: 13.03.2023], no. 1.

[Pietrycha 2016, 26-40]. This again obliges to be open about the number of children one has in a generous manner. Their number is a free decision of the loving spouses, but already the gift of a child should be accepted freely.

Marriage and the family "are intrinsically directed toward realization in Christ and need his grace for healing from the wounds of sin and for reference to the «beginning», i.e., to full knowledge and complete fulfillment of God's design" (FC 3). The Catholic family is thus called to be the "domestic Church,"[13] where man receives all that is necessary for integral development. Thus, it is the first and best environment in which the child receives integral (moral and religious) education (can. 226 § 2 CIC/83) [Biały 2020, 21-32]. Here it is a micro-world that allows all its members to develop "within the «sense of the Church»" (CCC 1666) [Fiałkowski 2013, 703-17].

All the faithful have the right to receive an integral upbringing, as "called to lead a life in accordance with the doctrine of the Gospel" (can. 217 CIC/83). However, it is the duty of spouses-parents to raise their children that is placed here as an objective inscribed in the essence of marriage (can. 1136 CIC/83) [Wąsik 2012, 222]. At the same time, "what is at stake here is not only the harmonious, consensual cooperation of the parents in the fulfillment of educational task, but also the equality of father and mother as educators" [ibid., 230]. The legislator in can. 1135 CIC/83 states that: "each spouse is entitled to equal duties and rights in what concerns the community of married life." Even separation does not abolish such an obligation (can. 1154 CIC/83).

Hereby, the upbringing of offspring (social, cultural, moral, religious – i.e., integral), is the heaviest duty and the first right of parents (can. 226 CIC/83), which is part of the essential duties of marriage, to such an extent that those who wish to enter into it should know it, accept it and have the capacity to perform it [Krajczyński 2005, 177]. It follows that – being the title for declaring a marriage relationship invalid – "incapacity to undertake the essential duties of marriage for reasons of a psychological nature" (can. 1095 CIC/83), here means such traits as permanence and antecedent, as well as narcissistic, antisocial, dependent personality, etc., which ultimately cause the child (subjected to care by such a person) to be neglected in adequate, integral, religious and moral upbringing.

All this also makes the Catholic Church a bit cautious or even reluctant to bless mixed marriages. The rationale for this position is as follows: "Marriage should be a perfect unity of two people. Meanwhile, in a mixed marriage, the fiancées differ in the most essential things, which will cause

[13] Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio dogmatica de Ecclesia *Lumen gentium* (21.11.1964), AAS 57 (1965), p. 5-75.

conflicts for them" (IEP/1989, no. 73). It is not surprising that the Church in such cases applies – the guarantees of faith, and motivates it thus: "However, for a better and deeper understanding and awareness of the obligations arising from the faith, the Church orders the Catholic party to make guarantees, i.e. binding statements. Analogous guarantees and declarations are required to be made by the other party if, being baptized, he has abandoned the faith or is a non-practitioner" (IEP/1989, no. 74).

5. THE CATHOLIC FAMILY BASED ON A VALIDLY ACCEPTED SACRAMENT OF MARRIAGE, I.E. MOTIVATED BY THE CURRENT CATHOLIC FAITH

Ultimately, the question can be addressed as to whether a valid sacramental marriage (which is a condition for establishing a Catholic family) requires a valid faith? The doctrine of the Catholic Church answers here in the affirmative. Faith is important in this regard insofar as without it is difficult to imagine the arousal of intention by the nupturients, i.e. the will to receive the sacrament.[14] The point is that the difficulty of such recognition may arise in a situation where a marriage is entered into by someone who, as the Polish Bishops' Conference puts it in its decree on conducting canonical and pastoral interviews with fiancées before entering into a canonical marriage of 2019, no. 71,[15] for example, "declares himself a non-believer or by formal act has left the Church." However, the matter of having faith (or not) can be explained as follows: "A baptized person's abandonment of acts of faith, or even personal awareness of being a non-believer – although for the gift of faith lodged in him by baptism this is a highly undesirable situation – does not remove this gift. This is evidenced by quite infrequent cases of what is colloquially considered a recovery of faith, which is actually rather its revival after a shorter or longer period of its hibernation or even death" [Salij 2016, 114].

It is not surprising that the canonical description of the conditions for validity of marriage bond omits the issue of faith, and that it is not mentioned in the chapter: Pastoral Care and Premarital Actions (can. 1063ff. CIC/83) [Strzelczyk 2016, 109]. As well as the fact that "joining

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[14] It seems an irrefutable thesis that every sacrament demands from the recipient, who is capable of "using reason," also a present faith, i.e., transforming into the intention to receive it.

[15] *General Decree of the Polish Bishops' Conference on Conducting Canonical and Pastoral Conversations with Fiancées Before Conducting a Canonical Marriage* (26.11.2019), https://episkopat.pl/nowe-przepisy-o-kanoniczne-preparowanie-do-malzenstwa/ [accessed: 15.03.2023]: "This decree, issued on the basis of and in conformity with the provisions of the Code of Canon Law and after having received *recognitio* (verification) by the Vatican Congregation for Bishops' Affairs, contains the revised provisions of the Church's marriage law."

the Sacrament of Penance and the Holy Eucharist before marriage, nor even receiving the Sacrament of Confirmation – although strongly recommended by the Church – is definitely not required for the validity of an ecclesiastical wedding" [ibid.]. This basis can be found in Pope John Paul II's exhortation FC. There it is recalled that: "the desire to establish definitive criteria for admittance to marriage in the Church, which would take into account the degree of faith of the newlyweds, contains, no matter what, great dangers. Above all, the risk of unfounded and discriminatory judgments; then the risk of creating doubts about the validity of marriages already contracted" (FC 68).

CONCLUSIONS

CIC/83, the promotion of the Catholic family (i.e., built on sacramental marriage), can be seen relatively easily, but it is an extensive, complex issue, as well as difficult to describe. Therefore, it is (in a sense) undefined. Having in mind the crisis that the family is experiencing today, it is even possible to see the ambiguity of the concept. However, the doctrinal certainties present in the teachings of the Catholic Church, allow to analyze its structure and the essence of God's vocation, which refers to it, but also vice versa. The distinctive element here is that the subject of marriage relationship (by God's will) can only be a man and a woman. This relationship, having a sacramental character, and therefore uniting, exclusive and sanctifying, secures by God's grace – the good and dignity (*bonum et dignitas*) of these spouses, and their offspring (i.e., the family created here), as well as the sacrament itself.

The concept of marriage, as well as the Catholic family, as it is intrinsically related to man's supernatural vocation, contains a moral obligation to protect them. The Catholic Church understands this and does so with pastoral as well as canonical (normative) care, striving for a normative that is as clear as possible so as not to offend anyone in their personal dignity. Hence, the Church's doctrine, both in its restrictive (exclusionary) and blessing versions, is an expression of the fulfillment of mission that Christ, the Head of the Church, commissioned to him when he departed for heaven. It is about the mandate spoken in the words: "Go and teach all nations, baptizing them […] making them my disciples."

CIC/83, providing a set of norms relating to marriage and the family, regulates (as well as promotes) the vocation of every (baptized) person to Christian life. These requirements find their source primarily in the charism of baptism, however, "the incorporation of the faithful into the Church through baptism is accomplished fully together with the other sacraments

of Christian initiation.[16]" In this way, the human person is incorporated ever more deeply into the community of faith, and finds the opportunity to realize the vocation to eternal salvation, but always in obedience to that faith. Hence, if there is any canonical and moral exclusion of the nupturients from the full rights of the community, it is an act that has its origin in the defense of the sacredness and dignity of the sacrament (i.e., defense of the faith, etc.), while on the other hand it is found in the attitude of moral subject concerned (i.e., that very nupturient). This never happens because of the (insensitive, captured in code norms) – interpretation of the Magisterium of the Catholic Church.

As for the timeliness of an issue being addressed, it should be noted that the unchanging (i.e., constant in its elements) supernatural dimension of man's vocation (so made present in the sacramental relationship of marriage, as well as the Catholic family) recurs in: Final Report to the Holy Father Francis after the 14th Ordinary Assembly of the Synod of Bishops on "The Mission and Vocation of the Family in the Church and in the Modern World." But also in the exhortation *Amoris Laetitia* or the General Decree of the Polish Bishops' Conference on Conducting Canonical and Pastoral Conversations with Fiancées Before Conducting a Canonical Marriage (November 26, 2019). However, it is most about the fact that the Church, speaking about the vocation of family marriage in the modern world, does so by explicitly referring to the teaching of John Paul II's exhortation FC, as well as the normative CIC/83.

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ENERGY DRINK USE DISORDER – A REVIEW OF THE LITERATURE

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Abstract. Energy drinks (EDs) are non-alcoholic, caffeine-rich drinks (>15mg/100ml), also containing other psychoactive substances, e.g. taurine. Currently, the ICD 11 and DSM 5 classifications do not specify any "Energy drink use disorder." The purpose of this article is to review the research to date on disordered use and addiction to energy drinks. In the review, we also present an overview of contemporary concepts of the classification position of the disordered use/dependent pattern of use of energy drinks. The results of a study by Holubcikova et al. showed that men are twice as likely to consume energy drinks as women. In a survey of young adults and adolescents in Poland, 67% of the interviewed group (n=29629) used Eds, of which 17% on a regular basis.

Keywords: caffeine; taurine; substance use disorders; toxicity; personality traits

1. INTRODUCTION AND DEFINITIONS

Energy drinks (EDs) are non-alcoholic beverages, but rich in caffeine >15mg/100ml. Energy drinks vary in their composition and percentage of individual ingredients. The psychoactive substances contained in each

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EDs are caffeine and taurine. Other psychoactive substances used in EDs are: l-carnitine, glucuronolactone, B vitamins, ginseng and guarana, the quantitative content of these substances is described on the label of the drinks. Some energy drinks contain additional amounts of caffeine, not included on the labels attached to them, which come from added ingredients like kola nuts, yerba maté, cocoa. While soft drinks with a high caffeine content (96mg/l) emerged in Europe and Asia in the 1960s, energy drinks, which contain a greater number of psychoactive substances, including taurine, and high concentrations of caffeine (320mg/l/), initially in Europe became available to consumers with the introduction of the Red Bull ® brand beverage to Austria in 1987 and then to North America in 1997 [Reissig, Strain, and Griffiths 2009, 1-10]. Consumption of energy drinks is on the rise from 2015 to 2018, rising from 10 billion liters to more than 15 billion liters/year, despite what might seem like widespread knowledge of their harm.[1] In 2015, global consumption of EDs reached 11.5 billion liters/year Studies conducted between 2007 and 2018 demonstrated the toxicity of these drinks to animals and humans, and analyzed patterns of use. In the ICD-11 and DSM-5, the use of energy drinks is cited as an example of a source of caffeine in the description of caffeine use disorder. Currently, the ICD 11 and DSM5 classifications do not distinguish: "Energy drink use disorder." There is a hypothesis that the abuse of energy drinks is not only due to caffeine addiction. Pathological use of energy drinks may be a behavioural addiction. And the function of taurine in the development of EDs addiction has not been ruled out. The purpose of this article is to review the research to date on disordered use and addiction to energy drinks. In the review, we also present, an overview of contemporary concepts of the classification position of the disordered use/dependent pattern of use of energy drinks.

2. LEGAL ASPECTS OF ENERGY DRINKS USAGE

In the European Union's legislative system, there is no document in which the name "energy drink" is used. In most cases, it is a reference to a non-alcoholic but caffeine-rich soft drink, including Regulation (EU) No. 1169/2011 on the provision of food information to consumers.[2] Beverages with a caffeine content of more than 15 mg/100 ml must carry the warning: "High caffeine content. Not recommended for children and pregnant or breastfeeding women." in the same field as the name

[1] Statista Research Department, Dec 2, 2016, Global energy drink sales volume, 2015/2018 l Statistic | Statista, https://www.statista.com/statistics/639965/sales-volume-energy-drinks-worldwide/ [accessed: 11.08.2022].

[2] Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers.

of the beverage, followed by a reference to the caffeine content expressed in mg per 100 ml. This has been mandatory since 2014 [Binder and Gortsos 2015]. In Denmark, the production and distribution of EDs is banned; Denmark's National Environmental Protection Agency Poison Ordinance prohibits the inclusion of caffeine in food except for 15 mg/100 ml in soft drinks. In the UK and Germany, the restriction on sales applies until the age of 16, while in Lithuania and Latvia it applies until the age of 18[3] [Schroeder 2016, 400]. In the US, EDs are classified as either a conventional food or a dietary supplement; some EDs, e.g. Monster Energy® , Rockstar® are branded as a dietary supplement, while others, e.g. Red Bull ® as a conventional food. This is due to the Dietary Supplement Health and Education Act of 1994 (DSHEA); according to it, a dietary supplement, unlike a conventional food, cannot contain additives (in the case of EDs-caffeine) that are not used in the production of conventional foods, unless it has been approved by the FDA and is deemed safe and can be used without prior FDA approval [Generali 2013, 5-9]. This is despite the fact that caffeine is recognized as a drug. Furthermore the U.S. Dietary Supplement Health and Education Act of 1994 (DSHEA), does not force manufacturers of energy drinks to list herbal supplement ingredients [Seifert et al. 2011, 511-28].

3. EFFECTS OF USING ENERGY DRINKS ACCORDING TO ICD-11 AND DSM-5

In the WHO's classification in revision 11 (ICD-11), behavioural and substance addictions are included in the group of disorders caused by either psychoactive substance use or addictive behaviours. According to the ICD-11, the addiction syndrome includes behavioural, cognitive and physiological symptoms that develop after repeated use of a substance or specific repetitive rewarding and reinforcing behaviours, which typically include a strong need to take the drug or perform an activity, difficulty controlling its use or behaviour despite awareness of harmful consequences, preference of taking the drug or addictive behaviour over other activities and commitments, increased tolerance, and sometimes the presence of physical symptoms of abstinence syndrome.[4] A similar change has occurred in the DSM-5, compared to the previous version. The chapter that classifies substance use disorders – "substance-related disorders" – is now defined as – "substance-related and addictive disorders." The changes in the classifications

[3] Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

[4] ICD-11 for Mortality and Morbidity Statistics (Version: 02/2022), https://icd.who.int/browse11/lm/en#/http%3a%2f%2fid.who.int%2ficd%2fentity%2f334423054 [accessed: 26.10.2022].

are based on current knowledge from ongoing research that addiction is a heterogeneous disorder whose subtypes include specific substance use disorders and addictive behaviour [Masiak, Maciejewski, Wallace, et al. 2016, 11-15]. Substance use disorder is currently diagnosed based on the – following DSM5 criteria. The disorder is characterized by impaired control of use, risky use, substance use impairs the patient's social functioning, and pharmacological criteria (tolerance and withdrawal symptoms) are additionally used. DSM 5 classifies pathological gambling as an addictive activity, this is due to new evidence provided by research on the pathophysiology of substance use disorders and impulse control disorders. Among other things, studies comparing alcohol dependence and pathological gambling have shown in both disorders low concentrations of the serotonin metabolite 5-hydroxy-indole-acetic acid in cerebrospinal fluid; reduced platelet monoamine oxidase levels, considered a peripheral marker of serotonin function; and a clinical response to 5-HT1 and 5-HT2 receptor agonists [Potenza 2006, 142-51]. In the ICD-11 classification, a separate diagnostic unit classified within addictive behaviour disorders are pathological gambling and pathological video or analog game playing, and there are also diagnostic units in the classification to diagnose behavioral addiction, which is different from gambling disorder or gaming use disorder. Other behavior that can be diagnosed as addictive must be characterized by symptoms that share basic clinical features with other disorders caused by addictive behavior. These include a persistent pattern of repetitive behavior in which the person demonstrates impaired control over the behavior (e.g., onset, frequency, intensity, duration, termination, context); an increase in the priority of the behavior to the extent that it takes precedence over other life interests and daily activities; and continuation or escalation of the behavior despite negative consequences (e.g., family conflict, poor academic performance, negative health effects).[5] For other pathological behaviors, such as compulsive use of the Internet, sex, shopping, eating or stealing, there have also been studies comparing their pathophysiology with addictive disorders, but not enough research has yet been shown to prove their unequivocal pathophysiological and clinical similarities with disorders classified together with addictions [Grant and Chamberlain 2016, 300-303].

4. PHYSIOLOGICAL ASPECTS OF USING ENERGY DRINKS

4.1. Caffeine

The most studied psychoactive substance in energy drinks is caffeine, which has psychostimulant effects [Addicott 2014, 186-92]. The mechanism

[5] Ibid.

of action of caffeine in non-toxic doses is based on antagonism of adenosine receptors (A1, A2A). Chronic caffeine consumption causes a "down-regulation" of A1 receptors; caffeine then has little effect on the A1 receptor and a predominant effect on A2A receptors [Rossi, De Chiara, Musella, et al. 2010, 525-31]. Antagonism of A2A adenosine receptors indirectly down-regulates CB1 receptors, suggesting that the A2A-CB1 receptor interaction plays a major role in the development of caffeine addiction [ibid.]. A1 receptors are located at dopaminergic terminals in the striatum. Caffeine regulates the density of the dopamine transporter in the striatum – the nucleus accumbens and prefrontal cortex Caffeine has also been found to modulate GABA-A receptor activity through its effects on benzodiazepine receptors [Myers, Johnson, and McVey 1999]. Genetic factors play an important role in caffeine consumption. The heritability of susceptibility to habitual caffeine consumption has been estimated at 36% to 58%. Cornelis et al. in their meta-analysis identified 8 loci associated with caffeine use; they lie close to loci of genes involved in caffeine pharmacokinetics: ABCG2, AHR, POR and CYP1A2; in caffeine pharmacodynamics: BDNF and SLC6A4. An association between caffeine use and the GCKR and MLXIPL genes has also been identified, but the link between their molecular function and caffeine use is unknown Analyses of the chemical composition of EDs have shown that a single dose in a serving (250ml) of a beverage provides 3 mg of caffeine/kg body weight [Jiménez, Díaz-Lara, Pareja-Galeano, et al. 2021, 2944]. Caffeine poisoning is a potential adverse effect of energy drinks. Typical symptoms of caffeine intoxication include restlessness, nervousness, excitement, chaotic thinking and speech, psychomotor agitation, insomnia, increased physical performance, increased diuresis, gastrointestinal disturbances, muscle cramps, tachycardia and other heart rhythm disturbances. The effect of caffeine use depends on the dose, for example, 250 mg increases excitement, while 500 mg increases irritability [Sandeep, Fleming, and Morrow 2004, 211-26]. In cases where doses close to the lethal dose were taken, hypertension, hypotension, arrhythmia and convulsions, and even death were observed [Yamamoto, Yoshizawa, Kubo, et al. 2015, 33-36]. Studies have shown that the lethal blood concentration of caffeine is >100 μg/ml [Takayama, Waters, Hara, et al. 2016, 228-33].

In the ICD-11 classification, there is a diagnostic category: "Caffeine Use Disorder," which can be diagnosed when a patient consumes energy drinks and, at the same time, the clinical picture meets the criteria for an addictive syndrome.[6] Although researchers explain the effects of energy drinks by the psychostimulant effects of caffeine, studies clearly do not support that

[6] Ibid.

only caffeine and its addictive potential contributes to the abuse of energy drinks [Kemps, Tiggemann, Cibich, et al. 2019].

4.2. Taurine

Taurine, is the active ingredient in energy drinks [Zucconi, Volpato, Adinolfi, et al. 2013, 394]. Taurine meets many of the criteria necessary to be considered a neurotransmitter, but no taurine-specific receptor has yet been discovered in the nervous system. However, taurine is known to be a GABA-A receptor agonist, and its affinity depends on the conformation of the subunits that make up this receptor [Ochoa-de la Paz, Zenteno, Gulias-Cañizo, et al. 2019, 289-91]. The concentration of taurine in a single ED serving ranges from 750 to 1,000 mg, where the average diet contains 40 to 400 mg per day. The Mayo Clinic recommends taurine intake of no more than 3,000 mg per day [Curran and Marczinski 2017, 1640-648]. Taurine is a psychoactive substance that stimulates GABAergic signaling in the hippocampus and olfactory bulb [Ochoa-de la Paz, Zenteno, Gulias-Cañizo, et al. 2019, 289-91]. The conformations of GABA receptor subunits determine the binding strength of taurine to this receptor. The α4, β2 and δ (thalamus) or α6, β2 and δ (hippocampus) subunits have the highest affinity for taurine with EC50 (half-maximal effective concentration) of 50 μM and 6 μM, respectively [ibid., 289-91]. In alcohol dependence, there is a systematic decrease in the number of α4 and gamma 1 subunits and an increase in the number of α1 subunits, which are part of GABA-A receptors, changes in the composition of the GABA-A receptor complex explain the molecular mechanism of addiction development [Devaud, Smith, Grayson, et al. 1995, 861-68; Kumar, Fleming, and Morrow 2004, 211-26].

5. ENERGY DRINKS USAGE PATTERNS

The patterns of EDs consumption are well known: the main conscious motives for reaching for the drinks; the dominant psychological characteristics of consumers; and comorbidities. In a systematic review, Nadeem et al. found that 76.7% of students surveyed reported consuming at least 1 energy drink per week to increase energy (24.5%; 2640/10757), to stay awake or mask insufficient sleep (15.7%; 1694/10,757), and to improve concentration while studying (14.1%; 1520/10,757) [Nadeem, Shanmugaraj, Sakha, et al. 2021, 265-77]. 3232 out of 6796 subjects reported combining energizers with other substances (47.6%), with alcohol being the most common (44.6%; 3030/6796). 2.9% of respondents had used other psychoactive substances, such as marijuana, ecstasy, cocaine and other stimulants [ibid.]. EDs used together with alcohol, was defined as (Alcohol mixed Energy Drinks

– AmED). Combining energy drinks with alcohol increases the potential for alcohol abuse, compared to consuming alcohol alone. Studies have shown that there has been an increase in the prevalence of binge drinking combined with energy drink consumption over the past seven years [Howard and Marczinski 2010, 553-61]. The synergistic effect of alcohol and taurine can cause epileptic seizures [Calabrò, Naro, and Bramanti 2016, 723-32]. The results of a study by Holubcikova et al. showed that men are twice as likely to consume energy drinks as women [Holubcikova, Kolarcik, Madarasova Geckova, et al. 2017, 599-65]. Advertisements for EDs have been analyzed for the presence of persuasive cues according to the Elaboration Likelihood Model. Terms such as "power" and "energy" are used; therefore, due to their, implicit association with physical activity, these products may be more attractive to men than to women [Bae, Kim, Choi, et al. 2019, 153-60]. In addition, advertisements depict athletes engaged in extreme sports, suggesting that EDs are healthy and help you achieve your goals [Bleakley, llithorpe, Jordan, et al. 2022, 16010]. In a survey by Nowak et al, respondents declared that ads alluding to power and strength were the most likely to prompt them to reach for EDs [Nowak and Jasionowski 2015, 7910-921]. Despite conscious motives for reaching for energizers, to increase energy or strength, students' physical activity and sedentary leisure activities were not significantly associated with regular consumption of energy drinks [Nuss, Morley, Scully, et al. 2021, 64]. In a survey of young adults and adolescents in Poland, 67% of the study group (n=29629) used EDs of which 17% used them systematically. 36% said EDs were harmful to health, and only 6% responded that they were not; the study group included people who used energy drinks despite awareness of their harmful effects [Nowak and Jasionowski 2015, 7910-921]. Chronic users of EDs are more likely to have poor eating habits, including consuming mainly sweetened beverages, juices and fast food [Nuss, Morley, Scully, et al. 2021, 64]. No association of EDs use with vegetable consumption has been observed [ibid.]. Energy drink users are more likely to engage in risky behaviors [Arria, Bugbee, Caldeira, et al. 2014, 87-97]: they are more likely than the control group to smoke cigarettes, use ecstasy; use alcohol riskily [Trapp, Allen, O'Sullivan, et al. 2014, 30-37]; and have casual sexual intercourse [Snipes and Benotsch 2013, 1418-423]. Habitual users of energizers are characterized by higher levels of impulsivity. They were more frequently diagnosed with self-injurious behavior [Bae, Kim, Choi, et al. 2019, 153-60]. Consumption was also strongly associated with sensation seeking and past injuries (reported by 16% and 42% of adolescents, respectively) [Hamilton, Boak, Ilie, et al. 2013, 496-501]. Above that, the following co-occurrences have been observed: ADHD, academic burnout [Nadeem, Shanmugaraj, Sakha, et al. 2021, 265-77], and erectile dysfunction [Marinoni, Parpinel, Gasparini, et al. 2022, 1307-319]. In studies, no higher prevalence of depressive

symptoms or increased anxiety as a personality trait was found in chronic EDs users [Nadeem, Shanmugaraj, Sakha, et al. 2021, 265-77]. A study of 15 – to 16-year-olds found a strong association between caffeine consumption and aggression and violent behavior [Kristjansson, Sigfusdottir, Frost, et al. 2013, 1053-1062; Park, Park, and Kim 2016, 132-39].

Toblin et al. in a study of American soldiers proved a strong link between EDs consumption and aggressive behavior [Toblin, Adrian, Hoge, et al. 2018, 364-70]. Tóth et al. proved that people with a weaker sense of coherence were significantly more likely to be addicted to energizers. A survey study, using the J-MHAT 7 scale, showed that those consuming 3 or more EDs per day felt more stress than respondents who did not consume EDs. Engaging in sports combined with the consumption of EDs does not increase feelings of coherence or reduce vulnerability to stress, although physical activity has been proven to reduce the severity of stress experienced [Tóth, Soós, Szovák, et al. 2020, 1920]. Nadeem et al. in their systematic review alerted that in a group consuming energy drinks more than 1 per day or 3-6 per week, suicidal thoughts and attempts are more frequently recorded [Nadeem, Shanmugaraj, Sakha, et al. 2021, 265-77]. An observational study on American soldiers found that soldiers were more likely to use energy drinks at rest than during physical activity.[7] Consumption of three or more energy drinks per day was associated with sleep disturbances – insomnia (sleeping ≤4 hours per night), resulting in excessive sleepiness at work[8] [ibid.]. Researchers Kemps et al. using Robinson and Berridg's "incentive synthesis" theory proved that some energy drink abusers experience abnormalities during associative learning when reaching for EDs, and similar abnormalities have been observed in alcohol and tobacco addicts. They have not been demonstrated by studying coffee consumers [Kemps, Tiggemann, Cibich, et al. 2019, 0226387]. Cognitive bias modification is used in the treatment of associative learning disorder, but the subjects clearly did not reduce their intake of energy drinks as a result of the treatment [ibid.].

CONCLUSIONS

The results of the current study are inconclusive as to whether energy drink use disorder meets the criteria to be distinguished from caffeine use disorder. From the current research, it appears that EDs use has features

[7] Centers for Disease Control and Prevention (CDC), Energy drink consumption and its association with sleep problems among U.S. service members on a combat deployment – Afghanistan, 2010. MMWR Morb Mortal Wkly Rep. 2012 Nov 9;61(44):895-898. PMID: 23134972.

[8] Ibid.

of addiction – use despite awareness of harmful effects, the need to seek and provide an addictive agent, an increase in tolerance to the effects of the agent, a compulsive need to provide stimuli at the expense of one's health and environment. Research is needed on the harmfulness of taurine and its addictive potential. Further research is needed on the pathogenesis of impaired EDs use and comorbidity with depressive, anxiety and attention deficit disorders. Regulation of labeling, retail restrictions and marketing of energy drinks are needed.

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THE COUNCIL OF EUROPE'S SUPPORT FOR UKRAINE IN THE FACE OF THE RUSSIAN FEDERATION'S AGGRESSION

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Abstract. A year will have passed on 24 February 2023 since the Russian Federation invaded Ukraine, violating the territorial integrity and sovereignty of the state and some fundamental norms of international law. Europe faced a grave refugee crisis, the largest since the end of the WW2, in connection with forced population movements – around 14 million were forced to leave their homes. Ukraine is still suffering from the bombing and shelling of its civilians and critical infrastructure, death, destruction, resettlements, and suffering on an unprecedented scale, with no end in sight. Since the beginning of the Russian aggression, Ukraine has been receiving diverse support from other countries or international organisations. The Council of Europe, with Ukraine as a member since 1995, has assisted that nation in many fields.

Keywords: membership of the Council of Europe; Russo-Ukrainian conflict; the Russian Federation's aggression; support for Ukraine

INTRODUCTION

This paper has been inspired by the words "Ukraine needs Europe and Europe needs Ukraine", spoken by the Chairman of the Council of Europe ('the CE', 'the organisation') Parliamentary Assembly Tiny Kox on the 31st anniversary of Ukraine regaining its independence.[1] These words have never been more topical, given the circumstances of the so-called special military operation[2] in Ukraine [Wyrozumska 2022, 30-55].

[1] To institute the primacy of its law over the laws of the Soviet Union laws, Ukraine declared its sovereignty on 16 July 1990. 24 August 1991, given the imminent collapse of the Soviet Union, independence was announced in Ukraine, to a massive support of the population in the 1 December 1991 referendum. A series of amendments to the 1978 Constitution paved the way for democracy.

[2] The way the Russian Federation's propaganda refers to the armed assault on Ukraine, an escalation of the Russo-Ukrainian conflict that commenced in 2014. See more in: Grzebyk 2022, 56-76; Wierczyńska 2022, 77-95.

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Ukraine, since 9 November 1995 a member state of the Council of Europe, a government organisation, a pillar of democratic security in Europe, and a guarantor of human rights and the rule of law [Pratchett and Lowndes 2004, 67], has been in receipt of multi-faceted aid from a number of states and organisations, including the Council of Europe, since the very first day of the Russian Federation's illegal aggression, that is, 24 February 2022.

The author analyses the support from the CE to Ukraine, both from the organisation's statutory authorities[3] (the Committee of Ministers and the Parliamentary Assembly) and various institutions in the CE system, including the Human Rights Commissioner or the European Court of Human Rights in Strasbourg, the guardian of the Convention for the Protection of Human Rights and Fundamental Freedoms[4] ('the European Convention'). The Strasbourg decisions are major mechanisms of specifying and developing democratic standards that create a vision of a new Europe [Sweeney 2012, 43].

1. SOME GENERAL CHARACTERISTICS OF THE COUNCIL OF EUROPE

The state signatories to the CE Statutes affirmed: "[…] their profound devotion to the spiritual and moral values that form the shared heritage of their nations and a source for the principles of personal freedom, political liberties, and the rule of law that constitute the foundations of any genuine democracy."

Article 1 letter a of the CE Statutes provides the rationale for the existence of the organisation, that is, a greater unity among its members in order to protect and embody the ideals and principles that make up their shared heritage and to facilitate their economic and social progress. Article 3 of the CE Statutes contains the states' undertaking to be guided by the rule of law and guarantee the fundamental human rights to all those present within the jurisdiction of a given state. What's more, Article 8 of the CE Statutes stipulates a state in breach of these rights shall be excluded from the organisation. Z. Cichoń is right to note no international organisation

[3] According to Article 10 of the CE's Statutes, adopted in London on 5 May 1949, the Committee of Ministers and the Advisory Assembly are the authorities of the Council of Europe. The Committee of Ministers is the main decision-making body of the organisation including the foreign ministers of its member states, while the Parliamentary Assembly is an advisory body that consists of the members delegated by national parliaments. See Council of Europe, Statute of the Council of Europe, 5 May 1949, ETS No. 001.

[4] Council of Europe, The Convention for the Protection of Human Rights and Fundamental Freedoms, to be amended with Protocols 3, 5 and 8 and supplemented with Protocol 2, 11 April 1950, ETS No. 005.

has been grounded in such clear and broad foundations of human rights [Cichoń 2005, 179].

The creation of the CE arose from integration and federalist ideas emerging in Western Europe after the Second World War. In spite of some initial difficulties with determining the organisation's role in integration processes, it worked towards a stable and strong position in the region of a mainstay of democratic values, rule of law, and human rights that promotes the harmonisation of national legal orders. The Council of Europe, "the democratic conscience of Europe", develops "the international law of Europe" and adapts universal solutions (in particular, those adopted by the United Nations) to European conditions as part of its treaty activities that comprise cultural, social, economic, scientific or legal issues. This is built on a solid foundation of three fundamental values: democracy – the rule of law – human rights [Barcik and Srogosz 2014, 179]. Hans-Peter Furrer points out the obligation of carrying on the undertaking arising from the very *raison d'ètre* of the organisation seems more important than the sweeping mandate and institutional structure of the CE. That undertaking is the protection and promotion across Europe of the principles guaranteed in the Statutes that form the sole proper basis of a European 'Federation': democracy, the rule of law, and human rights. The respect for human rights appears especially important here – without caring for it, democracy is at risk. The rule of law, in turn, is to serve the protection of human rights, while democracy is more than a mere 'good management' [Furrer 2005, 26].

2. UKRAINE'S MEMBERSHIP OF THE COUNCIL OF EUROPE

As part of the CE accession procedure, states prepare to reach the standards allowing for their membership of the organisation [Winkler 1995, 154]. The Council of Europe's membership is attained not only when states express their interest but when they meet certain requirements connected to its axiological system. The threshold requirements, which allow the accession, and those resulting from membership can be distinguished. Thus, a state deciding to become a member accepts a whole array of undertakings to be fulfilled[5] [Nordström 2008, 21].

Ukraine submitted its application to join the CE to the CE General Secretary on 14 July 1992. In its Resolution (92)29[6] of 23 September 1992, the CE Committee of Ministers requested the Parliamentary Assembly's opinion

[5] See more in: Djerić 2000, 605-29.

[6] Resolution (92) 29 on Ukraine (Adopted by the Committee of Ministers on 23 September 1992 at the 480th meeting of the Ministers' Deputies), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804f7beb [accessed: 26.01.2023].

on Ukraine joining the organisation. The Ukrainian Parliament was granted the status of the CE Parliamentary Assembly's special guest[7] on 16 September 1992. Ukraine has taken part in a range of the Council of Europe's actions since then, through its participation in some intergovernmental programmes of cooperation and aid (especially on legal reform and human rights) and of the guest's special delegation's part in the work of the Parliamentary Assembly and its commissions. The 'political dialogue' between Ukraine and the CE Committee of Minister was initiated on 13 July 1994. Ukraine signed the *Framework Convention for the Protection of National Minorities*[8] [Pawlak 2001] and joined the European Cultural Convention,[9] European Convention on Information on Foreign Law[10] and its additional protocol, and the European Outline Convention on Trans-Frontier Cooperation Between Territorial Communities or Authorities.[11]

Ukraine could join the CE as the organisation opened to the states of Central and Eastern Europe. Ukraine was in the second group of post-communist states to join the Council of Europe and the European Convention in the second half of 1990s (the first wave of accessions took place in the first half of the 1990s, the second in the second half, and the third in the beginning of the 21st century). The first tranche comprised the fastest reforming CEE states, including Poland, the second and the third, post-Soviet and post-Yugoslav states [Kamiński 2014, 11].

On 9 November 1995, Ukraine finally became a member of the Council of Europe. Since then, assisting the country with the fulfilment of undertakings it took upon itself when joining the organisation has become a key objective of the cooperation[12] [Huber 2005]. A Council of Europe Office was established in Ukraine and officially began its operation on 6 October 2006. It supports the organisation in the area of protection for human rights, democracy, and the rule of law and coordinates projects and cooperation programmes.

At the time Ukraine was joining the CE and the European Convention,[13] significant disparities were present between the Ukrainian law and practices and European standards. Views were expressed that the accession of post-Soviet states to the Council of Europe and the European Convention could be premature. Nonetheless, the CE and its judicial authority,

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[7] See more in: Benoit-Rohmer and Klebes 2006.

[8] Council of Europe, 1 February 1995, ETS No. 157.

[9] Council of Europe, 19 December 1954, ETS No. 018.

[10] Council of Europe, 6 July 1968, ETS No. 062.

[11] Council of Europe, 21 May 1980, ETS No. 106.

[12] Ukraine's detailed undertakings in connection with its membership of the CE are described in the CE Parliamentary Assembly's Opinion No. 190 (1995).

[13] Ukraine has been bound by the Convention since 11 September 1997.

the European Court of Human Rights, tolerated the state's failure to meet its obligations. In particular, there was no systemic response to the fact the judgments of the Strasbourg Court were ignored. That changed after the tragic events from the turn of 2013 and 2014. Since then, the European Convention and the ECHR ruling standards have been invoked as the normative points of reference for the transformations taking place [Kamiński 2014, 12].

A CE action plan for Ukraine for 2018-2021 was adopted as part of the collaboration,[14] which includes the following areas: human rights, the rule of law, and democracy. This is a strategic instrument expected to aid Ukraine in its efforts to develop effective practices on human rights, the rule of law, and democracy and consequently to support the state with fulfilling its membership undertakings.[15]

3. THE COUNCIL OF EUROPE'S SUPPORT FOR UKRAINE

The Russo-Ukrainian conflict has been on the CE's agenda since the very beginning, i.e., 2014, when Russia occupied Crimea[16] [Kranz 2014, 23-40]. The organisation and its bodies have kept reaffirming their support for Ukraine's sovereignty and territorial integrity within the borders recognised by the international community.

It should be noted it wasn't so at the very beginning, since the actions within the CE's institutional system apparently lacked consistency then. The CE's response to the annexation of Crimea by the Russian Federation may serve as an example. The Parliamentary Assembly responded by suspending the right of Russian representatives to hold management positions in the CE Assembly and to take part in the organisation's monitoring missions on 10 April 2014. In turn, Russian delegations have not participated in the body's work since 2016 and the Russian Federation has not paid membership fees of € 33m since 2017. In line with internal regulations, a failure to meet financial obligations for two years would entitle the CE Committee of Ministers to suspend the Russian representation to the organisation's statutory bodies until such time as the liabilities were settled.[17] The inconsistency of the CE's actions also shows in the fact the representatives of the Russian Federation held their seats in the key authority, the Committee of Ministers, all of that time. On 17 May 2019, the Committee of Ministers in its Helsinki meeting expressed the opinion all the member states had the right

[14] The action plan was subsequently extended until the end of 2022.

[15] Council of Europe Action Plan for Ukraine 2018-2021, https://rm.coe.int/coe-action-plan-for-ukraine-2018-2021-en/16807b4307 [accessed: 26.01.2023].

[16] See more in: Merezhko 2015, 167-194.

[17] Cf. Article 9 of the CE Statutes.

to be represented both in the Committee of Ministers and the Parliamentary Assembly. It was thus in favour – influenced by the diplomatic actions of Germany and France, assuming the Russian Federation would make concessions in its dealings with Ukraine – of restoring the Russian delegation's rights at the CE Parliamentary Assembly, which supported the move on 25 June 2019, with 118 delegates voting in favour, 62 against, and 10 abstaining. The parliamentarians from Estonia, Georgia, Lithuania, Latvia, Ukraine, and Poland were against [Kardaś and Rogoża 2019].

At the time, the human rights protection system failed Ukraine. Had the organisation's statutory bodies responded properly to the actions of the Russian Federation and became involved in the conflict over the disputed territories in Ukraine, the situation we have witnessed since February 2022 might have never passed.

The CE's narrative underwent a dramatic shift in connection with the events of 14 February 2022. The Chairman of the Parliamentary Assembly pointed out the Russian Federation's recognition of the so-called Donetsk and Luhansk People's Republics was a violation of international law and a unilateral breach of the Minsk agreements (signed in 2014 and 2015), which remain the sole basis of solving the conflict in Donbas.[18]

In the face of the illegal aggression, the Committee of Ministers, the main decision-making body of the organisation including the foreign ministers of its member states (replaced with standing representatives of the CE states, forming the Committee of Minister Delegates, on an everyday basis), also responded to the Russian Federation's action in compliance with the organisation's founding act as, on 25 February 2022, it decided to suspend the Russian Federation's right to representation in the CE Committee of Ministers and CE Parliamentary Assembly. This fact must be commended as a sign of European solidarity with the Ukrainian nation and state. As a consequence, the Russian Federation remained a member of the CE and a party to the conventions. In addition, the judge selected by the Russian Federation to the Strasbourg Court retained his post and complaints against the Russian Federation continue to be heard and resolved by the Court.

[18] *Statement by PACE President Tiny Kox on the recognition of the so-called 'people's republics' of Donetsk and Luhansk by the Russian the Russian Federationtion*, https://www.coe.int/en/web/kyiv/-/statement-by-pace-president-tiny-kox-on-the-recognition-of-the-so-called-peoples-republics-of-donetsk-and-luhansk-by-the-russian-the Russian Federationtion# [accessed: 03.02.2023].

The CE Committee of Ministers'[19] and Parliamentary Assembly's[20] decision to instigate the procedure under Article 8 of the organisation's Statutes was another step. The provision says: "Every member of the Council of Europe in a grave breach of Article 3 may be suspended in their right to representation and called upon by the Committee of Ministers to resign by force of Article 7. Should the member fail to obey such a call, the Committee may resolve they are no longer a member of the Council as of a date to be set by the Committee."

On 1 and 4 March 2022, the European Court of Human Rights identified to the Russian Federation some temporary measures[21] by force of Article 39 of its Rules,[22] focussing on the respect for and assurance of the right to life and other human rights guaranteed in the European Convention. The Court believes temporary measures play an important role in preventing irreversible situations that prevent the Court from functioning properly and, if needed, securing the possibility of exercising the rights provided for by the European Convention.[23] Each state party to the European Convention which has been prescribed temporary measures in order to avoid irreparable harm to a victim of an alleged violation is bound to follow these rules and to refrain from any actions or negligence that would undermine the authority and effectiveness of a final decision.[24]

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[19] The decisions of the Council Europe Committee of Ministers concerning the situation in Ukraine are available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a5a1f6 [accessed: 03.02.2023].

[20] It comprises parliamentarians designated by national parliaments and the membership of a national delegation must reflect the arrangement of forces in a parliament, as reviewed by the Assembly in its so-called procedure of powers approval. In effect, the Assembly, though unelected, is representative of the European public opinion and is referred to as 'the conscience of Europe'. The Congress of Local and Regional Authorities, whose two chambers (of Local Authorities and of Regions) assemble the representatives of self-government groups, is important as well [Jaskiernia 2020, 91ff].

[21] The European Court grants urgent interim measures in application concerning Russian military operations on Ukrainian territory, https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7272764-9905947&filename=The%20Cour [accessed: 23.01.2023].

[22] The ECHR Rules of 3 October 2022 are available at https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf [accessed: 03.02.2023].

[23] Cf. the ECHR judgment of 4 February 2005, Mamatkulov and Askarov against Turkey, complaints No. 46827/99 and 46951/99, HUDOC.

[24] The ECHR judgment of 20 March 1991, Cruz Varas and others against Sweden, complaint No. 15576/89, HUDOC. The ECHR's authority to apply provisional measures is also upheld in its judgment of 5 February 2002, Čonka against Belgium, complaint No. 51564/99 (HUDOC), where the Court points out finding an appeal effective under Article 13 of the European Convention does not mean its suspending effect must automatically be ensured, yet a party should have a real ability of preventing irreversible consequences of enforcing a decision before the end of proceedings.

In view of the above, the Court called on the Russian Federation to refrain from military attacks against the civilian population and vehicles in the territory attacked or besieged by the Russian army, including residential buildings, rescue vehicles, and other civilian facilities enjoying special protection, such schools and hospitals, and to promptly assure the safety of medical institutions, personnel, and vehicles. It stressed the Russian authorities should guarantee a free access to safe evacuation roads, healthcare, food and other necessary provisions to the civilian population, a quick and unhindered flow of humanitarian aid and movements of humanitarian staff.

In addition, the CE General Secretary made a decisive appeal to the Russian Federation to implement the provisional measures designated by the European Court of Human Rights on 1 and 4 March 2022 in order to provide the civilian population with a free access to safe evacuation roads and a quick flow of humanitarian aid, inter alia.

The situation in Ukraine has been an object of unflagging interest to a variety of the CE platforms. The consequences of the Russian Federation's aggression against Ukraine were discussed at an extraordinary meeting of the CE Parliamentarian Assembly on 14-15 March 2022.[25]

Following on the instigation of the procedure under Article 8 of the CE Statutes on 16 March 2022, the Committee of Ministers decided[26] the Russian Federation could no longer be a member of the organisation, with immediate effect, after 26 years of its membership,[27] and the General Secretary[28] notified the Russian Federation of the legal and financial effects of the decision.[29] In its plenary session of 5 September 2022, the European Court of Human Rights notified the Russian Federation was no longer a party to the European Convention as of 16 September 2022 and that

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[25] Cf. Consequences of the Russian the Russian Federation's aggression against Ukraine – *Assembly debate* on 15 March 2022 (3rd and 4th sittings) (see Doc. 15477, report of the Committee on Political Affairs and Democracy, rapporteur: Ms Ingjerd Schou). *Text adopted by the Assembly* on 15 March 2022 (4th sitting), https://pace.coe.int/en/files/29885/html [accessed: 03.02.2023].

[26] Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe (Adopted by the Committee of Ministers on 16 March 2022 at the 1428ter meeting of the Ministers' Deputies), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5da51 [accessed: 22.01.2023].

[27] The Russian Federation joined the CE on 28 February 1996.

[28] Although Article 10 of the CE Statutes doesn't identify it as the organisation's statutory authority, Articles 36-37 of the Statutes govern its competences.

[29] Resolution CM/Res(2022)1 on legal and financial consequences of the suspension of the Russian Federation from its rights of representation in the Council of Europe (Adopted by the Committee of Ministers on 2 March 2022 at the 1427th meeting of the Ministers' Deputies), https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5b15f [accessed: 03.02.2023].

the office of the judge in relation to the Russian Federation would be discontinued at the same date.[30] Nonetheless, as stipulated by the European Convention, the Russian Federation is legally bound to enforce all the rulings and decisions of the Court relative to its actions or negligence until 16 September 2022.

It should be stressed Article 8 of the CE Statutes had been virtually dead before (its application to Turkey was considered in 1981), while in 2000, in connection with the Chechen conflict, the Russian Federation's right to vote at the CE Parliamentary Assembly was suspended; a similar sanction came into effect for the annexation of Crimea, as mentioned before.

The representatives of the CE member states have held talks and debates to help end the aggression against Ukraine for its duration. The organisation staunchly condemns the Russian attempt at annexing the Ukrainian territory and supports Ukraine in this respect. The Committee of Ministers has adopted a decision concerning an urgent need to ensure a comprehensive enforcement of accountability for the grave violations of international law in effect of the Russian aggression in order to prevent impunity and further violations.[31]

The organisation's General Secretary, Marija Pejčinović Burić,[32] has condemned so-called referenda in the Ukrainian territories occupied by the Russian forces, regarding them as a further escalation of the conflict that breaches Ukraine's territorial integrity.

The Council of Europe experts continue to support the General Prosecutor and other Ukrainian agencies. An action plan has been agreed upon with the Ukrainian authorities designed to support reforms, bolster institutions, and assist the organisation's member states with supporting Ukrainian refugees.

Once attacked, Ukraine became a shield protecting the security of the entire Europe.[33] The Russian Federation's actions must be strongly condemned as a groundless and unprovoked aggression whose symptoms involve assaults on the civilian population and infrastructure, the cultural and religious heritage. It cannot be founded on international law or its

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[30] Cf. the Resolution of the European Court of Human Rights, https://www.echr.coe.int/Documents/Resolution_ECHR_cessation_Russia_Convention_20220916_ENG.pdf [accessed: 03.02.2023].

[31] Ministers' Deputies Decisions CM/Del/Dec(2022)1442/2.3, 15 September 2022, 1442nd meeting, 14-15 September 2022, 2.3 Consequences of the aggression of the Russian Federation against Ukraine – Accountability for international crimes, https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a8135a [accessed: 03.02.2023].

[32] The former Deputy Prime Minister and Foreign Minister of Croatia became the CE's General Secretary on 26 June 2019.

[33] See more in: Kupiecki 2015, 9-26.

past violations by other states, including the violations of the ban on the use of armed force, as they don't substantiate any current or future violations. This is a view shared by the Council of Europe, too, which keeps reaffirming its support for the populations of Crimea and the whole Ukraine in efforts to end this cruel war as soon as practicable.

The CE Committee of Ministers, in cooperation with the Ukrainian government, has adopted an action plan for Ukraine for 2023-2026[34] concerning the country's reconstruction given the brutal aggression of the Russian Federation and designed to foster the democratic rule of law and the protection of human rights. The document addresses the progress Ukraine has made on fulfilling the standards created by the CE, especially under the previous action plan for the years 2018-2022. It is intended to support Ukraine's efforts to meet its obligations connected to its membership of the organisation. The plan's priorities reflect the decisions, resolutions, recommendations, report conclusions, and opinions issued by the CE Committee of Ministers, Parliamentary Assembly, Congress of Local and Regional Authorities, and Human Rights Commissioner. The plan is also to support the programme of Ukrainian reform in a European perspective on foot of the Council of Europe's decision of 23 June 2022 to award the status of an EU candidate state to Ukraine and the undertaking, made at the conference on the reconstruction of Ukraine in Lugano (Switzerland) on 4-5 July 2022 to combine Ukraine's endeavour to join the European structures with the process of the country's rebuilding. The overall budget for four years is estimated at € 50m, the biggest ever Council of Europe's budget for a national action plan.

The CE Parliamentary Assembly has unanimously demanded a special international criminal court to be established in the Hague to prosecute Russian and Belarusian political and military leaders who 'planned, prepared, initiated or carried out' Russia's aggressive war against Ukraine. Such a court should be "supported and maintained by as many states and international organisations as possible, in particular, by the UN General Assembly." The Council of Europe should play an active leading role in its appointment and operation and provide for its tangible support. This postulate is of paramount importance, given that no other international criminal court is currently competent to prosecute and punish the criminal aggression against Ukraine. The civilised world is under no illusion the acts perpetrated on the Ukrainian civilians, the murders, compulsory resettlements or the russification of Ukrainian children can be called a genocide. The Parliamentary Assembly added the UN's inability to oppose the Russian

[34] Council of Europe Action Plan for Ukraine "Resilience, Recovery and Reconstruction" 2023-2026; Document prepared by the Directorate of Programme Co-ordination, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a96440 [accessed: 03.02.2023].

aggression due to the abuses of the right to veto in the Security Council is "an existential threat to the international order founded on principles" and that it supported any efforts and discussions to bring some order to the situation.[35]

As part of the action plan for 2018-2022, the CE supplied some IT office equipment to the War Crimes Department of Ukraine's General Prosecutor on 22 December 2022.It had been bought as part of the CE project "Human Rights Compliant Criminal Justice System in Ukraine". A total of 79 laptops, 79 all-in-ones/printers, and 16 video cameras were delivered. Additional equipment, namely, memory cards and hard disks, were supplied before the end of 2022.[36]

CONCLUSIONS

The unfounded, destructive war in Ukraine had long seemed but a political threat, a means of applying pressure. It proved a historical fact, however, that should not only shock the public opinion and elicit aid to the Ukrainian authorities, military or population, but also make one think about the future of not only Europe but also the entire world. The CE has also found itself at a junction where it must make a decision about its future – does it spell a collapse of the European system of human rights protection, or is it a moment when it will acquire a new meaning?

It is quite unfortunate that the CE apparatus lacks smarter sanctions that would focus on the responsible ones. As things stand, it is hardly possible to suspend a state from the CE and expect it to continue being a party to the Court. It is more than likely that the suspended state would either withdraw soon after the suspension or be expelled by the CE Committee of Ministers. The European Convention itself requires that only member states to the CE can be parties to it.[37] This inflexibility of the CE system of sanctions reflects the-rather old-fashioned – state-centric structure of international law, which traditionally relies on state consent and sovereignty. Generally speaking, it is now time to start reconsidering this and thinking

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[35] Legal and human rights aspects of the Russian Federation's aggression against Ukraine, Resolution no. 2482(2023), Parliamentary Assembly *debate* on 26 January 2023 (7th sitting) (see Doc. 15689, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Damien Cottier). *Text adopted by the Assembly* on 26 January 2023 (7th sitting), https://pace.coe.int/en/files/31620/html [accessed: 03.02.2023].

[36] The purchase and delivery of the equipment were organised under the CE project 'Human Rights Compliant Criminal Justice System in Ukraine', part of the Council of Europe's Action Plan for Ukraine for 20182022. See more about the project at https://www.coe.int/en/web/kyiv/human-rights-complaint-criminal-justice-system-in-ukraine [accessed: 03.02.2023].

[37] Cf. Article 58(3) of the European Convention.

about designing more resilient, effective, and efficient international human rights regimes.

Both the CE Committee of Ministers and the Parliamentary Assembly should liaise between the parties to the Russo-Ukrainian conflict. Although the situation has changed dramatically after the Russian Federation left the CE, the dialogue with Russia must be restored.

It should be concluded Ukraine's membership of the Council of Europe was not merely a token confirmation of its acceptance into 'the group of democratic states' but has also routed the process of systemic transformation and political stabilisation to a significant degree. The CE's multifaceted support for the bleeding Ukraine is not illusory, but real.

The Council of Europe is of the opinion the Russian Federation's aggression on the sovereign territory of Ukraine, severely condemned in each utterance from the representatives of the CE's statutory bodies and other institutions, is responsible for a massive suffering of the Ukrainian population and constitutes a breach of peace on an unprecedented scale, never witnessed on the European continent since the CE was formed.

The international community the CE is part of in the region must be at all times ready to support Ukraine. It seems the Council of Europe will uphold its support of Ukraine and will not withdraw it any time soon. This has been corroborated by, among others, the CE General Secretary, who said 'Ukraine must take central stage' at the approaching CE summit, scheduled for May 2023 in Reykjavik, and "the accountability for death and destruction caused by the Russian aggression is of key importance."[38]

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[38] *Secretary General: Ukraine is our priority and Russia must account for its aggression; urges ambition for upcoming summit*, https://www.coe.int/en/web/portal/-/secretary-general-ukraine-is-our-priority-and-russia-must-account-for-its-aggression-urges-ambition-for-upcoming-summit [accessed: 03.02.2023].

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PROTECTION OF CHILDREN'S RIGHTS IN THE CONDITIONS OF RUSSIA'S ARMED AGGRESSION AGAINST UKRAINE

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Abstract. The article draws attention to international standards for the protection of children's rights in wartime conditions, Ukrainian legislation that guarantees the protection of children's rights in wartime conditions, the main problems and challenges of implementing individual rights of children in wartime conditions. The author concludes that it is obvious that the state of war and active hostilities in Ukraine determine the new realities of today, and the general procedure for the protection of children's rights established by the current legislation, which operated in peacetime, simply stopped working in most cases.

Keywords: martial law; children's rights'; evacuation of children; temporary placement of children in a family

INTRODUCTION

According to the children's search portal Children of War, from February 24, 2022 to May 6, 2023, as a result of Russia's armed aggression in Ukraine, 480 children were killed, 980 children were injured, 403 children were considered missing, and 19,393 were deported.[1] These numbers are not final, as work is ongoing to establish them in places of active hostilities, in temporarily occupied and liberated territories.

During the war in Ukraine, every Ukrainian child, without exception, in any case suffered violations of their legally enshrined rights. Even if the child is not physically harmed, the child has not been subjected to exploitation prejudicial to any aspect of the child's well-being, sexual abuse, torture or other cruel, inhuman or degrading treatment or punishment, there is a violation of the child's fundamental rights, enshrined in the Constitution of Ukraine and norms of international law, such as: the right to personal life and protection against encroachment on it, the right to health care, the right to rest and leisure, the right to education and family. Unfortunately, this is not the entire list of violated rights.

[1] See https://childrenofwar.gov.ua [accessed: 11.05.2023].

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I. INTERNATIONAL STANDARDS FOR THE PROTECTION OF CHILDREN'S RIGHTS IN CONDITIONS OF WAR

An important area of activity of our state in the field of protection of children's rights is the improvement of current legislation, the ratification of conventions, including the implementation of norms of international law. As a result, Ukraine is a party to a number of international documents in the field of ensuring children's rights. However, in the conditions of martial law, which has been introduced throughout the country, it is difficult to implement the functions assigned to the state to ensure the protection of children's rights.

Children growing up in the conditions of wars are protected by the norms of international humanitarian law as part of the civilian population. However, given the vulnerability and developmental needs of children, children have special protections.

Article 19 of the Convention on the Rights of the Child of 1989[2] provides a general rule that member states take all necessary legislative, administrative, social and educational measures to protect the child from all forms of physical and psychological violence, insult or abuse, lack of care or negligent and brutal treatment and exploitation, including sexual abuse, by parents, legal guardians or any other person concerned about the child.

Article 38 of the Convention establishes a special norm that states: "are obliged to respect the norms of international humanitarian law applicable to them in the event of armed conflicts and concerning children, as well as to ensure their observance," "to take all possible measures to ensure the protection of children who affected by the armed conflict, and their care," which to a certain extent is consistent with the norms of international humanitarian law, in particular, with the Geneva Conventions of 1949[3] and the Additional Protocols to them of 1977,[4] in which the protection of children is devoted to the provisions concerning both the civilian population in general and them as a separate category.

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[2] Convention on the Rights of the Child of 1989, https://zakon.rada.gov.ua/laws/show/995_021#Text [accessed: 11.05.2023].

[3] Geneva Conventions of 1949, https://zakon.rada.gov.ua/laws/show/995_154#Text [accessed: 11.05.2023].

[4] Dodatkovy′j protokol do Zhenevs′ky′x konvencij vid 12 serpnya 1949 roku, shho stosuyet′sya zaxy′stu zhertv mizhnarodny′x zbrojny′x konfliktiv (Protokol I), vid 8 chervnya 1977 roku, https://zakon.rada.gov.ua/laws/show/995_199#Text [accessed: 11.05.2023]; Dodatkovy′j protokol do Zhenevs′ky′x konvencij vid 12 serpnya 1949 roku, shho stosuyet′sya zaxy′stu zhertv zbrojny′x konfliktiv nemizhnarodnogo xarakteru (Protokol II), vid 8 chervnya 1977 roku, https://zakon.rada.gov.ua/laws/show/995_200#Text [accessed: 11.05.2023].

Thus, according to Article 24 of Geneva Convention IV on the Protection of the Civilian Population in Time of War of 1949, the parties to the conflict will take all necessary measures to ensure that children under the age of 15 who are orphaned or separated from their families as a result of war are not left to fend for themselves, and also to facilitate, under any circumstances, their education. According to Article 27 of the Geneva Convention IV, protected persons have the right, under all circumstances, to personal respect, respect for their honor, the right to a family, their religious beliefs and rites, habits and customs. They should always be treated humanely and protected, in particular from any act of violence or intimidation, from insults and the curiosity of the crowd. Subject to the provisions relating to health, age and sex, the party to the conflict under whose authority the persons are under protection, have the right to treat all of them equally, without any discrimination, particularly as to race, religion or political opinion, while the parties to the conflict have to apply to such persons such measures of control or security as may be deemed necessary in the conduct of the war.

Article 4(3) of Additional Protocol II of 1977 regulates the issue of providing children with the necessary care and assistance during armed conflicts of a non-international nature, in particular, education, religious and moral education, reunification of separated families; separately, it is emphasized that children under the age of 15 cannot be recruited into armed forces or groups, and they are not allowed to participate in hostilities.

If we talk about the actions of the Rashists, then they bear the signs of a specific genocide of the Ukrainian people. These are the facts of deportation and forced relocation, the fact that the President of the Russian Federation signed a decree on granting citizenship to unaccompanied children, statements regarding a simplified adoption procedure. All these are clear signs of the transfer of children from one nation to another, which is prohibited by the Geneva Convention.

According to the Human Rights Commissioner, about 150,000 children were illegally deported from Ukraine.[5] Such actions of the aggressor country are a gross violation of Article 7 of the UN Convention on the Rights

[5] "There are 16,207 officially verified children on the territory of the Russian Federation. These are children that I, as an ombudsman, know about, which Ukrainian city these children are from and approximately where they are on the territory of the Russian Federation. In reality, this number of children is much higher. We assume that this number reaches approximately 150,000 children. Russia says that there are 733,000 Ukrainian children they keep on their territory. However, in our opinion, this figure is exaggerated," said ombudsman Lubinets. According to him, most children were taken to Russia from those regions that were temporarily occupied, namely Luhansk, Donetsk, Kherson, Zaporizhzhya and Crimea, https://www.ukrinform.ua/rubric-ato/3671478-kilkist-nezakonno-vivezenih-u-rosiu-ukrainskih-ditej-moze-sagati-150-tisac.html [accessed: 11.05.2023].

of the Child and a violation of Article 49 of the Geneva Convention on the Protection of Civilian Population in Time of War, which prohibits forced individual or mass relocation or deportation.

2. UKRAINIAN LEGISLATION ON THE PROTECTION OF CHILDREN'S RIGHTS

In the conditions of the war, there was an urgent need for legislative settlement of a number of issues regarding the protection of children's rights, which could not be resolved under the general order that operated in peacetime. The question of the possibility of real protection of the rights of children who became victims of Russian aggression and were left without parental care or are in difficult life circumstances arose [Mendzhul 2023, 107].

Ensuring the rights of children under martial law requires the consolidation of the efforts of a large number of organizations and institutions, especially since in recent months a significant number of new documents have appeared that regulate their actions, as well as the actions of parents, other relatives, guardians, etc.

The Law of Ukraine "On the Protection of Childhood"[6] is the main law of Ukraine regulating the situation with children in conditions of military operations. According to it, a child injured as a result of hostilities and armed conflicts is considered to be "a child who, as a result of hostilities or armed conflict, was injured, contused, maimed, suffered physical, sexual, psychological violence, was abducted or illegally taken outside Ukraine, involved to participate in military formations or was illegally detained, including in captivity." The state is obliged to take all necessary measures to ensure the protection of these children, care for them and their reunification with family members (in particular, search, release from captivity, return to Ukraine of children illegally taken abroad).

Resolution No. 302 of the Cabinet of Ministers of Ukraine dated March 17, 2022, "On the Formation of the Coordination Staff for the Protection of Children's Rights in Martial Law"[7] entered into force.

The coordination headquarters is a temporary consultative and advisory body of the Cabinet of Ministers of Ukraine, which was created to facilitate the coordination of activities of central and local bodies of executive

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[6] Pro oxoronu dytynstva: Zakon Ukrayiny′ vid 26.04.2001 № 2402-III, https://zakon.rada.gov.ua/laws/show/2402-14#Text [accessed: 11.05.2023].

[7] Postanova Kabinetu Ministriv Ukrayiny′ «Pro utvorennya Koordynacijnogo shtabu z pytan′ zaxystu prav dytyny′ v umovax voyennogo stanu» vid 17.03.2022 № 302, https://zakon.rada.gov.ua/laws/show/302-2022-%D0%BF#Text [accessed: 11.05.2023].

power, other state bodies, local self-government bodies on issues of protection of children's rights under martial law.

It is worth noting that during the period of operation of the Coordination Headquarters, thanks to the efforts of the representatives who were part of it, a significant amount of work was carried out, namely: 1) agreed decisions were made regarding the definition of the tasks of state bodies involved in the implementation of the policy on the protection of children's rights; 2) evacuation of children from dangerous areas and coordination of their safe movement to places of temporary accommodation was carried out; 3) coordinated the work of regional military administrations and local self-government bodies to prepare and organize safe places for temporary accommodation of evacuated children and meeting their needs; 4) registration of children who left for the safe territory of Ukraine or outside of Ukraine is ensured. In particular, the government made a decision to introduce information on children who are temporarily displaced (evacuated) on the territory of Ukraine, where hostilities are not taking place, or outside of Ukraine. Thus, the Unified Information and Analytical System "Children" was created to keep appropriate records in it and ensure the protection of the information contained therein; 5) compliance with the Rules for crossing the state border by citizens of Ukraine, children with legal representatives or organized groups of children is monitored in cooperation with central and local executive bodies, local self-government bodies; 6) through authorized representatives, monitoring of the conditions of children's stay in Ukraine and abroad, monitoring of compliance with social standards and the rights of children in the country of their stay, and implementation and protection of the rights and interests of children who are abroad are carried out together with consular institutions and diplomatic missions of Ukraine of Ukraine; and others [Drobyazko 2022].

In view of the above, it can be concluded that the state, thanks to the authorized members of the Coordination Staff, provides decent support and protection of children's rights under martial law.

Another significant step for the protection of children during martial law was the introduction of the nationwide program "The child is not alone." This program was introduced by the Office of the President of Ukraine together with the United Nations Children's Fund UNICEF Ukraine and the Ministry of Social Policy. The program is a chatbot "The child is not alone" – a resource for helping children in wartime, the content of which can be found on the Internet. Thanks to the introduction of the "The child is not alone" chatbot, every citizen of Ukraine can get answers to any questions regarding the temporary placement of a child in a family, finding a lost child; and also every concerned person can report cases known to him of a child being unattended. In addition, this resource contains a lot of useful

information for people who are not familiar with how to protect the rights of children in martial law, namely: 1) a number of norms and standards that form a legal framework for the protection of children's rights in conditions of armed conflict, consisting of Ukrainian legislation and norms of international law, are given; 2) contacts of services and bodies for the protection and support of children are indicated depending on the situation (violation of children's rights, provision of psychological support to a child, child trafficking, etc.); 3) highlighted the main questions and answers on the topic: "What to do and where to go if the rights of the child were violated during the war;" 4) there is a section for relatives and carers which provides guidance on what relatives and carers should do and how to communicate with traumatized children; 5) instructions and rules for communication with children who have experienced trauma are provided for psychologists and journalists.

It is also worth paying special attention to the fact that the bot has an attachment for submitting an application by citizens of Ukraine and foreign organizations that wish to temporarily shelter a child or groups of Ukrainian children. In order to shelter a child without parental care during the war, the family (person) must meet certain criteria that can be checked directly in the bot. In addition, people who have sheltered a child are offered online training on placement, adaptation and care of a child.

As can be seen from the mentioned chatbot, Ukrainians have already submitted almost 20,000 applications to temporarily shelter a child. But their number is growing every day.

From August 1, 2022, the state child tracing portal "Children of War" (https://childrenowar.gov.ua) became operational in Ukraine – an information platform on which information about children who suffered as a result of military operations during the full-scale aggression of the Russian Federation is updated daily against Ukraine (disappeared, wounded, deported). In addition, citizens have the opportunity to submit an application regarding the deportation or disappearance of a child, and receive counseling. As of May 6, 2023, according to the "Children of War" state portal: 1) 480 children died and 964 were injured (according to the Office of the General Prosecutor); 2) 403 children went missing (according to the National Police of Ukraine); 3) illegally deported to the Russian Federation or to the temporarily occupied territories of Ukraine: a) 19393 (according to the data of the National Information Bureau); b) 744,000 children (according to data from open sources, voiced by the Russian Federation); c) 364 children were returned to the territory of Ukraine from the territory of the Russian Federation and occupied territories (according to the National Information Bureau of Ukraine).

3. THE SAFETY OF CHILDREN DURING WAR IS AN URGENT ISSUE TODAY

Every child feels safe when he knows how to act correctly in this or that extreme situation. It is very important for children of any age to feel safe. And for this, it is necessary to acquire the simplest skills of personal and collective safety during martial law, skills of self-protection during situations that threaten life and health.

On August 23, 2022, Resolution No. 940 of the Cabinet of Ministers of Ukraine "On Amendments to Certain Resolutions of the Cabinet of Ministers of Ukraine Regarding Improvement of the Mechanism of Evacuation" was adopted, which at the legislative level defines the forms of refusal of an individual, legal representatives of children from mandatory evacuation.

In the event that the legal representatives refused the mandatory evacuation of orphans, children deprived of parental care, including those raised in foster families, family-type children's homes, under their care or custody, arranged in the family of foster carers, guardianship or guardianship of such children is terminated.

Guardianship and guardianship bodies can unilaterally terminate agreements on the placement of such children in a foster family, on the organization of the activities of a suitable family-type orphanage, on the patronage of such a child.

The National Social Service together with local state administrations, local self-government bodies in safe areas determine the list of foster families, family-type children's homes, families of foster carers, institutions in which children are expected to stay around the clock, to which orphans, children deprived of parental care, children left without parental care, taking into account their age and state of health.

By signing the refusal to evacuate, the natural parents familiarize themselves with the duties of the parents regarding the upbringing of the child, established by Articles 150 and 155 of the Family Code of Ukraine and the responsibility provided for by Article 184 of the Code of Ukraine on Administrative Offenses and Article 166 of the Criminal Code of Ukraine: starting from February 24, 2022, 4.8 million Ukrainian children changed their place of residence, of which: 2.5 million children moved within Ukraine, the rest went abroad.

As of December 16, 2022, according to the National Social Service, 6,730 children who are pupils of educational, health care, social protection

and private institutions (2,100 within Ukraine and 4,630 outside Ukraine) continue to be evacuated.[8]

Regions of Ukraine and foreign countries where children are relocated: 1) within Ukraine, the largest number of displaced (evacuated) children is in the Lviv region (474 children), Chernivtsi region (339), Transcarpathian region (240), Ivano-Frankivsk region (139) and the city of Kyiv (96); 2) outside Ukraine, the largest number of displaced (evacuated) children are in Poland (1,533 children), Germany (736), Turkey (299), Italy (267), Austria (255), Romania (254), Switzerland (181), the Netherlands (159) and Spain (129).

4. THE MAIN PROBLEMS AND CHALLENGES OF REALIZING THE RIGHT TO EDUCATION IN THE CONDITIONS OF THE RUSSIAN-UKRAINIAN WAR

The right to education is a fundamental socio-cultural right that ensures the stable development of a child. Violation of the right to education is part of armed conflict and part of a deliberate and systematic attempt by the aggressor to deprive children of the opportunity to receive an education, as well as attempts to legitimize repression and reproduce patterns of brutal behavior and total militarization of society.

After the full-scale invasion of the Russian Federation into Ukraine on February 24, the sphere of education, like all spheres of social life, underwent strong changes. The intensity of hostilities, the bombing of almost all Ukrainian cities and towns, migration processes, and the occupation of parts of Ukrainian territories have complicated the realization of the right to education and the implementation of the educational process.

In the conditions of the Russian-Ukrainian war, the destruction of educational institutions and the impossibility of realizing the right to education is not an accident, it is part of Putin's "denazification plan". And it is not surprising that the issue of preserving education should become one of the priority tasks of the Ukrainian state, because education plays an important role in the formation of society [Potapova 2022].

According to Article 19 of the Law of Ukraine "On Childhood Protection" dated April 26, 2001 No. 2402-III, every child has the right to education. In 2019, Ukraine joined the Safe Schools Declaration, which, confirming the importance of UN Security Council Resolutions 1998 (2011)

[8] Prava ditej: Shhorichna dopovid' Upovnovazhenogo Verxovnoyi Rady' Ukrayiny' z prav lyudyny' Dmytra Lyubyncya Pro stan doderzhannya i zaxystu prav i svobod lyudyny' i gromadyanyna v Ukrayini u 2022 roci, https://ombudsman.gov.ua/report-2022/dity-viiny [accessed: 11.05.2023].

and 2143 (2014), calls on the parties to the armed conflict to refrain from actions that impede children's access to education , states to consider specific measures to limit the use of schools by armed forces and armed non-state formations in violation of applicable norms of international law.

The Ministry of Education and Science of Ukraine issued Order No. 274 dated March 28, 2022 "On some issues of the organization of general secondary education and the educational process under martial law in Ukraine", according to which it is necessary to ensure and organize, among other things, the enrollment of general secondary education graduates , who were forced to change their place of study and/or residence (stay) and live (stay) in Ukraine or abroad, to educational institutions; general secondary education for students in any form that can be provided by the educational institution and is the safest for them.[9]

Education seekers during the special period are guaranteed the organization of the educational process in a remote form or in any other form that is the safest for its participants. Therefore, during the period of martial law, children are provided with conditions for obtaining education in safe conditions, in particular remotely (Article 57-1 of the Law of Ukraine "On Education" dated September 5, 2017 No. 2145-VIII).[10]

However, a significant number of children did not have access to the Internet (due to damaged power lines) or equipment for distance learning, as thousands of Ukrainian families were forced to leave their places of permanent residence, go abroad, or stay in the occupied territories [Pylypyshyna and Turchenko 2022, 68].

According to the Institute for Educational Analytics, before the full-scale invasion in February, there were 4.31 million students in Ukrainian schools. As of the beginning of 2023: 1) 7,764 schools operate in a traditional and mixed format; 2) 5,160 in online mode.

According to the given data, almost 70% of students study remotely or in a mixed form of education, which is due to the massive attacks of the Russian Federation on the critical infrastructure of Ukraine, which led to the absence of electricity, heating, water, access to high-speed Internet and mobile communications. 505,000 students and more than 13,000 teaching staff continue to stay abroad.

Thus, the children found themselves in a situation that makes it impossible for them to study and, accordingly, to exercise their right to education.

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[9] Nakaz MON Ukrayiny′ vid 28 bereznya 2022 roku No274 «Pro deyaki pytannya organizaciyi zdobuttya zagal′noyi seredn′oyi osvity′ ta osvitn′ogo procesu v umovax voyennogo stanu v Ukrayini», https://zakon.rada.gov.ua/rada/show/v0274729-22#Text [accessed: 11.05.2023].

[10] Zakon Ukrayiny «Pro osvitu» vid 05 veresnya 2017 roku №2145-VIII, https://zakon.rada.gov.ua/laws/show/2145-19#Text [accessed: 11.05.2023].

Therefore, although the state formally at the legislative level has complied with the requirements to ensure the safety of children from violence, in practice it is impossible to protect children from crimes committed by the country – an aggressor, contrary to the norms of international law.

5. LEGAL REGULATION OF PLACEMENT OF CHILDREN LEFT WITHOUT PARENTAL CARE

One of the main problems is the placement of children who were left without parental care as a result of the invasion of the Russian Federation into the territory of Ukraine.

On March 22, 2022, the Resolution of the CMU No. 349 "On Amendments to Certain Resolutions of the Cabinet of Ministers of Ukraine Regarding the Protection of Children's Rights During a State of Emergency or Martial Law"[11] amended the Regulations on Family-Type Children's Homes, approved by the Resolution of the Cabinet of Ministers of Ukraine dated April 26, 2002 of 2002 No. 564 and the Regulation on foster families, approved by Resolution No. 565 of the Cabinet of Ministers of Ukraine dated April 26, 2002, respectively, provide that during a state of emergency or martial law in Ukraine, family-type orphanages and foster families children left without parental care can be accommodated under the conditions of temporary accommodation within the stipulated maximum number of children in a family-type orphanage and in a foster family, respectively.

Also, with this Resolution, the Procedure for conducting activities related to the protection of children's rights by guardianship bodies, approved by the Resolution of the Cabinet of Ministers of Ukraine dated September 24, 2008 No. 866 "Issues of activities of guardianship and guardianship bodies related to the protection of children's rights" Section "Peculiarities of placement of children left without parental care, including children separated from their families, orphans, children deprived of parental care, in the event of a state of emergency or martial law being introduced on the territory of Ukraine," which, in particular, also provides for a temporary placement of children in functioning foster families and family-type children's homes.

Therefore, in the conditions of martial law, only temporary placement of children left without parental care in family-type orphanages and foster families is allowed.

[11] See https://zakon.rada.gov.ua/laws/show/349-2022-%D0%BF#Text [accessed: 11.05.2023].

CONCLUSIONS

In view of the above, the following conclusions can be drawn. Firstly, states, as the main responsible entities for the life and safety of their population, need to increase the level of coordination and interaction regarding the needs of children and youth during armed conflicts and in post-conflict situations; secondly, the parties to the armed conflict must clearly comply with their obligations regarding the protection of civilians in general, children in particular, not only under international humanitarian law, but also under the norms of general international law.

It is obvious that the state of war and active hostilities in Ukraine determine the new realities of today, and the general procedure for the protection of children's rights established by the current legislation, which operated in peacetime, simply stopped working in most cases.

In the conditions of war, children need proper protection, social support, guarantee of quality legal assistance, implementation of the right to housing, education, family reunification, etc. Martial law is not a reason to limit the application of the principle of the best interests of the child.

Today, our state adequately implements the functions entrusted to it to ensure the protection of children's rights. At the same time, it is extremely difficult, therefore, in these difficult and important times for our country, every caring citizen of Ukraine should help protect and realize the rights of the most unprotected category of persons – children.

The first and most important rule of protection for children during war is to ensure their right to family and care. By all possible means, it is important to prevent and prevent the forcible abduction of minors or orphans from the territory of Ukraine.

Minors must be accompanied by adults, parents, relatives or legal guardians, have copies of documents, information about parents, contact phone numbers with them, in case the child gets lost. When staying in Ukraine or when traveling abroad, it is important to take care with all your might to protect minor children from behavior that degrades their dignity, from torture, harsh or inhumane treatment towards them.

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THE PRINCIPLE OF RESPECTING THE RIGHT OF THE UKRAINIAN NATION TO SELF-DETERMINATION AND PRESERVING TERRITORIAL INTEGRITY IN THE FACE OF RUSSIAN AGGRESSION

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Abstract. The article provides a comparative analysis of the leading principles of the UN: respect for the nation's right to self-determination and the territorial integrity of the state, as well as their relationship, conditions of implementation and peculiarities of compliance in the context of gross violation by the Russian Federation of both of these principles in Ukraine. The author proves that the fundamental international legal principles of relations between states provide for respect for the right of nations to self-determination, including for their independent choice of their geopolitical activity, the right to inviolability of territorial integrity. This right is superior to the right of nation's self-determination (with the exception of colonized countries and countries in which the rights of national minorities are grossly violated on a regular basis).

Keywords: the nation's right to self-determination; sovereignty; the principle of territorial integrity

1. PROBLEM STATEMENT

Modern Ukraine has de facto become the epicenter of the undeclared third world war, which Russian imperialism unleashed against the entire democratic world, because most of the countries of the European continent are largely involved in this war. In a certain way, the basis for the deployment of Russia's large-scale armed aggression on the territory of sovereign Ukraine was both the absolutely illegitimate principle of dividing the world into zones of political interests and spheres of influence between the main world geopolitical players, which is not enshrined in any UN legal document, and certain contradictions containing the United Nations, first of all, such as the right of the nation to self-determination and the principle of respecting the territorial integrity of the state.

These contradictions received their modern aggravation in 2008 as a result of the unilateral declaration of Kosovo's independence from

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Serbia, when the principle of the nation's right to self-determination prevailed over the principle of respect for territorial integrity.

It is important to emphasize that the recognition by the overwhelming majority of international community of peoples countries of the separation of Kosovo from Serbia was regarded as "an extreme measure taken in connection with the exhaustion of all other ways to reconcile the Albanian people with the metropolis and preserve the state within its former borders." Nevertheless, the Kosovo precedent actually gave a "start" to separatist movements not only in the post-Yugoslav and post-Soviet areas, but also in Western Europe – from Spain (Catalonia) to Great Britain (Scotland) [Lyuba 2018, 132]. Thus, Professor Jason Sorens, a well-known specialist in the study of the geography of secession conflicts, argues that "in modern conditions, the region with the most separatist potential is Eurasia" [Sorens 2016]. Since the Eurasian continent is of high geostrategic interest among the subjects of world politics, even small ethnic or religious local disagreements with external assistance and support can become global. This situation raises questions of regional security of the states of the Eurasian region as one of the key issues in determining their foreign policy [Gostichsheva 2019, 114].

It should be emphasized that it was the exhaustibility of all other possible ways of reconciliation between two ethnic and religious groups that are different in terms of value and culture – Albanians and Serbs, which became the reason for recognizing such an extreme form of self-determination as secession. However, despite this, the Kosovo precedent has launched a number of processes of applying double standards to violate international legal norms.

The biggest violator of the fundamental principles of the United Nations was Putin's Russia, which was one of the few countries that refused to recognize Kosovo as an independent state and at the same time politically referred to the Kosovo precedent in its imperial ambitions, using the forces of the regular army, unleashed a war first on Georgia, where army bayonets provided "declaration of independence" of Abkhazia and South Ossetia in 2009, and then in Ukraine, where the same "declaration of independence" was falsified by the same use of military force as an instrument of organizing a "nationwide referendum", first by the Autonomous Republic of Crimea in 2014, and then by the so-called "DNR" and "LNR" in 2022.

Thus, there is an evident contradiction of international legal principles regarding the self-determination of peoples, national sovereignty, and the inviolability of the territorial integrity of states. According to the researcher from Kharkiv O. Lyuba, "the existence of these contradictory principles in the modern version is a favorable environment for the further fragmentation of independent states and the complication of the process

of conflict-free resolution of the crisis. The principle of equality and self-determination of peoples, which some states appeal to, justifying their actions and trying to legitimize them, can be viewed separately from other basic principles of international law, namely, non-interference in the affairs of a sovereign state, territorial integrity and inviolability of state borders" [Lyuba 2018, 132].

All of the above determines the relevance of the study of the essence and relationship of such leading principles of the UN as the principle of respect for the right of the nation to self-determination and the principle of the territorial integrity of the state in view of their blatant violation by the Putin regime of Russia in relation to Ukraine and the distorted interpretation by Russian political leaders and propaganda of the fundamental rights of the UN in justifying their imperial aggression.

2. ANALYSIS OF RECENT RESEARCH AND PUBLICATIONS

The state and problems of the right of nations to self-determination are actively covered both in foreign and Ukrainian expert and scientific discourse space. The topics of such publications are broad and multidisciplinary, they unfold within the framework of a number of modern scientific directions: law, public administration, national security, sociology and cultural studies. Such Ukrainian scientists as O. Dashkovska [Dashkovska 2016], N. Zaiats [Zayats 2015], K. Klymenko [Klymenko 2022], V. Kolisnyk [Kolisnyk 2001], I. Lossovskyi [Lossovskyi 2018], A. Luhovskyi [Luhovsky 2017], O. Liuba [Lyuba 2018], I. Rafalskyi [Rafalsky 2013], M. Rozumnyi [Rozumnyy 2016], O. Tarasov [Tarasov 2014], B. Chernikov [Chernikov 2017] are fruitfully working in this field; the publications of researchers I. Nurieva from Azerbaijan [Nurieva 2010], E. Gostishcheva from Kazakhstan [Gostichsheva 2019], and M. Koskenniemi from Finland [Koskenniemi 1994], whose research we will rely on in this scientific investigation, are worthy of attention.

The purpose of the research is to conduct a comparative analysis of the leading principles of the United Nations – respect for the right of the nation to self-determination and the territorial integrity of the state, their relationship, conditions of implementation, and peculiarities of compliance in the context of blatant violation by the Russian federation of both of these principles concerning Ukraine.

3. PRESENTATION OF THE MAIN RESEARCH MATERIAL

Historically, the idea of national self-determination in the world's political thought appears together with the emergence and development

of the theory of natural human rights in the Enlightenment era. Hugo Grotius, John Locke, Jean-Jacques Rousseau, Thomas Paine, and other thinkers laid the foundations for the concept of human rights and the people as the only source of state power and bearer of state sovereignty. Based on these ideas, during the war for the independence of the North American colonies from Great Britain at the end of the 18th century, Thomas Jefferson proposed the principle of the nation's right to self-determination, which was enshrined in the US Declaration of Independence in 1776. An important point of this declaration was the establishment of the right of the people to change the form of government if the state does not have the opportunity to ensure the inviolable natural rights of a person, first of all, the right to life, freedom, and the pursuit of happiness.

In Europe, the first official document that declared the principle of the sovereignty of nations was the Constitution of the French Republic, adopted in 1789 during the Great French Revolution. Subsequently, this principle "in the course of its evolution turned into the principle of nationalities, which was interpreted as the right of European nations to create a sovereign national state" [Chernikov 2017, 708]. However, the direct formulation of the concept of "the right of a nation to self-determination" appears in the political and scientific discourse in the second half of the 19th century in the presentation of the Swiss jurist and politician, Professor of the University of Zurich I. Bluntschli (Johann Kaspar Bluntschli). The left-wing parties of Europe, which united into the Communist International, picked up this idea. The Comintern, which dreamed of socialist revolutions in Europe, saw in the principle of the nation's right to self-determination the legitimization of the right to revolt and revolutionary changes both in the state power itself and in the state system as a whole, including territorial division and territorial organization of power.

The First World War, in which continental empires (such as Austria-Hungary, for example) took part, in whose borders many peoples of Europe lived within their historical territorial boundaries, extremely exacerbated the issue of the nation's right to self-determination. At the Versailles Peace Conference in 1918, the then President of the United States of America, Thomas Woodrow Wilson, in opposition to Comintern radicalism, put forward a more moderate program for post-war settlement in Europe, called "Wilson's 14 points". This program envisaged the creation of a strong international organization – the League of Nations and the resolution of territorial disputes in Europe based on the idea that the main subject of power is the people, who have the full right to self-determination. In accordance with these principles, the division of the territory of Germany, its loss of all overseas colonies, the disintegration of Austria-Hungary into separate Austria and Hungary with the simultaneous withdrawal from its composition

and the restoration of independence/establishment of the statehood of Poland, Czechoslovakia, and the Kingdom of Serbs, Croats and Slovenes (from 1929 – Yugoslavia).

The end of the Second World War was marked by the creation of the UN and the establishment of the concept of human rights at the highest level, including one of these rights – the right to self-determination of peoples and nations, since "the right of peoples and nations to self-determination is a prerequisite for the enjoyment of all basic human rights."[1] In particular, the Declaration on the Principles of International Law emphasizes that self-determination is the right of all peoples to freely determine their political status and to carry out their economic, social and cultural development without external interference, and every other state is obliged to respect this right.[2] As Ihor Rafalskyi notes, "The right of peoples to self-determination has been one of the fundamental principles not only of international law, but also of modern political practice for almost two centuries. After the adoption of the UN Charter, this principle turned from an exclusively political principle into a principle of positive international law. It was further developed in the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966), the Covenants of 1966, the Declaration on the Principles of International Law of 1970, the documents of the Conference on issues of security and cooperation in Europe (1975), in the Vienna Declaration of 1986, in the documents of the Copenhagen meeting, the Conference on the Human Dimension of the OSCE in 1990, the resolutions of the UN General Assembly General realization of the right of peoples to self-determination (1994) and in other international legal acts" [Rafalsky 2013, 137].

In the interpretation of the United Nations, the principle of national self-determination is based on the idea of the community as a full-fledged subject, as well as the collective will of citizens as a source of sovereignty and the main basis for the implementation of one or another state policy. Self-determination is a principle according to which each community is free to organize its public and political life, decides on its own the principles of internal political organization, foreign policy orientations, etc. On the basis of this principle, every nation is recognized as having the right to form its own state or voluntarily enter into contractual relations with other nations [Rozumnyy 2016, 9].

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[1] UN General Assembly Resolution 1514 (XV) of 14 December 1960, Declaration on granting independence to colonial countries and peoples, https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-granting-independence-colonial-countries-and-peoples [accessed: 27.05.2023].

[2] Declaration on the principles of international law, http://zakon3.rada.gov.ua/laws/show/995_569 [accessed: 27.05.2023].

At the same time, UN General Assembly Resolution 2625 (XXV) dated October 24, 1979 emphasized that "self-determination is not considered as a requirement for the creation of an independent state as a form of self-determination." The realization of the right to self-determination can also take place in the form of free accession to an independent state or unification with it, autonomy within the existing borders of the state, in the form of establishing any other political status or in the form of the withdrawal of a certain people from the state (secession or irredentism). A federation option is also possible [Rafalsky 2013, 137].

Already here we can see the manifestation of a legal collision of a certain inconsistency between the right of a nation to self-determination and the right to the inviolability of the territorial integrity of the state. However, this formal conflict is clearly explained in various UN documents, for example, the Declaration on the Granting of Independence to Colonial Countries and Peoples clearly defines that "any attempt to completely or partially destroy the national unity and territorial integrity of the country is incompatible with the goals and principles of the UN Charter". therefore, everyone must "respect the sovereign rights of all peoples and the territorial integrity of their states."[3] Likewise, the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation in accordance with the UN Charter emphasizes that only indigenous peoples can be subjects of the right to self-determination at the level of the creation of one or another form of statehood. Self-determination within the territories of other nations is tantamount to violating their same right [Nurieva 2010, 263]. Therefore, the Charter of the UN clearly states that "indigenous people, depending on their number, have the specified right, and other groups of national minorities are not granted the right to self-determination in the form of secession."[4]

As M. Koskenniemi notes, "In a modern state-organized society, the realization of the right to external political self-determination by a nation that has not yet created its statehood inevitably leads to a collision with the right to self-determination of any other nation. In fact, in this case, we are talking about the requirements of the national minority living compactly in a certain territory, which is connected with its formation as a nation in its original territory, historical homeland, that is, an autochthonous national community, secession – leaving the state within which it exists and creating

[3] Resolution of the Verkhovna Rada of Ukraine No. 2633-IX of 6 October 2022, Pro Zvernennya Verkhovnoyi Rady Ukrayiny do mizhnarodnoho spivtovarystva pro pidtrymku prava na samovyznachennya narodiv rosiys'koyi federatsiyi, https://zakon.rada.gov.ua/laws/show/2633-20#Text [accessed: 27.05.2023].

[4] The Charter of the United Nations and the Statute of the International Court of Justice, 1940. New York, 1946, http://zakon2.rada.gov.ua/laws/show/995010 [accessed: 27.05.2023], p. 2.

its national statehood or accession to another already existing state with its consent. Such a claim always conflicts with the sovereignty and territorial integrity of the state from which it is expected to leave, and, accordingly, with the right to external political self-determination of the nation (of the nation-building people, a part of which is the national minority claiming secession), which has already implemented this right, having created this state" [Koskenniemi 1994, 260].

Let's apply the above principles and international legal prescriptions of the UN to Ukraine. Our country is multi-ethnic with a clearly defined dominance of Ukrainians (their share in the total population is more than 77%), Russian diaspora scattered throughout the territory (as of 2001, there were just over 17% of them and in none of the regions did not constitute a formal majority of its residents) and numerous national minorities (Jews, Poles, Hungarians, Romanians, Germans, Crimean Tatars, Greeks, Karaites, etc.), whose number is less than one percent.

Consequently, the subject of any national self-determination in Ukraine is exclusively the Ukrainian people. The Russians, who sporadically settled Ukrainian lands after the annexation of Ukraine to Muscovy as a result of the Pereyaslav agreements, cannot be considered an indigenous people, moreover, they, as an ethnic group, have already received their self-determination within another state – Russia. Thus, Russians, in accordance with UN principles and international legal norms, have no right to any form of self-determination within Ukraine. Considering their small number, the indigenous peoples of the Ukrainian state, which include the Crimean Tatars (constituting 0.5% of the citizens of Ukraine), the Karaites (numbering just over 1 thousand people), the Krymchaks (there are less than 500 of them) have the right to national autonomy within the existing statehood, but by no means secession. In fact, all indigenous peoples, including the most numerous Crimean Tatars, have never claimed to secede from Ukraine, they are quite satisfied with the existing cultural and political autonomy. As Doctor of Law N. Zaiats notes, "recently, classical Western states prefer the form of national or cultural-political autonomy of regions. Such formations have existed for quite a long time in Finland, Denmark, Italy, and Spain" [Zayats 2015, 23].

Thus, according to the fundamental international legal norms described above, any "referendums" in any territories of Ukraine, including the Crimea, Donetsk, Luhansk, Zaporizhzhya, or Kherson regions, cannot be recognized as legitimate and cannot under any circumstances be considered a form of national self-determination After all, Ukraine as a state is already a form of self-determination of the Ukrainian people, therefore the self-determination of any region of Ukraine by its nature is not national, but only territorial. So, theoretically, it is possible to assume that a certain

region of a certain country, in which the majority consists of representatives of the dominant state-forming ethnic group, for some political, economic or other reasons, would like to withdraw from its state entity. In this case, it will only be about an attempt at territorial self-determination, which is defined as regional separatism in the international legal context!

The issue of observing the principle of territorial integrity in connection with the annexation and occupation of part of Ukraine by the Russian Federation became particularly acute.

On October 5, 2022, four federal laws of the Russian Federation on the ratification of so-called "international treaties" recognized on October 2 by the Constitutional Court of the Russian Federation as conforming to the Constitution of the Russian Federation, and four federal constitutional laws of the Russian Federation on the illegal annexation of the Russian Federation were published on the Official Internet Portal of Legal Information of the Russian Federation part of the territory of Ukraine. In accordance with the provisions of these acts, "Donetsk People's Republic", "Luhansk People's Republic", "Zaporizka Oblast" and "Kherson Oblast" are accepted into the Russian Federation from September 30 as "subjects of the Russian Federation", and their names are added to the list of relevant subjects in the part one of the article 65 of the Constitution of the Russian Federation.

Earlier, in March 2014, the "Republic of Crimea" and the "city of federal importance Sevastopol" were entered into the Constitution of the Russian Federation in the same way.[5]

However, according to the Constitution of Ukraine,[6] the sovereignty of Ukraine extends to its entire territory, and the territory of Ukraine within the existing border is integral and inviolable (parts one and three of Article 2). Since Ukraine is a unitary state (part two of Article 2), questions about changing the territory of Ukraine at the final stage are decided exclusively by an all-Ukrainian referendum (Article 73).

The sovereignty, territorial integrity and existing state border of Ukraine are recognized by all countries of the world in accordance with the UN Charter and are guaranteed by a number of bilateral and multilateral international treaties, to which the Russian Federation itself is a party, in particular, the Final Act of the Conference on Security and Cooperation in Europe (Helsinki Act) 1975 p., the Memorandum on Security Guarantees in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation

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[5] Yurydychna otsinka aktiv RF shchodo protypravnoyi zminy terytoriyi Ukrayiny, https://rpr.org.ua/news/yurydychna-otsinka-aktiv-rf-shchodo-protypravnoi-zminy-terytorii-ukrainy [accessed: 27.05.2023].

[6] Final Act of the Conference on Security and Cooperation in Europe of 1 August 1975, https://www.osce.org/files/f/documents/0/c/39505_1.pdf [accessed: 27.05.2023].

of Nuclear Weapons (Budapest Memorandum) of 1994, the Treaty between Ukraine and the Russian Federation on the Ukrainian-Russian State Border of 2003, etc.

On October 4, 2022, the President of Ukraine signed Decree No. 687/2022 "On the Nullity of Acts Violating the Sovereignty and Territorial Integrity of Ukraine" [Lossovskyi 2018], which recognizes the decrees of the President of the Russian Federation of March 17, 2014 No. 147, of February 21, 2022 No. 71, of February 21, 2022 No. 72, of September 29, 2022 No. 685, of September 29, 2022 No. 686 as null and void, i.e., as having no legal consequences.

The founding documents of the UN clearly deny the legality of any attempts at territorial self-determination, which will be recognized a priori as illegitimate. In the international law and political practice of developed states, there is a postulate according to which any form of national self-determination is possible only when the mother state gives its consent to a specific form of implementation of this principle. All national entities formed outside of this rule are illegitimate, they have no legal grounds for receiving international legal recognition from other states. Kharkiv lawyer O. Tarasov explained this issue well. Characterizing the institute of subjects of international law, he noted: "An illegitimate entity does not have any international rights and does not fulfill any international obligations. Moreover, unlike the mother state, it does not have the right to self-defense. At the same time, even exceeding boundaries necessary for the protection of state interests does not create consequences for the state in the form of the possibility of secession of part of its territory" [Tarasov 2014, 248-49].

As K. Klymenko emphasizes, the analysis of the relationship between the principles of the territorial integrity of states and the self-determination of peoples in international law provides all the grounds for the conclusion that "neither international law nor the legislation of Ukraine as a territorial sovereign provides for the right of part of the population of Ukraine to political secession; the subject of the title for the territory of Ukraine includes the entire people of Ukraine, who exercised their right to self-determination through the creation of the state of Ukraine, which is unquestionably recognized by the international community in general and the Russian Federation in particular" [Klymenko 2022, 449].

An important point in the context of our research is the fact that the Helsinki Agreements of 1975, which consolidated the agreement between European states on territorial issues, including the recognition of the principle of self-determination, at the same time insisted on the principle of territorial indivisibility and the recognition of existing borders. Likewise, the Declaration on the Principles of International Law, recognizing the right of nations to self-determination, at the same time emphasized

that "the territorial integrity and political independence of the state are inviolable."[7] Therefore, if the state faithfully fulfills its international obligations and adheres to the specified document, it is completely inviolable and sovereign. In this context, any secession is impossible, provided that the state has a government that legally represents the entire population (elected according to the established procedure), and there are no signs of discrimination against national minorities in its actions [Luhovsky 2017, 243].

Both at the international level and at the level of many of the world's most powerful countries, there is an unshakable political and legal position according to which the principle of territorial integrity is higher than the principle of national self-determination [Tarasov 2014, 709]. In particular, this is clearly stated by the leaders of China. Similarly, specifically in relation to the armed aggression of the Putin regime in Ukraine, it was stated that "Kazakhstan's position regarding the territorial integrity of states, the rejection of any forms and manifestations of separatism remains constant, it is based on the fundamental principles of the UN regarding the preservation of the sovereignty and territorial integrity of states in their internationally recognized borders, finding peaceful ways to resolve disputed issues" [Chernikov 2017, 115].

According to V. Kolisnyk, "national self-determination, if without speculation, does not directly contradict the principle of territorial integrity of the state. This principle is a principle of interstate relations, and the right to self-determination is realized not in interstate relations, but in the process of internal development of a multinational state. Implementation of the right of peoples (nations) for self-determination definitely contains a certain threat to the territorial integrity of the state, but this threat becomes the greater, the more real, the less this state is inclined to respect human rights, the rights of every people living on this territory" [Kolisnyk 2001, 38]. An indisputable fact follows from such positions: in Ukraine there are no subjects, factors or grounds for any national self-determination in the form of secession, since "the principle of the right to equality and self-determination of peoples does not provide for secession as a mandatory form of self-determination; on the contrary, the right to secession is expressly limited to special cases, which include decolonization, the struggle against occupation and the racist regime, while the priority during the exercise of the right to self-determination is given to the territorial integrity of the state. And here it is obvious that the population of neither the Autonomous Republic of Crimea, nor certain regions of the Donetsk or Luhansk regions meet the criteria of colonial, oppressed or repressed peoples. It also cannot be argued that they were denied real access to the authorities of Ukraine for the implementation

[7] Declaration on the principles of international law.

of their political, economic, cultural and social development, especially given the representation of the 'Donetsk guys' in the Ukrainian authorities of the times of Yanukovych" [Klymenko 2022, 448].

In modern Russia, which declares and pursues a tough imperial policy, in particular, constantly violates fundamental human rights, discriminates against numerous national minorities, there are such subjects of national self-determination in the form of secession and grounds! Such grounds are indicated in the Appeal of the Verkhovna Rada of Ukraine to the international community on supporting the right to self-determination of the peoples of the Russian Federation: "implementing its aggressive imperialist policy, Russia has been committing genocide of enslaved peoples for centuries, ignoring the principle of equal rights and self-determination of peoples, grossly violating the rights of indigenous peoples, belonging to national minorities, even while conducting a war of conquest against Ukraine, the Russian authorities are carrying out genocide of the peoples of the Russian Federation, in particular, using the mobilization announced by it for this."[8] Under such conditions, in accordance with international law and the founding documents of the UN, in particular the Declaration on the Granting Independence to Colonial Countries and Peoples, the indigenous peoples of the Russian Federation have a legal right to self-determination, including through secession! That is why the Verkhovna Rada of Ukraine: 1) supports the inherent right of the peoples of the Russian Federation to self-determination in accordance with the UN Charter, generally recognized norms and principles of international law; 2) appeals to the United Nations, the European Parliament, the Parliamentary Assembly of the Council of Europe, the NATO Parliamentary Assembly, the OSCE Parliamentary Assembly, the GUAM Parliamentary Assembly, and the national parliaments of the countries of the world with a call for consistent support for the peoples of the Russian Federation in realizing their right to self-determination and strengthening comprehensive support of Ukraine for its victory in the Russian-Ukrainian war with further de-imperialization of the Russian Federation and decolonization of the peoples that are annexed and kept within it.[9]

Appealing to the fictitious right of the mythical "people of Donbas" (has anyone ever heard of the special "people of Donbas") in justifying his military aggression in Ukraine, the Russian dictator directly violates his own Constitution and the conclusion of the Constitutional Court of the Russian Federation, which stated that "state integrity is an important condition of equal legal status of all citizens regardless of their place of residence, one

[8] Resolution of the Verkhovna Rada of Ukraine No. 2633-IX of 6 October 2022.
[9] Ibid.

of the guarantees of their constitutional rights and freedoms." Regarding the relationship between the territorial integrity of the state and the right of peoples to self-determination, the Constitutional Court of the Russian Federation noted that the Russian legislation in this matter is consistent with the norms of international law, according to which "the exercise of the right to self-determination" should not be interpreted as sanctioning or encouraging any actions that would lead to the dismemberment or complete violation of the territorial integrity or political unity of sovereign and independent states acting in accordance with the principle of equality and self-determination of peoples. "In other words, the Constitutional Court of the Russian Federation unequivocally stated that the right of the people to self-determination should not violate territorial integrity of the state" [Klymenko 2022, 107].

Therefore, the Russian Federation grossly violates all possible international political and legal principles and guidelines, as well as its own constitution, trying to impose Putin's doctrine of "limited sovereignty" on Ukraine and the whole world, which directly denies the right of nations to self-determination and territorial integrity. According to this doctrine, "post-Soviet countries are effectively deprived of their right to real sovereignty, since they are granted only 'limited sovereignty' that does not conflict with Russia's vital interests. These 'conceptual arguments' justify the 'legitimacy' of the Russian Federation's aggression in Ukraine and attempts to annex Crimea, 2008 intervention in Georgia" [Lossovskyi 2018, 26].

CONCLUSIONS

Thus, the comparative analysis of the leading principles of the United Nations – respect for the right of a nation to self-determination and the territorial integrity of a state, their correlation, conditions for implementation and features of compliance allows us to conclude that the fundamental international legal framework for relations between states provides for respect for the right of nations to self-determination, including self-selection of their geopolitical landmarks, the right to the inviolability of territorial integrity, and this right is higher than the right of national self-determination (with the exception of colonized countries and countries in which the rights of national minorities are systematically and grossly violated).

Self-determination of a nation, according to M. Rozumny, is a complex and contradictory process, which includes: a) actualization of the subject, his will to exist and readiness for transformations; b) an adequate perception of the historical challenge as a unique set of threats and opportunities that create a situation of cardinal choice; c) the invention of one's own innovative adaptation model, which provides for the implementation

of a basic civilizational algorithm, supplemented by one's own unique experience and creativity" [Rozumnyy 2016, 20]. Thus, the right to self-determination implies not only and not so much the creation of one's own statehood or autonomous government within another state (for small-numbered peoples), but also the natural right to independent use of full national sovereignty. Sovereignty, as another of the fundamental "pillars" of the United Nations and a key principle of the entire international legal order, implies the free choice by the people of the ways and goals of their own development, the prospects for integration with any other state or international entities. The UN directly denies any attempt by external geopolitical actors to interfere in the sovereign choice of any country.

Ukraine, like any other state, has the full right to choose its further path of civilizational development, joining or withdrawing from any defense alliance – this is its natural sovereign right to self-determination, and all other countries must respect this right. As you can see, not all states are ready for this.

The Putin regime, having unleashed a bloody war in Ukraine, is thereby trying to change the world political and legal order, challenging the UN and all of humanity, de facto denying the guiding principles of international relations enshrined in the Helsinki Final Act of the CSCE ("The participating States will respect the territorial integrity of each of the participating States, they will accordingly refrain from any action inconsistent with the purposes and principles of the UN Charter against the territorial integrity, political independence or unity of any participating State. The participating States will respect the equality and the right of peoples to decide their own destiny, constantly acting in accordance with the purposes and principles of the UN Charter and the relevant norms of international law, taking into account those relating to the territorial integrity of states"[10]), and the Declaration on Respect for the Sovereignty, Territorial Integrity and Inviolability of the Borders of the CIS Member States "Building their relations as friendly, the states will refrain from military, political, economic or any other form of pressure, including blockade, as well as support and use of separatism against the territorial integrity and inviolability, as well as the political independence of any of the Commonwealth member states, [...] the seizure of territory with the use of force cannot be recognized, and the occupation of the territory of states cannot be used for international recognition or the imposition of a change in its legal status"[11]).

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[10] Final Act of the Conference on Security and Cooperation in Europe of 1 August 1975.

[11] Deklaratsiya pro dotrymannya suverenitetu, terytorial'noyi tsilisnosti ta nedotorkannosti kordoniv derzhav-uchasnyts' SND (2006), Official Gazette of Ukraine. November 1, No. 42. p. 261. Art. 2859, http://zakon2.rada.gov.ua/laws/show/997_480 [accessed: 27.05.2023].

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CONSTRUCTION WASTE HANDLING AFTER AMENDMENTS IN WASTE REGULATIONS

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Abstract. Amendments to regulations on waste management effective from 1 January 2022 and associated with the implementation of the idea of circular economy, respond to the requirement of transposing relevant EU regulations. The proposed amendments address, for example, construction waste. They define construction waste and introduce new provisions as well as modifying existing measures related to the management of this waste. They highlight the principles of circular economy. This article assesses the practical value and applicability of these regulations in construction waste management from several points of view. First, re-use of such waste is discussed. Second, end-of-waste regulations are analysed, and so is the possibility of their application in the management of construction waste, especially construction rubble. The study closes with conclusions suggesting specific addendums to existing waste regulations.

Keywords: waste management; construction waste; waste regulations

INTRODUCTION

Recent amendments to EU waste-related legislation[1] meant that Polish laws had to be adjusted accordingly. The Amending Directive introduced a number of changes, mainly in the so called framework waste directive[2] and these amendments had to be introduced to many national laws, in particular to the Polish Waste Law.[3] These changes have been made by means of a few acts. From the point of view of this study, the amending act of November 2021 is especially important.[4] Its provisions largely entered into force

[1] Primarily Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending directive 2008/98/EC on waste, OJ L 150, 14.6.2018, p. 109-40 [hereinafter: Amending Directive].

[2] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain directives, OJ L 312, 22.12.2008, p. 3 as amended [hereinafter: framework directive].

[3] Act of 14 December 2012, the Waste Law, Journal of Laws of 2022, item 699 [hereinafter: WL].

[4] Act of 17 November 2021 on amending the Waste Law and certain other acts, Journal of Laws item 2151 [hereinafter: WLA].

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on 1 January 2022. The EU amendments and, consequently, national ones[5] are very robust and touch many issues that serve to implement the idea of circular economy to our legislation. This concept envisages most extensive use of waste (raw materials and deposits contained therein) in the economy and using them to replace natural resources thus saving the latter. This entails, for example, a certain change in the approach to construction waste. The Amending Directive emphasises in its preamble, first of all, that we need to adopt definitions of such waste (recital 9 of the preamble) and that we need to use it on a greater scale as material that replaces natural resources. This statement follows in particular from recital 1 of the preamble that points out at the outset that "waste management in the Union should be improved and transformed into sustainable material management, with a view to protecting, preserving and improving the quality of the environment, protecting human health, ensuring prudent, efficient and rational utilisation of natural resources, promoting the principles of the circular economy [...]." However, at the same time, it is expressly pointed out that this cannot infringe the basic rules of procedure with waste, which the theory of environmental protection law refers to as "the security principle."[6] This means that managing any waste should be conducted in a way that ensures protection of human life and health and the environment, in particular it must not have adverse effects these two stakeholders [Górski 2022a, 18].

The preamble also notes that it is irrational to have a separate approach to managing construction and demolition waste that results from minor do-it-yourself construction and demolition activities within private households (thus, classified as municipal waste due to their source), because morphology of this waste is in fact identical to other construction waste (recital 11). Additionally, this thesis points out that this type of waste (construction and demolition waste) as a rule includes waste identified in group 17 of the Waste Catalogue (here of course there is a reference to the European Waste Catalogue included in Decision 2014/955/EU[7]).

[5] Apart from this law, quite a number of transposing provisions were also included in the act of 11 August 2021 on amending the act on keeping the communes clean and in order, the act Environmental Protection Law and the Waste Law (Journal of Laws item 1648).

[6] See Korzeniowski 2014, chapter 9.

[7] Commission Decision of 18 December 2014 amending Decision 2000/532/EC on the list of waste pursuant to Directive 2008/98/EC of the European Parliament and of the Council, OJ L 30.12.2014, p. 44-86.

1. LEGAL DEFINITION OF THE CONCEPT "CONSTRUCTION WASTE" AND ITS CONSEQUENCES

The amending act of November 2021 introduced a definition of the concept "construction and demolition waste" to the Waste Law, modelled on the amended framework directive. This definition is in fact, in substantive terms, identical to the EU definition included in Article 3(2c) of the amended framework directive, which lays down that "construction and demolition waste" means waste generated during construction and demolition activities, though its Polish characterization is seemingly one word shorter. According the Polish definition, included currently in Article 3(1)(6a) WL, the concept of "construction and demolition waste" includes "waste that results from building works". Thus, to specify sources of this waste, the legislator used the term "construction waste" used and defined in provisions of the act Construction Law,[8] where the concept of "building works" was specified in Article 3(7). According to this definition, building works include erecting of a building structure as well as works consisting in the redevelopment, assembly, repair, or demolition of such a structure. A full use of this definition requires that definitions of other terms used within it are taken into consideration (construction, redevelopment, assembly, repair or demolition) and the basic term "a building structure". And thus, pursuant to Article 3(1) a building structure shall mean a building, a non-building structure, or a small architecture structure together with installations enabling the use of this structure in accordance with its intended purpose, erected with the use of construction products; the terms building, non-building structure and small-architecture structure are defined separately, in Article 3(2), (3) and (4) of Construction Law.

In turn, pursuant to the Waste Law, a producer of waste generated during construction and repair activities and at the same time its holder is, by default, the entity responsible for these activities. This results from the definition of waste producers defined in Article 3(1)(32) WL, in particular in its last part that indeed specifies who, in the understanding of the law, is the producer of waste generated, for example, during building works. A waste producer is obliged to handle it according to the law (Article 27(1) WL), which includes managing it in a way that is compliant with waste regulations. The possible collection and storage of such waste must adhere to waste-storage requirements, in particular those included in Chapter 7 of division II WL, possibly also in a permit for collecting or storing waste. Collecting waste in a place not designated for it is a breach of obligations

[8] Act of 7 July 1994, the Construction Law, Journal of Laws of 2023, item 682 as amended [hereinafter: CL].

presented above, therefore, the person that collects waste contrary to the law carries an obligation to remove it from the place of illegal storage (Article 26(1) WL). In the event of failure to fulfil this obligation, a relevant obligation-imposing decision may be issued (Article 26(2) WL), in particular cases Article 26a WL may be applied.[9]

Therefore, as follows from the definition above, it refers to the source of waste generation, based on an assumption that we are dealing with substances or objects that have the nature of waste in the meaning of the general definition of this term included in Article 3(1)(6) WL. In other words, we should first state that a given substance or object is waste and then, possibly, classify it under the construction waste category. In such a context, when it comes to any substance or object that triggers doubt or controversy as to their current legal status from the point of view of waste regulations, there should never be a case that something is regarded as waste, unconditionally and indisputably, without an analysis of meeting the requirements for recognition as waste that result from the general definition.

Such a recognition requires a careful analysis of all circumstances important from the point of view of the definition, identified especially in judicial decisions, in particular in decisions issued by EU courts that often address this issue,[10] referred to a specific situation. Acknowledgement of existence of circumstances that promote their recognition as waste means that the entities that caused the emergence of these premises becomes the producer of waste. Such a discussion should be even referred to specific parts of substances, depending on these circumstances that refer to a given part [Górski 2022b, 19; Idem 2021c, chapter 3].

Given the above, taking into account the findings of the previous paragraph, we may address the concept that often surfaces in the practice of construction works, in particular in repair and demolition activities. It is about the previously used construction products which are reclaimed during such activities in a condition that allows for their re-use in the same function, practically without any preparation for such use or with minimal such preparation. In my opinion, we should therefore assume, that, given the definition of the term "waste", such a construction product in the form of a substance or object did not acquire the status of waste in a situation where it may be used in its original function. This application should be made possible without having to do any activities that restore a given substance or object features that allow them to be used in their original function and this use could not cause any threats to people or the environment. Such use should

[9] See Górski 2021c, chapter 4.

[10] See for example decisions of the EU Court of Justice in cases C-624/17, C-212/18, and C-629/19.

be facilitated even in a situation where this substance or object have become useless for the current holder, but have been taken over by a different entity that makes use of them. This may apply to, for example, objects which appear during street repairs, for example while fixing pavement slabs, curbs or similar objects including sand ballast, which may be questioned for their recognition as "construction waste". We should also assume that simple activities that restore the primary practical value to the substance or object (for example activities that involve cleaning them of possible admixtures such as vegetation, soil or other substances) will not bear the feature of waste treatment, as an element decisive in acquiring the status of waste, as long as they do not interfere with physical properties of a given substance or object. In the example given we see use in the original function – a pavement slab is re-used to build a pavement, not necessarily the one being repaired, from which it originates. However, such interference would include activities that involve cleaning the substance (or object) of various contaminants, such as oils (grease), other chemicals or similar impurities, that require the use of adequate chemical substances, provided that such cleaning should be necessary to restore the original practical functions. Such tampering would also accommodate activities that involve even further interference (repairs related to restoring a previous practical function). These should be considered as recovery activities, for example remanufacturing (that is indeed restoring a practical value), and thus activities that have the character of waste treatment; this, in turn, would be key in recognizing a substance as waste.

These comments refer mainly to construction products recovered during demolition, repair or redevelopment activities, such as bricks, curbs, pavement slabs or slabs used to build road surfaces (e.g. so-called jomb slabs), as long as these objects are not damaged and still have practical-use features characteristic for a given type of "construction product" within the meaning of applicable laws, primarily the Construction Law act in conjunction with the Construction Products Law[11] and the key Regulation of the European Parliament and of the Council 305/2011.[12] In my opinion, in a situation where such an object still meets the requirements of a "construction product" it will obviously not have the features of "waste" within the meaning of the definition under Article 3(1)(6) WL – mainly because the basic requirement will not be met, that is "disposing of" a useless object. A suggestion included in point 7 of Annex 1 of Regulation 305/2011 would also be important in this question. It stipulates that construction works must

[11] Act of 16 April 2004, the Construction Products Law, Journal of Laws of 2021, item 1213.

[12] Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, OJ L 88, 21.12.2011, p. 5-209 as amended.

be designed, built and demolished in such a way that the use of natural resources is sustainable and in particular ensure reuse or recyclability of the construction works, their materials and parts after demolition. However, we must note that this remark suggests that "providing on the domestic market" such objects obtained during demolition, repair or redevelopment works as construction products (not waste) will be possible where they will meet requirements for "construction products" in the meaning of the provisions quoted. These requirements are both substantive (identified above) and formal (different for the legal state of affairs from before and after 1 July 2013 due to the implementation of EU laws, especially the aforementioned Regulation 305/2011).

We must also note that the suggestion formulated above which refers to the possibility to recognize objects that have features of construction products and that have been used before and that are used again in the same character as non-waste (that is not qualifying them to the category of waste) is not, unfortunately, in line with the current position expressed by construction authorities, in particular the General Office of the Construction Supervision Authority (GUNB). As a rule, these bodies recognize the assumption of "one-time use" of construction products. This means that the use of a given construction product to build a building structure does not allow for this product to be reused in the same capacity, based on documentation that certifies that a given construction product meets the assumed requirements before it is first used.

This position is mainly argued using concerns for the security of using building structures. The suggestion formed above is, in turn, based on the content of the recommendation included in Annex 1 to Regulation 305/2011 and on a statement that construction laws do not feature provisions that clearly construct "the disposal obligation" with respect to construction products that have been used once already in the assumed function; according to a general definition of waste, such an obligation would clearly require that a given product be considered as waste in the moment of its recovery during repair or demolition works. Looking at things systemically, it seems that construction laws do not really keep up with the evolution of waste regulations and the idea of circular economy, which would require their review and possible amendment (which is, after all, suggested in the preamble to the 2018 Amending Directive). Let us have a look at another example. Why could we not recognize aggregate used as tramway – or railway-track substructure or even road substructure as non-waste, that is why we could we not classify it to the waste category, as long as it is reused in the same role directly or only after basic cleaning off of soil or vegetation.

2. MANAGEMENT OF CONSTRUCTION WASTE

Should these conditions not be met, objects that have previously had the nature of construction products, obtained during demolition, repair or redevelopment works, should, naturally, be recognized as waste and then as managed waste, pursuant to general principles of the Waste Law and detailed requirements on handling the procedure of collecting and treating waste. The aforementioned amendment of the Waste Law of November 2021 also introduced certain guidelines on managing construction waste, included in chapter 6A in division VII WL. These guidelines are based on an obvious obligation of selective collection of this waste which distinguishes between its identified fractions (wood, metals, glass, plastics, plaster, mineral waste, including concrete, bricks, tiles and ceramic materials and stones – Article 101a(1)). This obligation does not apply to construction waste generated in households and in selective municipal waste collection points and construction and demolition waste for which the law does not provide the obligation to hold waste records[13] specified in provisions issued pursuant to Article 66(5). The legislator has stipulated an adjustment period for these requirements which enter into force on 1 January 2023.

When we consider the possibilities of using substances or objects obtained especially from repair (repair and construction) works in a place other than a construction (repair) site from which they originate, we would have to acknowledge that such a possibility will result mainly from the assessment of the nature of a specific substance – in the context of it obtaining the character (status) of waste or not, which in the context of non-qualification to the waste category has been analysed above. As has been acknowledged, the assessment of acquiring the status of waste or failure to do so must be always based on a general definition of "waste" under Article 3(1)(6) WL. While I do believe we could possibly recognize the aggregate referred to in the previous paragraph as non-waste or not qualify it in the category of waste, such an approach cannot be proposed towards brick or cement rubble. In the majority of cases rubble cannot be used as material directly used in its original function; it must be adjusted in its essence to a specific function that allows it to be used in constructing another building structure, that is – looking through the prism of waste laws – subject to recovery operations. It is not a "construction product" either. In such a situation we are dealing with non-usability of such rubble which is

[13] Provision of Article 101(2) that releases from the obligation points out that it refers to waste identified in the regulation of the Climate Minister of 23 December 2019 on types of waste and quantities of waste for which waste records are not obligatory (Journal of Laws item 2531); however, we need to admit that this also refers to this exemption from the obligation to hold waste records, identified in Article 66(4) WL.

an element of the concept of "disposal". Still though, such non-usability does not have to be permanent, it may be removed during recovery (e.g. by being ground in a crusher, sorted in a sifter or cleaned of contaminants). Nonetheless, rubble itself as waste in such a situation has undisputed economic value. Such value, however, does not rule out obtaining the status of waste and, on the other hand, it should result in actions that serve to restore its practical value and to use the material obtained to possibly replace natural (raw) materials.

Another issue that must be addressed in the analysed context is the activity that involves sorting waste. The WL amendment of 1 January 2022 introduced the sorting of waste to the definition of "managing waste" (Article 3(1)(2) WL) (according to the current content of the first part of the definition, managing waste involves "collecting, transporting or treating waste, including the sorting of it..."). Based on the addition to the definition, we should assume that sorting is not always accommodated in the concept of treatment and thus demolition material that requires sorting must be treated. Given that, it is subject to an activity characteristic to waste management, thus must be recognized as waste. As has been pointed out before, I believe that simple mechanical cleaning of an object (which primarily was a construction product) obtained as a result of demolition activities (e.g. removing soil or sand from an undamaged cement curb or a pavement slab or brick, sieving off soil, sand or plant parts from the aforementioned aggregate), that allows their reuse in the same function without any further "facilitations", will not constitute waste treatment. On the other hand, sorting rubble into e.g. brick rubble and cement rubble should be considered treatment.

3. CONSTRUCTION WASTE AND THE LEGAL INSTITUTION OF "LOSING OF THE STATUS OF WASTE"

The recovery operations applied towards perhaps the most characteristic construction and repair waste, that is construction rubble, may possibly be associated with the institution of the "end-of-waste status". This measure has been expanded by most recent regulations (WL amendment of November 2021) and is regulated primarily by provisions included in Article 14 WL. The latter are quite problematic in interpretation if we are to be frank [Górski 2021a, 20; Idem 2021b, 18].

It seems that a regulation analogous to the one on crushed asphalt is called for. It should establish premises for the end-of-waste status through activities carried out on construction rubble aimed to prepare this rubble in operations of recovery of material that replaces natural aggregate.[14] Until

[14] Regulation of the Minister for Climate and the Environment of 23 December 2021

such a law is passed, it would be possible to use the form of individual consent by introducing relevant provisions to the waste treatment permit, which is stipulated in existing provisions of Article 43 WL. It would be worth obtaining the opinion of construction supervisory authorities. In the context of the formulated suggestion that refers to obtaining the opinion of the construction supervisory authority, we need to point out that even though the law does not stipulate a formal obligation to obtain such an opinion at the moment (July 2022), this suggestion is rooted in the provisions of Article 81(1)(1c) of Construction Law. They stipulate that construction supervisory authorities are responsible for, for example, supervision and inspection of compliance with construction law. Such review should include compliance of design and construction measures with technical and construction regulations and principles of technical knowledge. I believe this is a basis for these authorities to assess the treated waste's practical value for building works. It is also worth noting that using the phrase "end-of-waste status", regardless of the legal forms available now (meeting normatively specified requirements or requirements specified by an individual decision), is beneficial for both interested parties. The waste holder (following recognition of the end-of-waste status of truly former waste) and the entity taking over the former waste alike gain from it because transfer of such already former waste (and now a substance or an object) does not require compliance with rules of procedure for waste. It is particularly noticeable in the context of an obligation to hand it over to the so-called legal waste holders (Article 27(2) WL) or in the context of transport and the related obligation to name the recipient with the status of the so-called legal waste holder.

In a practical example, application of these arrangements would look as follows: concrete rubble created as a result of demolition of an old road surface made of concrete (which, by the way, is quite a typical problem associated with repairs of pre-war motorways in the western regions where such waste is quite abundant) has the nature of waste which may be used after being cleaned and crushed.

From the formal and legal point of view, such activities should be considered as generation of waste (taking off of an old surface and obtaining concrete rubble as waste) and as its preparation for re-use (cleaning and crushing intended to obtain a material that is analogous to natural aggregate). The lack of a practical value of the obtained substance in direct use and having to prepare it for re-use (treatment) is the criterion that determines whether the resulting rubble is counted as waste. This said, adequate treatment could be considered to lead to a situation in which rubble

on specifying detailed conditions for the end-of-waste status for crushed asphalt waste, Journal of Laws item 2468 – new version replacing regulation of November 2021, which became ineffective on 1 January 2022 due to the amendment of the delegation for issuing it in WL.

prepared to play the function of aggregate loses its status of waste by meeting the premises stipulated in the regulation or in an administrative decision.

In the current state of affairs, where there is no adequate implementing regulation, one would have to obtain a waste recovery permit and such a decision could name the premises for the end-of-waste status for the treated rubble (the basis for it is stipulated in Article 43(2)(3a) WL). The problem lies in the fact that there are no set standards for specifying and for the scope of such requirements provided in a decision. That being said, this is a problem both for the authority (which formulates the content of the waste treatment permit) and the applicant, who must demonstrate in their application that they meet such requirements (Article 42(2)(6a) WL). A crucial element in such a situation for specifying the premises for the end-of-waste status could involve taking into consideration the material so obtained in the design draft, along with possible identification of its obligatory features. The requested permit would concern preparation of waste for re-use (preparation operation R-12) and permission for final use of the waste prepared for a given manner of using it (operation R-5). Combining both operations in one permit would be possible it they were both carried out by the same holder and it would be a relatively easier case.

On the other hand, in a situation where another holder was to actually use it, there seem to be two options. In the first one, a decision for carrying out preparatory operations would be to express consent only for this operation. As a consequence, the entity that takes over the prepared aggregate (which is still considered waste after preparatory operations) will become the waste holder and is naturally obliged to obtain permission for the final use of the waste, which would also specify premises for such use (permission for treating waste in the form of recovery that specifies requirements for carrying out such a recovery). On the other hand, a possible second solution would involve obtaining confirmation of the end-of-waste status directly after carrying out preparatory operations. Then, upon completion of this operation and having agreed on the meeting of the requirements for the end-of-waste status specified in the decision, the treated waste ceases to be waste and may be handed over for intended use a product, thus non-waste (a useful product). As a result, the entity that uses this product would naturally have to obtain permits for recovery and would not become the waste holder, thus would not be subject to waste regulations. It seems obvious in such a situation that the entity that takes over a given product (which is not waste any more) may adjust such product to their own needs that result from the intended use. However, it should be such final use that was identified in specified requirements for the end-of-waste status (in the example: use of natural aggregate as substitute); the entity that uses this product should also comply with possible requirements resulting from construction laws

that refer to the given type of use. The ultimate conclusion for the example analysed would then be as follows – construction rubble loses the status of waste after being prepared for re-use in the function intended for natural aggregates used for construction purposes and after meeting requirements that such aggregates should meet; subjecting such a product (former waste), treated as a substitute of aggregate, to operations that allow obtaining the degree of granulation appropriate to the intended purpose should not be considered as further treatment of the waste [Górski 2022b, 24].

CONCLUSIONS

This analysis allows a conclusion that the amendments, introduced at the beginning of this year, which addressed handling construction waste, are heading in the right direction, compliant with the assumptions of circular economy and current EU regulations. At this, it seems that they require a certain clarification, especially in the context of principles of defining the criteria for the end-of-waste status for this type of waste (and at least certain kinds of waste). This should be done by means of general laws, that is implementing regulations, or by means of more precise guidelines on defining these requirements in a waste treatment permit. However, certain doubts do arise in differentiating activities that involve direct re-use of specific construction products, without qualifying these products to the category of waste, and activities that involve preparation for re-use, carried out for products that have already been recognized as waste. It is indeed a question of whether a construction product used in such a function once may be reused in the same function, along with a possible specification of condition for such use. This question is addressed towards construction regulations that concern requirements necessary for construction products.

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THE PROFESSION OF PHYSIOTHERAPY ON THE INTERNAL MARKET OF THE EUROPEAN UNION

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Abstract. The basic legal act governing professional qualification in the European Union (and the countries of the European Economic Area and Belgium) is Directive 2005/36/EC of the European Parliament and of Council of 7 September 2005 on the recognition of professional qualifications. To practise a profession outside the country in which it was earned, a citizen must comply with certain legal requirements. The author discusses the Polish Act on the Profession of Physiotherapist. The EU has established a European Professional Card. Its holder is entitled to the same rights and privileges, as well as assuming obligations, across the EU as in the state in which the profession was learned. In Poland, pursuant to Article 5 of the Act on the Profession of Physiotherapist, the term "physiotherapist" may only be used by a person who has the right to practice the profession, and the professional title itself is protected by law.

Keywords: profession of physiotherapist; regulated profession; license to practice; free movement of services; European professional card

INTRODUCTION

The European Union is an international organization that originated from the European Communities established in the 1950s. One of the goals pursued by the Communities, and in particular the European Economic Community, was to guarantee a balanced and constant economic growth of the Member States, and to create an internal market that would enable the implementation of four freedoms: movement of workers, movement of services and establishment, movement of capital and payments, and movement of goods. In the initial period, the internal market implemented the indicated freedoms only in the economic context, i.e. EU citizens could move only after proving the economic significance of their activity. The first treaty amending the founding treaties – the Single European Act – introduced the concept of an internal market, which was also based on the above-mentioned freedoms, however, it significantly changed the manner in which they were implemented. The treaty that was of key importance in terms of the concept and implementation of the freedoms of the internal market was the Treaty on the European Union that established EU citizenship, including civil rights.

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One of these rights is the freedom of movement and residence in the territory of the host country. The indicated modification resulted in the change of one of the existing freedoms to the freedom of free movement of persons, which initiates each of the EU personal freedoms. Currently, in accordance with the provisions of Article 26(2) of the Treaty on the Functioning of the European Union, "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."[1] In the context of the subject of this article, the freedom of movement of services and establishment, which allows EU citizens to move in order to pursue their professional activity in other EU Member States, is of key importance. Thanks to the legal regulations in force in the Member States, self-employed individuals, representatives of liberal professions and legal persons can permanently and constantly conduct business activity in another EU country (TFEU, Article 49) or temporarily offer and provide services while remaining in their country of origin (TFEU, Article 56).

The free movement of establishment and services is conducive to mobility of workers and enterprises in the EU, but it also requires detailed legal regulations that set, among others, the rules for recognition of professional qualifications.

The elements that are of great importance in the context of the profession of physiotherapy are the Directive on the recognition of professional qualifications and the European Professional Card introduced under it. The Card is a document awarded by the competent national authorities to a specific professional group that is able to practice the profession in the host country without additional formalities.

The aim of this article is to demonstrate that the regulations currently in force in Poland enable one to obtain the indicated document and the freedom of movement within the EU.

1. THE FREEDOM TO PRACTICE PHYSIOTHERAPY IN THE EUROPEAN UNION

The basic legal act that enables one to practice a regulated profession in the European Union (and the countries of the European Economic Area and Switzerland) is Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications. This document sets the rules which are the basis for each Member State to recognize professional qualifications obtained in another

[1] Treaty on the Functioning of the European Union, OJ EU C 202 of 6 June 2016 [hereinafter: TFEU].

Member State, and thus allow a person with such qualifications to practice their profession within its borders.[2] It is worth emphasizing that these provisions refer to regulated professions,[3] and thus it has become necessary to define the concept of a regulated profession. In Title I, Article III of the Directive, a regulated profession is defined as "a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit" (Directive 2005/36/EC, Article 3(2)).

If a given profession is regulated in Poland, a person who obtained qualifications in another Member State needs an official recognition of these qualifications. Similarly, recognition is necessary if a person acquired qualifications in Poland and intends to work in another Member State in a profession regulated there.[4]

The possibility of practicing a profession outside the country in which the qualifications were obtained is facilitated for individuals who practice certain regulated professions (a general practitioner and a specialist, a dentist, a pharmacist, a general nurse, a midwife, a veterinarian, and an architect). They automatically have access to their profession in another country. Other individuals who wish to practice their profession in the EU must undergo an appropriate procedure that consists in submitting an application and all relevant documents.[5] It is clear that the qualifications required for a given profession may vary from country to country. The purpose of the recognition procedure is to identify significant differences that may affect the level of services provided. If the competent authority finds substantial differences in the process of education or in the scope of professional activities in a given profession between the country where the qualifications were obtained and the host country, as well as in order to verify whether the knowledge and skills acquired in the process of gaining professional

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[2] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255/22 [hereinafter: Directive 2005/36/EC], Title 1, Article 1.

[3] In the case of professions that are not regulated in Poland, the decision to employ an employee with qualifications obtained in another EU Member State belongs to the employer.

[4] Each EU Member State decides to regulate access to professions. Thus, the same profession may be regulated in one EU Member State while not regulated in other Member States.

[5] Member States specify in separate legal acts the principles of recognition of qualifications. In Poland, such a document is the Act of 22 December 2015 on the Rules Governing Recognition of Professional Qualifications Acquired in the Member States of the European Union.

experience by the person wishing to practice the profession in the host country can compensate for these differences (Directive 2005/36/EC, Article 14), the Directive provides for the possibility of imposing compensation measures in the form of an adaptation period or an aptitude test (Directive 2005/36/EC, Article 7), with the principles of their organization preliminarily outlined in the Directive (Directive 2005/36/EC, Article 3).

The result of such recognition of qualifications is that a person practicing a given profession is subject to the same laws, has the same duties and privileges as the citizens of the country in which the profession will be practiced. The laws in question are those relating directly to the profession, including regulations on professional liability (Directive 2005/36/EC, Article 5).

Under the Directive, individuals who intend to practice their profession in another Member State retain their professional title (if any) and it is given in the language of the country in which the qualifications were obtained (Directive 2005/36/EC, Article 7). On the other hand, if a given profession is regulated in the host Member State by an association or organization (in Poland it is The Polish Chamber of Physiotherapists – KIF), the possibility of using one's professional title is conditional on the presentation of proof of membership in these associations or organizations (Directive 2005/36/EC, Article 52). However, this condition does not apply to the seven regulated professions mentioned above, and their representatives adopt the professional title in force in the host country (Directive 2005/36/EC, Article 7). What is important from the point of view of a physiotherapist is the fact that in the case of professions related to public health or safety, the competent authority of the host country may verify the professional competence of the person wishing to practice a given profession – this also applies to those professions where qualifications are recognized automatically (Directive 2005/36/EC, Article 7). However, it should be noted that the EU legislator introduced an additional element that strengthens the migration capacity of certain professions, i.e. established the European Professional Card. The aforementioned Directive 2005/36/EC provided for the introduction of a professional card that would enable career monitoring of individuals practicing a given profession. However, it was only the Directive of 20 November 2013 that established such a document, and defined it as "an electronic certificate proving either that the professional has met all the necessary conditions to provide services in a host Member State on a temporary and occasional basis or the recognition of professional qualifications for establishment in a host Member State."[6] Therefore, the purpose of the card

[6] Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, OJ L 354/132 of 28 February 2013 [hereinafter: Directive

is to support the mobility of employees and entrepreneurs, and to facilitate the process of recognition of professional qualifications. It is issued in order to enable pursuing one's professional activity on a permanent basis, it should be treated on an equal footing with any other decisions regarding recognition of qualifications, and it is intended to supplement the registration requirements related to a given profession. These cards can be obtained in the country where qualifications were obtained, provided that an application and all appropriate attachments that confirm one's qualifications are submitted. In Poland, the European Professional Card for physiotherapists is issued by KIF.

2. PHYSIOTHERAPY IN POLAND

Physiotherapists are the third largest (after nurses and doctors) professional group of medical personnel in Poland. As of 7 January 2023, over 74,000 people are registered in the National Registry of Physiotherapists. The profession of physiotherapy, despite some doubts [Łakomski, Kędziora-Kornatowska, Podhorecka, et al. 2014, 48ff.] related to the lack of legal regulations, was considered a medical profession [Karkowska 2012, 298] and functioned as such in the Polish health care system [Migała 2015, 70-71]. In the Regulation of the Minister of Labor and Social Policy of 7 August 2014 on the classification of professions and specialties for the needs of the labor market and the scope of its application, it was classified in the category "health care specialist", and a distincion was made between physiotherapists and physiotherapy specialists.[7] However, due to this profession's specificity and subject matter, and bearing in mind patient safety, the community of physiotherapists requested for years the introduction of legal regulations that would define the principles of practicing the profession [Wierdak and Kiljański 2015, 6-12]. A particularly important provision in the Act on the Profession of Physiotherapy[8] is Article 2, which defines the profession of physiotherapy as an independent medical profession. This change raised the status of the profession and gave physiotherapists specific rights. Pursuant to APP, a physiotherapist has the right to: keep the patient's medical records; access medical records; obtain from the entity providing health care services full information about the state of the patient's health, diagnosis, proposed diagnostic methods, treatment, rehabilitation,

2013/55/EU], Article 1(1)(k).

[7] Regulation of the Minister of Labor and Social Policy of 7 August 2014 on the classification of professions and specialties for the needs of the labor Mmarket and the scope of its application, Journal of Laws of 2018.

[8] Act of 25 September 2015 on the Profession of Physiotherapy, Journal of Laws of 2015, item 1994 [hereinafter: APP].

preventive methods and foreseeable consequences of the actions taken, to the extent necessary to provide the patient with physiotherapeutic health care services; demanding from the doctor justification of the need to perform a specific order in the field of physiotherapy; in the event of justified doubts – physiotherapists have the right to refuse to perform the service.

3. EDUCATION OF PHYSIOTHERAPISTS IN POLAND

The Act of 25 September 2015 on the Profession of Physiotherapy has become a document guaranteeing that only a person with appropriate qualifications can become a physiotherapist, which is supposed to increase the effectiveness of treatment and patient safety [Henc 2018, 364]. The APP contains clear guidelines on the principles of practicing the profession, obtaining the license to practice, the scope of competences, duties and professional responsibilities of physiotherapists, as well as education requirements.

In Poland, since 1 October 2017, physiotherapists have been educated only at five-year uniform master's studies at various universities, including medical universities and physical education academies. Other individuals who want to use the title "physiotherapist" must meet the requirements that depend on the date of starting their studies. Firstly, those who started their education after 30 September 2012 and before 1 October 2017, must complete studies in the field of physiotherapy and obtain a Bachelor's degree (at least 180 ECTS credits, including at least 100 ECTS credits in physiotherapy) or an additional Master's degree (at least 120 ECTS credits, including at least 60 ECTS credits in physiotherapy). Secondly, individuals who started their education after 31 December 1997 must have a degree in physiotherapy (Bachelor's or Master's degree). Thirdly, individuals who started their education before 1 January 1998 must have a degree in functional rehabilitation or rehabilitation (Master's degree), or a degree from the Academy of Physical Education (Master's degree) and a first or second degree specialization in functional rehabilitation. Fourthly, individuals who started their education before 1 January 1980 must have a degree in physical education (Master's degree) and a two-year specialization in therapeutic gymnastics or functional rehabilitation, or a degree in physical education (Master's degree) and a three-month specialized course in rehabilitation in accordance with the regulations of the Central Committee of Physical Culture and Sport [Styczyński and Sywula 2016, 4-5]. Other individuals who are allowed to use the title "physiotherapist" and provide physiotherapy services to a limited extent are those who graduated from a public or non-public post-secondary school with the rights of a public school before the date of entry into force of the APP.

The APP is further specified in the Regulation of the Minister of Health of 27 June 2018 on a detailed list of professional activities of a physiotherapist. It contains a list of professional activities of a physiotherapist within individual professional tasks and the corresponding level of education necessary to perform them. The above-mentioned regulation defines three levels of education of a physiotherapist, i.e.: basic, extended, specialist. The first of them – basic – is held by a person who graduated from a public post-secondary school or a non-public post-secondary school with the rights of a public school and obtained the professional title "physiotherapy technician". The next level – extended – is held by a person who obtained a Master's degree diploma that confirms their qualifications. The third level – specialist – is held by a physiotherapist with the title "physiotherapy specialist" or the title "specialist in functional rehabilitation" of the second degree.[9] Graduates can work in health centers, hospitals, private practices, sports clubs, associations and foundations for the disabled, special and inclusive schools, as well as in companies that produce orthopedic supplies. Additional ways of practicing the profession of physiotherapy also include: teaching the profession, scientific and research work, managing the work of physiotherapists, employment in administrative positions related to planning, organizing or supervising the provision of health care services [Słowińska 2018, 4-8].

From 1 April 2019, the legislator expanded the catalog of activities performed by a physiotherapist, which guarantees the individuals employed in entities that do not conduct medical activity (nursing homes, sports clubs) the possibility of retaining the right to practice the profession after a period of 5 years from the date of employment.[10]

4. LICENSE TO PRACTICE PHYSIOTHERAPY (PWZF)

Pursuant to Article 5, the title "physiotherapist" may only be used by a person who has been authorized to practice the profession, and the professional title itself is legally protected.

Mere completion of relevant studies does not give one the right to practice the profession of physiotherapy, and in particular to provide health care services. The element that is necessary to practice the profession is obtaining the so-called license to practice physiotherapy. The person who has the license may use the professional title "physiotherapist". Therefore, one cannot use the above title without having such a license. According to Article 13

[9] Regulation of the Minister of Health of 27 June 2018 on a detailed list of professional activities of physiotherapists, Journal of Laws item 1319.

[10] Ibid.

APP, the license to practice physiotherapy is granted to individuals who meet the following conditions jointly: they have full legal capacity; their health allows them to practice the profession, which is confirmed by a medical certificate or other document stating the lack of contraindications to practice the profession required in a Member State of the European Union other than the Republic of Poland or the Swiss Confederation, or in a Member State of the European Free Trade Association (EFTA) – a party to the agreement on the European Economic Area, issued by competent entities in that country; they demonstrate sufficient knowledge of the Polish language to practice as a physiotherapist; with their current behavior, they guarantee the proper fulfilment of professional duties, in particular, they have not been convicted by a final judgment for an intentional crime against life and health, against sexual freedom and decency, and for actions specified in Article 207 and Article 211 of the Penal Code;[11] they have a diploma, a certificate or other documents that confirm their qualifications to practice as a physiotherapist. After completing 5-year studies in the field of physiotherapy, the interested person submits an application to the Polish Chamber of Physiotherapists for a license to practice. On the basis of resolutions on confirming or granting the right to practice the profession, the Polish Chamber of Physiotherapists makes an entry in the National Registry of Physiotherapists and issues a document called "Physiotherapy License". According to Article 28 APP, a physiotherapist, before commencing his or her tasks in a given entity, should submit a document that confirms their right to practice the profession, while the entity intending to employ a physiotherapist, regardless of whether on the basis of an employment contract or other civil law contract, should request such a document. This is important because anyone who allows services to be provided by an unauthorized person is subject to a fine or restriction of liberty.

Further paragraphs of Article 13 APP define in detail the documents that confirm the required education and enable one to apply for the license. Ultimately, the right to practice as a physiotherapist will be available to individuals who, after 1 October 2017, started uniform 5-year master's studies that covered 300 ECTS points, including at least 160 points in the field of physiotherapy, and completed a six-month apprenticeship. The APP also assumed that a State Physiotherapy Examination would be obligatory for such individuals, however, at the time of submitting the article to print, the amendment to the APP that abolishes the examination is pending the president's signature.[12] The abandonment of the exam is intended

[11] Act of 6 June 1997, the Penal Code, Journal of Laws of 2018, item 1600 and 2077.

[12] See https://kif.info.pl/sejm-przeglosowal-nie-bedzie-egzaminu-pef-wazna-informacja-dla-tegorocznych-absolwentow/ [accessed: 13.08.2022].

to facilitate the entry into the labor market for people who completed education in the field of physiotherapy.[13]

The introduction of the authorization requirement and the entry in the National Registry, as well as legal protection of the professional title "physiotherapist", caused significant difficulties for individuals who had previously run a business in this field. Prior to the introduction of the APP, anyone could call themselves a physiotherapist and run a business that consisted in providing physiotherapy services [Jacek 2019, 133-56]. By 31 May 2018, all those who still wanted to use this title had to have their qualifications verified. As a result, owners of physiotherapy offices or salons had to improve their qualifications in order to continue using this title or change the name of the business to a massage studio or a massage parlor. If they refused, they had to discontinue some services. This is because some of these services are reserved only for physiotherapists with appropriate qualifications. According to many physiotherapy practitioners, the APP will make it possible to draw clear boundaries between physiotherapists and masseurs who had completed a short physiotherapy course that did not give them any chance to gain thorough knowledge of functional anatomy or physiology, and yet they were present on the market as physiotherapists and competed with educated professionals.

Regulating the profession of physiotherapy also has a positive effect on patient safety. The patients are assured that they are under the care of specialists with appropriate experience and qualifications, and in the event of a medical error, pursuing claims has become easier. The introduction of the APP makes obtaining the title "physiotherapist" more time-consuming and demanding, and the obligations indicated in the APP complicate performing physiotherapy activities, however, the new regulations allow for greater participation of physiotherapists in the entire process of diagnosing and treating a patient, which seems particularly important in the face of the population's aging.

5. STANDARDS OF PRACTICING THE PROFESSION OF PHYSIOTHERAPY

In order to determine the legal status of the profession of physiotherapy it is necessary to analyze whether it is a regulated profession, a liberal profession, and a profession of public trust. The applicable regulations do not

[13] See https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy-o-zawodach-pielegniarki-i-poloznej-oraz-niektorych-innych-ustaw [accessed: 10.08.2022].

provide precise definitions of all the above terms[14] and their explanation should be sought in the literature [Kłusek 2016, 44-56].

The definition from the Directive on the recognition of professional qualifications quoted above describes the essence of a regulated profession (Directive 2005/36/EC, Article 3(2)). It clearly emphasizes the need to have a legally defined education and professional title. The Act on the Profession of Physiotherapy clearly included it among such professions.

In the judgment of the Constitutional Tribunal of 19 October 1999, it was indicated that the essence of the freedom to exercise professional activity is a legal status in which everyone has access to the profession and a real possibility to practice it (conditional upon qualifications and talents), and practicing the profession is not subject to the rigors of subordination.[15]

According to A. Krasnowolski, a liberal profession is practiced "on the basis of appropriate education, independently (which does not necessarily mean individually) and on one's own responsibility in a professionally independent manner, in order to offer intellectual or conceptual services in the interest of the client or in the public interest. The important characteristics of a liberal profession are: the mission to practice the profession, compliance with deontological rules, guaranteeing professional secrecy and a relationship of trust between the person practicing such a profession and the client, and bearing special responsibility due to the manner in which the service is provided" [Krasnowolski 2013, 69-80].

J. Jacyszyn emphasizes that practicing a liberal profession requires detailed legal regulations that indicate its organizational and legal forms, and, like others, he draws attention to the necessity of having appropriate qualifications and professional independence. He also indicates the obligation to belong to a professional self-government when practicing a liberal profession [Jacyszyn 2015, 238].

The analysis of the above sources leads to the conclusion that the most important criteria for a liberal profession include the need to have appropriate qualifications, professional independence, and the obligation to belong to a professional self-government. While referring to professional independence, the Act of 9 November 2018 Amending the Act on Medical Activity and Certain Other Acts[16] should be mentioned. This document

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[14] These terms are used in various legal acts, but without definitions. For example, the concept of a liberal profession appears in the Act of 15 September 2000, the Commercial Companies Code, with regard to the possibility of establishing partnerships by partners in order to create a liberal profession, and in the Act of 29 August 1997, Tax Ordinance, where the legislator, in Article 3 pt. 9, recognized pursuing liberal professions as a type of economic activity.

[15] Judgment of the Constitutional Tribunal of 19 October 1999, ref. no. SK 4/99, OTK ZU 1999, No. 6, item 119.

[16] Act of 9 November 2018 Amending the Act on Medical Activity and Certain Other Acts,

confirms the presence of physiotherapy in the catalog of liberal professions and enables one to practice the profession of physiotherapy as part of their apprenticeship.

In Article 17 of the Constitution of the Republic of Poland one may find the concept of a profession of public trust, combined with the possibility of establishing professional self-governments representing these professions under statute. However, there are no criteria for identifying such professions. In the literature on the subject, these criteria are: the regulated nature of a given profession, the service provided in person, professional education, the structure of a liberal profession, professional independence, professional ethos, professional secrecy, special responsibility, and corporate self-governance. The literature on the subject also emphasizes the specific mission of the profession of public trust, i.e. it is performed not for remuneration, but to satisfy the public interest [Młynarska-Sobaczewska 2009, 740]. According to P. Sarnecki, "practicing a profession of public trust is additionally specified by the standards of professional ethics, the specific content of the oath, the tradition of corporate governance, or the special nature of higher education and specialization obtained. When a person practicing this profession is admitted by another person to the sphere of their privacy, this admission must be correlated with the trust that it will not be abused" [Sarnecki 2005, 9]. Similarly, A. Młynarska-Sobaczewska emphasizes that professions of public trust "are professions the practice of which involves providing specific services significant from the point of view of the basic goods of an individual – such as health, protection of property interests, personal rights and others" [Młynarska-Sobaczewska 2009, 740].

The specific features of the profession of public trust were defined by the Constitutional Tribunal in its judgment of 24 March 2015. It emphasized that these features are: the need to ensure proper manner of practicing the profession, and in accordance with the public interest; provision of services and interaction between the representatives of the professions in question and natural persons in the event of potential or real threat to goods of special nature; diligence and attention to the interests of individuals using their services; caring for their personal needs; ensuring the protection of their rights guaranteed by the Constitution; having specific qualifications to practice the profession in question and giving guarantees of practicing it in a proper manner, consistent with the public interest; relative independence in practicing the profession.[17]

Journal of Laws item 2219.

[17] Judgment of the Constitutional Tribunal of 24 March 2015, ref. no. K 19/14, OTK ZU 2015, No. 3A, item 32.

The regulations of the APP require physiotherapists to meet all these criteria and they specify the standards for practicing the profession. Therefore, the profession of physiotherapy should certainly be included among the professions of public trust. In the Act on the Profession of Physiotherapy, Article 4(1) defines the basic legal standards for practicing the profession. According to this regulation, physiotherapists should practice their profession with due diligence, in accordance with the principles of professional ethics, with respect for the patient's rights, with care for their safety, and taking into account the current medical knowledge [Paszkowska 2015, 72-74]. It is difficult, if not impossible, to specify these concepts, and their exact definitions regarding physiotherapists are not found in legal acts. Therefore, explanations of such terms as diligence or care for safety should be sought in the literature [Borysiak 2017, 79-96] and legal acts on other medical professions [Kłusek 2016, 44-56]. According to the available sources, due diligence should be generally defined as a pattern of conduct developed on the basis of the rules of social coexistence, legal regulations, customs and professional experience, which was created in order to best and correctly fulfil professional obligations[18] [Banaszczyk and Ganecki 2014, 19].

The provisions of the APP state that physiotherapists should respect the patient's rights on several levels. First of all, they have the obligation to inform the patient about the scope of health care services provided, about the proposed methods of diagnosis and treatment and their possible consequences, as well as to obtain the patient's informed consent to therapy.[19]

The care for the patient's safety is defined in the literature as the physiotherapists' responsibility for the negative effects of violating the safety rules concerning the patient using their services [Mikos et al. 2017, 502].

The rules of professional ethics for physiotherapists are provided in the resolution of the Polish Chamber of Physiotherapists No. 20/I KZF/2016 of 29 December 2016 on the Principles of Professional Ethics for Physiotherapists.[20] This document contains 10 standards for practicing the profession of physiotherapy and indicates, among others, the obligation to practice the profession within the scope of knowledge possessed,

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[18] Judgment of the Court of Appeal in Łódź of 16 January 2014, ref. no. I Ac1148/12, Legalis.

[19] Act of 25 September 2015 on the Profession of Physiotherapy, Journal of Laws item 1994.

[20] The Ethical Code of Conduct for Physiotherapists of the Republic of Poland was also established by the Polish Asssociation of Physiotherapy in 2009. The document developed by a team led by Dr. habil. Wojciech Kiebzak resembles other documents, i.e. Code of Medical Ethics and Code of Professional Ethics for Nurses and Midwives of the Republic of Poland. It contains the oath and the principles of relations with the patient and society, as well as those concerning one's own activity and scientific research. It also includes a provision on continuing development.

to enable access to rehabilitation for every person, to constantly improve qualifications, and the obligation of professional secrecy.[21]

Article 4 of the Act on the Profession of Physiotherapy and Article 6 of the Act on Patient Rights and Patient Ombudsman stipulate that patients have the right to receive health care services that meet the requirements of the current medical knowledge.[22] The key concept here is timeliness [Widłak 2017, 610], which has no definition in legal acts, but is referred to by various authors [Haberko 2009, 49], especially in relation to health care services provided by doctors. However, it seems justified to transfer these definitions to the field of physiotherapy, especially in the context of the standards of professional practice. In general, it may be assumed that a physiotherapist should provide health care services in accordance with confirmed scientific achievements in the field of medical sciences, but also in accordance with the guidelines developed by the authorities of the Polish Chamber of Physiotherapists [Henc 2018, 364].

6. PROFESSIONAL ACCOUNTABILITY

Physiotherapists bear legal responsibility for their professional activity in accordance with the principles provided in Chapter 7 APP. They are held accountable if they commit the so-called professional misconduct, which is referred to in Article 85 as violation of the rules of professional ethics or rules of practicing the profession. In the case of professional misconduct, the following proceedings are conducted: preliminary inquiry – aimed at examining whether there are grounds for initiating investigative proceedings; investigative proceedings – aimed at determining whether a given activity may be qualified as professional misconduct, and if so, identifying the person culpable and collecting evidence for the Disciplinary Tribunal; disciplinary proceedings – aimed at holding the person culpable to account; enforcement proceedings – enforcement of the judgments given in the course of proceedings before the Disciplinary Tribunal. Disciplinary proceedings are two-instance, so it is possible to appeal against the judgment of the Disciplinary Tribunal to the Higher Disciplinary Tribunal. On the other hand, a valid judgment of the Higher Disciplinary Tribunal may be appealed against by filing a cassation appeal to the Supreme Court.

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[21] Resolution of the Polish Chamber of Physiotherapists No. 20/I KZF/2016 of 29 December 2016 on the Principles of Professional Ethics for Physiotherapists, https://kif.info.pl/wp-content/uploads/2017/01/20-I-KZF-2016-zal.pdf [accessed: 02.09.2022].

[22] Act of 6 November 2008 on Patient Rights and Patient Ombudsman.

CONCLUSIONS

Nowadays, the profession of physiotherapy has become one of the most needed and wanted both on the Polish and EU market. There is no doubt that its importance will increase due to the aging of Europe's population and the consequences of changing lifestyles. Each Member State has exclusive competence in shaping the education system and establishing the conditions for practicing the profession in the country. Without affecting the indicated area, the European Union has created legal regulations that enable qualified individuals to move and practice their profession in any Member State. However, the basic condition in the indicated process is the precise shaping of the processes of education and acquisition of professional titles. The above considerations indicate that the current solutions adopted in Poland regarding the profession of physiotherapy meet this requirement.

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CHANGES IN THE LABOUR CODE – NEW CHALLENGES FOR EMPLOYERS

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Abstract. The COVID-19 epidemic affected the labour market in an unprecedented way and forced employers and employees to switch to remote work. The idea of home office garnered many supporters, both among employers and employees. Remote work during the epidemic was, in many cases, a necessity, and now it is becoming an opportunity and a choice. Although existing in the previous legislation, provisions on remote work were adjusted in response to and following the epidemic and lockdowns. The relevant amendment to the Labour Code offers employers an opportunity to control the sobriety of employees and control the presence of substances having a similar effect to alcohol. This legal solution had been awaited and proposed by employers' organisations for several years. The article aims to discuss the most important changes in the amended Labour Code and to indicate challenges that employers are soon to face.

Keywords: remote work; Labour Code; employee sobriety check

INTRODUCTION

The Labour Code of 26 June 1974, which is currently in force, has already been amended dozens of times, which is understandable because the regulation has inevitably lost its relevance. Due to the COVID-19 pandemic that broke out in 2020, many employers directed employees to work remotely. From remote work, introduced by the special regulation contained in the Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them[1] was used by many employers.

In the literature, the concepts of remote working and telework were sometimes regarded as the same and used interchangeably [Dolot 2020, 36]. As D. Makowski rightly notes, remote work and telework do not remain in relation to each other in the conceptual "absorption", because not every case of remote work is telework and not every telework has the characteristics of remote work [Makowski 2020, 12]. In the current Labour

[1] Journal of Laws of 2021, item 2095 [hereinafter: the COVID-19 Act].

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Code (before the amendment) only telework was regulated. In accordance with Article 67^5 of the Labour Code, work can be performed regularly outside the workplace, using electronic means of communication as defined in regulations on the provision of electronic services (telework). On the other hand, the COVID-19 Act in Article 3(1) introduced into the legal order the concept of remote work, which should be understood as the right of the employer to commission the employee to perform the work specified in the employment contract, outside the place of its permanent performance for a specified period of time during the validity period, as well as up to 3 months after the cancellation of the epidemic emergency or epidemic state, announced due to COVID-19.

In June 2022, the Sejm received a government bill amending the Act – the Labour Code and some other acts, but work on the bill itself had been underway for almost three years. The amendment introduces a group of regulations setting remote work and sobriety control or control of substances having a similar effect to alcohol. The introduction of the regulation of remote work permanently into the Labour Code is to contribute, among others, to improve the employment opportunities of people in a special situation on the labour market – including pregnant women, parents of young children or people caring for another member of the immediate family or another person remaining in the common household, having a disability certificate or a certificate with a significant degree of disability. An important and necessary change contained in the amendment is to enable employers to preventively control employees for the presence of alcohol or substances having a similar effect to alcohol. According to the amended changes, the employer will gain a number of tools that will allow them to independently check the sobriety of their employees and apply new disciplinary actions to the employees.

This is one of the most anticipated regulations on the Polish labour market. Employers have finally obtained a legal basis for organizing such work after the pandemic, but will the solutions contained in the revised Labour Code meet their expectations? It is difficult to answer this question unequivocally at the moment but probably the practice of application will allow to do it.

Due to the framework of the study, the aim of the article is to discuss the most important changes contained in the amendment to the provisions of the Labour Code and to indicate the challenges associated with them. Unfortunately, the analysis of the regulations probably raises doubts because, in my opinion, the regulations concerning remote work are too formalised and will make it difficult for employers to widely use remote work as a flexible form of employment. The excessive formalization of remote work in the course of preparation of the analysed bill was also indicated by,

among others, the Polish Banks Association, PGNiG or the Civil Aviation Authority.[2]

On December 1, 2022, The Sejm passed a bill amending the Labour Code. 430 deputies voted in favour of the amendment, 12 voted against (11 deputies from the Confederation and 1 deputy from the Law and Justice party), no one abstained. On December 2, 2022 in accordance with Article 52 of the Rules of Procedure of the Sejm, the text of the Act of 1 December 2022 amending the Act – the Labour Code and some other acts[3] was sent to the Senate and to the President of the Republic of Poland. On 15 December 2022, the Senate passed a resolution on the adoption of the Act amending the Labour Code Act and some other acts with 4 amendments. 99 senators voted in the Senate. 97 senators voted for the resolution with four amendments, no one was against it, and two abstained from voting. On 13 January 2023, the Sejm rejected all amendments of the Senate, and on January 27, 2023, the President of the Republic of Poland signed a law amending the Labour Code.[4]

1. REMOTE WORK

The implementation of remote work into the applicable provisions of the Labour Code was demanded by both employees, employers and representatives of the doctrine [Mitrus 2020a, 8; Idem 2020b, 4]. The remote work provided for in the Act replaced telework which was abolished. Remote work is also based on teleworking regulations as to how it should be implemented and the formal requirements enabling it to be applied to a given employer.[5] The legislator, taking into account the fact that in some workplaces telework was adopted and is still used, allowed employers to apply the provisions regulating teleworking in the current wording for 6 months from the date of entry into force of the Act amending the Labour Code.

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[2] List of comments submitted as part of public consultations of the bill amending the Labour Code, the Act on occupational and social rehabilitation and employment of disabled people and the Act on employment promotion and labour market institutions pp. 6-15 [hereinafter: List of Comments], https://legislacja.rcl.gov.pl/projekt/12356556 [accessed: 01.12.2022].

[3] Hereinafter: the Code of Administrative Procedure.

[4] Act of 1 December 2022 amending the Act – Labour Code and some other acts, Journal of Laws of 2023, item 240.

[5] In the opinion of the Centre for Research, Studies and National Legislation of the Council of Legal Advisors approximately 90% of the provisions of Chapter II of the second section of the Labour Code were directly or with minor changes transferred to the designed section II c (second section) of the Labour Code – p. 4, http://obsil.kirp.pl/wp-content/uploads/2021/08/Opinia-z-14.06.2021-r.-KP-praca-zdalna-final.pdf [accessed: 12.12.2022].

In accordance with the Act, remote work may be performed in whole or in part in a place indicated by the employee and each time agreed with the employer, including the employee's address of residence. Remote work will primarily be carried out using means of distance communication (Article 67^{18} of the Labour Code). This means that the work can be performed on a full-time basis as a remote job or in a hybrid form, e.g. 3 days a week at the employer's office and 2 days at the employee's place of residence. The place of remote work will always be the place indicated by the employee, and then each time agreed with the employer. And the word "each time" raised a number of objections, according to the Polish Bank Association. The content of this article raises the question of whether the employee can indicate more than one workplace for the purposes of remote work and whether the employee will be obliged to inform the employer where they are currently performing remote work? Indicating the place of remote work by the employee and at the same time agreeing on this place with the employer will be administratively burdensome for both the employee and the employer because the employee will have to obtain the employer s consent to perform remote work each time if he/she wants to change this place. Allowing remote work should give the employee the freedom to choose the place from which he/she provides work without the need to obtain consent for its provision from a given place, as long as the employee is able to provide work effectively from a given place. Despite the conclusions, the word "each time" has not always been deleted. In connection with it, the provision does not allow complete freedom to choose the place of remote work by the employee, i.e. without agreeing on this place with the employer. Arrangements for remote work can be made when concluding an employment contract or during employment – at the initiative of the employer or at the request of the employee.

Another solution contained in Article 67^{19}(3) of the Labour Code is that the employer will be able to issue an order to perform remote work in the following cases: a) during the period of the state of emergency, epidemic emergency or epidemic state and within 3 months after their cancellation b) or during a period in which the employer's provision of safe and hygienic working conditions at the employee's current workplace is not temporarily possible due to force majeure, if the employee submits a statement in a paper or electronic form immediately before issuing the order that he/she has the housing and technical conditions for performing remote work. It should be emphasized that the instruction to perform remote work by the employer may be issued only for objective (random) reasons and independent of the employer and only for a specified period of time [Florek 2021, 3-4]. However, in order to be able to order remote work at all by the employer, the employee will have to submit immediately before

issuing the instruction – a statement in a paper or electronic form that he/she has the housing and technical conditions to perform such work. Pursuant to the amendment, in some situations listed in Article 67^{19}(6) of the Labour Code, the employer will be obliged to take into account the application for remote work in the case of: 1) employee – the parent of a child with a declaration of disability or a certificate of a moderate or significant degree of disability, 2) employee – the parent of a child who has an opinion on the need for early childhood development support, a decision on the need for special education or a decision on the need for revalidation and educational activities, 3) pregnant workers, 4) an employee raising a child up to the age of 4, 5) an employee with custody of another member of the immediate family or another person in the common household who has a disability certificate or a severe disability certificate.

The employer will be able to refuse only if this is not possible due to the organization of work or the type of work performed by the employee. The employer shall inform the employee about the reason for refusal to take into account the application in a paper or electronic form within 7 working days from the date of submission of the application by the employee.

The amendment in Article 67^{20}(1-5) of the Labour Code indicates that the rules for performing remote work should be specified in an agreement concluded between the employer and the company trade union organization, and in the event that more than one company trade union organization operates at the employer – in an agreement between the employer and these organizations. In the event that, within 30 days from the date of submission of the draft agreement by the employer, the parties are unable to reach an agreement, the employer will be entitled to determine the rules for performing remote work independently in the regulations after taking into account the arrangements made with the company trade union organizations in the course of agreeing on the agreement [Baran 2022, 22-25]. If there are no company trade union organizations at the employer, then the employer will be entitled to determine the rules for performing remote work in the regulations after consulting the representatives of employees selected in the manner adopted by the employer. However, remote work will also be allowed if no agreement has been concluded or regulations have been issued. The employer should then specify the rules for the performance of work in the instruction to perform such work or directly in the agreement concluded with the employee. When introducing remote work, the employer should specify in this agreement, in particular: the group of employees who may be covered by remote work, the rules for determining the equivalent or lump sum, the rules for conducting inspections, the method of communication with the employee, including the method of confirming the presence at work, the principles of personal data protection and conducting training

in this field (Article 67^{20}(6) of the Labour Code). These are activities that are likely to be problematic in some workplaces. As a result of workplaces where the possibility of working outside the company's office concerns only a small group of employees, they may not decide to take this mode.

In this context, it is important to oblige employers to finance expenditures related to the use of the remote mode of performance. Pursuant to Article 67^{24}(1) of the Labour Code, the employer will be obliged to: provide employees performing remote work with appropriate materials and tools, as well as their installation, service or maintenance or cover the costs associated with it; cover the costs of electricity and telecommunications services necessary to perform remote work, and the rules for covering them should be specified in agreements or regulations; provide the employee performing remote work with training and technical assistance necessary to perform this work. The employer will be obliged to cover labour costs or to pay the equivalent in its place. The amount of the allowance should correspond to the expenses incurred by the employee, i.e. there must be a reasonable relationship between the amount paid to the employee and the value of the tools, materials or equipment belonging to the employee used for the employer's purposes. Here is the basic difficulty that employers indicate, i.e. how to interpret this vague criterion. This requirement can also be met by the payment of a lump sum, the amount of which corresponds to the expected costs incurred by the employee in connection with the performance of remote work. This solution is beneficial for employees, but in the opinion of employers, it may cause doubts because it is imprecise. The regulations will not eliminate the problems that may arise with the calculation of the equivalent or lump sum because they assume that these issues will be determined in the in-house files or independently by the employer. It should be noted that in this respect, it was postulated, among others, to legally determine the minimum amount of the lump sum or that the amount of the lump sum (or the method of its calculation) should be determined by means of a regulation.[6] In addition, at the meeting of the Extraordinary Committee for Amendments in Codifications – Standing Subcommittee on Amendments to the Labour Code and the Code of Administrative Procedure. A. Kuchta, a member of the NSZZ Solidarność National Committee, demanded the implementation of minimum amounts of equivalent or lump sum, and clarification of these amounts or extension could take place already in agreement with the employee, in collective agreements or in the work regulations.[7] However, it did not gain the support of other members of the committee. Importantly,

[6] Such a proposal was made by BOP Kraków Solidarność and PGNiG SA, see Summary of comments, p. 11, 54.

[7] See Full record of the meeting of the Standing Subcommittee on Amendments to the Labour Code and the Code of Administrative Procedure (No. 3) of 13 September 2022, p. 18.

these amounts will not constitute an employee's income within the meaning of the provisions of the Personal Income Tax Act (Article 67^{25} of the Labour Code).

Another novelty is the introduction to the Labour Code – occasional remote work (Article 67^{33}(1) of the Labour Code). Unlike regular remote work, occasional work will not require agreement with company trade union organizations or fulfilment of numerous obligations. For the employer, it will also not be associated with burdens such as a lump sum for electricity consumed or the employee's Internet. It will be possible at the request of the employee to submit in a paper or electronic form. However, the bone of contention between company trade union organizations and employers' organisations remained the dimension of such work. Union members proposed that this should be the shortest possible period, a maximum of 12 days a year. They pointed out that the employer would not incur additional costs for this form of performance of tasks. In their view, the excessive lengthening of the period of occasional remote work will make it easier for employers to avoid its additional costs (provision of equipment, the Internet, etc.). Employers, on the other hand, strived for 36 or more such days a year, claiming that not every company would introduce remote work according to the new rules. Then occasional work at the request of the employee can become an opportunity for him/her to stay at home and thus save time and travel costs. The Ministry of Family and Social Policy indicated that the compromise solution would be to leave 24 days as part of this solution. As K. Moras-Olaś rightly points out, the proposed regulation does not refer expressly to the situation of a part-time employee starting work during the calendar year, and legitimate problems may arise on the part of the employer with counting the period of occasional remote work of part-time employees [Moras-Olaś 2022, 26].

It should be noted that the employer, in accordance with Article 67^{28}(1) of the Labour Code, will be entitled to carry out control over the performance of remote work by the employee (but only during the employee's working hours), including in the field of health and safety and control of compliance with procedures in the field of security and information protection, including the protection of personal data on established terms. The performance of control activities will not be allowed to violate the privacy of an employee performing remote work or other persons (accompanying the employee in his/her remote workplace) or hinder the use of home rooms in a manner consistent with their purpose (Article 67^{28}(2) of the Labour Code). If the employee refuses such control or during the inspection, it turns out that the position threatens the safety of the employee. In this case the employer, due to their responsibility, will be obliged to withdraw such an employee from remote work and return to stationary work.

On April 7, 2023, the amended provisions of the Labour Code regarding remote work will enter into force. Thanks to the 2-month period of *vacatio legis*, employers gain valuable time to prepare for the upcoming changes, although in the opinion of many entrepreneurs, it is still not enough.

2. CONTROL OF EMPLOYEE SOBRIETY AND CONTROL OF THE PRESENCE OF SUBSTANCES HAVING A SIMILAR EFFECT TO ALCOHOL

An important change that has been introduced into the Labour Code is to allow employers from February 21, 2023 to introduce control of the sobriety of employees (including contractors or B2B associates) – and control for the presence of substances having a similar effect to alcohol, when it will be necessary to ensure the protection of life and health of employees, other people or property protection (Article 22^{1c}-22^{1f} of the Labour Code). This is a change expected by employers, thanks to which the employer has obtained a number of tools that will allow them to independently check the sobriety of their employees for the presence of substances acting similar to alcohol. The new rules provide for two forms of sobriety testing (and, accordingly, alcohol-like testing): a preventive test; a test in the event of reasonable suspicion that the employee appeared to work in a state after using alcohol or in a state of intoxication or consumed alcohol during work. The decision of the employer depends on whether they will carry out both forms of testing or only one of them. It should be noted that employers called for the introduction of the principle of "zero tolerance" or "full sobriety" in the Labour Code, i.e. total sobriety wherever it may affect public safety, health and life – both employees and outside person, but the legislator did not decide to introduce this principle. This means that, in principle, there will be no grounds for preventing an employee from working if the alcohol content in the employee's body is below 0.2‰ of blood alcohol concentration or 0.1 mg of alcohol in the exhaled air. If the inspection shows the employee's condition after drinking alcohol, the employer does not allow the employee to work, informing him/her of the reason for such a decision, and the time of not performing work is sometimes unpaid. In the event that the employee disputes the employer's decision in this regard, at the request of the employer or an employee not admitted to work, the sobriety test is carried out by the police. In practice, this will probably cause a problem because employers will not be able to introduce the requirement of "zero" concentration of alcohol in internal company regulations (collective agreements or labour regulations), because they cannot be less beneficial for employees than the provisions of labour law, and on the other hand, the measurement of consumption will be made at a given moment, and the employer

will not be able to predict whether the concentration of alcohol will decrease or whether it will increase. For example, for the studied bus driver and the responsibility for allowing the employee to work "under the influence" will lie with the employer [Leśniak 2022].

The employer, as in the case of the sobriety check, will be obliged to prevent the employee from working if the inspection shows the presence in the employee's body of substances having a similar effect to alcohol or if there is a reasonable suspicion that the employee appeared to work in the state after using such substance or took some substance during work. The Regulation of the Ministry of Health indicates that substances having a similar effect to alcohol are: opioids; amphetamine and its analogues; cocaine; tetrahydrocannabinols; benzodiazepines.[8] The employer will be able to carry out such an inspection using methods that do not require laboratory testing (narcotics tests). It should be noted that some of these substances are components of drugs used in various therapies, often very serious diseases. Benzodiazepines, in particular, are quite common in use, as a result, they can be detected in the drug tests used by employers. Therefore, employers will have the opportunity to obtain information that the employee is being treated with the use of certain substances. Those who use different drug therapies can feel uncomfortable when the company orders a drug test. Many people are also often unaware that their drug contains a substance indicated in the new regulations as undesirable during work and may find out about it only during the study. Both the employer and the employee will have the opportunity to challenge the result of the survey carried out by the employer. At the request of the employer or an employee not admitted to work, such a test will be able to be carried out by the police, while a blood or urine test will be carried out in situations indicated in the Labour Code, e.g. an employee will refuse to undergo a non-laboratory test, the condition of an employee not admitted to work will prevent the performance of a test using a method that does not require a laboratory test (Article 22^{1d}(5) and Article 22^{1f}(3) of the Labour Code).

A problematic issue from the employer's point of view may be the requirement to regulate the principle of inspections (sobriety of employees and the presence of substances similar to alcohol) in internal sources of labour law. According to Article 22^{1c}(10) of the Labour Code in the content of the collective agreement or in the work regulations or in the notice, if the employer is not covered by the collective agreement or is not obliged to establish the work regulations, it will be necessary to determine: the introduction of the control itself; the determination of the groups or groups

[8] Regulation of the Minister of Health of 16 February 2023 on tests for the presence of alcohol or substances having a similar effect to alcohol in the employee's body, Journal of Laws, item 317.

of employees covered by the control; the method of conducting sobriety control, including the type of device used for control, the time and frequency of its performance (whether it will perform it only before the employees start their work on a given day or also during work). This means that some employers will have to agree with company trade union representatives.[9] Importantly, the employer will be obliged to inform employees about the introduction of sobriety control or control for the presence of substances having a similar effect to alcohol – in the manner adopted by the employer, no later than 2 weeks before the commencement of its performance. In the above-mentioned internal acts, the employer will also specify the method of carrying out inspections. It should be noted that testing of employees can only be carried out with correctly calibrated devices, having calibration certificates (Article 22^{1c}(4) of the Labour Code). Three types of breathalysers are allowed on the market, i.e. electronic (semiconductor), electrochemical and spectrophotometric. However, the cost of specialized equipment can be as much as PLN 20,000, which for many business owners can be a prohibitive amount.

In addition, the legislator *expressis verbis* stipulated that the control of sobriety must not violate the dignity and other personal rights of the employee. When controlling the content in the bodies of employees of both alcohol and substances having a similar effect to alcohol, the employer must not violate the dignity and any other personal rights of the employee, and during the inspection should respect the intimacy of the employee.

Subsequent obligations of the employer are associated with the appointment of dedicated employees for control, their appropriate training in the operation of equipment and compliance with the new procedure in accordance with respect for the privacy of other employees. At the same time, those who accept the obligation to carry out an on-the-job examination must sign a confidentiality clause, as they will have direct access to sensitive personal data.

[9] Objections to this article were raised by, among others Employers of the Republic of Poland, in the assessment of which trade unions will gain rights, which in practice will result in an extension of the period of entry into force of the proposed changes, and the role of company trade union organizations in this respect should be limited only to the consultative function. They demanded that the maximum negotiation time with company trade union organizations be limited to 14 days, and in the absence of a consensus, the possibility of introducing the control procedure unilaterally by the employer, i.e. similarly to the regulation of remote work. However, according to the Ministry of Family, Labour and Social Policy, the proposed solution would lead to a reduction in the powers of company trade union organizations, therefore the comment was not taken into account.

CONCLUSIONS

After almost three years of work, the Sejm adopted a law that introduced the permanent possibility of performing work in the form of remote work into the Labour Code and amended the sobriety test for employees. This is a regulation that has been expected and demanded by employers' organizations for several years. Remote work is to be used in typical conditions – and not only in emergency conditions, as it was done to counteract COVID-19. In turn, regulating the issue of sobriety control and control of the employee in terms of substances having a similar effect to alcohol in the workplace is very important for the employer, who is responsible for ensuring safe working conditions for all people performing work in the workplace. The amendment contains many guidelines, but it does not dispel all doubts and does not reduce the challenges faced by the employer. Probably the biggest problem that employers will face in the initial stage will be the implementation of these solutions to enterprises. New solutions represent a certain compromise between the expectations of unions and employers, and such a compromise rarely fully meets the expectations of all parties. Probably the practice of applying the revised Labour Code will allow assessing its consequences and usefulness in practice.

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THE OFFICE AND TASKS OF THE DEAN IN THE FIRST SYNOD OF THE DIOCESE OF TARNÓW

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Abstract. Deans, in the organisation of the Church, are to assist the diocesan bishop in the exercise of governance in the territory that is part of the diocese. This area is called a deanery. In the history of the Church, deans have been seen as assistants to bishops. This article discusses the attributes of the office and deans' obligations as set out in the 1928 Synod of Bishop Leon Wałęga. The First Synod of the Diocese of Tarnów was a transmission belt that made the provisions of the 1917 Code of Canon Law a reality in the Diocese of Tarnów. The particular legislator, Bishop Leon Wałęga, encouraged the clergy to surround deans with the reverence and trust due to them, considering them as elder brothers who, on behalf of the authorities, performed demanding duties for the common good. To date, no comprehensive study of this topic has appeared. As a starting point for the reflection on the office of dean, the etymology of the word is discussed, followed by a brief look at its archetypes: chorepiscopi, visitators and archdeacons.

Keywords: archdeacon; *chorepiscopus*; dean; dean's visitation; visitator

INTRODUCTION

Many studies have appeared on the institution of a dean, especially in dictionaries and encyclopaedias.[1] Deans play an important role in the organisation of the Church and their primary task is to assist the diocesan bishop in exercising his governance in the territory that is part of the diocese called a deanery. This article aims to present the office and tasks of the dean contained in the First Synod of Bishop Leon Wałęga.[2] To date, no comprehensive study on this subject has been published. As a starting point for the reflection on the office of dean, the etymology of the word *dean* will be used first, followed by its archetypes: chorepiscopi, visitators or archdeacons.

[1] The following publications can be mentioned, among others: Grężlikowski 2009, 255-319; Wysocki 1906; Padacz 1937, 280-93, 385-93; Pawluk 1995, 586-88; Sitarz 2019, 654-59.

[2] *Pierwszy Synod Diecezji Tarnowskiej* (04.11.1923), Nakładem Kleru Diecezjalnego, Drukiem Zygmunta Jelenia, Tarnów 1928 [hereinafter: First Synod].

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Against this background, the office of dean in the statutes of the First Synod will be presented as well as his tasks, with particular reference to dean visitation.

1. THE ETYMOLOGY AND ORIGIN OF THE OFFICE OF DEAN

The word *dean* is found in languages derived from the Mediterranean culture.[3] This is because it is derived from the Latin word *decanus* formed from *decem* which in turn comes from the Greek word *deka* and means the number ten. Originally, this word meant an elderly man with some authority over ten people. In the Eastern Roman Empire, the title of dean was held by a supervisor of ten lower officials of the imperial court. In Roman law, this title was given to supervisors of ten soldiers or magistrates, or to members of the municipal council [Bobrowski 1903, 1025]. As noted by M. Przybyłko, the name dean was adopted by the Church from Roman offices, receiving different meanings throughout history. When monastic life began to be organised, in those monasteries we find deans elected by the prior and senior monks to supervise ten monks in the bedrooms and refectories. From its monastic significance, the institution of deanery passed to the lay clergy. Canonical colleges were formed, from which, in time, cathedral and collegiate chapters emerged. The members of these chapters began to elect deans to preside at meetings and represent the chapter externally. In imitation of the life of these chapters, the rest of the lay clergy, when deliberating on pastoral matters, gathered in the so-called district chapters, into which the dioceses were divided. At such a conference, a chairman was elected, usually the archpresbyter, i.e. the most senior and respected priest in the given district, who was entrusted by the bishop with supervision of the lifestyle of the local clergy. He was also given the title of dean. Sometimes deans were referred to directly as priests, vicars forane meaning rural vicars, or episcopal commissioners [Przybyłko 1960, 200].

In the history of the Church, the dean has been seen as an assistant to the bishop. Throughout history, various forms of such assistants have emerged, whose office shows great similarity to that of the modern dean. Such assistance was provided by, for example, chorepiscopi.[4] This word is derived from the Greek word *chora* and means province or village and was originally used to designate rural bishops. They can be found as early as the middle of the 2nd century and in the 4th century the office

[3] In French, it is *doyen*, in German *dean* and in English *dean*.

[4] The following items can be consulted on this office: Gillmann 1903; Amadou 1959, 233-40; Sardes 1975; Parisot 1901, 157-71; Leclef 1937, 1935; Kirsten 1941, 1105-114; Scholten 1876, 149-70; Höfer and Rahner 1957, 1080-1081; Gottlob 1928, 712-23; Moroni 1842, 122-35.

of chorepiscopi was flourishing. These bishops had full pastoral authority and ordinary titular authority of the office, making them in no way different from urban bishops.[5]

The powers of chorepiscopi are enumerated by M. Przybyłko: 1) they had oversight of the clergy and subordinate churches which they visited as vicars of the ordinary; 2) in their church and, with the permission of the diocesan bishop, they could confer minor ordination including the subdiaconate; 3) they had the right to issue letters of recommendation called letters of peace; 4) they accepted the vows of ladies consecrated to God; 5) they had the right and duty to care for the poor of their district; 6) they were allowed to celebrate Mass, even in the presence of the bishop; 7) they sat on councils; 8) they had the right to impose and lift public penances; 9) in the West, at least for a certain time in Gaul, they confirmed neophytes; 10) on receiving their office, they had the right to a special ordination rite which was conferred on them by the ordinary by the laying on of hands [ibid., 215-16]. The above powers, of course in a modified form and to the extent that the development of ecclesiastical law required, passed essentially to later deans.

The bishop's assistants also included visitators. When the office of chorepiscopi began to decline, in order to speed up this process, the Synod of Laodicea in the middle of the 4th century decreed that bishops should appoint *periodeutai*, i.e. visitators, in their place. They were given the right to visit designated churches, but without being able to announce any decisions. They were to report their findings at the next synod [ibid., 217-18].

However, the office most closely resembling today's function of dean was that of archdeacon. Archdeacons emerged from the ranks of deacons. The latter, in turn appointed by the apostles to care for the poor, soon became inseparable companions of the apostolic work and versatile assistants of the bishops. They received gifts from the faithful and handed them over to the bishop, read the gospel to those gathered in church, sometimes preached in the bishops' stead, assisted in the administration of Holy Communion, prepared catechumens, administered baptism, visited those in prison, took down the records of martyrdoms and cared for cemeteries [Silnicki 1927, 31]. For a long time, until the 9th century, an archdeacon could not be a priest. This office was so honourable that many preferred to be without

[5] According to Rostworowski, this remarkable increase in the number of rural bishops changed in peacetime. The question arose as to whether, according to past practice, to establish bishops in every settlement, so that their numbers would increase excessively and their authority would diminish or to continue with the establishment of episcopal capitals only in larger urban centres. The question arose as to what to do with the existing rural pastors. Gradually, the powers of these rural bishops were reduced until finally they were made assistants and vicars of the rural bishop [Rostworowski 1925, 188].

ordination, so as not to lose this dignity, which, by the extent of its power and influence over the life of the diocese, surpassed that of the priesthood.[6]

The archdeacon originally had the duty to watch over the other deacons and guide them in the fulfilment of their tasks. In addition, he supervised the lower clergy. However, the essential nature of his tasks was economic in nature. In time, the canons forbade bishops to deal with property matters. Archdeacons soon concentrated in their hands almost all the authority for the administration of church property in the diocese. However, these were not the only activities of the archdeacon. From the 5th century onwards, they have been entrusted with the care for the proper education and nurture of candidates for the clerical state. In the 6th century, the archdeacon had the right to try and punish clerics in the first instance, which could be appealed to the bishop. The archdeacon could appear in state trials, where cases of clergy in dispute with the laity, and even cases of widows and orphans or poor people in general, were tried. During the bishop's illness, the archdeacon completely replaced him in the administration of the diocese [ibid., 76].

In the 9th and 10th centuries, the so-called district archdeacons occurred. Bishops began to divide dioceses into smaller districts and appointed archdeacons to head them. Their powers were as follows: 1) he had the right to take part in the solemn episcopal services during which he sang the gospel, oversaw the proper conduct of the liturgy in the cathedral church; 2) he administered the property and income of the cathedral church; 3) he cared for the education and nurture of candidates for the clerical state; 4) he oversaw the morals of both urban and rural clergy; 5) he annually visited the parishes of his archidiaconate; 6) he had the right to convene archdeacons' synods; 7) he examined the qualifications of candidates for ecclesiastical benefices and, after appointment by the bishop, their introduction; 8) together with the bishop, he appointed and removed deans, with whom the archdeacon shared the hardships of church governance; 9) he had a criminal jurisdiction that allowed him to impose the most severe punishments: suspend, impose excommunication and interdict. He could also impose fines; 10) he had its own judicial tribunal headed by an official, whose verdicts could be appealed to the bishop; 11) he had the right to material remuneration; 12) since the 12th century, they could appoint vicars for themselves [ibid., 76-77].

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[6] The bishop, wishing to get rid of an archdeacon who was inconvenient for him, would ordain him to the presbyterate, thus virtually demoting him. This was done, for example, in 450 by the Patriarch of Constantinople Anatolius, dissatisfied with his archdeacon Aetius [Silnicki 1927, 5; Idem 1953, 351].

From the 13th century, synods began to limit the power of archdeacons. The Council of Trent stipulated that ordinaries should examine the aptitude of candidates for clerical ordination, pass judgements in matrimonial matters, try and punish clergy, impose excommunications and impose other ecclesiastical penalties. Over time, the office of archdeacon began to disappear. In some localities, it survived until the 17th and 18th centuries, but with very limited authority, often retaining only the title without any powers [Przybyłko 1960, 233].

The office of dean and his tasks were dealt with by the 1917 Code of Canon Law.[7] CIC/17 gives the following definition of a dean: he is a priest placed at the head of a deanery by the bishop (Canon 445). From the common law, a dean has a certain amount of administrative authority, while from the particular law, on the basis of synodal laws or a bishop's order, a dean may have the power of jurisdiction. From the common law, a dean has the right and duty to see to it that the clergy live according to ecclesiastical regulations, performing their duties diligently, that they observe their residences, preach the word of God and implement the bishop's decrees after visitation. In addition, according to canon law, deans should see to it that in parishes regulations are observed with regard to the decoration of the church, the storage of the Blessed Sacrament, that church property is properly managed and that parish books are properly kept (Canon 447 para. 1) [Bączkowicz, Baron, and Stawinoga 1957, 571-72].

2. THE TASKS OF THE DEAN IN THE STATUTES OF THE FIRST SYNOD

The First Synod addressed the issue of the office of dean in Title III. At the outset, the legislator provides a definition of the office of dean, which virtually echoes the definition in CIC/17. It states that deans are ex officio assistants to the bishop in the administration of the diocese and share with the bishop the responsibility for discipline among the clergy and people. Statute 43 encourages deans to perform their duties diligently, even if they were to face various annoyances because of it. "As the faithful are more offended by impunity than by the failings of priests: they lose trust and begin to waver in their faith whenever they see that the failings of priests, reported to the dean or the bishop, go unpunished" (Statute 43 para. 2).

The particular legislator encourages the clergy to surround deans with the reverence and trust due to them, considering them as elder brothers who, on behalf of the authorities, perform a difficult duty for the common

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

good (Statute 44). The dean, as an intermediary between the diocesan authority and the clergy of the deanery, should first and foremost oversee the life, morals and work of the clergy in the deanery, give encouragement and fraternal admonition to the priests and notify the bishop without delay of those who do not follow the law. In particular, the dean: 1) informs the curia of the assumption of office and the death of each priest; 2) submits to the curia all requests concerning the headcount of the clergy entrusted to him, attaching his opinion to the request; 3) visits the priests in the deanery who are seriously ill, in order to offer assistance if necessary and above all to try to give the sick person the last rites. On this occasion, the dean should ensure that the sick person puts his property affairs in order and, in particular, secures the celebration of Mass intentions; 4) is responsible for the funeral of deceased priests in the deanery (Statute 45).

Statute 46, on the other hand, enumerates the tasks of the dean as deanery administrator. In this area, the dean: 1) notifies the bishop of all major events that have taken place in the deanery; 2) accompanies the bishop during the canonical visitation, having arranged its order with the deanery clergy; 3) convenes and arranges the deanery congregation[8] and submits its records to the curia; 4) is ex-officio visitator of the schools in the deanery and sends his own reports, as well as those of the assistant visitators, to the curia; 5) keeps records of his activities, holds the seal and keeps the archive of the deanery.

Another group of tasks that the First Synod imposes on the dean are his duties towards churches and parishes. In this matter, the dean: 1) introduces the new parish priests into office, giving them possession of the church and the benefice according to Statute 68; 2) collects the holy oils for the deanery from the cathedral church and distributes them between individual churches; 3) controls the management of individual church institutions; 4) sends annually, in the month of January, copies of the certificates from each parish for the previous year and in October material for the schema for the following year (Statute 47).

In describing the office of dean, Bishop Leon Wałęga also took care to mention his rights and privileges. Among these, the First Synod lists the following: 1) right to *absolvendi a casibus reservatis in dioecesi et a censura propter procurationem abortus* within the diocese; 2) it authorises the priests from a foreign diocese, equipped by their ordinaries with the authority to hear confessions and preach the word of God, to hear confessions, preach the word of God within the deanery for eight days, during missions, retreats and indulgences also to absolve from sins reserved in the diocese; 3) in cases of emergency, it grants priests the authority to binate, notifying

[8] On this subject, consult: Lewandowski 2020, 93-109.

the bishop of this fact; 4) it grants permission to deliver a funeral eulogy or commemorative sermon under Statute 6;[9] 5) it allows weddings to take place in the afternoon under Statute 169;[10] 6) it grants permission to parish priests and vicars to leave the parish for a period of one week, provided that spiritual care in the parish is provided; 7) has the right to authorise the holding of extraordinary public processions; 8) blesses bells for non-consecrated churches and chapels; 9) examines whether the conditions required to open a semi-public chapel exist. An expression of the significance of the office of dean is also the provision stating that on the day of the funeral of an active or former dean, the bells should be rung in all the churches of the deanery (Statute 48).

3. DEAN'S VISITATION AS ONE OF THE IMPORTANT DUTIES OF THE DEAN

Among the numerous tasks of the dean, the First Synod emphasises the importance of dean's visitation. The dean, according to the synodal statutes, was obliged to personally visit the parishes in his deanery every year, except in the year when a canonical visitation of the bishop was scheduled in the given deanery. The Instruction for Dean's Visitation of the First Synod reads: "The dean should notify the parish priest of the day of the visitation 2 weeks in advance. The parish priest, notified of the day of the visitation, is to invite the patron and members of the parish committee to the parish office on that day and on the Sunday preceding the dean's arrival, announce from the pulpit that anyone wishing to see the dean in person may come to the parish office at the appointed hour on that day. The parish priest is to send horses to collect the dean from the railway station and take him to the station or to the next clergy house; and if the dean arrives with his own horses, he is to give maintenance for them and for the servant during the visitation."[11] In order to make it easier for the visitator to give an accurate

[9] "Para. 1. Deans may grant permission to deliver a funeral eulogy or commemorative sermon insofar as it is not possible to refer to the Curia due to lack of time or other legitimate obstacles. Para. 2. Lay people may speak at funerals with the knowledge of the parish priest, provided their religiousness is not questionable, once the priest has completed the sacred rites and put on the liturgical vestments. In the case of speeches that are unforeseen, or for legitimate reasons that do not inspire confidence, the priest is to remove himself under protest if he sees fit."

[10] "Para. 1. The conclusion of marriage late at night is always forbidden; in the afternoon it is possible for just reasons and with the separate permission of the Episcopal Curia or the competent dean who should easily permit it when it comes to weddings in cities and towns. Para. 2. The governors of churches shall take care to prevent, by prudent regulations, any possible disrespect for the Lord's sanctuary in such cases."

[11] *Instrukcja o wizytacji dziekańskiej* (04.11.1923), in: *Pierwszy Synod Diecezji Tarnowskiej*

and detailed account of the state of the parish and the activities of the clergy, the Instruction gives in detail the points according to which the visitator, on the basis of personal observations and on the basis of conversations with the clergy and the parish committee, will form an opinion of the overall parish life.

The visitation issues concerned several thematic blocks. The first referred to the religious and moral state of the parish. The following topics were addressed here: 1) the state of faith and morals in the parish; 2) celebration of Sundays and holidays: attending morning and afternoon services, attending sermons, abstaining from heavy work, public games, festivities; 3) observance of prescribed fasts; whether they are announced in advance from the pulpit; 4) receiving the Holy Sacraments: frequent and daily Holy Communion, attendance at weekday services; whether everyone complies with the obligation of Easter Confession and Communion, whether there is a card check for Easter Confession, whether infant baptisms are delayed; 5) family life in the parish: children upbringing, praying together, reading in families. Whether parents and employers are willing to send children and servants to services and catechisation; 6) adolescent youth: what their behaviour and piety are, whether there are youth associations in the parish; 7) bad magazines, books, libraries, shows; 8) drunkenness: saloons, weddings, parties. Whether and how the Temperance Society is developing in the parish; 9) public depravity, concubinage, "wild marriages," illicit friendships, illegitimate births, arbitrary separations, hatreds, rowdiness; 10) migration among parishioners: abroad, to cities or to factories. What is being done for their spiritual welfare; 11) negative influence of political parties, dissenters: how this is prevented (*Instruction*, 155-56).

The second block of issues subject to the dean's visitation was pastoral work. The dean paid attention to, among other things: 1) whether the service starts punctually and follows the prescribed order, at what time the service is held on weekdays; 2) whether homilies are always preached during the first morning mass on Sundays and holidays, sermons at mass and passion sermons at Bitter Lamentations, whether sermons are not extensively long, whether personal matters are not touched upon in sermons; 3) whether catechisation takes place regularly; 4) how children, young people and adults behave in church, whether men stand separately from women in church, whether church singing is developing properly; 5) whether May and October services are held, what other services are held during the year, how the Patron Saint of the church, parish is celebrated; 6) whether the faithful always have an easy opportunity to receive the Holy Sacraments, whether priests sit in the confessionals every day, whether foreign confessors

[hereinafter: *Instruction*], p. 155.

are also invited; 7) when, how the preparation of children for their first Confession and Holy Communion takes place; 8) whether the sick are given the last rites as soon as a priest is called to them, whether anyone died without having received the last rites, whether and how often the bedridden are visited; 9) how the existing fraternities in the parish are developing: care for the orphans, the disabled, those called up for military service, the servants and above all the poor, whether there are charitable social associations such as homes for the poor, orphanages; 10) whether the parish priest makes an annual visitation of the parish, in what order, whether he admonishes the wicked, whether he carries out a careful preparation of the newlyweds to receive the sacrament of marriage in a worthy manner; 11) how the Parish Council is developing (*Instruction*, 156-57).

Another subject of the dean's visitation, according to the Instruction, was issues concerning buildings and the management of parish property. The dean paid attention to whether the church met the needs of the parishioners and whether it was properly secured. He also visited the cemetery, checking that there was proper order. Economic matters included whether the parish priest was running the farm, the state of the livestock and deadstock. The visitation also included office matters, whether the canonical and diocesan laws are observed in this respect, whether the organist and the church servants are hired on a contract basis and whether they are paid properly (*Instruction*, 157-59).

Finally, the Instruction contains a group of issues concerning the clergy. Among these, the following can be highlighted: 1) whether the dwellings of the parish clergy are in good condition, whether all priests wear tonsure and soutane, whether they give no reason for suspicion in their dealings with women, whether there are good relations between the clergy; 2) the dean was obliged to interview separately each diocesan priest residing within the parish about the life and duties of the priestly state: whether he keeps the order of his priestly life; how often he goes to confession; whether he devotes himself to the study of theology; whether he has in his library the Holy Scriptures, the Code of Canon Law, the Diocesan Statutes; when and where he has made a retreat; whether he has a will ready; whether he keeps the book of offerings diligently (*Instruction*, 159-61).

After the visitation, the dean drew up a visitation report in which he included his observations and indications. He signed it together with the parish priest. In turn, he presented a detailed report to the diocesan curia, noting the differences between the present state of the parish and its state during the previous visitation. In addition to the annual visitation, the dean could make an extraordinary visitation, if he considered it necessary, bearing in mind that he is an intermediary between the diocesan authority

and the clergy of the deanery and has the right to verify at any time any reports of irregularities in the parish of his deanery (Statute 60).

CONCLUSIONS

1. The office of dean in the organisation of the Church was seen as one to assist the diocesan bishop in the exercise of governance over the territory that is part of the diocese bearing the name of a deanery.
2. In the history of the Church, the dean has been seen as an assistant to the bishop. Throughout history, there have been various forms of assistants to the bishop, whose office shows great similarity to that of the modern dean. These included chorepiscopi, visitators and archdeacons.
3. CIC/17 stipulated that the dean had the right and duty to see to it that the clergy lived according to ecclesiastical regulations, performing their duties diligently, that they observed their residences, preached the word of God and implemented the bishop's decrees after the visitation. In addition, in accordance with canon law, deans should ensure that in parishes the regulations are observed with regard to the decoration of the church, the storage of the Blessed Sacrament, that church property is properly managed and that parish books are properly kept.
4. The First Synod is somewhat a transmission belt that transfers the provisions of CIC/17 to the reality of the Diocese of Tarnów. The particular legislator, Bishop Leon Wałęga, encourages the clergy to surround deans with the reverence and trust due to them, considering them as elder brothers who, on behalf of the authorities, perform a difficult duty for the common good. The dean, as an intermediary between the diocesan authorities and the clergy of the deanery, should above all oversee the life, morals and work of the clergy in the deanery, give encouragement and fraternal admonitions to the priests and notify the bishop immediately of those who do not follow the law.
5. The dean's special task is dean's visitation. The First Synod offers the dean an extremely important aid to this duty, which is the Instruction for Dean's Visitation. It contains a series of issues that deal with the religious and moral state of the parish, pastoral work, buildings, property management, running of the office and the clergy.
6. The issue of the office and tasks of the dean in the First Synod, discussed in this article, has not been addressed in the literature on the subject so far. It is important and it is worth recalling the beginnings of the particular legislation of the Diocese of Tarnów on this subject. This is all the more so because later synods, as well as current legislation related to this issue, are largely based on the provisions of 1928, which should

be evaluated positively, especially the *Instruction* for Dean's Visitation. Deans, as representatives of the particular Church, in the light of the discussed statutes of the First Synod, belonged to the closest and most trusted associates of the diocesan bishop and played a very important role in the structure of the Church of Tarnów.

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HEALTHCARE AS THE STATE'S RESPONSIBILITY AND FREEDOM OF CONSCIENCE AND BELIEF DURING THE FIRST STAGE OF THE PANDEMIC

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Abstract. Some time has passed since the outbreak of the COVID-19 epidemic, which affords an opportunity to reflect on the condition of the law-making process in Poland. The article attempts to assess the legislation made during the first stage of the epidemic, with special emphasis on restrictions pertaining to the freedom of conscience and belief. The procedure of circumscribing basic human rights and freedoms is discussed in detail, pointing out the necessity to restrict the said freedoms only through a legislative act. The text also addresses sanctions levied on citizens for their failure to comply with epidemic regulations. By sharing specific examples, the author presents an array of behaviours that seem difficult to justify from the perspective of the formal requirements of law-making. Extraordinary conditions in which the state operated at that time only partially justify the absence of proper legal mechanisms. For this reason, it seems imperative to reflect on how to design a proper response to similar threats in the future. It should enable an even distribution of restrictions of civil rights in extreme circumstances.

Keywords: COVID-19 restrictions; proper legislation; human rights; freedom of conscience and belief; theory of law

INTRODUCTION

The influence of the pandemic on the law has been a widely debated issue, not only within the theory and philosophy of law but also from the perspective of individual legal dogmas. One of the key issues in this respect is the state's interference in citizens' civil rights during the COVID-19 pandemic. The acceptability of imposing restrictions on one's human and civil rights constituted a crucial element of public debate among political decision-makers, doctors, scientists, and ordinary citizens. It would be no exaggeration to claim that within the last three years the pandemic has been an overarching discursive subject *sensu largissimo*. To avoid formulating conclusions *prima facie*, it seems legitimate to root the discussion in the context of a specific stage of the pandemic and a specific basic right. This article concentrates on regulations pertaining to the freedom of conscience and belief during

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the first stage of the pandemic (March-April 2021), as discussing the totality of pandemic-related legislation would fall beyond the scope of this article. What is more, reflecting on the initial legislative reaction to the pandemic will make it possible to pinpoint the character, legitimacy or lack thereof, as well as the proportionality or disproportionality of limiting a certain civil right. Finally, an *ex post* analysis will enable an assessment of the strategy of legal regulations in the most pivotal moment of the pandemic, that is immediately after the first case of SARS-CoV2 infection was diagnosed in Poland. The time that has passed since the outbreak of the pandemic lets one objectively evaluate the strategy of legal regulation as the scale of the pandemic as well as modifications and efficacy of the response are now well know facts.

The article has an interdisciplinary character, positioned as it is between religious law and human rights. One more component of the present reflection is a theoretical philosophical-legal approach that offers a sort of a bird's eye view of law in action. A juxtaposition of two values – that of healthcare and freedom of conscience and belief – enables an argumentative discourse. An axiological reflection will constitute an opportunity to look more widely at law during the pandemic, not only from the ontological but also epistemological perspective. The article makes use of the formal-dogmatic method, explaining the literal meaning of values under study. The functional and systemic methods have been deployed to better understand the position of these values in the legal system. A question of *de lege ferenda* kind would be how the legislative should respond to similar dangers in the future and what arguments should be taken into consideration in the process of circumscribing civil rights. These reflections constitute a mere starting point for a much broader scholarly exploration.

1. DEFINITION OF HEALTH

Health is a strictly personal quality, belonging to every living person, while at the same time constituting a socially appreciated value. Health is closely connected with a person, their body and physical integrity, a violation or deprivation of which will result in deviation from the norm assumed by the law [Tabaszewski 2016, 29-30]. Health is then a permanent and immanent feature and is determined by internal and external variables, both dependent and independent [ibid., 29-30].[1] The World Health Organization defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[2]

[1] See Thorz 2010, 26.

[2] See https://www.who.int/about/governance/constitution [accessed: 23.12.2022].

Essentially, two approaches need to be distinguished that are of fundamentally different qualities, namely the dogmatic-legal and the socio-medical ones. The former understands healthcare as an attempt to guarantee a specific right for an individual, namely putting to use all the means at their disposal to retain their health as a personal good and, by inference, to keep their body in the same state, taking into account their age and general psycho-physical condition [Motyka 2013, 177]. In accord with the socio-medical approach, healthcare is perceived as part of the state's social policy encompassing all the social activities to prevent and cure illnesses, to keep individuals in good health, including by creating organizational conditions conducive to individuals' realization of their rights and, as a result, to the improvement of health of the whole population [Tabaszewski 2016, 30-31].

Healthcare encompasses "various aspects of the health of an individual and community and seems a continuum of sorts, ranging from activities supporting and promoting health to solving difficulties and problems with respect to illness, infirmity, and disability.[3] In this sense, healthcare should be treated as one of the policies of the state. It denotes the totality of medical and extra-medical activity performed by the state in all the sectors of socio-economic life" [ibid., 32]. Healthcare needs to be "legally regulated, whereby priority is given to meeting diverse interests and to clarity in terms of principles and consequences of the selected model (that is the social, economic, and political effects of the passed bill)."[4] It is the position of a citizen's right to healthcare that is a litmus paper for the state's character as either a liberal or a welfare state.

The freedom of conscience and belief is a sphere of an individual's life that the state chooses not to interfere in. The sphere is demarcated by legislative acts and international agreements. It is assumed in scholarship that the freedom of conscience and belief encompasses the freedom to hold religious convictions and to accept or reject a religious denomination as one sees fit. It likewise encompasses the freedom to express one's religious convictions alone or with others, in public or in private. Said expression can take the form of worship, prayer, religious practices, or preaching [Sobczak and Gołda-Sobczak 2012, 28].

Terminological consistency is indispensable to formulating a lucid scholarly reflection. For the sake of this article, the expression "freedom of conscience and belief" seems the most appropriate even though normative acts of many states as well as international legislative acts may also include the following expressions: "freedom of religion," "freedom of religious

[3] Cf. Poździoch 1996, 52.

[4] Cf. Skwarzyński 2010, 82.

beliefs," "freedom of worship," "freedom of thought and convictions," "freedom of conscience and religion," "freedom to accept and preach religious, areligious, and antireligious ideas and doctrines."[5] This terminological plurality stems from a long-lasting historical and philosophical process at the heart of freedom of conscience and belief.

2. FREEDOM OF CONSCIENCE AND BELIEF

At odds with a certain tradition, the Constitution of the Republic of Poland employs in Article 53(1) the term "freedom of conscience and religion" ["wolność sumienia i religii"], deviating from the expression "freedom of conscience and belief" ["wolność sumienia i wyznania"] deployed in Article 111 of the Constitution of 17 March 1921[6] and rooted in literature [Sobczak and Gołda-Sobczak 2012, 28-29]. It is not clear why the currently operative Constitution uses the term "freedom of conscience and religion" rather than that of "freedom of conscience and belief."

Scholars assume that this change in terminology stems from the Constitution's espousal of Catholic terminology deployed in *Dignitas splendor*, the Second Vatican Council's declaration on religious freedom [Winiarczyk-Kossakowska 2015, 27 onwards]. Krukowski argues, in turn, that that the expression "freedom of religion" has been borrowed from international documents on basic human rights and freedoms affirming the natural law [Krukowski 2000a, 77]. The English word "religion" may be translated into Polish both as "religia" [religion] and as "wyznanie" [belief], for which reason Krukowski's argument is not a sufficient explanation of the departure from the expression "freedom of conscience and belief." As Misztal sees it, the expression "freedom of conscience and religion" may imply that the former is the province of non-believers, while the latter – of believers. He emphasizes the fact that "freedom of conscience" presupposes atheism without ruling out "freedom of conscience" among believers, while "freedom of belief" pertains only to those who believe in God [Misztal 2000, 211].

Skrzydło seems to be of a similar opinion, claiming that "freedom of conscience" signifies an ability to choose a viewpoint other than a religious one and thus pertains to non-believers [Skrzydło 2000, 53]. It needs to be added that the Constitution of the Republic of Poland from 23 April 1935[7] paid little attention to the problem of freedom of conscience and belief. In Article 5(2), it posits that "the state provides its citizens with an ability to develop their personal values and safeguards freedom of conscience, expression,

[5] See Piechowiak 1996, 7-21; Pyclik 2002, 435-62; Safjan 2003, 43-73.

[6] See http://libr.sejm.gov.pl/tek01/txt/kpol/e1921.html [accessed: 23.12.2022].

[7] See http://libr.sejm.gov.pl/tek01/txt/kpol/e1935.html [accessed: 23.12.2022].

and assembly."[8] The Constitution of the People's Republic of Poland from 22 July 1952[9] deploys in Article 70 the expression "freedom of conscience and belief to all citizens" in a very synthetic way, accentuating at the same time lack of compulsion to participate in religious activities.

The departure from the expression "freedom of conscience and belief" is sometimes understood as a sign of shift from the 1952 Constitution's treatment of freedom of conscience and belief as a right that can be licensed by the state. Such an interpretation is espoused by Mezglewski, Misztal, and Stanisz [Mezglewski, Misztal, and Stanisz 2006, 62].

Freedom of belief, or freedom of religion as others would have it, is composed of three elements, or three other "freedoms": that of thought, conscience, and belief [Warchałowski 2004, 77]. It is generally assumed that freedom of conscience encompasses an individual's right to freely choose, shape, and change their opinions and convictions in matters of religion. Freedom of belief is in turn typically conceived of as an individual's right to express and manifest their religious opinions and convictions, as an addition to and concretization of freedom of conscience [Sobczak and Gołda-Sobczak 2012, 34].

It should be noted, however, that the above freedoms constitute a compromise "accepted by major drafters of the constitution" as unlikely to generate conflict [Krukowski 2000b, 101]. The 1997 Constitution[10] adopted "a method of dispersion with respect to belief."[11] Internally speaking, freedom of religion is freedom of conscience, that is a human being's ability to make a moral choice in accord with the mandate of their own conscience. It also incorporates an individual's capability of knowing the truth and an obligation to accept it as well as to act in accord with it. In its external aspect, freedom of religion encompasses one's freedom to manifest their convictions in their private and public life as well as freedom from external compulsion in manifestation of their religious beliefs.

In accord with Article 31(3) of the Polish Constitution – termed a general limitation clause – it is possible to restrict individuals' rights and freedoms only when certain formal and material conditions are met that are determined by the constitutional legislator [Olszówka and Dyda 2020, 445-46]. It is made clear that such restrictions can only be introduced through a legislative act, which rules out the possibility to regulate such matter in any other way, for example through ordinances ("test one").[12] It is thus beyond

[8] Cf. Serzhanova and Tuora-Schwierskott 2018, 306.

[9] See http://libr.sejm.gov.pl/tek01/txt/kpol/e1976.html [accessed: 23.12.2022].

[10] See https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [accessed: 23.12.2022].

[11] Cf. Sobczak and Gołda-Sobczak 2012, 39.

[12] Judgment of the Polish Constitutional Tribunal of 25 July 2006, ref. no. P 24/05. OTK ZU 7A/2006, item 87, par. III.2.

any doubt that in the current Polish constitutional system it is unacceptable to restrict anybody's rights and freedoms without a univocal legislative act [ibid., 446].

The complete list of material conditions is given, which means that any restriction of a constitutionally guaranteed right or freedom needs to have at least one goal out of these enumerated in Article 31(3) of the Constitution, such as protection of health or public morality. An assessment of a bill restricting a constitutional freedom should not analyze individual cases (or *status quo*) in which certain values (may) collide with one another but rather should come down to an analysis of the law which would make it possible to unequivocally point out the values at odds.[13] In this case, the formal-dogmatic method is sufficient and there is no need to focus on juridical precedent with respect to measuring values, even though the latter may be useful in legitimizing the law-makers' resolutions.[14]

When it comes to restricting civil rights and liberties, it needs to be borne in mind that belief in the validity of actions undertaken by the legislative authorities is in itself insufficient, even if it serves the health of the whole population. In a democratic system, any restriction needs to be inevitable and it may not lead to complete deprivation of constitutional rights and freedoms ("test two").

The law's status of an act – the formal requirement ("test one") – and introducing a restriction so as to serve public safety or order, protect the environment, health and public opinion, or to safeguard freedoms and rights of others ("test two") are mere prerequisites for the so-called "test three." In this respect, the Constitutional Tribunal is of help, stipulating that for the state to restrict citizens' rights and freedoms, positive answers must be given to the following three questions:

1) is the legal regulation introduced able to achieve its goals (the so-called usefulness);
2) is the regulation necessary to protect public interest (the material conditions enumerated above) which it is related to (the so-called inevitability);
3) are the effects of the introduced regulation proportional to the burden it imposes on the citizen (the so-called proportionality *sensu stricto*).[15]

A negative answer to any of these questions of "test three" qualifies the regulation as faulty and unconstitutional. In the act under study here

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[13] Judgment of the Polish Constitutional Tribunal of 7 October 2015, ref. no. K 12/14, OTK ZU 9A/2015, No. 9, item 143, par. III.5.3.3.

[14] See Hubmann 1982, 301-15; Alexy 2010; Dworkin 2013; Peczenik 2010, 7-37; Potrzeszcz 2015, 107-22.

[15] Judgment of the Polish Constitutional Tribunal of 26 April 1995, ref. no. K 11/94. OTK ZU 12/1995, No. 1, item 12.

the constitutional legislator imposes one more obligatory condition strictly related to proportionality *sensu stricto*: the restrictions may not violate the essence of a given freedom, or its core, without which said freedom or law cannot exist and which at the same time determines its identity [Olszówka and Dyda 2020, 103]. As the Constitutional Tribunal's decisions evince, "the essence of law and freedom is based on the principle that within a specific right or freedom certain basic elements may be distinguished (root or core), without which said right or freedom will not be able to exist at all, and additional elements (areola) that may be restricted or modified in various ways without jeopardizing the identity of a given right or freedom."[16]

3. RESTRICTIONS OF THE FREEDOM OF CONSCIENCE AND BELIEF IN THE FIRST STAGE OF THE PANDEMIC

The general limitation clause is commonly used with respect to all the rights and freedoms guaranteed by the Constitution. This notwithstanding, the constitutional legislator identified specific regulations to protect rights and freedoms. One of these is Article 53(5) of the Constitution, which stipulates that one's freedom to express their beliefs may only be restricted through an act of the Parliament and only when it is necessary to protect the state's security, public order, health, morality, or the rights and freedoms of other people. The Constitutional Tribunal traditionally mentions freedom of conscience alongside freedom of belief, while the Article 53(1) of the Constitution speaks of freedom of religion. All of the above occupy a special place among a human being's rights and freedoms.

According to the Act from 5 December 2008 on countering and combating infections and infectious diseases in people,[17] a state of epidemic threat signifies "a legal situation announced within a given area as a reaction to the risk of epidemic so as to undertake preventive measures defined in the act," while the state of epidemic denotes "a legal situation announced within a given area as a response to the outbreak of the epidemic so as to undertake counter-epidemic and preventive actions defined in the act to minimalize the outcome of the epidemic."

On the basis of these legal regulations, Minister of Health issued an ordinance announcing a state of epidemic threat within the Republic of Poland

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[16] Judgment of the Polish Constitutional Tribunal of 25 May 1999, SK 9/98, Journal of Laws No. 49, item 498; see Niżnik-Mucha 2014.

[17] Act of 5 December 2008 on countering and combating infections and infectious diseases in people, Journal of Laws of 2021, item 2069, 2120, as amended, Article 2(23), Article 2(22).

on 13 March 2020,[18] in accord with which religious worship in public was restricted, including in buildings and other places of religious worship, by imposing the limit of 50 participants, clergy included. This restriction was sustained in Minister of Health's ordinance from 20 March 2020 announcing the state of epidemic within the Republic of Poland.[19] The situation was drastically changed by the amendment to the ordinance from 24 March 2020,[20] which decreased the number of participants in religious worship to 5 persons, excluding the clergy or, for funerals, employees of the funeral home, for the period of 24 March – 11 April 2020.

In practice, lay believers were not able to participate in liturgy during Easter celebrations (until Easter Saturday), which constitutes the most important period for all Christian churches and communities deriving from the Latin tradition. These limitations were sustained by the ordinance of the Council of Ministers from 31 March 2020 introducing restrictions, orders, and prohibitions due to the state of epidemic,[21] and were later extended to 20 April 2020.

There is no doubt that these restrictions of religious worship were meant to protect public health. What is more, they protected the rights and freedoms of other people, including their right to live (Article 38 of the Constitution) and the right to protection of health (Article 68 of the Constitution), as well as public order, which could have been endangered by social unrest related to a substantial increase in the number of cases and casualties. That was the *ratio legis* behind the above mentioned legal regulations.

On the other hand, it needs to be emphasized that the Constitution does not entitle Minister of Health, any other Minister, or the Council of Ministers to restrict freedom of religion due to the state of epidemic threat or epidemic, even less so to totally deprive believers of an ability to take part in religious practices that are of fundamental value to them (such as in-person participation in the Sunday mass for Catholics), which was the actual outcome of the restrictions introduced. To refer to the limitation clause, the legislator did not fulfil the formal criterion – "test one" – which resulted in unjustified decrease of constitutional protection of individual rights. What is more, making no exception to the rule of keeping a distance

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[18] The regulation of Minister of Health of 13 March 2020 announcing the state of epidemic threat within the Republic of Poland, Journal of Laws item 433 as amended, § 5(1)(4), § 6(1)(3).

[19] The regulation of Minister of Health of 20 March 2020 announcing the state of epidemic within the Republic of Poland, Journal of Laws item 522.

[20] The regulation of Minister of Health of 24 March 2020 amending the regulation announcing the state of epidemic within the Republic of Poland, Journal of Laws item 522.

[21] The regulation of the Council of Ministers of 31 March 2020 on establishing specific restrictions, orders, and prohibitions in relation to the state of epidemic, Journal of Laws item 566 as amended.

of 1.5 meter among the believers in a place of worship for people living in the same household needs to be viewed as a certain legal loophole.

The restrictions likewise pertained to mobility, the functioning of certain institutions or workplaces, and contained prohibitions against organizing events and other assemblies (Article 46(4)(1, 3, 4) of the act on countering and combating infections and infectious diseases in people). These regulations cannot be treated as legitimizing restrictions of freedom of religion, as they refer to completely different aspects and are unrelated to freedom of religion, which in the Polish Constitution and legislative acts is clearly distinguished from other freedoms, including that of assembly. As a matter of fact, it is not the practices of "folk" religiosity that are jeopardized here but the essential religious obligation for members of the Catholic Church. For this reason alone, the prohibition needs to be treated as non-proportional as it not only restricts freedom of religion but essentially nullifies it ("test three").

4. SANCTIONS FOR FAILURE TO COMPLY WITH THE REGULATIONS

Another issue to address in this context is the legality of sanctions imposed on citizens for their failure to comply with pandemic restrictions. According to Article 54 of Petty Offenses Code, "whoever breaks the rules of conduct in public established by a legislative act is subject to a fine of up to 500 PLN or to an official reprimand." The problem arises when rules of conduct are introduced with a violation of the mandate to do so through a legislative act. The legitimacy of such regulations should always be assessed by a court of law. If these are found to be at odds with the operative acts, they may not be enforced. As a matter of fact, the hastily introduced pandemic restrictions led to a disregard of the principle of *nullum crimen sine lege*. Article 46b(4) of the act on countering and combating infections and infectious diseases enabled solely the introduction of the obligation to have one's mouth and nose covered as a "preventive measure," and only for people infected with or suspected of being infected with an infectious disease.[22] It needs to be added that the order to use mouth and nose coverings referred to places open to the public, including places of worship. Even if it is hypothetically assumed that regulations of Minister of Health and the Council of Ministers had the status of a legislative act, the material

[22] See Maroń 2021, 40; It was only on 29 November 2020 – when Article 46b(13) added to the act became operative – that the Council of Ministers was entitled to issue an regulation of "an order to have one's mouth and nose covered, in specific circumstances, places and buildings and within specific areas, together with the way of enforcing the order." Act of 28 October 2020 amending certain laws in connection with counteracting COVID-19 emergencies, Journal of Laws item 2112.

conditions were nevertheless not met: the principles of inevitability and proportionality *sensu stricto* were not met and the "essence of freedom of religion" was not respected [Maroń 2021, 40].

While undertaking actions related to freedom of religion during the pandemic, the legislative and executive bodies did not avoid involvement in the sphere of sacrum, which is beyond their realm [ibid., 44]. A classical example referred to in literature is the letter of the State Powiat Public Health Inspector in Leżajsk from 4 May 2020, in which he reiterates the obligation to respect rules of hygiene while taking the communion. Currently, the most recommended form of receiving communion is having it placed in one's palm. However, if the believers prefer to receive the communion on their tongues, they need to be divided into two groups, those who prefer taking the communion in their hands in the first, and the remaining believers in the latter.[23]

Such a situation clearly goes against the autonomy and separation of the state and churches and other religious groups, including the Catholic Church (Article 25(3) of the Polish Constitution actually strengthens the constitutional protection of freedom of religion, especially when exercised in places of worship). Hence, state authorities are in no position nor do they have any instruments to determine the way in which communion should be received or check the number of people participating in worship inside the temple.[24] It needs to be emphasized at this point that in accord with Article 91(2) of the Constitution, an international agreement consensually ratified through a legislative act – such as a concordat – takes precedence over a legislative act if the two cannot be reconciled. According to the Constitution of the Republic of Poland, as corroborated by decisions of the Constitutional Tribunal, freedom of religion scores high in the hierarchy of constitutional values, and its restriction is acceptable only when the above mentioned criteria are met in accord with the rule of proportionality. As a result, restrictions of freedom of religion should be introduced as the last possible measure, not the first or second one.

CONCLUSIONS

There can be no doubt that the legislative activity of the executive in the context of the state of epidemic threat and subsequently the state

[23] See https://nowiny24.pl/inspektor-sanitarny-do-dymisji-bo-napisal-jak-podawac-komunie-urzednik-to-nie-biskup-oburzali-sie-katoliccy-dzialacze-zdjecia/ar/c1-14987132 [accessed: 22.12.2022].

[24] See https://tyna.info.pl/tarnobrzeg-policjanci-wkroczyli-do-kosciola-bo-na-mszy-mialo-byc-zbyt-duzo-wiernych-zdjecia/ [accessed: 22.12.2022].

of epidemic was meant to prevent and combat the COVID-19 pandemic. The value that was safeguarded in this way was public health (ensuring positive outcome of "test two").

What remains doubtful is whether some of the introduced restrictions fulfilled other criteria of the principle of proportionality ("test one" and "test three"). This pertains in particular to restrictions of freedom of religion and of mobility introduced through regulations. It needs to be stressed that the assessment of these measures should always take into account the current state of the epidemic and restrictions introduced in other spheres of social life.

The COVID-19 restrictions enforced from March to April 2020 pertaining to the acceptable number of participants in religious worship raise justified doubts in the context of "test one" and "test three" of the principle of proportionality, as they were stricter than those introduced in other spheres of social life, such as public transport or trade and commerce. It is likewise difficult to pinpoint the medical rationale for imposing tougher restrictions on religious worship than on other areas of life. The constitutional status of freedom of religion is not lower than that of other freedoms – which were restricted to a lesser degree – but in accord with consistent decisions of the Constitutional Tribunal it is very high. What is more, religious freedom should have been restricted through a legislative act, not a regulation. If one was able to use public transport, go shopping, visit shopping malls, etc. since that was deemed essential from the point of view of citizens' basic necessities, particularly sensitive and vital needs of religious nature should also have been taken into consideration.

Three persons were allowed at that time in shops per one cashier [Maroń 2021, 34]. In turn, in public transport the number of passengers allowed equaled 50 percent of the available seats.[25] The Constitutional Tribunal believes that "the contingency that restrictions of rights and freedoms are only legal when introduced 'through a legislative act only' is more than a mere reminder of a general rule that the legal status of individuals needs to be determined through acts as a classical element of the concept of the rule of law."[26]

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[25] Regulation of the Council of Ministers of 31 March 2020 on establishing specific restrictions, orders, and prohibitions in relation to the state of epidemic, Journal of Law item 566 as amended (§ 5(4), § 8(1)(3), § 9(1)(3), § 9(5), § 18(1)(2)). See the regulation of the Council of Ministers of 10 April 2020 on establishing specific restrictions, orders, and prohibitions in relation to the state of epidemic, Journal of Laws item 658 (§ 5(4), § 8(1)(3), § 9(1)(3), § 9(2)).

[26] Judgment of the Polish Constitutional Tribunal of 12 January 2000, ref. no. P 11/98, Journal of Laws No. 3, item 46.

Maroń aptly argues that "a theological laxism of sorts on the part of some clergy and believers as regards restrictions of group religious worship during the pandemic as well as their obedient and *ex ante* affirmative attitude to the activities of the authorities in this respect should have no bearing on the assessment of the constitutionality of regulations restricting freedom of religion."[27]

The moral of sorts and recommendation for the future that can be formulated is therefore a necessity to always seek maximum efficacy and efficiency of legislative changes. The dynamic of a complex reality, chaos, and panic are not good indicators in the law-making process. It is always worthwhile to recall the legislative canon, which essentially comes down to respecting the formal principles of natural law as formulated by Lon Luvois Fuller[28] or the rules of decent legislation (principles of the law-making process[29]) as manifested by the Constitutional Tribunal's decisions. The reflection offered in this article is of an *ex post* character as at the present moment more in-depth knowledge on the coronavirus is available, together with vaccines and herd immunity. All of these may lead one to the conclusion that it is now easy to criticize the legislative reaction during the early stage of the pandemic. However, it needs to be remembered that excessively restrictive regulations passed with a violation of normal procedure and later implemented at the authorities' discretion seriously disrupt the democratic rule of law. It is the role of both theoretical and practical lawyers to counteract the atrophy of the law and demonstrate constant care for good law in all its five dimensions.[30]

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[27] Cf. Maroń 2021, 42.

[28] See Fuller 2004; Izdebski 2020, 29-58.

[29] See regulation of the Prime Minister of 20 June 2002 on the principles of the law-making process, Journal of Laws of 2016, item 283.

[30] Namely, creation, implementation, interpretation, validity, and compliance.

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JUDGE'S RECUSAL AS ONE OF THE GUARANTEES OF FAIR CRIMINAL TRIAL A FEW REMARKS IN THE CONTEXT OF ARTICLES 40 AND 41 OF THE POLISH PENAL CODE

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Abstract. The article presents the issue of recusal of a judge as one of the guarantees of a fair criminal trial. The author presented in the first part of the text the question of recusal of a judge under Articles 40 and 41 of the Code of Criminal Procedure in historical perspective. Looking from that perspective, she analysed the fundamental context of recusal of a judge in view of procedural principles, namely the impartiality and independence of the judge, and the function of judge's recusal. Finally, she presented conclusions for the currently applicable law and proposals for the law as it should stand and the consequences of admitting a judge affected by recusal under Article 40(1) or (3) of the Code of Criminal Procedure.

Keywords: recusal (disqualification) of judge under Articles 40 and 41 of the Code of Criminal Procedure; recusal of judge and the principle of impartiality; recusal of judge and court independence; functions of the recusal of a judge

INTRODUCTION

The recusal (disqualification) of a judge is a procedural institution which, like no other, implements the constitutional rule from Article 45(1) of the Polish Constitution of 2 April 1997[1] and, on the other hand, the Convention rule from Article 6(1) of the European Convention on Human Rights.[2] Both of those acts are astonishingly unanimous in describing the court as "independent" and "autonomous", with the Constitution also describing it as "impartial". All these values constitute a minimum standard of justice and their implementation is a prerequisite for finding that a fair trial has taken place. Despite some declarative nature of these values, they are actually present in judicial and systemic practice of the Polish judiciary.

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

2 European Convention for the Protection of Human Rights and Fundamental Freedoms done in Rome on 4 November 1950 (ETS No.005 as amended).

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This paper seeks to illustrate the nature of the guarantee nature of the institution of judge's recusal, without analysing individual cases, as this issue has been examined in depth over the years in the literature of the subject [Skrętowicz 1994, 21-44; Jasiński 2009, 284-355].

1. RECUSAL OF A JUDGE – HISTORICAL PERSPECTIVE

Chapter 2 of Section II of the currently applicable Code of Criminal Procedure[3] concerning courts contains provisions on recusal of a judge. The Polish equivalent of the word "to recuse" (*wyłączyć*) means with regard to an object "to stop the work of (something)", and in relation to a person – "to exclude (someone) from some group or from some action."[4] The provisions of Articles 40 and 41 CCP as directly concerning the person of the judge, and *mutatis mutandis* also court referendaries and lay judges (cf. Article 44 CCP), it has the second of these meanings.

The institution of the exclusion of a judge was also present in the two previous codes of criminal procedure. Thus, the Code of 1928[5] regulated the recusal of a judge in Chapter 2 of Book I ("Courts"), while the Code of 1969 regulated this issue in Chapter 2 of Section II ("Court"). The pre-war act used the Polish term *wyłączenie* (exclusion, recusal, disqualification) in the title of the relevant chapter, while the wording of Article 39,[6] which catalogued the "grounds for recusal" in relation to a judge, formulated an explicit prohibition to proceed a case if any of the circumstances listed in the paragraphs occurred ("may not participate in proceeding the case"). These circumstances were referred to by the legislature as "grounds for recusal" (Article 39(2)) and as "causes of recusal" (Article 40(1) and (2), Article 42), each time referring to events that prevent a given judge to decide the case. It was not until the subsequent Code of Criminal Procedure[7] when it was indicated that the recusal of a judge due to circumstances clearly specified by the law, still inconsistently referred to as "reasons" (Article 30(2)) or "causes" (Article 31(2), Article 32(2)), is a recusal effective *ex lege*, i.e. "by operation of law". The same Code of 1969 did not impose on a judge the prohibition to participate in the conduct of a case, instead it contained a statement that the same judge is subject to "exclusion from participation

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3 Act of 6 June 1997, the Code of Criminal Procedure, Journal of Laws of 2021, item 534 as amended [hereinafter: CCP].

4 See *Słownik języka polskiego*, https://sjp.pwn.pl/sjp/wylaczyc;2539715.html [accessed: 11.04.2022].

5 Ordinance of 19 March 1928, the Code of Criminal Procedure, Journal of Laws No. 33, item 313 as amended.

6 According to the original numbering of Code provisions.

7 Act of 19 April 1969, the Code of Criminal Procedure, Journal of Laws No. 13, item 96 as amended.

in the case". The pre-war Code, in Article 42, also allowed for the recusal of a judge "irrespective of the reasons mentioned in Article 39" in the event of a situation where "there was a personal relationship between him and one of the parties, of such a kind that it could give rise to doubts as to his impartiality". This reason for recusal was adopted unchanged by Article 31 of the Code of Criminal Procedure of 1969. Only the institution of recusal of a judge due to a relationship between the judge and one of the parties (Article 42 of the Code of Criminal Procedure of 1928, Article 31(1) of the Code of Criminal Procedure of 1969) or a "circumstance of a [certain] kind" affecting the judge clearly indicate a related threat to the implementation of the principle of impartiality, which Article 40 CCP does not do, but which does not prevent considering the legislative *rationes* as identical.

2. JUDGE' RECUSAL AND THE PRINCIPLE OF IMPARTIALITY

Currently, the institution of recusal is not an instrument that distinguishes judges in any particular way, because the legislature provides for the possibility of disqualification of other proceedings participants, i.e. mediator (Article 23a(3) CCP), prosecutor, other persons who conduct pre-trial proceedings and other public accusers (Article 47(1) CCP), protocol officer and stenographer (Article 146(1) CCP), witness expert (Article 196(1) CCP).

The possibility of applying the institution of recusal also to other participants in criminal proceedings does not in any way undermine the position that judge's recusal is an institution firmly rooted in the constitutional model of justice, which, in accordance with Article 45(1) of the Polish Constitution, is based on "competent, impartial and independent" courts, and the actual hearing of the case by such courts should be "fair". Thus, notwithstanding the fact that recusal is now an institution applicable to various participants in the criminal proceedings, it is precisely the recusal of a judge, but also a lay judge, that seems to play a crucial role in shaping the proceedings in a manner consistent with the principle of impartiality, which, as P. Wiliński puts it, takes the form of a "procedural rule which imposes an obligation on the judge to hear the case without bias, objectively, taking the pursuit of the truth as the most important criterion of the independence of the court", following the regulation contained in Article 4 CCP [Wiliński 2020, 334].

Impartiality must be required from the court defined as a hearing panel and understood as a State body competent to administer justice, and from a particular judge who is a member of the hearing panel. In this respect, impartiality is a feature not only of the adjudicating authority but also of the persons entrusted with the exercise of judicial power. However, impartiality can also be referred to the proceedings themselves as a characteristic inherent in the judicial procedure concerned. Impartiality (or, more broadly,

objectivity) can take the form of procedural impartiality or substantive impartiality. Procedural impartiality is the elimination of any relationship between a judge and the parties to the proceedings, but also the case itself, which could lead him to be willing to issue a ruling with specific content, while substantive impartiality is the actual conduct of a judge in the proceedings which requires him to have an appropriate personal attitude, ability to distance himself from the parties and to treat them on an equal footing [Artymiak 2007, 87]. It is only a preliminary analysis of the problem that shows that it is easier to implement the first type of impartiality, because the second type constitutes a sum of elements which are often immeasurable and not self-evident [Tabor 2005, 12]. The institution of recusal is intended for the parties to defend against "overt bias", but usually the party is deprived of the means of defending against "covert bias" that does not overlap for any reasons of recusal, whether under Article 40 or Article 41 CCP.[8] However, even the institution of recusal is not capable of ensuring perfect impartiality understood as "elimination of any external element not strictly related to the matter of the case from the thought process of the procedural decision-maker,"[9] but it can still serve to "maximize" that impartiality [Grzegorczyk 2014].

Today, impartiality has nowadays been elevated to the rank of the supreme procedural principle by such authors as S. Kalinowski [Kalinowski 1966, 78; Kruszyński 2003, 108], S. Waltoś [Waltoś and Hofmański 2016, 226], J. Tylman [Grzegorczyk and Tylman 1997, 81], K. Dudka [Dudka and Paluszkiewicz 2021, 158], P. Wiliński [Wiliński 2020, 332] and J. Kosonoga [Kosonoga 2017]. M. Cieślak has noticed that the principle of impartiality (objectivity) shows a strong link with the principle of material truth and the principle of equal rights of parties to the proceedings [Cieślak 1984, 319], but also that it is a principle that does not allow any deviations. And although he did not distinguish the principle of impartiality, he saw the need to preserve the "objectivity in judging" as an important factor affecting the judge's assessment of evidence [ibid., 220 and 289].

It should be noted here that the situation of a judge differs from the status of other participants in criminal proceedings who may be subject to disqualification, since the objection of a sort of "systemic" inability to maintain impartiality, formulated by scholars in relation to the public prosecutor [Sowiński 2005, 114-22][10] as a procedural institution focused on the prosecution of offenders, do not apply to judges. It is therefore inconceivable

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8 Judgement of the Supreme Court of 5 February 2008, ref. no. SNO 2/08, Lex no. 432189.

9 Resolution of the Supreme Court of 26 April 2007, ref. no. I KZP 9/07, OSNKW 2007, No. 5, item 39.

10 Differently: Kuczyńska 2020, 161 – based on Articles 2 and 64 of the Act of 28 January 2016, the Law on Prosecutors (Journal of Laws of 2021, item 66 as amended) – and Kulesza 2020.

in the case of a judge that his or her impartiality is more declared than actual, which is the case with the public prosecutor [Tokarczyk 2009, 25-26]. The profession of judge was and still is a public trust function, and its significance result from the judicial tasks entrusted to them [Świda 2011, 509]. Although the degree of this trust may vary, depending on the attitude of the professional community itself or intentional actions of the executive power, nothing can exempt a judge from keeping an appropriate ethical and professional attitude. It is difficult, however, to agree with the view expressed by G. Artymiak that "since the concept of human rights ingrained in the social consciousness, when we have committed ourselves to applying human rights covenants on a daily basis, the life of an independent judge has been more difficult," because none of these factors can have a negative impact on a judge's ability to fulfil their constitutional and statutory obligation to remain objective in a criminal case [Artymiak 2010, 226]. The judge was, and still is, a criminal trial participant who is expected to maintain a particularly high ethical and moral level as well as a kind of neutrality towards the parties and the case. The argument that a higher degree of legal awareness of other participants of criminal proceedings would have a negative impact on the conditions of deciding the case cannot be taken seriously as following this line of thought, one should consider reducing the parties to the role of passive executors of court orders and the need to abandon the application of Article 16(1) and (2) CCP in their present form, which obviously is out of question.

3. JUDGE'S RECUSAL AND INDEPENDENCE OF THE COURT

P. Wiliński sees the difference between the independence of the court under Article 187(1) of the Constitution of the Republic of Poland as subordination of judges in the exercise of their duties only to the Constitution and laws, and independence of the judge understood as an expression of the place of the judiciary within the system of state authorities, independent from the legislative power and executive power [Wiliński 2020, 335]. The position of the judge thus determined will manifest itself in judge's ability to independently and autonomously assess whether there are grounds for his recusal in the case. Depriving the court of any of these powers means that it will not be able to hear the case as required by the standards of fair trial [Nowicki 1998, 157]. The judges themselves, upon assuming the office of judge, take an oath , an essential part of which is the obligation to administer justice 'in accordance with the law, impartially, according to (their) own

conscience' (Article 66(1) of the Law on the System of Common Courts[11])[12]. The same is true for judges of the Supreme Court (cf. Article 34(1) and Article 41(1) of the Act on the Supreme Court[13])[14].

Judge independence is considered by M. Cieślak as "a very important, necessary principle of a democratic process, safeguarding the rule of law and the objectivity of the operation of our judiciary" [Murzynowski 1994, 225], but he denies its unlimited nature, as in his opinion it is limited by the content of "laws, thus by the will of the legislature". However, it is the rational legislature's responsibility to shape the content of the law so as not to unduly restrict judicial freedom, both in the procedural and political aspects, but the latter, as publicly stated by some, may unfortunately be jeopardized by the recent legislative efforts towards deconstruction of the procedure of appointment of the members of the National Council of the Judiciary leading to its definitive politicization or, finally, the activities of certain presidents of courts in disciplining their subordinate judges based on unclear charges.

Such activities cannot be reconciled with the content of Article 45(1) of the Constitution, nor with Article 6(1) ECHR and in this respect nothing will be changed by disavowing those of the judiciary who criticize such behaviour, or by creating constructs based on the alleged collision of the Convention model of justice with the national model.

Referring to the allegations about the above-mentioned state of affairs raised by representatives of various milieux of the legal community, it should be stated that these arguments, especially regarding the recusal of a judge appointed by the new National Council of the Judiciary, are not fully justified.

In my opinion, the current regulations do not provide for the possibility of using the institution of recusal of a judge (Articles 40 and 41 CCP) to challenge the prerogatives of an individual judge to adjudicate in a case, by invoking doubts as to the manner of his appointment to this position or the manner of appointing a hearing panel in the case, which transfers this problem to the appellate stage.

From this perspective, however, there is a question whether the appellate court, when examining the objection under Article 439(1)(1) CCP that

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11 Act of 27 July 2001, the Law on the System of Common Courts, Journal of Laws of 2020, item 2027 as amended.

12 The same case is associate judges – Article 106i (3) of the Law on the System of Common Courts and lay judges of common courts – Article 164(2) of the Law on the System of Common Courts.

13 Act of 8 December 2017 on the Supreme Court, Journal of Laws of 2021, item 2027 as amended).

14 The same case is lay judges of the Supreme Court – Article 63(2) of the Act on the Supreme Court.

the adjudication involved an unauthorized person or more precisely, a judge who, proposed by the currently functioning National Council of the Judiciary and appointed by the President of the Republic of Poland to perform the functions of common court judge or Supreme Court judge, should express a positive opinion on such an objection having a self-standing appellate character without specific reasons contained in the appeal, deeming the self-standing reason as sufficient and constituting the basis for repealing the judgment. It seems that such a practice would lead to a kind of schizophrenia and destabilisation of judgments subjected to higher-instance review, a state that cannot be reasonably justified by anything, and in particular in the context of the applicable procedural law provisions. At the same time, such a state of affairs would correlate with the deprivation of experienced judges in lower-instance courts of the obvious right for their judicial work being appreciated and a well-deserved nomination to adjudicate in higher instance courts, since the so-called "newly" appointed judges would risk without any reason that they lose their judicial functions and administering justice in the context of their participation in the criminal justice process. Therefore, taking into account the following situations: possible demand in the request to recuse a judge without a legal and factual reason, not being justified in the grounds for recusal under Articles 40 or 41 CCP and the possible formulation of an objection based on the above-mentioned situation, devoid of both the reason and the legal basis for recognizing the reason for the recusal, it should be considered that in the light of the applicable provisions, a recusal or resulting repeal of the judgment seems unacceptable.

Recusal of a judge was also subject to a position taken by the Supreme Court, which proceeds requests for judge recusal in the following cases: in the first case, the recusal of a judge due to doubts as to his independence and impartiality resulting from the appointment procedure,[15] in the second, the recusal of a judge appointed by the so-called the new National Council of the Judiciary.[16]

4. FUNCTIONS OF THE RECUSAL OF A JUDGE

Recusal is designed to perform three basic functions. K. Papke-Olszauskas mentions among them: ensuring the impartiality of adjudication, strengthening social trust in the impartiality of the court and elimination

[15] Decision of the Supreme Court of 8 October 2020, ref. no. I NWW 59/20, Lex no. 3066719; see also decision of the Supreme Court of 3 November 2021, ref. no. IV KO 86/21, Lex no. 3251718.

[16] Decision of the Supreme Court of 16 June 2021, ref. no. I NWW 27/21, Lex no. 3304790.

of conflicts of judge's conscience [Papke-Olszauskas 2017, 52]. I fully agree with this view, adding that trust in the impartiality of the court can be considered in general terms (trust in the system of justice) or in terms of a specific case (trust in a given hearing panel), while the elimination of conflicts is nothing more than the need to provide the judge with ease in adjudicating.[17] This comfort is needed because the shaping of procedural decisions is the result of a complex and multidimensional process. E. Skrętowicz noticed that the content of a procedural decision is influenced by a number of factors of a different nature. These factors are not only of a legal, but are also logical, philosophical, ethical and psychological nature [Skrętowicz 1989, 9].

The application of the institution of recusal entails a change in the composition of the hearing panel, which is an exception from the principle of the invariability of the hearing panel in criminal cases, which can be derived from the provisions of the Code of 1997.[18] This exception, due to its statutory origin, is within the limits allowing to state that at least in the model and doctrinal terms the modern criminal judiciary is free of administrative influence, which prevents arbitrary appointments for these bodies [Glaser 1934, 96-97]. Needless to say, this freedom should be considered one of the guarantees of a fair trial, but also a circumstance that serves the performance of the adjudication function, which is considered by P. Hofmański as one of the most important procedural functions [Hofmański 2013, 524]. The guarantee function is also a feature of recusal itself. Scholars in the field note that this very role of recusal outweighs its practical value [Jankowski 1986, 7].

The guarantee character of the institution of recusal of a judge due to one or even several reasons under Article 40(1) or (3) CCP can be looked at from the negative and positive perspectives. On the negative side, the recusal of a specific judge is intended to eliminate from the trial a judge who does not guarantee a proper judicial attitude [Waltoś 2003, 223], and on the positive side, it strengthens us in the belief that every other judge already gives such a guarantee. In the same doctrine, the recusal of a judge is primarily related to the guarantees of the interests of the judiciary [Skrętowicz 1968, 1176], but it seems that this institution can also be associated with guarantees for the interests of other participants in criminal proceedings and a guarantee of an appropriate penal response [Papke-Olszauskas 2017, 55].

Judges are covered by the most comprehensive list of circumstances that prevent them from adjudicating, but there is also no need to convince

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[17] It should be noted, however, that the institution of recusal of a judge eliminates him from any acts performed in the case, including those that do not fall within the concept of "adjudication" or "settlement".

[18] This view is also shared by Artymiak 2007, 89.

anyone that this they are particularly important participants in criminal procedure. Article 40(1) CCP lists as many as ten circumstances, the presence of which makes a judge incapable of adjudicating (*iudex inhabilis*). These circumstances are: direct interest of the judge in the case ("the judge is directly concerned") – item 1; marriage to, or being in cohabitation with, a party or victim, or their defence counsel, attorney or legal representative – item 2; consanguinity or affinity in the straight line and in the lateral line up to the degree of kinship between children of the siblings of persons referred to in para. 1(2) or being related to one of those persons under adoption, care or guardianship relationship – item 3; being a witness to the offence in question, or being heard as a witness or acting as an expert witness in the same case – item 4; participation in the case as a public prosecutor, defence counsel, attorney, legal representative of a party, or conducting the ruling or issuance of the challenged order – item 6; participation in the issuing of the repealed ruling – item 7; participation in the issuance of a ruling against which an objection has been lodged – item 9; mediation – item 10. Since 2003, the participation in the decision on conditional discontinuance of proceedings has not constituted a reason for recusal (para. 1(8) currently not in force).[19] This list is supplemented by the provision of Article 40(3) CCP. The provision precludes a judge who was involved in the issuance of a ruling subject to those measures from deciding on a request for renewal, annulment or extraordinary action.

Each of the grounds of recusal under Article 40(1) is equivalent, but it is evident that not all of them have similar universality, as evidenced by the comparison of grounds of recusal based on the proven rule *nemo iudex in causa sua* [Skrętowicz 1969, 333] (item 1 of Article 40(1) CCP) e.g. with the ground under Article 40(1)(9) CCP. Some of the grounds stated in Article 40 CCP are applied to adjudication in a second instance court, e.g. the reason specified in item 6, whereas the reason stated in paragraph 3 is applicable to proceedings carried out after the judgment has become final. The grounds from paragraphs 5 and 10 of Article 40(1) CCP are the result of the exercise of procedural functions other than adjudication, which is also partly the case with paragraph 4 *in fine* of Article 40(1) CCP. In contrast to recusal under Article 41 CCP, recusal by operation of law is in principle based on objectively existing, easily verifiable and even measurable grounds (an exception may, however, constitute the ground based on "cohabitation with one of the persons" listed in item 1 of Article 40(1) CCP and that mentioned in item 4). The catalogue in Article 40(1) items 1 to 10 (para. 3) CCP is also a close-ended enumeration, as confirmed by the Supreme Court

[19] Article 40(1)(8) repealed by Article 1(13)(c) of the Act of 10 January 2003 (Journal of Laws No. 17, item 155) amending that Act.

in many judgments.[20] Perhaps except the reason set out in Article 40(1) item 1 CCP, i.e. the judge's personal interest in the case ("the case directly concerns that judge"), the rest of the reasons set out in Article 40(1) CCP, is of a strict nature.

The situation is different with the reason under Article 41(1) CCP, which refers to "a circumstance of such a kind that could raise a reasonable doubt as to the impartiality of [the judge] in a given case." This reason requires an assessment by the judge himself (Article 41(2) CCP) and the court (Article 41(4) CCP), and the result of this assessment affects the future of the judge in the case. At the same time, it is a reason that requires plausibility and objective occurrence,[21] because Article 41 CCP cannot serve to eliminate an inconvenient judge, but only one who does not guarantee impartiality in this particular case. It may also happen that some part of the judge-related circumstances invoked is confirmed, but also their gravity is not as serious as considered by this party. Undoubtedly, the reasons under Article 40 CCP are characterized by a greater gravity than that under Article 41 CCP, hence the more strict legislature's reaction to them [Mucha 2006-2007, 402].

Both groups of reasons for recusal, both those from Article 40 and those from Article 41, serve to disqualify an individually specified judge, and not to generally disqualify an entire organizational unit of the justice system, e.g. the Regional Court in Lublin [Grajewski and Steinborn 2015]. However, it is possible to submit recusal requests in relation to any subsequent member of the adjudicating panel who has "replaced" the previously disqualified one, which in effect may lead to the situation constituting the subject of Article 43 CCP [Stefański 2007, 450].

The obligation to disclose circumstances that may be the grounds for recusal is borne by the judge, even though it does not appear explicitly from any provision of the Code of Criminal Procedure.

Concluding reflections on the guarantee nature of the institution of recusal of a judge, it should be pointed out that pre-emptive disqualification of this participant in a criminal case makes it possible to avoid further perturbations with the ruling, which enhances stability of adjudication and, in the long run, also the stability of the legal environment of citizens.[22] I my-

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[20] Decision of the Supreme Court of 14 November 2017, ref. no. V KK 216/17, Lex no. 2449657; decision of the Supreme Court of 12 February 2014, ref. no. V KO 4/14, Lex no. 1427480; judgment of the Supreme Court of 15 November 2013, ref. no. III KK 227/13, Lex no. 1403880; judgment of the Supreme Court of 4 January 2011, ref. no. SDI 30/10, Lex no. 1223732.

[21] Decision of the Supreme Court of 11 January 2012, ref. no. III KK 214/11, OSNKW 2012, No. 4, item 40. Supera 2010, 75.

[22] For more on the stabilization function of the procedural criminal law itself, see Olszewski 2019, 71-79.

self am also in favour of admissibility of requesting by a party for the recusal of a judge referred to in Article 40(1)(3) CCP, although from the wording of the Code provisions, such a procedure seems to be reserved exclusively for a judge under Article 41 CCP. Although the cases referred to in Article 40 CCP concern "self-disqualification" by the judge, nothing prevents a party from requesting such recusal of the judge. This may counteract the passivity of the judge himself, although whenever such a judge has made an appropriate statement, the party's request will be unreasonable (see Article 42(2) CCP). This manner of interpretation results from the conviction that the parties to the procedure have controlling function, and also from the fact that Article 42(1) CCP does not specify that the "request of a party" mentioned there should be limited to the grounds of recusal from Article 41 CCP. J. Kosonoga, who presents a similar view on this issue, proposes, and I fully share this postulate, to delete from Article 42(3) CCP the phrase: "pursuant to Article 41" [Kosonoga 2018, 166], which would determine the admissibility of filing a request for recusal also with regard to a judge specified in Article 40 CCP.

CONCLUSIONS

Judge recusal proceedings have all the features of an incidental proceeding, but still important [Kaczorkiewicz 2006, 197]. A judge affected by any of the grounds of recusal listed in Article 40 or 41 CCP, will never be able to hear a criminal case well. The process with his participation will be characterized by the original sin of partiality, and without impartiality it is difficult to talk about a fair trial. Disqualifying such a judge is therefore necessary, but also quite exceptional.

The differentiation of the procedure for the recusal of a judge and the "separation" of the grounds of recusal into two provisions, i.e. Articles 40 and 41 CCP (although both types of recusal perform the same function) demonstrates a certain gradualness of these circumstances: the circumstances absolutely supporting the disqualification of a judge from the trial are included in Article 40 CCP, and those that are relative (evaluative) – in Article 41 CCP. The first is assigned more gravity, which results in a certain "automatic"[23] disqualification in a situation to which the legislator attaches an indelible legal presumption of the judge's inability to adjudicate impartially, and in the second case – the resignation from such unconditionality of removing the judge from the case.

The uniqueness of the rules providing for the recusal of judges was noticed as early as in the 1930s by A. Mogilnicki, who was against their

[23] The "rule of automatic disqualification" is referred to by Wąsek-Wiaderek 2007, 97-110.

extensive interpretation [Mogilnicki 2019, 94].[24] On the one hand, the recusal of a judge is an exceptional institution, since it serves to remove a person professionally qualified to hear the case and appointed to the hearing panel in accordance with the provisions of Chapter 1 of Chapter II CCP, and on the other hand it is a most obvious institution in a democratic state, because it is to safeguard what is considered necessary in relation to the administration of justice and naturally related to this dimension, namely impartiality of adjudication. This, in turn, is a prerequisite for the attainment of the general objective of the criminal trial [Marszał 2021, 32-33; Idem 1997, 13], namely the decision about the matter of that trial. In a sense, Article 40ff. CCP are an expression of shaping the criminal proceedings to make it possible to achieve this objective by a court which is distanced to the case and to the parties, regardless of the fact that it seems that this impartiality is not mentioned in any of the paragraphs of Article 2(1) CCP. The omission of the condition of impartiality of the court is, however, ostensible, since it is not derived from the above-mentioned Article 45(1) of the Constitution that is superior to the Code provisions. Regardless of the constitutional origin of the condition of impartiality, I believe that it can also be inferred from the content of Article 2(2)(1) ("no innocent person can be held liable" [Kulesza 2020; Kurowski 2022]), 2 ("obligation of an appropriate punitive response") and 2 ("principle of material truth" [Kurowski 2022]).

The admission of a judge affected by the reason for recusal under Article 40(1) or (3) CCP to adjudicate in the case, unlikely from the practical perspective, but theoretically possible, should be considered in terms of the absolute grounds of appeal referred to in Article 439(1)(1) CCP. The very location of this reason in the structure of this provision shows that a breach of law consisting in taking part in the issuance of a judgment by a person "subject to disqualification under Article 40" is considered by the legislature as one of the most serious procedural shortcomings. On the other hand, the more likely admission to adjudication of the judge referred to in Article 41 CCP, is covered by the postulate *de lege ferenda* to equate it with "improper staffing of the court", i.e. the ground of appeal under Article 439(1)(2) CCP [Artymiak 2007, 96]. This view seems to be too far-fetched. J. Kosonoga, who has no doubts that the proceedings in which there are justified doubts as to judge's impartiality are defective, considers the infringement through the prism of Article 438(2) CCP and this position is closer to the truth [Kosonoga 2013, 195]. Defectiveness of proceedings with the participation of the judge referred to in Article 41 CCP is manifested in its inconsistency with the principle of impartiality, and to challenge the appealed judgment, the impact of this infringement on its content must be demonstrated.

[24] Decision of the Supreme Court of 7 January 2019, ref. no. V KK 361/18, Lex no. 2602690; decision of the Supreme Court of 9 October 2018, ref. no. III KK 477/18, Lex no. 2561613. See also the case-law cited by Paprzycki 2007, 389-400.

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THE EUROPEAN STANDARD OF LEGAL GENDER RECOGNITION

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Abstract. The author in his analysis focuses on two subjects. The first one is the history of legal gender recognition as a European standard followed by the analysis of the connections between legal gender recognition and the right to have medical treatment reimbursed by insurance, right to marriage, right to have children and protection against discrimination. The second one is related to the analysis of the margin of appreciation that States-Parties to the Convention enjoy in regulating conditions for the admissibility to request the recognition of one's gender identity. Presented analysis lead to a conclusion that European standard of legal gender recognition is defined in negative way by limiting the margin of appreciation that States-Parties to the Convention enjoy in regulating conditions for the admissibility to request the recognition of one's gender identity.

Keywords: human rights law; case-law of the European Court of Human Rights; legal gender recognition procedure

INTRODUCTION

The notion of gender identity or its legal recognition is not a subject of direct reference in the Convention for the Protection of Human Rights and Fundamental Freedoms [Cannoot 2019, 14-35; Dunne 2014, 506-10; Idem 2015, 530-39; Holzer 2022, 165-82; Osajda 2010; Theilen 2016, 530-39]. The European standard of legal gender recognition, as a positive obligation of a State-Party to provide a procedural framework allowing gender identity to be reconciled with a legal gender record comes from the Strasbourg case-law and was formed in 2002. The Court places this obligation in the context of the right to respect for private and family life, and emphasizes its importance for the life of an individual by pointing out that the legal gender is also related to other rights and freedoms of an individual, such as the right to marriage, to have medical treatment reimbursed by insurance, parental rights, or protection against discrimination. Taking into consideration the listed assumptions, the scope of this article is to reconstruct the European standard of legal gender recognition in terms of a standard that defines the applicable level of a guarantee of a specific legal status

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shaped in the case-law of the European Court of Human Rights, by focusing on two subjects. The first one is the history of legal gender recognition as a European standard followed by the analysis of the connections between legal gender recognition and the right to have medical treatment reimbursed by insurance, right to marriage, right to have children and protection against discrimination. The second one is related to the analysis of the margin of appreciation that States-Parties to the Convention enjoy in regulating conditions for the admissibility to request the recognition of one's gender identity

1. FROM REES TO GOODWIN. TOWARDS LEGAL GENDER RECOGNITION AS A EUROPEAN STANDARD

The history of the European case-law on the rights of transgender persons[1] is marked by the distinction between two periods, which differ in terms of the Court's approach to legal gender recognition [Osajda 2010; Theilen 2016, 530-39]. In its judgments delivered from 1986 to 1998 the Court gave State-Parties to the Convention a margin of appreciation in regulating the procedure for amending the legal gender record of a transgender person. The basis for this approach comes from the judgment delivered in the Rees case,[2] where the applicant alleged a violation of Articles 8 and 12 of the Convention due to the refusal to register the change of legal gender from female to male in his birth certificate, despite the fact the applicant had undergone hormone therapy and surgical body correction. In its judgment, the Court did not find a violation of the Convention and stated that the admission of the medical gender reassignment procedure does not oblige state authorities to amend the birth certificate, which was justified by the lack of European consensus, as revealed on the basis of a comparative analysis of State-Parties' legal orders. The Court subsequently relied on this view in its judgment from 27 September 1990, in Cossey v. The United Kingdom, holding that the refusal to change legal gender in the birth certificate of the applicant, which made it impossible to marry, did not violate the applicant's right to respect for her private and family life or the right of to marry.

The judgments in the Rees and Cossey cases, however, were not reached unanimously, and the additional dissenting opinions foreshadowed

[1] The first case on gender identity recorded in the case-law of the bodies of the human rights law of the Convention for the Protection of Human Rights and Fundamental Freedoms is case X v. Germany ended with a settlement, concluded before the European Commission of Human Rights, on the basis of which the applicant's name and legal gender on her birth certificate were changed. X v Germany App no. 6699/74, 15 December 1977.

[2] *Rees v United Kingdom* App no. 9532/81 ECtHR, 17 October 1986.

changes that were to take place in 2002 in the landmark case of Goodwin v. The United Kingdom. Judges Bindschedler-Robert, Russo and Gersing dissented on the point expressed by the majority in the Rees Case by pointing out in a dissenting opinion that the refusal to change the legal gender in the birth certificate "has resulted – and may again result – in the applicant's having to face distressing situations which amount to an interference with his private life and thus to a breach of Article 8"[3] which could have been avoided by an annotation in the birth register that there had been a change of his sexual identity. In turn, the judgment in the Cossey case was supplemented by four dissenting opinion of eight judges, who drew attention to a change in the approach to the rights of transgender people. Judges Bindschedler-Robert and Russo recalled the dissenting opinion in the Rees case. Judges Macdolan and Spielman noted changes in the domestic legal system of the Council of Europe Member States since 1986. Palm, Foighel and Pekkanen saw a violation of Art. 8 and 12, while Judge Martens presented a critical view on the adopted line in the case-law of the Court.

As to the admissibility of legal gender reassignment as an internal matter of State-Parties to the Convention, the Court also made a statement in the judgments in the cases of B v. France,[4] X, Y, Z v. The United Kingdom,[5] and Sheffield and Horsham v. The United Kingdom.[6] In the judgment of 25 March 1992, in B v. France, the Court revealed the differences between the British and French civil registration records systems in order to conclude that "Article 8 ECHR created a positive obligation on France to allow the applicant to change her legal gender on at least some official documents" [Holzer 2022, 173]. The Court's opinion expressed in the Rees case was reflected in the assessment of the situation of the applicant, who was denied his right to paternity registration despite gender reassignment surgery changing his body features from female to male, in X, Y, Z v. The United Kingdom. Despite permission for treatment with a view to artificial insemination by an anonymous donor from which Z was born, an obstacle to establishing the relationship between X and Z was the X legal gender annotation as a female, as registered in his birth certificate.

The Court contends that the domestic authorities of the Contracting States enjoy a wide margin of appreciation in applying the provisions of the European Convention in relation to the rights of transgender persons, as is evident from the judgment of 30 July 1999, in Sheffield and Horsham v. The United Kingdom. While assessing the situation of the applicants

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[3] *Rees v United Kingdom* App no. 9532/81 ECtHR, 17 October 1986.

[4] *B v France* App no. 13343/87 ECtHR, 25 March 1992.

[5] *X, Y, Z v France* App no. 21830/93 ECtHR, 22 April 1997.

[6] *Sheffield and Horsham v United Kingdom and* App no. 22985/93, 23390/94 ECtHR, 30 June 1999.

in the joined cases of Sheffield and Horsham, the Court once again emphasized a lack of consensus among the States of the Council of Europe in recognizing the request for a change of legal gender and pointed out that the scientific progress made in this area did not allow it to break the line adopted in the case-law. The Court also found it impossible to indicate that there had been a clear trend in the member States of the Council of Europe towards giving full legal recognition to gender reassignment. Bearing in mind these considerations, it therefore adjudicated that there had been no violation of the applicants' rights guaranteed by Article 8, 12 and 14 of the Convention, but its decision was made by a minimum majority of 11 to 9 votes, with five dissenting opinions emphasizing the need to take into consideration the changing approach to the rights of transgender people.

A breakthrough in the approach to gender identity came with the judgment of 11 July 2002, in Goodwin v. The United Kingdom,[7] in which the Court emphasized that it appeared illogical to refuse to recognise the legal implications of the result of the applicant's gender reassignment surgery that had been carried out by the National Health Service. The lack of appropriate procedures left the applicant with significant effects on her life where gender was of legal relevance. The applicant was unable to avail herself of the legal remedies for women when she experienced sexual harassment in the workplace. Her application for a new NI social security number was rejected and she was denied the ability to benefit from retirement rights under the rules for women, and due to the fear of the social consequences of revealing the fact that she had undergone gender reassignment surgery to a new employer, she was forced to pay her own pension contributions for five years. She was also prevented from marrying a man with whom she was in a relationship. These experiences, resulting from the failure to register the legal gender change to female, became the basis for the allegations of violation of Article 8, 12, 13 and 14 of the Convention which the applicant referred to the Court. The Court found that "the state had not struck a fair balance between the applicant's right to private life and the public interest of avoiding any major bureaucratic changes to the birth registration system that could affect «access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance»"[8] [Holzer 2022, 173] which constituted a violation of the right to respect for private life and the right to marry. Its judgment allowed the European standard of protection to be recognized for transgender persons, giving legal significance to the gender reassignment procedure in all areas of private life of the person concerned, by taking actions such as changing the legal gender

[7] *Christine Goodwin v United Kingdom* App no. 28957/95 ECtHR, 11 July 2002 [Bratza 2014, 245-50; Dunne 2015, 530-39; Theilen 2016, 530-39].

[8] *Christine Goodwin v United Kingdom* App no. 28957/95 ECtHR, 11 July 2002.

given on a birth certificate. This positive obligation of the States Parties to the Convention constitute the last stage on the way "to achieving as one of its principal purposes as close an assimilation as possible to the gender in which the transsexual perceives that he or she properly belongs."[9]

The unanimous judgment of the Court delivered in the Goodwin case was justified by the international trend towards legal gender reassignment recognition, which allowed the Court to change the approach it had presented since Sheffield and Horsham v. The United Kingdom.[10] This statement was confirmed on the same day in the judgment delivered in the case I v. The United Kingdom.[11] Three years later, both judgments were recalled in the judgment of 23 August 2006 Grant v. The United Kingdom, in which the Court decided on the temporal consequences of the landmark Goodwin case in relation to the constitution of a new obligation for States parties to the Convention. At the same time, it emphasized that domestic legal regulations, which prevents the change of legal gender, amounted to a violation of the applicants' rights under Article 8 of the Convention. In Grant's case it resulted in her being denied a retirement pension under the rules for women despite the fact the applicant had undergone gender reassignment surgery. Finding this to be a violation of the Article 8 of the Convention, the Court rejected the argumentation of the United Kingdom that it takes time to change legal regulations so that they correspond to the interpretation of the right to respect for private life adopted in the Goodwin case.

The lack of legal regulation regarding the status of transgender persons is pointed out by the Court in the judgment of 11 September 2007, in L. v. Lithuania. In its statement in the L case the Court considered that a fair balance between the public interest and the rights of the applicant had not been struck, leading to a violation of Article 8 of the Convention. The violation of the applicant's right to respect for private life due to his continuing inability to complete gender reassignment surgery left him with a permanent feeling of personal inadequacy. This suspended the process aimed at full assimilation with society in accordance with the sense of belonging to the male gender. The lack of subsidiary legislation to implement the right to gender reassignment surgery envisaged by the Lithuanian Civil Code affected the applicant. Due to the prolonged work on regulations required by Lithuanian law, the applicant was allowed to undergo hormone therapy with a mastectomy, to change his name to a gender neutral form and to correct his legal gender status in some of his documents, but his numerical code that indicates gender, remained unchanged.

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[9] *Christine Goodwin v United Kingdom* App no. 28957/95 ECtHR, 11 July 2002.

[10] *Sheffield and Horsham v United Kingdom and* App no. 22985/93, 23390/94 ECtHR, 30 June 1999.

[11] *I v United Kingdom* App no. 25680/94, ECtHR, 11 July 2002.

The Court not only confirmed positive obligation to provide procedural framework allowing gender identity to be reconciled as the European standard but also emphasized that legal gender is related to other rights and freedoms of an individual. While protection against discrimination was a subject of Goodwin case, in Van Kück v. Germany; Hämäläinen v. Finland and A.M. and others v. Russia the Court focuses on the relation between gender recognition procedure and the right to have medical treatment reimbursed by insurance, right to marriage and parental rights. The issue of whether gender reassignment surgery with accompanying hormone therapy should be reimbursed by a health insurance company as an "essential medical procedure" for transgender persons was the subject of the judgment of 12 September 2003 in the Van Kück v. Germany case.[12] Analyzing the arbitrary approach of the German courts to the interpretation of the concept of "necessary medical treatment" in Van Kück case, the Court emphasized that in determining whether the positive obligation to ensure respect for private or family life exists, a fair balance must be struck between the public interest and the rights of the applicant, and found the German authorities had exceeded their margin of appreciation, leading to a violation of Articles 6 and 8 of the Convention.

The relationship between gender recognition and the marital relationship of a transgender person is defined by the Court in its judgment of 16 July 2014 in Hämäläinen v. Finland.[13] In its judgment the court states that the possibility of automatically converting the marriage of a transgender person who seek to obtain legal recognition of his/her preferred gender into a registered partnership does not interfere his/her right to respect for private and family life. Approval for this condition comes from the previous case-law of the Court on the national regulations on civil status records. State Parties to the Convention enjoy a wide margin of appreciation in regulating the right to marriage or legal partnership by persons of the same sex. According to this view, the Finnish legal order allows correction of the legal gender record, with the precondition that the marital status of the person concerned has to be converted, in order to avoid a same-sex marriage. Thus legal gender recognition of a married transgender person is possible, but only with the consent of his/her spouse, which results in their marriage being converted into a registered partnership. In the event of lack of consent to convert the marriage into a registered partnership, transgender persons are left with divorce as way of regularizing their marital status before the relevant entry in the civil record is made. The applicant did not receive such consent. Neither did she decide to divorce. In consequence her sex change was not formally recognized and a new gender identification number was

[12] *Van Kück v Germany* App no. 35968/97 ECtHR, 12 June 2003.

[13] *Hämäläinen v Finland* App no. 37359/09 ECtHR, 16 July 2014 [Dunne 2014, 506-10].

not assigned. In the opinion of the Court this fact was not sufficient to rule that there had been a violation of Article 8 of the Convention. Finnish law ensures a level of protection for transsexuals in line with the European Convention and the applicant could have used the available forms to regulate their marital status, including converting marriage into a partnership, which would not have affected parental and property rights.

In its judgment of 6 July 2021 in A.M. and others v. Russia,[14] the Court ruled that the restriction of parental rights in connection with denying a transgender person the right to contact with her children, due to the reassignment of biological sex constitutes, a violation of the right to respect for family life and discrimination. As the Court indicated that: "restricting the applicant's parental rights and contact with her children without doing a proper evaluation of the possible harm to the applicant's children, the domestic courts relied on her gender transition, singled her out on the ground of her status as transgender person and made a distinction which was not warranted in the light of the existing Convention standards."[15]

2. LIMITS OF THE MARGIN OF APPRECIATION IN LEGAL GENDER RECOGNITION PROCEDURES IN EUROPE

While the positive obligation of a State-Party to provide a procedural framework allowing gender identity to be reconciled with an ID certificate is a European standard, domestic regulation on the prerequisites for the admissibility of legal gender recognition is subject to the margin of appreciation [Basetti 2020, 291-325; Cannoot 2019, 14-35; Holzer 2022, 165-82]. The scope of this margin is clarified by the judgments delivered in the cases of Schlumpf v. Switzerland,[16] Y.Y. v. Turkey,[17] A.P., Garçon and Nicot v. France,[18] S.V. v. Italy,[19] Y.T. v. Bulgaria,[20] Rana v. Hungary[21] and Y. v. Romania.[22]

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[14] *A.M. v Russia* App no. 47220/19 ECtHR, 6 July 2021.
[15] Ibid.
[16] *Schlumpf v Switzerland* App no. 29002/06 ECtHR, 8 January 2009.
[17] *Y.Y. v Turkey* App no. 14793/08, ECtHR, 10 March 2015.
[18] *A.P., Garçon, Nicot v France* App no. 79885/12, 52471/13, 52596/13 ECtHR, 6 April 2017.
[19] *S.V. v Italy* App no. 55216/08 ECtHR 11 October 2018.
[20] *Y.T. v Bulgaria* App no. 41701/16 ECtHR, 9 July 2020.
[21] *Rana v Hungary* App no. 40888/17, ECtHR, 9 July 2020.
[22] Ibid.

2.1. Transitional preconditions of legal gender recognition procedure

In Schlumpf v. Switzerland, the Court found that a two-year "transitional period" as a condition for the admissibility of a claim for the reimbursement of sex reassignment surgery is incompatible with the Convention.[23] The reasoning behind this requirement, as defined by the Swiss Federal Insurance Court, was that it served as a test of whether a person suffers from sexual dystrophy. Motivated by age, health, family situation and a medical opinion confirming sexual dystrophy, which had manifested in childhood, the applicant decided to undergo this surgery with no transitional period, despite a negative decision regarding reimbursement. Both the Insurance Court of the Canton of Aargau and the Federal Insurance Court of Switzerland agreed with the insurance company, which refused to finance the procedure. The European Court of Human Rights, however, upheld the applicant's position in the part concerning the violation of Art. 6. 1 and art. 8 of the Convention, stating that the arbitrary approach of the domestic authorities to the admissibility of the claim for reimbursement of the sex reassignment surgery meant that a fair balance had not been struck between the interests of the insurance company and the rights of the applicant.

2.2. Legal gender recognition procedure and gender reassignment surgery

In the judgment of 10 March 2015, in Y.Y. v. Turkey,[24] the Court stated that permanent inability to have children as a condition of admissibility of legal gender recognition constitutes an unjustified interference in the sphere of private life. In the Court's opinion this condition constituted a conflict between the protection of gender identity and the protection of physical integrity, which led to a dissonance between the perceived belonging to the male sex and having female physical characteristics in the applicant's case. In 2005 the applicant asked the court for permission to undergo sex reassignment surgery. Despite a positive psychiatric opinion on his sexual dysphoria, the decision was negative, which was later upheld on appeal. In the justification of its statement the Turkish court referred to the lack of permanent incapacity to procreate. The applicant then appealed to the European Court of Human Rights, claiming there had been a violation of Article 8 of the Convention, and then re-submitted a request for consent to undergo sex reassignment surgery, which he finally received, after eight years of efforts, on May 21, 2013. In the Court's opinion, the actions taken by the Turkish judicial authorities resulted in a state

[23] The applicant decided to undergone gender reassignment procedure after her children had grown up and her wife had died of cancer.

[24] *Y.Y. v Turkey* App no. 14793/08, ECtHR, 10 March 2015.

of suspension, which lasted despite the fact that the applicant had already been diagnosed as a transgender person, lived in society as a man and benefited from psychological counseling. Thus the Court found that the permanent inability to have offspring is not justified as the condition for permitting sex reassignment surgery.

In its judgment of 6 April 2017 delivered in the cases of A.P., Garçon and Nicot v. France,[25] the Court found the condition requiring that a transgender person prove that he or she has undergone an irreversible sex reassignment surgery related to the loss of the ability to have children in order to be able to initiate a legal gender reassignment procedure constitutes a violation of Article 8 of the Convention. The applicants A.P., Garçon and Nicot requested to change their legal gender status and names on their birth certificates in line with their perceived belonging to the female gender. In the course of the proceedings before the French courts, the first applicant submitted medical documentation to prove that he was suffering from sexual dystrophy and had already undergone the required surgery in Thailand. The second, in turn, referred to ongoing hormone therapy and genital surgery. The third one did not provide any medical documentation. However according to the statement of the French court, they did not prove irreversible gender reassignment and did not confirm sexual dysphoria with the required medical documentation. In its judgment, the European Court of Human Rights held that there had been a violation of Article 8 of the Convention in respect of the second and third applicants on account of the requirement to demonstrate an irreversible change in appearance; held that there had been no violation of Article 8 of the Convention in respect of the second applicant on account of the requirement to demonstrate the existence of a gender identity disorder; and held that there had been no violation of Article 8 of the Convention in respect of the first applicant on account of the requirement to undergo a medical examination. In its justification, the Court indicated there was a lack of a fair balance between the rights of the individual and the interests of the society: "French positive law as it stood at the material time presented transgender persons not wishing to undergo full gender reassignment with an impossible dilemma. Either they underwent sterilisation surgery or treatment – or surgery or treatment very likely to result in sterilisation – against their wishes, thereby relinquishing full exercise of their right to respect for their physical integrity, which forms part of the right to respect for private life under Article 8 of the Convention; or they waived recognition of their gender identity and hence full exercise of that same right. In the Court's view, this amounted to disrupting

[25] *A.P., Garçon, Nicot v France* App no. 79885/12, 52471/13, 52596/13 ECtHR, 6 April 2017.

the fair balance which the Contracting Parties are required to maintain between the general interest and the interests of the persons concerned."[26]

In its judgment of 19 January 2021, in X and Y v. Romania,[27] the Court held that the requirement to have genital sex reassignment surgery performed in order to have the civil-status records amended constitutes a violation of Art. 8 of the Convention. The applicants lodged requests to have the details on the documents concerning their gender identity corrected. Their request was supported by medical documentation confirming sexual dysphoria, that hormone therapy had been carried out, and that they had both undergone the mastectomy procedure. However, their requests were refused, because they both failed to meet the requirement of having had genital sex reassignment surgery performed. In the opinion of the Court, the decision of the national authorities in the case of X and Y was not consistent with Article 8 of the Convention "due to the lack of a clear and predictable procedure of legal gender recognition procedure allowing for the change of biological sex, and thus the name and number or code of a personal record, in official documents, in a quick, clear and accessible manner"[28] and "the refusal of the national authorities to recognize the male identity of the applicants in the absence of sex reassignment surgery led in this case to a breach of the fair balance which the State is required to maintain between the general interest and the interests of the applicants."[29]

2.3. Legal gender recognition procedure and request to change one's name

In its judgment of 11 October 2018, in S.V. v. Italy,[30] the Court found a violation of Article 8 of the Convention due to the refusal to change the applicant's name from male to female before successful completion of the gender recognition procedure. On the 10th of May 2001 the applicant obtained consent for sex reassignment surgery modification, after which she applied to the administrative authorities with a request to change her name. However, she was refused for formal reasons. Consequently, the applicant was left in a waiting period until the end of the court proceedings, until 10 October 2003, when the Rome District Court ordered Savona's authorities to change the legal gender status from male to female, and to change the name of L. to S. In the Court's view, this situation resulted in a violation of the applicant's right to respect for her private life. Although "safeguarding

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[26] Ibid.
[27] *X and Y v Romania* App no. 2145/16, 20607/16, ECtHR 19 April 2021.
[28] Ibid.
[29] Ibid.
[30] *S.V. v Italy* App no. 55216/08 ECtHR 11 October 2018.

the principle of the inalienability of civil status, the consistency and reliability of civil-status records and, more broadly, the need for legal certainty are in the general interest and justify putting in place stringent procedures aimed, in particular, at verifying the underlying motivation for requests for a change of legal identity"[31] in the circumstances of the present case "the Court fails to see what reasons in the public interest could have justified a delay of over two and a half years in amending the forename on the applicant's official documents in order to match the reality of her social situation, which had been recognised by the Rome District Court in its judgment of 10 May 2001. In that connection it reaffirms the principle according to which the Convention protects rights that are not theoretical or illusory, but practical and effective."[32]

2.4. Examination of the application to have one's gender identity to be reconciled

In its judgment of 9 July 9 2020, in Y.T. v. Bulgaria,[33] the Court found that the refusal to allow a transgender person to have his change of sex recorded in the civil-status register, on the basis of a public interest that was not precisely defined, was not justified and constituted a violation of the right to respect for private life. The applicant Y.T. underwent gender reassignment process changing his physical appearance from feminine to masculine and functioned in society as a man, but was refused authorisation by the Bulgarian courts to have the indication of legal gender in the civil-status registers amended, and thus was unable to obtain legal recognition of his identity as a male, which the Court judged to be based on a public interest that was not precisely defined. This justification became the basis for judgments delivered in the first and second instance against domestic case-law recognizing the right of transgender persons to have their gender identity recognized. As emphasized by the Court, the Bulgarian judiciary "have in no way elaborated their reasoning as to the exact nature of this general interest and have not carried out, in compliance with the margin of appreciation granted, an exercise in balancing this interest with the applicant's right to recognition of his sexual identity."[34]

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31 Ibid.

32 Ibid.

33 *Y.T. v Bulgaria* App no. 41701/16 ECtHR, 9 July 2020.

34 Ibid.

2.5. Legal gender recognition procedure and rights of foreign nationals legally settled on the territory of the States-Parties to the Convention

In its judgment of 16 July 2020, in Rana v. Hungary,[35] the Court held that "denying a refugee who could not change his legal gender in his country of origin, the right to access the Hungarian gender recognition procedure" [Holzer 2022, 176] constituted a violation of Article 8 of the Convention. The applicant applied for a gender and name change at the Hungarian Immigration and Citizenship Office. In its decision the Immigration and Citizenship Office Office issued a "formal rejection decision without examining the application on the merits, holding that it did not have jurisdiction to take any further action, Because the applicant's birth had not been registered in Hungary, the application could not be forwarded to the relevant registrar."[36] The conclusion of the Office on the lack of jurisdiction of the Hungarian administrative authorities was upheld by the Courts in the first and second instance and by the Constitutional Court, which called upon Parliament to regulate the gender recognition procedure for petitioners without Hungarian birth certificates. However, this obligation has not been fulfilled. As emphasized by the European Court of Human Rights: "The complete lack of regulations excluded lawfully settled non-Hungarian citizens from the name-changing procedure, including those whose country of origin did not allow for such a procedure. The Constitutional Court considered that the legislative omission identified was disproportionately restrictive and unconstitutional. In its view, the legislator was under the obligation to find a different solution for petitioners without Hungarian birth certificates, for example by entering the change of name in other documents received from the Hungarian authorities."[37]

CONCLUSIONS

The positive obligation of a State-Party to provide a procedural framework allowing gender identity to be reconciled is a European standard that serves the right to self-determination. Its realization requires the preservation of a fair balance between the interests of the society and the individual's right to respect for his/her private life. Behind the right of a State-Party to set its conditions for the admissibility to request the recognition of one's gender identity is the necessity of "safeguarding the principle of the inalienability of civil status, the consistency and reliability of civil-status records

[35] *Rana v Hungary* App no. 40888/17, ECtHR, 9 July 2020.
[36] Ibid.
[37] Ibid.

and, more broadly, the need for legal certainty are in the general interest and justify putting in place stringent procedures aimed, in particular, at verifying the underlying motivation for requests for a change of legal identity."[38] However, the States-Parties to the Convention enjoy a limited margin of appreciation in regulating conditions for the admissibility to request the recognition of one's gender identity, which is specified in the case-law of the Court. The Court considers as inconsistent with the Convention:

1) arbitrary regulation on the "transitional period" as a precondition of gender reassignment procedure, or as a precondition for the admissibility for reimbursement of the sex reassignment surgery;[39]
2) permanent inability to have children as a precondition for the admissibility of sex reassignment surgery;[40]
3) sex reassignment surgery connected with the permanent inability to have children as a precondition for gender recognition procedure;[41]
4) positive conclusion of the legal gender recognition procedure as a precondition to change one's name;[42]
5) formal rejection of the request to recognise one's gender identity without examining the application on the merits;[43]
6) denying the right to access gender recognition procedure to legally settled foreign nationals, who could not change their legal gender in their country of origin;[44]
7) genital sex reassignment surgery as a precondition to correct legal gender record.[45]

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[38] *S.V. v Italy* App no. 55216/08 ECtHR 11 October 2018.
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PROTECTION OF PERSONAL RIGHTS IN LAW OF SUCCESSION

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Abstract. This author aims to demonstrate that in addition to the legal measures provided for in Article 24 of the Polish Civil Code, protection of personal rights may also indirectly serve the institutions mentioned in Book IV of the Civil Code, one of which is the law of succession. These institutions are primarily disinheritance (Article 1008 of the Civil Code) and unworthiness of inheritance (Article 928 of the Civil Code), as well as the exclusion of a spouse from inheritance (Article 940 of the Civil Code). They serve to protect, above all, such personal rights as life and health, honour and freedom, in particular the freedom to make a will. Violation of these personal rights will be met with specific pecuniary sanctions, among them, deprivation of the right to inheritance, to the reserved share of the estate, to bequests, or to the statutory superannuation as provided for in Article 939 of the Civil Code.

Keywords: Civil Code; personal rights; inheritance; legacy; disinheritance; unworthiness of succession; exclusion of the spouse from succession; offence

INTRODUCTION

Measures for the protection of personal rights are generally listed in Article 24 of the Civil Code.[1] It mentions in particular: 1) the abandonment of the unlawful infringement of personal rights (para. 1 sentence 1); 2) the fulfilment of the actions necessary to remove the consequences of the (negative) infringement of personal rights, for example, the submission of a statement of appropriate content and in an appropriate form (para. 1 sentence 2); 3) pecuniary compensation (para. 1 sentence 3); 4) payment of an appropriate sum of money to a designated social purpose (para. 1, sentence 3 *in fine*)[2]; 5) compensation in the case of pecuniary damage caused by the infringement of a personal right (para. 2). The first two are of a non-material nature [Cisek 1989, 114; Wierciński 2002, 183]. The last three are of a pecuniary nature and consist of the payment of a certain sum

[1] Act of 23 April 1964, the Civil Code, Journal of Laws of 2022, item 1360 as amended [hereinafter: CC].

[2] See also Article 448 CC.

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of money by the person who committed the infringement of personal rights [Skiba 2017, 246].

The last paragraph of Article 24 of the Civil Code also acknow-ledges the existence of rights provided for in other provisions guaranteeing the protection of personal rights. The legislator has referred here, for example, to the extra-Code protection provided for in copyright law and the law of invention. Such reference, however, does not exclude recourse to other provisions of the Civil Code (e.g. Articles 444-448 CC). The aim of this article is to indicate that, in addition to the measures directly dictated by the disposition of Article 24 CC, the protection of personal rights may be indirectly served also by institutions provided for in the provisions of the fourth book of the Civil Code, i.e. institutions of the law of succession. These institutions are, first of all, disinheritance (Article 1008 CC) and unworthiness of inheritance (Article 928 CC), as well as exclusion of the spouse from inheritance (Article 940 CC).

1. DISINHERITANCE (ARTICLE 1008 OF THE CIVIL CODE)

Article 1008 CC provides that the testator may disinherit, i.e. deprive his/her descendants, spouse and parents of the reserved portion of the estate in a will. Thus, disinheritance can only be made in a valid will, and its consequences follow arise directly from the will of the testator.[3]

This provision lists three grounds for disinheritance: 1) persistent conduct against the will of the testator in a manner contrary to the principles of social co-existence; 2) committing an intentional offence against the testator or one of his or her closest persons against life, health or freedom or gross insult; 3) persistent failure to fulfil family obligations towards the testator [Księżak 2010, 164-90; Załucki 2010, 383-418]. It should be noted that not all of these prerequisites will overlap with a violation of personal rights. Among the statutory prerequisites for disinheritance, in the context of protection of personal rights, the behaviour set out in the second point particularly stands out.

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[3] The institution of disinheritance was shaped by Roman law, initially casuistically through case-by-case settlements, and ultimately the Emperor Justinian introduced in November 115 of 542 an enumerative catalogue of reasons for disinheritance comprising fourteen reasons for disinheriting descendants and eight reasons for disinheriting ascendants [Kursa 2008; Idem 2009]. In contemporary Codes, disinheritance occurs, for example, in the BGB (para. 2333), while the French Civil Code, followed by the Italian, do not know the institution of disinheritance, due to the fact that they adopt a system of reserves, and thus there is no place for the institution of disinheritance, whose function in practice is fulfilled by the institution of unworthiness of inheritance [Borysiak 2008, 159-62, 185].

Firstly, in the second point of Article 1008 CC, the commission of an intentional offence against life, against the testator or one of his closest persons is indicated. These offences are defined in Chapter XIX of the Penal Code.[4] These include: murder (Article 148 PC), the killing of a child by the mother during childbirth (Article 149 PC), advocating euthanasia (Article 150 PC), inciting or assisting in committing suicide (Article 151 PC), and offences relating to the termination of pregnancy (Articles 152-154 PC). Subsequently, in Article 1008 CC, the legislator indicated the commission of an offence against health as a reason for disinheritance. These, too, are defined in Chapter XIX of the Penal Code. These offences are: causing damage to health (Articles 156-157 PC), prenatal damage (Article 157a PC), exposure to danger of loss of life or serious damage to health (Article 160 PC), exposure to contagion (Article 161 PC) and failure to provide assistance (Article 162 PC).

Another group of offences providing grounds for disinheritance are offences against liberty. These offences in turn, are defined in Chapter XXIII of the Penal Code. Of these, the following should be mentioned first and foremost: deprivation of human liberty (Article 189 PC), human trafficking (Article 189a PC), punishable threats (Article 190 PC), stalking (Article 190a PC), forcing a person to behave in a certain way, failure to do so or endurance of such behaviour (Article 191 PC) and fixation or dissemination of an image of a naked person or of a person during sexual intercourse (Article 191a PC). Offences against sexual freedom and morality (Chapter XXV PC) and offences against freedom of conscience and religion (Chapter XXIV PC) should also be included. In addition, the second point of Article 1008 CC provides for gross insult to the honour of the testator or the person closest to him as a reason for disinheritance. This will be constituted in particular by cases of committing the offences of defamation (Article 212 CC), insult (Article 216 CC) and violation of integrity (Article 217 CC) [Księżak 2010, 173]. Although Article 1008 CC operates with the concept of "offence", when assessing whether a given behaviour constitutes grounds for disinheritance, one should not, however, apply a purely penal interpretation of the concepts used in this provision [Kordasiewicz 2008, 427-30]. Following P. Księżak's rightful statement "the concepts appearing in Article 1008 point 2 of the Civil Code are autonomous in nature and the civil court is not bound by the systematic and criminal qualification when determining whether a given conduct falls within the hypothesis of the provision" [Księżak 2010, 174]. A civil court is only bound by a final decision of the criminal court deciding whether or not an offence has been committed. On the other hand, in the absence of a conviction, the civil

[4] Act of 6 June 1997, the Penal Code, Journal of Laws of 2022, item 1138 as amended [hereinafter: PC].

court determines on its own whether an offence has been committed [Niedośpiał 1993, 116].

Most of the aforementioned behaviours may be directed against the testator or the person closest to him or her (offences against health, freedom, gross insult to honour), only in the light of certain offences against life (e.g. infanticide, abortion), as grounds for disinheritance, persons closest to the testator, not the testator himself or herself may be affected. Without going into a detailed analysis of the above-mentioned behaviours providing grounds for disinheriting the person who has committed them, it should be noted that each of them essentially amounts to an action infringing a specific personal right (life, health, freedom, honour) of the testator or one of his or her closest persons.

As a consequence of such behaviour, the testator gains the power to disinherit, i.e. to remove the person who is a statutory heir who has committed the above-mentioned actions from the inheritance and deprive them of the right to the reserved portion of that inheritance (Article 1008 CC). It is up to the testator to decide whether the harm caused was great enough to him or her to decide to disinherit a descendant, spouse or parent. It may also happen that the testator, in spite of the harm caused, forgives such behaviour to the statutory heir. In such cases, he or she may not disinherit him or her and the disinheritance made earlier becomes ineffective. If, however, forgiveness has not taken place and the testator has effectively disinherited that person, he or she becomes excluded from the statutory inheritance and also loses the possibility to claim payment of the sum of money needed to cover the reserved portion of the estate or to supplement it (Article 991(2) CC) [Skowrońska-Bocian 2004, 156, 161-64], thus experiencing a peculiar pecuniary sanction.

2. UNWORTHINESS OF INHERITANCE (ARTICLE 928 OF THE CIVIL CODE)

Article 928 CC contains a closed catalogue of prerequisites for being declared unworthy of inheritance. According to para. 1, an heir may be declared unworthy by the court if: 1) he or she has intentionally committed a grave offence against the testator; 2) by deceit or threat, he or she has induced the testator to make or revoke a will or in the same way prevented him or her from doing one of these acts; 3) he or she has intentionally concealed or destroyed the testator's will, forged or altered his or her will or knowingly used a will forged or altered by another person.

The first of these prerequisites was indicated by the legislator using the term "intentional grave offence", which is not defined in the Civil

Code, which compels an analysis of the provisions of the Penal Code, based on which the meaning of the term "offence" (Article 7 PC) and the term "intentional" (Articles 8-9 PC) can be established. However, the provisions of the Penal Code do not provide an answer as to how to understand the term "grave", leaving the qualification of a given offence to the judgement of the court adjudicating in the process of declaring an heir unworthy, taking into account the circumstances of the particular case. In any case, the offence in question should be directed against the testator himself.[5] In the first instance, such offences should include offences against life[6] and health, freedom, sexual freedom and morals, family and guardianship, honour and bodily integrity. Their commission harms the personal interests of the person against whom they are directed, in this case the testator's personal interests.

The next two prerequisites for declaring an heir unworthy boil down to various forms of influencing the testator's will with regard to the drawing up of a will or the annihilation or forgery of his will. In these cases, too, it is possible to speak of a violation of the testator's personal right, which is the freedom to make a will.[7]

It is worth noting at this point that currently work is already advanced on the draft amendment of Article 928 (a draft bill amending the Civil Code and certain other acts [UD222]; Government draft bill amending the Civil Code and certain other acts [Print No. 2977]), which is to extend

[5] The scholars have formulated a *de lege ferenda* proposal to extend the basis specified in Article 928, point 1, by committing such an offence also against the testator's closest relatives, similarly to the one adopted in Article 1008, point 2 [Zrałek 2006, 209-10; Kuźmicka-Sulikowska 2017, 146-49]. Such an extension, although in my opinion unjustified, as the inadmissibility of inheritance is relative in nature and, by definition, refers to inheritance from a specific person and not other persons, even if they are close to him, would undoubtedly increase the scope of persons whose personal rights are additionally protected by means of inadmissibility of inheritance.

[6] Both Roman law and modern Civil Codes treat as a reason for declaring an heir unworthy the murder of the testator; see: D. 34,9,3; D. 48,20,7,4; Article 727(1) of the French Civil Code; para. 2339(1) of the BGB; Article 463(1) of the Italian Civil Code. This kind of protection of life is present in each of the systems, because if a potential heir intentionally contributed to the death, or killed the testator, it would not be appropriate if, being guilty of the testator's death, he inherited from his victim. A testator who has been killed, on the other hand, cannot disinherit his torturer, so the only thing that comes into play in this case is the intervention of the law, which allows the person guilty of the testator's death to be declared unworthy of inheriting from him.

[7] Protection of the freedom to make a will by declaring oneself unworthy is also provided for in para. 2339 BGB. Interestingly, Italian law also (Article 463(4) of the Italian Civil Code) provides for this type of ground of unworthiness, although French law does not. This indicates that, although in principle the Italian Civil Code of 1942 is modelled on the French Code as far as succession law solutions are concerned, its drafters were also inspired by the solutions adopted in the BGB.

the catalogue of prerequisites for declaring an individual unworthy by two more, i.e. "persistent evasion of the fulfilment of a maintenance obligation towards the testator defined in amount by a court decision, settlement concluded before a court or other authority or other agreement" [Witczak 2022] and "persistent evasion of the duty of care towards the testator, in particular arising from parental authority, guardianship, the exercise of the function of a foster parent, the matrimonial duty of mutual assistance or the duty of mutual respect and support between the parent and the child."[8] Again, in the absence of mutual respect and support between parent and child, a violation of personal rights can be found.

As a consequence of being declared unworthy, an heir is excluded from the inheritance as if he had not lived to see the opening of the inheritance (Article 928(2) CC). He or she cannot inherit from the testator in question either under the law or under the will, claim the execution of an ordinary bequest (Article 972 CC), or receive the object of a debt collection bequest (Article 981^5 CC), and loses the right to a reserved portion of the estate [Szpunar 2002, 16-17]. This type of sanction is imposed by the court at the request of the person concerned (Article 929 CC). However, also in this case, the testator has an influence on whether the person who has violated his/her personal rights will be declared unworthy, because as long as he/she is alive (as long as the violation of his/her personal rights does not cause his/her death or loss of consciousness), he/she can forgive the act in question (Article 930 CC) and prevent the filing of an effective motion to declare him/her unworthy. Thus, also the court's declaration of an heir as unworthy, although not made by the testator himself, does not take place completely independently of the will of the testator whose personal rights have been violated. In the same way that disinheritance constitutes a specific sanction for the person who has violated the testator's personal rights.

3. EXCLUSION OF A SPOUSE FROM THE SUCCESSION (ARTICLE 940 OF THE CIVIL CODE)

In addition to disinheritance and unworthiness of inheritance, the protection of personal interests is also served by the solution adopted in Article 940 CC. According to this provision, a legitimate application for divorce or separation through fault of the spouse, in the event that the applicant dies before the court decision is made, results in the exclusion of the guilty spouse from the statutory inheritance (para. 1). He or she is also deprived of the right to the reserved portion of the estate (as if he or she had been

[8] See https://legislacja.rcl.gov.pl/projekt/12354503/katalog/12839239#12839239; https://www.sejm.gov.pl/sejm9.nsf/agent.xsp?symbol=RPL&Id=RM-0610-173-22 [accessed: 11.04.2023].

disinherited) [Stecki 1990, 91] and the statutory superannuation provided for in Article 939 CC. However, the exclusion of a spouse from the inheritance on the basis of Article 940 CC does not deprive him or her of the donation (inheritance, share in the inheritance, bequest) provided for him or her by the spouse in the will [Trzewik 2009, 130-32]. The reason for being found guilty of divorce or separation through the fault of the spouse may also be a violation of personal rights, such as an attitude to life, health or liberty, for example, if a spouse tried to kill, physically or mentally abused or imprisoned a spouse.

In these aforementioned cases we may also find violations of personal rights sanctioned by the rules of the law of succession. The main consequences in terms of the statutory succession for the spouse committing the infringement of the spouse's personal rights will be, similarly to the case of declaring an heir unworthy of inheritance, related to the property sphere of the testator – he or she will not be able to inherit from the deceased spouse, nor will he or she be able to claim a reserved portion of her or his estate. The exclusion of the spouse from the inheritance is carried out by the court (para. 2), however, it would not be possible without a prior legitimate petition for divorce or separation through the fault of the spouse, filed during his or her lifetime.

CONCLUSIONS

The considerations carried out in this article lead to the conclusion that the protection of personal rights is also served by the mentioned institutions of the law of succession: disinheritance, unworthiness to inherit and exclusion of the spouse from the inheritance.

These institutions have multiple functions. Firstly, a preventive function, which is primarily realised through the means of protection of the aggrieved person provided for in Article 24(1) CC. This function is also realised through the aforementioned institutions of inheritance law, as the fear of not receiving the inheritance from the deceased can in many cases effectively restrain the heirs from behaviours that constitute a violation of personal rights of the deceased or those closest to him/her.[9] In particular, if the inheritance represents a significant value, the prospect of losing it strengthens the preventive function. Although its effectiveness largely depends on knowledge of the law, it seems to be obvious to almost everyone that, for example, the testator's murderer should not inherit from him.

[9] As M. Niedośpiał notes, certain testamentary dispositions, in particular disinheritance, and sometimes the very announcement of its making, may influence the behaviour of the persons concerned [Niedośpiał 2004, 78-79].

These institutions also have a repressive function, which narrows down to losing (not gaining) what the person guilty of violating personal rights would have received if the personal rights had not been violated by them, i.e. a kind of a pecuniary penalty. In the case of disinheritance one can also find a retaliatory (satisfying) function, when the testator, in the way, takes revenge, or seeks justice, by depriving the person who violated his or her personal rights cited above of the right to a reserved portion.[10]

Disinheritance, unworthiness to inherit and the exclusion of a spouse from the succession primarily protects personal rights such as life and health, honour and freedom, in particular the freedom to make a will. In the case of infringement of personal rights in the sphere of the freedom to make a will, the inadmissibility of the inheritance causes the most natural sanctions, taking into account the type of the infringed personal right, as the one who has acted on this freedom will not be able to inherit (nor receive a bequest or a reserved portion of the estate) from the one whose freedom to make a will has been infringed. Similarly, in the case of violation of other personal rights protected by the institutions of inheritance law, the sanction consisting in depriving the violator of personal rights of the right to inherit, a reserved portion, a bequest or a statutory superannuation from the person whose personal rights he violated in one of the previously mentioned ways seems to be the most appropriate.

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[10] On the other hand, the basic function fulfilled by satisfaction for *non-material* damage or compensation for damage inflicted by infringement of personal rights is the compensatory function [Matys 2010, 324-36] and the literature quoted therein. However, this does not exclude the repressive (punitive) function of compensation or reparation [Kordasiewicz 1988, 26].

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HEALTHCARE IN SLOVAKIA FOR PEOPLE COMING FROM UKRAINE AND SOME RELATED LEGISLATIVE CHANGES INTRODUCED DUE TO THE 2022 RUSSIA INVASION OF UKRAINE

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Abstract. The paper discusses the right of Ukrainian nationals to healthcare services in Slovakia depending on their status of an asylee, a person with subsidiary protection, a person with temporary protection, an applicant for asylum or temporary protection, and a person transiting through Slovakia due to the military conflict. It also briefly addresses the changes that the war brought to the performance of the medical profession by Ukrainian healthcare professionals in Slovakia.

Keywords: Ukraine; Slovakia; healthcare for Ukrainians; legislative changes; asylee; subsidiary protection; temporary protection; applicants; transiting persons; Ukrainian healthcare professionals

INTRODUCTION

The war break-out was shocking for the entire democratic world, which had to react immediately. The President of the Slovak Republic issued a clear statement on the morning on February 24, 2022: "A few hours ago, the Russian Federation attacked Ukraine and started a military invasion. Russian armed forces also hit the rest of eastern Ukraine. The hope of those who thought that Russia would be satisfied with the military occupation of parts of the Donetsk and Luhansk regions turned out to be an illusion. I strongly condemn the illegal aggression of the Russian Federation against Ukraine. I express my full support and solidarity to the Ukrainian people, the country's leadership, and President Zelensky."

Immediately after this statement, on February 24, the President, together with the Parliamentary Speaker, Boris Kollár, and the Prime Minister of the Slovak Republic, Eduard Heger, delivered another, longer statement: "Dear fellow citizens, a few hours ago, the Russian military invasion of Ukraine began. Russian armed forces are hitting targets throughout our neighbor's territory. The hopes of those who thought the Kremlin would be satisfied with the military occupation of parts of the Donetsk and Luhansk

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regions have turned out to be an illusion. The joint efforts of the international community to avert a war conflict have come in vain. President Putin has decided to assert his unacceptable territorial and political ambitions through direct military aggression. He attacked the weaker, whose only committed offense was the will to live peacefully, according to ideas, like any other sovereign nation. No words can justify this. All the victims that this war will bring in Ukraine will be his victims, and he will bear full responsibility for it in front of the world public. Not even the spreaders of the disinformation can believe that the Ukrainian army provoked Russia into a military attack. Today, Ukraine has every right to defend itself. Defend the right to exist as a state and freely decide destiny. We, ourselves, would not act differently in this situation. The Slovak Republic strongly condemns Russian aggression and stands by the suffering Ukrainian people. In cooperation with allies in the North Atlantic Alliance and the European Union, we are ready to provide assistance to Ukraine to end the conflict and protect human lives. Establishing peace is an absolute priority. The tense situation we are experiencing today is a reason for vigilance because the security situation in Europe has changed dramatically after tonight. At the same time, we must keep calm. Although there is an armed conflict near our borders, our territorial integrity and security are not in direct danger. Slovakia is part of Western civilization, a member of the European Union and the North Atlantic Alliance. Thanks to them, even in this tense situation, our freedom and sovereignty are protected by our allies. It is in the vital interest of Slovakia to be part of a union in which the members guarantee each other's security. Even in front of those who did not hesitate to attack their own neighbor and, in their demands, seek to weaken our sovereignty. Dear fellow citizens! All over the world, armed conflict is associated with the suffering and migration of those scared for their lives. We might say with certainty that Russian aggression will also drive many Ukrainian men and women out of the country. Please have compassion and understanding for them. Those fleeing war deserve our help under international law. The Slovak Republic will responsibly fulfill the principles of humanity and solidarity, as others fulfilled them when our parents or grandparents fled our country during war and invasion. At the same time, we want to assure you that our armed forces and police, even in this exceptional situation, will ensure controlled border crossings and that people fleeing the war will receive the necessary facilities here. Please, let's keep calm and let's keep our heads cool even in this troubled time. Let's not be provoked, let's not fall for disinformation, and let's unite! For our own security and to ensure peace in Ukraine and Europe."

On the same day, the President issued a statement addressed to President Zelensky about providing aid to Ukraine. Shortly after, the President issued another one directed to the citizens of the Slovak Republic to assure them

that the territorial integrity and security of the Slovak Republic were not in immediate danger and that the world unitedly condemned Russian aggression. She called for humanity towards the people of Ukraine.[1]

1. IMMEDIATE REACTION OF THE HEALTH SECTOR ON THE WAR BREAKOUT

Since February 2022, states have responded to the consequences of war in all spheres of life, not excluding law. One of the many issues to address was the issue of providing health care for Ukrainians, implying the need to amend legislation.

Minister of Health Lengvarský made an immediate statement in which he said that the situation in Ukraine was serious and that the health sector would provide help. He informed the public about the number of reserved hospital beds, the hospitals available for war migrants, and the hotspots of the Ministry of the Interior for refugees and asked people to donate blood.[2]

The Slovak Medical Chamber expressed support for the medical condition and population of Ukraine on February 25: "The Slovak Medical Chamber expresses solidarity with our neighbors – the people of Ukraine. The unprecedented, inexcusable, and unjustified act of aggression of the Russian Federation will cause loss of life, health, and property of the people of Ukraine. At this critical and sad moment, we simultaneously express our support for the citizens of Ukraine living in Slovakia. More than 500 doctors from Ukraine work in the Slovak healthcare system, and we hope their loved ones are safe. Doctors, above all, see the consequences of politicians' actions – people's suffering. We recall the parallels of historical events in Europe and Czechoslovakia in 1938 and 1968 because support alone is not enough without awareness of the context. We also condemn any acts of aggression and attacks on medical facilities and preventing doctors from providing medical care to patients or sanctioning them for this – this violates international law enshrined in conventions to which the Russian Federation is committed. We believe that Ukraine will defend itself with the support of all decent people and that Russian soldiers will return to their country with their weapons. Ukraine must now and in the next period feel the support of Slovakia and the Slovaks."[3]

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[1] Official page of the President of the Slovak Republic, Mrs. Zuzana Čaputová [Čaputová 2022].

[2] Speech of the Minister of Health of the Slovak Republic, Vladimír Lengvarský, on the situation in Ukraine and related steps in the health sector [Lengvarský 2022].

[3] Available online: https://sls.sk/web/wp-content/uploads/2022/03/Vyhlasenie-SLK-Podpora

Subsequently, the Ministry of Health of the Slovak Republic informed on March 7 that: "War refugees from Ukraine will receive health care." The press release provided information on the provision of health care depending on the different statuses of persons from Ukraine, which was further specified.

2. HEALTHCARE FOR PEOPLE WITH GRANTED ASYLUM

The first group to consider includes persons with asylum**.** According to Article 53 of the Constitution of the Slovak Republic: "The Slovak Republic provides asylum to foreigners persecuted for exercising their political rights and freedoms. Denial of asylum is possible if the asylum seeker has acted in violation of human rights and freedoms. The law clarifies the details." By granting asylum, refugees obtain permanent residence in Slovakia. Article 8 of Act no. 480/2002 Coll. on Asylum as Amended (hereinafter referred to as the "Asylum Act") tells: The Ministry of the Interior of the Slovak Republic will grant asylum to an applicant if the applicant has a well-founded fear of persecution in the country of origin for racial, national or religious reasons, for holding certain political opinions or belonging to a particular social group and, due to these concerns, cannot or does not want to return to that state, or is persecuted in the country of origin for exercising political rights and freedoms. According to Article 9, also humanitarian reasons can be grounds for granting asylum. According to the Implementing Regulation of the Ministry of the Interior of the Slovak Republic of February 21, 2014, to the Act on Asylum, unsuccessful asylum seekers from the ranks of vulnerable persons can obtain humanitarian asylum. It includes mainly the elderly, traumatized persons, and the seriously ill, whose return to the country of origin could pose considerable physical hardship, possibly even death. Furthermore, family reunification can be a reason for granting asylum under Article 10. According to Act no. 580/2004 Coll. on Health Insurance and on Amendments to Act no. 95/2002 Coll. on the Insurance Industry as Amended (hereinafter referred to as the "Health Insurance Act"), the person with asylum is a publicly insured person (i.e., always has health insurance). The state is the payer of the insurance for six consecutive calendar months from the date of the grant of asylum (unless otherwise determined by law due to higher incomes). After six months from the submission of the asylum application, the asylum seeker has access to the labor market, except in the cases specified in Article 23(6) of the Asylum Act, while the person granted asylum or supplementary protection does not need work permits. Persons with asylum are thus entitled to the full range of health

-lekarskemu-stavu-a-obyvatelstvu-Ukrajiny.pdf [accessed: 08.03.2023].

care. They must validate themselves with an insurance card, and the health insurance company pays for their health care.

3. PERSONS WITH SUBSIDIARY PROTECTION

In the second group, we can include persons with subsidiary protection. If the authorities denied asylum pursuant to Article 13 of the Asylum Act, pursuant to Article 13a, the Ministry shall provide subsidiary protection to the applicant if there are serious reasons to believe that the applicant would be exposed to a real threat of grave injustice if returned to the country of origin unless otherwise stipulated in the Act. The Asylum Act defines grave injustice in Article 2 letter f as the imposition of the death penalty or its execution, torture or inhuman or degrading treatment or punishment, or a serious and individual threat to the life or integrity of a person due to arbitrary violence during an international or national armed conflict. According to Article 13b, it is possible to provide subsidiary protection also for the purpose of family reunification. In contrast to asylum, in the case of subsidiary protection, temporary residence is granted for a period of one year, which can be extended again for two years based on justified reasons.

According to Article 9h of the Health Insurance Act and Article 8 of Act No. 577/2004 Coll. on the Extent of Health Care Paid from Public Health Insurance and on Payments for Services Related to the Provision of Health Care (hereinafter referred to as the "Act on the Scope of Health Care"), a foreigner with subsidiary protection who is not publicly health insured in Slovakia or in another member state is entitled to payment of health care within the scope of public health insurance. Contrary to an asylum seeker is therefore distinguished whether the person with subsidiary protection is or is not health insured. It means that person with subsidiary protection is entitled to health care as a person with asylum. The Ministry of Health of the Slovak Republic reimburses the costs of providing health care to the General Health Insurance Company. A person with subsidiary protection must prove himself with a claim card issued by General Health Insurance Company at request, valid throughout the duration of subsidiary protection. If a person with subsidiary protection pays for health insurance, gets a job, or runs a business, they have the right to health care even in other EU member states.

4. PERSONS WITH TEMPORARY SHELTER

In the third group, there are persons with temporary shelter in Slovakia. According to Article 29(1) of the Act on Asylum: "Temporary shelter shall

be granted for the purpose of protecting aliens from war conflicts, endemic violence, impacts of humanitarian disasters or permanent or mass violation of human rights in the country of their origin; For the purpose of providing temporary shelter, a foreigner means a national of a third country according to a special regulation." On February 25, 2022, Act No. 55 of 2022 Coll. on Some Measures Concerning the Situation in Ukraine entered into force and amended Section 29 of the Act on Asylum by paragraph 2. Hence, the government could declare the provision of temporary shelter even without a prior decision of the Council of the European Union. As the Minister of the Interior of the Slovak Republic let himself be heard: "Slovakia preceded the European Commission with its proposal to activate the Directive (on the provision of temporary shelter) from 2001" [Mikulec 2022]. The goal was to "offer immediate assistance and protection to the people of Ukraine suffering from the consequences of the armed conflict caused by the Russian Federation as the simplest way of protection for persons fleeing war, which does not require lengthy official procedures." To provide an example, pursuant to Article 20 of the Asylum Act: "In an asylum procedure the Ministry shall decide within six months from the commencement of the procedure" – compared to Article 31 of the Asylum Act: "The Ministry shall decide on the granting of temporary shelter to a foreigner according to paragraph 2 no later than 30 days after the application submission [...]" (whereas if applicants from Ukraine have identity documents, they receive temporary shelter immediately). A legal ground for temporary shelter is family reunification, too. Ukrainians can apply for temporary shelter from March 1, 2022. The original period of providing temporary shelter until December 31, 2022, was automatically extended until March 4, 2023. This period is automatically further extended by six months, but at most by one year unless the Council of the European Union decides otherwise. Currently it is extended to March 4, 2024, without the obligation to take further administrative steps. The person with temporary shelter has a tolerated residence in Slovakia. The advantages of a tolerated residence are the possibility to work without a work permit, the participation of minor children in compulsory school attendance, the access to study at a secondary school and university, access to accommodation, entitlement to a benefit in material need, exemption from accommodation tax, free movement in Slovakia and the Schengen area space, access to health care, etc.

Act no. 92/2022 Coll. on Some Other Measures Concerning the Situation in Ukraine (Lex Ukraine) amended the Health Insurance Act as follows: Article 9h(2)(a): "A foreigner without public insurance in accordance with this Act, who has no insurance in another member state and who has been granted temporary shelter in the Slovak Republic is entitled to reimbursement of emergency care." Act on Healthcare defines emergency medical

care in Article 2(3). "Urgent health care is health care provided to a person in the event of a sudden change in health condition, which immediately threatens life or one of the elementary vital functions, eligible, without prompt provision of health care, to seriously endanger health, cause sudden and unbearable pain, whose immediate non-treatment could lead to a threat to life or health, or cause sudden changes in behavior and actions, under the influence of which the person immediately endangers himself or his surroundings." It also includes: a) childbirth; b) diagnosis and treatment of a rapidly spreading and life-threatening infection; c) immediate transport to a medical facility (including the donor or recipient of a human organ and medical personnel and the organ itself).

The Ministry of Health of the Slovak Republic reimburses the costs of the provided healthcare to the General Health Insurance Company. The person must identify himself or herself with a document of tolerated residence in the Slovak Republic with "temporary shelter" written on it.

According to Article 9h(9) of the Health Insurance Act: "The Ministry of Health can determine the range of medical services covered beyond the scope of emergency care according to paragraph 2 by publishing this range on its website." The Ministry of Health publishes the list of emergency healthcare services.[4]

It also publishes the scope of the so-called new health services paid beyond the scope of urgent health care related to complex medical screening and control screenings in ambulatory care.[5] These also cover the complex medical check of the child before entering the school since an entrance medical examination is required in connection with the entry of Ukrainian children into the school.[6] In Slovakia, a certificate of a child's medical fitness to stay in a group, which also contains information on mandatory vaccinations, is regularly submitted before the child's first entry into preschool pursuant to Article 24(7) of Act no. 355/2007 Coll. on the Protection, Support and Development of Public Health as Amended.

The Ministry of Health of the Slovak Republic also publishes the list of medical devices reimbursed beyond the scope of emergency medical care.[7]

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[4] Annex no. 3, https://www.health.gov.sk/?urcenie-rozsahu-potrebnej-zdravotnej-starostlivosti [accessed: 08.04.2023].

[5] Annex no. 1, https://www.health.gov.sk/?urcenie-rozsahu-potrebnej-zdravotnej-starostlivosti [accessed: 08.04.2023].

[6] *Methodological guidelines of the Ministry of Health of the Slovak Republic for the entrance medical examination of children from Ukraine entering the school*, https://www.health.gov.sk/?pomoc-ukrajine [accessed: 08.04.2023].

[7] Annex no. 2, https://www.health.gov.sk/?urcenie-rozsahu-potrebnej-zdravotnej-starostlivosti [accessed: 08.04.2023].

The Ministry of Health calls the range of medical services reimbursed beyond the scope of urgent health care as necessary care. "Necessary health care is health care required by a person's state of health that shall be provided due to the nature of the health care and the expected length of the person's stay so that they do not have to return to their country for the necessary treatment earlier than they originally intended. It includes any treatment by the ambulatory emergency service and emergency medical service. Consultation with a general practitioner, including preventive health care and vaccination, is also considered necessary healthcare. Necessary health care also includes treatment and management of chronic diseases: for example, dialysis, oxygen therapy, chemotherapy, asthma treatment, or echocardiography in the case of chronic autoimmune diseases. Planned (delayable) healthcare and spa care do not fall under necessary health care."[8] Similarly, see the webpage of the General Health Insurance Company: "In the case of a chronic disease, treatment is continued according to the state of health to the same extent as of the insured person in Slovakia."[9]

However, the General Health Insurance Company advises that if a healthcare provider provides health care for an employed citizen of Ukraine insured by a different health insurance company, the General Health Insurance Company cannot reimburse the medical examination.[10] For public medical insurance, it is necessary to earn at least the minimum wage.[11] The minimum wage in 2023 is 700 €. Employed citizen of Ukraine with a temporary shelter in Slovakia has the same status as the Slovak insure and is entitled to medical care to the full extent.[12]

5. APPLICANTS FOR ASYLUM OR TEMPORARY SHELTER

In another group, we can include applicants for asylum or temporary shelter. According to Article 9h(2)(b) and (c) of the Health Insurance

[8] Ministry of Health of the Slovak Republic, *On the scope of necessary health care: reimbursement of urgent and necessary health care*, https://www.health.gov.sk/?urcenie-rozsahu-potrebnej-zdravotnej-starostlivosti [accessed: 08.04.2023].

[9] General Health Insurance Company, *Guidelines for the provision of medical care for the Ukrainian citizens*, https://www.vszp.sk/files/novy-podadresar/newsletter-usmernenie-k-vykazovaniu-zs-pacientov-z-ua.pdf [accessed: 08.04.2023].

[10] General Health Insurance Company, *Reporting medical care – citizens of Ukraine working in Slovakia*, https://www.vszp.sk/files/novy-podadresar/vykazovanie-obcanov-ua-pracujucich-sr.pdf [accessed: 02.04.2023].

[11] IOM, *How to get a job in Slovakia – advice for refugees, emigrants or asylum seekers from Ukraine*, https://www.mic.iom.sk/sk/novinky/763-podmienky-zamestnania-sa-na-slovensku-pre-utecencov-odidencov-alebo-ziadatelov-o-azyl.html [accessed: 02.04.2023].

[12] General Health Insurance Company, *Guidelines for the provision of medical care for the Ukrainian citizens*.

Act, an asylum seeker and a foreigner applying for temporary shelter with no public health insurance in Slovakia or another member state are entitled to reimbursed emergency care. The Ministry of Health pays the costs for the General Health Insurance Company. The applicants must identify themselves with applicant ID cards. Even in this case, the Ministry of Health of the Slovak Republic can determine the range of medical services reimbursed beyond the scope of urgent care by publishing this range on its website. As stated by the Ministry of Health of the Slovak Republic: "Asylum applicants and applicants for temporary shelter are entitled to urgent and necessary indicated health care. This means, also the kind of health care that the doctor recommends to them through examination." The asylum seeker must undergo a medical examination, which the Ministry will arrange without undue delay upon arrival at the detention camp, and stay in the detention camp until the result of the medical examination is announced unless the Ministry decides otherwise (Article 23(3)(b) and (c) of the Act on asylum). The content of the medical check-up includes blood, urine, stool examination, X-ray examination, antigen test, and other examinations if necessary. The range of the medical check also depends on which countries the applicant passed through, from the country of origin to Slovakia.[13]

The asylum seeker does not have the right to choose a health care provider – the camp doctor and a camp nurse provide medical care (Article 11(6)(b) of the Health Care Act).

According to Article 30(4) of the Act on Asylum: "A foreigner according to paragraph 1 (applicant for temporary shelter) who has secured accommodation, is not obliged to come to the detention camp."

6. PERSONS FROM UKRAINE TRANSITING THROUGH SLOVAKIA

In the last group, we can include persons from Ukraine transiting through Slovakia. Lex Ukraine amended the Health Insurance Act by Article 38eza, according to which a natural person who is not publicly health insured, resides in the territory of Ukraine, and enters the Slovak Republic due to an armed conflict in Ukraine is entitled to reimbursed urgent care provided to the day of applying for asylum, subsidiary protection or temporary

[13] HRL, *Frequently asked questions*, https://www.hrl.sk/sk/najcastejsie-kladene-otazky [accessed: 10.02.2023] and *Methodological guidelines of the Ministry of Health of the Slovak Republic for medical examinations of foreigners arriving on the territory of the Slovak Republic due to the armed conflict in Ukraine and placed in a detention or residence camp under the competence of the Migration Office of the Ministry of the Interior of the Slovak Republic*, https://www.health.gov.sk/?pomoc-ukrajine [accessed: 10.04.2023].

shelter, but no longer than 30 days from the day of entry into the territory of the Slovak Republic. The Ministry of Health can determine the range of medical services reimbursed beyond the scope of urgent care according to the first sentence by publishing this range on its website. There, the Ministry only lists the emergency healthcare services.[14] The Ministry of Health reimburses the General Health Insurance Company.

7. THE IMPACT OF WAR ON THE HEALTH CARE PROFESSIONALS

The pressure on healthcare providers was excessive even before the pandemic and the war in Ukraine. From the statistical overview of legal and illegal migration for the first half of 2022, published on the website of the Ministry of the Interior, the number of third-country nationals who legally crossed the external land border of the Slovak Republic in the first half of 2022 was 624,402. Out of it, 344,094 left Slovakia. As of 30 June 2022, 52,107 Ukrainians had a temporary residence in Slovakia, 7,819 Ukrainians had a permanent residence, and 79,921 Ukrainians had tolerated residence (a total of 139,849 residences).[15] Also for this reason, through Lex Ukraine, the amendment of Act No. 578/2004 Coll. on Healthcare Providers, Healthcare Workers, Professional Organizations (hereinafter referred to as the "Law on Healthcare Providers") came into effect, which facilitates the entry of Ukrainian healthcare professionals into the Slovak labor market. According to Article 30a, it is possible to carry out a temporary professional internship for interns in all health professions and facilities. An intern can be a citizen of a Member State or a citizen of a third country who has a recognized document of education in order to perform a healthcare profession and performs work activities in an employment relationship or a similar work relationship with the provider and under the professional supervision of a health worker professionally qualified to perform work activities in the relevant health profession. The intern-to-be must attach a copy of the identity document, a copy of the recognition of education, a document proving medical fitness, an affidavit of integrity, and an affidavit of knowledge of the state language or English language to the extent necessary for the performance of the medical jobs.

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[14] Ministry of Health of the Slovak Republic, *On the scope of necessary health care: reimbursement of urgent and necessary health care*, https://www.health.gov.sk/?urcenie-rozsahu-potrebnej-zdravotnej-starostlivosti [accessed: 12.04.2023].

[15] Presidium of the Police Force, Border, and Foreign Police Office, *Statistical overview of legal and illegal migration in the Slovak Republic. 1st half of 2022*, https://www.minv.sk/swift_data/source/policia/hranicna_a_cudzinecka_policia/rocenky/rok_2022/2022-I.polrok-UHCP-SK.pdf [accessed: 12.04.2023].

The duration of the professional internship is related to the COVID-19 crisis in Slovakia. If it began during this crisis situation, it is possible to perform it within 180 days from the end of the crisis situation. If it started after the end of the crisis situation related to COVID-19, its maximum length is 18 months. Such an internship can not be interrupted, repeated, or carried out at various healthcare facilities.

As of August 2022, 101 medical workers from Ukraine were performing a temporary professional internship in Slovakia (out of a total of 115 trainees).[16]

A more complicated process than placement in a professional internship is the recognition of a professional qualification, thanks to which a Ukrainian health worker can work without restrictions. After the recognition of the educational document (as in the case of a professional internship), the second phase begins, which consists of the obligation to take a supplementary exam[17] at a high school or university that provides the same study program in which the applicant requests recognition of the professional qualification.[18]

In June 2022, the International Association of Medical Doctors in Slovakia reported that the "Slovak bureaucracy has always been averse to medical professionals." Kurotová from the Association criticized, for example, "such a huge long-term shortage of doctors in Slovakia that there is no one to do the supervision required by law for the internship, long-term non-recognition of the education of pediatricians from post-Soviet countries, unsecured language training for Ukrainian health workers or usurious fees for the recognition of education and exams."[19] The Association informed in September 2022 about introducing free online Slovak language courses for Ukrainian health professionals, as the supplementary exam is in Slovak (at that time, there were courses with 125 participants), and about the reduction of fees for professional exams.

At the same time, the Ministry of Health of the Slovak Republic informs about the possibility of reducing the administrative fee for the application

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[16] TASR, *101 Medical workers from Ukraine perform a temporary professional internship in Slovakia*, https://www.aktuality.sk/clanok/kQiY95g/docasnu-odbornu-staz-na-slovensku-vykonava-101-zdravotnikov-z-ukrajiny/ [accessed: 16.04.2023].

[17] Ministry of Education, Science, Research and Sport of the Slovak Republic, *Supplementary exam*, https://www.minedu.sk/doplnujuca-skuska [accessed: 16.04.2023].

[18] Ministry of Health of the Slovak Republic, *Aid to Ukraine – Actual Information: Process of recognition of health qualifications (Ukrainian documents of education)*, https://www.health.gov.sk/?pomoc-ukrajine [accessed: 16.04.2023].

[19] TASR, *International Association of Medical Doctors in Slovakia – Ukrainian health workers can take Slovak courses for free. Orthopedic magazine*, https://ortopedickymagazin.sk/malns-ukrajinski-zdravotnici-mozu-zadarmo-absolvovat-kurzy-slovenciny/ [accessed: 16.04.2023].

for the recognition of education documents if the application is submitted electronically.[20]

MALnS currently informs about the opportunity for Ukrainian nurses to sign up for free for a preparatory course focused on the basics of the Slovak language, including medical terminology and the legal minimum for health workers, to successfully pass the differential exams and independently practice their profession. It also informs about the government's decision to recognize the diplomas of Ukrainian pediatricians if they pass the entrance test in their native language. The reason for the previous non-recognition was that Ukrainian pediatricians specialize in pediatrics from the beginning of their studies, while Slovak pediatrics specialize only after studying general medicine.

CONSLUSIONS

The highest political representatives in Slovakia immediately condemned the Russian aggression and started to seek ways to help Ukraine. From the legal point of view, of much help was Lex Ukraine and its amendments. Based on it, the Ministry of Health of the Slovak Republic could issue regulations and guidelines to secure fair providing of healthcare to people arriving from Ukraine to Slovakia because of the war conflict.

In the article, the reader can mainly find information about the scope of free medical health provided to the Ukrainians in Slovakia based on their status (asylee, a person with subsidiary protection, a person with temporary protection, an applicant for asylum or temporary protection, and a person transiting through Slovakia due to the war conflict).

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[20] Ministry of Health of the Slovak Republic, *Aid to Ukraine – Actual Information: Process of recognition of health qualifications (Ukrainian documents of education).*

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IMPLEMENTATION OF THE CLERGY'S RIGHT TO REST ACCORDING TO THE POLISH POST-CODE SYNODAL LEGISLATION

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Abstract. The right to rest is undoubtedly one of the most fundamental rights of every person. The ecclesiastical legislator regulated this right in the following: Canon 283 para. 2; Canon 395 para. 2; Canon 410; Canon 533 para. 2; Canon 550 para. 3 of the 1983 Code of Canon Law. Thirty-three Polish post-CIC synodal legislators recited code dispositions, promulgating detailed regulations on leaves and days off for members of the clergy. The exercise of the right must always take into account the principle of salus animarum suprema lex.

Keywords: clergyman; holiday leave; day off; synodal statutes

INTRODUCTION

Relaxation has been incorporated into the natural rhythm of every human being by God, who rested on the seventh day after the six days of creating the world: "By the seventh day God had finished the work he had been doing; so on the seventh day he rested from all his work. And God blessed the seventh day and made it holy, because on it he rested from all the work of creating that he had done" (Gen. 2:2-3). As the *Catechism of the Catholic Church* teaches, God's behavior is the model of human behavior. Since God "rested" on the seventh day (Ex. 31:17), man should also "abstain from work" and let others "be refreshed" (Ex. 23:12). So the Sabbath orders us to stop our daily work and give ourselves a chance for a well-deserved rest.[1]

The Magisterium of the Church, in numerous documents, draws attention to the value of leisure time and calls for the proper use of the right to rest, bearing in mind the third commandment of the Decalogue, not only in relation to Sunday. This right should be perceived as one of the most important rights that a person who takes up work is entitled to.[2] The code

[1] *Catechismus Catholicae Ecclesiae*, Libreria Editrice Vaticana, Città del Vaticano 1997, no. 2172.
[2] Ioannes Paulus PP. II, *Palatium deinde adiit Nationum Unitarum; in quod ingressus, allocutionem habuit ad earundem Nationum Legatos* (02.10.1979), AAS 71 (1979), p. 1140-160, no. 13.

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legislator[3] regulated the analyzed right in: Canon 283 para. 2, according to which a cleric is entitled to a due and sufficient annual leave, determined by general or particular law; Canon 533 para. 2, according to which, unless there is a serious reason, the parish priest is allowed to leave the parish each year for a holiday for a maximum of one month, counted continuously or with breaks; Canon 550 para. 3, according to which an assistant priest has the same rights regarding leave as a parish priest; Canon 395 para. 2, according to which, apart from the situations specified in canon law, a diocesan bishop may, for a just cause, stay outside the diocese for a month, continuously or intermittently, if his absence does not cause any harm to the diocese; and Canon 410, according to which the coadjutor bishop and the auxiliary bishop, like the diocesan bishop, are entitled to leave not exceeding one month.

Particularly important is the indication of the Congregation for the Clergy, which notes that despite urgent pastoral needs, or rather in order to take care of them properly, the clergyman must find the humility and courage to rest. Although standard rest is the most effective means of restoring the priest's strength and continuing his pastoral ministry for the Kingdom of God, it may be necessary to give priests a longer or shorter time to unite themselves more calmly and more deeply to Jesus Christ, and thus to carry out the *munus docendi*, *sanctificandi* and *regendi* more fruitfully and effectively.[4]

The analyzed issue, especially in relation to common legislation, has already been addressed by, among others: Bamberg 2005, 199-220; Bieńkowski 2018, 219-38; Giemza 2012; Kroczek 2007, 217-34; Sabbarese 2013; Woestman 2006.

In addition to the universal legislation, binding in the entire Catholic Church, there is particular legislation, a part of which is the synodal legislation, binding in individual particular Churches. Particular legislation may have a national, provincial or diocesan dimension [Pawluk 2002, 131; Lewandowski 2015, 81].

In a particular Church, four entities of authority have the right to legislate: 1) by God's institute, only the highest authority in the Church has the competence to enact normative acts, i.e. the Bishop of Rome and the College of Bishops with the Pope as its head (Canon 331-341) and the bishop diocesan (Canon 381, 391); 2) from positive law, particular synods are competent to legislate in a particular Church (Canon 445) as well as the conference of bishops (Canon 455) [Sitarz 2009, 1006; Lewandowski 2015, 81].

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

[4] Congregazione per il Clero, *Direttorio per il ministero e la vita dei presbiteri* (11.02.2013), Libreria Editrice Vaticana, Città del Vaticano 2013, no. 101.

The post-code legislation should be considered to be that which was issued after the promulgation of CIC/83, i.e. after January 25, 1983 [Lewandowski 2015, 82].

Thirty-five post-code particular and diocesan synods were held in Poland. In the area of the conducted analysis, the relevant norms were promulgated by thirty-three synodal legislators: Białystok, Częstochowa, Drohiczyn, Ełk, Gdańsk, Gliwice, Gniezno, Kalisz, Katowice, Kielce, Koszalin–Kołobrzeg, Lublin, Łomża, Łowicz, Łódź, Opole, Pelplin, Płock, Poznań, Przemyśl, Radom, Rzeszów, Sandomierz, Siedlce, Sosnowiec, Tarnów, Toruń, Warmia, Warsaw, Warsaw–Praga, Włocławek, Wrocław and Zamość–Lubaczów. However, the issue was not regulated by Legnica[5] and the Plenary Legislator.[6]

1. HOLIDAY LEAVE

The Siedlce legislator emphasizes the importance of rest as an indispensable tool for regaining strength, mental peace and energy for further priestly service. For this reason, he warns the clergy against underestimating the dangers of excessive overwork and daily struggle with various adversities and hardships of priestly work. Therefore, he recommends that priests, when planning sufficient time for a well-deserved rest, should take into account the great advantage of the possibilities of tranquility offered by monasteries or specialized centers of spirituality.[7]

As a rule, Polish post-code synodal legislators, emphasizing the importance of the obligation to maintain residence, accept the dispositions of the code legislator contained in Canon 533 para. 2 and Canon 550 para. 3, according to which parish priests and assistant priests are entitled to a monthly holiday leave in a given calendar year (Opole, Statute 236; Siedlce, Statute 46).[8] This leave may be taken continuously or intermittently,

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[5] *I Synod Diecezji Legnickiej (2007-2012). Przypatrzmy się powołaniu naszemu* (24.03.2012), vol. I: *Program odnowy religijno-moralnej*, Biblioteka im. Jana Pawła II, Legnica 2012.

[6] *II Polski Synod Plenarny (1991-1999)* (25.01.2001), Pallottinum, Poznań 2001.

[7] *II Synod Diecezji Siedleckiej. Żyjąc mocą chrztu* (09.06.2018), Wydawnictwo Diecezji Siedleckiej Unitas, Siedlce 2018 [hereinafter: Siedlce], Statute 45.

[8] *I Synod Archidiecezji Białostockiej* (25.03.2000), Kuria Metropolitalna Białostocka, Białystok 2000 [hereinafter: Białystok 1], Statute 51, 63f; Metropolitan Archbishop of Częstochowa, *Współpraca proboszcza i wikariusza w parafii* (23.11.1986), in: *II Synod Diecezji Częstochowskiej*, Częstochowskie Wydawnictwo Archidiecezjalne Regina Poloniae, Częstochowa 1987 [hereinafter: Częstochowa], Article 4; *I Synod Diecezji Ełckiej 1997-1999*, Kuria Biskupia Diecezji Ełckiej, Ełk 1999 [hereinafter: Ełk], Statute 358, 387; Metropolitan Archbishop of Gdańsk, *Rozporządzenie o prawach i obowiązkach księży wikariuszy* (25.03.2002), in: *III Synod Gdański. Misja ewangelizacyjna Kościoła gdańskiego na początku Nowego Tysiąclecia. Załączniki*, vol. 2, Kuria Metropolitalna Gdańska, Gdańsk 2001 [hereinafter: Gdańsk], Article 8; *Pierwszy Synod Diecezji Gliwickiej (2017-2018). Statuty i aneksy* (04.11.2018), Kuria Diecezjalna, Gliwice 2018

generally during summer holidays (Kalisz, Statute 289; Opole, Statute 236)[9]

[hereinafter: Gliwice], Statute 174; *III Powojenny Synod Archidiecezji Gnieźnieńskiej z okazji Millenium jej powstania*, Prymasowskie Wydawnictwo Gaudentinum, Gniezno 2001 [hereinafter: Gniezno 1], Statute 50 para. 2; *Pierwszy Synod Diecezji Kaliskiej (2007-2009). Prawo diecezjalne Kościoła Kaliskiego*, Kuria Diecezjalna, Kalisz 2009 [hereinafter: Kalisz], Statute 289; *II Synod Diecezji Lubelskiej 1977-1985* (08.12.1987), Kuria Diecezjalna, Lubelskie Wydawnictwo Diecezjalne, Lublin 1988 [hereinafter: Lublin], Statute 289; *I Synod Diecezji Łomżyńskiej. Prawo partykularne Kościoła Łomżyńskiego*, Łomżyńska Kuria Diecezjalna, Łomża 2005 [hereinafter: Łomża], Statute 119, 160; *I Synod Diecezji Łowickiej 1995-1999* (25.03.1999), Apostolicum, Łowicz 1999, Statute 72; *III Synod Archidiecezji Łódzkiej* (22.11.1998), Archidiecezjalne Wydawnictwo Łódzkie, Łódź 1999 [hereinafter: Łódź], Article 102; *Pierwszy Synod Diecezji Opolskiej (2002-2005). Statuty i Aneksy. Parafia u progu Nowego Tysiąclecia* (29.03.2005), Wydawnictwo Świętego Krzyża, Opole 2005 [hereinafter: Opole], Statute 236; *Instrukcja o relacjach i współpracy proboszcza, wikariusza i seniora* (05.12.2015), in: *Gdzie jest Bóg, tam jest przyszłość. XLIII Synod Diecezji Płockiej. Prawo partykularne i program odnowy pastoralnej Kościoła Płockiego*, Płocki Instytut Wydawniczy, Płock 2015, p. 530-32 [hereinafter: Płock], Article 21; *Synod Archidiecezji Poznańskiej 2004-2008 zwołany i przeprowadzony przez Arcybiskupa Stanisława Gądeckiego. Statuty* (23.11.2008), vol. II, Wydawnictwo Święty Wojciech, Poznań 2008 [hereinafter: Poznań], Statute 42, 111; *Synod Archidiecezji Przemyskiej 1995-2000. Statuty i aneksy* (01.01.2000), Wydawnictwo Archidiecezji Przemyskiej, Przemyśl 2000 [hereinafter: Przemyśl], Statute 166 para. 1; *Ustawa Synodalna Diecezji Radomskiej promulgowana przez Biskupa Radomskiego Edwarda Materskiego 5 kwietnia 1997 roku w Radomiu na I Synodzie Diecezji Radomskiej* (05.04.1997), Radomskie Wydawnictwo Diecezjalne AVE, Radom 1999 [hereinafter: Radom], Statute 166 para. 1; *Pierwszy Synod Diecezji Rzeszowskiej 2001-2004* (20.11.2004), Poligrafia Wyższego Seminarium Duchownego w Rzeszowie, Rzeszów 2004 [hereinafter: Rzeszów], Statute 59; *„Aby nieść Światło Ewangelii". Trzeci Synod Diecezji Sandomierskiej (2017-2022)* (02.06.2022), Wydawnictwo Diecezjalne i Drukarnia w Sandomierzu, Sandomierz 2022 [hereinafter: Sandomierz], Statute 87; *I Synod Diecezji Sosnowieckiej. Prawo Partykularne Kościoła Sosonowieckiego* (11.12.2004), Wydawnictwo «scriptum», Sosnowiec 2005 [hereinafter: Sosnowiec], Statute 133 para. 1, 138 para. 1; *IV Synod Diecezji Tarnowskiej. Ad imaginem ecclesiae universalis (Lumen gentium 23)* (13.03.1986), Kuria Diecezjalna, Tarnów 1990 [hereinafter: Tarnów], Statute 341 para. 2; 353 para. 5; Bishop of Toruń, *Instrukcja o współpracy i uposażeniu duszpasterzy parafialnych* (27.06.2011), in: *Uchwały Pierwszego Synodu Diecezji Toruńskiej. Prawo partykularne Kościoła Toruńskiego*, Toruńskie Wydawnictwo Diecezjalne, Toruń 2011, p. 273-84 [hereinafter: Toruń 1], Article 10 para. 1; Idem, *Instrukcja o urlopach i wyjazdach pozaurlopowych kapłanów* (27.06.2011), in: *Uchwały Pierwszego Synodu Diecezji Toruńskiej*, p. 284-85 [hereinafter: Toruń 2], Article 2, 4 para. 1; *IV Synod Archidiecezji Warszawskiej* (19.03.2003), Wydawnictwo Archidiecezji Warszawskiej, Warszawa 2003 [hereinafter: Warszawa], Statute 44; *Pierwszy Synod Diecezji Warszawsko-Praskiej* (08.12.2000), Kuria Biskupia Diecezji Warszawsko-Praskiej, Warszawa 2000 [hereinafter: Warszawa-Praga], Statute 68 para. 1; *I (XIV) Synod Archidiecezji Warmińskiej (2006-2012). Misja Kościoła Warmińskiego w dziele Nowej Ewangelizacji* (30.09.2012), Wydział Duszpasterski Kurii Archidiecezji Warmińskiej, Olsztyn 2012 [hereinafter: Olsztyn], Statute 35; *Drugi Synod Diecezji Włocławskiej. Statuty* (04.04.1994), [no publisher information], Włocławek 1994 [hereinafter: Włocławek], Statute 317; *Porządek prawny i organizacja* (06.12.1993), in: *Synod Archidiecezji Wrocławskiej 1985-1991* [hereinafter: Wrocław 1], p. 347-421, Article 71, 88e; *I Synod Diecezji Zamojsko-Lubaczowskiej 1996-2001* (25.03.2001), Kuria Diecezjalna, Zamość 2001 [hereinafter: Zamość–Lubaczów], Statute 11, 13.

[9] *Wsłuchani w Ducha. Uchwały II Synodu Archidiecezji Katowickiej* (20.11.2016), Księgarnia Świętego Jacka, Katowice 2016 [hereinafter: Katowice 1], Statute 124; *Statuty I Synodu*

or summer holidays and winter school holidays (Drohiczyn, Statute 243).[10] The Częstochowa legislator proposes to divide the leave into twenty days in the holiday months and ten days at other times (Częstochowa, Article 4). The Toruń legislator – as a desirable action – indicates the implementation of the leave in a continuous system, however, if the pastoral possibilities do not allow it, the principle of at least two weeks of continuous leave should be maintained, and the rest of the leave should be spread over other days of the year, preferably in the summer or during school winter holidays (Toruń 1, Article 10 para 1).

Assistant priests subjected to a translocation in a given year receive appropriate decrees at the end of the school and catechetical year and until the move is subject to the parish priest *a quo*, with whom they agree the duration of the holiday leave.[11] In the diocese of Toruń, the parish priest, in agreement with the vicar forane, has the right to terminate the holiday leave, if a very serious pastoral reason demands it and it cannot be remedied in any other way. In such a situation, the costs resulting from the interruption of the leave are covered from the parish funds (Toruń 1, Article 10 para 3).

Employees of the diocesan curia, ecclesiastical tribunals, theological seminaries and other diocesan institutions are entitled to holiday leave, the length of which is determined by the state labor law.[12] In the dioceses of Gliwice and Siedlce, this leave does not include trips to training, courses, seminars or conferences. The date of the leave should be planned in such a way that all curial agencies have a sufficient number of employees (Siedlce, statute 46).[13] The leave list of employees of the episcopal tribunal of the diocese of Gliwice is prepared by the tribunal office and approved by the judicial vicar. It should be prepared in such a way that one of the notaries and the judicial vicar or one of the associate judicial vicars is always present at work. Priority in planning holidays during summer holidays, winter

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Diecezji Pelplińskiej (06.06.2000), Wydawnictwo Diecezji Pelplińskiej Bernardinum, Pelplin 2001 [hereinafter: Pelplin], Statute 49.

[10] *I Synod Diecezji Drohiczyńskiej. Statuty. Dokumenty wykonawcze* (24.05.1997), Drohiczyńskie Wydawnictwo Diecezjalne, Drohiczyn 1997 [hereinafter: Drohiczyn], Statute 243.

[11] Metropolitan Archbishop of Białystok, *Dekret dotyczący przenoszenia księży wikariuszy* (15.05.2000), in: *I Synod Archidiecezji Białostockiej*, p. 272, Article 2.

[12] The length of employee leave in Poland amounts to: 20 days – if an employee has been employed for less than 10 years; 26 days – if an employee has been employed for at least 10 years. Act of 26 June 1974 The Labor Code, Journal of Laws of 1974, No. 24, item 141 as amended, Article 154 para. 1.

[13] Bishop of Gliwice, *Aneks XVIII. Regulamin Kurii Diecezjalnej w Gliwicach*, in: *Pierwszy Synod Diecezji Gliwickiej*, p. 245-61, Article 56.

holidays and holydays is given to clergymen who additionally undertake pastoral work with children and youth.[14]

Permanent catechists (prefects) are entitled to a month's leave during the holiday season.[15] In the remaining time free from school activities, they should organize camps and summer camps for their students, undertake self-education and participate in priestly retreats, and help pastorally in the parish (Katowice 2, Article 9).

Priests undertaking specialized studies outside the diocese, like all other clergy, are entitled to one month of leave. Students who received a financial scholarship financed from diocesan funds in a given academic year may be assigned to pastoral work in the diocese during the holidays (Sandomierz, Statutes 109-10). Continuing studies from the parish does not give the clergyman the right to additional time off in connection with commuting to study. If the advancement of the doctoral dissertation, confirmed by the head of the department in which the dissertation is being prepared, requires additional time to finalize the work, the parish priest, if the pastoral conditions allow it, should consider favorably the request of the interested student priest for the possibility of more frequent contact with the university.[16]

During their leave in their homeland, missionary clergymen are obliged to pay a visit to the diocesan bishop, informing him at the same time about the place of permanent residence during the holidays (Gliwice, Statute 216). The Sandomierz legislator provides spiritual and material assistance to missionaries during their holidays. To this end, he encourages parish priests to invite missionaries to parishes so that the faithful can strengthen their faith and unity with the universal Church through sermons preached by missionaries and support their missionary activity with prayer and material help (Sandomierz, Statute 100).

Nine synodal legislators state that clergy are entitled additional three days of leave for priestly retreat (Częstochowa, Article 4; Gliwice, Statute 30; Kalisz, Statute 289; Łomża, Statute 160; Płock, Article 19; Radom, Statute 166 para 1; Siedlce, Statute 46; Toruń 2, Article 2).[17]

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[14] Idem, *Aneks XVIX. Regulamin Sądu Biskupiego Diecezji Gliwickiej*, in: *Pierwszy Synod Diecezji Gliwickiej*, p. 263-77, Article 29.

[15] Metropolitan Archbishop of Katowice, *Status katechety stałego w archidiecezji katowickiej* (20.11.2016), p. 85-87 [hereinafter: Katowice 2], Article 9; Metropolitan Archbishop of Warszawa, *Status księdza prefekta – rezydenta w parafii* (19.03.2003), in: *IV Synod Archidiecezji Warszawskiej*, p. 131-32, Article 12.

[16] *Prawo księdza do odpoczynku* (06.12.1993), in: *Synod Archidiecezji Wrocławskiej* [hereinafter: Wrocław 2], p. 423-24, Article 3k.

[17] Metropolitan Archbishop of Poznań, *Regulamin Kurii Metropolitalnej Poznańskiej* (14.06.2008), in: *Synod Archidiecezji Poznańskiej*, p. 502-505, para. 9(4).

In the archdioceses of Gdańsk and Katowice and the diocese of Płock, participation in diocesan and parish pilgrimages, camps and parish retreats – depending on the pastoral situation – is treated in whole or in part as an off-holiday activity (Gdańsk, Article 8; Katowice 1, Statute 127; Płock, Article 22). In the diocese of Gliwice, the time of such service is not included in the holiday leave only with the prior consent of one's own parish priest (Gliwice, Statute 176). The legislator of Kalisz excludes from the holiday leave the time devoted to leading the pilgrimage group of the pilgrimage of Kalisz and the diocese of Kalisz and the pilgrimage of Wieruszów to Jasna Góra as well as conducting retreats and holiday and retreat camps commissioned by the diocesan authority or the parish priest, who should first obtain the consent of the vicar general in this case (Kalisz, Statute 289). The Białystok legislator provides similarly, which stipulates that the service of priests during longer pilgrimages, i.e. to Jasna Góra and Vilnius, should not take place at the expense of the time allocated for holidays, and a clergyman who decides to participate in the aforementioned pilgrimages should be provided with leave at a different time (Białystok 1, Statute 802). Priests conducting fifteen-day oasis retreats during their leave are compensated by the Częstochowa legislator with an additional week of leave (Częstochowa, Article 4). In the diocese of Sandomierz, one pastoral trip during the holidays is not treated as a holiday (Sandomierz, Statute 87). In the archdiocese of Warsaw, the assistant priest's leave does not include the time spent on holiday pastoral care undertaken in consultation with the parish priest for up to ten days (Warsaw, Statute 44), while in the Warsaw–Praga diocese, holiday pastoral care of various formation groups as a whole is not treated as leave (Warsaw–Praga, Statute 68 para 1).

In the diocese of Gliwice, the synodal legislator provides for the possibility of taking an additional, one-week special leave, which is granted to clergy involved in the pastoral Christmast visit (Gliwice, Statute 175). In the archdiocese of Poznań, such leave is five days (Poznań, Statute 53). The Bishop of Kalisz agrees to a three-day rest for the priest after the pastoral Christmas visit, but from the monthly leave pool and only if the pastoral service is secured and social sensitivity is taken into account, which could to link the priest's departure with the offerings collected during the pastoral visit (Kalisz, Statute 292). In the Płock diocese, during the winter school holidays, catechist clergy – with the consent of the parish priest – may take advantage of additional days off (Płock, Article 20). The Katowice legislator regulates the issue of leaves taken during school winter holidays, specifying that clergy generally begin their weekly time off on Monday after the first Holy Mass morning, and finish it on Saturday before the beginning of the last Holy Mass (Katowice 1, Statute 126).

The Kalisz legislator allows – as part of the leave due to the clergy – *ad hoc* private trips, but only in the event of a necessary need. In the analyzed matter, the right is vested in: 1) assistant priests for a period of two days with the consent of the parish priest, more than two days with the consent of the vicar general; 2) parish priests and chaplains – for a period of two days without special permission, more than two days with the consent of the vicar general; 3) vicars forane – for a period of five days without special permission, more than five days with the consent of the vicar general. In each of the above-mentioned situations, a substitute in pastoral care and catechesis must be provided (Kalisz, Statute 297). In the diocese of Łowicz, a special permit must be obtained for all holiday trips: 1) an assistant priest is approved by the parish priest for up to three days, and by the vicar forane for more than three days; 2) the vicar forane consents to the parish priest's leave for a period of up to one week; 3) the assistant priest and the parish priest for a period longer than one week are approved by the diocesan curia after prior indication of the reason for the departure, the exact address of the planned stay and contact details, the written approval of the parish priest in the case of assistant priest and the proposal of the substitute to obtain the approval of the diocesan authority in the case of parish priests.[18] In the archdiocese of Białystok, visits of lecturers of the theological seminary – as long as they do not interfere with educational activities – between three and seven days require the consent of the rector of the seminary, more than a week's, consent of the Ordinary.[19] In the diocese of Toruń, permission from the diocesan authority is required for a non-holiday trip of more than a week. The written request should include: reasons for departure, place of stay and contact telephone number, proposal of the substitute in order to obtain the approval of the diocesan authority for him (applies to the parish priest), written approval of the parish priest (applies to assistant priests) (Toruń 2, Article 5 para. 1). The Warsaw legislator allows parish priests to leave for important reasons – apart from holidays – for three days, and after notifying the vicar forane of this fact for six days (Warsaw, Statute 55).

The diocesan bishop should be notified of the absence of the parish priest for more than a week (Białystok 1, Statute 51; Poznań, Statute 111; Przemyśl, Statute 167 para. 2; Radom, Statute 166 para. 2; Toruń 2, Article 2). The Gliwice legislator relaxes the disposition of the code legislator contained in Canon 533 para. 2 and obliges the parish priest and administrator of the parish

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[18] Bishop of Łowicz, *Instrukcja synodalna o urlopach i wyjazdach pozaurlopowych kapłanów Diecezji Łowickiej* (25.03.1999), in: *I Synod Diecezji Łowickiej*, p. 131-34 [hereinafter: Łowicz], Article 6-7.

[19] Metropolitan Archbishop of Białystok, *Statut Archidiecezjalnego Wyższego Seminarium Duchownego* (25.03.2000), in: *I Synod Archidiecezji Białostockiej*, p. 320-29, Article 6.

leaving the parish for a period longer than seven days to inform the vicar forane of this fact in writing. The vicar forane informs the vice-vicar forane of his absence (Gliwice, Statute 178).

The legislators of Ełk and Kielce consider it an urgent matter to create the possibility of going on holiday leave, which the code legislator provides in Canon 533 para. 2, of parish priests working in parishes without an assistant priest (Ełk, Statute 139).[20] The bishops of Gniezno, Lublin and Przemyśl recommend mutual assistance in this respect by the clergy, especially within the deanery (Gniezno 1, Statute 327; Lublin, Statute 289; Przemyśl, Statute 166 para. 4). In the diocese of Koszalin–Kołobrzeg, the issue of replacements for the duration of the holiday is solved by priests, first of all, on their own, and in case of difficulties, they report the need to the diocesan curia.[21] In small parishes of the Opole diocese, priests from the vicariate should provide the parish priests with a replacement at least on one or two Sundays and duty in emergency matters, such as a call to the sick or a funeral. In such situations, the bishop of Opole allows a reduction in the number of Holy Masses celebrated on Sundays in the deanery. If necessary, you can additionally celebrate the Holy Mass three or four times. This kind of fraternal help should allow at least a two-week leave for the pastor of even the smallest parish. The function of the coordinator of holiday leaves in the vicariates of the diocese of Opole is performed by the vicars forane (Opole, Statute 236). In the dioceses of Drohiczyn and Sosnowiec and the archdiocese of Warsaw, in parishes without assistant priests, the parish priest himself organizes a holiday replacement, the cost of which he covers from the parish fund (Drohiczyn, Statute 243; Sosnowiec, Statute 138 para. 3; Warsaw, Statute 44). In the Archdiocese of Poznań, monthly holiday replacements are undertaken by neo-presbyters and priests directed to specialist studies outside the archdiocese. Clergy employed at the local theological faculty, and not bound by a written contract with the parish in which they live, are obliged to undertake four Saturday-Sunday substitutes in other parishes (Poznań, Statutes 44-45, 47).

In the archdiocese of Białystok, clergymen are obliged to report all holiday trips to the metropolitan curia, specifying the exact address of their stay.[22] In the diocese of Gliwice and the archdiocese of Warsaw, this obligation applies only to assistant priests, who inform the parish priest about the place of spending their leave (Gliwice, Statute 176; Warsaw, Statute 44).

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[20] *Sprawy bytowe duchowieństwa diecezji kieleckiej* (03.06.1992), in: *III Synod Diecezji Kieleckiej 1984-1991*, Wydawnictwo Jedność, Kielce 1992, p. 91-97, Article 13.

[21] *Uchwały II Synodu Diecezji Koszalińsko-Kołobrzeskiej* (15.10.2022), Kuria Biskupia Koszalińsko-Kołobrzeska, Koszalin 2022, Statute 108.

[22] Metropolitan Archbishop of Białystok, *Dekret o rezydencji kapłanów* (25.02.2000), in: *I Synod Archidiecezji Białostockiej*, p. 268 [hereinafter: Białystok 2], Article 5.

The Opole legislator requires only to be given a contact phone number, which the assistant priests conveys to the parish priest, he in turn to the diocesan curia and substitute (Opole, Statute 236).

Foreign trips require permission from the local ordinary (Białystok 2, Article 6; Ełk, Statute 145; Kalisz, Statute 298; Łomża, Statute 120; Pelplin, Statute 49; Płock, Article 23; Przemyśl, Statute 167 para. 4; Rzeszów, Statute 63; Sandomierz, Statute 88; Olsztyn, Statute 26; Wrocław 1, Article 71). In the archdiocese of Łódź, permission from the diocesan bishop is required to travel abroad, but only outside the holiday period (Łódź, Article 107). In the diocese of Siedlce, the diocesan bishop's consent is required for a trip abroad lasting more than five days (Siedlce, Statute 48). In the archdiocese of Gdańsk the diocesan bishop gives consent to travel abroad after obtaining a positive opinion in the presented case from a suitable parish priest pertaining to the request of the assistant priest or from the vicar forane pertaining to the request of the parish priest (Gdańsk, Article 9). In the diocese of Kalisz, permission for all trips abroad, including those related to participation in a pilgrimage, must be obtained with the prior consent of the diocesan bishop. In addition, a clergyman should not participate in a foreign pilgrimage more than once in a calendar year. Due to the organization of the school and catechetical year, priests should not organize pilgrimages or take part in them in the first half of September (Kalisz, Statute 299). The Łowicz legislator gives permission for clergy to travel abroad after submitting a will in a sealed envelope, if this obligation has not yet been fulfilled, and after settling all liabilities towards church legal persons, institutions and natural persons (Łowicz, Article 9). The Warmian legislator regulates only the issue of foreign trips of parish priests, making the diocesan bishop's consent in this matter subject to prior submission of an updated will to the archdiocesan curia (Olsztyn, Statute 26).

Clergy who are not involved in activities related to the area of study and higher education should use the leave they are entitled to outside the holiday months, and during the holidays they should take parish substitutes. This disposition applies to employees of diocesan curias, ecclesiastical tribunals, higher seminaries or theological faculties (Katowice 1, Statute 125).

Even during a short absence from the parish, the parish priest is obliged to provide for the spiritual needs of the parishioners (Ełk, Statute 360; Poznań, Statute 111; Toruń 2, Article 3 para. 1 point 2; Warsaw, Statute 55). Therefore, the priest who is to replace him must receive the appropriate authorization, in a special way to assist at the sacrament of marriage (Ełk, Statute 360; Toruń 2, Article 3 para. 1 point 3). In sudden and unforeseen situations, especially in relation to parishes without an assistant priest, pastoral needs should be addressed by the vicar forane (Ełk, Statute 360). The Poznań

legislator brings to mind that a serious violation of the residency obligation may result in deprivation of office after giving a proper warning (Poznań, Statute 111).

Out of concern for the selection of the most appropriate priests for the individual parishes in the archdiocese of Białystok and the diocese of Rzeszów, parish priests prepare annual opinions concerning assistant priests according to a special questionnaire, which takes into account, among other things, the attitude of the assistant priest towards the obligation of residence and the proper use of the right to rest.[23]

The Sandomierz legislator stipulates that each holiday trip of a clergyman in which a minor under the age of eighteen will participate must be notified in writing to the chancellor of the curia within thirty days before its commencement. The application should specify the date and place of departure in detail and explain the reason for the minor's participation. The application must be accompanied by a written consent of the minor's parents or legal guardians for the trip. This disposition, however, does not apply to minor members of the clergyman's family (Sandomierz, Statute 811).

2. DAY OFF

The right to rest is one of the unquestionable rights of every human being – based on the needs of human nature, discovered, described and justified by various sciences, including theology, it is protected by the Polish post-code synodal legislation. The Wrocław legislator notes that although the analyzed entitlement is obvious, its implementation can be complex and is the result of a compromise between the arguments of the individual and the claims of the community. In the opinion of the Wrocław legislator, the category of people who often face a difficult dilemma includes the clergy, because the term "day off" for a priest is rarely an unambiguous concept and is usually a resultant of the pastoral service performed and the need for rest and its role in the order of salvation (Wrocław 2, Articles 1-2).

Twenty-five Polish post-code synodal legislators promulgated relevant dispositions in this matter. According to them, the parish priest and assistant priest are entitled to one day off from pastoral and catechetical activities in the parish (Częstochowa, Article 4; Drohiczyn, Statute 243; Gdańsk, Article 7; Gniezno 1, Statute 50 para. 2; Kalisz, Statute 293; Lublin, Statute 290; Łomża, Statute 119; Łowicz, Article 8; Łódź, Statute 105; Opole,

[23] Idem, *Dekret o opiniowaniu wikariuszy* (28.02.2000), in: *I Synod Archidiecezji Białostockiej*, p. 270-71, Article II, 4; Bishop of Rzeszów, *Instrukcja dla księży proboszczów o redagowaniu opinii o księdzu wikariuszu* (20.11.2004), in: *Pierwszy Synod Diecezji Rzeszowskiej*, p. 219-20, Article III, 5.

Statute 237; Pelplin, Statute 53 para. 1; Płock, Article 17; Poznań, Statute 48; Przemyśl, Statute 167 para. 3; Rzeszów, Statute 62; Sandomierz, Statute 87; Siedlce, Statute 47; Tarnów, Statute 353 point 6; Toruń 1, Article 11 para. 1; Warsaw, Statute 45; Warsaw–Praga, Statute 68 para. 2; Olsztyn, Statute 35; Włocławek, Statute 318; Wrocław 1, Article 88e; Wrocław 2, Article 3d; Zamość–Lubaczów, Statute 11, 13).[24]

The main purpose of a day off is to regenerate spiritual and physical strength, deepen one's inner life, contact a confessor and spiritual director, do personal study, prepare for pastoral work (Gdańsk, Article 7; Gniezno 2, p. 371; Kalisz, Statute 294; Łowicz, Article 8; Opole, Article 237; Pelplin, Statute 53 para. 1; Płock, Article 17; Rzeszów, Statute 62; Toruń 1, Article 11 para. 1; Warsaw, Statute 45; Warsaw–Praga, Statute 68 para. 3; Olsztyn, Statute 35). When leaving the parish on a day off, one should also allow time for visiting parents and siblings, priests, especially classmates and senior priests (Kalisz, Statute 295; Sandomierz, Statute 87; Włocławek, Statute 318; Wrocław 2, Article 3c).

The choice of a day off is agreed between the clergy at the beginning of the pastoral and catechetical year (Częstochowa, Article 4; Drohiczyn, Statute 243; Poznań, Statute 48). An obligatory condition for taking a day off is to provide parishioners with proper pastoral care in accordance with the code principle enshrined in Canon 1752: *salus animarium suprema lex* (Gniezno, Statute 50 para. 2, 327; Gniezno 2, p. 371; Kalisz, Statute 293; Łomża, Statute 119; Opole, Statute 237; Toruń 1, Article 11 para. 1; Warsaw, Statute 45).[25]

The day off for pastoral reasons begins after the Holy Mass in the morning and ends in the evening of the same day (Częstochowa, Article 4; Kalisz, Statute 293; Toruń 1, Article 11 para. 1; Wrocław 2, Article 3c). If, for various reasons, a clergyman does not return to the parochial house or to a service apartment at night, he should report his absence to his immediate superior. It is considered unacceptable for a priest to leave the parochial house in the evening and return in the morning without informing the relevant superior (Białystok 2, Article 3).

In the event of extraordinary pastoral needs (e.g. the first Thursday and Friday of the month, parish retreats, the day of confession organized in the parish, the need for neighborly help, etc.) or in the event

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[24] Metropolitan Archbishop of Gniezno, *Dekret o wolnym dniu kapłanów* (08.12.2000), in: *III Powojenny Synod Archidiecezji Gnieźnieńskiej z okazji Millenium jej powstania* [hereinafter: Gniezno 2], p. 371.

[25] Metropolitan Archbishop of Poznań, *Status proboszcza w archidiecezji poznańskiej* (05.04.2007), in: *Synod Archidiecezji Poznańskiej*, p. 324-31, Article V, 4; Idem, *Status wikariusza w archidiecezji poznańskiej* (05.04.2007), in: *Synod Archidiecezji Poznańskiej*, p. 332-36, Article VI, 3.

of unforeseen random events, the parish priest has the right to transfer the day off due to the assistant priest to another day, if possible or otherwise provide him with the rest he is entitled to (Kalisz, Statute 296; Łódź, Statute 105; Toruń 1, Article 11 para. 2). The right to a day off never exempts a clergyman from participating in mandatory vicariate, diocesan or formation meetings (Toruń 1, Article 11 para. 4).

A possible departure of the assistant priest outside the parish during a day off may take place with the knowledge and consent of the parish priest (Częstochowa, Article 4; Gdańsk, Article 7; Gniezno 2, p. 371; Pelplin, Statute 53 para. 1; Siedlce, Statute 47; Toruń 1, Article 12 para. 1; Wrocław 2, Article 3e). Pastoral considerations also require assistant priests to know where, if necessary, they can find the parish priest on a day off (Gniezno 2, p. 371). The Siedlce legislator obliges parish priests to inform at least the assistant priest on duty about their absence on a day off (Siedlce, Statute 47).

As a rule, Saturday is not a day off for priests. This day should be used to work with parish groups, e.g. altar servers, Catholic Youth Association, oasis or charity groups (Częstochowa, Article 4; Wrocław 2, Article 3f). Similar rules apply to other days free from school catechesis (Płock, Article 18). Saturday is a day off for full-time catechists (who teach religious education from Monday to Friday) (Rzeszów, Statute 62). Sundays and holidays are days of special importance for the life of the parish, therefore, apart from justified cases, the constant presence of priests is required (Częstochowa, Article 4; Wrocław 2, Article 3g). A priest loses the right to a day off if a holy day of obligation or another parish celebration falls on it (Toruń 1, Article 11 para. 3). The right to a day off is suspended during the holiday months (Poznań, Statute 48). A day off is not included in the leave (Sandomierz, Statute 87).

No form of free time entitles a priest to dispense from the moral obligation to celebrate the Eucharist and the Liturgy of the Hours (Płock, Article 14).

CONCLUSIONS

The analysis carried out in this article allows us to draw the following *de lege lata* and *de lege ferenda* conclusions:

1. Every clergyman has the right to rest. Thirty-three Polish post-code synodal legislators regulated the subject matter. Priests may leave the pastoral institution each year for a month's leave, either continuously or intermittently. Twenty-four synodal legislators introduced the practice of a weekday off.
2. Pastoral necessity may require changing the date of a planned holiday or day off. During seminary formation and permanent priestly formation,

a clergyman should develop the ability to follow the principle of the hierarchy of values, resign from his right and always put the good of souls before his own good.

3. Apart from unforeseen situations, great care should be taken to protect and enable the proper exercise of the right to rest, which contributes significantly to the spiritual strengthening and physical renewal of the priest. Due to the decreasing number of ordained priests and the liquidation of assistant priests in parishes, the cooperation of clergy is especially needed, even within the vicariate. It becomes necessary to engage clergy employed in diocesan curias, ecclesiastical tribunals, seminaries or theological faculties in occasional holiday replacements. Priests who do not undertake school work should take leave outside the holiday months.
4. It should be postulated to regulate all additional pastoral activities undertaken by the clergy with great commitment and physical effort during the school summer holidays and winter holidays, as activities outside the holiday leave, which will undoubtedly contribute to the activity of priests in this matter.
5. In the era of a world without borders and easy travel, dispositions of synodal legislators obliging to meet excessive requirements in order to obtain permission to travel abroad should be negatively assessed today, as exemplified by the obligation to submit an updated will to the diocesan curia or to settle all obligations towards church legal persons.
6. Organizing the possibility of rest while securing the pastoral ministry requires upbringing the cleric in freedom and responsibility. This involves the need to implement the principle of trust. What can be properly agreed between priests within a parish or vicariate does not require the involvement of the local Ordinary or even the diocesan bishop.

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"RETAINED PROFIT" OR MAKING AN ADDITIONAL CONTRIBUTION TO THE COMPANY AND THE POSSIBILITY TO RECOGNIZE TAX DEDUCTIBLE EXPENSES ON ACCOUNT OF NOTIONAL INTEREST – INTERPRETATION DIFFICULTIES UNDER ARTICLE 15CB OF THE CORPORATE INCOME TAX ACT

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Abstract. The subject of the study is CIT tax relief regulated by Article 15cb of the CIT Act (known as interest relief). This relief provides for additional tax deductible expenses, even though no expenses were incurred in the amount of multiplication result of additional capital contribution made to the company and/or profit contributed to the company's reserve capital or supplementary capital and NBP's reference rate applicable on the last working day of the year preceding the fiscal year increased by 1 percentage point. The author presents eleven interpretation doubts that arose during the four years of the relief being in force. Most of the doubts concerned individual tax decisions issued by the Director of the National Tax and Customs Information Office. The author subjects these interpretations to a critical assessment, presenting his own opinion, sometimes different from that of the tax authorities.

Keywords: interest relief; CIT; internal financing of the company

1. INTRODUCTORY NOTES

1 January 2019 was the day when the act of 23 October 2018 on amending the personal income tax act, the corporate income tax act and certain other acts entered into force.[1] One of the amendments introduced by it was to add Article 15cb to the Corporate Income Tax Act of 15 February 1992.[2] It reads: "1. In a company, tax deductible expenses[3] shall also include an amount corresponding to the product of the reference rate of the National Bank of Poland[4] applicable on the last working day of the year preceding the fiscal year

[1] Journal of Laws item 2159 [hereinafter: Amending Act].
[2] Journal of Laws of 2020, item 1406 as amended [hereinafter: CIT Act].
[3] Hereinafter: Expenses.
[4] Hereinafter: NBP's Reference rate.

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increased by 1 percentage point[5] and the amount of: 1) an additional capital contribution made to the company in accordance with the procedure and the rules set out in separate regulations[6] or 2) any profit contributed to the company's reserve capital or supplementary capital.[7] 2. The expense referred to in paragraph 1 may be deducted in the year in which the additional contribution is made or in which the reserve or supplementary capital is increased and in the next two consecutive fiscal years. 3. The total amount of tax deductible expenses deducted in a fiscal year on the grounds listed in paragraph 1 shall not exceed the amount of PLN 250,000. 4. The provision of paragraph 1 shall not apply to additional contributions and profits allocated for covering a balance-sheet loss. 5. The provision of paragraph 1 shall apply if the additional contribution is repaid or the profit is distributed and paid not earlier than after 3 years counting from the end of the fiscal year in which that contribution was made to the company or in which the resolution on the retention of the profit in the company was adopted. 6. The fiscal year in which an additional contribution is made to a company shall be the year in which the additional contribution is credited to the company's payment account. 7. If the additional contribution referred to in paragraph 1 is repaid before the end of the period indicated in paragraph 5, then in the fiscal year in which the additional contribution is repaid, the revenue shall be a value corresponding to the tax deductible expenses deducted in accordance with paragraph 1. 8. The provision of paragraph 7 shall apply accordingly to a company's revenue corresponding proportionately to that part of the tax deductible expenses that corresponds to the repaid amount of the additional contribution – in the case of the repayment of part of the additional contribution referred to in paragraph 1. 9. If the company referred to in paragraph 1 is acquired as a result of a merger or division or is transformed into a partnership not being a legal person before the end of the period referred to in paragraph 5, revenue in an amount corresponding to the tax deductible expenses deducted in accordance with paragraph 1 shall be determined as at the date preceding the date of the acquisition or transformation. 10. The provision of paragraph 1 does not apply if the taxable person or entity affiliated therewith within the meaning of Article 11a.1 (4) performed a transaction or related transactions without justified economic reasons, mainly for the purpose of recognising an amount specified in paragraph 1 as a tax deductible expense. Justified economic reasons do not include cases where a benefit earned in a tax year or subsequent years arises from recognition as tax deductible expenses."[8]

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[5] Hereinafter: NBP's Reference rate + 1 p.p.

[6] Hereinafter: Contribution.

[7] Hereinafter: Profit.

[8] Article 15cb(10) CIT Act entered into force on 1 January 2021.

The article in question was used to introduce an interesting tax preference to the CIT Act, which involves the right to identify additional tax deductible expenses, even though no expenses were incurred, on account of retention of profit made in the company or making additional contributions to the company instead of resorting to external financing.

Nevertheless, Article 15cb CIT Act brings a few interpretation difficulties that are a springboard for this discussion. The ambiguities noticed by the author and visible in practice concern in particular: 1) the meaning of the phrase: "on the last working day of the year preceding the fiscal year" used in Article 15cb(1) CIT Act; 2) the way Expenses are calculated in a situation where the taxpayer wants to deduct them also in the next two consecutive fiscal years, pursuant to Article 15cb(2) CIT Act; 3) the procedure for calculating Expenses by the taxpayer who carries out his activity in the Special Economic Zone and/or under a Decision on Support;[9] 4) the possibility of settling Expenses as a result of transferring the reserve capital to the position "profit from previous years" before the lapse of the deadline specified in Article 15cb(5) CIT Act; 5) the possibility to settle Expenses as a result of allocating profit for the reserve capital, and then its partial payment in the same year to shareholders as divided; 6) the possibility of settling Expenses as a result of "retention of profit in the company" other that allocating it for the company's reserve or supplementary capital; 7) the possibility of settling Expenses as a result of making an additional contribution to the company by way of compensation (offsetting); 8) the possibility to settle Expenses as a result of a limited partnership allocating the profit earned before the company becomes a CIT taxpayer for the reserve or supplementary capital; 9) the possibility of settling Expenses as a result of allocating profits earned before 2018 for the reserve or supplementary capital; 10) the earliest date form which onwards Expenses may the settled; 11) the possibility of settling Expenses by a company subject to a flat-rate tax on company's income (the so-called Estonian CIT).

The further part of this study will also present the author's position on these doubts. The discussion was based on the legislation in force on 1 April 2023.

2. *RATIO LEGIS* OF ARTICLE 15CB CIT ACT AND THE AMOUNT OF THE TAX ADVANTAGE

Given the fact that capital interest on credits and loans taken out to finance taxpayer's economic activity as a rule constitutes tax deductible expenses, from the entrepreneur's point of view it would be more profitable

[9] In the meaning of the Act of 10 May 2018 on supporting new investment, Journal of Laws of 2023, item 74.

to reach for external financing [Małecki and Mazurkiewicz 2019]. With regard to financing with equity capital, the provisions of the CIT Act did not allow at all to include the costs of obtaining such capital in the base of tax costs of a capital company [Jankowski 2020, 49]. The legislator decided to change this state of affairs.

Regulations included in Article 15cb CIT Act intend to encourage CIT taxpayers to retain profits instead of paying them to shareholders as dividend or financing the activity by means of additional Contributions [Gil, Obońska, Wacławczyk, et al. 2019]. This incentive allows recognizing additional tax deductible expenses if the profits are retained or additional contribution is made to the company, in the amount of notional interest that the taxpayer would have to pay if he resorted to external debt financing. The taxpayer is entitled to settle these costs irrespective of any expenses made by him [Dmoch 2020]. The measure analysed leads to the levelling off of tax entitlements related to external financing in the form of a loan and to creating self-financing capitals.[10]

The essence of the tax preference regulated in Article 15cb CIT Act[11] it the possibility to deduct from the CIT tax base of the sum of notional interest, whose value is computed as the product of the amount of Contribution or[12] Profit and the NBP's Reference rate + 1 p.p., where the total amount of costs deducted must not exceed PLN 250,000 in a given fiscal year [Malinowski 2022, 4]. Pursuant to Article 10(1) of the Amending Act, costs may be deducted for the first time in the fiscal year that began after 31 December 2019. Moreover, pursuant to Article 10(2) of the Amending Act, when calculating the costs, the additional contribution and the profit made after 31 December 2018 are taken into consideration, for which legal fiction is assumed that they were made in a fiscal year that began after 31 December 2019. costs are due in the year of making the additional contribution or profit and in the next two consecutive fiscal years. The year of making the additional contribution is understood as the year in which the additional contribution was credited to the company's bank account.

NBP's reference rate on the last working day in 2019 was 1.5%,[13] and thus NBP's reference rate + 1 p.p. adequate for 2020 is 2.5%, which in turn

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[10] The Sejm Document no. 2854 of 25 September 2018, http://orka.sejm.gov.pl/Druki8ka.nsf/0/00EF5C8EC167E3CEC1258313005E70BC/%24File/2854.pdf [accessed: 01.10.2020], p. 44.

[11] Hereinafter: Interest relief.

[12] "Or" is used as a linking word in the function of an inclusive disjunction, therefore the basis for calculating Costs may include the amount of the Additional Contribution, the amount of the Profit or the sum of those. The "or" used further in the text must also be understood as an expression of inclusive disjunction in the context of Additional Contribution or Profit.

[13] NBP's basic interest rates for 1998-2020, https://nbp.pl/en/historic-interest-rates/ [accessed: 01.04.2023].

means that the fully effective use of the interest relief requires involvement of an Contribution or Profit of at least PLN 10,000,000.

The reference rate valid as at last working day of 2022 (30 December 2022) is 6.75%, which, means that the full use of the interest relief in 2023 will require involvement of Contribution or Profit of PLN 3,225,806.45.

Despite NBP's relatively high reference rate, we must agree with the postulate put forward by the American Chamber of Commerce in Poland, the Polish Chamber of Real Estate, the Polish Chamber of Insurance and the Polish Bank Association during the public consultation of the draft of the Amending Act. This postulate calls for removing the threshold of the interest relief or for raising it significantly (e.g. to PLN 1,000,000) or, alternatively, for making the threshold dependent on the amount of e.g. capitals or the gross financial result, and thus for taking into account the scale of the taxpayer's activity.[14] Effective use of the interest relief is difficult with the current NBP's reference rate, especially for small taxpayers. We must also note that the amount of the interest relief in reference to the CIT amount is quite low because when the full limit of costs (PLN 250,000) is used, it is PLN 47,500 per year for a 19% tax rate and PLN 22,500 for a 9% tax rate (which gives the taxpayer a maximum of PLN 142,500 (19%) and PLN 67,500 (9%) of tax advantage in the three-year period of using the Interest relief). This poses a serious question of whether the negligent amount of the nominal tax preference in relation[15] to the amount of the additional contribution or profit that must be engaged to obtain this preference will constitute a real incentive to generate the additional contributions[16] or profit.

It is worth noting that Poland is not the only EU country that has adopted a similar solution. Notional interest deduction (NID) mechanism functions in Belgium for several years, a little shorter in Portugal, Italy and Cyprus, and was recently implemented into tax law also in Malta [Małecki and Mazurkiewicz 2022, 210].

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[14] Report on public consultation and opinion-giving included in the Sejm Document no. 2854 of 25 September 2018, p. 8 (p. 72 of the document).

[15] The amount of a tax saving is a mere 1.47% of engaged funds in each of three years of tax relief application: (PLN 47,500 ÷ PLN 3,225,806.45) × 100% ≈ 1.47%.

[16] The additional contribution is, one way or another, a very rarely used method of financing the activity of companies in Poland. The poor polarity of this legal institution results primarily from essential limitations on its amount and return.

3. INTERPRETATION DOUBTS RELATING TO ARTICLE 15CB CIT ACT

3.1. The understanding of the "last working day of the year preceding the fiscal year"

The phrase used by the legislator, "last working day of the year preceding the fiscal year", is ambiguous. Given that precise determination what day is meant is the core of the issue from the point of view adopting a correct NBP's reference rate, we must conclude that such a situation in highly undesirable. Interpretation doubts arise around the question of whether the legislator understands "year" in the phrase "last working day of the year preceding [...]" as a calendar year or as a fiscal year for a given taxpayer. This differentiation gains importance for CIT taxpayers for whom a tax year is changed under Article 8(1) CIT Act.

The author believes that the correct day to establish the value of NBP's reference rate will each time be the last working day of the tax year preceding the tax year of a given taxpayer. For example, for a taxpayer for whom the fiscal year begins on 1 April 2023, the value of NBP's reference rate should be calculated according to the state of affairs as at 31 March 2023 (Friday). The argument that advocates such an interpretation is to avoid a situation in which there is a break longer than 11 months between the period in which the interest relief is applied and the day for which the NBP's reference rate was read. This would be the case if we adopted NBP's reference rate from the last working day of December 202X for taxpayers whose tax year begins on 1 December 202X+1. This time difference, with today's unstable interest rates, could result in unjustified dissonance between the value of NBP's reference rate + 1 p.p. taken to calculate the interest relief at the market interest rate for credits and loans in the same time. The Director of the National Tax and Customs Information Office (hereinafter: Director) expressed the same opinion in his individual tax ruling of 8 December 2022 (ref. no. 0114-KDIP2-2.4010.147.2022.1.SP).

3.2. Procedure for calculating the amount of costs for subsequent tax years

The interpretation doubt that the company wanted to clarify by requesting a tax interpretation concerned the issue of whether, for the needs of calculating the cost in the year of allocating profit for the reserve capital and in two subsequent years, NBP's reference rate known on the day that the resolution on allocating profit for 2022 was passed specifies the amount of costs in all 3 years in which the preference was applied (2020-2022). The company believes that NBP's reference rate known on the date of taking

this resolution is a basis to calculate costs for the entire 3-year period of application of the preference.

Director did not agree with this stance in his individual tax ruling of 1 September 2021 (ref. no. 0111-KDIB1-3.4010.262.2021.1.JKT), stating that the value of costs on account of notional interest should be determined by employing NBP's reference rate effective on the last working day of the year preceding the tax year (the year of recognizing a tax cost). It is because Article 15cb(1) CIT Act does not stipulate that the set value of the interest (that is based on the reference rate in effect on the last working day of the year preceding the year of allocating profit for a suitable capital) should be applied in the entire calculation period.

The author shares the Director's view. Admittedly, in Article 15cb(2) CIT Act, the legislator does give the taxpayer the right to calculate the cost also in two subsequent tax years that follow the year of making an additional contribution or increasing the reserve or supplementary capital, yet he does not prescribe its amount for this period. This provision only allows taking into account the retained profit or the additional contribution in calculating the interest relief also in two subsequent years (as long as the amount of the profit or additional contribution still allows it). Therefore, it seems valid to set the value of the interest relief each year on the basis of NBP's reference rate applicable for a given tax year (as stipulated in Article 15cb(1) CIT Act) and limiting it to the amount of PLN 250,000 (pursuant to Article 15cb(3) CIT Act). A drawback of such an approach lies in the uncertainly as to the value of the interest relief in subsequent years on the basis of additional contributions made already or profits retained in the company. On the other hand, an undoubted advantage of such an approach would be a stronger adjustment of the amount of the interest relief to the current interest rate for credits and loans (which is based on the NBP's reference rate).

3.3. Settling of the interest relief by the taxpayer who operates an activity in a Special Economic Zone (SEZ) and/or under a Decision on Support (DoS)

The interpretation doubt that the company wanted to clarify by requesting a tax interpretation concerned the question of whether, since the company is carrying out a zone-related activity or a taxable activity, the company should calculate the costs in full as tax deductible expenses of the activity carried out outside the SEZ. The company believes that it is entitled to such full deduction of costs.

The director of the National Tax and Customs Information Office did not agree with the company's stance in his individual tax ruling of 19 November 2021 (ref. no. 0111-KDIB1-3.4010.443.2021.1.BM). The Director claimed

that the specific tax deductible expenses referred to in Article 15cb CIT Act cannot be assigned solely to the taxable activity or solely to the exempted activity, and the CIT Act does not provide any detailed regulations in this regard. The Authority believes that an income key referred to in Article 15(2) and (2a) CIT Act must be applied. Pursuant to Article 15(2) CIT Act, where a taxpayer incurs tax deductible expenses from sources generating income subject to income taxation and expenses related to revenue from sources generating income not subject to income taxation or exempt from income tax and, where it is not possible to classify given expenses under their respective revenue sources, these expenses shall be determined in the same ratio as the ratio of the revenue earned from those sources in a given fiscal year to the total amount of revenue.

The author believes that the taxpayer is in the right here, but one must agree with the tax authority that costs cannot be classified to a particular kind of taxpayer's activity (still though, the tax authority draws wrong conclusions from this circumstance). That costs cannot be assigned results from the fact that they are hypothetical (notional) – the taxpayer does not incur them in fact. As a consequence, we cannot by default classify them to any source of incomes. Given the above, the income key cannot be applied to calculate the interest relief because it only applies to costs "incurred". Thus, taking into account the *ratio legis* of the interest relief, we must assume that the taxpayer who earns revenues that are subject to taxation and revenues that are not (e.g. from an activity in SEZ/under a DoS) has the right to deduct the full amount of the interest relief from revenues that are subject to tax.

3.4. Transferring reserve capital to profit from previous years before the lapse of 3 years

The interpretation doubt that the taxpayer wanted to clarify by requesting a tax interpretation concerned a situation in which the taxpayer, before the lapse of a 3-year deadline stipulated in Article 15cb(5) CIT Act, transferred funds gathered in the reserve capital to the position "profits from previous years" and passed a resolution of dividing them, where these profits will not be paid out of the company before the lapse of 3 years counting from the end of the tax year in which the resolution on retaining profit in the company was passed. The company believes that in these circumstances it has retained the right to apply the interest relief towards the aforementioned profits.

The Director of the National Tax and Customs Information Office agreed with this stance in his individual tax ruling of 12 December 2022 (ref. no. 0111-KDIB1-1.4010.571.2022.2.AW), claiming that the loss of the right to the interest relief only appears after both premises referred to in Article

15cb(5) CIT Act are met cumulatively, that is division and payment of profit from the company. Since the company will not pay the divided profit before the lapse of the 3-year deadline, it will not lose the right to the interest relief in this regard.

The Director's position should be approved of in the context of the linguistic interpretation of Article 15cb(5) CIT Act, pursuant to which the legislator indeed makes the loss of the right to the interest relief dependent on the conjunction of two circumstances when it comes to "retained profit" – its division and then payment.

3.5. Partial payment of the reserve capital on account of the dividend and the right to the interest relief for the remainder of the reserve capital

The interpretation doubt that the company wanted to solve by obtaining a tax interpretation concerned a situation in which in 2020 the company allocated profit for 2019 to the reserve capital and then, in the same year, it paid part of this profit to its shareholders as dividend. The company had to make sure that in such circumstances it will not lose the right to employ the interest relief for the amount that was left in the reserve capital. The company believed that an earlier payment of the reserve capital does not affect the opportunity to exercise the interest relief for the remainder of the profit gathered in the reserve capital.

The director of the National Tax and Customs Information Office agreed with this stance in his individual tax ruling of 21 January 2022 (ref. no. 0111-KDIB1-1.4010.575.2021.1.AW). The authority thus concluded that the payment of the dividend in the same year in which the profit was transferred for the reserve capital only affects the amount of profit that is the basis to calculate notional interest.

The author thinks that the opinion of the taxpayer and of the tax authority in this regard is correct. The structure of the interest relief means that it should be taken into account only in the annual CIT-8 tax return form and its basis should be the reserve and supplementary capital on the last day of the tax year for the taxpayer, where transfers of funds gathered in these capitals are irrelevant for the interest relief.

3.6. "Retention of profit in the company" other than to allocate it for the reserve or supplementary capital

In this case the interpretation doubt results from editorial inconsistencies which became apparent in comparison to Article 15cb(1)(2) and Article 15cb(3) of the CIT Act. On the one hand, the legislator specifies that

the basis for calculating costs are profits allocated for the reserve or supplementary capital (Article 15(1)(2)), on the other it makes a general reference to "taking a resolution on retaining profit in the company" (Article 15(5)). A doubt arises in this context of whether retention of profit in the company in a way other that allocating it for the reserve or supplementary capital gives the taxpayer the right to the interest relief. This issue was resolved by the Director of the National Tax and Customs Information Office in the tax interpretation (individual tax ruling) of 7 May 2020 (ref. no. 0111-KDIB1-1.4010.24.2020.3.ŚS), who concluded that "the condition to exercise the preference identified in this provision is to allocate the profit for the company's reserve or supplementary capital, not only for this profit to play the same role as the reserve capital, like the Applicant claimed". The Director thus deemed the taxpayer's position as incorrect because the taxpayer passed a resolution on retaining profit from the previous year in the company by excluding it from division.

The author believes that the position of the Director is correct given the clear indication that the profit should be allocated for the reserve or supplementary capital. However, the phrase "resolution on retention of the profit in the company" must be read in relation to the allocation of profits only for these two types of the company's capitals which, since they do not have a definition in the CIT Act, must be given a special meaning pursuant to the Commercial Companies Code.

3.7. Making a contribution to the company by setting off claims

The interpretation doubt here was resolved be means of Article 15cb(6) CIT Act, pursuant to which: "The fiscal year in which an additional contribution is made to a company shall be the year in which the additional contribution is credited to the company's payment account". A dispute arose in this context between the taxpayer and the tax authority, which has now been resolved by the judgement of the Voivodship Administrative Court in Szczecin of 30 November 2022 (ref. no. I SA/Sz 438/22; the judgement is not final). The court, similar to the tax authority, claimed that "Additional contributions identified in the Application were not credited to the Company's bank account but were deducted by means of compensation for the Company's commitments on account of loans granted to the Company by its shareholders. [...] Article 15cb(6) CIT Act requires that additional contributions physically appear on the Company's account, which did not happen in this case. This regulation, in the case of additional contributions, undoubtedly requires an actual movement of property (transfer of funds) from the shareholders to the Company. Therefore, the only possibility to enjoy the benefits of Article 15cb CIT Act is to make additional contributions by their actual

payment to the Company. Performing this commitment in a different form ruins the taxpayer's right to enjoy the deduction."

In this case too, the author agrees with the resolution of the tax authority and the court. We must note here that they even if shareholders indeed made additional contributions to the company pursuant to Article 15cb(6) CIT Act then the Company's possible settling of amounts due on their account could be deemed as paying them back if it happened before the lapse of 3 years counting from the tax year in which these additional contributions were made to the company and the company would lose its right to the interest relief on these additional contributions – pursuant to Article 15cb(7) CIT Act.

3.8. The option to settle costs by means of a limited partnership's allocating profit made before the company became a CIT taxpayer to the reserve or supplementary capital

Under the amendment of the CIT Act (Journal of Laws of 2020, item 2123), limited partnerships became CIT taxpayers on 1 January 2021 (or under the company's individual decision since 1 May 2021). For this reason, a doubt appeared of whether a limited partnership may enjoy the interest relief as a result of partners' passing a resolution on creating a reserve capital and on allocating to it undivided profits of the limited partnership made before the company gained the status of a CIT taxpayer. The resolution would be made after the partnership gains such a status (in the case analysed – after 30 April 2021). For balance sheet reasons, the undivided profits would be visible in the reserve capital rubric. The company does not envisage division and payment of profit allocated for the reserve capital before the end of 2024, nor does it plan to use this profit to cover losses from previous years. In the request for an individual tax ruling the company believed that in such circumstances is has the right to exercise the interest relief. The Director of the Information Office believed to the contrary and in his individual tax ruling of 25 May 2021 (ref. no. 0111-KDIB1-1.4010.145.2021.1.BS), he deemed the company's stance as wrong and concluded that: "The possibility referred to in Article 15cb CIT Act for including in taxable costs a specific amount of profit allocated for the supplementary capital concerns only profit made by the Applicant in the period when he will operate as a corporate income tax taxpayer already."

One cannot disagree with the Director's position in this matter. First of all, such a position ruins the aim for which the interest relief was introduced, that is to promote actions aiming to create self-financing capitals in companies. Second of all, the legislator did not reserve anywhere that the profit allocated to the reserve or supplementary capital must result from

taxable revenues. It seems that if the legislator had intended the interest relief to accommodate profits of limited partnerships that have just been taxed with CIT, then the lawmaker would have laid down appropriate interim regulations when introducing provisions that extended CIT's personal scope to cover limited partnerships from January/May 2021.

3.9. The possibility to settle costs by allocating profits made before 2018 to the reserve or supplementary capital

The interpretation doubts that the company wanted to solve by obtaining a tax interpretation concerned the question of whether undivided profits earned before 2018 and allocated for the reserve capital in 2022 may be used to calculate the interest relief.

The Director of the National Tax and Customs Information Office did not agree with this stance in, for example, his individual tax ruling of 5 January 2023 (ref. no. 0111-KDIB1-3.4010.824.2022.1.PC) and of 23 March 2023 (ref no. 0111-KDIB2-1.4010.39.2023.1.BJ), concluding that the opportunity to apply the interest relief depends on, for example, the period in which the profit was earned and which was then allocated to the reserve or supplementary capital, because this preference may be enjoyed only by measures that emerged in the period indicated in Article 15cb(1) CIT Act in conjunction with Article 10(1) of the Amending Act, that is since 2018.

We must firmly advocate the position expressed by the taxpayer. Contrary to what the tax authority claims, no provision lays down a time in which profits must be earned whose transfer to the supplementary or reserve capital would allow exercising the interest relief. Article 10 of the Amending act, to which the Director refers, only talks about the date on which the additional contribution should me made or on which the profit should be allocated for relevant capitals. Therefore, allocating undivided profits from any previous year for the newly-created reserve capital should not rule out the application of the interest relief.

3.10. The earliest date from which the interest relief may the settled

Even though the Amending Act as a rule entered into force on 1 January 2019, pursuant to its Article 10(1) the interest relief is first applied to the fiscal year that began after 31 December 2019, where, still though, under Article 10(2) the interest rate is applied also to additional contributions made and profit allocated for the reserve or supplementary capital after 31 December 2018. In such a case, the year of making the additional contribution or allocating profit shall be assumed to be the fiscal year that began after 31 December 2019. The above shows that the right to settle the interest relief is

effective as of 1 January 2020 for companies whose fiscal year overlaps with the calendar year or from the first fiscal year beginning after 31 December 2019 for companies with a changed fiscal year. However, profits and additional contributions adequately allocated and made in 2019 may be included in the calculation of the interest relief in 2020 and 2021. This interpretation is confirmed by the Director in his individual tax rulings (e.g. individual tax ruling of 1 June 2021, ref. no. 0111-KDIB1-1.4010.155.2021.1.BS and of 25 September 2019, ref. no. 0111-KDIB1-1.4010.356.2019.1.BS).

3.11. The possibility to apply the interest relief by a company subject to a flat-rate tax on corporate income (Estonian CIT)

The interpretation doubt that the company wanted to solve by obtaining a tax interpretation concerned the question of whether a company taxed with a flat-rate tax on company revenues pursuant to Article 28c-28t (so-called Estonian CIT) is entitled to the interest relief. The company believes that taxpayers of the Estonian CIT do have the right to the interest relief. The Director of the National Tax and Customs Information Office did not agree with this stance in his individual tax ruling of 17 February 2023 (ref. no. 0111-KDIB2-1.4010.760.2022.1.DD), in which he claimed that the flat-rate tax on revenues of companies is an alternative way to tax legal persons with an income tax in place of the classical CIT. Article 28h CIT Act points out that no other provisions of the CIT Act that regulate analogical issues are applied in determining the tax basis in the flat-rate tax. These issues include, for example establishing income, tax base, tax rate and also tax on revenues from buildings or the minimum tax, settlement of which is directly related with basic (classic) principles of settling the CIT. Therefore, when choosing the flat-rate tax as a form of taxation, the company has no option to classify the notional value of the interest referred to in Article 15cb CIT Act as costs of its operation. Both the stance taken by the Director and its reasoning deserve utmost approval.

CONCLUSIONS

In the 4 years of application of the interest relief, there have surfaced many issues that have triggered interpretation doubts in the practice of its application, which have been collected in this study. Most of these doubts have been subject to tax interpretations issued by the Director of the National Tax and Customs Information Office. The author's analysis of positions expressed by the Director in individual cases has revealed multi-faceted differences in views presented by taxpayers and the Director. In most disputes the author felt much closer to the argumentation presented by the taxpayers.

Undoubtedly, we may have a valid expectation for increased decision-issuing activity of administrative courts soon that would address the interest relief – activity that is a consequence of complaints brought against tax interpretations in which the Director negates the taxpayer's position. This will be a very interesting judicial material that will lend itself to author's further research on the interest relief and may be the basis for formulating *de lege ferenda* conclusions.

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THE PREROGATIVE OF THE PRESIDENT OF THE REPUBLIC OF POLAND TO APPOINT JUDGES

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Abstract. To define the nature of the Polish President's prerogative to appoint judges requires the analysis of the abundant case-law of courts and tribunals, including those enjoying international status. If the constitutionality of the National Council of the Judiciary and its competence are questioned, the role of the President of the Republic of Poland in the procedure of nominating a person as judge should never be perceived as a merely formal one. In this situation, the President of the Republic of Poland must independently carry out a substantive assessment of candidates because he is no longer bound by the conclusions from the formal request of the National Council of the Judiciary in this respect. Examination of the validity or effectiveness of the constitutional act of appointment of a judge by the President of the Republic of Poland, and the resulting constitutional relationship between the judge and the Republic of Poland, continues to be inadmissible in any proceedings before a court or other state body.

Keywords: National Council of the Judiciary; prerogative; President of the Republic of Poland; appointment of judges

1. THE ESSENCE OF THE PREROGATIVE OF THE PRESIDENT OF THE REPUBLIC OF POLAND TO APPOINT JUDGES

It is quite astonishing that the prerogative of the President of the Republic of Poland to appoint judges has not been thoroughly studied, especially given the importance of this legal institution. All in all, this is a legal institution that implies the appointment for a post of judge, so it affects the very foundations of judicial power. The "post of judge" is to be understood here as the performance of a judicial function, that is the exercise of the power to issue judgments on behalf of the Republic of Poland (*officium iudicis*).[1] The judge is a public officer performing the judicial and other tasks entrusted, equipped with the power of sovereign and authoritative resolution of legal disputes [Ereciński, Gudowski, and Iwulski 2009, 182]. Although reflection on this issue is primarily of a practical nature, it must

[1] See decision of the Supreme Court of 16 October 2019, ref. no. I NOZP 2/19, OSNKN 2020, No. 3, item 17.

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always be accompanied by a theoretical dimension. Of course, the theoretical dimension focuses mainly on determining the nature of the prerogative of the President of the Republic of Poland to appoint judges. The starting point is then the analysis of the case-law, recently very abundant, of courts and tribunals, also those of international status.

First, it seems necessary to emphasize that the prerogative of the President of the Republic to appoint judges is rooted in constitutional regulation.[2] In this context, it should now be noted that the President of the Republic of Poland is undoubtedly an independent (and not auxiliary) constitutional state body, with its own attributed competences, exercised in its own name, on its "own account" and under its own responsibility [Sarnecki 2000, 53]. This competence should therefore be understood as a set of authorisations and at the same time responsibilities to take specific actions and to do so generally on an exclusive basis [ibid., 35]. The classification of competences of the President of the Republic of Poland is based, as a rule, on substantive criteria and formal criteria. In applying the substantive criteria, the following competences are usually distinguished: activities as the highest representative of the State and activities as the guarantor of the continuity of power, while the use of formal criteria leads to distinguishing the competences exercised independently, exercised on request, dependent on a countersignature, exercised in agreement with other state authorities [ibid., 52-53]. Therefore, the prerogative of the President of the Republic to appoint judges is a competence that relates both to the activity as the highest representative of the State and to some extent of guarantor of the continuity of power, and a competence exercised independently, at the request of another authority (the National Council of the Judiciary) and independent of a countersignature.

The fact that judges are appointed through the exercise of a prerogative by the President of the Republic of Poland strengthens the guarantee of their independence.[3] Since the President embodies the highest national dignity and majesty of the Republic of Poland, by granting judges judicial power he also legitimises this power on behalf of the nation by whom he has been elected in accordance with the most important principles of democracy.[4] Thus, the crucial element for the effectiveness of entrusting a specific person with judicial power by appointment to the post of a judge is the democratic legitimacy of the person performing the act, as set out in the constitutional

[2] See Article 143(179) of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483 as amended). For the English translation of the Constitution, see: https://www.sejm.gov.pl/prawo/konst/angielski/konse.htm [accessed: 04.12.2022].

[3] See resolution of the Supreme Court of 28 January 2014, ref. no. BSA I-4110-4-4/13, OSNC 2014 No. 5, item 49.

[4] Ibid.

procedure, especially when it stems from direct election to the office of President of the Republic of Poland.[5] Consequently, the President of the Republic of Poland, when appointing a judge, provides the latter with the necessary democratic legitimacy, but also legitimises the entire judiciary, which necessarily directly serves the implementation of the principle of the democratic rule of law.[6] It is therefore obvious to everyone that the act of appointment of a judge by the head of State constitutes a manifestation of the sovereign power of the Republic of Poland.[7] Consequently, the appointment of a judge is ultimately an expression of the sovereign competence of the head of State.[8]

2. THE MECHANISM OF THE PREROGATIVE OF THE PRESIDENT OF THE REPUBLIC OF POLAND TO APPOINT JUDGES

Moreover, the prerogative of the President of the Republic of Poland to appoint judges is in line with the principle of the tripartite division of powers, essentially based on the separation of the legislature, the executive and the judiciary. It certainly constitutes now an important element of the checks-and-balances mechanism within the public authority.[9] At the same time, it should be further highlighted that the prerogative of the President of the Republic of Poland to appoint judges is of a sovereign nature and reflects mutual relations between the authorities and, more precisely, the balancing of the competences of the judiciary by the executive, including the President of the Republic of Poland [Weitz 2016, 1045-1046; Sułkowski 2008, 54]. Indeed, the separation and distinctiveness of the judiciary cannot lead to the abolition of the mechanism of necessary balances and checks within the public authority, since it relates almost exclusively to the implementation of the judicial function.[10] As regards the judiciary, a total prohibition of interference of the legislative and executive authorities in the activities of the courts and tribunals has been introduced.[11] Therefore,

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[5] See decision of the Supreme Court of 9 June 2020, ref. no. I NO 37/20, Lex no. 3012330.

[6] See resolution of the Supreme Court of 8 January 2020, ref. no. I NOZP 3/19, OSNKN 2020, No. 2, item 10.

[7] See decision of the Supreme Court of 9 June 2020, ref. no. I NO 37/20.

[8] See judgment of the Supreme Court of 10 June 2009, ref. no. III KRS9/08, OSNP 2011, No. 7-8, item 114.

[9] See decision of the Supreme Administrative Court of 9 October 2012, ref. no. I OSK 1883/12, Lex no. 1269634.

[10] See judgment of the Constitutional Tribunal of 15 January 2009, ref. no. K 45/07, Journal of Laws No. 9, item 57.

[11] See judgment of the Constitutional Tribunal of 8 November 2016, ref. no. P 126/15, Journal of Laws item 2201.

the appointment of the personnel of the judiciary may still be classified as a checks-and-balances mechanism within the public authority.[12]

Whenever a judge is appointed, it is a result of cooperation between two constitutional bodies, with the National Council of the Judiciary giving an opinion on the proposed candidate for judge and ultimately deciding whether to apply for his or her appointment, while the President of the Republic of Poland performs the act of appointing the judge in the form of a decision issued for an indefinite period of time.[13] Thus, the President of the Republic of Poland may never appoint anyone, even if they meet the requirements for a candidate for judge, but only a specific person considered and proposed by the National Council of the Judiciary [Garlicki 2007a, 4]. As far as the status of the National Council of the Judiciary is concerned, it is a *sui generis*, independent and central state organ, whose competences are related to the judicial power, as it guards the independence of courts and judges.[14] The exercise of the prerogative of the President of the Republic of Poland to appoint judges, despite the constitutional regulation involving cooperation with the National Council of the Judiciary, may not, however, reduce his position to the role of a "notary" solely confirming decisions taken elsewhere [Garlicki 2007b, 5; Ciapała 2018, 45].[15] It is also worth noting that such cooperation does not rule out the independence of the President of the Republic of Poland in exercising the prerogative to appoint judges [Sarnecki 2000, 53].

Therefore, the President of the Republic of Poland does not have a merely approving role, but he may oppose any candidature in a situation where he finds that the appointment of a given person to the post of judge would be contrary to the constitutional values that he is directly empowered to protect.[16] Therefore, the prerogatives of the President of the Republic to appoint judges comprise the right to refuse to accept the request of the National Council of the Judiciary, which becomes even an obligation if the acceptance would be contrary to the constitutional values he is required to protect [Ziółkowski 2013, 76].[17] In the procedure of appointment to the post

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[12] See resolution of the Supreme Court of 8 January 2020, ref. no. I NOZP 3/19.

[13] See judgment of the Supreme Administrative Court of 4 November 2021, ref. no. III FSK 3626/21, Lex no. 3392867.

[14] Cf. judgment of the Constitutional Tribunal of 15 December 1999, ref. no. P 6/99, OTK ZU 1999, No. 7, item 164.

[15] See decision of the Constitutional Tribunal of 23 June 2008, ref. no. Kpt 1/08, OTK ZU No. 5/A/2008.

[16] See judgment of the Supreme Administrative Court of 4 November 2021, ref. no. III FSK 3626/21.

[17] See judgment of the Supreme Administrative Court of 7 December 2017, ref. no. I OSK 858/17, Lex no. 2804297; decision of the Supreme Administrative Court of 26 November 2019, ref. no. I OZ 550/19, Lex no. 2733066.

of judge, the role of the President of the Republic of Poland cannot therefore be viewed in purely formal terms, even when we are dealing with the co-optation model of appointment to the post of judge, in which the decision is in fact made by the judges-composed part of the National Council of the Judiciary appointed by the judges themselves.[18] Under this model, there have been situations where the President of the Republic of Poland has refused to appoint to the post of judge a candidate proposed by the National Council of the Judiciary, in an attempt to indicate that his role in the nomination procedure is not of a merely formal nature, albeit without justifying the refusal.[19]

If the constitutionality of the National Council of the Judiciary is questioned, along with the powers exercised by it, the role of the President of the Republic of Poland in the judge nomination procedure should never be seen only formally.[20] This concerns e.g. the independence of the National Council of the Judiciary, which has recently been challenged, though there is no basis for this in constitutional regulation,[21] especially given that the National Council of the Judiciary cannot be identified as a court that must normally remain independent, which unfortunately has been the case.[22] Consequently, the President of the Republic of Poland should have exercised his prerogative to appoint as a judge the candidate proposed by the National Council of Judiciary within the framework of the recognition objectively defined by the constitutional values, principles and institutions, and not by the request of the Council.[23] Thus, the President of the Republic of Poland must then carry out a substantive assessment of the candidates on his own, since he ceases to be bound by conclusions which result only from a formal proposal of the National Council of Judiciary in this regard.[24] Therefore, it would be too far-reaching and quite unconstitutional to assume that the President of the Republic of Poland could, by his action, correct the defects which arose as a result of the action of the National Council of the Judiciary, e.g. those relating to the choice made by the latter.[25]

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[18] See judgment of the Supreme Administrative Court of 4 November 2021, ref. no. III FSK 3626/21.

[19] Ibid.

[20] Ibid.

[21] See judgment of the Court (Grand Chamber) of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18 A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy, ECLI:EU:C:2019:982; judgment of the Constitutional Tribunal of 7 October 2021, ref. no. K 3/21, Journal of Laws item 1852.

[22] See Article 186(1) of the Constitution of the Republic of Poland.

[23] See judgment of the Supreme Administrative Court of 4 November 2021, ref. no. III FSK 3626/21.

[24] Ibid.

[25] Ibid.

3. THE NATURE OF THE PREROGATIVE OF THE PRESIDENT OF THE REPUBLIC OF POLAND TO APPOINT JUDGES

The nature of the President's prerogative to appoint judges is usually explained in a descriptive way. First of all, it should be noted that the act of appointing a judge does not require a countersignature of the Prime Minister, but needs a request from the National Council of the Judiciary, which restricts the freedom of action of the President of the Republic of Poland [Sarnecki 2000, 74]. Certainly, the act of appointment of a judge then ends the nomination procedure, which begins with the announcement in the Official Journal of the vacant judicial position. On the other hand, the essence of the appointment to the office of judge means conferring the right of jurisdiction, in other words granting the power to administer justice, because we are dealing with a kind of "investiture", an act of incorporation into the judiciary [Gudowski 1994, 19]. The appointment of a judge is undoubtedly an act of constitutional law which consists in staffing the judicial authority and is therefore carried out within the state apparatus.[26] In view of the foregoing, it may also be added that the appointment of a judge is not an individual act of application of the law, in particular it is not an act of public administration.[27] Naturally, the appointment of a judge is still permitted to be classified as an official act as it has constitutional grounds, but it is not required to provide reasons in any circumstances [Winczorek 2008, 299; Czarny 2009, 430].[28]

The uniform case-law of national courts and tribunals further makes it possible to conclude that the examination of the validity or effectiveness of the instrument of constitutional appointment of judges by the President of the Republic of Poland, and of the resulting political relationship between the judge and the Republic of Poland, is not admissible in any proceedings before a court or any other state body.[29] This has already been directly confirmed by the case law of an international court, which considers the constitutional acts of the appointment of a judge by the President of the Republic

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[26] See resolution of the Supreme Administrative Court of 9 November 1998, ref. no. OSP 4/98, ONSA 1999, No. 1, item 6; judgment of the Constitutional Tribunal of 27 May 2008, ref. no. SK 57/06, OTK-A 2008, No. 4, item 63 (Journal of Laws No. 96, item 621).

[27] See decision of the Regional Administrative Court in Warsaw of 24 January 2019, ref. no. VI SA/Wa 2287/18, Lex no. 2653544.

[28] Judgment of the Constitutional Tribunal of 23 February 2022, ref. no. P 10/19 (Journal of Laws item 480).

[29] See resolution of the Supreme Court of 8 January 2020, ref. no. I NOZP 3/19 – point 25 and the case-law of the Constitutional Tribunal, the Supreme Administrative Court and the Supreme Court referred to therein; judgment of the Constitutional Tribunal of 23 February 2022, ref. no. P 10/19.

to be not subject to judicial review.[30] In this context, it is even stressed that, in some cases, the possible absence of judicial review may not pose any problems in view of the legal requirements to be complied with an international court.[31] The constitutional acts of the appointment of a judge were indirectly recognized as not subject to judicial review when the judge was appointed by non-democratic bodies (Council of State, President Wojciech Jaruzelski) or with the participation of an unconstitutionally composed body (National Council of the Judiciary before 2017), since the international court did not challenge, in principle, its independence and impartiality.[32] And, finally, the international court did not agree to create a separate procedural measure, which does not exist in the national legal order but would allow to launch judicial review of constitutional acts of the appointment of a judge.[33]

An explanation of the nature of the prerogative of the President of the Republic of Poland to appoint judges requires discussing its foundations. Undoubtedly, the systemic act of appointing a judge by the President of the Republic of Poland is rooted in the constitutional regulation [Czarny 2006, 79-88] since the appointment of a judge by the President of the Republic of Poland is based on the norms of constitutional law [Kijowski 2004, 6]. As a result, it creates the constitutional status of a judge, thus establishing an appointment relationship between the judge and the Republic of Poland [Czarny 2006, 79-88]. Of course, the act of appointing a judge by the President of the Republic of Poland cannot then be based on the norms of administrative law, because it does not fall within any of the legal forms of activity of public administration.[34] Moreover, there is no doubt that the act of appointing a judge by the President of the Republic of Poland is not based on the norms of civil law, because it is characterized by clear public-law inclinations. Hence, it can never imply the existence of a civil case, neither in the substantive nor in the formal sense.[35] In such a case, it cannot be stat-

[30] See judgment of the Court of Justice of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18 A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy, ECLI:EU:C:2019:982 – paragraphs 133 and 145; judgment of the Court of Justice of 2 March 2021 C-824/18 A.B. and Others v Krajowa Rada Sądownictwa and Others ECLI:EU:C:2021:153 – paragraphs 122 and 128; judgment of the Supreme Administrative Court of 21 September 2021 ref. no. II GOK 10/18, Lex no. 3241781 – point 9.

[31] See judgment of the Court of Justice of 2 March 2021, C-824/18 A.B. and Others ECLI:EU:C:2021:153.

[32] See judgment of the Court of Justice of 29 March 2022, C-132/20 Getin Noble Bank, ECLI:EU:C:2022:235.

[33] See judgment of the Court of Justice of 22 March 2022, C-508/19 Prokurator Generalny, ECLI:EU:C:2022:201.

[34] See decision of the Regional Administrative Court in Warsaw of 24 January 2019, ref. no. VI SA/Wa 2287/18.

[35] See decision of the Supreme Court of 16 October 2019, ref. no. I NOZP 2/19.

ed, for example, that an appeal against a resolution of the National Council of the Judiciary is a separate type of civil action that could be effectively secured.[36] Under the legislation currently in force, there is no legal basis for the use of a security that would oppose the issuance by the President of the Republic of Poland of a constitutional act of appointment of a judge.[37]

From the perspective of the nature of the prerogative of the President of the Republic of Poland to appoint judges, the principle of democratic state ruled by law must be mentioned. It should be emphasised at this point that it does not specify the manner in which judges are to be appointed, but rather requires them to be independent.[38] However, independence is not intrinsically linked to the manner in which a judge is appointed and should never be examined *ex ante* and *in gremio*, i.e. before the act of appointment of the judge by the President of the Republic of Poland has taken place, and regarding all judges as a whole.[39] This constitutional standard could not, of course, be replaced by interpretation guidelines based on international treaties, which were recently formulated by two international courts,[40] especially considering that they have been formulated so as to give the norms of international agreements also the character of imperative statements (orders and prohibitions) towards national courts.[41] Admittedly, the defects in appointing a judge lead to the conclusion that the court composed of such a wrongly appointed judge is not a "lawfully established court", which means that the prerogative of the President of the Republic to appoint judges is not directly questioned, but nonetheless entails a tendency towards depreciating it.[42] Such approach was confronted by the national tribunal which generally found it inconsistent with the constitutional regulation.[43]

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[36] See judgment of the Supreme Administrative Court of 27 September 2018, ref. no. II GW 28/18, Lex no. 2566106; decision of the Supreme Court of 16 October 2019, ref. no. I NOZP 2/19.

[37] See decision of the Supreme Court of 16 October 2019, ref. no. I NOZP 2/19.

[38] See judgment of the Constitutional Tribunal of 7 October 2021, ref. no. K 3/21.

[39] Ibid.

[40] See judgment of the Court of Justice of 6 October 2021, C-487/19 W.Ż, ECLI:EU:C:2021:798; judgment of the European Court of Human Rights of 8 November 2021 in the Case of Dolińska-Ficek and Ozimek v. Poland (Applications nos. 49868/19 and 57511/19).

[41] See judgment of the Constitutional Tribunal of 7 October 2021, ref. no. K 3/21.

[42] See judgment of the Court of Justice of 6 October 2021, C-487/19 W.Ż, ECLI:EU:C:2021:798; judgment of the European Court of Human Rights of 8 November 2021 in the Case of Dolińska-Ficek and Ozimek v. Poland, Applications nos. 49868/19 and 57511/19.

[43] See judgment of the Constitutional Tribunal of 7 October 2021, ref. no. K 3/21; judgment of the Constitutional Tribunal of 10 March 2022, ref. no. K 7/21 (Journal of Laws item 643).

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LEGAL REGULATIONS OF CLINICAL TRIALS IN THE POLISH LEGAL SYSTEM

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Abstract. The article deals with the issue of regulation of clinical trials against the background of the Polish legal system. The starting point is the analysis of the institution of medical experimentation in the context of clinical trials on humans. The paper pays particular attention to the informed and voluntary consent of the participant in a clinical trial, taking into account the current case-law of the Supreme Court. Drafts of future legislative changes concerning clinical trials have been announced recently.

Keywords: medical experiment; research experiment; clinical trials; participant consent; evidence-based medicine

INTRODUCTION

The development of medical science is associated with the creation of new pharmacotherapy regimens. Advances in medical technology allow the use of increasingly effective treatments, personalized therapy, individually tailored to the patient, such as molecularly targeted anticancer treatment, is emerging. Technological advances are giving hope to many patients, effective therapies are being developed for conditions to date considered incurable, but an indispensable prerequisite for bringing a drug product to life is testing it in the experimental phase.

The global pharmaceutical market is developing rapidly, the number of studies related to related to medicinal products in humans is increasing.

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In the laboratories of pharmaceutical companies, technologically new substances are created, which undergo successive phases of research before routine use. The literature presents a view that clinical trials are a recognized method of verifying the efficacy and safety of medicinal products and medical devices coinciding with the paradigm of evidence-based medicine [Wąsik and Koczur 2016, 25].

In addition to the term clinical trial, an essential element of which is the research objective, in literature there is the concept of experimental therapy. Experimental therapy, also called novel treatment, innovative treatment or therapeutic innovation, is based on the premise of providing medical assistance to a specific patient using a new, insufficiently tried therapeutic method [Gałązka 2019, 60-61]. It includes off-label treatment, i.e., off-label use, and the administration of off-label drugs, which are the subject of clinical trials, outside the protocol [Borysowki, Górski, and Wnukiewicz-Kozłowska 2018, 90].

1. THE STATISTICS OF CLINICAL TRIALS IN POLAND

In the medical literature, normative elements are woven into the understanding of the concept of clinical research, hence the understanding of the concept can vary [Gałązka 2019, 55]. It should be listed alongside basic research, which aims to determine the discovery of a disease-modifying substance, and from preclinical research, which aims to study the effect on cells, tissues and animals [ibid., 56]. Clinical research refers to the next stages of testing the therapeutic effect in humans. The first phase of the clinical trial evaluates the pharmacokinetic and pharmacodynamic properties of the investigational product. The second phase, involving a control group, is used to establish therapeutic doses, while the third phase is a form of comparative studies on a larger group of patients. The fourth phase determines the long-term efficacy and safety of the new drug already on the market [ibid., 57-58].

A report published by the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products has published data related to the area of registration of medicinal products in Poland. In 2021, the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products received a total of 17,430 applications, of which 13,200 applications were related to making changes to the authorization and the documentation on which the marketing authorization is based, 838 applications were related to the related to the marketing authorization of a medicinal product

or pharmaceutical raw material. 654 decisions on marketing authorization of a medicinal product or pharmaceutical raw material were issued.[1]

In 2021, there were 685 applications to start a clinical trial, and the number of clinical trials of medicinal products registered in the Central Register of Clinical Trials was 683, the highest number of applications to start a clinical trial in a calendar year in the Office's history. About 47% of the applications were for phase III trials, about 33% for phase II trials, the largest percentage, more than 27% of clinical trials were related to oncology treatment.[2]

2. STATUTORY REGULATION OF MEDICAL EXPERIMENTATION

In the dictionary meaning, an experiment is an attempt to implement a novel idea, also a scientific experiment conducted to study a phenomenon.[3] From the essence of an experiment, it follows that it is a method as yet untested, bearing risks. Therefore, the need arises for the establishment of appropriate regulations both at the national and international level, the purpose of which is to guarantee the safety of research participants in particular, as well as to allow the access to modern discoveries to as many people as possible [Gutowska-Ibbs 2022, 3]. Much of the international research is carried out in parallel in several or more research centers, hence the need for effective strategies to enable the exchange of information [ibid.].

The overarching regulation of medical experimentation is found in Article 39 of the Constitution of the Republic of Poland,[4] which stipulates that no one may be subjected to scientific experimentation, including medical experimentation, without freely given consent. The Constitution does not prohibit medical experiments on human beings, but makes them conditional on the consent of both the person being experimented on and the experimenter, and requires that consent be freely given [Ogiegło 2015, 343]. Informed consent is a principle in medical law for carrying out any medical intervention, but the regulation of constitutional rank applies only to medical experimentation, which emphasizes the importance of the consent of the person participating in the experiment, although the consent of the participant is not the only prerequisite for the legality of medical intervention [Drozdowska 2013, 11-12].

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[1] See Annual report published by the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products, https://www.urpl.gov.pl/sites/default/files/pictures/plakat%20URPL_2021.pdf [accessed: 08.03.2023].

[2] Ibid.

[3] See https;//sjp.pwn.pl/sjp/eksperyment;2556243.html [accessed: 08.03.2023].

[4] Constitution of 2 April 1997, Journal of Laws No. 78, item 483 as amended.

The legality of a medical experiment in Poland is conditional on obtaining a positive opinion from an independent bioethics committee and the issuance of a permit by the President of the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products [ibid., 12].

The President of the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products issues, by way of a decision, an authorization to conduct a clinical trial or a veterinary clinical trial pursuant to Article 4 of the Act of March 18, 2011 on the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products.[5]

The basic legal act regulating medical experimentation in Poland is the Act of December 5, 1996 on the professions of physician and dentist,[6] where in Articles 21-29 there are provisions regulating medical experimentation. In addition, provisions related to the clinical testing of medicinal products are found in the act of September 6, 2001, the Pharmaceutical Law, in the Regulation of the Minister of Health of May 2, 2012 on the manner of conducting clinical trials involving minors. When participating in medical experiments, doctors are also required to comply with the ethical standards contained in the Code of Medical Ethics.[7]

In addition to the regulations contained in generally applicable laws, the guidelines concerning clinical trials can be found in the Principles for the Proper Conduct of Clinical Trials. The Principles for the Proper Conduct of Clinical Trials were created on the basis of the Declaration of Helsinki,[8] which contains rules for conducting experiments on humans, and based on international standards related to the conduct of clinical trials, recognized in the countries of the European Union, Japan and the United States. The guidelines also include recommendations from the World Health Organization. The aim of the standards is to conduct experiments on the basis of respect for the rights of the people involved and the application of special precautionary rules, they also contain precise guidelines for researchers [Kubiak 2002, 82].

The Principles for the Proper Conduct of Clinical Trials are an elaboration of the provisions of the law on the professions of physician and dentist, and contain guidelines for conducting clinical trials. These guidelines should

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[5] Act of 18 March 2011 on the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products, Journal of Laws No. 82, item 451.

[6] Act of 5 December 1996 on the professions of physician and dentist, Journal of Laws No. 28, item 152.

[7] See the Code of Medical Ethics, https://sip.lex.pl/akty-prawne/akty-korporacyjne/kodeks-etyki-lekarskiej-286454095 [accessed: 09.03.2023].

[8] See the Principles for the Proper Conduct of Clinical Trials were created on the basis of the Declaration of Helsinki, https://nil.org.pl/dzialalnosc/osrodki/osrodek-bioetyki/etyka-w-badaniach-naukowych/1553-deklaracja-helsinska [accessed: 10.03.2023].

be taken into account when conducting clinical trials of medicinal products in Poland, and can also serve as guidelines during clinical experiments to guarantee safety rules. Their use has been recommended by the Minister of Health and posted on the website of the Ministry of Health.[9]

It is worth pointing out at this point that in the field of post-registration studies, concerning new drugs, a similar role to the Good Clinical Practice Principles is fulfilled by the guidelines concerning supervision over the safety of pharmacotherapy, known as Pharmacovigilance guidelines, which are in force in all European Union countries and in Poland have been recommended by the Director of the Institute of Medicine.

The safety of the use of medicinal products in humans, known as Pharmacovigilance, is controlled by the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products. The purpose of the control is to verify whether the responsible entity with marketing authorizations for medicinal products monitors safety in the use of medicinal products, as stipulated by Polish law, as well as European Union law.[10] The inspection is carried out by inspectors of the Department of Medicinal Products Inspection and Medical Devices, who, under the authorization of the President of the Office, may inspect the responsible entities with regard to the system of monitoring the safety of use of medicinal products, demand the presentation of relevant documentation and explanations, regarding the operation of the system of monitoring the safety of use of medicinal products.

3. MEDICAL EXPERIMENTS ON THE GROUNDS OF THE LAW ON THE PROFESSION OF PHYSICIAN AND DENTIST

The law on the professions of physician and dentist introduces a division of medical experiments into two categories. The legislator has divided medical experiments into therapeutic experiments and research experiments, creating legal definitions for both procedures. According to Article 21 of the Law on the Profession of Physician and Dentist, a medical experiment conducted on humans may be either a therapeutic experiment or a research experiment. The legislator also includes as a medical experiment the conduct of tests on biological material, including genetic material, taken from a person for scientific purposes, and defines the person on whom the experiment is conducted as "participant".

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[9] See https://www.gov.pl/web/zdrowie/zasady-prawidlowego-prowadzenia-badan-klinicznych [accessed: 10.03.2023].

[10] See https://urpl.gov.pl/pl/urząd/inspekcja-badań-klinicznych-i-phv/kontrola-pharmacovigilance-produktów-leczniczych-stosowanych [accessed: 10.03.2023].

The innovative or experimental nature of medical procedures should be understood broadly, which means that they should include both methods used for the first time, as well as methods already known but insufficiently studied, evaluated or discussed in the medical literature and in clinical practice [Ogiegło 2015, 346]. Such a broad view of the experimental nature of medical procedures makes it possible to include in experimental procedures both clinical trials of medicinal products and the use of medicinal products outside of registration indications.

The legal definition of a therapeutic experiment is contained in Article 21(2) of the Law on the Profession of Physician and Dentist, according to which a therapeutic experiment is the introduction of new or only partially tried diagnostic, therapeutic or prophylactic methods in order to achieve a direct benefit to the health of a patient. It can be carried out if the methods used so far are not effective or if their effectiveness is not sufficient. The participation of pregnant women in a therapeutic experiment requires a particularly careful assessment of the associated risks to the mother and the conceived child.

The literature indicates that the subject limitation regarding the conceived child included in the statutory definition of therapeutic experimentation with the entry into force of the amendment of July 16, 2020 of the Law on the Profession of Physician and Dentist testifies to the rank of the above regulation and indicates that the participation of pregnant women is allowed only as part of a therapeutic experiment [Sakowski 2022, 715].

The statutory definition distinguishes three areas of therapeutic experimentation, these are the scope of diagnostic methods, the scope of therapeutic methods, and the scope of preventive methods, and allows experimentation in each of these areas [Ogiegło 2015, 346].

Conducting a therapeutic experiment depends on the implementation of new or only partially proven methods related to the diagnosis, therapy or prevention of disease entities, but the condition for the use of the opportunity to use a therapeutic experiment is the lack or unsatisfactory effectiveness of available methods. An additional assumption is the experimental method is intended to achieve a direct health benefit of the treated person [ibid.].

The second type of experiment is a research experiment. Paragraph 3 of Article 21 of the Law on the Profession of Physician and Dentist indicates the purpose of the research experiment and the conditions for participation, stating that the research experiment is primarily aimed at expanding medical knowledge. It can be conducted on both an ill and a healthy person. Conducting a research experiment is permissible when participation in it is not associated with risk, or the risk is minimal and not in disproportion to the possible positive results of such an experiment. Thus, the essence

of a research experiment is to advance medical knowledge and search for new solutions, assuming low risk for the participants taking part in the experiment.

The doctrine recognizes that a medical experiment with a medicinal product conducted on humans is also a clinical trial of a medicinal product [ibid., 343].

The law contains specific requirements for the possibility of conducting a research experiment, excluding from participation in them specific categories of people, due to the potential possibility of their exploitation and harm [ibid., 347].

Article 23a of the Law on Medical and Dental Professions contains a catalog of prohibitions related to the related to the research experiment. It is prohibited to conduct a research experiment on: (1) a conceived child; (2) an incapacitated person; (3) a soldier and any other person in a in a hierarchical relationship limiting the freedom of voluntary consent; 4) a person deprived of liberty or subjected to detention. The provision contained in Article 23a(2) of the Law of the Law on the Profession of Physician and Dentist contains conditions for the participation of minors in a research experiment. Participation in a research experiment by a participant who is a minor is permitted when all of the following conditions are met: 1) the expected benefits are of direct relevance to the health of the minor subjected to the research experiment or other minors belonging to the same age group; 2) the research experiment will bring about a significant expansion of medical knowledge; 3) there is no possibility of conducting such an experiment of comparable effectiveness with the participation of an adult.

The statutory ban on the participation of incapacitated persons or children conceived both *in vivo* and *in vitro* in research experiments stems from their inability to recognize their own situation and their inability to make a free decision [Sakowski 2022, 732-33].

Participation of a minor in a research experiment is permitted when three conditions are all met. First, the expected benefits are of direct relevance to the health of the minor subjected to the research experiment or other minors of the same age group, the research experiment will bring about a significant expansion of medical knowledge, and there is no possibility of conducting such an experiment of comparable effectiveness with the participation of an adult. Before giving consent, the participant should receive oral and written information, presented in an understandable manner. The fact of receiving this information should be recorded in the documentation on the experiment.

4. CONSENT TO PARTICIPATE IN A MEDICAL EXPERIMENT

The provision contained in Article 25 of the Law on the Profession of Physician and Dentist concerns consent to participate in a medical experiment, and stipulates that a medical experiment may be conducted with the consent of the participant or a person who may be directly affected by the consequences of the experiment. In a case when the participant is a minor who has not reached the age of thirteen, the consent of their legal representative is needed. When the participant is a minor who has reached the age of thirteen, the consent of the participant and their legal representative is required. In case of disputes, the case is decided by the guardianship court. When the participant is a person who is completely incapacitated, the consent to participate in the in the therapeutic experiment is given by the legal guardian. Consent is required if the totally incapacitated person has sufficient understanding.

Article 25 of the Law on Physician and Dentist Professions was amended by an amendment on July 16, 2020, which took effect on January 1, 2021, the change concerned the possibility of conducting a medical experiment without obtaining the consent of the participant. The above situation could arise in a case of urgency and when there was an immediate threat to life. In the doctrine there was criticism of such a solution, as contradicting Article 39 of the Constitution of the Republic of Poland, prohibiting scientific experiments without freely given consent. In addition, it has been pointed out that due to the increased risk of experimental treatment, the legal requirements cannot be more lenient than those imposed on standard therapy. The current regulation indicates that only a therapeutic experiment can be conducted without the consent of the participant, after cumulative fulfillment of the statutory conditions, and takes into account the suggestions of the doctrine [Sakowski 2022, 752-53].

Paragraph 3 of Article 25 of the Law on the Profession of Physician and Dentist assumes the expression of consent in writing, and if written consent is not possible, oral consent given in the presence of two impartial witnesses with full legal capacity shall be considered equivalent. If the legal representative refuses to consent to the participant's participation in the therapeutic experiment, permission to conduct the experiment may be granted by the guardianship court.

The legislator, in Article 25a of the Law on the Profession of Physician and Dentist, allows situations of conducting a therapeutic experiment without the required consent after the following conditions are all met: 1) the participant is incapable of giving consent to participate in this experiment; 2) there exists a case of urgency and, due to the need for immediate action, it is not possible to obtain consent to participate in the therapeutic

experiment from the participant's legal representative or court authorization within a sufficiently short period of time; 3) an experiment of comparable effectiveness cannot be conducted on persons not in an urgent situation; 4) the participant has not previously objected to participation in such an experiment; 5) the participant in a therapeutic experiment conducted in a situation of urgency and, if applicable, his or her legal representative will be provided with all relevant information regarding participation in the therapeutic experiment or their issuance by the court.

In the doctrine one can find the view that the patient's consent to participate in a medical experiment is a consent of a special nature, it should be based on comprehensive information about the possible consequences of the experiment and the dangerous consequences associated with it. The patient should be informed of all possible consequences of the experiment [Ogiegło 2015, 354-55]. At this point, it is worth emphasizing that according to the position of the doctrine that the patient participating in the experiment cannot waive the right to information, which is possible in the case of routine treatment; and if he refuses to accept the information, he should be excluded from the experiment [Sakowski 2022, 743].

On the other hand, an opinion is presented that the essence of an experiment is the search for something new, which has not yet been studied, and therefore it is not possible to determine the exact risks involved. Therefore, the danger of unknown consequences cannot be completely included in the balance of benefits and disadvantages, and the final outcome of a novel experiment always remains a certain unknown [ibid., 711].

It should be pointed out that the patient's consent must be informed and explained. The patient should be given all the information about the diagnosis, treatment methods, possible effects and risks, about alternative treatments and also about the abandonment of treatment. The extent of the information provided by the doctor depends on the type of medical procedure, on the mental state and sensitivity of the patient, as well as on what an objectively reasonable person in the patient's situation should hear from the doctor in order to be able to make an informed decision [Nesterowicz 2017, 511-12].

The patient's consent to medical treatment has been topic of analysis by the Constitutional Court. In its verdict K 16/10 of November 11, 2011, the Constitutional Court[11] indicated that the institution of consent to perform a medical procedure is a manifestation of the individual's right to decide for themselves and is one of the prerequisites for the legality of treatment activities. The informed and voluntary consent of participants in a clinical

[11] Judgement of the Constitutional Court of 11 November 2011, ref. no. K 16/10, Journal of Laws No. 240, item 1436.

trial was analyzed by the Supreme Court, which, in its judgment of September 21, 2022, I NSNc 75/21,[12] indicated that the lack of legally effective consent expressed by participants in a clinical trial violates human dignity and freedom, a medical experiment conducted in violation of the law will always be an illegal experiment. The main issue of the judgment in question was the resolution of the criteria for awarding compensation to participants in a clinical trial conducted with informed and voluntary consent. The Supreme Court, in the judgment in question, pointed out that the failure to demonstrate disruption of health cannot be a circumstance justifying even a symbolic award of compensation for pain and suffering.

In the literature, there was a gloss on the Supreme Court's judgment of September 21, 2022, I NSNc 75/21, in which B. Kozielewicz-Kutrzepa emphasized the social importance and legal significance of the judgment for the legal protection of participants in clinical trials, and stressed that the judgment in question will be an important point of reference alongside the common law and pharmaceutical law for determining liability for infringement of personal rights of participants in a medical experiment [Kozielewicz-Kutrzepa 2022, 121].

Due to the increased risk for participants in a medical experiment, a special form of consent is provided. Consent to participate in a medical experiment in accordance with Article 25(3)(8) requires written form. The regulation allows oral consent given in the presence of two impartial witnesses with full legal capacity in the event that written consent cannot be given. Such consent shall be considered equivalent to written consent. Consent so given shall be recorded in the documentation of the medical experiment. The law reserves the rigor ad probationem for the written form. This statutory solution is accepted in the literature with regard to medical experiments. The literature presents the view that for research experiments the number of witnesses should be increased to three, with one of the witnesses being a person from the medical staff [Ogiegło 2015, 356].

5. THE PURPOSE OF A THERAPEUTIC EXPERIMENT VS. THE LEGAL DEFINITION OF A CLINICAL TRIAL

The Law on Physician and Dentist Professions indicates the essential purpose of conducting a medical experiment. First of all, the expected therapeutic or cognitive benefit is important, and the expected achievement of this benefit, as well as the purposefulness of the and manner of conducting the experiment should be reasonable in light of the current state

[12] Judgement of the Supreme Court of 21 September 2022, ref. no. I NSNc 75/21, OSNKN 2022, No. 4, item 23.

of knowledge and consistent with the ethics of the medical profession. The legislator also concretizes the conditions that must be met by the person in charge of the medical experiment, indicating in Article 23 of the Law on the Profession of Physician and Dentist that they must be a physician with specialization in a field of medicine that is particularly relevant to the nature or conduct of the experiment, and with appropriately high professional and research qualifications.

In Article 2(2) of the Pharmaceutical Law, the definition of a clinical trial is any study conducted with human subjects to discover or confirm the clinical, pharmacological, including pharmacodynamic, effects of one or more investigational medicinal products, or to identify adverse effects of one or more investigational medicinal products, or to follow the absorption, distribution, metabolism and excretion of one or more investigational medicinal products, with a view to their safety and efficacy.

An investigational medicinal product is, according to Article 2(2c) of the Pharmaceutical Law, a substance or a mixture of substances given a pharmaceutical form of an active substance or a placebo that is being tested or used as a reference product in a clinical trial, including a product already authorized for marketing but used or prepared in a manner different from the authorized form or used for an indication not covered by the authorization, or used to obtain additional information on already authorized forms.

The legal definition of a clinical trial was constructed for the possibility of bringing new drugs to the market, but the definition also implies the possibility of testing drugs after they have already been registered. Therefore, part of clinical trials cannot be of an experimental nature. It is possible to divide clinical trials into two groups, the first will be new data of clinical relevance, in terms of already existing, registered therapies, and the second group is research, where a novel therapy will be used [Drozdowska 2013, 15-16].

The Pharmaceutical Law includes provisions on civil and criminal liability. According to Article 37c of the Pharmaceutical Law, the conduct of a clinical trial does not exempt the sponsor and investigator from criminal or civil liability arising from the from the conduct of the clinical trial. Article 126a contains standards imposing criminal penalties in connection with the improper conduct of clinical trials.

One example is conducting a clinical trial without obtaining the informed consent of the clinical trial participant or his legal representative [Wąsik and Koczur 2016, 186].

At the same time, the lack of consent should be understood as the granting of uninformed consent, which is not preceded by providing

full information about the purpose of the study and the rights and obligations of the participant.

Legislative work is currently underway on a new law of January 13, 2023 on clinical trials of medicinal products for human use.[13] The purpose of introducing new legislation in the area of clinical trials stems from the need to ensure the application of Regulation (EU) No. 536/2014 of the European Parliament and of the Council of April 16, 2014 on clinical trials of medicinal products for human use[14] and repealing Directive 2001/20/EC.

CONCLUSIONS

The experimental phase of a medicinal product is a prerequisite for bringing a new drug to market. Clinical trials are a method to evaluate the efficacy and safety of medicinal products, and are an indispensable part of evidence-based medicine. They constitute a research experiment, which is a form of medical experimentation aimed at improving medical knowledge and seeking new solutions in medicine. The essential legal regulations related to the area of clinical trials are found in the Pharmaceutical Law and the Law on the Profession of Physician and Dentist. Persons conducting clinical trials may incur criminal and civil liability, and the Pharmaceutical Law itself contains criminal law provisions. A new law on clinical trials conducted in humans is currently in the final stages of legislative work.

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THE CONSCIENCE CLAUSE OF SERVICE PROVIDERS FROM THE PERSPECTIVE OF LEGAL SECURITY

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Abstract. This paper discusses the issue of legal applicability of the conscience clause with respect to service providers. In the Polish legal order, at the statutory level, currently there are no provisions regarding the conscience clause of service providers. When assessing the issue from the perspective of legal security, the implementation of the abovementioned legal provisions into the Polish legal system appears to be a priority, since it would significantly improve the legal security of both service providers and service recipients.

Keywords: conscience clause; conscientious objection; provision of services; legal security of service providers; legal security of service recipients

INTRODUCTION

The conscience clause in the Polish legal order is currently subject to numerous discussions and controversies [Bielecki 2019, 93-163]. While in principle it is not questioned with regard to the medical professions and the health service, the question is different with regard to other professions.

A recent subject of controversy in public discourse has been the issue of whether conscientious objection can be invoked by service providers [Dybowski 2019, 165-96]. In Poland, a lively public discussion on the subject arose with regard to the media-focused so-called 'case of the printer of Łódź' [Potrzeszcz 2019b, 13-55]. This case should be classified as a typical *hard case*, which is difficult to be conclusively resolved due to the conflict of values. It primarily involves the principle of equal treatment and non-discrimination on the one hand, and the principle of freedom of conscience and the principle of economic and contractual freedom on the other hand. Undoubtedly, the conflict of values reflected in the above principles cannot be resolved unequivocally *in abstracto*. In each particular case, its circumstances should be thoroughly analysed and subsequently, on this basis, the respective importance of various values must be determined.

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In the author's view, however, it is indisputable that a kind of profession cannot prevent invoking conscientious objection [Skwarzyński 2016, 63-88], since every human being (including, of course, a person providing services), as a being endowed with an inherent and inalienable dignity of the person, has the natural right to be guided by the voice of his or her conscience in social relationships and the positive law should respect such a right. According to the doctrine, "the inalienable human rights cannot be protected effectively without the protection of his or her conscience. It is because freedom of conscience reflects human dignity. Its protection is vital to safeguard the essential content of certain fundamental rights, such as the freedom to express one's ethical, philosophical or religious convictions. […] The right to invoke the conscience clause is recognised as a fundamental right, which may be only exceptionally limited" [Johann and Lewaszkiewicz-Petrykowska 1999, 21].

However, the question is whether and how it is possible to distinguish a real conflict between the voice of conscience and the obligation to act from a declared conflict, which in fact is not a real conflict, because its actual reason for refusal (e.g., to provide a service) is mere human malice, impoliteness, a tendency for prejudice or even laziness.

This paper discusses the issue of the conscience clause with respect to service providers from the perspective of legal security. In particular, it is appropriate to draw attention to the issue of the necessity and legal applicability of the conscience clause in respect to service providers. In the Polish legal order, at the statutory level, currently there are no provisions regarding the conscience clause of service providers. When assessing this state of affairs from the perspective of legal security, it is necessary to consider whether the implementation of provisions providing for invoking the conscience clause in respect of providing services will result in improving application of the concept of legal security of subjects involved in the relationships between service providers and service recipients. In other words, the research problem may be worded as follows: whether, and if the answer is positive, what impact may the implementation of the conscience clause of service providers into the Polish legal order have on the level of accomplishment of legal security of service providers as well as service recipients?

1. THE CONCEPT OF CONSCIENCE CLAUSE

The term "clause" (from the Latin *clausula* – termination, closure) when applied in legal and juristic language is understood as "a stipulation or provision in a contract, an arrangement or a legal act; an authorization for the consideration of special circumstances in the application of legal

norms, in the enforcement of judicial decisions and administrative acts" [Kość 2002a, 80-81].

The term "conscience clause" is understood as "the acceptance of the primacy of conscience, referring to natural law or ethical-religious convictions in important moral questions, by the legislator; it assumes the possibility of refusing to perform an obligation or rescinding a prohibition in the case of a conflict between positive (statutory) law and conscience" [Idem 2002b, 83].

The conscience clause is "a legal institution which safeguards freedom of conscience. The conscience clause means a provision or provisions of law (due to the system of legal sources adopted in the Constitution of the Republic of Poland of 2 April 1997,[1] the conscience clause must be provided for in the law), specifying a manner of exercising the right to conscientious objection, including procedural conditions and possible limitations in exercising it" [Olszówka 2019a, 58].

In the jurisprudence of the Polish Constitutional Tribunal (hereinafter: the Tribunal), the conscience clause is understood "as the capacity to refrain from performing an obligation in accordance with the law, yet contrary to the worldview (ideological or religious convictions) of a particular person. From the ethical point of view, this concept may prove the primacy of conscience over the obligations of statutory law, whereas from the juridical point of view, it safeguards freedom of conscience and prevents conflicts between the provisions of statutory law and ethical norms, thus enabling the individual to act in dignity – according to his or her own convictions."[2]

The conscience clause, as a legal institution, aims to resolve the conflict between an individual's moral convictions and a particular legal norm. However, it is necessary to distinguish between the conscience clause and conscientious objection, which means "the act of refusing to perform an obligation imposed by legal provisions, undertaken, however, not with the use of the provided legal measures (e.g., the conscientious clause), but under conditions of risk that it will not be recognized as falling within the limits of the constitutional freedom of conscience, and with the readiness to bear legal liability for committing this act. Furthermore, conscientious objection, so understood, may be a signal of a new important moral controversy, which has not yet been disclosed in a given community."[3]

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[1] Journal of Laws No. 78, item 483 as amended [hereinafter: the Constitution].

[2] Judgment of the Constitutional Tribunal of 7 October 2015, ref. no. K 12/14, OTK ZU 9/A/2015, item 143.

[3] Dissenting opinion of the Constitutional Tribunal Judge Sławomira Wronkowska-Jaśkiewicz to the judgment of the Tribunal of 7 October 2015, ref. no. K 12/14.

The distinction between the concept of conscience clause and the concept of conscientious objection has been explicitly made in the doctrine and it is worth accepting. The conscience clause is understood as a legal means of "expressing the right to conscientious objection, which constitutes part of the right to freedom of thought, conscience and religion. […] The conscience clause should be understood within a sufficiently narrow and precise scope [...] it should be the exception and not the rule of law. […] is the execution of this right [i.e. the right to freedom of thought, conscience and religion – author's note] in a circumstance where its statutory limitations are necessary" [Orzeszyna 2017, 17-28]. By contrast, "conscientious objection" (in French: *l'objection de conscience*), refers to an individual's objection to a formally binding legal norm, rather than to a questioning of the validity of the entire legal system of the state. The idea of acting in the name of conscientious objection is to improve a particular community through correcting an existing, in the opinion of the person exercising conscientious objection, faulty and unjust law. A conscientious objection arises when a citizen, because of his convictions, cannot respect the law in force. A wise legislator aims to avoid such a problem and to provide the law in such a manner that it respects the differences in worldviews which may amount to a conflict of conscience" [Orzeszyna 2017, 18-19].[4]

From the point of view of legal security, understanding the conscience clause as a legal institution is very important due to its inclusion in the legal order, thus in the normative sphere, whereas conscientious objection is placed in the factual sphere.

2. PROVISION OF SERVICES AND THE CONSCIENCE CLAUSE

The concepts such as service and provision of services encompass a large catalogue of social phenomena, the comprehensive presentation of which is beyond the scope of this study. The "service" is defined as "any activity or benefit of a non-material nature that one party can offer to another, which does not necessarily involve the sale of goods or services in comparison to a product that can be purchased on its own."[5] According to the definition in the *Dictionary of Polish Language* (*Słownik języka polskiego*) "services": "economic activity which does not consist in the production of material goods, it takes the form of services provided by natural and legal persons (entities) for the benefit of others; the third, apart from agriculture and industry, sector of the national economy; includes

[4] See also Szostek 2013, 7-8.

[5] *Service – Encyklopedia Zarządzania*, https://mfiles.pl/pl/index.php/Us%C5%82uga [accessed: 15.09.2021].

the following sections: transport, communications, trade, municipal economy, health care, education, administration, justice, financial and insurance institutions, and others, e.g. hairdressing [...]."[6]

Alternatively, a selection of normative acts providing definitions of such concepts may also be indicated. According to point 4.1 of the Annex to the Regulation of the Council of Ministers of 4 September 2015 on the Polish Classification of Goods and Services,[7] services include: "all activities provided to economic entities conducting productive activities, i.e. services for production purposes that not directly produce new material goods, [...] all activities which are provided for the benefit of units of the national economy and for the benefit of the population, intended for the purposes of individual, collective and general public consumption. The concept of services does not encompass activities related to manufacturing of products (including semi-manufactured products, components, parts, machining of parts) from the enterprise's own materials, at the order of other units of the national economy, intended for production purposes or for further resale, and, as a rule, does not include manufacturing of products on individual order, from the contractor's own materials".

According to point 7.6.1 of the PCGS 2015 "services are divided into: [...] production services – activities that cooperate in the production process, but do not directly produce new goods, performed by one economic unit on the order of another economic unit, [...] consumption services – all activities related directly or indirectly to satisfying the population' demands, [...] general social services – activities satisfying the order and organisational demands of the national economy and the society as a whole".

Pursuant to Article 8 of the Act on Goods and Services Tax of 11 March 2004,[8] "by providing services, as specified in Article 5(1)(1), shall be understood as any service provided to a natural person, legal person or organizational unit without legal personality, which does not constitute a supply of goods within the meaning of Article 7 [...]". However, Article 7 of the AGST defines the concept of supply of goods as "transfer of the right to dispose of goods as owner [...]".

In the context of the issue of the potential application of the conscience clause concerning persons providing services, the question of the obligation to provide services should be raised. The doctrine holds that "the refusal to perform as well as the consent to perform are fundamental attributes of economic freedom and the principle of freedom of contract. […]

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[6] *Services – Słownik języka polskiego*, https://encyklopedia.pwn.pl/haslo/uslugi;3991813.html [accessed: 15.09.2021].

[7] Journal of Laws, item 1676 as amended [hereinafter: the PCGS 2015].

[8] Journal of Laws of 2021, item 685 [hereinafter: the AGST].

Just as a consumer cannot be forced to choose a particular entrepreneur, an entrepreneur cannot be required to enter into contractual relationships with every consumer. The principle of freedom of contract works both ways" [Derlatka 2018, 120-21]. As regards the allegation of discrimination against consumers, attention was drawn to the wording of second sentence of Article 32(1) of the Constitution, according to which "all persons shall have the right to equal treatment by public authorities", and therefore "transferring the prohibition of discrimination from public-law relations to private-law relations would lead to absurdity" [ibid., 122].

If there is no obligation to provide services and the provision of a particular service is performed within the framework of economic freedom and the principle of freedom of contract, thus the problem of the application of the conscience clause will not arise at all. Only if there is an obligation to provide a particular service and the performance of such an obligation results in a conflict of conscience, then the service provider may, being motivated in his or her behaviour by conscientious objection, refuse to provide the service. If the law regulated under which circumstances a service provider could refuse to provide a particular service, then they would be able to invoke the conscience clause as a legal institution.

In the absence of implementation of the conscience clause in the law, service providers have, in the author's view, the right to demonstrate their conscientious objection, which stems directly from the constitutional values. Whereas, the potential implementation of a formal conscience clause will limit their capacity to invoke conscientious objection only to the circumstances provided for in the law.

Therefore, the issue arises as to whether, from the point of view of legal security, the situation is more favourable if the legislation includes provisions explicitly referring to the possibility of refusing to provide a service or whether a legal assessment of the refusal to provide a service is made on the basis of general provisions, having regard to the international and constitutional levels of law. Of course, the view, according to which no explicit statutory authorisation is necessary to invoke the conscience clause, is acceptable, since pursuant to Article 53(1) of the Constitution: "Freedom of conscience and religion shall be ensured to everyone". Thus, in practice, anyone can refuse to perform a certain action due to conscientious objection. Therefore, we can pose the questions: Is a statutory authorization necessary? And if the answer is yes, who does it benefit, the service provider or the service recipient?

3. THE CONCEPT OF LEGAL SECURITY WITH RESPECT TO THE RELATIONSHIP BETWEEN SERVICE PROVIDER AND SERVICE RECIPIENT

Legal security is a state achieved by means of positive law in which the life goods and interests of the subject of that security are safeguarded as completely and effectively as possible [cf. Potrzeszcz 2013, 405]. Legal security is a gradable value in the sense that the level of its achievement may be more or less corresponding to the standards of the rule of law.

While defining the concept of legal security, the issue of specifying the concept of the subject of legal security cannot be omitted. We can distinguish between a passive subject and an active subject of legal security. The passive subject of legal security is the entity that is entitled to protection in legal order, the entity that is a beneficiary of legal security. Whereas the active subject of legal security is the entity which acts in order to realise the idea of legal security [Idem 2015, 76].

With regard to the undertaken research problem, the active subject of legal security in respect of the relationship: service provider – service recipient, it is the legislator, as well as the bodies applying the law, which are competent to realise the legal state achieved by means of positive law, in which the life goods and interests of the passive subject of legal security are safeguarded as completely and effectively as possible.

With regard to the service provider – service recipient relationship, this paper focuses on both: the service provider and the service recipient as the passive subjects of legal security.

4. THE ISSUE OF JUSTIFYING THE REASON FOR A REFUSAL TO PROVIDE A SERVICE

In the service provider – service recipient relationship, similarly as in any social relationship, the predictability of the partner's behaviour is of significant importance. Such predictability allows to plan actions in advance and to prepare for possible "emergency scenarios". In the author's opinion, the implementation of a statutory authorisation for refusal to provide a service, i.e. the conscience clause as a legal institution, would improve the predictability of behaviours in the service provider – service recipient relationship and thus contribute to increasing the level of legal security of the service provider as well as the service recipient.

In order to achieve such a postulated state, a catalogue of reasons for refusing to provide a service should be specified and implemented into the legal system. As a result, the service provider and the service recipient would

both be aware of the terms on which the service is provided and under which circumstances the service provider may refuse to provide it. However, the question of creating such a catalogue may be difficult, if not impossible, to achieve.

Nevertheless, it should be noted that a certain attempt to specify a justified reason for refusal to provide a service was undertaken by the Supreme Court in one of its media-famous rulings, concerning the printer of Łódź [Potrzeszcz 2019a, 49-91]. In Poland, the problem of refusing to provide a service due to objection of conscience, and in particular due to religious convictions, has emerged and become current as a result of the so-called "case of the printer of Łódź", Adam J., an employee of a printing house in Łódź. By its decision of 14 June 2018, ref. no. II KK 333/17, the Supreme Court dismissed the cassation filed by the Public Prosecutor General in favour of the accused printer [Szczucki 2019, 197-215].

In the reasoning of its decision, the Supreme Court accepted the view that the source of the obligation arising from Article 138 (in the wording in force until 4 July 2019[9]) of the Act of 20 May 1971, the Code of Petty Offences[10] was the very fact of professional providing of services, thus the above provision does not impose a contractual obligation to provide a service. The wording of Article 138 of the CPO as of 14 June 2018, on which the Supreme Court issued the said decision, was as follows: "Whoever, while professionally engaged in the provision of services, demands and collects for the provision of services a payment higher than the prevailing one or intentionally refuses, without justified reason, to provide the service to which he is obliged, shall be punished with a fine".

The Supreme Court shared the appellate court's view according to which merely an individual worldview or subjective understanding of a professed religion cannot be a justified reason for the refusal of providing a service under Article 138 of the CPO. However, in the Supreme Court's opinion, it can provide a justified reason for the refusal of providing a service, under Article 138 of the CPO, only if it is referred to the circumstances of a particular situation, as in the case of the accused printer, which are assessed in an objectivised manner. The Supreme Court held that the phrase "justified reason", pursuant to Article 138 of the CPO, understood "as a circumstance justifying the refusal to provide a performance, is a kind of general

[9] Article 138 of the CPO was in part found inconsistent with Article 2 of the Constitution by the judgment of the Constitutional Tribunal of 26 June 2019, ref. no. K 16/17 (Journal of Laws 2019, item 1238) as of 4 July 2019. Pursuant to the judgment, the aforementioned provision shall be repealed in the passage "or intentionally without a justified reason refuses the performance to which he or she is obliged".

[10] Journal of Laws of 2018, item 618. Currently: Journal of Laws of 2021, item 281 [hereinafter: the CPO].

clause which, when assessing the obligor's motivation, allows for the comparison of various values underlying such refusal, also including constitutional rights and freedoms. Moreover, the clause also enables the application of extra-legal criteria, such as moral, custom and religious norms".

According to the reasoning of the Supreme Court, we can conclude (*a contrario*) that providing a service may arise in a particular case an obvious conflict with moral, custom or religious norms. However, if the provision of a service is not in obvious conflict with the above values, in the Supreme Court's view, the right of the service provider to act in accordance with his or her conscience, understood as a person's moral self-awareness, as well as the right to freedom from being forced to act against their conscience, is not limited. Whether such a conflict has arisen should be assessed in each particular case, having regard to its circumstances.

The Supreme Court concluded that if in the course of providing a particular service "a conflict of fundamental freedoms and rights arises between the service provider and the consumer, then the concept of »justified reason«, under Article 138 of the CPO, also refers to religious convictions, which means that when they are in obvious conflict with the features and nature of the service, the provision of such service may be refused, even if they remain in conflict with other values, also constitutional ones, such as the prohibition of discrimination. However, the refusal to provide a particular service cannot be justified by individual personal aspects of the entity (e.g. religious convictions, manifested views or sexual preferences) for whom a particular provider is obliged to provide such a service".

The Supreme Court's decision was issued on 14 June 2018, hence a few days after the judgment of the Supreme Court of the United States of 4 June 2018, concerning the case of a Colorado confectioner who refused – due to his religious convictions – to make a wedding cake for a gay couple. The US Supreme Court upheld the confectioner's appeal and adjudicated that the ruling of 2013, issued by an administrative law judge of the Colorado Civil Rights Commission, which ordered the confectioner to provide wedding cake orders to all couples, had been incorrect. The US Supreme Court upheld the arguments of the confectioner's defence counsel, Kristen Waggoner, who portrayed her client as an artist and consequently she took the position that her client was entitled to equal safeguards of freedom of expression as a sculptor or painter. In the defence lawyer's view, if the confectioner was selling ready-made products, he could not have refused to sell a cake to a gay couple. However, since making of a bespoke cake requires creative invention, the same as a work of art, a confectioner may refuse to make a cake, as a sculptor or painter may refuse to make a sculpture or painting whose meaning is contrary to his or her religious convictions.

The reasoning of the Supreme Court's decision of 14 June 2018 is manifestly inspired by the above argumentation of the confectioner's defence counsel, which has been upheld by the Supreme Court of the United States. As the Polish Supreme Court observed in its decision, "we cannot exclude a situation in which a person obliged to provide a service, who performs artistic work, e.g. a painter or a sculptor, and who manifests his or her affiliation to a particular religious community and living according to its canons, having a direct impact on the final image of the service by engaging their sensitivity as well as moral and customary norms, which he or she respects, can refuse to perform such work when in a particular case their own religious convictions and the dignity of the artist are superior to other values that would be violated, e.g. the prohibition of discrimination. Thus, they shall constitute a justified reason for refusing to provide such a service under Article 138 of the CPO." The Supreme Court did not conceal the source of its inspiration, but explicitly referred to the US Supreme Court judgement of 4 June 2018: "Similar argumentation was one of the reasons for the ruling of the Supreme Court of the United States of America of 4 June 2018 in the case no. 16-111 of *Masterpiece Cakeshop, LTD., ET AL. v. Colorado Civil Rights Commission ET AL*, regarding a Colorado confectioner, which found him to be an artist who manifests Christian views in his work".

The Supreme Court recognized that "justified refusal under Article 138 of the CPO could, for instance, also arise in a case of a printer who, as a Catholic, receives an order to print an advertisement that promotes content obviously contrary to the principles of his faith. A similar situation may apply to followers of other religions or atheists, who represent different professions, provided that the kind of service results in a real and dramatic conflict between their commonly accepted convictions and the rights and freedoms of the consumer."

Applying the above interpretation to the case of the printer of Łódź, the Supreme Court concluded that "the defendant had no justified reason to refuse to make a printout based on the design of a roll-up delivered by the L. Foundation. His work was merely reproductive and involved performing technical activities. Although the graphical design also included the colourful logo of the said foundation, its message was of a neutral nature and hence it could not violate the defendant's religious convictions."

In the author's assessment, the Polish Supreme Court's reasoning is not correct. First of all, because the Court arbitrarily assumed, following the US Supreme Court's judgment, that a justified reason for refusing to provide a service must relate to the service provider's creative rather than reproductive work. However, the printer of Łódź explicitly stated in his email correspondence with a volunteer of the LGBT Business Forum Foundation: "I refuse to make a roll-up from the graphics I received. We do not

contribute to the promotion of the LGBT movement with our work." Whether the making of the roll-up is merely reproductive work or also in a certain sense creative one is a minor issue, especially in the view of the fact that each time the manufactured materials were marked with the name and address of the printing house, and thus the printing house was "signed" on it. Hence, the printer might have had a reasonable conviction that by making the roll-up he would thus contribute to the promotion of the LGBT movement and not anonymously. Therefore, we cannot – following the argumentation of the Colorado confectioner's defence counsel – compare his work to selling a cake "straight off the shelf."

Although the Supreme Court's decision of 14 June 2018 (ref. no. II KK 333/17) was unfavourable for the accused printer and it casts certain doubts as to the coherence of the argumentation, the Court's recognition that the concept of "justified reason", as provided for in Article 138 of the CPO in the wording in force until 4 July 2019, also encompasses religious convictions. Therefore, when they are in obvious contradiction with the features and nature of a particular service, it is permitted to refuse to provide it, could be of fundamental importance for the interpretation and application of Article 138 of the CPO in the future. The interpretation provided by the Supreme Court created the impression that Article 138 of the CPO was likely to become a provision implementing the conscience clause for service providers or, applying the term used by Wojciech Ciszewski, the "commercial conscience clause" [Ciszewski 2017, 46-51].

However, the Constitutional Tribunal, in its judgment of 26 June 2019, ref. no. K 16/17, adjudicated that Article 138 of the CPO, in the passage "or intentionally without a justified reason refuses the performance to which he or she is obliged", is not in compliance with Article 2 of the Constitution. Thus, the provision which could have provided the conscience clause in the field of service provision has been derogated from the Polish legal order. Currently, there is no other provision explicitly designed for service providers which would regulate the issue of refusal to provide a service. In such circumstances, the service provider, as any other individual, may directly invoke the constitutionally safeguarded freedom of conscience and religion. Nevertheless, for reasons of legal security of both the service provider and the service recipient, it would be desirable to implement such provisions at the statutory level, which would precisely specify the conditions and circumstances of the refusal to provide a particular service. Amendments to the law regulating the provision of services are needed, aimed at providing precise conscience clauses, reminding that conscientious objection is a rationally justified moral judgment that qualifies a legal obligation as ethically wrong (objective evil) and justifies refusal to perform it [cf. Olszówka 2019b, 274]. That would enable a higher predictability

of the behaviour of both parties in the service provider – service recipient relationship.

CONCLUSIONS

The considerations presented in this paper lead to the conclusion that currently there are no legal provisions, at the statutory level, in the Polish legal order which specify the conscience clause in the field of service provision. After the Supreme Court judgment of 14 June 2018 (ref. no. II KK 333/17), the provision that could provide the conscience clause for service providers was Article 138 of the CPO. However, the Constitutional Tribunal, in its judgment of 26 June 2019, ref. no. K 16/17, adjudicated that Article 138 of the CPO, in the passage "or intentionally without a justified reason refuses the performance to which he or she is obliged", is not in compliance with Article 2 of the Constitution.

The absence of a formally specified statutory provisions of the conscience clause in the field of service provision must be critically assessed from the point of view of the legal security of both the service provider and the service recipient. Hence, the current legislation lacks a precise definition of under which circumstances and for what reason a service provider may refuse to provide a particular service. Therefore, it is appropriate to postulate relevant statutory amendments. From the point of view of legal security of service providers, it will ensure that they may refuse to provide a particular service in the circumstances and for the reasons explicitly specified in the law, thus it will legally safeguard their freedom of conscience. From the point of view of legal security of service recipients, the implementation of the above clause into the legal order will contribute to enhancing the predictability of the behaviour of service providers and thus it will improve planning and execution of service recipients' objectives.

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PROCEEDINGS FOR SCIENTIFIC ADVANCEMENT AS A SPECIAL TYPE OF ADMINISTRATIVE PROCEDURE. ASSUMPTIONS AND EFFECTS OF THE ADMINISTRATIVE JURISDICTION MODEL

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Abstract. This article was presented under the same title at the 26th Congress of the Faculties of Law and Administrative Procedure, "Directions for the Development of Administrative Jurisdiction". It was held in Poznań on 18-20 September 2022. The authors reflect on the currently adopted solutions for the transfer of legal institutions relevant to general administrative proceedings into specific spheres of social relations. They use the example of human resources development in research area. In this context, the authors cover the genesis of the shaping of the models of these procedures, the essence and role of the reference clauses used to achieve the assumed effects, as well as challenges associated with it. As a consequence, an attempt was made to answer the question of whether the effects of the model of administrative jurisdiction adopted thereby corresponds to its assumptions, or whether it becomes necessary to look for other solutions in this regard.

Keywords: scientific promotion proceedings; development of scientific staff; administrative jurisdiction; proper application of the law

INTRODUCTION

At the outset, it is justified to quote a general statement that it is characteristic for the present times to impose more and more tasks on public administration. It is rightly argued in the scientific discourse that the growing scope of duties of the broadly understood administration is becoming a specific feature of the modern state [Dańczak 2021, 826]. This situation may raise the question of the legitimacy of extending the jurisdictional model of administration to some spheres of social life.

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The procedures for promoting research staff, it means – the issues regarding the awarding of doctorates, habilitated doctors, and the title of professor, which can be described as proceedings for scientific promotion may be an example of this type of phenomenon. Undoubtedly, this area, which has long been an integral part of the development of civilization, is of great value, especially due to its social and economic importance.

Shaping by the legislator the model of proceedings for scientific promotion, including those with which we are dealing now, currently regulated mainly by the provisions of the Act of 20th July 2018, the Law on Higher Education and Science, proceeded in a variety of ways. These proceedings were not always a codified process of implementing substantive administrative law. Undoubtedly, this is the result of adopting various assumptions regarding the creation of scientific staff, and thus influencing the development of this sphere of social life.

Currently, by applying the general clause in the Article 178(3) and the Article 228(9) of the mentioned act, concerning the proper application of the provisions of the act of 14th June 1960 – Code of Administrative Procedure in proceedings for scientific promotion, it means a legislative procedure which should bind specific legal institutions, these proceedings are considered to be a special type of administrative procedure of a non-autonomous nature.[1] At the same time, entities which have been granted competences to promote scientific staff, as well as the doctrine of law, indicate the lack of elaboration of a uniform definition of the adopted legal structure in this sphere of social relations [Dańczak 2021, 826]. As a consequence, this translates into numerous practical problems with the correct application of the law by authorized entities as part of their proceedings for scientific advancement, but also in a comprehensive doctrinal approach to this issue.

Considering the above-mentioned issues, a need arises to reflect on the currently adopted legal structure regulating the proceedings for scientific promotion. In this context, it becomes necessary to consider this issue both from the historical perspective, indicating the process of evolution which took place over the years in these proceedings, and dogmatic perspective in order to verify whether the currently adopted solutions can be considered optimal in such a special sphere of social relations.

On the basis of the concept outlined in this way, one can assume a hypothesis that an attempt to implement this type of special proceedings in the too broad framework of the existing regulations and general principles of administrative procedural law does not bring the effect intended by the legislator in all adopted assumptions, and even requires

[1] Between others: Izdebski and Zieliński 2013, 121-22; Wilczyńska and Wilczyński 2014, 587-88, or above all: Sieniuć 2019, 44-46.

the further research for the appropriate direction of administrative jurisdiction in the sphere of scientific promotion proceedings. Striving to transfer certain legal institutions, appropriate for the general model of administrative jurisdiction, to a specific type of social relations, the nature, the principles, and properties of which have been shaped over the years as a result of adopting certain assumptions by the legislator, going too far by misrepresenting the institution of the proper application of law may also raise doubts from the point of view of the constitutional principle of legal certainty.

1. THE EVOLUTION OF THE PROCEDURE FOR SCIENTIFIC PROMOTION AS A SPECIAL PROCEDURE

As indicated in the doctrine, the legal conditions which define the system of scientific advancement in Poland have come a long way before being shaped into the currently functioning system [Sieniuć 2019, 23]. As a side note, it is worth pointing out that it was no different in the cases of other countries, in which this process began to take shape much earlier[2]. These issues were also mentioned by the Constitutional Tribunal in the justification to the judgment of 12th April 2012.[3]

Despite the fact that for nearly three decades, proceedings for scientific promotion have been identified more or less with administrative proceedings, or at least with specialized administrative proceedings, however, they were not always of this nature.[4] The need to formalize the procedures leading to the next levels of scientific career appears only with the development of public administration, which took over the tasks related to granting these types of promotion [Sieniuć 2019, 25]. These regulations were originally taken from Prussian and Austrian legislation [Pruszyński 1983, 27].

The Act of 13th July 1920 on academic schools was the first act which regulated the procedure of academic advancement in Poland.[5] Over the next decades, until the entry into force of the Act of 12th September 1990 on the academic title and degrees,[6] the procedures for awarding

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[2] More about this issue see: Gromkowska-Melosik 2020.

[3] Judgment of the Constitutional Tribunal of 12 April 2012, ref. no. SK 30/10, Journal of Laws, item 494.

[4] For more on the recognition of the process of awarding doctoral and postdoctoral degrees as administrative proceedings, see: Pruszyński 1983, 8ff.

[5] Journal of Laws No. 72, item 494.

[6] This act was preceded by the following acts: Act of 31 March 1965 on Academic Degrees and academic titles (Journal of Laws of 1985, No. 42, item 2020), the Act of 15 December 1951 on Higher Education and Research Workers (Journal of Laws of 1952, No. 6, item 38), the Act of 28 October 1947 on the organization of science and higher education (Journal of Laws No. 66, item 415), the Act of 15 March 1933 on Academic Schools (Journal of Laws No. 29, item

the degrees of doctor, habilitated doctor and the title of professor, regardless of the change in the nomenclature defining individual stages of the scientific career,[7] were subject to discretionary assessment scientific achievements and knowledge in the field of a particular science, performed by the scientific community as part of generally normatively defined procedures, which boil down to the determination of individual stages of the procedure and indication of the competence of individual entities to carry them out. It was, therefore, a qualification process related to a specific type of explanatory procedure, in which a person applying for a given scientific promotion was subject to expert assessment by a group of scientists, it means – collective bodies, whose scientific achievements in a given field of science had previously been confirmed by recognized achievements. The person who was to be promoted in the structure of the academic staff had to demonstrate certain personal qualifications [Borkowski 2007, 148]. Therefore, these proceedings were fully autonomous.

Noticeable changes in the procedures for scientific promotions, similar to the regulations resulting from administrative procedural law, were brought by the Act of 12th April 1973 on the change of the regulations on academic degrees and titles and the organization of research institutes.[8] This act established the Central Qualification Committee for Scientific Personnel, operating at the Prime Minister's office, and being the central body of state administration. It is also indicated that the members of this institution were to be outstanding scientists representing the main fields of science.[9] Thus, an expert body, similar to a higher-level body, was established, which was responsible for auditing the procedures for obtaining scientific promotions.

It is worth pointing out that it was on the basis of the Act of 12th April 1973 on the amendment of the provisions on academic degrees and titles and the organization of research institutes, probably for the first time, that the administrative court ruled on the application of the provisions of the Code of Administrative Procedure in proceedings related to scientific promotions. As indicated in the decision of the Supreme Administrative Court in Warsaw of 13th July 1983, the award of an academic degree is a decision in an individual case, granting a citizen specific rights in legal

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594), the Act of 13 July 1920 on academic schools (Journal of Laws No. 72, item 494).

[7] On the basis of previously binding legal acts, individual scientific promotions were defined as a higher academic degree corresponding to the current doctoral degree; the title of associate professor, equivalent to the degree of habilitated doctor, and the title of full professor, which is currently referred to as the title of professor.

[8] Journal of Laws No. 12, item 89.

[9] More on the activities of the Central Qualification Committee for Research Personnel and the bodies preceding and following it, see: Izdebski 2020.

relations, issued by a competent scientific institution equipped with imperative powers. At the same time, it was recognized that the provisions of the Act 31st March 1965 on academic degrees and titles as well as the regulation of the Council of Ministers of 8th February 1966 on the conditions and procedure for conducting doctoral and postdoctoral theses,[10] issued on its basis, do not prevent the application of the provisions of the Code of Administrative Procedure.[11] This provision, due to its precedent nature, was widely commented on in the legal doctrine.[12]

As it is indicated in the literature, the continuity of solutions regarding the system of scientific promotions was ensured by the provisions of the Act of 12th September 1990 on the academic title of and academic degrees.[13] However, it was a breakthrough act for the procedures related to the development of scientific staff. The main *novum* introduced by the mentioned act was the determination that in proceedings for scientific promotion, in the scope not regulated in this act, the provisions of the Code of Administrative Procedure apply accordingly. The adoption of this legal structure by the legislator was especially important as with regard to the decisions taken within these proceedings in 1985, the possibility of applying the provisions of the Code of Administrative Procedure has been explicitly disabled.[14] Thus, the proceedings in individual cases of scientific promotions, which before the date of entry into force of this Act were of a fully special and largely discretionary nature, in connection with a significant element of essentially exclusively consultative powers, which took place in their course, became special proceedings within the system of administrative proceedings, and thus also within the system of controlling the compliance with the law of the effects of these proceedings [Izdebski 2020, 56].

This state of affairs has been maintained until now, however, it is worth emphasizing that with a noticeable intensification of the phenomenon of introducing legal institutions appropriate for general administrative proceedings, by establishing, in the provisions of the Act of 20th July 2018 – Law on Higher Education and the Science, the decisions made in matters of conferring the degrees of doctor, habilitated doctor and the title of professor directly as administrative decisions.

It should also be pointed out that perceiving the legitimacy of adopting a model of a specific type of administrative proceedings under scientific

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[10] Journal of Laws of 1970, No. 1, item 6.

[11] Decision of the Supreme Administrative Court in Warsaw of 13 July 1983, ref. no. II SA/Wa 983/83, Lex no. 9741.

[12] See Gloss (annotation): Kucharski 1984, 149, as well as a gloss on the provision in question: Pruszyński 1984, 151-52.

[13] Journal of Laws No. 65, item 386. See: Dańczak 2015, 24.

[14] Journal of Laws No. 36, item 168.

promotion procedures is not favored by decentralization of legislative powers, consisting in assigning public tasks related to law-making to entities granting academic degrees. This statement is due to the fact that the main purpose of administrative proceedings is not only to establish binding consequences of the norms of substantive law in relation to a specifically designated addressee, in an individual case handled by a public administration body in the form of a decision, but above all to guarantee a uniform and predictable course of procedures in the proceedings application of the provisions of substantive law and ensuring respect for the rights and freedoms protected by the Constitution of the Republic of Poland [Wróbel 2022]. Granting the right to entities conducting scientific promotion proceedings to independently, internally regulate the detailed procedure of their conduct, and therefore *suis generis* of the provisions of internal law, but also affecting external entities, makes it necessary to express a far-reaching doubt whether the indicated axiology, relevant to administrative procedures, is maintained.

2. THE ROLE OF CORRECT APPLICATION OF THE LAW

The normative structure adopted and implemented by the legislator, which was aimed at embedding scientific promotion proceedings in the already established system of procedural administrative law, requires consideration of the role of applying this legislative procedure, and, consequently, how this may translate into a correct understanding of the essence of these proceedings.

In the theory of law, it is emphasized that the use of the legal construction of "appropriate application" in legal texts is dictated by considerations of legislative technique. It is about reducing the volume of normative acts. Instead of the completed regulation of each of the original, standardized legal area, a normative act contains a regulation stipulating that provisions regulating another legal area should be applied accordingly. These are linguistic phrases referring to the content which has been expressed in other parts of the legal text or in other normative acts in such a way that the correct interpretation of the passages containing these phrases is not possible without taking these content into account [Studnicki, Łachwa, Fall, et al. 1990, 15]. Consequently, this legal structure serves the purpose of achieving consistency between the regulated institutions in accordance with the general principle of formal justice [Błachut, Gromski, and Kaczor 2008, 61].

The application of this legislative technique is grounded in the paragraph 156 of the Regulation of the Prime Minister of 20th June 2002 on "Principles of legislative technique."[15] As emphasized in the literature, this pro-

[15] Journal of Laws of 2016, item 283.

vision applies both to external references, which are the provisions of another legal act, and the internal references within the same normative act, and these references should be clear, unambiguous, and exhausting [Wierczyński 2018]. It should be borne in mind that under the paragraph 156 of the "Principles of legislative technique", it is also possible to interpret the prohibition of imposing an order to apply other provisions to a given legal institution, where it is an unnecessary repetition [ibid.]. Such a situation can be considered when the obligation to apply certain provisions results from the general principles of the legal system and there are no indications that an individual, who is an addressee of these provisions, would have difficulty recognizing them properly. Therefore, it may be questioned whether it is sometimes justified to refer in a specific law to the application of code provisions within a given legal institution, when it is possible to say that their provisions should apply in a specific way due to the very role of these codes, as they play in a particular branch of law.

The doctrine indicates that the structure of the proper application of the law is not uniform. It may allow the applicable legal provisions to be applied unchanged or with modifications. Some of the relevant provisions of a given normative act cannot be applied, mainly because they are irrelevant or contradictory with the rules laid down for the initial relations [Nowacki 1964, 370]. The first situation takes usually place, when reference is made to a broader category of provisions or to the entire normative act [ibid., 370-71]. In the case of a generally worded reference, it is, in most cases, impossible to apply literally all the relevant provisions in the field of the output regulation. It can therefore be assumed that the proper application of the law "consists in the most normal application of certain provisions to the second scope of the reference, but that they do not apply entirely or that some of their content are changed by those which, due to the content of their provisions, are relations, to which they are to be applied, pointless or inconsistent with the provisions governing the given relations" [ibid., 372].

It should be emphasized that the existence of legal relations consisting in the application of provisions of another legal act to a given legal institution should result from specific relations, such as the will of the legislator, to regulate them in a similar way, and the actual possibility of regulating them using the same provisions.

At this point, it is worth referring to the meaning of the phrase "appropriateness". For this purpose, its dictionary meaning should be cited, according to which this expression should be understood as meeting the required conditions as well as adequacy or optimality.[16] Therefore, it can be

[16] See: https://sjp.pwn.pl/szukaj/odpowiednio [accessed: 01.08.2022].

assumed that, in this sense, the appropriate application of legal provisions is a legislative procedure which should be used only when it is necessary for the proper implementation of a given legal institution due to the compatibility of one legal content with another. It is also pointed out that when interpreting provisions containing a reference to the appropriate application of other provisions of law, first of all, functional and purposeful interpretation should be applied [Hauser 2005, 159]. The consequence of this position is the necessity to establish, first of all, the scope of the reference, it means the group of provisions which can actually be applied under a special act [ibid., 161]. The next step should be to examine whether the provisions to which reference is made, and which will apply can be implemented directly or require modification. This activity is attributed the most judgmental character [ibid.]. Bearing in mind that this stage gives the most possible interpretations, the literature points to the problem of the possibility of actually determining these modifications, in particular whether only the text layer of the provision may be subject to it, or whether it is also permissible to redefine the given concepts [Dańczak 2015, 56]. Considering this issue, it seems reasonable to conclude that any modifications to the provisions to which reference is made may not lead to the provisions being in force losing their basic character and significance.

The doctrine argues that the concept of appropriate application of legal provisions should be understood as an order to use an analogy from a normative act to which reference is made, as a way of applying the law in the cases indicated by the referring provision [Hauser 2003, 88-89]. Therefore, it can be concluded that modifications to the provisions to which reference is made should be made as little as possible, so that an analogy to a legal act, in particular to the institutions regulated by it, to which reference is made, can be drawn to the greatest possible extent.

The extensive jurisprudence of the Constitutional Tribunal also points to the issues related to the understanding and practical application of provisions that contain the phrase "shall apply accordingly."[17] On its basis, it is assumed that it is possible to link interpretation problems related to the legislative technique of applying the phrase "applies accordingly" to the constitutional principle of law, namely the principle of specificity of legal provisions, which can be derived from the Article 2 of the Constitution of the Republic of Poland. A manifestation of the implementation

[17] See between others: judgment of the Constitutional Tribunal of 13 March 2000, ref. no. K 1/99, Journal of Laws of 2000, No. 17, item 574; judgment of the Constitutional Tribunal of 7 September 2010, ref. no. P 94/08, Journal of Laws of 2010, No. 170, item 1149; judgment of the Constitutional Tribunal of 19 May 2011, ref. no. SK 9/08, Journal of Laws of 2011, No. 115, item 673; judgment of the Constitutional Tribunal of 18 October 2011, ref. no. SK 2/10, Journal of Laws of 2011, No. 240, item 1439.

of this principle is the formulation of legal provisions in a correct linguistic, logical, and precise manner, so that the intention of the legislator does not raise doubts as to the circumstances of the application of a given legal norm.[18]

When analyzing the role of the proper application of the law in the process of scientific promotions, particular attention should be paid to the factual definition of the subject of the Act. According to the paragraph 19(2) of the Regulation of the Prime Minister of 20th June 2002 on "Principles of legislative technique", the definition of the subject of the Act may be factual – starting with the words "Code", "Law", or "Ordinance", written with a capital letter, if the Act exhaustively regulates a wide area of affairs, or from the words "Introductory Provisions ...", if the Act is the Introductory Act. The literature on the subject indicates that for certain basic areas of law, it is desirable to function in legal area of extensive normative acts of a comprehensive nature. In this way, it is possible to achieve uniform general assumptions and guiding principles and, consequently, internal consistency in a given area of law [Gwiżdż 1997, 114]. It is assumed that the name "Law" is appropriate when a given act exhaustively regulates a wide area of matters, but it does so by means of provisions belonging to various areas of law [Wierczyński 2018].

Translating the cited opinions of the legal doctrine into the system of scientific advancement, it can be stated that the provisions of the Law on higher education and science[19] constitute the basic and most important regulatory matter in matters related to applying for the award of an academic degree or the title of professor. Consequently, the application of all other legal acts in the discussed procedure, it may not change the basic norms, principles, but also the features resulting from the provisions of the Law on higher education and science, but only supplement them or adapt to them accordingly.

3. PROBLEMS OF THE APPLICATION OF THE RULES OF THE CODE OF ADMINISTRATIVE PROCEDURE IN DECISIONS TAKEN IN THE SCOPE OF PROCEEDINGS FOR SCIENTIFIC PROMOTION

The legislative technique outlined, as already indicated, found its expression in the procedures for awarding academic degrees and the title of professor for the first time thanks to the Act of 12th September 1990 on academic titles and academic degrees. Understanding the essence of the proper

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[18] See *Dobre praktyki legislacyjne, Odsyłanie do przepisu zawierającego upoważnienie ustawowe przez użycie sformułowania „przepisy stosuje się odpowiednio"*, https://www.rcl.gov.pl/sites/zalaczniki/artykul_23.pdf, p. 115 [accessed: 02.06.2018].

[19] Journal of Laws of 2022, item 574.

application of the provisions of the Code of Administrative Procedure in the proceedings for scientific promotion, it was constantly evolving, in particular due to the emerging jurisprudence of administrative courts, which, however, was not uniform in this matter, as well as the decisions of the Central Committee for Degrees and Titles. As indicated in the literature on the subject, the scientific community was not used to this type of understanding of procedures aimed at awarding academic degrees and the title of professor. Acquiring by the entities conducting these proceedings the necessity to follow the provisions of the Code of Administrative Procedure, taking into account the specificity of individual proceedings in the sphere of science, determining the scope of this inclusion created and still creates the greatest difficulties in the application of the general clause of appropriate application of the provisions of the Code of Administrative Procedure [Izdebski 2020, 57].

In this context, it should be indicated that each time when reference is made to the appropriate application of the provisions of the Code of Administrative Procedure in these proceedings, it has been and is taking place exclusively in the scope not regulated in the initial act. Two fundamental statements emerge from the normative structure adopted in this way. Firstly, in the event that the provisions of the initial act, which currently is the Law on higher education and science, do not regulate a given procedural institution, the appropriate application of the provisions of the Code of Administrative Procedure is obligatory. Secondly, if the basic law for scientific promotion procedures regulates certain procedural aspects of these procedures in a specific way, the application of the code regulations is not allowed, or requires their significant modification, or the application of only auxiliary ones. As a consequence, both on the theoretical and practical levels, the basic problem is to determine which institutions of procedural law are governed by the provisions of the basic laws exhaustive enough to be able to state that the given provisions of the Code of Administrative Procedure will not find an appropriate application that can be used with regard to their modification and to what extent, and finally, that can be used directly without any changes.

The issue of the proper application of the provisions of the Code of Administrative Procedure in proceedings for scientific promotion meets with increasing interest of representatives of legal sciences. The achievements of representatives of these sciences, as well as of the administrative judiciary, gave grounds for the formation of interpretations strengthening and emphasizing the specificity of proceedings for scientific promotion in relation to general administrative proceedings. On this basis, concepts such as the specific procedural position of a person applying for scientific promotion, manifested in a significant limitation of active participation

in the procedure, were developed; peculiar explanatory proceedings of an expert nature, however not equated with the role and position of experts within the meaning of the provisions of the Code of Administrative Procedure; closed or relatively limited catalog of evidence; limited devoluctivity in the instance course of adjudication, consisting in the lack of competence of the second instance authority to make substantive decisions; or the special position and structure of decision-making bodies, taking decisions collectively and in a secret manner.

All these aspects, proving the specificity of proceedings for scientific promotion, may raise even greater doubts as to the provisions of the Law on higher education and science adopted by the legislator in the provisions of solutions concerning the legal nature of decisions taken in these proceedings. According to the Article 178(1) *in principio* and the Article 228(5) of the Law on higher education and science respectively, a decision on awarding or refusing to confer the degrees of doctor and habilitated doctor and on applying or refusing to apply to the President of the Republic of Poland for the title of professor is issued by way of an administrative decision.

The analysis of the decisions issued by the Scientific Excellence Council as part of the instance control procedure of the correctness of the proceedings for scientific promotion shows that the most common reason for revoking the decisions on refusing to award the degree of doctor or the degree of habilitated doctor is insufficient justification of the reasons for the decisions made by the bodies of first instance. Consequently, the body of the second instance, pointing to the theses emerging from the more recent jurisprudence of administrative courts, seems to place emphasis on the subsumption process typical of general administrative proceedings, aimed at establishing by way of an administrative decision, whether the established and thus proven facts correspond to the content of the norm of substantive law.

At this point, it should be pointed out that the provisions of the Act of 12th September 1990 on the academic title and academic degrees, as well as the Act of 14th March 2003 on academic degrees and the academic title as well as degrees and title in the field of art provided that decisions made in the proceedings for scientific promotion are made by way of resolutions adopted in secret ballot, with an absolute majority of votes. At the same time, these acts stipulated that the provisions on appealing against administrative decisions to an administrative court were applicable to appealing against them. As a consequence, the issued judgments were not directly administrative decisions within the meaning of the provisions of the Code of Administrative Procedure. The adoption of a different assumption would result in the recognition that the reference to the provisions of the Act

of 30th August 2002 – Law on proceedings before administrative courts with regard to complaints,[20] is unreasonable.

The current legal structure, assuming that the decisions taken by entities conducting scientific promotion proceedings are administrative decisions, raises doubts as to the possibility of proper preservation of all elements of these administrative acts, which are regulated by the Article 107(1) of the Code of Administrative Procedure. This issue concerns mainly the factual and legal justification of the decision issued in a given case. As it has already been indicated, the judgments issued in proceedings for scientific promotion are, as a rule, taken as a result of a secret ballot.[21] Thus, the manner of voting of individual members of collective bodies who adopt resolutions on academic degrees and the title of professor, including the motives for casting individual votes, are not known to the parties to the proceedings, but also remain secret to the members of these bodies themselves.

It has been noted in the literature on the subject that the issue of secrecy of voting is related with the inability to exhaustively justify the taken decisions [Tarno 2011, 22; Borkowski 2007, 164]. Already in the judgment of the Supreme Court of 26th April 1996, it was noticed that decisions taken by secret ballot could not be justified at all, because it was not possible to establish the actual intentions of the voters and to verify how particular persons voted.[22] The secrecy of voting, as indicated by representatives of legal sciences, is nothing more than a guarantee of the freedom to express a personal position, which implies that any external control, also performed by courts, must be limited to examining only the potential violation of the basic rules of conduct [Dyl 2020, 208].

CONCLUSIONS

To conclude, it should be stated that the phenomenon of the willingness to regulate by the state an increasing scope of social relations within

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[20] Journal of Laws of 2022, item 329.

[21] According to the Article 20(1) of the Act of 14th March 2003 on academic degrees and academic title as well as degrees and title in the field of art, the resolutions referred to in the Article 14(2) and the Article 18a(11), are taken in a secret ballot and are passed by an absolute majority of the votes cast in the presence of at least half of the total number of people entitled to vote. Admittedly, the provisions of the Act of 20th July 2018 – Law on Higher Education and Science do not regulate the subject matter, however, the analysis of resolutions adopted by university senates and scientific councilors of institutes of the Polish Academy of Sciences, research institutes and international institutes on the basis of the authorization contained in the Article 192(2) and the Article 221(14) of this Act indicates the consolidation of the model of decisions taken for a long time.

[22] Ref. no. III ARN 86/95.

the established framework of legal institutions, including their adaptation to the provisions of administrative procedural law, may seem understandable. It results from the right assumption that individuals participating in these relations should be surrounded by the apparatus of public administration with certain procedural guarantees which implement the principles of procedural justice, equality before the law or the rule of law. By the definition, these individuals should be protected against arbitrariness and latitude of decisions taken, which shape their rights and obligations.

These factors probably determined the adoption of solutions, according to which internal activities related to the administration of scientific promotion proceedings became activities codified by appropriately applied provisions of procedural administrative law. In this context, it can be said that it was aimed at strengthening the position and procedural guarantees of people aspiring to obtain further scientific promotions, at the same time strengthening supervision over the correctness of awarding them, including in the field of compliance with ethical principles and good manners in science in connection with the public-law benefits which were associated with obtaining these promotions. At the same time, the tradition of submitting to a specific type of qualification procedure determined each time, also in the current legal state, the search for specific procedural solutions which would not result in the loss of specific features of these procedures.

In this context, far-reaching doubts should be expressed as to whether the legislator's assumptions outlined in this way have been achieved. The use of the general clause of the proper application of the provisions of the Code of Administrative Procedure in the procedures for the promotion of scientific staff, due to the specificity of these procedures, it has resulted in the development of practical mechanisms by entities applying the law, which to a large extent exclude or limit the guarantees which should be provided by the use of administrative procedural law. Proceedings for scientific promotion are not a typical process of applying the norms of substantive administrative law within the procedure appropriate for general administrative proceedings. It should be noted that assessing the highly vague prerequisites for obtaining a given scientific promotion, such as the originality of a solution to a scientific problem, a significant contribution to the development of a specific discipline, or outstanding achievements, does not submit to proving, and then to adjudication, actual corresponds to a given legal norm.

Transferring the legal institutions related to the conduct of explanatory proceedings, as well as those related to the stage of settling the case, which have been regulated in the provisions of the Code of Administrative Procedure, is not possible in their comprehensive dimension to the procedures for the promotion of scientific staff. Increasing one's scientific achievements, knowledge, and hence the development of science, is associated

with the need to use a qualification system, associated with expert evaluation, and expressing discretionary opinion, but supported by achievements and skills in a particular field by a group of recognized people.

As a result, the adoption by the legislator of solutions aimed at increasing the scope of application of institutions relevant to the Code of Administrative Procedure, such as making decisions on scientific advancement by way of an administrative decision, should be considered counter-effective from the point of view of the assumptions and role of the proper application of the law.

In the light of the presented issues of establishing scientific promotion proceedings as a special type of administrative proceedings, assumptions of the adopted model of legal shaping of the discussed social relations, and finally its effects, the position of the Central Commission for Scientific Title and Degrees, and therefore institutions in which the representatives of all scientific and artistic disciplines were included, as expressed in the report on the activities of this body for the years 1991-1993, in which the practical problems of applying the general clause of appropriate application of the provisions of the Code of Administrative Procedure were already noticed at that time. According to the opinion of this authority, "the amendment to the provisions subordinating the process of awarding degrees and the academic title to the provisions of administrative proceedings should be assessed as unfavorable. Due to the fact that the well-established, long-standing traditions of scientific criticism and the rules of conduct of collegial bodies operating in science differ from typical administrative procedures, the change in regulations in this area makes it difficult to conduct scientific research and, at the same time, lowers the importance of substantive assessment in favor of formal procedural requirements. […] By raising this problem, we do not want to deprive candidates for promotion from the possibility of defending their interests by means of a complaint – this is one of the foundations of democracy. However, there is a need for a separate, as regards scientific conducts, definition of the rules of conduct in the provisions concerning the awarding of academic degrees and titles; These provisions should not refer to the provisions of administrative procedure, but regulate the procedure accordingly, in line with the needs and tradition of these conductors. The administrative court dealing with complaints should control the observance of those provisions."

Finally, it should be stated that the attempt to include the procedures regulating special social relations, such as the proceedings for scientific promotion, into the too broad framework of the existing regulations and principles of general administrative procedural law does not bring the effect intended by the legislator in all the adopted assumptions, and even requires further search for the right direction of their regulation. Excessive transposition

of certain provisions of the Code of Administrative Procedure concerning the promotion of academic staff does not correspond to the role which should be played by the institution of the proper application of the law. In this context, the doubt as to the observance of the constitutional principle of legal certainty in the adopted model of public administration operation remains valid.

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THE REALISATION OF THE PRINCIPLE OF HUMAN DIGNITY IN THE ACTIONS OF PUBLIC ADMINISTRATION – SELECTED ISSUES

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Abstract. Human dignity is one of the constitutional values in a number of contemporary states, including Poland. Article 30 of the Polish Constitution says that the inherent and inalienable human dignity is a source of human and civic freedoms and rights. It is inviolable and must be respected and protected by public authorities. Respect for human dignity is expressed as a normative principle or a value that public administration must keep in mind in its operations. Given its universal nature, it determines the way in which people are treated by public administration, which must not only consider but also respect human dignity. Therefore, the state administration should not take action that would violate human dignity and should take action where that dignity is at risk. This obligation becomes the source of the public administration's special duties concerning the respect for and protection of human dignity.

Keywords: dignity; human dignity; public administration; the duties of the administration; the Polish Constitution

INTRODUCTION

Human dignity is placed at the forefront of constitutional values in current legal systems, forming chapters devoted to human freedoms and rights in the constitutions of contemporary states [Zieliński 2010, 155]. This is also true of the Polish Constitution, whose Article 30 declares the inherent and inalienable human dignity is a source of human and civic freedoms and rights. It's inviolable, while its respect and protection are the duties of public authorities.

In this way, dignity becomes a crucial principle relating to man. It is expressed as a normative principle or a value that must be considered by public administration. The high status it is attributed results from the fact a human being is recognised as the rationale for law and the supreme legally protected value. It becomes a fundamental determinant of the state and law [Sadowski 2007, 24]. This means a prevailing legal order must be subordinated to human beings. They should be at the centre of the administration's

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actions and the administration is to serve the human being, who is the *raison d'etre* of public administration.

This paper aims to emphasise and substantiate the significance of human dignity in the actions of public administration. The formal dogmatic method, which consists in analysing legal acts using literature and judicial decisions, is the basic method of research in this study.

1. THE CONCEPT AND TYPES OF DIGNITY IN POLISH LAW

The notion of dignity cannot be interpreted unilaterally, since it's an "ambiguous concept from the domain of values" [ibid., 26]. It nonetheless continues to be analysed by a variety of researchers, including the practitioners of legal doctrine [Borski 2014, 7-20; Duniewska 2005a, 9-27], who point to its two dimensions, namely, human and personal dignity. The former, cited by Article 30 of the Polish Constitution, accrues to anyone owing to the nature and fact of being a human being [Mrozek 2014, 43] as an inherent attribute subject to absolute protection. It's treated as primary and supreme in the hierarchy of human values in the legal order [Duniewska 2019, 157-58]. It's permanent, universal, and inalienable [Bucińska 2001, 32-33]. In turn, personal dignity is regarded as an attribute a human being can acquire, develop, and lose [Kapis 2011, 28]. It's associated with self-esteem, respect for oneself and others. It's treated as synonymous with reputation, formed by a series of external circumstances.[1]

This distinction is important, because human dignity cannot be forfeited, whereas personal dignity can. Their mutual connection is very clear, though, since personal dignity arises from human dignity [Giełda 2017, 49].

The Constitutional Court has likewise pointed out two aspects of human dignity grounded in Article 30 of the Polish Constitution.[2] Referring to the doctrine [Complak 1998, 41ff.; Idem 2002, 63; Redelbach 2001, 218ff.; Mazurek 2001], the Constitutional Court states the human being's dignity as a transcendent value, prior to other human rights and freedoms (for which it is the source), inherent and inalienable, always accompanies a human being and cannot be violated either by a legislator or by any acts of other entities. In this sense, human beings always preserve their dignity and no behaviour can remove or breach that dignity. It's an immanent characteristic of every human being that does not require an 'acquisition' or can be forfeited.[3] The other sense of 'personal dignity' is closest to what can be

[1] Judgment of the Supreme Court of 25 April 1989, ref. no. I CR 143/89, Legalis no. 26653.

[2] Judgment of the Constitutional Court [hereinafter: CC] of 5 March 2003, ref. no. K 7/01, Legalis no. 56028.

[3] Decision of the CC of 21 September 2011, ref. no. Ts 220/10, Legalis no. 1351593.

referred to as the right to privacy, including the mental life values of every human being and all those values which define an individual's subjective status in society which make up the respect due to each person.[4] In the Court's opinion, only the latter aspect of dignity can be violated by the conduct of others or the application of certain legal regulations.[5] The former aspect of human dignity, on the other hand, cannot be even violated by an undignified behaviour of its subject, since that type of dignity cannot be taken away from any human being.

A more detailed division of dignity has been suggested by M. Piechowiak, who identifies its four types. Beside the human and personal dignity, he defines personality dignity, based on a moral perfection of an acting subject, and a dignity grounded in everyday circumstances that foster or impede the realisation of personality dignity, e.g., relating to health conditions [Piechowiak 1999, 343ff.; Idem 2011, 3-20].

2. THE HUMAN BEING'S DIGNITY AS THE FOUNDATION OF STATE GOVERNMENT

A human being possesses dignity as a human person, therefore, they must always be an end in themselves, not a means to forming public and social life [Fundowicz 2009, 159]. This has been affirmed in legal systems [Ćwil 2010, 238], both domestic and international.[6] This is upheld by the Constitutional Court, which states the legislator has endowed human dignity with a constitutional rank, making it a point of reference for the value system on which the constitution and the entire legal order of the state are founded.[7] A human person's dignity has thus been recognised as the highest value, which means it's not a human being who is for the state but it's the state which is for a human being [Mazurek 2001, 81]. The idea of human dignity is therefore respected by every democratic legal order and becomes the foundation for any constitutional laws relating to all the aspects of human life.[8]

The Polish Constitution makes three references to the concept of dignity [Potrzeszcz 2005, 27]. This is already the preamble that points out that all who apply the Polish Constitution shall do so "careful to preserve the inherent human dignity, the right to freedom, and the duty of solidarity with

[4] Judgment of the CC of 10 July 2007, ref. no. SK 50/06, Legalis no. 83418.

[5] Judgment of the CC of 5 March 2003, ref. no. K 7/01.

[6] Due to the space constraints, the provisions of international law are not discussed in this paper.

[7] Judgment of the CC of 23 March 1999, ref. no. K 2/98, Legalis no. 43190.

[8] Judgment of the Regional Court in Olsztyn (1st Civil Division) of 9 February 2021, ref. no. I C 765/19, Legalis no. 2583448.

others, while treating the respect for these principles as the unshakable foundation of the Republic of Poland." This indicates a systemic association of dignity not only with human rights and freedoms but also with the Constitution's overarching principles [Bosek 2012, 727]. In this manner, dignity becomes a value that provides the guidance for the interpretation and application of the Constitution in the spirit of respect for the inherent dignity of the human being [Zieliński 2019, 107-27; Mrozek 2014, 45].

Dignity is mentioned again in Article 30, the beginning of Chapter II, devoted to human and civic freedoms, rights, and duties. The human dignity – an inherent, inalienable, and inviolable source of rights and freedoms – is listed first there. Its inviolability is prioritised [Granat 2014, 16-18; Piechowiak 2011, 4]. This corroborates dignity is a fundamental constitutional value in the legal order of Poland and plays a major role in the application and interpretation of legal regulations [Piechowiak 2012, 351; Idem 2013a, 39-40].

Dignity is last regulated in Article 233(1), according to which a law laying down the scope of restrictions to human and civic freedoms and rights during a martial law and a state of emergency cannot restrict the freedoms and rights set out in the respective provisions, with Article 30 cited first.

The provisions of the Polish Constitution imply, therefore, both persons and their dignity are values superior to the entire legal system and, as such, are subject to special protection [Piechowiak 2020].

Like M. Granat emphasises, though, the introduction of the principle of dignity to the Polish Constitution is not a condition necessary to recognising human dignity in law. The appreciation of human dignity in law does not necessarily result from its representation in regulations. A number of legal systems do not express the principle in their constitutions while attaching importance to human dignity. This means that even if the Polish Constitution failed to refer to human dignity, it wouldn't change the fact of its existence, respect, and protection by all entities, including public administration authorities [Granat 2014, 21].

3. HUMAN DIGNITY IN COURT DECISIONS

The Constitutional Court decisions make increasingly frequent references to human dignity as the supreme value. It's difficult, nonetheless, to identify a case where the dignity would be the sole benchmark. Human dignity cannot be captured in law 'for the sake of itself'. Its 'action' can be perceived in certain situations where law is applied. M. Granat is right to note, therefore, the question of dignity violations in the Court's decisions is chiefly situational, concerning the infringements on specific rights or freedoms.

The charge of breaching Article 30 of the Polish Constitution is advanced in conjunction with the violations of other constitutional rights, e.g., human freedom, the legal protection of life, equality under the law, etc. [ibid., 3].

The concept of dignity drew special interest at the time the new Polish Constitution was drafted [Krukowski 1997, 38-50], although the Constitutional Court had ruled even before the Constitution became effective that the principle of respect for and protection of human dignity is a major component of the democratic rule of law and thus a binding legal norm.[9] Once the prevailing constitutional law was approved, the Court's pronouncements concerning the value system incorporated in the Constitution have expressed the view the principle of inherent and inalienable human dignity is at the core of the system.[10] The Court has also stressed Article 30 of the Polish Constitution lays down the axiological and normative foundation of the entire legal system.[11] It's even been accepted human dignity can be treated as an autonomous constitutional standard, including in the case of a constitutional complaint,[12] which implies the Constitutional Court sees Article 30 of the Polish Constitution as a source of subjective rights, questioning the refusal to treat dignity as a subjective right since it is placed among other general principles.[13]

The Court also emphasises regulations and norms guaranteeing human dignity, due to its nature and legal importance, cannot be excluded by other specific provisions concerning human rights and freedoms or substantive legal provisions based on the principle *lex specialis derogat legi generalis*.[14] As A. Zoll points out, no type of freedom and no right can be protected if they contravene human dignity, since they cannot contradict their own source [Zoll 2006, 281].

The Court has found that since human dignity is the source of individual rights and freedoms, this fact determines how they are understood and realised by the state. The prohibition against violating the dignity is absolute and binding on everyone.[15] This is the only right to which the principle of proportionality cannot be applied.[16] Thus, all the actions of public authorities should consider the existence of a sphere of autonomy wherein human

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9 See Safjan and Bosek 2016, comments on Article 30.

10 Judgment of the CC of 23 March 1999, ref. no. K 2/98.

11 Judgment of the CC of 27 May 2002, ref. no. K 20/01, Legalis no. 54123.

12 Judgment of the CC of 29 April 2003, ref. no. SK 24/02, Legalis no. 56666.

13 Judgment of the CC of 15 October 2002, ref. no. SK 6/02, Legalis no. 55388. The CC cites the doctrine in its arguments: Wojtyczek 2001, 210; Jabłoński 2001, 304; Urbanek 2000, 67.

14 Judgment of the CC of 7 March 2007, ref. no. K 28/05, Legalis no. 80542.

15 Judgment of the CC of 24 February 2010, ref. no. K 6/09, Legalis no. 209522; of 9 July 2009, ref. no. SK 48/05, Legalis no. 159125; of 30 October 2006, ref. no. P 10/06, Legalis no. 77571.

16 Judgment of the CC of 5 March 2003, ref. no. K 7/01.

beings can realise themselves in full socially though, on the other hand, these actions cannot lead to legal or social situations that remove the sense of dignity from individuals.[17]

The CC has found human dignity under Article 30 of the Polish Constitution is double in nature – it's a constitutional value and a right.

3.1. Human dignity as a value

The Court treats human dignity as a value "of a crucial significance to the axiology of the present constitutional solutions,"[18] of a guiding importance to the interpretation and application of "all the remaining provisions concerning individual rights, freedoms, and duties."[19] The Court describes it as a 'transcendent', 'absolute value' of a particular 'rank', since 'it's a link between the natural and statutory law'. It exerts a substantial influence on human rights while remaining above the law itself. It's a primary value that doesn't need to be 'acquired'. It's universal and serves everyone. It is a kind of 'matrix' for other values that helps the Court 'to read' these values and constitutional values that provide the former with detailed content in specific cases.[20] It's a 'regulator' of other rights.

Dignity as a value is distinct from other values of the Constitution and can be regarded as absolute. No constitutional value is higher than dignity. It cannot be replaced with another value or e.g. suspended. Dignity is independent from circumstances as well. It's not a relative value, therefore. The primacy of dignity among constitutional values is absolute [Granat 2014, 15].

3.2. Human dignity as a legal norm

Human dignity as a legal norm is easier 'to capture' than the dignity as a value, since it is a human subjective right that is independent from anyone's qualifications, mental and physical condition or everyday circumstances. It's a kind of respect due to any person. It can be violated with others' actions or with legal regulations. It's subject to an absolute protection, though, therefore the legislator cannot create legal or factual situations that deprive an individual of their sense of dignity.[21]

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[17] Judgment of the CC of 4 April 2001, ref. no. K 11/00, Legalis no. 49672.

[18] Judgment of the CC of 30 September 2008, ref. no. K 44/07, Legalis no. 106699, and of 27 May 2002, ref. no. K 20/01, Legalis no. 54123. M. Najman is of a contrary opinion that dignity should not be understood as a value – cf. Najman 2021, 95ff.

[19] Judgment of the CC of 24 February 2010, ref. no. K 6/09, Legalis no. 209522.

[20] Judgment of the CC of 9 July 2009, ref. no. SK 48/05, Legalis no. 159125.

[21] Ibid.; judgment of the CC of 30 September 2008, ref. no. K 44/07.

Dignity is a fundamental principle of the Polish Constitution which determines any attempts at viewing a human being from a legal perspective. Since the Polish law lacks regulations guaranteeing everyone the right to respect for their legal capacity,[22] this is human dignity that constitutes the principal source of the capacity. The legislator associates man's subjective status with the inherent and inalienable human dignity [Bosek 2012, 165-66].

4. THE NATURE OF HUMAN DIGNITY

The Polish Constitution introduces the concept of dignity while identifying its characteristics, namely, its inherence, which rules the norms of positive law as its source (it's not granted). It's characteristic of every human being[23] [Bronk 2010, 83]. It exists at every point in life. Therefore, human beings must be recognised and respected regardless of their condition, since human dignity is always the same [Complak 1998, 42]. It's not a source or foundation of being human, but an intrinsic, internal property of people [Piechowiak 1997, 14ff.]. A human person, even if they err, preserves their innate dignity without ever forfeiting it.[24]

The inherence determines the universality of dignity, which accrues to every human being on equal terms, and its non-disposability, or the impossibility of acquiring and disposing of it [Piechowiak 1999, 80; Dziedziak 2019, 95]. Dignity is not conferred on a human being by anyone. It cannot be lost in effect of the actions of others or of oneself, either [Piechowiak 2003, 5-35; Idem 2004, 41-42].

Inviolability is another feature of dignity. It is violated anywhere a human being becomes a mere object of actions by other entities. Inviolability is different than inalienability, though. The former is a normative characteristic – its recognition is expressed in the prohibition to sacrifice dignity for the sake of other values [Piechowiak 2009, 74-75]. On the other hand, inalienability is a descriptive characteristic – one cannot divest themselves of or disown it [Piechowiak 2013b, 656; Winczorek 2008, 79].

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[22] The legal capacity is clearly regulated in the basic documents of international human rights law. Cf. Article 6 of the Universal Declaration of Human Rights ("Everyone has the right to recognition everywhere as a person before the law") and Article 16 of the International Covenant on Civil and Political Rights ("Everyone shall have the right to recognition everywhere as a person before the law").

[23] Judgment of the CC of 22 November 2016, ref. no. K 13/15, Legalis no. 1532469.

[24] Jan Paweł II, *Orędzie do sekretarza generalnego ONZ „Wolność religijna podstawą praw ludzkich"*, in: *Dzieła zebrane Jana Pawła II*. Vol. V: *Orędzia. Przesłania. Przemówienia okolicznościowe*, Wydawnictwo M, Kraków 2007, p. 286.

Views on the attributes of constitutional human dignity and its rank in the constitution's hierarchy of values are summarised by L. Bosek. He calls it 'the constitutional principle, the principle of principles, which we deem absolute and fundamental, the basic constitutional principle, the principle of constitutional order, 'the guiding constitutional principle', 'the supreme principle of the constitutional objective law', 'the guiding idea of the Constitution', the general principle concerning human freedoms and rights, the principle of the entire legal order [Bosek 2012, 144].

5. HUMAN DIGNITY AND THE DUTIES OF PUBLIC ADMINISTRATION

The foregoing discussion implies human dignity becomes a source of duties for public administration relative to human beings and communities [Czarny 2001, 191] it is to serve by satisfying the collective and individual needs of citizens arising from life in communities [Boć 2007, 130]. The administration is bound to do so by norms and acts in relation to people generally or individually by resolving specific administrative cases.

The protection of dignity is a guideline for public administration by setting the limits of its actions. Article 30 sentence 2 *in fine* combines the negative duty of (prohibition against) violating the dignity and the positive duty of its respect and protection.[25] This means the duty of refraining from actions that violate dignity, of actions to prevent its violations and guarantee remedies in case of such violations [Wojtyczek 2001, 204]. Public authorities are also bound to react in any cases of violating or restricting human dignity. This obligation requires the provision of 'the most effective and broadest possible' protection of constitutional freedoms and rights and the removal of their violations. The absence of such a response allows for resorting to the available remedies to protect the rights [Chmaj 2002, 85]. Any interpretative doubts as to the removal of human right violations should be resolved with a view to expanding the mechanisms of protection of these rights.[26]

The duty of respecting and protecting dignity is first of all imposed on public authorities and applies to every area of law operation. The actions of the state and state functionaries can be legislative, executive or even actual.[27] The duty can be preventive, current or consequential. Z. Duniewska points out the state's activities in this area are primarily expressed

[25] Judgment of the CC of 9 July 2009, ref. no. SK 48/05, Legalis no. 159125.
[26] Judgment of the CC of 16 March 2011, ref. no. K 35/08, Legalis no. 299300.
[27] See Safjan and Bosek 2016, comments on Article 30.

in public legal regulations as police and performative actions [Duniewska 2005b, 19-20].

This duty must be actually realised. It's not about laying it down in law, but about its real fulfilment in practice. This is exemplified with respect for the general principles of administrative proceedings, regarded as a statutory guarantee of respect for the basic rights of parties to proceedings. These principles determine a range of duties the authorities have in respecting individual powers in order to protect them against unauthorised actions [Smarż 2018, 16]. Anyone coming into contact with the state empire must be treated not only justly under the law but with respect for their due dignity.

Article 8 of the Code of Administrative Procedure, according to which public administration authorities conduct their proceedings so as to generate parties' trust in public power, is of particular importance. The introduction of appropriate legal mechanisms is a necessary condition for the principle of dignity to be realised, but it is insufficient. Public authorities are to realise the principle in the process of law application in direct contact with their customers as well [Polak and Trzciński 2018, 271-72]. Therefore, a lack of assistance from the administration is highly reprehensible and cannot lead to a violation of the constitutionally protected human dignity, guarded by public administration[28] [Łukasiewicz 2004, 198].

The timely handling of cases needs to be addressed, too, stressed by the Regional Administrative Court in Wrocław in its judgment of 2 September 2020,[29] where it ruled the excessive length of proceedings or the inaction of an authority in dealing with a case may violate human dignity and thus breach constitutional principles. A situation where a party waits for a resolution from a public administrative authority too long cannot be reconciled with the democratic rule of law and clearly signals a gross violation of law. Such conduct of an authority obviously undermines an individual's trust in public administration authorities. The Court continued to point out it's beyond any doubt the negative experiences of parties in connection with an authority's inaction or excessively long proceedings are especially painful where such inaction (length of proceedings) becomes aggravated. This view accords with the decisions of the European Court of Human Rights (ECHR), which has repeatedly found protracted administrative proceedings are in breach of Article 6 of the European Convention on Human Rights.[30] The Court accepts a strong presumption an excessive length of proceedings causes a moral damage.[31]

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[28] Judgment of the CC of 15 April 2003, ref. no. SK 4/02, Legalis no. 56664.

[29] Ref. no. III SAB/Wr 662/20, Legalis no. 2499163.

[30] Cf. e.g., Fuchs versus Poland, complaint No. 33870/96, the judgment of 11 February 2003, and Beller versus Poland, complaint No. 51837/99, the judgment of 1 February 2005.

[31] Judgment of the Supreme Administrative Court of 11 July 2019, ref. no. I OSK 442/18,

The principle of subsidiarity needs to be mentioned, too, which assumes that wherever an individual is capable of taking care of themselves and their affairs, the public administration shouldn't intervene, while where an individual is helpless, the administration is bound to help. It should assist an individual with their efforts before, though, guide their actions, and make them feel not overwhelmed with the administration's actions but supported. When other options are not available, the public administration can carry out its actions or deal with an affair on behalf and for the benefit of an individual [Giełda 2017, 56].

Public administration should not only respect individual dignity but also draw the legislator's attention to any necessary changes to law. As the Constitutional Court is right to note, the legislative powers, one of public authorities, are especially charged with respecting and protecting human dignity.[32] This is stressed by J. Blicharz, who emphasises law exists for humans [Blicharz 2012, 27-28].

Public administration should protect and guard human dignity [Giełda 2017, 46 and 56]. The Supreme Court has underlined[33] the public authorities' duty of respecting and protecting human dignity is particularly important wherever a state acts as part of an empire, pursuing its repressive goals whose execution cannot restrict human rights and dignity more than is implied by the protective aims and purpose of a given means.[34] This protects citizens from the actions of public administration authorities that impair the value expressed in Article 30 of the Constitution.

CONCLUSIONS

The legal orders of particular states are founded on specific values. Human dignity is a crucial value in the Polish legal system and a principle the state political system and the entire legal system are built upon.

It constitutes the source of the remaining freedoms and rights, including those not explicitly declared in the constitutional law. It's universal and thus becomes a measure of how human beings are treated by public authorities. In discharge of its statutory duties, public administration must have regard to human dignity at all times. It must be respected and protected. Therefore, the administration cannot act where human dignity would be violated and must act where the dignity is at risk. The protection of this dignity

Legalis no. 2232695. Cf. Scordino against Italy, 36813/97, the judgment of 29 March 2006.

[32] Judgment of the CC of 19 May 1998, ref. no. U 5/97, Legalis no. 10436.

[33] Judgment of the Supreme Court of 2 October 2007, ref. no. II CSK 269/07, Legalis no. 88045.

[34] Judgment of the Supreme Court of 30 November 2006, ref. no. I CSK 269/06, Legalis no. 161066.

should be a fundamental characteristic of public administration's actions. It becomes the source of public administration's special duties towards human beings and communities as far as the respect for and protection of human dignity are concerned.

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ELECTRONIC COMMUNICATION BETWEEN ENTERPRISES AND AUTHORITIES

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Abstract. A dynamic growth of electronic services in every area of human activity is a fact. This also applies to the ways in which enterprises communicate with public authorities. The legal regulations introduced in Poland bind enterprises to engage in electronic communication via a network of electronic public services. An analysis of the legal foundations of electronic communication between enterprises and authorities is the purpose of the article. The author defines the concept of electronic communication and how it links to electronic administration. The author presents the amended terms of serving documents in administrative proceedings. Electronic public services for enterprises are covered in the final section of the paper.

Keywords: public e-services; electronic administration; enterprise; electronic communication; electronic delivery

INTRODUCTION

Electronic administration and its application are becoming an alternative to services provided traditionally. The state can be observed to focus on dealing with customers in electronic format, a range of public e-services are implemented for citizens and enterprises. The legislative efforts that introduce electronic communication to the institution of deliveries in administrative proceedings show the application of IT technologies is the future of administration. This also applies to enterprises acting in connection to communication with authorities. They have the option of using a range of public e-services, including: Electronic Platform of Public Administration Services, (EPUAP), biznes.gov.pl portal, the Electronic Services Platform (PUE) offered by the National Insurance Company (ZUS), e-Tax Office, e-Pit system, and many others. Without leaving home and based on the Internet, a range of transactions can be undertaken, from starting to closing a business through a variety of formalities.

This paper will aim to analyse the legal foundations of electronic communication, to define it and determine its relation to the electronic public administration. The institution of electronic delivery in administrative

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proceedings will be discussed then. Due to the space constraints of this text, only selected public services for enterprises will be discussed.

1. THE CONCEPT OF ELECTRONIC COMMUNICATION

The IT Implementation to Entities Discharging Public Duties Act of 17 February 2005 is crucial to electronic communication.[1] K. Wojsyk, Cz. Martysz and G. Szpor point out this Act and the executive acts grounded therein are the starting points for the participation of the state and its entities in electronic document flows and supplements to the regulations concerning electronic communication [Martysz, Wojsyk, and Szpor 2015]. The Provision of Services By Electronic Means Act of 18 July 2002,[2] the Trust Services and Electronic Identification Act of 5 September 2016,[3] the Access to Public Information Act of 6 September 2001,[4] as well as the Electronic Deliveries Act of 18 November 2020[5] were the subsequent legal acts. They have defined the fundamental concepts, principles, duties, and competences of authorities regarding electronic communication.

Before defining the concept of electronic communication, it should be remembered attempts at definitions of communication have been undertaken in specialist literature a number of times. According to B. Dobek-Ostrowska, it's "a process of exchanging ideas and information among individuals, groups or institutions in order to share thoughts and knowledge. The process takes place at a variety of levels using diverse means and causing certain effects" [Drobek-Ostrowska 2002, 7]. This definition indicates communication among different entities by various means, including those of electronic communication. A. Monarcha-Matlak notes "communication takes place only after the contents of a message are decoded. This means electronic communication is an activity involving at least two parties, namely, a sender acting upon a receiver and a receiver acting upon a sender. Where intentions are not read and signs contained in transmitted signals are not interpreted, that is a case of control" [Monarcha-Matlak 2017, 142]. The author proceeds to define electronic communication as one by means of computers [ibid., 143]. It must be noted the communication is also possible by means of telephones

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1 Act of 17 February 2005, the IT Implementation to Entities Discharging Public Duties, Journal of Laws of 2021, item 2070 as amended [hereinafter: the IT Implementation Act].

2 Act of 18 July 2002, the Provision of Services By Electronic Means, Journal of Laws of 2020, item 344.

3 Act of 5 September 2016, the Trust Services and Electronic Identification, Journal of Laws of 2021, item 1797.

4 Act of 6 September 2001, the Access to Public Information, Journal of Laws of 2022, item 902.

5 Act of 18 November 2020, the Electronic Deliveries, Journal of Laws, item 569 as amended.

with Internet access, tablets or other electronic devices featuring appropriate technical solutions which allow for the exchange of information.

The legislation, meanwhile, defines the means of electronic communication[6] as technical solutions, including ICT equipment and the associated software tools, which enable remote individual communication using data transmission between ICT systems, in particular, electronic mail. M. Błażewski notes "the means of electronic communication serve to facilitate the transmission of information within public administration or between private actors, public administrative authorities, and administrators" [Błażewski 2017, 272]. The legal definition of the electronic provision of services, that is, the execution of a service without a simultaneous presence of parties (remotely) by transmitting at an individual request of a service user, sent and received by means of equipment for electronic data processing including digital compression and storage, sent, received or transmitted in full by means of a telecommunications network under the Telecommunications Law of 16 July 2004,[7] is important from the viewpoint of electronic communication as well. An electronic service is strictly dedicated to a specific person and delivered with electronic equipment and Internet connections [Romaniuk 2022, 272]. Thus, a public e-service can be defined as one provided by means of electronic communication between entities of different types, including a public administrative authority. P. Romaniuk points out e-services are based on several identical conditions, that is, an almost fully automated transmission (provision) with state-of-the-art information/IT technologies, realisation (at least in part) on and via the Internet, personalisation for a specific user, and different locations of actors involved in a service [Idem 2019, 272].

P. Ruczkowski notes the extent of electronic communication continues to expand also in citizens' contacts with public authorities, part of the process of the IT implementation to the state [Ruczkowski 2016, 149]. The notion of electronic communication is addressed in the context of electronic administration. Electronic public administration is tasked with building a kind of "a digital bridge" between authorities and the users of public services to streamline economic processes and simplify administrative procedures while reducing operational costs [Stempnakowski 2007, 58]. M. Ganczar and A. Sytek say all the actions of the public administration using new information technologies are known as e-government [Ganczar and Sytek 2021, 60]. Electronic administration should be seen in the context of digital technologies, the Internet, and the means of electronic communication used

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6 Act of 18 July 2002, the Electronic Provision of Deliveries, Journal of Laws of 2020, item 344 [hereinafter: EPD], Article 2 point 5.

7 Act of 16 July 2004, the Telecommunications Law, Journal of Laws of 2022, item 1648 as amended.

to support the public, enterprises and other actors. J. Janowski points out electronic administration allows for access to authorities from any location and at any time, for dealing with a case via the Internet, a simplified service, uninterrupted supply of information, and lower operating costs. It should also provide a flexible and open mechanism for the cooperation among staff of various levels in order to settle the cases of individual customers (including citizens, enterprises, private individuals, and corporations) and to meet their collective needs [Janowski 2009, 52-53]. These advantages also include the ongoing operation of public administration, like at the time of COVID-19 pandemic [Świtał 2022, 20], when movement and contacts were restricted. A. Skóra and P. Kardasz claim the benefits of electronic communication may give rise to a variety of problems resulting from this form of contacts between authorities and individuals. They emphasise the breakdowns of technical means and ICT network for electronic communication, data transmission errors or interruptions and slow data transfers, among other issues [Skóra and Kardasz 2021, 303]. The need of access to the Internet infrastructure, which is becoming widespread, is a major condition that directly affects the dynamics of e-service development. An insufficient access to broadband connections is highlighted, though [Romaniuk 2022, 451]. D. Skoczylas also indicates a variety of threats to the correct functioning of electronic communication, key and digital services, and critical infrastructure. These include hacking, the installation of malware, prevention of access to system data by data theft, disclosure to third parties, unauthorised use, and stopping the operation of critical infrastructure and public registers [Skoczylas 2020, 951]. Therefore, ensuring the efficient system operation, standardisation, interoperability, and above all an adequate protection and cybersecurity of electronic systems will be crucial to the electronic administration.

2. ELECTRONIC DELIVERY AS A FORM OF CHANGING CONTACTS WITH AUTHORITIES

Delivery is defined as an act of a public administrative authority to which the Code attributes legal effects [Wróbel and Jaśkowska 2013, 356]. In line with Article 14 of the Code of Administrative Procedure,[8] cases should be dealt with in writing or in the format of electronic documents served by means of electronic communication. In the case of electronic delivery, correspondence is served on a party to or another participant in proceedings to: an electronic mailing address recorded in an electronic address database

[8] Act of 14 June 1960, the Code of Administrative Procedure, Journal of Laws of 2022, item 2000 as amended [hereinafter: CAP].

and, in the case of an attorney, to an electronic mailing address designated in the application; an electronic mailing address associated with the qualified service of registered electronic delivery through which the application has been submitted if an electronic mailing address of a party to or another participant in proceedings is not recorded in an electronic address database (Article 39[1] CAP). The institution of electronic delivery, like M. Adamczyk stresses, had been known in Article 63(1) CAP prevailing until 5 October 2021, which allowed applications in writing, by telegraph, telefax or orally for the record, as well as by other means of electronic communication via an electronic inbox of a public administrative authority established under the IT Implementation to Entities Discharging Public Duties Act of 17 February 2005 [Adamczyk 2022, 9]. The regulations concerning electronic deliveries are amended to adapt the Polish legislation to the Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [Kardasz 2021, 446]. The Regulation understands the service of registered electronic delivery as enabling data transmission between third parties by electronic means and ensuring the evidence of the data transmitted, including proof of data sending and receipt, and protecting the data from the risk of loss, theft, damage or any unauthorised modification. Thus, the service provides for the integrity of data transmitted electronically, allows for an unambiguous identification of their sender and recipient and for a confirmation of both dispatch (sending) of the data by the sender and their receipt by the addressee.[9]

This amendment to deliveries in administrative proceedings completely modifies the institution. Article 39(1) CAP binds a public administrative authority to serve correspondence to an electronic mailing address under Article 2(1) EPD, unless such delivery is effected to an account in the authority's ICT system or in the authority's offices [Gacek 2022]. The new system of deliveries is envisaged as universal, including a range of legal procedures both with public administration and courts [Wilbrandt-Gotowicz 2022, 557]. A. Skóra notes the design of the Electronic Provision of Deliveries Act rests on two basic principles adumbrated in Article 1 EPD: the universality of electronic deliveries and the primacy of electronic over traditional deliveries [Skóra 2022, 474]. The latter consists in the organisation of the correspondence exchange around the public service of registered electronic delivery to an electronic mailing address (in the electronic address database – Article 1 in conjunction with Articles 38ff. EPD) [ibid.]. As A. Bródka

[9] The Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, EU OJ of 2014, No. 257.

points out, encouraging customers to make entries in the Email Address Base and a due, earlier testing of the system should be most pressing and important goal of public entities. Since public administrative authorities have not yet been obliged to make electronic deliveries, a customer, even if they have made their entry in the EAB, will not receive their correspondence at the address provided in the base [Bródka 2022, 18]. An entry of an address in the electronic mailing address database is tantamount to requiring that public entities deliver their correspondence to that address [Jaśkowska, Wilbrandt-Gotowicz, and Wróbel 2022].

A public hybrid service, on the other hand, is a postal service defined by Article 2(1)(3) of the Postal Law,[10] provided by a designated operator where a letter is sent by a public entity. The other form, the public hybrid service, involves the sending of mail by means of electronic communication if it has the form of physical mail at the stages of receiving, moving or delivery of information messages [Gacek 2022]. The method is supplementary, however. M. Wilbrandt-Gotowicz notes the legislator has decided to regulate the service as part of a unidirectional model, only from public to non-public entities. A transformation of citizens' correspondence addressed to courts or authorities from the paper to the electronic format by an external entity would not provide an adequate guarantee of the rights to privacy and confidentiality of correspondence [Wilbrandt-Gotowicz 2022, 565].

The changing approach to deliveries and the shift from the traditional model to electronic communication are also part of the changes grounded in regulations for enterprises, mainly with regard to obligatory public e-services. One hopes the regulations, once introduced, actually improve the communication between enterprises and public administrative authorities.

3. ELECTRONIC SERVICES FOR ENTERPRISES

Like R. Biskup and M. Ganczar note, the process of introducing information technology to public administration focuses on providing for electronic support to citizens and other parties concerned by public authorities [Biskup and Ganczar 2008, 59]. Such actions are part of a broadly-defined introduction of IT to public administration. The process has gained rate lately, as evidenced by the implementation of a range of public services to virtually any area. These efforts are also addressed to enterprises as part of public e-services. The electronic portals and offices that supply electronic services are discussed in this section of the paper. Due to space constraints, the operation of biznes.gov.pl portal, *Elektroniczna Platforma Usług Administracji Publicznej* (Electronic Platform of Public Administration Services, ePUAP),

[10] Act of 23 November 2012, the Postal Law, Journal of Laws of 2022, item 896 as amended.

the Electronic Services Platform (PUE) offered by the National Insurance Company (ZUS), and e-Tax Office will be discussed.

The portal biznes.gov.pl is the first of the government portals dedicated to enterprises. It is administered by the Ministry for Enterprise and Technology. It is addressed to those who intend to start and who run their businesses.[11] Its builders says the three key pillars of the portal are: services helping enterprises to deal with their cases on the Internet, up-to-date content about prevailing legislation, procedures and formalities required to start and run business in Poland and the European Union, as well as a Centre for Enterprise Assistance, where experts answer business questions. Present and future entrepreneurs, their representatives, and officials using the systems of the Central Registration and Information on Business (CEIDG) are the major beneficiaries.[12] The portal can be accessed after setting up an Enterprise Account. It provides more than 300 e-services on the Biznes.gov.pl and a full access to information available with the CEIDG.[13] The enterprise services include registration, suspension, renewal, and closure of business, the option of making modifications to the CEIDG, the recognition of professional qualifications, regulation of transborder services supplied in Poland, and certifications of VAT payer status.

The Electronic Platform of Public Administration Services (ePUAP) is the most widespread form of electronic services. Its main objective is to concentrate the government administration services on a single platform, which guarantees the creation of a secure, standard, legally binding electronic channel that offers the public administration services to all citizens, enterprises, and public administration [Wiewiórowski and Wierczyński 2008, 351]. The scope and conditions of the platform, including the account creation and the administration of a service catalogue on the ePUAP, as well as the exchange of information between the ePUAP and other ITC systems are determined in the Administration and Digitalisation Minister's Regulation on the scope and conditions of the electronic platform of public administration services of 6 May 2014.[14] Via the ePUAP, an authority can also serve e-correspondence on a party (or another participant in proceedings) both to their individual mailing account (inbox) with the ePUAP platform and to another email address supplied by such a party, e.g., an electronic mail address [Kardasz 2021, 458]. Key services for enterprise comprise: PIT

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11 See https://www.biznes.gov.pl/pl/portal/03129 [accessed: 31.12.2022].

12 Ibid.

13 E-services and information for enterprises, https://www.gov.pl/web/rozwoj-technologia/e-uslugi-i-informacje-dla-przedsiebiorcow [accessed: 31.12.2022].

14 Act of 6 May 2014, the Administration and Digitalisation Minister's Regulation on the scope and conditions of the electronic platform of public administration services, Journal of Laws of 2019, item 1969 as amended.

and CIT settlements, settlement of means of transport taxes, VAT declarations, payment of stamp duties, applications to have employees reported for health insurance, applications to have due dates of insurance contributions delayed, applications for individual or general interpretations, certifications of non-arrears in current liabilities, registration and de-registration of vehicles. An account and a trusted profile are required to use the ePUAP. The profile enables communication with public administration authorities and serves as a tool of identification. The trusted profile can be used to sign any electronic document.

The Electronic Services Platform (PUE) offered by the National Insurance Company (ZUS) is another system. Every contribution payer has been bound by law to hold their profile there since 1 January 2023.[15] The system enables viewing data stored by the National Insurance Company, the transfer of insurance documents, submission of applications and receipt of responses, querying the ZUS and getting answers, and arranging for visits to ZUS offices. Enterprises have access to business information on the PUE ZUS, including the information about the balances of current and monthly settlements of contributions paid to the ZUS, about payable contributions, payments, annual information for contribution payers, and settlement declarations submitted to the ZUS. Enterprises can also view the lists of individuals submitted to insurance and lists of workers on medical leave.[16] The PUE ZUS features a free application *ePłatnik* (ePayer) for the handling of insurance documents. This tool is targeted at small and medium-sized enterprises (up to 100 insured). It's easy to operate thanks to creators that step by step guide users through the stages of filling insurance documents. The ePayer's key functions include the completion of insurance documents and their transfer on the Internet, filling documents with data directly from the ZUS system, online verification, and blocking of faulty documents submitted to the ZUS.[17]

E-Tax Office is the final digital office to be discussed. It's another virtual administrative office, designed primarily to develop the e-service catalogue of the National Revenue Administration (KAS), chiefly concerning the VAT, PIT and CIT and using the information resources of the finance ministry and communication channels. E-Tax Office is an information and transactional portal where authorised taxpayers who are private individuals, corporations or organisations without legal personality will have access to fiscal information concerning them, to the cases of other taxpayers to which

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[15] Act of June 2021, the obligation is imposed by the Act Amending the National Insurance System Act and Certain Other Acts, i.e., Journal of Laws of 2021, item 1621.

[16] See more: Information on PUE ZUS, https://www.zus.pl/baza-wiedzy/o-platformie-uslug-elektronicznych-pue-/o-platformie-uslug-elektronicznych-pue-/informacje-dotyczace-pue [accessed: 04.01.2022].

[17] Ibid.

they are appropriately authorised, and of other taxpayers who have submitted relevant authorisations.[18] The creators of the e-office assume it will enable the online dealing with PIT, CIT, and VAT cases. KAS customers will also be provided (by means of a web or mobile application) access to five groups of services, namely, e-Taxpayer, e-Payers, e-Representative, e-Bailiff, and e-Notary channels. Those will contain, among other things, information about settlements, case status, and documents submitted in relation to all taxes. Furthermore, more tax cases will be dealt with electronically and comprehensively, the clarity and transparency of the KAS's operations, the quality and scope of communication between the KAS and its customers will improve, the time devoted to the fulfilment of fiscal duties will be shorter, irregularities in their discharge will be limited, a single access point to the finance ministry e-services will be available, the preparation and submission of information/ data and forms will become simpler, and data dispersed across a variety of systems will be integrated and thus available to other public entities.[19]

CONCLUSIONS

The application of electronic communication to administration has already become universal. Electronic public services are present in nearly all the spheres of the state's activity. The paradigm of and approach to public services are changing and a digital revolution is taking place. This is also true of enterprises, expected to fulfill their duties in contacts with authorities via electronic portals and virtual offices. This is evidenced, for instance, by the obligatory forms of contacts with offices by means of the Electronic Services Platform offered by the National Insurance Company (PUE ZUS) and the e-Tax Office. They offer a range of services for businesses and more are being implemented. The state binds enterprises to support and carry out certain duties in the electronic format only. The electronic delivery, the basic form of deliveries in administrative proceedings now, has also been implemented as part of the adjustment of regulations to the EU law. The progressing digital revolution is evident in administrative and fiscal proceedings, national insurance or public tenders. Security, access to broadband, and adequate education and awareness of the Internet use for official contacts will be crucial to the operation of e-services. As the experience of the COVID-19 pandemic has shown, electronic administration in a dangerous situation became a requirement for contacts with authorities and provided for their ongoing operation.

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[18] E-Tax Office, https://www.gov.pl/web/finanse/e-urzad-skarbowy [accessed: 04.01.2022].

[19] Ibid.

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LEGAL AND INSTITUTIONAL SYSTEM OF REFUGEE PROTECTION AND SUPPORT IN POLAND AFTER 1989

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Abstract. The aim of the article is to present legal and institutional solutions to support and help refugees in Poland after 1989. The article presents the rights and obligations of foreigners who have been granted refugee status or, in the case of persons who do not meet the conditions for granting refugee status, subsidiary protection. The system of support and protection of foreigners in Poland is shaped on the basis of international, EU and national law. Foreigners with international protection may receive: social, medical, material and integration assistance. The article characterizes each type of assistance that foreigners who have been granted international protection can count on. Today, Poland is increasingly becoming a destination for immigration and foreigners seeking shelter. As a consequence, the question arises – is the system of support and assistance for refugees in Poland sufficient? As indicated by the adopted solutions in this regard, in many areas such as material or integration assistance, the adopted solutions are insufficient.

Keywords: refugee; refugees; migrations; international protection; integration

INTRODUCTION

Migrations and refugees are not new phenomena, however, in recent years, these phenomena have gained an unprecedented pace. The reasons for this state of affairs can be seen in many factors of a legal, economic, cultural, religious or political nature. Stephen Castles points out that contemporary migrations are the result of three groups of factors: the social dynamics of migration movements, factors related to globalization and factors present in political systems [Castles 2004, 857]. Contemporary forced migrations are an important security issue, not only from the perspective of individuals, but also from the perspective of countries. It is the states, as the most important entities in shaping population movements, that strive to maintain and implement a certain state of security. Relations between migration and the state also concern the sphere of sovereignty. Gary Freeman argues that immigration is changing the traditional notions of sovereignty, nationalism and citizenship, and the current understanding of these

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concepts is now untenable [Freeman 1997, 48]. The state's migration policy is the answer to the dynamics of migration processes. It is worth noting that the state policy towards migration does not explain their causes, but rather responds to them by acting on possible consequences for the society, economic system or state security. Marek Okólski claims that migration policy is a specific type of state activity. This is because it concerns sovereign prerogatives, areas of key importance for the security of citizens [Okólski 1998, 4]. State policy is one of the elements shaping migration, as it is important in the context of decisions determining the movement of people to their destination. It is through a specific model of policy that foreigners obtain the opportunity to stay in the destination country after meeting the necessary conditions, they acquire citizenship, they are guaranteed rights, but also obligations. State policy is important for the size of migration flows, as it regulates the conditions of entry to, stay in and departure from the country. Thus, migration policy includes the multidimensional nature of the issues it regulates. One of the aspects of its implementation is helping refugees.

Social, economic and political changes that took place in Poland after 1989 result in an increasing percentage of foreigners living or working in Poland. These changes had a significant impact on political, social, economic and cultural life. The fall of communism, which for almost 45 years ideologically determined the way of conducting politics, opened up new perspectives for the Polish state. New opportunities to travel and employ foreigners were created, they also gave the opportunity to shape the support system for those who seek protection in Poland. Agnieszka Floraczak points out that the reasons for the influx of refugees to Poland after 1989 include, among others, democratizing the political system, improving the economic situation, accepting international commitments in the field of human rights protection, tightening the conditions for granting refugee status in Western European countries or the transit location of the country [Florczak 2003, 101-102].

1. LEGAL BASIS FOR INTERNATIONAL PROTECTION OF FOREIGNERS IN POLAND

As already mentioned, refugee migrations have various causes. Most often they include political and religious persecution, racial persecution, wars, changes in state borders, expulsions, ethnic cleansing or natural disasters. Exile also often has a transnational dimension. The legal regulations concerning the protection of foreigners have a twofold character. We can distinguish international protection, governed by the provisions of international law or EU law, and the second type, concerning national protection, governed by the provisions of national law, which is valid only on the territory

of a given state. The forms of international protection in Poland include: refugee status, subsidiary protection and temporary protection. In turn, the forms of national protection in Poland include: asylum, residence permit for humanitarian reasons, tolerated stay permit, temporary residence permit for victims of trafficking in human beings, temporary residence permit issued due to respect for the right to family life and the rights of the child.

The issue of international protection of foreigners is largely based on international obligations, which does not mean that there are no legal solutions in the analysed scope under national law. On April 2, 1997, a new Constitution of the Republic of Poland was adopted.[1] Chapter II, entitled "Freedoms, Rights and Obligations of Man and Citizen", contains provisions on the legal protection of foreigners. It is worth mentioning that the general principles defining the status of an individual mean that a foreigner is entitled to common and basic values of every human being, and these are: dignity, freedom, equality before the law, prohibition of discrimination [Kumela-Romańska 2017, 102-103]. Article 56 of the Constitution provides that "1. Foreigners may take advantage of the right of asylum in the Republic of Poland on the terms set out in the Act; 2. A foreigner who seeks protection against persecution in the Republic of Poland may be granted refugee status in accordance with international agreements binding on the Republic of Poland." In the indicated Article, two forms of assistance to foreigners were given a statutory rank – the status of an asylum seeker and a refugee. The conditions for obtaining the status of an asylum seeker or refugee must be regulated by statutory provisions, especially since upon obtaining the aforementioned status, foreigners enjoy protection and rights under the Constitution. At this point, it should be noted that the freedoms and rights in question cannot be unlimited. Barbara Kowalczyk, analysing the content of the provisions contained in Chapter II of the Constitution, points to the dualism of rights and freedoms due to the entitled entities. He comes to the conclusion that there are rights and freedoms that everyone is entitled to, regardless of nationality.[2] At the same time, it indicates that the Constitution contains a general limiting clause that allows for the introduction of restrictions on the rights and freedoms of foreigners by statute. Article 37(2) of the Constitution does not list the catalogue of grounds and principles for the scope of restrictions on rights and freedoms. The regulations contained in this article determine the conditions for differentiation in the treatment of citizens and foreigners regarding the exercise of rights and freedoms recognized by the Constitution as human rights and freedoms.

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

[2] Cf. Wróbel 2002, 154; Kowalczyk 2014, 58.

Apart from the Constitution of the Republic of Poland, regulations concerning the legal protection of foreigners are also included in international agreements ratified by Poland, community law, normative acts of statutory rank and regulations. In the context of the legal situation of refugees, the so-called the 1951 Geneva Convention[3] and the 1967 New York Protocol.[4] The indicated acts of international law were ratified by Poland in 1991. By ratifying both documents, Poland became a party to two basic acts of international law in the field of migrants and refugees. The Geneva Convention defines the concept of a refugee and who can be considered a refugee. It sets out the basic standards that states parties should meet for the refugees they protect. The Convention also defines the obligations of the refugee in the host country. Thanks to the ratification of these documents, Poland was recognized as a safe third country.

As mentioned, the Geneva Convention introduces a definition of a refugee. Article 1 of the Convention defines a refugee as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to that country." The Convention identifies five types of reasons that give grounds for granting refugee status. These are persecutions due to: race, religion, nationality, political beliefs and belonging to a particular social group. According to Karolina Łukasiewicz and Witold Klaus, due to the fact that this document was created in specific socio-political conditions and due to the passage of time, it requires amendments in several areas. The authors point out that there is no gender factor among the reasons for persecution. This results in the necessity of interpreting this condition from another one listed by the Convention, namely "membership of a social group". Secondly, there is no central authority to which individuals could lodge complaints about state malfunctions. Thirdly, according to the authors, the Geneva Convention defines the term "refugee" too narrowly. Łukasiewicz and Klaus believe that the document mainly touches on the premises of political persecution without taking into account those of a climatic nature [Łukasiewcz and Klaus 2018, 358].

At the same time, it is worth noting that Poland, by becoming a member of the European Union, has committed itself to implementing EU law into

[3] Convention relating to the Status of Refugees of 28 July 1951, Journal of Laws of 1991, No. 119, item 515.

[4] Protocol relating to the Status of Refugees of 31 January 1967, Journal of Laws of 1991, No. 119, item 517.

national law, also in the field of refugees. As an example, the so-called a procedural directive setting out minimum standards for procedures for granting refugee status.[5] The most important acts of national law regulating the protection of foreigners, in addition to the above-mentioned constitution, include: 1) Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland;[6] 2) Act of 12 December 2013 on foreigners;[7] 3) Act of 12 March 2004 on social assistance.[8]

The first of the above-mentioned acts regulates the principles of granting protection to foreigners on the territory of Poland, together with an indication of the competent authorities in matters of granting it. Article 13(1) GPF states that refugee status is granted in the event that a foreigner "due to a well-founded fear of persecution in the country of origin due to race, religion, nationality, political beliefs or membership of a particular social group is unable or unwilling to avail itself of the protection of that country." The Act also indicates the premises of persecution, in other words, what persecution may consist of and the elements that the competent entity should take into account when assessing persecution. The Polish legislator indicates that persecution, due to its nature and repetition, must constitute a violation of human rights or be an accumulation of various actions or omissions, also constituting a violation of human rights, having severe consequences such as persecution (Article 13(3) GPF). In turn, the legislator in Article 13(4) GPF indicates a catalogue of circumstances that may be considered persecution. These are: a) physical or psychological violence, including sexual violence; b) application of legal, administrative, police or judicial measures in a discriminatory manner or of a discriminatory nature; c) initiating or conducting criminal proceedings or sanctions in a disproportionate or discriminatory manner; d) no right to appeal to a court against a disproportionate or discriminatory penalty; e) initiation or conduct of criminal proceedings or punishment for refusal to perform military service during a conflict, if performing military service would constitute a crime or a crime against peace, a war crime or a crime against humanity as defined by international law, actions contrary to the purposes and principles of the United Nations set out in the Preamble and Article 1 and 2 of the United Nations Charter, a crime of a non-political nature outside the territory of the Republic of Poland before submitting the application for international protection; f) acts directed against persons because of their gender or minority.

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[5] See Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Official Journal of the EU L 326 of 13.12.2005.

[6] Journal of Laws of 2023, item 185 [hereinafter: GPF].

[7] Journal of Laws item 1650 as amended.

[8] Journal of Laws No. 64, item 593 as amended [hereinafter: SA].

Moreover, the Act specifies the circumstances of refusal to grant refugee status or deprivation of it. In Poland, each application for protection in the territory of the Republic of Poland by a foreigner is treated as an application for refugee status, unless he/she indicates that it is about asylum [Grzymała-Kazłowska and Stefańska 2014, 205]. If a given foreigner does not meet the criteria for granting refugee status, the grounds for granting subsidiary protection are examined in the course of the proceedings. In Article 15 GPF, the legislator indicated cases when a foreigner may be granted this form of protection. Thus, a foreigner who does not meet the conditions for granting the refugee status is granted subsidiary protection if returning to the country of origin may expose him to a real risk of suffering serious harm by: imposing the death penalty or execution, torture, inhuman or degrading treatment or punishment, serious and individualized threat to life or health resulting from the widespread use of violence against civilians in a situation of international or internal armed conflict – and due to this risk, he cannot or does not want to use the protection of the country of origin.

The refugee procedure itself begins when a foreigner submits an application to the Head of the Office for Foreigners through the commanding officer of the Border Guard unit or post. The authority conducting the proceedings for granting international protection decides in the first place on granting or refusing to grant the foreigner refugee status, and in the case of refusal to grant the refugee status, decides on granting or refusing to grant subsidiary protection (Article 47(1) GPF).

2. KINDS OF SUPPORT AND ASSISTANCE TO FOREIGNERS HAVING OR APPLYING FOR REFUGEE STATUS

Foreigners who apply for international protection may receive social and medical assistance. The forms of social assistance that may be used by foreigners staying in a refugee center include: accommodation in a refugee center, meals, pocket money for small personal expenses, cash support for the purchase of cleaning and personal hygiene products in the amount of PLN 20 per month or cleaning and hygiene products personal, one-off cash assistance in the amount of PLN 140 or gift vouchers for the purchase of clothing and footwear. In addition, providing a cash equivalent in exchange for food for children up to 6 years of age and children fulfilling the school obligation in the amount of PLN 11 per day. Persons staying outside the center may receive a cash benefit to cover the costs of staying in Poland on their own. It should be noted that the cash benefit does not cover medical assistance.

Norbert Rafalik sees two important, positive issues in the help provided outside the centre. He believes that foreigners living outside the center can integrate faster with the environment in which they stay. The problems they face force foreigners to take action to solve them. The second argument raised by Rafalik is the difference in the cost of living for immigrants staying in the centers and those who live outside them. He believes that the cost of living for foreigners who do not live in the center is much lower, which in turn translates into lower expenses from the state budget [Rafalik 2012, 31]. A cash benefit may be granted when it is justified by organizational reasons or when it is necessary to: ensure the safety of a foreigner, taking into account the special situation of single women; protection of public order; protecting and maintaining family ties; preparing a foreigner to lead an independent life outside the centre, after receiving a decision on granting the refugee status or a decision on refusal to grant the refugee status in which subsidiary protection was granted (Article 72(1) GPF).

Social assistance is provided until the application is considered and the final decision on international protection is issued. The amount of financial assistance is regulated by the Regulation of the Minister of the Interior and Administration on the amount of assistance for foreigners applying for refugee status.[9] The amount of the cash benefit for one person staying outside the center is PLN 25. If the foreigner stays in Poland with his spouse or children, the cash benefit varies depending on the number of people. In the case of two, it is PLN 20; three people – PLN 15; four and more – PLN 12.5 per person per day.

Table 1. Cash benefit under social assistance granted to foreigners applying for international protection to cover the costs of stay on the territory of the Republic of Poland

Number of family members	**Daily amount per person**	**Monthly amount per person**
1 person	25 PLN (approx. 6,25 EUR)	750 PLN (approx. 187,5 EUR)
2 persons	20 PLN (approx. 5 EUR)	600 PLN (approx.. 150 EUR)
3 persons	15 PLN (approx. 3,75 EUR)	450 PLN (approx. 112,5 EUR)
4 persons	12.50 PLN (approx. 3 EUR)	345 PLN (approx. 93,75 EUR)

Source: own study based on the Regulation of the Minister of the Interior and Administration of 19 February 2016 on the amount of assistance for foreigners applying for international protection, Journal of Laws item 311.

[9] Regulation of the Minister of the Interior and Administration of 19 February 2016 on the amount of assistance for foreigners applying for international protection, Journal of Laws item 311.

In addition, all foreigners, regardless of the form of assistance, are entitled to assistance in learning the Polish language along with basic didactic materials necessary to learn the language, coverage, if possible, of the costs of extracurricular and recreational and sports activities for children. In addition, foreigners applying for international protection are entitled to finance travel by public transport in order to participate in the procedure for granting international protection or for the purpose of treatment or vaccination, or in other justified cases. It is worth noting that foreigners, apart from the support offered by the state, may also participate in activities organized by non-governmental organizations. Such forms include, among others: courses of Polish culture, language classes or vocational courses. These activities are referred to as pre-integration assistance [Grzymała-Kazłowska and Stefańska 2014, 206]. In addition, an applicant for international protection may also benefit from the so-called assistance in voluntary return, return to the country to which he has the right to enter and assistance in the event that a foreigner is transferred to another Member State responsible for examining the application for international protection.[10]

One of the forms of assistance provided to foreigners applying for refugee status is accommodation. As previously indicated, these people may be staying in special centres or staying outside them. You can indicate centres that are open and those that are closed. The former are conducted by the Office for Foreigners, while the latter are conducted by the Border Guard. The Head of the Office for Foreigners may commission social organizations, associations or other legal entities or natural persons to run such centres. According to information from the Office for Foreigners, nine centres currently run (May 2023) by the Office are located in four provinces: 1) Kujawsko-Pomorskie: Grupa near Grudziądz, 2) Lubelskie: Bezwola, Biała Podlaska, Łuków, Kolonia Horbów, 3) Mazowieckie: Dębak, Linin, 4) Podlaskie: Bialystok and Czerwony Bór.[11]

The facilities run by the entities selected in the tender must meet certain premises criteria. These criteria apply not only to the conditions of the technical condition of buildings, but also to recreational opportunities, religious practices, facilities for people with disabilities or even equipment of rooms for foreigners. Aleksandra Chrzanowska and Witold Klaus point out that "Initially, the price was almost the only criterion in the selection of centres. Currently, its importance has significantly decreased, successively giving way to other criteria related to raising the living standards

[10] Regulation 2013/604 Criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, Official Journal of the EU L 180/31 of 29.06.2013.

[11] See https://www.gov.pl/web/udsc/kontakt-do-osrodkow [accessed: 06.05.2023].

of foreigners in the centres – starting from the search for facilities smaller than before, ending with various equipment that facilitates the functioning" [Chrzanowska and Klaus 2011, 7]. It is worth noting that a foreigner staying in a centre is obliged to comply with certain rules, such as: 1) complying with the regulations of stay in the centre; 2) following the instructions of the staff of the centre; 3) taking care of personal hygiene and cleanliness of the premises; 4) undergoing medical examinations and sanitary procedures recommended by the doctor providing medical care in the centre; 5) in the event of the occurrence of disease symptoms or the occurrence of a threatening event in case of damage to the property of the centre, the foreigner should immediately notify the staff of the centre; 6) moving to another centre, if it is necessary for organizational reasons (Article 82(1) GPF).

The Act on granting protection to foreigners within the territory of the Republic of Poland also specifies the rights of foreigners staying in the centre. These are rights to: 1) maintain customs, national and cultural traditions and perform religious practices; 2) move freely around the facility, excluding places prohibited from entering; 3) access to information on entities providing free legal assistance in cases for granting international protection; 4) access to information on non-governmental or international organizations whose statutory tasks include refugee matters; 5) access to information on procedures for preventing and responding to cases of violence, including sexual violence or gender-based violence; 6) receive visits to the rooms intended for this purpose; 7) submit to the Head of the Office, in the native language, complaints and requests in matters the functioning of the centre and the conditions of stay there; 8) contacts with his attorney in conditions that do not violate the right to privacy (Article 82a GPF).

Residents of centres for foreigners are also obliged to comply with the internal regulations of the facility. These regulations contain provisions regarding the accommodation of foreigners, the rights of people working in the office or the protection of the centre, the obligations of residents, the rules of entry for people who do not live in the centre and prohibitions applicable to residents.

Another type of assistance provided is medical assistance. It is worth recalling that the legislator obliged foreigners entering Poland to present relevant documents confirming the right to health insurance, which will cover the costs of treatment if necessary. Therefore, the use of social assistance, including health care, as indicated by Magdalena Kumela-Romańska, was based on the principle of financial self-sufficiency of foreigners [Kumela-Romańska 2017, 336]. Foreigners are entitled to medical care for the duration of the proceedings for granting international protection and in the case of granting refugee status or subsidiary protection, and the costs are borne

by the State Treasury. Medical services are provided in all centres for foreigners and medical facilities with which the Head of the Office for Foreigners concluded a civil law agreement. It is worth noting that foreigners with international protection receive health care benefits to the extent that persons covered by compulsory or voluntary health insurance are entitled to under the Act of 27 August 2004 on health care services financed from public funds,[12] however, excluding spa treatment or spa rehabilitation (Article 73(1) GPF). Therefore, immigrants applying for international protection can count on benefits, e.g. in the field of primary health care; outpatient specialist care; hospital treatment; psychiatric care and addiction treatment; medical rehabilitation; long-term care and care services; dental treatment; spa treatment; supply of medical devices, at the request of an authorized person, and their repair, referred to in the Act on Reimbursement; medical rescue; palliative and hospice care; highly specialized services; health programs; medicines, foodstuffs for particular nutritional uses and medical devices available in a pharmacy on prescription; drug programmes; drugs used in chemotherapy specified in the provisions of the Reimbursement Act.

The assistance, its scope and forms provided to foreigners depend on the title on the basis of which they stay in Poland. Integration activities are an important element of supporting refugees in Poland. This is an important part of the assistance provided. This is due to the fact that foreigners, especially refugees, face the problem of adapting to the new conditions in which they find themselves. Confrontation with reality and the related problems result in a kind of closure in a group representing the same cultural circle, language, nationality. In addition, the integration of refugees and foreigners granted subsidiary protection is an extremely delicate issue, as these people most often experienced situations that affected their mental and physical condition. Thus, an individual approach to each person to some extent determines the success or failure of the undertaken integration efforts. Integration is to strive for mutual understanding, both of immigrants and members of the host society. Sławomir Łodziński argues that integration presupposes the mutual participation of the majority and the minority in the main social and political institutions and the possibility for the minority group to maintain its customs, culture and separate ethnic identity [Łodziński 2005, 13]. Integration assistance in accordance with Article 89e of the Act on foreigners of 2013 is entitled to a foreigner who has refugee status or benefits subsidiary protection, in the manner and on the terms set out in the Act of 12 March 2004 on social assistance. Originally, this assistance was available only to refugees, only since 2008 the integration activities have been extended to foreigners with subsidiary

[12] Journal of Laws No. 210, item 2135.

protection. In turn, in 2014, foreigners staying on the basis of a temporary residence permit as part of family reunification with family members with refugee status or subsidiary protection in Poland were among the persons entitled to assistance.

It is worth noting that the administrative and legal entitlement to use social assistance is vested in the broadest scope in refugees. A foreigner who has received one of the above-mentioned statuses within 60 days may, through the poviat family support center, submit an application to the staroste for assistance in the integration process. the aid is granted for a period not longer than 12 months. It includes activities such as: 1) cash benefits in the amount from PLN 4,463 to PLN 11,753 per month per person for: a) maintenance, in particular to cover expenses for food, clothing, footwear, personal hygiene products and housing fees, b) covering expenses related to learning Polish; 2) paying the health insurance premium specified in the Act of 27 August 2004 on health care services financed from public funds; 3) social work; 4) specialist counselling, including legal, psychological and family counselling; 5) providing information and support in contacts with other institutions, in particular with labour market institutions, with the local community and non-governmental organizations; 6) other activities supporting the foreigner's integration process.

The instrument by means of which the process of integration of foreigners covered by international protection is carried out is the Individual Integration Program (IIP). An important aspect of the assistance provided under the aforementioned instrument is its individualized character. The forms of assistance provided under the IIP are agreed between the foreigner and the poviat family assistance centre. The individualization of the program is consequently important for the success of the integration process. The implemented program determines the scope and amount of the assistance provided. In addition, it contains the obligations of the parties, i.e. the poviat family support centre and the foreigner in the implementation of the programme. The Social Welfare Act defines the obligations of the poviat family assistance centre under the IIP. These are: 1) providing the foreigner with information on the assistance specified in the program and the conditions for its suspension or refusal; 2) cooperation with the foreigner and supporting him in contacts with the local community, including establishing contact with the social assistance center appropriate for the foreigner's place of residence; 3) assistance in obtaining housing, including, if possible, in a sheltered apartment; 4) conducting social work with a foreigner; 5) other actions agreed with the foreigner resulting from the foreigner's individual life situation; 6) choosing of the employee, hereinafter referred to as the "programme

implementer", agreeing the program with the foreigner and supporting the foreigner during the implementation of this program (Article 93(1) SA).

Obligations have also been defined towards a foreigner who has been granted refugee status or subsidiary protection. Belong to them: 1) registration of residence; 2) registering at the labor office within the time limit set in the program and actively looking for a job; 3) obligatory participation in Polish language courses, if necessary; 4) cooperation and contacting the program implementer on fixed dates, but not less frequently than twice a month; 5) other activities agreed with the implementer of the program resulting from the individual life situation of the foreigner; 6) compliance with the commitments made in the programme (Article 92(1) SA).

The Individual Integration Program is addressed to foreigners who have also met other requirements necessary to obtain social assistance. These programs are the only form of assistance to immigrants in the integration process and implement the principle of cooperation in the context of assistance for foreigners provided by the state. Based on Article 93(2) and (3) SA, the Individual Integration Program agreed with the foreigner together with its cost estimate is submitted to the voivode. By accepting it, the voivode allocates funds for its implementation. The social worker is the implementer of the program and assesses the foreigner's progress in the integration process at least once every three months, starting from the day the program starts. Unfortunately, it is worth noting that the IIP tool in practice often boils down to cash withdrawal. In addition, the individualized nature of the program, which should condition subsidies to the needs of the foreigner, is often of a general nature. This is a consequence of too few social workers.

CONSLUSIONS

Legal regulations in Poland make it possible to grant various forms of protection to foreigners. Initially, after 1989, the Polish policy of helping refugees was based on the regulations of international law, to which it became a party. Then, over the following years, the activities of the legislator in the field of developing forms of protection of foreigners were shaped by EU legislation and the introduction of national legal acts regulating the analysed issue. Currently, the forms of international protection include: refugee status, subsidiary protection. The status granted to a foreigner results in a varied scope and amount of assistance provided to the foreigner. Refugee status is one of the most important forms of protection, which in the case of Poland gives the greatest opportunities to benefit from support in the form of social, medical, financial and integration assistance.

The introduction of various forms of support for refugees seems insufficient. A good example of this is the amount of financial assistance that foreigners with refugee status receive. The costs of living are rising faster than the rates of financial support per person – a refugee and his family – updated by the regulation. Refugees can count on integration support. This space has been widely regulated in Polish law. Individual Integration Programs, which are a form of assistance and an instrument for implementing the integration process, have certain shortcomings. One of them is too short time of implementation of the mentioned programs – 12 months. For people who are significantly different culturally, carrying the burden of mental experiences, having problems with establishing contacts or finding themselves in different living conditions, this period is insufficient. Poland is increasingly chosen by foreigners as a place to work or live. The image of Poland as a leader of socio-economic changes in the region of Central Europe may result in an increasing percentage of foreigners applying for international protection in the near future. This forecast requires the development of instruments to support and help refugees in many areas of social life. Unfortunately, the lack of a migration strategy of the Polish state is not conducive to the development of instruments to support and protect foreigners in Poland.

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URBAN PROTOTYPING AS A TOOL TO ENHANCE PUBLIC PARTICIPATION IN TERRITORIAL SELF-GOVERNMENT

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Abstract. The main purpose of the article is to discuss the potential and justification of the crucial role that urban prototyping may play in participatory processes. Satisfaction of the needs of residents who create a self-governing community should be the primary axiological milestone and a goal to be pursued by local governments. Thus, effective and modern management tools should be identified and put in place. The idea that guides one of them, i.e. urban prototyping, is to offer residents an opportunity to resort to various variants of change of the public space before they are ultimately applied in the investment process. Dialogue with residents supported by research, analysis, and tests can help stakeholders realise the consequences of spatial changes around them and then, based on the feedback from residents, design guidelines should be created that best reflect their needs. Thus, residents, through real and multifaceted participatory process, should gain a real, decisive influence over transformation of public spaces.

Keywords: urban prototyping; territorial self-government; horizontal subsidiarity; participants; satisfaction of residents' needs

INTRODUCTORY REMARKS

The analysis devoted to using urban prototyping in the activity of local government units, and also in the assessment of the role that this tool has to play in civic participation, requires first and foremost that its methodological framework be presented. The area on which the research focuses is the operation of local government units associated with the performance of their basic task, that is public duties to satisfy needs of self-governing communities. The question of how to meet these needs optimally is incredibly complex. Finding the answer is even more difficult since the Polish legislator does not use any anthropologically normative model of needs, nor does it specify how they should be satisfied. What is more, the law-giver rarely points to needs that are to be satisfied, focusing on the characterization of public tasks in which these needs are encoded.

In a model approach to prototyping public services, one must first look into learning the real needs of recipients of such services and to using this

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knowledge to define the problem or barrier (barriers) that the public service beneficiary is dealing with. This is a starting point in generating solutions that are an answer to the problems diagnosed. We may then move to prototyping the best solutions, thus verifying effectiveness and feasibility of generated ideas. While the prototypes are being tested, the assumptions adopted are being verified through pilot actions. Hence, their validity may be checked before taking a final decision on implementing them [Gawłowski and Makowski 2022, 253-56].

Responsiveness of the synthetically described process above means that self-government administration receives direct feedback from residents about adequacy of the proposed solutions. Therefore, this process creates a possibility to order the designed measures according to their social rank, thus to prioritize them. However, what is most significant from the perspective of this article is participation as the foundation of this process. Residents that take an active part in prototyping, who participate in person and are truly engaged, co-create solutions that are best for them. By doing so they go beyond many typical and rather passive legal participatory procedures.

Therefore, we may look at participation as a mechanism of creating an adequate "substantive contribution" for correct implementation of a public task and thus a mechanism of better satisfaction of residents' needs. Such an approach fits within the principle of subsidiarity, its horizontal dimension to be more precise, which aims, as Izdebski writes, "to facilitate and improve the public good" [Izdebski 2011, 194].

Urban prototyping, which in short may be defined as an advanced consultation-research-drafting process, may be recognized as a specific and interesting area of application of prototyping in commune self-government [Wacinkiewicz 2020, 10234-10240]. An analysis of this tool will be the canvas for the research problem presented in this paper, namely the question of increasing public participation in activities (projects) implemented by local administration. The main research goal is to characterize the potential and to substantiate the role that urban prototyping, an innovative management tool, pay play in participatory processes.

1. WHY USE URBAN PROTOTYPING IN THE ACTIVITY OF TERRITORIAL SELF-GOVERNMENT?

Let us analyse now to what extent may urban prototyping play a significant role in the activity of territorial self-government and what goals it may help achieve. Let us start by outlining the systemic, legal and axiological framework in which a local government may reach for modern management tools such as urban prototyping. Indeed, the foundations of the organization

and operation of local government units are laid down in the Constitution of the Republic of Poland. It is this basis that demonstrates direct participation of territorial corporations in exercising public power and the fact that the substantial part of public duties which local government is empowered to discharge is done in its own name and under its own responsibility (Article 16(2) of the Polish Constitution). This means that tasks carried out by local government units are public duties in the understanding expressed by the Constitutional Tribunal, that is they serve to satisfy collective needs of local communities.[1] The Polish Constitution calls such duties self-governments' direct responsibility (Article 166(1) of the Polish Constitution). Naturally, universal rules laid down in statutes which express (encode) specific human needs are the basis for creating these duties and for exercising them.

These constitutional regulations alone clearly demonstrate the goal of public duties performed by local government units (so-called satisfaction of the needs of a self-government community expressed in public duties) and the responsibility to implement it. Therefore, we may say with certainty (as the Constitutional Tribunal strongly emphasizes) that the essence of public activity (activity for the benefit of the municipality) of territorial self-government is to satisfy residents' needs.[2] This opinion is representative for the science of administrative law where it is emphasized that satisfying society's needs is the basic public goal (public value) and local government units are obliged to materialize them through their public duties [Szydło 2008, 42]. Thus, the category of needs (human or public) is associated with the basic axiological value that territorial self-government should exercise.

There is no doubt that in the coming decades local governments will have to function in a dynamically changing environment and will be left with limited resources to solve problems of civilization placed before them. This means a departure from existing development axioms and forcing changes to now-applied solutions. This all will have a direct impact on constructing functional and spatial models of self-governments, urban living conditions, and sustainable development in the environmental, social, communication and infrastructure dimension.

These factors alone prompt territorial self-governments to look for effective and modern management solutions that will facilitate best possible satisfaction of residents' needs.

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[1] Resolution of the Constitutional Tribunal of 27 September 1994, ref. no. W 10/93, Journal of Laws No. 113, item 550.

[2] Ibid.

2. ESSENCE OF URBAN PROTOTYPING

A synthetic characterization of urban prototyping based on Jaworski's methodology – urban planner and philosopher, author of a number of such projects implemented in Poland – demonstrates a three-phase structure of this process [Jaworski 2017].

It begins with creating the fullest possible resume on the area to be prototyped. Therefore, we need an inventory of the existing state of affairs of the public space. The more extensive and multidimensional the investigation is, the closer it is to a correct diagnosis. To do that, three majors actions must be carried out. First, the local government must specify the planning status (resulting from spatial planning documents or lack of thereof). Then, it needs to examine formal and legal requirements (is the area in question located in a zone undergoing regeneration?; is it subject to restrictions under conservation and restoration laws?; and, especially important, are there any cultural property facilities located there that enjoy a special protection status?). Lastly, economic requirements must be checked (how well are production and services doing in this area?; what is the economic capital of this area?). Environmental and transport issues will play key roles here. The local government will have to look into the status of green areas in a given area, technical and formal determinants of its development and legal restrictions for the former, and it will have to think about designing a temporary traffic organization and an analysis of transport behaviours of users of this space for the latter.

One more essential element must be emphasized. Activities that precede establishing the prototype as a rule provide for most far-reaching involvement of residents in its preparation. This may take various forms, depending on the specific characteristics of a given prototyping process. Still, it must be highlighted that diagnostic and design workshops with the participation of residents play the most crucial role. Conducting the design process in such a way may yield an additional result of creating elements of the prototype with the participation of the public, for example joint building of elements of small architecture that will be used in the prototype (e.g. making municipal furniture). Another emphasis-worthy element of prototyping is holding dialogue with various stakeholders of the public space. Meetings, talks, public debates and smaller and more personal sessions encourage interaction with important participants of the process, such as local business operators or NGOs that work in the area.

The total information and feedback received so from relevant stakeholders, especially residents, is the basis for creating a prototype of changes in public space. And thus, we are moving on to the second, fundamental, stage of the process, namely determining the prototype.

It is the stage when the prototype is being tested. The prototype itself should, as a rule, incorporate a few variants to make sure that residents are provided a real opportunity to see each of them. Testing the model means that locals are given the chance to physically use the public space to be transformed. We thus enable a process of gradual introduction of changes and of familiarizing space users with these changes before they become irreversible. What is more, the proposed variants may be constantly corrected thanks to the project's iterative structure. It is because local governments may respond to residents' needs flexibly by improving or modifying the prototype at the testing stage. Highly importantly, it also allows the authorities to detect errors during the implementation of the project, not at its end after a great deal of resources has been invested.

At the same time, residents have the opportunity to assess and to see for themselves how valid and effective individual variants are. In particular, through personal experience, public acceptance for the proposed options is built and the best one from the user's perspective is selected.

Another benefit of such implementation of a project is testing the readiness of public space users for its modification, most importantly, on the basis of their real involvement rather than declared approval or disapproval. Inclusion of residents at this stage of project implementation mainly means that they may share their opinions about the prototype. Selected issues (significant form the point of view of the assumptions adopted) are being examined at the same time. These include traffic and movement in the area subject to prototyping, how temporary facilities are being used, traffic intensity or use of parking spaces.

Lastly comes the third stage of the project, that is removing the prototype. It is an extremely important moment of the summing-up of the existing experience with the prototype variants and forming opinions following an interactive process. This is why it is paramount that the authorities maintain users' interests in the project itself and encourage them to actively continue to participate in meetings and workshops to get as much feedback as possible. This will be used to draft a final report and to present it publicly.

Material obtained this way will form additional "input" for architectural design. We may say in this context that urban prototyping helps reveal new information-related elements from the level of space users that allow the local self-government to avoid the risk of conflict associated with re-building or installing inadequate solutions. Therefore, prototyping is a way to solve difficulties inscribed in the traditional model of designing public space, based on an expert approach. Substantive discussions carried out in this angle yield strategic studies and planning regulations used to design and implement investment in the public space.

3. VALUES OF URBAN PROTOTYPING IN THE CONTEXT OF BOOSTING CIVIC PARTICIPATION IN TERRITORIAL SELF-GOVERNMENT

Let us now look at the potential and role that urban prototyping may play in participatory processes. This indeed is the main research aim of this analysis.

Under axiological assumptions of the Polish territorial self-government, increasing civic participation in projects implemented by the local governments is an end in itself. The potential of residents' interest in public matters means that local authorities must look for such participatory formulas and such management tools, which will actively join residents in processes intended to satisfy their needs and thus in optimal exercise of public duties. Such an approach from municipal organs is axiologically justified in the principle of subsidiarity, namely in its horizontal dimension (horizontal subsidiarity). It emphasizes that public duties should be implemented by civil society institutions as much as possible [Izdebski 2015, 172-73], creating space for non-actors, such as businesses, NGOs and other interested participants [Colombo 2004, 39] and perceiving the value of complexity of society with its unique coordination mechanisms [van de Donk 2019, 4]. Active engagement of various stakeholders and cooperative networking between them play a key role in this conglomerate of interactions of various entities.

Assuming the perspective of horizontal subsidiarity, urban prototyping, with its specific characteristics, structure and methodology, seems to be a tool that might play an important role in increasing residents' engagement in processes that take place in their territorial community. Let us take a synthetic look at two most important factors that have an impact on such a state of affairs.

First off, transparency of the process. On-going dissemination of information about all elements of the process in an immanent element of the process of urban prototyping. Residents are informed from the start about the project's assumptions, its components and schedule. Then, after establishing the prototype and while testing it, they are informed about the course of its implementation. Informative (and consultation) actions bind all stages of the process.

Second thing on the agenda, making knowledge public. A sine qua non precondition of the effectiveness of the process is equipping stakeholders with an adequate scope of knowledge on the space that is to be prototyped. When the first stage of prototyping was being characterized, we highlighted the gravity of a comprehensive inventory of the existing condition of public space – in the legal, planning, environmental, conservation, restoration,

economic, and other aspects. Knowledge systematized like this must then be adapted to the needs of "recipients – non-professionals", taking on a communicative and approachable form. By doing so, we may attempt to "debunk the myth" of its exclusiveness in areas such as law, architecture, urban planning or environmental protection. This is how "knowledge gets public", giving stakeholders a better foundation for fuller participation in the act of creating the prototype. The importance of this factor cannot be stressed enough. It is because residents often fail to engage in public matters thinking that it requires specialist, if not expert, competences. Let us also add that apart from adequate preparation of knowledge for the needs of process participants, institutions and measures based on experience are also an element that facilitates participation. These are measures applied in the urban prototyping method whose interpretation does not require special competences.

Let us now determine implications of these two factors for participatory processes that take place in territorial self-government and their quality.

We shall begin by saying that thanks to equipping stakeholders adequately with information and knowledge, one of the barriers to access to participatory processes is removed. By doing so it is easier to see the causes and consequences of the solutions introduced (prototypes to be tested) and the related threats and opportunities. Therefore, a basis for a holistic understanding of changes planned for the public space is created. This encourages responsible attitudes in place of insistent approaches and demands not justified by needs. Such stakeholders' awareness will have an incredibly important impact on the quality of public debate.

Among the many participatory procedures exercised at the level of territorial self-government, urban prototyping has a distinctive character and scope when it comes to including residents. Many manifestations of local democracy (referendum or consultations) allow residents merely to choose between certain per-defined options (variants). Additionally, some persons directly show they do not want to take part in typical consultation because they believe this participatory path has marginal force. The urban prototyping process is something much deeper than a simple choice between ready-made-variants. As we have already said, residents are active participants of the entire procedure. They take part in diagnostic and design workshops, they co-create (as part of public action) prototype's elements (for example small architecture), they actively speak in debates, discussions and theme sessions, while arrangements made in such meetings form part of the prototype. After that, with all the feedback from residents, authorities incorporate design guidelines yielded by the participatory and research process to design public space and then to implement the investment physically. This is a particularly important element – a certain guarantee of agency that gives the entire prototyping process authority and reliability. From

the participatory perspective, this boosts the chances for active and greater engagement in public affairs by removing another potential barrier in access to such involvement.

However, let us look at urban prototyping mostly through the prism of the quality of public debate. This process uses dialogue with all stakeholders, supported with research, analysis and tests, to strive to fully realize the benefits that follow from changing the surrounding space and from improving its quality. Consultations, meetings, discussions, debates, workshops with specialists or study walks produce a specific pool of feedback from stakeholders. It is an incredibly valuable complementation of knowledge on real needs and also on qualitative expectations, formulated directly by space users. Still, this does not mean that this process is free from tension, conflicts and contrasting expectations.

A discussion on changes in the public space is where various arguments clash and where disputed issues, controversial matters and things that divide the community reveal themselves. It is perfectly clear in the problem of "privatization" of public space. Such areas may be seen by some, e.g. residents, as not only public space, but also "their own". On the one hand they may show approval for upgrading or etatism activities, while on the other they may have concerns whether this space will become more frequented, with all its consequences. It will start to change and become less of "their private corner" and more of an open, publicly available spot. Transportation issues trigger similar controversy, especially availability of public space for individual road transport or parking problems. Residents expect certain preferences for themselves since they live in a given area. On the other hand, local businesses signal their own needs (e.g. ensuring parking places for deliveries) and also the needs of their customers (ease of access). This all is topped with the problem of having to guarantee parking places for persons with disabilities, forcing parking rotation, ensuring traffic security to all traffic participants (especially pedestrians and cyclists), speed limits, closing certain zones to traffic and many other. These two examples alone demonstrate how difficult it is to move from a particular narrative to a compromise around a common good.

Urban prototyping, with its structure, transparency, access to information and equipping process participants with knowledge, increases the chances for an informed and responsible dialogue. Thanks to this "knowledge resource", process participants understand relatively early that this procedure does not boil down to simple convincing them to a certain single idea or even more so, to forcing it onto them. Its framework is not built from a "wish list" (by default rather diverse) of different participants of prototyping. It is built upon an objectivised design framework (legal, environmental or conservation – and restoration-related) and arrangements resulting from

investigating the prototype, with a layer of "a feasible matter" developed jointly through dialogue. Such "anchoring" of the process, supported with the guarantee of agency, allow urban prototyping to be perceived as a dialogue tool that is asked to develop a compromise regarding the public space to be transformed.

CONCLUSIONS

The research aim of this study was to characterize the potential and to substantiate the role that urban prototyping may play in participatory processes. This innovative management tool may be applied in transforming territorial self-governments (cities or municipalities) into institutions most friendly to their residents. The idea behind urban prototyping is to create a temporary opportunity for residents to use different variants of changes that may be introduced in public space (the prototype, or to be more precise a multivariate prototype) before they are ultimately implemented.

This is fully justified when it comes to designing space. Since such activities intend to better satisfy needs of residents (let us reiterate that they are the core purpose of the activity of local government units), then it is paramount that LGUs know residents' real needs and expectations and then incorporate such knowledge correctly to design adequate solutions.

The urban prototyping process uses dialogue with residents supported with research, analyses and tests to strive to make locals fully aware of the consequences of changes made to the surrounding public space and of the resulting benefits of improving the quality of this territory. Then, taking feedback from residents as a basis, design guidelines are drafted that best reflect their needs.

Thus, from the point of view of functioning of local government it is vital that residents have a real decision-making say in transforming public space. What is key here is to ensure that the making of the knowledge public, which is where the process starts, should translate onto making the decision-taking process public in its final stage.

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EFFECTS OF THE REORGANISATION OF CULTURAL INSTITUTIONS FOR THE AREA OF EMPLOYMENT RELATIONSHIPS

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Abstract. The article discusses the problem of reorganisation of cultural institutions in the context of employment. The reorganisation of a cultural institution may take the form of a merger or split-up of institutions, and, in extreme cases, complete dissolution of such an entity. These forms of reorganisation are crucial for the employment relations inside the institution. Cultural institutions have legal personality, and they are separate from their founding bodies. Employees of cultural institutions also enjoy a special status: while their employment relations are governed by the provisions of the Labour Code, the specificity of work in cultural institutions is also governed by the provisions of the Act on the Organisation and Pursuit of Cultural Activities.

Keywords: cultural institution; reorganisation; merger; split-up; liquidation; workplace transfer

INTRODUCTORY REMARKS

Pursuant to the Act of 25 October 1991 on the organisation and pursuit of cultural activities,[1] cultural institutions constitute an organisational form for cultural activities. State cultural institutions are established by ministers and heads of central offices; these bodies organise cultural activities by establishing state cultural institutions for which the pursuit of such activities is their primary statutory objective. Local government cultural institutions, for which the pursuit of cultural activities is the main statutory objective, are established by local government units. These bodies empowered to set up cultural institutions are referred to in the Act as organisers.[2]

The organiser issues a founding act for the cultural institution, which specifies its subject of activity, name and seat and whether the cultural

[1] Journal of Laws of 2020, item 194 [hereinafter: AOPCA].

[2] It should be noted that the concept of "cultural institution" under the Act on the organisation and pursuit of cultural activities does not cover a cultural institution established by an entity other than those listed in Articles 8 and 9 of the Act, see judgement of the Regional Administrative Court in Poznań of 16 July 2008, ref. no. IV SA/Po 29/08, Lex no. 516026.

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institution is an artistic institution.[3] Establishing a cultural institution is a two-stage process, since the founding act alone is not sufficient for the establishment of the cultural institution; in order for an institution to be able to start operation, it must acquire the legal personality which it does once registered with the register of cultural institutions maintained by its organiser (Article 14(1) AOPCA).

In the judgement of 16 July 2008 cited above, the Regional Administrative Court in Poznań has stated that only an institution set up by an entity referred to in Articles 8 and 9 AOPCA is subject to registration as a cultural institution supervised by that entity, and this is not discriminatory against natural persons organising and carrying out cultural activities and does not infringe the constitutional principle of equality before the law.[4]

Although it is the authorised founders who establish cultural institutions, the cultural institution is a completely separate entity from the organiser, having financial autonomy in running its economic policy within the framework of its own resources.[5] The case law emphasizes the autonomy of cultural institutions as legal persons, which also means that the organiser must not arbitrarily modify the scope of activities of the cultural institution, and the organiser can only intervene in the object and manner of its activities within the statutory framework.[6]

On the other hand, between the organiser and the cultural institution established by the organiser there is an organisational link and a legal bond, which, using the terms used in the Act on the organisation and pursuit of cultural activities, must be described as subordination and which is expressed most fully just in conferring powers on the organiser to unilaterally influence its operation in a sovereign way [Antoniak-Tęskna 2019].[7]

The organiser has a number of statutory powers over the cultural institution which it established, mainly due to the owner's supervision exercised

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[3] Pursuant to Article 11(2) AOPCA, artistic institutions are cultural institutions established to carry out artistic activities in the field of theatre, music or dance, with the participation of authors and performers, in particular: theatres, philharmonic orchestras, opera and operetta houses, symphony orchestras and chamber ensembles, song and dance ensembles and choral ensembles.

[4] In that judgement, the court pointed out that "it clearly follows from the provisions of the Act that natural persons, legal persons and organisational units without legal personality may conduct cultural activities, but only the entities listed in Articles 8 and 9 of the Act on cultural activities may establish cultural institutions."

[5] Judgement of the Regional Administrative Court in Warsaw of 20 March 2008, ref. no. I SA/Wa 134/08, Lex no. 506226.

[6] Ibid.; judgement of the Regional Administrative Court in Gorzów Wielkopolski, ref. no. II SA/Go 101/22, Lex no. 3354170.

[7] Judgement of the Supreme Administrative Court of 7 September 2017, ref. no. II OSK 1790/17, Lex no. 2348658.

over the institution [Antoniak 2012, 58-59; Szewczyk 1996, 44].[8] A manifestation of this supervision is, above all, the possibility of undertaking actions involving the reorganisation of cultural institutions.

1. FORMS OF CULTURAL INSTITUTION REORGANISATION

Pursuant to Article 18 AOPCA, the organiser may perform a merger of cultural institutions, including cultural institutions operating in various forms, or a split-up of cultural institutions. In the event of a merger of an artistic institution with a cultural institution other than artistic, the cultural institution established as a result of such a merger has the status of artistic institution. The law imposes on the organiser an information obligation to make public the intention and reasons for such a decision 3 months before the issuance of the act on the merger or split-up of the cultural institution.

As already noted above, the organiser has the right to influence on the activities of the cultural unit in a unilateral, arbitrary and sovereign way. The organiser's act on the transformation of a cultural institution is an act of internal management and as such is not subject to review by the administrative court [Antoniak-Tęskna 2019].[9] The way in which the organiser regulates the establishment of a cultural institution is an organiser's internal act, the established unit is required to perform under the principle of organisational subordination.[10]

As provided for in Article 19(1) AOPCA, the merger of cultural institutions consists in creating one institution, which includes the staff and property of the institutions subject to merger. The merger of a cultural institution takes place by way of an act issued by the organiser of the cultural institution. The merger may also take place by way of an agreement concluded between the so-called central-government organiser and the local-government

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[8] Also see the Resolution of the Supreme Court of 8 May 1992, ref. no. III CZP 42/92, OSNC 1992/11, item 196.

[9] It should be noted that acts of merger or split-up of cultural institutions, as well as acts of intent to do so, are subject to different legal regimes as regards the possibility of reviewing them, depending on whether central or local authorities are concerned. Decisions of ministers and heads of central offices and resolutions of councils of municipalities, district councils and regional assemblies on the split-up or merger of cultural institutions are not automatically appealed against before the administrative court, but resolutions of legislative bodies of local government units are subject to the supervision of the voivodship governor (*wojewoda*) and, therefore, indirectly, also to judicial review of legality by administrative courts.

[10] As in the above-mentioned decision of the Supreme Administrative Court of & September 2017.

organizer on the establishment of a new cultural institution or the merger of already existing institutions.

The act of merger of cultural institutions specifies the names of the cultural institutions to be merged, the name, type, seat and subject of operation of the cultural institution established as a result of the merger, the date of the merger of the cultural institution, the rules for the takeover of liabilities and receivables by the institution established as a result of the merger. At the same time, the organiser confers the statutes on the cultural institution created as a result of the merger. On the date of entry in the register of the newly established cultural institution, the organiser strikes off from the register the previous cultural institutions which had been subject to the merger. Thus, upon registration of a new institution, the legal existence of the merged institutions ceases.

The second form of reorganisation of cultural institutions is their split-up. Pursuant to Article 20(1) AOPCA, the split-up of a cultural institution consists in the establishment of two or more cultural institutions based on the personnel and property belonging to the cultural institution being divided. The split-up of a cultural institution may also consist in the separation of a distinct organisational unit or units from a cultural institution in order to incorporate them into another cultural institution or establish a new cultural institution based on the personnel and property of that unit or units. The rules for the transfer of assets included in the balance sheet of the separated units are to be specified by the organiser.

The act of split-up of a cultural institution must contain the name of the cultural institution being split up, the name, type, seat and object of operation of the cultural institutions established as a result of the split-up, the specification of organisational units separated in order to create a new cultural institution or incorporation into the institutions established as a result of the split-up, determination of the rules for taking over the liabilities and receivables by the institutions established as a result of the split-up.

Pursuant to Article 25a(1) AOPCA, a cultural institution established as a result of a merger or split-up enters into all legal relationships of the merged or divided institution, regardless of the legal nature of these relationships, in particular permits, licences and tax reliefs, which were granted to this institution before its transformation, unless the legislation or the decision on granting the permit, licence or relief provides otherwise. We are dealing here with universal succession, i.e. entering into all the rights and obligations of the merged or divided institutions, including the takeover of receivables and liabilities. Universal succession is characterised by the fact that the consent of the creditors of the merged, divided, transferred or liquidated cultural institutions for the transfer of debt is not

necessary;[11] it also covers all procedural rights and obligations, regardless of the stage of the proceedings, and employee rights and obligations [Antoniak-Tęskna 2019]. In the sphere of employment relationships, Article 23^1 of the Labour Code[12] is relevant, which means that a cultural institution established as a result of a merger or split-up of existing institutions becomes, by operation of law, a party to the existing employment relationships.

At this point, one should also mention the most far-reaching organiser's decision regarding the existence of a given cultural institution, namely the liquidation of a cultural institution. Pursuant to Article 22(1) of the Act, in particularly justified cases, the organiser may liquidate a cultural institution. The organiser is obliged to make public the intention and the reasons for the liquidation 6 months before the issuance of the act of liquidation of the cultural institution. Where the organiser decides to liquidate a cultural institution, the public notification of the intention and reasons for liquidation six months in advance is supposed to create an opportunity to take action to raise funds that will enable the continued functioning of the cultural institution concerned, since the liquidation of a cultural institution should not be abused and utilised as an instrument to enable the organiser to save funds that it can and should allocate to the activities of cultural institutions.[13]

The legislature, when discussing the conditions for liquidation uses the vague term "particularly justified cases", containing an evaluative phrase that requires assessment of a certain state of affairs. When applying it, it is necessary to provide a detailed and convincing reasons for the decision indicating the choice of evaluation criteria. The organiser is obliged to specify the reasons for the liquidation of the cultural institution, and it is obvious that what is meant here are exceptional, extraordinary events and situations that make it impossible for the cultural institution to continue functioning.[14]

The act of liquidation of a cultural institution is the basis for its deletion from the register. Pursuant to Article 24 AOPCA, the liabilities and receivables of the liquidated cultural institution shall be taken over by the organiser.

Due to the liquidation of the cultural institution as an employer, i.e. the liquidation of the workplace, the employment is no longer possible, and therefore there is a basis for the termination of employment relationships based on Article 41^1 LC. The provision of Article 41^1(1) LC refers only

[11] Article 519 of the Act of 23 April 1964, the Civil Code, Journal of Laws of 2022, item 1360.

[12] Act of 26 June 1974, the Labour Code, Journal of Laws of 2022, item 1510 [hereinafter: LC].

[13] Judgement of the Regional Administrative Court in Gdańsk of 4 September 2014, ref. no. III SA/Gd 355/14, Lex no. 1534610.

[14] Judgement of the Supreme Administrative Court of 29 February 2012, ref. no. II OSK 45/12, Lex no. 1252076.

to the complete and final liquidation of the workplace, i.e. one in which no other employer becomes the successor of the liquidated workplace, and the liquidated workplace ceases to exist both in fact and in law.[15]

2. MERGER AND SPLIT-UP OF A CULTURAL INSTITUTION AND EMPLOYMENT RELATIONSHIPS

The merger of cultural institutions is a form of terminating the existence of cultural institutions that is distinct from their liquidation. As already mentioned above, the cultural institutions to be merged are struck off from the register of cultural institutions and thus cease to legally exist. Consequently, the legal winding up of an employer which leads to the use of the workplace to continue the existing activity as part of the new organisational structure does not constitute its liquidation within the meaning of Article 41^1 LC, but constitutes a transfer of the workplace, the effects of which in the sphere of labour law are determined by Article 23^1 LC.[16]

This means that the newly established cultural institution becomes, by operation of law, a party to the existing employment relationships, therefore the employees of the merged cultural institutions become, also by operation of law, its employees. The new employer assumes all the rights and obligations of the previous employers, and the employees of the merged cultural institutions retain their previous rights and obligations. The provision of Article 23^1 LC is a mandatory rule, the transfer of employees is done *ex lege*, it is not affected by anyone's decision – be it the employers or organisers of cultural institutions.

As stated in Article 23^1(2) LC, the previous employer and the new one are jointly and severally liable for the obligations arising from the employment relationship, which arose before the transfer of part of the workplace to another employer. As regards the merger of cultural institutions, the existing employers are struck off from the register, and in the legal sense they cease to exist, so only the newly established cultural institution is responsible for the obligations under the employment relationship, which arose before the merger of the cultural institutions [Antoniak-Tęskna 2019; Gajewski and Jakubowski 2016, 116; Liszcz 2016, 138; Gersdorf and Rączka 2012, 164; Pezda 2010, 34; Hajn 1996, 24].[17]

The employees of the merged or (split up) cultural institutions become employees of the resulting cultural institutions and retain the rights under

[15] Judgement of the Supreme Court of 14 March 2012, ref. no. I PK 116/11, OSNP 2013/5-6/51.
[16] Judgement of the Supreme Court of 21 January 2003, ref. no. I PK 85/02, OSNP 2004/13/228.
[17] Also see the judgement of the Supreme Court of 23 November 2006, ref. no. II PK 57/06, OSNP 2008/1-2, item 4.

the employment relationship. Pursuant to the Labour Code, the employees are guaranteed at least the previous terms of labour. Any changes in this respect should be agreed between the parties to the employment relationship or the trade unions operating at the relevant workplace.

Employers are obliged to notify of the transfer of the workplace their respective trade union organizations or directly the employees, if such organisations do not operate at the employers' premises.

Pursuant to Article 26^1 of the Act on trade unions,[18] the previous and the new employer are obliged to notify in writing the trade union organizations operating in each of them, at least 30 days before the expected date of transfer, about the expected date of this transfer, its reasons, legal, economic and social consequences for their employees, as well as intended actions regarding the terms of employment of these employees, in particular working conditions, pay and retraining.

Where it is the trade union organization who receives information from the employer pursuant to Article 26^1 ATU, it must forward that notification to all employees of the employer concerned, since it represents all the employees, both those who are and who are not its members [Maniewska 2009, 18].

It should be stressed that the Act on trade unions penalises the failure to comply with the obligation to notify trade unions, as in accordance with Article 35(1)(4) ATU, it is an offence punishable by a fine or a restriction of freedom.

If the previous or new employer intend to take measures concerning the conditions of employment of workers, they must enter into negotiations with the trade union organizations to conclude a respective agreement, within a maximum period of 30 days from the date of notification of those measures. The agreement shall be concluded by all the trade union organizations which have negotiated the agreement. Nothing prevents the agreement being concluded by two employers – the transferor and the transferee, then it will have a tripartite form. Nothing prevents the trade union organizations which are not formally operating in the workplace being transferred, but which operate with the transferee employer, from participating in the negotiations with the employer in the process of taking over the workplace

If the agreement is not concluded within the prescribed period due to the employer being unable to agree on the content of the agreement with workplace's trade union organizations or representative trade union organisations bringing together the employees,[19] involved in the negotiations, the employer shall independently take action in matters concerning

[18] Journal of Laws of 2022, item 854 [hereinafter: ATU].

[19] In the meaning of Article 25^3(1) or (2) ATU.

the conditions of employment of workers, taking into account the arrangements made with the workplace's trade union organizations in the course of the negotiations on the conclusion of the agreement.

As regards the terms of employment of the employees transferred, it should be emphasised that the employer who takes over another workplace is bound by the terms of individual employment contracts resulting, inter alia, from the remuneration system in force at the workplace being taken over.[20] The content of the contractual employment relationship is determined not only by the employment contract, but also by the regulation of internal by-laws, remuneration schemes adopted by the employer and generally applicable labour law provisions. The change on the employer's part as a result of the transfer of the workplace does not mean that the new employer is still bound by the content of the by-laws in force at the transferred workplace, but that the elements of the employment relationship of the employees of the transferor employer resulting from the provisions of those acts binding the new employer until changed by an amending agreement or amending notice. As the Supreme Court points out, this relationship stems from the institution of the new employer's entry into the existing employment relationship with the employees of the acquired workplace, and not from liability for the obligations arising prior to that transfer.[21]

Thus, if the new employer intends to take action regarding changes in the terms of employment, for example: if within a certain period of time from the date of the transfer of the workplace, it intends to consolidate and thus adapt the remuneration system for the transferred employees to the rules in force at the new employer, which will mean the elimination of a remuneration component to which the former employer was entitled and which is not covered by the remuneration system applied at the new employer, it is obliged to amend these terms and conditions in accordance with the requirements of the procedure of amending notice (or amending agreement).[22]

If there are no trade union organizations operating at the employers undergoing the transfer of the workplace, each of them shall inform its employees in writing of the expected date of the transfer of the workplace, the reasons for it and the legal, economic and social consequences for the employees, as well as the intended action concerning the terms

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[20] Judgement of the Supreme Court of 15 June 1993, ref. no. I PK 63/93, I PRN 63/93, OSP 1994, vol. 5, item 95; judgement of the Supreme Court of 21 September 1995, ref. no. I PRN 60/95, OSNP 1996/7/100.

[21] Judgement of the Panel of Seven Judges of the Supreme Court of 29 October 1992, ref. no. I PZP 52/92, OSNCP 1993, vol. 4, item 48.

[22] Subject to Article 241^8 LC.

of employment of the employees, in particular the terms and conditions of work, pay and retraining.

At the same time, it should be noted that the failure of the previous employer to comply with the obligation to provide information and instruction under Article $23^1(3)$ LC does not affect the effect of the transfer of the workplace or its part consisting in assuming by the new employer of the rights and obligations of a party to the employment relationship.[23] The Supreme Court pointed out that the failure to notify employees in writing of the subjective change of the employer does not have the features of a gross breach of the employer's basic obligations towards the employee within the meaning of Article $55(1^1)$ LC, as it does not pose a direct threat to the continuation of the employment relationship on the previous terms and conditions of work and pay.[24]

Providing employees with the above information is very important, it is a manifestation of the implementation of the protective nature of the labour law provisions. The information is intended to familiarise the employee with the new situation of working for a new employer. Despite permanence of employment, the *ipso iure* entry into the existing employment relationship and the guarantee of the existing terms and conditions of work and pay, the employees may not be interested, for various reasons, in working for the new entity, so they should be given the opportunity to familiarise themselves with the new situation in order to decide whether or not to continue their employment.

Pursuant to Article $23^1(4)$ LC, within 2 months of the transfer of a workplace or part thereof to another employer, the employee may terminate his employment relationship without notice of termination, with seven days' advance notification. The termination of employment in that way causes for the employee the effects related under the provisions of labour law to the termination of the employment relationship by the employer upon notice. If the employee does not intend to continue employment with the new employer for any reason, he may terminate his employment relatively quickly, without having to "wait" for the expiry of the notice period. This regulation attempts to reconcile, on the one hand, the protection of the workplace and, on the other hand, freedom of work; its essence is that the exercise of the worker's right to freely choose his employer does not lead to unfavourable legal consequences for him, therefore the choice of one of the two equivalent legally protected goods is on the part of the employee.[25] Where the employee uses this "simplified" termination procedure, the employee

[23] Judgement of the Supreme Court of 8 January 2002, ref. no. I PKN 779/00, OSNP 2004/1/7.
[24] Judgement of the Supreme Court of 6 May 2003, ref. no. I PKN 219/01, OSNP 2004/15/264.
[25] Judgement of the Supreme Court of 25 May 2000, ref. no. I PKN 647/99, OSNP 2001/21/644.

shall not be entitled to compensation or severance pay.[26] The Supreme Court adopted the view that the termination of the employment relationship under 23^1(4) LC does not entitle to be paid the severance pay provided for in Article 8 of the Act of 13 March 2003 on special rules of termination of employment relationships with employees for reasons not attributable to employees,[27] unless the reason for termination of employment was a serious change to the detriment of the employee.[28]

The transfer of the workplace or its part to another employer may not constitute a reason for the termination of the employment relationship by the employer, and this also applies to an amending notice.[29] The employer taking over the workplace may not change the employee's terms of employment to his detriment for the reasons of the mere takeover of the workplace, regardless of whether the employee agrees to such a change.[30] In one of the rulings, the Supreme Court indicated that the transfer of the workplace or its part to another employer may not be the only reason justifying the termination of the employment relationship by the employer, but it should be assumed that justified circumstances and reasons for making organizational changes on the part of the employer undertaken for the sake of recovery from a difficult economic situation known to employees does not prevent such an agreed defining of the content of the employment relationship by the parties who agree to less favourable remuneration terms in order to achieve goals beneficial to both parties; this means that the transfer of the workplace to another employer does not preclude voluntary modifications to the terms of employment by agreement of the parties.[31]

The discussed principles of employment permanence under Article 23^1 LC do not apply to individuals working under civil-law contracts:

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[26] The resolution of the Supreme Court of 10 October 2000, ref. no. III ZP 247/00, OSNP 2001/3/63 adopted that an employee who, as a result of the transfer of the workplace to another employer, has chosen the option of terminating the employment relationship without notice of termination, with 7 days' advance notification (Article 23^1(4) LC), is not entitled to compensation for any notice period that does not run after the termination of the employment relationship.

[27] Journal of Laws of 2018, item 1969.

[28] Resolution of the Panel of Seven Judges of the Supreme Court of 18 June 2009, ref. no. III PZP 1/09, OSNP 2011/3-4/32.

[29] The judgement of the Supreme Court of 17 January 2017, ref. no. I PK 326/15, unpublished, it states that Article 23^1(6) LC prohibits notice of termination of employment (and amending notice) by the employer only for one reason, i.e. the transfer of the workplace or its part to another employer, and therefore the mere transfer of the workplace or its part to another employer does not prevent the notice of termination by the employer, if it is justified by other actual and material reasons.

[30] Judgement of the Supreme Court of 7 February 2007, ref. no. I PK 269/06, OSNP 2008/5-6, item 68.

[31] Judgement of the Supreme Court of 20 June 2007, ref. no. I BP 61/06, Lex no. 951495.

assignment contracts or contracts for specific work, as they are not employees within the meaning of Article 2 of the Labour Code. Thus, the new employer does not automatically become, on the basis of Article 23[1] LC, a party to these civil law relationships. However, it should be kept in mind that the new cultural institution assumes all rights and obligations of the merged cultural institutions and takes over their receivables and liabilities on the day of the merger (Article 25a AOPCA).

On the day of transfer of the workplace or part of it, the employer is obliged to propose new working and pay conditions to employees who hitherto have been working on a basis other than an employment contract, and to set a time limit, not shorter than 7 days, by which the employees may submit a declaration of acceptance or refusal to accept the proposed terms. Where new working and pay conditions are not agreed, the current employment relationship is terminated at the end of a period equal to the period of notice, counted from the date on which the employee submitted a statement of refusal to accept the proposed terms, or from the date by which he could submit such a statement. This provision applies to people hired on the basis of non-contractual employment, i.e. appointment, nomination, election, as well as a cooperative employment contract.

In the case of employee claims against the employer based on the provisions of the Labour Code, such as, for example, damages or compensation for mobbing, after the takeover of the entire workplace, in the event of liquidation of the previous employer, as already indicated above, only the new employer is liable [Sadlik 2012, 10; Gersdorf and Rączka 2012, 181].

Pursuant to para. 7 of the Regulation of the Minister of Family, Labor and Social Policy of 10 December 2018 on employee files,[32] in the case referred to in Article 23[1] LC or in separate provisions providing for the legal succession of the new employer in employment relationships established by the previous employer, the previous employer must transfer the employee files to the new employer. It should be noted at this point that employers sometimes use the practice of concluding new employment contracts with the transferred employees on the occasion of a transfer of the workplace. This is a wrong practice, because the employees being taken over become, by operation of law, employees of the new employer, and the conclusion of a new employment contract is not constitutive in this case as far as the existence of the employment relationship is concerned, it only determines its content.[33]

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[32] Journal of Laws of 2018, item 2369.

[33] It was pointed out in the judgement of the Supreme Court of 29 September 1998, ref. no. I PKN 349/98, OSNP 1999/20/653 that also the issuance of an employment separation certificate to an employee by the previous employer has no legal significance in relation to the consequences of taking over the workplace by the new employer, because it is not

3. RELATIONSHIP OF EMPLOYMENT OF THE MANAGERS OF CULTURAL INSTITUTIONS UNDER MERGER

Pursuant to Article 15(1) AOPCA, the manager of a cultural institution is to be appointed by the organiser for a limited period of time, having consulted the trade unions operating in that cultural institution and the professional and authors' associations competent for the type of activity carried out by the institution. The manager of a cultural institution shall be appointed for a period of three to seven years.

The appointment of the manager of a cultural institution may be preceded by a competition, but in local government cultural institutions, the list of which is to be determined by regulation by the minister responsible for culture and heritage protection, the appointment of a candidate for the post of manager by means of a competition is obligatory.[34] However, the minister responsible for culture and heritage protection may agree to appoint a candidate nominated by the organiser to the post of the manager without a competition.

A dismissal of the manager shall take place in the same manner. It is not necessary to consult trade unions and professional and authors' associations where candidate for manager is selected through the competition procedure

As has already been pointed out, the merger of cultural institutions results in the loss of legal personality of the merging institutions, since those institutions are struck off from the register of cultural institutions and thus their legal existence ceases. The legal liquidation of an employer, which will, however, in essence lead to the use of the workplace to continue the existing activity within only a new organisational structure, does not constitute liquidation of the workplace, but a transfer of the workplace. The newly established institution in place of the merged institutions becomes, by virtue of Article 23^1 LC, a party to the employment relationships of employees of the merged institutions.

Does this also apply to the managers of the institutions subject to merger? If a new institution is established as a result of a merger of cultural institutions, the act of appointing the manager of one of these cultural institutions being merged shall not form a basis for holding the position of the manager of the institution established as a result of the merger. This

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an event causing the termination of the employment relationship, and the employee would not become an employee of the transferee employer by operation of law only where his employment relationship was terminated before the new employer took over the workplace.

[34] The competition procedure is also obligatory where it is provided for in the statutes of the cultural institution; see judgement of the Regional Administrative Court in Olsztyn of 14 July 2016, ref. no. II SA/Ol 629/16, Lex no. 2083854.

is so because the act of appointment concerns a specific cultural institution, which in this case ceases to legally exist and is struck off from the register. However, regarding Article 23^1(5) LC, a question arises as to its application to the employment relationship of the manager of a cultural institution being merged. According to that provision, on the day of transfer of the workplace or part of it, the employer is obliged to propose new working and pay conditions to employees who hitherto have been working on a basis other than an employment contract, and to set a time limit, not shorter than 7 days, by which the employees may submit a declaration of acceptance or refusal to accept the proposed terms. The application of this provision to an appointment does not, in principle, raise any doubts either among scholars in the field or in the case law [Pezda 2010, 44]. It is even noted that Article 23^1(5) LC should refer primarily to staff members employed on the basis of appointment in managerial positions in the workplace being taken over [Świątkowski 2016, 164]. However, with regard to appointed employees, the exclusion of the possibility of termination of the employment relationship by amending notice should be stipulated.[35] According to the established case law of the Supreme Court, it is unacceptable to terminate the working and pay conditions of an employee employed through appointment.[36]

Analysing the above situation in more detail, one should refer to Article 15(6) AOPCA that lists grounds for dismissing the manager of a cultural institution, which contains neither merger nor liquidation of the institution. In the matters not covered by the Act, the issues related to the employment relationship of managers of cultural institutions are governed by the provisions of the Labour Code. In such a case, it seems that it can be assumed that the dismissal of the manager of a cultural institution subject to merger takes place on the basis of Article 70 LC, provided of course that Article 23^1(5) LC is not considered applicable in this case. This is supported by the fact that the manager of a cultural institution has been appointed to a position in a specific entity, which in this case is struck off from the register and loses its legal personality. Therefore, the act of appointment as the basis for establishing an employment relationship in this institution does not extend to the newly established cultural institution replacing the merged entities. Accepting the possibility of changing the terms of employment of the manager based on Article 23^1(5) LC would in fact mean a change in the position, the manager could no longer be the manager of the liquidated institution, and as the Supreme Court adopted in one of its judgements, changing the working and pay conditions, and in particular

[35] As in the judgement of the Supreme Court of 20 August 2009, ref. no. II PK 43/09, OSNP 2011, No. 7-8, item 102.

[36] Resolution of the Supreme Court of 21 December 1987, ref. no. III PZP 47/87, OSNC 1989/9/131.

the type of the employment (position) of an employee hired based on an appointment may be made by way of dismissal and establishing an employment relationship with the employee on new terms, if the dismissing body is competent for this purpose.[37]

Due to the fact that Article 15(6) AOPCA contains an exhaustive enumeration of reasons for dismissing the manager of a cultural institution, it is a provision of a special nature, which, in accordance with the principle of *lex specialis derogat legi generali*, excludes the possibility of applying the general rules of the Labour Code to a dismissal of the manager of a cultural institution. The provision in question applies only to managers of cultural institutions and only their dismissal from office, so a dismissal may only take place in strictly defined cases. However, excluding the possibility of dismissing the manager of a cultural institution subject to merger, which will lose its legal personality as a result of the merger, solely due to the lack of such a reason in the list contained in the Act, seems to be too far-reaching. In this perspective, it should be stated that the provisions of the Act on the organisation and pursuit of cultural activities that in fact exclude the option of dismissing the manager of a cultural institution subject to merger due to strictly defined grounds for such dismissal, will not be applicable.

Taking into account the above doubts regarding the legal grounds for dismissal of managers of cultural institutions, the list of grounds for dismissal of managers of cultural institutions listed in Article 15(6) of the AOPCA should be extended (as a proposal for future legislation) to include the merger of cultural institutions [Antoniak-Tęskna 2019].

CONCLUSIONS

The reorganisation of cultural institutions in the form of a merger of institutions (or their split-up), i.e. a reorganisation not resulting in the actual liquidation of these entities, and the use of these institutions as workplaces in order to continue existing activities within the new organisational structure, constitutes a transfer of the workplace protected under the Labour Code. This means that a new entity enters into the existing employment relationships of employees of the merged institution as their employer, which ensures that employment is preserved and continued in the new institution, essentially in its previous form, in accordance with the terms of the contracts previously concluded. The personnel of the merged institutions must not be adversely affected by the reorganisation activities of the organisers of those institutions empowered to decide on the legal status of the institution. The continuation of the employment relationship with the new employer

[37] Ibid.

on the existing terms of employment takes place also when the founders – the organisers taking binding decisions about cultural institutions – have agreed otherwise.

These rules do not apply to the managers of institutions subject to the merger, since, due to the above-mentioned differences, they do not automatically become employees of the newly created entity, which consequently means that the manager of the newly established cultural institution should be appointed in accordance with the relevant provisions of law. The procedure for appointing and dismissing the manager of a cultural institution is regulated in the Act on the organisation and pursuit of cultural activities, which are provisions having precedence over the general principles adopted in the Labour Code. The absence of merger of cultural institutions, resulting in the deletion of the merged cultural institution from the register and thus resulting in the loss of its legal personality, on the list of grounds for dismissal of the manager of that institution raises numerous doubts and requires appropriate legislative action to extend the statutory grounds for dismissing the manager before the end of the term of office.

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A CLAIM FOR COMPENSATION FOR RECOVERY COSTS UNDER ARTICLE 10 OF THE ACT ON COUNTERACTING EXCESSIVE DELAYS IN COMMERCIAL TRANSACTIONS – SELECTED ISSUES

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Abstract. Compensation for recovery costs, referred to in Article 10 of the Act on Counteracting Late Payments in Commercial Transactions, is an additional amount due to a creditor when a debtor delays a pecuniary performance arising from a commercial transaction. The nature of this performance is controversial both among legal scholars and in judicial decisions. On the one hand, it is pointed out that it does not depend on incurring any costs, while, on the other, the meaning of the word "compensation" is emphasized, and no costs are expected to be borne in order to acquire the right to claim them from the debtor. The author of the article brings together some of the currently trending views and reviews them taking into account some key challenges. He then supports one of them, justifying his choice and highlighting its practical consequences. Also, he indicates under what conditions and using which defence measures the debtor can defend themselves against such claims before court.

Keywords: compensation for recovery costs; delays in commercial transactions; defence of abuse of a personal right

INTRODUCTION

The Act on combating late payment in commercial transactions,[1] which

[1] The Act of 8 March 2013 on combating excessive delays in commercial transactions, Journal of Laws of 2022, item 893 as amended [hereinafter: Late Payment Act or LPA]. The title of the act was changed under Article 10 of the Act of 19 July 2019 on amending certain acts to reduce payment backlogs (Journal of Laws item 1649), which entered into force on 1 January 2020. The change of the title was primarily substantiated by the fact that the amendment yielded proposals to add provisions to regulate proceedings before the President of the Office for Competition and Consumer Protection (UOKiK) on excessive late payments (see reasoning for the draft act, Sejm document no. 3475, p. 17, https://orka.sejm.gov.pl/Druki8ka.nsf/0/25F61482AF05ECCEC12584090025522D/%24File/3475.pdf [accessed: 28.02.2023]). It must be noted on the side that the title adopted by the legislator seems imprecise from the linguistic point of view and should rather read: on counteracting excessive delays "in payments for commercial transaction" or "in fulfilling financial performances that result from commercial transactions", which would clearly show that the act intends to limit the occurrence of late payments exactly when it comes to carrying out financial performances.

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implements Directive 2011/7/UE,[2] introduced in 2013 the option that creditors of amounts due in commercial transactions executed as part of their economic activity may demand flat rate amounts for late payments for a delivered non-financial performance.[3] A decade of said laws being in force has shown practical problems with claiming these payments from contractors, also through litigation. The legislator has managed to solve some of those doubts by precise amendments of specific laws, but some of them stayed unchanged, which means that courts still remain a place where they are interpreted, thus there are bound to be discrepancies in judicial decisions.

The subject of the discussion in this study will be problems associated with pursuing claims resulting from late financial performances in commercial transactions, which the author believes is particularly important from the perspective of coherent interpretation of provisions of the act for effective redress, while at the same time avoiding excessive burdening of the debtor. The author will also attempt to demonstrate in a practical way the gravity of these issues from the point of view of both the creditor, who optimises satisfaction of their claims, and from the point of view of the debtor, who, in a specific interpretation of said provisions, may experience a rightful sense of excessive burden of these legal measures.

1. NATURE OF A CLAIM FOR COMPENSATION FOR DELAYS IN COMMERCIAL TRANSACTIONS

The first issue to be explained, and which is fundamental for a further discussion, is to specify the nature of the performance identified in Article 10(1) LPA as "compensation for recovery costs". This expression is a source of many interpretation ambiguities that in consequence lead to extremely different rulings on essentially similar facts.

To interpret it correctly, we must first look at the recitals of the Directive in question and its Article 6. Admittedly, both its recitals and further regulations talk about "compensation for recovery costs,"[4] which would seem to suggest that this amount has a compensatory character and thus, the creditor must cover any costs to recover amount due resulting from commercial transactions. The legislator's use of the EU term "compensation"[5]

[2] Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, OJ L 48, 23.2.2011, p. 1-10.

[3] Depending on the amount in the invoice, this amount is EUR 40 (where the value of the performance exceeds PLN 5,000, but is not more than PLN 50,000) or PLN 100 (where the value of the financial performance is at least PLN 50,000).

[4] See recitals 12, 19, 21 and 28 of Directive 2011/7/EU.

[5] Importantly, it is not solely a linguistic nuance resulting from the Polish translation of the text of the Directive. This phrase was also used in, for example, the French version ("indemnisation").

seems *prima facie* to confirm this thesis;[6] however, before we draw such conclusions we must look at the broader interpretative context made up of, in particular, the aim of the Directive and the construction of provisions on the right to charge this amount.

As for the Directive's fundamental aim, it must be concluded that it is to protect creditors against debtors' bad practices.[7] It is worth looking here at recital 12 of the Directive, which reads: "late payment constitutes a breach of contract which has been made financially attractive to debtors in most Member States by low or no interest rates charged on late payments and/or slow procedures for redress. A decisive shift to a culture of prompt payment, including one in which the exclusion of the right to charge interest should always be considered to be a grossly unfair contractual term or practice, is necessary to reverse this trend and to discourage late payment". This may suggest a shift in the burden of the principal function of this compensation onto the repressive and guarantee function, thus moving the compensatory function to the back burner.

The construction of the provision of Article 6(1) of Directive 2011/7/EU seems to also suggest the same thing, as it stipulates that Member States shall ensure that the creditor is entitled to obtain from the debtor, as a minimum, a fixed sum of EUR 40 where late payment interest becomes due in commercial transactions. The Union legislator does not mention "compensation" in this provision, but a "fixed amount", which seems to reflect the more universal nature of the sum discussed better. This is also evident in the fact that the said provision conditions the entitlement to obtain this fixed amount only on due and payable late payment interest. On the other hand, recital 17 of the Directive helps specify when the payment is late. It lays down that a debtor's payment should be regarded as late, for the purposes of entitlement to interest for late payment, where the creditor does not have the sum owed at his disposal on the due date provided that he has fulfilled his legal and contractual obligations. The above was successfully implemented in the Polish legal order in Article 10(1) LPA, which stipulates that the creditor is entitled to obtain from the debtor a fixed amount as "compensation for recovery costs" from the date he acquires the right to interest on delays in commercial transactions, which in turn occurs, pursuant to Article 7(1) and Article 8(1) LPA, when the creditor carries out the performance resulting from the debt on the one hand and has not received the payment within a specified time limit on the other. What is also crucial, this amount is due without issuing a request for payment, which means that the creditor may

[6] In particular, the costs incurred could be expressed in administrative costs involved in recovering amounts due (see e.g. recital 19 of the Directive) or requests for payment.

[7] E.g. recitals 29, 33, 36 and 28 of Directive 2011/7/EU.

charge it on the first day when the payment for the commercial transaction becomes due and payable.

The author believes that the above suggests that the performance discussed is primarily repressive and guarantee in nature, intending to ensure tools the creditor may use to pressure the debtor to pay the financial performance within the agreed deadline. That is why it must be believed that the name "compensation" is misleading despite being in line with the terminology used by the EU legislator. However, the character of this performance cannot be specified as detached from its goal, solely on the basis of its name, as discussed later herein.

2. POSSIBILITY TO CLAIM COMPENSATION AND THE NEED TO DEMONSTRATE RECOVERY COSTS INCURRED

The discussion so far has shown that despite the fact that the Directive and the act that implements it to the Polish legal order alike talk about "compensation" or "recovery of due amount", the fee is rather repressive and guarantee in nature. This may inspire further interpretative problems in the context of the obligation or lack thereof for the creditor to demonstrate whether or not he incurred any recovery costs. The provision of the act seems precise on the one hand, but on the other, as pointed out before, both the act and the Directive talk about "compensation". Legal scholars do not see eye to eye here, the same is the case for judicial decisions when it comes to premises to order such a performance.

Some commentators believe that the concept of "fixed compensation" is new in the majority of EU's legal systems, but there should be no doubt that, contrary to the literal interpretation of Article 10(1) LPA, the possibility to obtain it from the debtor should not be entirely automatic but it should be conditioned at least on substantiating the activities taken up [Fik and Staszczyk 2015, 122]. In justifying their position, authors refer to the *ratio legis* of this institution and the dictionary meaning of "compensation". Invoking the meaning of this word, used by both the Polish and the EU legislator, is in fact quite a popular argument against awarding the creditor entitlement to charge the equivalent of EUR 40, 70 or 100 pursuant to a liberal wording of this provision and to make the right to this performance conditioned on demonstrating that the creditor has made any steps to recover the due amounts.[8] We cannot deny that this argument is valid, yet still it must be noted that it must not be an overwhelming one. As follows from findings made by Fik and Staszczyk, the word "compensation" means "removing losses or damage suffered by someone" [Drabik and Sobol 2007, 210

[8] See for example: Kaźmierczak 2020, 81-82; Gołębiowski 2015, 42; Fik and Staszczyk 2015, 123.

as quoted in Fik and Staszczyk 2015, 122]. However, it is a vague expression which mainly refers to the meaning of specific words in general language, which are not necessarily reflected in the language of the law. You cannot overlook that the general understanding of terms such as "loss" and "damage" could accommodate a meaning according to which if the creditor does not have the due amount in their bank account on the date when it is payable, this constitutes "loss" or "damage". In this case it will be understood as e.g. being unable to use funds, which could lead to a measurable loss or violation of a sense of financial security, which in essence could constitute damage.

Another argument advocating that the entitlement under Article 10 LPA be not associated with the right to charge interest on late payments in commercial transactions would be the circumstance that creditors often treat this provision as a source of additional remuneration, even if no enforcement procedures have been initiated yet or have been initiated collectively. This may lead to a situation where the debtor may face having to pay to the creditor a grossly overinflated recovery amount that does not correspond to the costs incurred [Kaźmierczak 2020, 75]. Some experts in the field believe, that, in other words, such an interpretation of this provision is simply unfair. Moreover, in contrast to liquidated damages, there is no room for dosing the flat-rate charge discussed.[9] Legal scholars and commentators think it important in the fact that in the case of minor figures of the principal the additional flat rate charge of EUR 40 would have to be considered excessive, which would blur the concept of the main amount due and costs of its enforcement. Such costs should not be its sole basis, and in particular they should not exceed the value of a basic performance because such a solution leads to a clear strain on trust in the law [Fik and Staszczyk 2015, 125]. While again we cannot deny a certain merit to the quoted views, using concepts such as "injustice" or "gross excess" seems inadequate in a situation where, which must not be forgotten, even a different, restrictive approach to the content of Article 10 LPA conditions the charging of the flat-rate amount on two premises. The first one, greatly dependent on the creditor, involves the performance of a consideration. The second one, fundamentally influenced by the debtor, is to carry out the financial performance in time. Therefore, since the creditor's right is correlated with debtor's omission, that is failure to carry out the financial performance in time, we cannot accept that the creditor, charging a flat-rate sum for the recovery of amounts due, violates in any way the principles of equity and community life and abuses a personal right. Naturally, it is possible that the debtor is not entirely responsible for failure to pay on time since it may be down to his current

[9] Judgment of the District Court for Łódź-Śródmieście in Łódź of 11 April 2016, ref. no. XIII GC 1966/15, Lex no. 2244109.

financial problems, thereby issuing sanctions against the debtor for exceeding the payment deadline would be a mistake;[10] however, from the perspective of the creditor, debtor's financial troubles should not be a mitigating circumstance at all. The debtor has the right to expect that his counterparty, pursuant to, e.g. Article 355(2) of the Civil Code, will run his economic activity with due diligence required for the specific characteristics of a given industry, which does not preclude the right to expect that certain universal standards should be respected, such as for example, keeping a certain reserve to cover running costs in the event of temporary payment backlogs. Adopting a different view and excusing the defaulting debtor for financial reasons without giving it any consideration is a simple way to wind up a vicious circle of insolvency and of enhancing payment backlogs. This is why, even though the legislator did not wish to design criminal sanctions for late payment, one cannot agree with Kaźmierczak, who claims that because the Directive intended to encourage debtors to make timely payments, not to penalise them for defaulting, upholding repressive measures for debtor's liability also after he has carried out the performance will not result in encouraging him to carrying out financial performances on time [Kaźmierczak 2020, 84-86]. At this point we must also note that even though the aim of the Directive itself is not a subject of controversy, some legal scholars and commentators draw other conclusions from it. This discussion cannot take place without recalling findings made by Dolniak. She notes that the main goal of a claim for the equivalent of EUR 40, as a mechanism that is to counteract late payments, is not to compensate the creditor for the costs incurred due to failure to pay on time, but to motivate debtors to pay their debt timely. This is why conditioning the right to the equivalent of EUR 40 on the creditor's suffering damage seems groundless [Dolniak 2019, 31].[11] The author also rightly points out that "this cost must be burdensome for the defaulting debtor. In consequence, absence of cost on the side of the creditor will not mean that he will not be allowed to request compensation for recovery costs" [Idem 2021, 104]. We should agree with this, but at the same time, contrary to what Kaźmierska believes, we must acknowledge that satisfying the obligation to pay compensation in the amount that is equivalent to EUR 40, 70 or 100, even in the case of payment of the main amount due, may be educational. To illustrate this, the debtor, aware of the potential burdensome consequences for defaulting, will be more willing to pay before the agreed deadline, even if this should be done for counter parties other than the creditor.

Some believe that since the premises for a claim for payment of interest on late payment were constructed in a similar fashion to compensation

[10] See for example Kaźmierczak 2020, 84.

[11] Similar in Naworski 2019, 14-15. See also judgment of the Supreme Court of 7 July 2017, ref. no. V CSK 660/16, Lex no. 2350004.

for recovery costs, it must be construed that the creditor has other legal measures at his disposal which he may also exercise if the debtor does not keep the payment deadline and, as a consequence, there is no need to establish another institution whose application depends on meeting the same requirements. This, however, does not seem convincing. The amount of the claim for payment of interest is not a zero or negligent value, as assumed in the Directive's preamble, but a value that gives a real chance to repair the creditor's damage suffered as a result of the delay [ibid., 84]. We should first note that for reasons pointed out above (not having funds in a bank account on maturity date, not being able to use the funds due in transactions), one cannot accept that a claim for payment of interest fully compensates the effects of late payment the creditor suffered. Secondly, the interest itself does not fully satisfy the purpose of the Directive, that is encouraging fulfilment of financial obligations in time. This interest, albeit high,[12] may still mean that part of the debtors, somehow crediting their activity, will be late in carrying out a financial performance, assuming that the only negative consequence will be having to pay interest on late payment in commercial transactions. Only a real threat that the creditor will charge compensation (without having to demonstrate activities undertaken intended to recover the amounts due) may truly fulfil the aim of the Directive.

We must also note on the side that the postulate that the creditor must at least substantiate any activities to recover the amounts due, that is in particular requests for payment issued for the debtor in the form of effective service of an invoice [Fik and Staszczyk 2015, 123], pursuant to recitals of Directive 2011/7/EU, materialises itself somehow by demonstrating that the invoice was served on the debtor. Because, pursuant to recital 18, invoices trigger requests for payment and are important documents in the chain of transactions for the supply of goods and services, inter alia, for determining payment deadlines, the mere service of an invoice may be seen as an activity intended to recover amounts due. Moreover, one needs to note that in the reality of practice of economic transaction, the start of the payment deadline is marked indeed by serving the invoice, which means that it is a very rare occasion that the business operator pays the counter party before receiving an accounting document. This, in turn, implies a conclusion that for the needs of judicial proceedings it should be enough to demonstrate that an invoice has been issued and the that the defendant has paid it after the deadline, which may prove with high likelihood that this invoice was delivered to the debtor.

[12] In the first half of 2023 this interest rate is 16.75% per year for transactions in which the debtors are entities that are not public health care entities and 14.75% per year in situations where the debtor is a public health care entity.

The Supreme Court's adoption of a resolution of 11 December 2011 was a breakthrough moment in several aspects.[13] This resolution stipulated that the creditor has the right to compensation for recovery costs in the value of EUR 40 without having to demonstrate that these costs have been incurred and this claim arises after the lapse of deadlines stipulated in an agreement or agreed under Article 7(3) and Article 8(4) LPA. First of all, it was the first such a clear stand of the Supreme Court in this matter which solved the question of interpretation of Article 10 LPA. However, as Naworski rightly notes, even though this regulation was indeed adopted, a contrary belief dominates in the established line of decisions of lower instance courts [Naworski 2019, 9]. Second of all, despite a clear stance on the interpretation of the provision discussed, the Supreme Court pointed to the option to invoke an effective defence measure against the creditor's pursuing claims for the payment of compensation for recovery costs. It is the defence of abusing a right under Article 5 CC and the court pointed out that due to the burden of the sanction imposed on the debtor the adjudicating court should examine whether a personal right was infringed in the circumstances of a given case.

It seems that such a position is most appropriate because, on the one hand, it corresponds with a literal wording of Article 10 LPA and also implements the purpose of the compensation which has its source in this provision. On the other hand, it allows the debtor to free himself from the obligation to pay this amount if the creditor has abused this right. However, we need to emphasize that the possibility of effective transfer of this challenge could be exceptional and cannot result in a certain automation that means that the creditor's demanding that the debtor pay the equivalent of EUR 40, 70 or 100, where the debtor has paid it voluntarily (albeit late), will result in dismissal of the claim.

3. THE DEFENCE OF ABUSE OF A PERSONAL RIGHT AS THE DEFENDANT'S PROTECTION MEASURE

The aforementioned challenge of violation of a personal right is one of the leading defence measures afforded to the defendant in proceedings in which the applicant requests the payment of the equivalent of EUR 40, 70 or 100 to cover recovery costs. Naturally, the defendant may bring other defence measures, e.g. he may state that the payment was indeed done in time and the applicant calculated the deadline wrongly (this will be the case in particular where the invoice was delivered by post and the applicant

[13] Resolution of the Supreme Court of 11 December 2015, ref. no. III CZP 94/15, OSNC 2017, No. 1, item 5.

calculated the deadline from the date of sending the invoice and the defendant from the date he received it). However, this is not always possible, especially in the case of very late payments. The defence of abuse of a personal right does, however, seem like a potentially most effective defence measure, especially in a situation where the creditor claims the said compensation for a late payment of more than one invoice.

Legal commentators point out a fundamental practical problem associated with the application of Article 5 CC, namely that taking into account the challenge of violation of a personal right is in practice an exceptional situation and that effectiveness of the debtor's defence depends entirely on judicial discretion and the chances to reverse results of such evaluation are smaller than in the case of bringing in challenges of violation of provisions that do not have the nature of a general clause [Kaźmierczak 2020, 82]. We must also note here the principle of clean hands developed by legal scholars, according to which "the person who himself violates the principles of community life cannot invoke them and use them to demand that judicial protection be refused to a person whose right has been violated. This would constitute erroneous understanding of the general clause expressed in Article 5 CC."[14] While Kaźmierczak believes that the possibility of defence before the claim for payment of a flat-rate charge under Article 10 LPA based on this defence is, from the point of view of the debtor, unfair [ibid., 83], one cannot note that the debtor, by paying his obligations after the deadline, did undoubtedly violate principles of community life himself and the principles of trader's integrity, thus should not invoke creditor's abuse of a right unless other, exceptional circumstances that substantiate this defence, are found.

One cannot rule out a situation in which the debtor, pursuing his claims under Article 10 LPA, abuses this right, which will make the defence under Article 5 CC valid. This may the case when, for example, the delay is negligent and through no fault of the debtor, caused e.g. by sudden and unforeseen financial problems about which he informed the creditor and finally, in the case where the creditor gives the debtor his permission for a late payment and then, the creditor requests that the performance under Article 10 of the act be additionally fulfilled. However, it must be clearly emphasized that these reasons should be exceptional and that they should each time be examined through the prism of a given case. For this reason, it is impossible to share the view of the District Court for Łodź-Śródmieście,[15] which

[14] Judgment of the Supreme Court of 4 January 1979, ref. no. III CRN 273/78, Lex no. 8161; judgment of the Regional Court in Warsaw of 22 December 2017, ref. no. I C 780/17, Lex no. 2439687.

[15] Judgement of the District Court of Łodź-Śródmieście of 11 April 2016, ref. no. XIII GC 1966/15, Lex no. 2244109.

took into consideration the defence of violation of a personal right only because the defendant carried out her performances late, though voluntarily, that is without the creditor taking any enforcement steps; the delay was only slight and the interest negligent; interest is a basic form of compensation for creditor's damage in the form of lack of funds caused by debtor's delay in payment and, finally, that the sum of EUR 40 amounts, converted into the Polish currency pursuant to the instruction of Article 10(1) of the Late Payment Act, that is PLN 2,029.34, exceeds more than 79 times the amount of late payment interest on the amount due that is the basis for redress under the legal basis quoted. This ruling, in a model fashion violated the purpose of the act, that is encouraging debtors to keep their deadlines in paying their commitments resulting from commercial transactions. Granting protection to such debtors who are late in their payment without a clear and exceptional reason is a clear signal that they do not face any severe consequences of these violations and thus it is not only a *contra legem* interpretation, but also contrary to the functions of the measure in question, which has been discussed above. For this reason, a judgement of the Regional Court in Rzeszów deserves more attention. It states that "the defendant's defaulting, albeit minor, and considering that he did pay the principal amount due after the deadline without a separate request for payment, is permanent, recurring and continuous, which rules out the understanding of the relations between the plaintiff and the defendant as exceptional and thus rules out application of Article 5 CC."[16]

The court rightly noted that where the delays are permanent, extension of deadlines turns into common practice, reflects behaviour that it not deserving of legal protection and thus rules out fall-back on Article 5 CC. It is also worth noting here that when deadlines are longer in economic trading it should be the debtor's responsibility to make sure that such deadline is not missed. There are no contraindications that this performance should not be made before the deadline, for example on the twentieth day, instead of waiting till the last moment, that is till the thirtieth day. No provision asks to wait till the very end of the deadline and such actions are, unfortunately, quite common, which may, inevitably, cause slight delays. This may be the case in particular where the payment is to be made in a foreign currency. It must be concluded that in the event of default for technical reasons, where the payment mechanism has been initiated on the last possible day, this circumstance should be counted against the debtor.

Therefore, we need to conclude that in essence the defence of violation of Article 5 CC should be treated as a basic and most important tool

[16] Judgement of the Regional Court in Rzeszów of 24 August 2018, ref. no. VI Ga 469/18, Lex no. 2537616.

of defense in proceedings for the payment of compensation under Article 10 LPA, and its exceptional character is not contrary to such a conclusion – since payment of amounts due should be made in time as a rule, there are no reasons to look for systemic, permanent defence measures to evade adverse consequences of behaviours which constitute violations of the purpose of the act.

4. SELECTED PROCEDURAL ASPECTS ASSOCIATED WITH SEEKING COMPENSATION UNDER ARTICLE 10 LPA

Pursuing compensation for recovery costs together with the principal may give rise to specific problems in practice. One of them is the question of how such a claim should be treated in the context of Article 20 CC, pursuant to which the value in dispute does not include interest, fruits and costs requested along the principal? These costs identified in this provision are this very problem. It is a rather broad term and legal scholars believe that it covers, inter alia, both litigation costs and costs resulting from substantive law activities, such as costs of receipt (Article 462(3) CC), costs of handing over and collecting a thing (Article 547 CC) [Wójcik 2017, 71], remittance costs (Article 454(1)) [Stefańska 2021, 100-101], or costs of private expert opinions [Zieliński 2017, 77]. This signalled problem mainly concerns qualification of the compensation under Article 10 LPA, which the legislator directly calls "recovery costs" and thus the possibility to add this amount to the value in dispute, which may ultimately affect issues such as: a filing fee, representation costs if a professional attorney is involved or court's material competence.

Legal commentators point to a broad array of ways to treat this amount – from increasing the value in dispute by this amount, to demanding it next to the principal, without charging it to the value in dispute, to adding it to litigation costs, next to the filing fee and representation fees [Dolniak 2021, 112] (which also means that this amount in not taken into consideration in the value in dispute). It is worth pointing out in this question to the fact that a claim for the equivalent of EUR 40, 70 and 100 is of a substantive law nature, whereas a claim to award litigation costs to a party – a civil law character [Grochowski 2017, 162-63]. For this reason, it does not seem valid to add it to litigation costs because the obligation to pay it arises by operation of law upon the debtor's delay in making the financial performance resulting from a commercial transaction. In other words, it is not necessary for this amount to arise to initiate proceedings in which a competent court must award it so that the obligation to pay it to emerge only then.

Advocates of the thesis that it is not allowed to add an amount equivalent to EUR 40 to the value in dispute often invoke Gołębiewski's position,

who believes that it seems reasonable to add this claim towards costs that will include both costs associated with actions under substantive law (sending a financial performance, confirmation of receipt, handing over and receipt of a sold item, notarial certification of a failure to pay a bill-of-exchange) and steps under procedural law, and also other necessary costs, such as those of drawing up private opinions and also requests for voluntary payment. Costs understood this way overlap, in author's belief, with the notion of costs of recovering amounts due whose flat-rate amount is indeed the equivalent of EUR 40. This means that it is not valid to charge this performance in the value in dispute [Gołębiowski 2015, 38-43].[17] We cannot deny a certain truth of this view, though we must not forget the purpose of Directive 2011/7/EU and the nature of this claim. Since, as concluded earlier, compensation is to be also an additional element that sanctions debtor's disloyal behaviour and will also be due in a situation there the creditor has not incurred any additional costs, we cannot talk in essence about "costs" in their model form. In reality it seems that the greatest problem of both the Directive and the Polish implementing act is the terminology applied, which may be confusing both under substantive and procedural law. However, we must support the view that compensation referred to in Article 10 LPA does not constitute costs referred to in Article 20 of the Code of Civil Procedure and thus should be added to the value in dispute under Article 21 of the CCP.

However, in practice the court that examines the case will sometimes verify the value in dispute as a result of which a decision is made in camera under Article 25(1) CCP, subtracting the equivalent of the compensation from the amount specified as value in dispute. Leaving aside the correctness of this solution, one may consider a potential solution to this problem by charging interest on this compensation, which should lead to it losing the nature of a subsidiary amount due. In this context one should point to a principle that has been in effect for years, pursuant to which interest is not pursued along the principal, if their character changes from the periodic payment to the amount given in the interest, that is capital, and Article 20 CCP does not apply to capitalisation of interest in a legal meaning.[18] Therefore, since capitalization of interest for a specific period causes it to lose its indirect character, even where interest so calculated, specified as a specific amount (most often for the period from the maturity date to the date of filing a claim with the court) is claimed in single proceedings together with the principal claim, it seems that a similar rule should be applied for pursuing amounts that are compensation referred to in Article

[17] Similar in judgment of the District Court in Tychy of 23 January 2018, ref. no. VI GC 1103/17, Lex no. 2454051.

[18] Decision of the Supreme Court of 30 May 2007, ref. no. II CZ 38/07, Lex no. 346207.

10(1) LPA. This seems especially true considering that pursuant to recital 19 of Directive 2011/7/EU compensation may be combined with late interest, though this should not be statutory interest for delays in commercial transactions, but statutory interest for a delay provided for in Article 481(2) CC [Dolniak 2021, 111]. The proposed solution seems to be getting approval from the judicature. We may point out here the position of the District court in Bartoszyce, which held that it is allowed to charge statutory interest on the amount referred to in Article 10(1) of the Late Payment Act, especially given the recent introduction of the regulation of Article 98(1[1]) CCP. This court believed that by charging interest on this amount due it loses its auxiliary character thus itself becomes the principal on which another amount under Article 20 CCP is being claimed – late interest. If we were not to recognize the interest on the amount due as the principal, we would deal with a situation in which another indirect claim is pursued for the indirect claim, and the regulation of Articles 20 and 21 CCP does not provide for this. Given the above, the court concluded that the amount due under Article 10 of the Late Payment Act, as a result of the interest rate, has gained the character of capital and lost its indirect (accessory) character. This is why Article 21 CCP will apply to it.[19] However, irrespective of the above one needs to clearly advocate admissibility of charging the amount referred to in Article 10(1) LPA to the value in dispute, without additional steps.

As has been mentioned earlier, the claim for the compensation for recovery costs may incur interest. Therefore, we need to consider the issue of when it should be charged? In practice we may see a few techniques used. The first one, objectively least problematic, covers demanding interest on compensation from the date of filing the claim at the court. The second one – from the date of expiry of the deadline specified in the request for payment, where we must note that it should not be treated as a rule, since the claim for payment of compensation is afforded without a request. The third one, in turn, is based on the wording of Article 10(1) LPA. It reads that if the claim for compensation for recovery costs is afforded, by operation of law, from the date of acquiring the right to charge interest, this will mean that the first possible day on which the creditor may request that the performance resulting from compensation be made will be the maturity date of the principal. At the same time, considering that it is necessary that there is at least one day on which the debtor is not late in making the performance, we must conclude that when it comes to the claim for compensation, the debtor will be late the earliest on the following date, that is on the date after the day on which the creditor gained the right to claim it, thus two days after the principal's deadline.

[19] Decision of the District Court in Bartoszyce of 16 July 2020, ref. no. II NSW 46/20, Lex no. 3040447.

CONCLUSIONS

The purpose of Directive 20117/7/EU and of regulations that implement it to the Polish legal order do not raise doubts among legal commentators or in judicial decisions. It is precisely specified in Directive's recitals and it involves motivating debtors to carry out their financial performances resulting from commercial transactions timely, that is agreements between traders. Interpretation discrepancies related to this purpose arise when specifying the nature of compensation for recovery costs referred to in Article 10(1) LPA. One must clearly advocate the view that treats a flat-rate charge as a performance that is to be burdensome on the debtor when he does not make his performance on time, which means that this amount is due to the creditor also in the case when the payment is made. What is important, pursuant to the position taken, it is due even when the performance is made without the creditor taking additional enforcement steps and the only two premises that allow for it to be charged are the creditor's carrying out the performance and the debtor's being late with the payment.

Consequently, we may assume then that the only effective challenge that allows the debtor to free himself from the obligation to pay this amount will be the defence of violation of a personal right. Still though, this defence should be exceptional and refer to a situation in which the delay is independent of the debtor or when the creditor consents to extending the deadline and then, contrary to the previous position, demands payment. On the other hand, the creditor's exercising his statutory right to charge this amount cannot be treated as violation of a personal right, even if the delay was marginal and the amount due was paid voluntarily, without the creditor's performing any additional steps aimed to recover the amount due; especially if the delays are regular and the debtor somehow credits his activity at the expense of the creditor. Such action is a direct violation of the aim of the Directive and the act, and thus should not deserve legal protection.

A performance resulting from compensation may incur interest (in the amount of late interest) and it may begin as early as on the first day after the deadline for paying the principal. One must also recognize that it is possible to add this amount to the value in dispute since it is not costs referred to in Article 20 CC. This question should nor raise doubts, especially where this performance is subject to interest the way it is described above.

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SELECTED ASPECTS OF THE FINANCIAL STRATEGY OF THE LOCAL GOVERMENT UNIT'S ORIENTED TO THE DEVELOPMENT OF ECONOMIC AND SOCIAL ACTIVITY (FINANCIAL AND LEGAL ANALYSIS)*

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Abstract. Fiscal burden, especially taxes, is undoubtedly one of the factors influencing business decisions. Taxpayers often prefer one location for their business to another based on the local fiscal policy. It can also lead to a decision to relocate the company's headquarters or to start a branch or plant elsewhere. The intervention function (stimulative, incentive) of taxation is linked to its non-fiscal impact on taxpayers. The results of tax interventions depend on the proper selection of incentives and their intensity. Despite doubts that have been raised around the rationale for the use of taxes as a stimulus influencing economic decisions (due to the interference with the principle of fair competition), tax incentives are widely used in practice.

Keywords: public finance act; financial strategy; local government units; public administration

INTRODUCTION

Local finance is distinguished from state finance by its territorial scope and the place of concentration of monetary resources. The essence of local self-government is the exercise of state power using administrative authority in municipalities, counties and provinces, within the framework of the applicable legal order, by entities separate from the state with a corporate structure regulated by laws. Local government units (LGU's) are non-state and decentralized entities that have been granted public administration

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tasks and powers by law. A form of ensuring that the actions of decentralized entities comply with the law is verification supervision, that is, supervision whose criterion is legality and which is exercised over an autonomous and independent entity.

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

The social sciences use the typical methods found in the social sciences and humanities, i.e.: the study of documents (legal acts, expert reports, opinions, analyses), comparative methods (scientific articles, reports, analyses derived from linguistic, grammatical and historical interpretation) and case studies. The result of cognitive research is new claims or theories. On the other hand, the results of research for the purposes of economic practice are determinations of whether and by how much existing theorems and theories on entrepreneurial development are effective from the perspective of contemporary requirements of social and economic development. In other words, they serve the purpose of clarification and piecemeal verification of existing theorems and theories. Induction was used as the main research method. It involves drawing general conclusions or establishing regularities on the basis of 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. Inductive methods include the various types of analysis of public and private institutions (including consulting forms), expert opinions, statistical data and scientific documents (scientific articles and monographs) used in social research, which were examined for the purpose of this study. In addition, the paper uses two general research methods, i.e. analytical and synthetic methods, characterized by a particular approach to the study of reality. Analytical treats reality as a collection of individual, specific features and events. Following this research method involves breaking down the object of study into parts and studying each part separately or detecting the components of that object.

The research methods used in the study are: comparative analysis, functional analysis, questionnaire, interviews with municipal managers through a direct interview with the respondent, and the method of research in dynamic terms. The synthetic method treats reality as a collection of characteristics, its implementation consists in searching for common features of various phenomena and events, and then tying them into a unified whole. Thus, the synthetic method examines and determines the totality of the object of study. Using a comprehensive (hybrid) research approach, the so-called triangulation of data sources, i.e. comparing information on corporate social responsibility from different periods, as well as economic systems,

and theoretical triangulation – which consists in analyzing the acquired data from the perspective of many different theoretical concepts describing the functions, purpose and tools of managing the economic and social development of the local municipality (LGU) – were also applied.

2. SOCIO-ECONOMIC DIAGNOSIS OF THE LOCAL GOVERNMENT UNIT IN THE CONTEXT OF FINANCIAL PLANNING

Socio-economic and spatial diagnosis of the municipality is most often carried out in dynamic and comparative terms, using public statistics and relevant analytical studies. It is essential for long-term forecasting of local finances and investments. It is crucial to analyze the socio-economic and spatial trends and tendencies occurring in the municipality and its surroundings in recent years, together with the identification of development consequences and challenges. The diagnosis should therefore be conducted in a dynamic (several years) system, allowing to obtain information on the changes taking place. A good period is the last five years (or more, e.g., 10, if justified), taking into account the delays that occur in the publication of data within the framework of public statistics. The most up-to-date data is, of course, available to the municipality, but in this case there is the problem of comparability with other units, which would have to make similar data of their own available at the municipality's request. Stretching the analysis over several years makes it possible to determine the direction of change, its dynamics, identify "turning points" and set development trends in the future. Such an approach also minimizes the risks associated with disturbances, obscuring the full picture of a given phenomenon. For example, the COVID-19 pandemic caused an economic collapse and a difficult situation in the labor market – failure to include in the analysis the most recent data or information from previous years, which were characterized by prosperity and declines in unemployment, can affect the misinterpretation of the level of local entrepreneurship.

In addition, statistical forecasts are very important for the planning process. Most often, they relate to population or economic development. In the work on the strategic diagnosis, it is worth using, first of all, the forecast of the population of municipalities until 2030, developed and made available by the Central Statistical Office in 2017. However, when formulating conclusions and making possible strategic decisions, it is important to keep in mind the imperfection of forecasts. In summary, a reliably developed diagnosis of the municipality should include: the current state, the state preceding the current state – for example, five years back and the predicted state in the form of forecasts – where possible [Wołowiec and Bogacki 2019, 7-27].

Ultimately, the diagnosis should contain information allowing to formulate key conclusions for the social, economic and spatial development of the municipality. The use of comparison – benchmarking in the diagnosis allows to place the LGU's in a broader context, and at the same time serves as a basis for self-improvement. Key in this case is the selection of a comparative background. The basic criteria that can be used to select benchmarks are: similarity – in terms of characteristics and development conditions, e.g. selected municipalities from a given county, region or country with similar characteristics; benchmark – on the basis of measuring development distance and learning from the best, e.g. district, subregional or regional leaders and neighborhood – when the comparative background is made up of units from closer or further surroundings.

The aforementioned similar nature of municipalities, which allows their comparative juxtaposition, is usually determined by taking into account key development factors – the most common in this role are: 1) location (e.g., within an agglomeration, near a state border or in a mountainous area); 2) terrain (e.g., lowland, hilly or mountainous); 3) similar settlement structure (e.g., urban-rural municipalities headquartered in a small); 4) above-average potential in a given area – e.g., agricultural, tourist, industrial; 5) similar nature and scale of existing problems – e.g., demographics or structural unemployment.

In practice, it is worthwhile to present the municipality against the background of neighboring units, assuming that they most often have a similar character, while taking into account that the strategy will be consulted with their participation. Keep in mind the good practice of showing the analyzed municipality in relation to the district, provincial and – in justified cases – national average. In particularly important thematic areas for the municipality, it is also good to introduce a comparison with selected leader municipalities, for identification and creative adaptation of best solutions and practices. In all these cases, it is necessary to use conversion rates of indicator values per one, one thousand or ten thousand residents to increase the authoritative nature of the information.

It is important to take into account the spatial variation of the presented phenomena within the analyzed unit. Differences may exist between separate units, such as city versus rural areas, comparison of localities or auxiliary units (socio-districts, neighborhoods, settlements and others). Today, functional areas are even more important, where administrative boundaries recede into the background [Krupa and Wołowiec 2010, 7-35].

3. LGU BUDGET AS A TOOL FOR PLANNING AND MANAGING LOCAL DEVELOPMENT

According to Article 211 of the Law on Public Finance (LPF), the municipal budget is an annual plan of income and expenditures, as well as revenues and expenditures of the unit. The budget of a local government unit is adopted for the fiscal year. The fiscal year is the calendar year. The basis for financial management of a local government unit in a given fiscal year is the budget resolution. The budget resolution consists of the budget of the local government unit and annexes. In accordance with Article 212 LPF, the budget resolution specifies:

1. The total amount of planned revenues of the budget of the local government unit, distinguishing current and property revenues. The amount of income in the budget resolution has the character of a forecast, however, it should be based on the most accurate possible calculations, premises and simulations. The main sources of income are: taxes, fees, general subsidy, grants;
2. The total amount of planned expenses of the budget of the local government unit, distinguishing current and property expenses. Expenditures in the budget resolution are an impassable limit, they are determined by the type of tasks performed by the local government. In the plan of expenditures of the budget of the l.g.u. the planned amounts of current expenditures and property expenditures are specified, by division and chapter of the budget classification;
3. The amount of the planned deficit or planned surplus of the budget of the local government unit, together with the sources of covering the deficit or allocating the surplus of the budget of the local government unit (the definition of budget surplus and deficit of the budget of the local government unit is contained in Article 217(1) of the LPF, while the sources of financing the deficit are specified in Article 217(2) of the LPF);
4. The total amount of planned revenues of the budget of the local government unit. The amount of revenues is in the nature of a forecast, while the sources of revenues are specified in Article 5(1)(4) of the LPF;
5. The total amount of planned outgoings of the budget of the local government unit. The outgoings are an impassable limit, and the types of outgoings are specified in Article 6(2) of the LPF;
6. Limit of liabilities on account of incurred credits and loans and issued securities, referred to in Article 89(1) and Article 90 of the LPF. This limit is determined in the case of planning a budget deficit and indicating as a source of its financing in whole or in part a credit, loan or issued

securities, this limit is also determined in the case of financing from these sources of previously incurred liabilities, or in the situation of financing in advance of activities financed from sources originating from the budget of the European Union;

7. The limit of liabilities included in the debt title;
8. The amount of expenditures due for repayment in a given fiscal year, in accordance with the concluded agreement, under sureties and guarantees granted by the local government unit. The local government unit shall be obliged to secure in the budget on the expenditure side an amount that makes it possible to cover potential repayments of obligations under the suretyship or guarantee, in the event of a party's failure to comply with the terms of the agreement;
9. Special rules for the execution of the budget of the local government in the fiscal year, resulting from separate laws. These rules relate to the obligation under the law to allocate income from specific sources to finance specific tasks;
10. The powers of the auxiliary unit to conduct financial management within the municipal budget. Auxiliary units such as villages, neighborhoods, or settlements may be separated within the framework of the local government [Wołowiec 2020, 25-40].

The decision-making body may, in the budget resolution, authorize the management board of the local government to incur short – and long-term liabilities on account of credits and loans and to issue securities. Detailed specification in the budget resolution of the limit for the management board of the local government to incur liabilities in the budget year on account of credits, loans and the issuance of securities sets the limits of the authorization. The lack of such authorization for the management board of the local government in the budget resolution gives rise to the necessity of adopting a resolution in this regard by the decision-making body of the local government unit each time, if necessary.

Speaking of local government revenues, it is important to emphasize the financial independence of these units both in terms of collecting revenues and making expenditures. According to the provisions of the Law on Municipal, County and Provincial Self-Government, it follows that they carry out independent financial management on the basis of the budget resolution). In order to finance its own and state-commissioned tasks or joint tasks, the local government unit collects funds, which it then distributes, hence the amount of income raised by the local government units to carry out these tasks is extremely important. The starting point for discussing the income of local government units should be the European Charter of Local Self-Government (hereinafter: EKSL). This Charter contains provisions

on, among other things, the ways of financing of local government units, in accordance with the principle of financial independence, including the right to dispose of their own financial resources adapted to the nature and scope of the tasks performed. Particularly noteworthy in the aspect of the income of the l.g.u. is the content of the provisions of Article 9(1), (2), (3) of the EKSL, which emphasize the financial independence of the l.g.u., pointing to the need to provide them with sufficient financial resources to carry out their tasks, as well as the share of taxes and fees in the budget, the amount of which is determined by the l.g.u. within the limits of the law (Article 9(1) of the EKSL stipulates that local communities have the right, within the framework of national economic policy, to sufficient resources of their own, which they may freely dispose of in the exercise of their powers. According to Article 9(2) of the ECSL, the financial resources of local communities should be proportionate to the competencies provided by the Constitution or the law. It follows from the wording of Article 9(3) of the EKSL that at least part of the financial resources of local communities should come from local fees and taxes, the level of which they have the right, within the limits of the law, to set themselves).

Article 216(1) of the LPF does not indicate the sources of income of local government units, it only states that they are determined by a separate law. The consequence of this is the establishment and clarification of the sources of income in the Law on Income of Local Government Units (Law of 13.11.2003 on Income of Local Government Units). From it's content it follows that the revenues of local government units are: own revenues, general subvention and targeted subsidies from the state budget. This mirrors the content of Article 167(2) of the Polish Constitution, with the legislator specifying that local government units' own revenues also include shares in personal income tax and corporate income tax revenues.

Revenues of local government units may also include funds from non-reimbursable foreign sources, funds from the budget of the European Union and other funds specified in separate regulations. However, the latter are of an optional nature, which means that they may or may not appear as revenues of a given local government unit. The Law on Revenues of Local Government Units defines the sources of income of the municipality, county and province. From its content it follows that the budget of a municipality, county and province is based on both its own income and income from external sources – mainly from the state budget.

Other normative acts relating to the income of local government units are individual laws of a constitutional nature. According to Article 54(2) of the Law on Municipal Self-Government, municipal revenues may also include revenues from self-taxation of residents. Self-taxation can only take place through a municipal referendum. Pursuant to Article

56(3) of the Law on County Self-Government, the transfer of new tasks to the county, by law, requires the provision of funds necessary for their implementation in the form of increased revenues. According to Article 67(3) of the Law on Provincial Self-Government, the transfer of new tasks to the province, by law, requires the provision of the necessary financial resources for their implementation in the form of an increase in revenue, however, the norms in this regard are very limited and one would like to say chaotically written.

The Systematics of Sources of Revenues of Municipalities lists own revenues first, but does not provide a definition of own revenues. Sources of own income of the municipality are:

1) proceeds from the following taxes: real estate tax, agricultural tax, forest tax, tax on means of transportation, personal income tax, paid in the form of a tax card, tax on inheritances and donations, and tax on civil law transactions;
2) proceeds from additional tax liability related to tax avoidance in the following taxes: real estate, agricultural, forestry, transportation means;
3) revenues from the following fees: stamp duty, market, local, spa and dog ownership, advertising, exploitation and other fees constituting municipal income, paid under separate regulations;
4) income received by municipal budget units and payments from municipal budget establishments;
5) income from municipal property;
6) inheritances, bequests and donations to the municipality;
7) income from fines and penalties specified in separate regulations;
8) 5.0% of income received for the benefit of the state budget in connection with the implementation of tasks of government administration and other tasks assigned by law, unless otherwise provided by separate regulations;
9) interest on loans granted by the municipality, unless separate regulations provide otherwise;
10) interest on untimely transfer of receivables constituting income of the municipality;
11) interest on funds accumulated on the municipality's bank accounts, unless otherwise stipulated in separate regulations;
12) subsidies from the budgets of other local government units.

The municipality's own income also consists of shares in income tax from natural persons, from taxpayers of this tax residing in the area of the municipality in the amount of 39.34%, and from income tax from

legal persons, from taxpayers of this tax residing in the area of the municipality in the amount of 6.71%.

Revenues of a public-law nature are taxes, levies, as well as shares in the proceeds of state taxes, i.e. personal income tax and corporate income tax. Their public-law nature is due to the fact that they are established exclusively by the state authority, so they are not a private-law benefit based on a legal relationship arising from the will of the parties. These revenues play the most important role in the budget of the local government, while it should be emphasized that local government taxes and fees are exclusively municipal revenues [Miemiec, Sawicka, and Miemiec 2013, 102-105]. Speaking of taxes that constitute a municipality's own revenue, it is important to note the two categories of these taxes, i.e. local and local government, with local taxes being local government taxes, but not all local government taxes being local taxes [Tyrakowski 2017, 121].

Local taxes are defined in the Law on Local Taxes and Fees. These taxes are directly collected by the municipality. Under the provisions of the Constitution of the Republic of Poland, the municipality has the right to determine the amount of local taxes to the extent specified by law (Article 168 of the Constitution of the Republic of Poland). Other local government taxes are collected by the heads of tax offices and transferred to the budgets of the municipalities. The amount of funds due to the municipal budget from taxes collected by the heads of tax offices is influenced by the municipality only through its participation in decisions on granting relief from their repayment (concerns remission, installment, deferral of payment).

Income of a private-law nature includes income of a property and capital nature. Income of a proprietary nature should include income derived from the own economic activity of the bodies of the local authority and its subordinate units. These may include income from rental, lease, sale of property owned by the l.g.u. or from the acquisition of such property in the form of, for example, inheritance, bequests or donations, 5.0% of the income received for the benefit of the state budget in connection with the implementation of tasks of government administration and other tasks assigned by statute. The budget of the local government units is also supplied with income of a capital nature, i.e. interest on loans granted, interest on overdue receivables, interest on funds accumulated on bank accounts, dividends on capital contributed to companies.

4. MULTIANNUAL FINANCIAL FORECAST (WPF) OF THE MUNICIPALITY AS A FINANCIAL MANAGEMENT TOOL

The multi-year financial forecast should be realistic and specify for each year covered by the forecast at least:

1) current revenues and current expenditures of the budget of the local government unit, including for debt service, guarantees and warranties;
2) property income, including income from the sale of assets, and property expenditures of the budget of the local government unit;
3) the result of the budget of the local government unit;
4) allocation of the surplus or method of financing the deficit;
5) revenues and expenditures of the budget of the local government unit, taking into account the debt incurred and planned to be incurred;
6) the amount of debt of the local government unit and the manner of financing its repayment.

Multi-year planning in the area of public finance is a general trend related to professional management of resources in an organization. Within the framework of such management, one can enumerate not only planning, but also directing or controlling. Planning over a longer period of time – in this case, in 3-year episodes – gives the opportunity to predict certain events related to income and revenue. In addition, the current law makes these processes dependent on the occurrence of so-called undertakings (programs financed with funds referred to in Article 5(1) (2) and (3) of the Law and public-private partnership agreements). The multiannual financial forecast of the local government is introduced by means of a resolution of the executive body of a given entity, although other entities also participate in the process of adopting such documents.

Court rulings point out that the multiannual financial forecast of a municipality is a forecast of the multiannual budget of the municipality, expanded to include financial forecasts of multiannual financial programs with the participation of European funds, multiannual public-private partnership agreements, as well as other multiannual agreements and guarantees and warranties. It is required to be realistic, which means that it should be based on premises that make it possible to realistically assess the development in the financial situation of a given local government in the period to which the multi-year financial forecast is to apply.[1] This court also notes that the LPF does not list such prerequisites, so the assessment of the future financial situation of a local government is entirely up to its decision-making

[1] Judgment of the WSA in Szczecin of 28 November 2013, ref. no. I SA/Sz 1129/13, Lex no. 13789.

body. Thus, it can be concluded that this provision, through the phrase "realistic," contains an undefined legal norm, which in this respect should be filled with appropriate content by the local government's decision-making body adopting the resolution in question and, if necessary from this point of view, controlled by the college.[2] Another interpretation of this phrase by the College of the Regional Chamber of Accounts in Opole (No. 4/8/2019) has recently emerged. The College pointed out that the term "realistic" means "juxtaposing intentions, action with reality, with facts, based on sober judgment." This means that, of the data included in the forecast, at least the historical and current data for determining the level of acceptable debt should be presented correctly. Presentation of unreliable data in the forecast is not legally justified.

The long-term financial forecast of the local government is not an act of local law within the meaning of the provisions on sources of local government law. This is because it is not an act of general and abstract nature, which could have direct legal effects on the part of entities outside the public administration. Therefore, the multi-year financial forecast should be qualified as an act of an internal nature, which is the basis for action for administrative entities in the internal sphere of public administration. As it is rightly pointed out in court rulings – the multi-year financial forecast is a document that allows to assess the investment opportunities and credit capacity of the local government; it concerns the basic budget parameters, i.e. the projected level of income (including current income from the sale of property and investment grants), the level of expenditures (divided into investment and current) and the resulting: deficit or surplus amount of credit and the amount of debt service; it is implemented in order to assess the financial situation by, among others, local government units, its residents, financial institutions, supervisory authorities. However, the question of the compatibility of the multiannual financial forecast with the budget resolution adopted by the local government remains a matter of debate.

Methodology for preparing the multi-year financial forecast. The multi-year financial forecast is a financial model that should be characterized by internal consistency. It should be borne in mind that the dependencies and the requirement for consistency are not only intra-periodic, but equally apply to inter-periodic relations. A change in any income or expenditure item in the first year covered by the WPF causes changes in all the years covered by the forecast, up to its final year. This applies not only to the deficit and the level of debt, but also to the cost of servicing LGU's debt, and therefore to the overall level of spending. When constructing the WPF, it is

[2] Judgment of the Supreme Administrative Court in Warsaw of 15 September 2015, ref. no. II GSK 1601/14, Lex no. 23290.

necessary to distinguish between forecasting the primary part of a local government's budget and forecasting its part related to the level of debt. Primary expenditures are defined as the sum of expenditures less the cost of debt service (interest payable in a given period) . On the other hand, the difference between primary revenues and primary expenditures is the primary budget balance of the local government. If this difference is negative, it is more convenient to use the category of primary deficit, representing the difference between primary expenditures and revenues. The starting point for interim budget analysis is the equation: Bt = (1 + Rt) x Bt-1 + (Gt – Ht), where:

t – fiscal year designation;

B – nominal debt level as of December 31 of year t;

R – average nominal interest rate on TSU debt in year t;

H – level of total revenues;

G – level of primary expenditures (i.e., excluding debt service costs).

The primary balance is defined as: St = Ht – Gt. This means that the level of debt at the end of the year is equal to the amount of debt at the beginning of the year (or at the end of the previous year), plus debt service costs and minus the amount of the primary balance. Debt service costs are the product of the amount of debt at the beginning of the period and the average nominal interest rate on the local government's debt instruments R. The total debt level at the end of the year can be converted using the formula: Bt = Bt-1 + Rt x Bt-1 – St.

The debt level is thus "pushed up" by the cost of servicing existing debt. For the sake of balance, it should also be "pulled down" by developing a sufficiently high primary surplus. If the amount of the primary balance for several years (3-4 years) in a row is not enough to cover the cost of debt service, one can speak of the TSU finding itself in a debt spiral. This is because if the primary balance is less than the amount of interest (i.e.), the amount of debt in the following year is greater than in the previous year (i.e. St < Rt x Bt-1). Such a situation is referred to as a "debt loop" because the characteristic tendency is to deepen and increase in intensity. As debt increases, interest costs rise, making an ever-increasing primary surplus necessary to break the debt growth process. Holding the primary balance constant, in turn, causes the debt level to grow exponentially, in a self-accelerating manner. Such a phenomenon can be avoided if one accepts as a rule of thumb that the primary surplus should be at least sufficient to cover interest expenses on existing debt. Such a rule can be written as: Ht – Gt >_ Rt x Bt-1.

In general, the maintenance of such a rule avoids an increase in debt and is a guarantee of rational budget management in interim terms. The above rule is referred to in the literature as the so-called "balanced budget rule". In practice, property-related expenditures are of key importance

on the activities of local self-government units, as they are the most common cause of indebtedness of local self-government units. While indebtedness to cover current expenditures should be treated as a manifestation of fiscal irresponsibility and poor management of local government finances, incurring debt to finance investment (property) expenditures in certain situations has its justification. The so-called "golden rule" of public finance says that only public expenditures of a current nature should be covered by current revenues, while the proper source of coverage for expenditures of an investment nature is the incurring of debt. According to proponents of the "golden rule," it ensures the proper distribution of wealth between successive generations. This is because investment expenditures create wealth that will largely benefit future generations, hence it is also reasonable to burden them with the need to repay debt. It should be remembered that it is most often not possible to comply with the requirements of the fiscal rules in the short term. The most important budget categories – revenues, expenditures and debt – are characterized by considerable inertia, which greatly limits the possibility of quick action in case financial stability is threatened. The formation of revenues is still mostly beyond the influence of local government units, while the process of reducing expenditures is difficult and lengthy, usually impossible to carry out from year to year. Debt accumulation, on the other hand, is most often the result of budget imbalances for a number of years in a row, hence its reduction is also a multi-year proces [Wołowiec 2019b, 131-35].

Therefore, one of the key expectations placed on the multi-year financial forecast is to provide an "early warning system" against negative trends emerging in the formation of the entity's finances. This is to enable countermeasures to be taken well in advance when their implementation is both effective and allows costs to be spread over many years. In the absence of timely information and consequent countermeasures, when liquidity problems arise or fiscal rules are broken, the necessary corrective actions become drastic and costly.

The first step in the process of creating the WPF should be to estimate a given LGU's total revenues (both its own and those received in the form of external transfers) and compare them with all current expenditures necessary to ensure the LGU's operation. Debt service expenses are ignored at this stage. The difference between total revenues and current expenditures (excluding debt service) plus the amounts of revenues from the budget surplus of the previous year and free funds, as referred to in Article 217(2)(6) of the LPF, constitutes a pool of funds that can be allocated for two purposes, in the following order: debt repayment and service, and investments. The more LGU funds are allocated for debt repayment and debt service, the less for new investments. The amount of funds remaining after financing

investments indicates a surplus, or, as a rule, more often, a shortage of funds for investment. This value, depending on whether it is positive or negative, indicates a possible need for external financing in the form of loans/loans or bond issues [Wołowiec 2019b, 129-40].

5. INDIVIDUAL DEBT RATIO OF THE LOCAL MUNICIPALITY

The new debt limitation rules (Articles 242-244 of the LPF), which have been in effect since 2014, have been a major setback for most local government units (LGU's) in planning and managing local finances. Over the 4 years of their validity, many defects and inconveniences in the application of the new norms have become apparent, and the "creativity" of the LGU's financial sector has shown that they can be circumvented with relative ease. The construction of the maximum indicator limiting the liabilities of the titles specified by the legislator, falling due in a given year, is closely related to the provisions of the Law of the Public Sector. for the first time it was applied to the assessment of budgets passed in 2014. The essence of this legal regulation is the comparison of two indicators, included in the formula of the equation (formula). A positive condition for the adoption of the budget is to obtain a relationship in which the left side of the formula (annual repayment ratio) is less than or equal to the right side (maximum repayment ratio). The maximum repayment ratio is calculated on the basis of the budget values of the three years preceding the budget year, which is intended to ensure that the ratio is individualized for each LGU's, in a way that takes into account the results of previous budgets. The ratio of the annual repayment ratio to the maximum repayment ratio (debt repayment ratio) is presented by is in the debt forecast, which is part of the WPF (Long-Term Financial Forecast) [Walczak 2019]. The LGU's sector saw a rapid increase in property expenditures in 2019. This was related to the implementation of numerous projects co-financed by European Union funds. Due to the large number of commercial projects carried out by construction companies, the execution of many LGU's planned in 2018 was postponed until 2019 and 2020.[3]

In the budgets of local government units, one can notice a decrease in 2020 in relation to 2019 in property expenditures and the total amount of new debt. This is the result of formal requirements related to the creation of planning documents in local government units. Another problem (ballast) is the education subsidy received by the local government units, which allowed in 2019 to cover on average only 60% of education expenses (there is no indication that in 2020 education funds are to be increased). At the same time, it is worth noting that some of the costs incurred and planned were

[3] Raport INC Rating 2019, p. 4-10.

due to the introduced educational reform. The growing disparity indicates that the costs of financing the reform have been passed on to municipalities, which is particularly evident in municipalities with the smallest budgets. Another challenge for some local governments is also the need to regulate the liabilities incurred in the current year, mostly related to the implementation of numerous property investments. Since 2013, one can observe improving conditions for repayment of liabilities by units at all levels. In 2013, the average term of repayment of liabilities, assuming that local governments allocate the entire operating surplus for this purpose, was 4.80 years. In 2017, the value of this indicator fell to – 3.25 years. Due to the acceleration of the implementation of expenditures co-financed by EU funds, a significant increase in debt is planned for 2019-2023. The value of the discussed indicator rises for this reason to the level of – 6.61 years [Wołowiec, Skrzypek-Ahmed, and Gliszczyński 2021, 34-46].

Article 243 is a legal instrument for limiting and monitoring LGU debt, which limits the level of repayments on the titles listed by the legislator, falling in a given year, without limiting the size of LGU debt itself. Restrictions on the amount of repayment of certain obligations (including debt obligations) may indirectly affect the level of debt, although they may also result in its incurring on particularly unfavorable terms, such as for long periods, with repayment of debt in the last two or three years of the contract, and thus the need to incur debt service costs [Martyniuk and Wołowiec 2021, 15-26]. The pressures associated with the need to raise European funds, the cyclical nature of local elections and the obligation to continue investment projects that have been started increase the risk of incurring debt obligations on terms that may be evaluated in terms of the economy (rationality) of the local government bodies when making decisions. The debt repayment ratio is supposed to somehow ensure the security of the local government in the fiscal year by adjusting the level of repayment of certain obligations to its financial potential. Regional chambers of auditors still have not developed a uniform methodology for examining and evaluating the WPF. For example, they allow free forecasting of the amounts of repayment of debts, without linking them to the credit or loan agreements in force at the time of adopting the WPF, or the terms of issuance of securities, setting the dates and amounts of repayment. From the point of view of debt limit procedures, two indicators are the most important: The "X" indicator, which is the ratio of the sum of operating surplus and income from the sale of assets of a given local government unit to total income: X = No + Sm / Do, where: No – operating surplus, Sm – income from sale of assets, Do – total income. A negative value of this indicator is dangerous. It shows that the local government unit does not achieve an operating surplus and this is not compensated by income from the sale of assets. At this point

it should be noted, the convergence of the formula under discussion with the components of the right side of the inequality that determines the limits of the debt of each local government unit.

Indicator "Y", expresses the ratio of interest and principal installments on borrowings and funds for the redemption of issued papers to total income. Y = R + O / Do, where: O – interest on borrowings, R – the amount of repayment of capital installments and interest on loans taken by the local government unit, Do – total revenues. The convergence of the formula in question with the left side of the inequality limiting the debt of each local government unit is important. Debt financing capacity is evidenced by the excess of the arithmetic average of the "X" indicators from the three consecutive years preceding the budget year over the "Y" indicator estimated for the budget year [Walczak 2019].

Thus, with limited financial resources at their disposal, it is important to project and manage finances in such a way as to ensure the implementation of tasks, while guaranteeing the financial stability of the local government. With the limited financial resources available to the jsts, effective and efficient financial management becomes one of the most important tasks to achieve the intended objectives. The budget planning process has its beginning in the multi-year financial forecast and be consistent with it throughout the fiscal year. This connection is evident not only through the implementation of multi-year projects, but primarily through the individual debt ratio. The numerical model for analyzing the indicator makes it possible to constantly monitor the amount of deviation of the planned indicator from the permissible one [Grad 2018, 108-11].

Since 2014, the legislator has introduced a structure limiting the level of repayment of financial liabilities, expressed in Article 243 of the LPF, thus departing from the rigid indicator formula that had been in operation for many years, used by all local governments. Under the current formula, the limit of repayments, possible to be planned in the budget year, on account of obligations indicated in Article 243 of the LPF is determined. The legislator based it on the category of operating surplus, which, in his opinion, reliably characterizes the financial situation of the local government. To make the result more authoritative, the legislator decided that when calculating the ability of a local government to repay its obligations (maximum repayment ratio), data from several years preceding the fiscal year for which the maximum repayment ratio is set is adopted. For the relationship set for 2019-2025, this is a three-year period, and for the relationship for 2026 and subsequent years, the financial values will be for the seven previous fiscal years (2019-2025). It should be borne in mind that in the relation set forth in Article 243(1) of the LPF, the legislator excluded the possibility of adding revenues from previous years (e.g., from the budget surplus)

to the current revenues of a given year, that is, the opposite of the solution adopted in Article 242 of the LPF. Thus, it is possible that the enacted budget will maintain the relationship described in Article 242 of the LPF, but the annual value of the indicator adopted for calculating the maximum repayment ratio will be negative [Wołowiec 2021, 515-27; Bogacki and Wołowiec 2021, 17-31].

6. DIRECTIONS OF REFORM OF LOCAL GOVERNMENT SECTOR FINANCES

Financial problems of the local government sector. The Law on the Revenues of Self-Governments, passed in 2003 and still in force today, assumed an increase in the volume of own revenues, including shares in PIT and CIT taxes, while reducing the scope of subsidies and eliminating the road part of the general subvention. The result was to be an increase in LGU's financial self-reliance and a stronger link between LGU's financial situation and the state's economic prosperity. Poland's self-government reform set a number of important tasks for local and regional communities, among which local and regional development is one of the most important. This is evidenced by the following data – investment expenditures of decentralized budgets amounted to more than 535 billion zlotys (cumulative) in the period from 2004 to 2020, which is clearly more than investment expenditures of the central budget. The own investment potential of local governments (gross operating surplus) amounted to PLN 232.8 billion in this period, which means that 56% of the investment expenditures of TSUs financed with funds obtained from other sources, including repayable instruments (mainly loans) [Wołowiec 2018, 129-40]. The structure of LGU's income has changed significantly in recent years – the share of own income and subsidies has fallen, and the largest part of it has become – originally the smallest – grants. The share of own income fell from 31 to 25.2%, and the share in state tax revenues (PIT and CIT) increased from 22.7 to 24.1%. At the same time, the share of general subvention fell from 29.5 to 22.4%, including the educational part – from 22.9 to 17.1%, and the share of subsidies increased from 16.9% to 28.3% (including targeted subsidies to 22%).

The importance of the supply based on the redistribution of funds from the state budget in the form of a general subvention, including primarily its most important component – the educational part – is declining. With regard to the educational part of the general subvention, the 2003 law maintained the principle that part of educational tasks were carried out with funds received from the state budget, and part with own income. It was assumed that the subvention would be determined annually in the budget law, in the amount of the total amount of the educational part

of the general subvention adopted in the budget law in the base year, adjusted by the amount of other expenses due to changes in the educational tasks carried out. The dynamics of the educational subvention was surprisingly low in the period under review: own revenues increased from PLN 62.9 billion to PLN 124 billion (by 97%), and the educational part of the general subvention increased from PLN 26.8 billion to PLN 43 billion (by 60%). The size of the educational subvention in relation to state budget expenditures fell during the period in question from 12.69% to 11.04%, and in relation to GDP – from 2.72% to 2.04%. At the same time, the expenses of local governments on education more than doubled (by as much as 111%), which was caused by the increase in the cost of running it, also as a result of the 2015 education reform. The period under review also saw the loss of the original importance of the correctional-equalization system, especially for provinces and districts. This was caused by the non-systemic nature of the purely arithmetic solutions adopted back in 1999. The municipal system, which includes a double equalization mechanism (also in the educational part), was based on substantive criteria, which is why it still functions, although it also needs updating. Between 2004 and 2019, the amount of subsidies to LGU's increased from 13.1 to 71.4 billion zlotys, or 5.5 times. The increase in earmarked subsidies was related to the transfer of new government administration tasks to municipal governments, especially in the field of social policy. During the period in question, targeted subsidies for government tasks increased from PLN 8.0 to 43.8 billion, that is, by more than five times. Subsidies for own tasks increased over the period from PLN 3.6 to PLN 8.2 billion, that is, only slightly more than twice. The majority (75.4%) are grants for current expenses. Investment subsidies in this group totaled PLN 23.7 billion over the entire 2004-2018 period. Funds for investment in the form of subsidies were also obtained by local governments from other sources (from subsidies for commissioned tasks, for tasks entrusted by the government administration and other LGU's from earmarked funds and as part of aid between LGU's). In total, over the entire period in question, local governments raised PLN 26.9 billion in this way, almost half of which in the form of transfers between local governments (PLN 12.5 billion), and PLN 6.6 billion from earmarked funds.

Recent years have seen a significant increase in LGU's expenses, both in the group of current and investment expenses. This is, on the one hand, the result of an increase in the scope of tasks and the level of investment, but on the other hand, the result of a significant increase in most of the costs of performing tasks. With regard to current expenditures in 2015-2018 – there was an increase in the current expenditures of LGU's in the basic component of task execution costs, which is salaries and derivatives, which increased by PLN 11.26 billion (from PLN 71.44 billion to PLN 82.70

billion). Thus, one must conclude that almost all of the increase in PIT revenue over the same period was used to finance the increase in wages in the self-government subsector, which is the largest employer in Poland. If you add to this the increase in current spending on the purchase of materials and services, which amounted to nearly PLN 8 billion, you can see that the increase in revenue from the PIT share was not enough even for basic current spending. It should be noted that in 2018, the number of local government employees fell by more than 2,100 people, and the average gross salary was lower by PLN 900 than the average gross salary in the government administration, which instead saw an increase in employment by about 2,100 people. Of course, LGU's wage expenditures include all local government employees, not just administrative officials.

LGU's investments are the main driver of the country's socio-economic development. The main determinant of the state of TSU finances, related to their role in development policy, is the level of investment. Over the 15 years under discussion, LGU's investment expenditures have reached as much as PLN 494 billion, of which nearly 223 billion were local governments' own funds, another nearly 171 billion – non-refundable foreign funds (120.1 billion) and grants from domestic sources (50.6 billion), and the rest – loans. The increase in PIT revenues contributed to the generation of a net operating surplus of PLN 14.4 billion in LGU's budgets in 2018, all of which was spent on development. LGU's capital expenditures totaled as much as PLN 52 billion in 2019. This was possible thanks to the disbursement of about 21.5 billion in EU subsidies and the incurring of new liabilities for a total of about PLN 16.2 billion [Wojciechowski and Wołowiec 2021, 101-11].

CONCLUSIONS

The previous rules of Article 243 of the LPF did not provide for the possibility of early repayment of debt in excess of the calculated ratio (even if the local government had such possibilities), nor did they provide for the possibility of restructuring it in order to reduce costs or spread repayments more favorably over time. The revised LPF regulations, effective January 1, 2019, have partially solved these problems [Gołaszewski 2018, 32-33]. Thus, it is possible to make early debt repayment if the local government has funds from repayment of a previously granted loan, free funds, privatization proceeds or surpluses from previous years. At the same time, the law stipulates that only early repayments, i.e. those originally planned for future fiscal years, are excluded from the indicator. Repayments planned for the fiscal year must fit within this limit [Bogacki and Wołowiec 2021, 17-31].

A serious problem related to financing investments and balancing LGU's budgets are changes in the construction of personal income tax (re-education of tax progression, increase in deductible expenses, exemption from income tax for people under 26 years of age). These changes are generating a revenue loss to the entire public finance sector of PLN 13.3 billion a year, including PLN 6.6 billion in local government units [Wołowiec 2021, 515-27].

It is possible to restructure debt, that is, to replace one debt with a new one, but on condition that the cost of the new debt is lower than the cost of the restructured debt. Assessment of the fulfillment of the condition of lower cost of debt service will be made by the applicable regional chamber of auditors. undoubtedly, the problem will be to assess the fulfillment of the condition of lower costs in situations where we will actually know the cost of the new loan or bonds only after the award of the tender [Rutkowski 2015, 281-82].

Starting in 2019, additional debt titles have been included in the limitation rules. Thus, for example, leasebacks or debt buybacks are included in the left-hand side of the Article 243 LPF indicator starting in 2019. The amendment introduced in Article 243(1) was intended to include in the limitation of the repayment of obligations of local governments (except for loans and credits) all obligations that produce economic effects similar to a loan or credit agreement. Thus, this applies to all liabilities classified under the debt title "loans and advances," and therefore also to securities whose marketability is limited, sales contracts in which the price is payable in installments, leasing contracts concluded with a manufacturer or financier in which the risks and benefits of ownership are transferred to the lessee of the property, as well as non-negotiable contracts with a maturity of more than one year, related to the financing of services, supplies, construction works, which produce economic effects similar to a loan or credit agreement. In particular, this applies, for example, to sale-leaseback agreements, sale-leaseback agreements, debt restructuring agreements, including installment sales, forfaiting, unnamed agreements with a term of payment longer than one year, related to the financing of services, supplies, construction works, which have economic effects similar to a loan or credit agreement [Wołowiec 2019c, 45-54]. Importantly, the biggest flaw in the Article 243 LPF ratio will be eliminated in 2020. The current creditworthiness is calculated as the arithmetic average of three one-year indicators, which are formed by the sums of current surpluses and asset sales relative to total income. This structure results in the fact that the higher the asset subsidies (the component of total income that is the denominator of the fraction), the lower the creditworthiness (i.e. the value of the percentage representing the allowable repayment for the year). This is despite the fact that

subsidies should in no way affect the LGU's creditworthiness. Beginning with budget planning for 2020, the right side of the formula is already calculated as the average of the last 3 years of one-year ratios, which are the ratio of the sum of current surplus and asset sales to current income for the year, less current subsidies from the EU. In addition, the current surpluses in the numerator of this fraction will be adjusted for EU current subsidy income and expenses, respectively. After this change, EU current grants (both current and property) will have no effect on creditworthiness. We calculate the left side of the formula as the ratio to current income minus EU current grants.

In 2020-2025, the sum of the current surplus and asset sales will be related to current income. In 2022, there will be a rather significant change in Article 242 of the LPF – until now, the condition required by this provision that current income be higher than or equal to current expenses could be met by adding free funds available to the local government. Free funds are, according to the law, previously borrowed and unspent loan funds. Thus, the legislator allowed current expenditures to be higher than current revenues, provided that the local government had unsettled funds from loans. This generated unnecessary (unreasonable) situations of taking loans "in reserve" just to have the "security" requirement of Article 242 of the LPF fulfilled (from 2022 such a situation will be completely eliminated).

Starting in 2019, current or asset expenditures related to debt titles are treated like installments or interest on loans, and are subject to the limitation set by the formula in Article 243 of LPF (left). In addition, their incurrence requires that the local government set an appropriate limit in the budget resolution, as well as obtain an appropriate opinion from the regional chamber of auditors. In addition, as of 2019, the right side of the formula has changed – it is possible, when calculating the limit for 2020, to exclude current expenditures related to repayment of obligations under non-standard debt titles for the last 3 years. From 2020, when calculating the indicator, the LGU must take into account only current income (income from the sale of assets is no longer relevant), and the calculation of the average itself has been extended to 7 years [Wołowiec 2019a, 467-502].

Starting in 2026, there will be significant changes. First, there will be an extension of the period on the basis of which the average operating surplus is calculated to 7 years, while replacing the arithmetic average with a weighted average; second, there will be the exclusion of property income from the sale of assets from the numerator's right-hand side, and the exclusion of debt service expenses from current expenses on the right-hand side of the formula. Extending the period for calculating the index was the LGU's main demand. Basing the average on three years of data could

have generated the risk that the data for the formula could have come from a period of, for example, a downturn or economic crisis. Starting in 2026, the indicator will be calculated based on a weighted average of the last seven years, with the first four years having a weight of 40% and the last three years 60%. Budgetary results for 2019 will enter the indicator for 2026 with a weight of 6%, and subsequent ones with weights of 9%, 11%, 14%, 17%, 20% and 23% [Gołaszewski 2018, 33].

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E-JUSTICE IN POLAND – POLISH EXPERIENCES

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Abstract. In his research article, "E-justice in Poland: Polish experience," the author discusses a relatively important subject that members of the society are likely to face, namely the use of modern Internet technologies and electronic devices in courts. At the outset, the author advances a thesis that today's societies around the world are no longer able to go without the Internet, social networks, electronic documents, and electronic means of remote communication. This is how people do business and maintain contact today. Technology has become embedded in our civilisation as its natural component. This is no different in the court room where modern communication tools serve citizens. The author looks at the technological solutions through the Polish experience, but also through the European experience, in particular CEPEJ operating under the Council of Europe. The author also addresses the important issue of artificial intelligence and indicates areas in the judicial system where it could be applied effectively. The article aims to stimulate a global discussion on e-justice.

Keywords: artificial intelligence; e-justice; digitalization; e-court

INTRODUCTION

Technological developments force us to continuously change and adapt to using new web applications and technical solutions. The technology of 4k televisions will soon become outdated, the 5G networks will be widely utilised, and a flight to the moon will be as accessible to the average person as the flight from Warsaw to Los Angeles. At present, we cannot imagine life without the Internet. E-mail is a commonly used tool for communication between citizens, while documents in the form of pdf files are beginning to replace paper documents. We can no longer imagine our lives without social media, we contact our loved ones through Facebook or Instagram and utilise constantly newer technological solutions. We have applications to buy public transport tickets, make an appointment with a dentist, or transfer money from a bank account. All these devices serve one purpose – to make it easier for us to move around in the public social space. It is difficult to turn back the course of history. Digitalisation has deeply penetrated our world. Consequently, this sphere of change must also affect the justice system.

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Hence, the courts are forced to implement newer technical solutions to enable the citizen to freely and fully use the innovations to pilot the course of court proceedings. Several decades ago, it was difficult to convince judges to prepare judgments and their justifications in a computerised version, whereas today, it is difficult to believe that this could occur differently. The changes in this respect are predominantly of a procedural nature, and thus must primarily affect the mechanisms of civil proceedings.

Two things should be assumed when determining the direction of changes in civil proceedings: proceedings must be faster and cheaper. These two elements are inscribed in the concept of technological development, because thanks to the use of modern technologies, the course of civil proceedings could be faster, and at the same time, due to the elimination of numerous expensive factors, cheaper. As Reiling [Reiling 2009, 17] believes "delay, access and corruption are three crucial issues any judicial organization or court faces. They are the three most common complaints of court users around the world." Now court users need more.[1]

The changes in the civil procedure regulations in the Polish legal system have recently affected several areas. First of all, the following were implemented: electronic writ-of-payment proceedings, submission of electronic applications in land and mortgage register proceedings, electronic registration of company – S24, electronic confirmation of receipt of judicial letter shipments by parties proceedings, system of random allocation of cases to judges as well as electronic system of case file management. New changes are already on the horizon – electronic bankruptcy proceedings. For the efficient functioning of the justice system, another element, which is of current interest to the whole of Europe in the field of the administration of justice, is necessary, i.e. weighing of cases. Efficient simulation of the course of a case would enable even distrubution of cases to judges, which would in turn result in the acceleration of the proceedings.

1. ELECTRONIC SYSTEM OF CASE FILE MANAGEMENT

The major technical changes, which had to be made by the courts in the first place, prior to the implementation of changes in the civil proceedings, concerned the need for an efficient electronic case file management system. The idea was that a modern case file management system was, in principle, to gather all information about the course of the proceedings in one place. The judges were convinced about the necessity to enter information concerning the judgement into the system, so that the attorneys could familiarise themselves with the activities currently undertaken

[1] See Dymitruk 2020, chap. XX, doc. 8.

by the court without having to leave their offices. This system fulfils its function as long as the information entered by the court's employees is entered reliably. It particularly allows saving time in activities aimed at determining the stage of the proceedings and concurrently reduces the need to contact court employees by phone, which considerably relieves them from the laborious activities consisting of providing information. The system is complemented by the possibility of obtaining more information about the course of cases at the Stakeholders' Service Office [pol. *Biuro Obsługi Interesantów*], the task of which is to serve petitioners only.

Thanks to the implemented system, officials can quickly identify the place where the case is located and efficiently undertake subsequent steps. Access to the record of the trial as well as to the content of issued rulings allows the parties to issue copies of rulings without undue delay. The date of a hearing can be set quickly and the statistical data on the settlement of cases in a specific division of the court as well as on the effectiveness of settling cases by a particular judge can be obtained instantly.

A disadvantage of the system is undoubtedly the fact that it was developed by IT specialists who were not lawyers. Hence, some solutions were not introduced intuitively. They have not been adjusted to the needs of the system and efficient handling of civil proceedings. System corrections are continuously being made to eliminate the indicated errors.

An important solution from the viewpoint of the implementation of the principles of trial economics would be the introduction of mechanisms that would alert the judge about the need to make a decision in cases, in which this decision has not been made for a long time. This would allow for supervision throughout the proceedings and would eliminate situations, where decisions are made slowly. Such prototype solutions are already being introduced in courts. Nevertheless, the system must respect the independence and sovereignty of judges [Allen 2020, 1; Gurkaynak, Yilmaz, and Haksever 2016, 8].

2. ELECTRONIC WRIT-OF-PAYMENT PROCEEDINGS

The global trend of replacing a paper document with an electronic one has also affected the justice system [Niiler 2019]. In Poland, it was decided to introduce electronic proceedings. Electronic writ-of-payment proceedings are a type of a civil procedure, which entirely takes place without any physical contact between the judge (here the court referendary) and the party to the proceedings and involves no paper records. However, all decisions are still sent to the parties to the proceedings by traditional mail. An advantage of these proceedings is undoubtedly efficiency, as the decisions are made

relatively quickly. The disadvantage, however, is that the court cannot read the evidence directly, which only the plaintiff invokes in their statement. The proceedings, however, concern the category of the so-called unquestionable cases, where as a rule, the fact that the claim arose does not raise any doubts, and therefore the case would also be met with a court verdict in a normal course of its examination.

Nonetheless, there are some opinions that the proceedings conducted in this manner have nothing to do with the administration of justice.[2] The decision is made without the participation of the party to be charged and without the possibility of their defence. However, such a allegation is missed, because the defendant can object to the payment order required in the electronic proceedings, which in effect results in quashing of the proceedings and the possibility to initiate the proceedings in the usual procedure. The problem is quite significant if the party does not react to the received payment order. There may be different reasons for this, including the delivery of the payment order to an incorrect and no longer valid address of the defendant. The latest amendment to the civil code in principle introduces the obligation to deliver court correspondence in the event that it is not received by the defendant at the address indicated in the statement of claim through a court bailiff. The bailiff's task is to establish whether the defendant actually resides at the given address.

This procedure is quite popular in Poland. Only in the first half of 2019, 1,169,944 claims were filed under those proceedings. For comparison, 6,659,082 cases were received in ordinary proceedings. Additionally, it should be noted that the so-called e-court is only a division of one of the courts in Poland, i.e. the District Court Lublin-West in Lublin. The previous legal regulation in this regard was subject to amendments in the legal provision, which was necessary. In the previous legal situation, when the court found no grounds for issuing a substantive trial decision in the form of a payment order, it transferred the case to the courts of general jurisdiction. Thus, the court had to deal with the case in ordinary proceedings. Consequently, this meant that the proceedings conducted in an electronic form were mixed with the ones carried out in a paper form. The court transferred the lawsuit electronically through a special system, while the traditional court had to print documents and use them to create case records. In the current legal situation, however, it has been decided that in a situation, where the electronic legal proceeding cannot end in a substantive manner, i.e. the court does not find any grounds for issuing a payment order, the e-court will dimiss the legal proceeding. Nevertheless, the plaintiff will have a period of 3 months for keeping the date of filing the lawsuit, which might affect,

[2] See Kościółek 2019, chap. 5, doc. 3.

for instance, the deadline for the statute of limitations, to file the lawsuit to the court in the traditional version.

On the one hand, this is a solution, which actually means that the proceeding will be carried out either completely electronically or in the paper form. On the other hand, it might discourage the party from initiating electronic proceedings at all. Hence, it seems more reasonable to introduce entirely electronic proceedings, including those conducted by traditional court, with the possibility, if necessary, of setting hearings in the court using video conferences (a great solution in this regard was introduced in Florida, i.e. "Florida Courts E-Filing Portal").[3] However, there is still a question about the effectiveness of such proceedings in a situation, where a witness might not have access to the necessary equipment or there are no appropriate statutory instruments that would allow the court to enforce their virtual presence in the courtroom. Undoubtedly, this depends on the level of technological development of a given country. Nonetheless, it should not be forgotten that for a suitable connection to the court, it is sufficient to have access to the Internet, which is already widespread, as well as to own a device, such as a smartphone, the number of owners of which is increasing.

3. SUBMISSION OF ELECTRONIC APPLICATIONS IN LAND AND MORTGAGE REGISTER PROCEEDINGS

In the Polish civil procedure, some of the court proceedings that allow electronic submission of applications include the land and mortgage register proceedings. Those proceedings are carried out by the court, although in most countries they have been excluded from the jurisdiction of the court and are the domain of public administration activities. In Poland, the land and mortgage register courts operate as separate divisions of the district courts, and the documents submitted to the land register are only in the paper form. The land register is kept both in the paper and electronic form. The paper form is a collection of documents, which among other things contain legal claims to properties. In contrast, the electronic form is only an electronic record containing the property designation and its owners as well as any encumbrances on the property, including mortgage charges.

The legislator in the field of land and mortgage register proceedings has allowed the possibility of initiating such proceedings by submitting an electronic application to the electronic version of the land resister. This application may only be submitted in this form by a notary public, bailiff or the head of the tax office. After the sale of a property conducted at the notary's office,

[3] The Florida Courts E-Filing Authority, https://www.myflcourtaccess.com/authority/links.html [accessed: 09.12.2020].

the notary public is obliged to submit an electronic application for entry of the new owner into the land register. On the same day, the notary sends the application electronically. Subsequently, the information about the application is recorded as a citation of its submission in the electronic land registry. The notary has 3 days to send the documents, which are the basis for the exposure of the new owner in the land registry. After the documents are submitted to the court, the case is assigned to a court referendary. The citation of the application is visible in the land registry until the entry is made or the application for entry is dismissed.

This form of submitting an electronic application significantly accelerates the land and mortgage register proceedings. This procedure is remarkably important to ensure property transactions; therefore, the emphasis on its speed plays such an important role. However, it seems that the method of submitting applications electronically adopted by the Polish legislator should also be extended to other participants. Other changes in the land registry, which are not a direct result of a sale transaction but depend on their initiators, i.e. applicants (e.g. an application for removing a mortgage from the land register), could also be made electronically. Nevertheless, it should be noted that due to their importance, the land and mortgage register proceedings could not be completely replaced by electronic proceedings. The role of the land and mortgage register court is to collect original documents confirming the legal status of the property, which can only be stored in paper form.

4. ELECTRONIC REGISTRATION OF A COMPANY – S2

As in the case of land and mortgage register proceedings, the procedure for entering a company is in the Polish legal system a registration proceeding. It is also conducted by the court, specifically by the economic court division – the National Court Register [pol. *Krajowy Rejestr Sądowy*].[4] The essence of those proceedings is that the court supervises the very fact of establishing a company as well as any changes concerning it. It should be noted that not all companies are entered into the register. Specifically, the basic form of a company, which is a civil partnership, has been excluded from the obligation to register. It is exclusively an agreement between at least two entrepreneurs, which is concluded for the purpose of jointly undertaking an economic activity.

The electronic application for company registration applies to a limited liability company, general partnership and limited partnership. Other companies cannot be currently registered in this way and in order to register

[4] Ministry of Justice in Poland, https://ekrs.ms.gov.pl/s24/ [accessed: 09.12.2020].

them, a traditional paper application should be used. The company must be registered electronically within 24 hours, which is the essence of this procedure. However, the legislator is considering extending the catalogue of companies that would be subject to registration in this way. The current form of company registration is an innovative solution, even though in practice, it is not always possible to issue a decision on company registration within 24 hours, as it is often necessary to implement a proceeding aimed at removing the formal defects of the submitted application by the applicant.

The condition for using this form of company registration is the need to register a user account, i.e. enter the user's identification data and set their profile. In addition, it should be indicated that that procedure enables changing the data in already registered companies as well as submission of the company's financial statements. Currently, the S24 portal allows for the change of the company's seat and address, subject of activity (PKD codes), composition of the management and the supervisory board at the same time.

When implementing an entry or a change, a set of necessary documents must be prepared. The content of the documents is then entered into the system, and each document must be signed by appropriate people. The signature may be a qualified signature or the document may be signed by a so-called Trusted Profile.

5. ELECTRONIC CONFIRMATION OF THE RECEIPT OF JUDICIAL LETTER SHIPMENTS BY PARTY PROCEEDINGS AND ELECTRONIC DELIVERY OF JUDICIAL LETTERS

A technical solution, which has been expected for quite a long time, and which significantly improves the course of civil proceedings, is the electronic confirmation of delivery to the party. Until recently, the only document confirming that a party to the proceedings had received a court consignment was a paper return confirmation, which was signed by the party to the proceedings in the presence of the postman during the delivery. The witnesses were served with hearing summonses in an identical manner. The content of the confirmation included information about the method of delivery of the parcel, date of receipt and whether the parcel was collected personally or delivered to an adult household member. The paper method of providing information was therefore predominantly associated with the late submission of information about the delivery or non-delivery of the parcel to the court. This undoubtedly affected the length of the proceedings and made it impossible for the court to issue a judgement in a situation, where there was no information about the delivery, e.g. information about the submitted claim to the party, and therefore determine whether

the lack of reaction from the defendant to the claim submitted by the claimant was a consequence of the failure to provide them with a copy of the claim as a result of the claimant's incorrect indication of the defendant's address, or whether it was dictated by other circumstances. This method of delivering consignments also determined the course of interviewing the witnesses. It was difficult to effectively establish whether the witness was correctly summoned to the trial date, which consequently often led to its postponement.

As a result, the legislator decided to introduce an innovative solution. At present, consignments are delivered in a traditional way; however, the confirmation of their delivery is provided to the court electronically. The postman goes to the place where the consignment is to be delivered (i.e. the place of residence of the party to the proceedings), and subsequently, during the delivery, asks the party to electronically sign for it on an electronic device. The information about the delivery of a consignment or the reasons for its non-delivery is sent electronically to the post office, and then forwarded to the court in the same manner.

An important advantage of such a solution is the improvement of the course of the proceedings. The information is updated in the case management system and, after entering the case reference number, the judge is immediately informed about the date and method of delivery. This allows them to immediately proceed with further procedural steps. The presented solution significantly accelerates the course of proceedings.

Nonetheless, further improvements of legal proceedings, including the possibility of sending correspondence to the parties by e-mail, are still being introduced. Obviously, this solution is technically simple to implement; however, it requires the introduction of legal regulations, which would allow the delivery to be considered effective under the law. The fact that the information reached the addressee and the addressee had the opportunity to become acquainted with it must be undoubted in legal terms. This technical solution is close to implementation. At present, the claimant in economic proceedings, or their representative, is required to provide an e-mail address. It is also a way to contact the court quickly.

In the current legal situation, final legislative work is being undertaken to introduce an act considering electronic delivery. It also introduces real changes in civil proceedings and allows for electronic exchange of correspondence between the court and the party, the delivery of which is to produce certain procedural effects. The introduction of innovative rules, however, requires the refinement of the existing ICT system, which would operate this communication method, and, as a result, issuing of appropriate regulations by the Minister of Justice after entering the act into force.

The constant development of the electronic correspondence between the parties to the proceedings as well as its other participants is important

from the viewpoint of civil procedure. In the currently reality, and therefore in a situation, where most citizens communicate electronically, this seems to be necessary. We live in the age of the Internet and access to the electronic network; thus, the version of paper correspondence is being displaced by it. The indicated legislative changes are also justified from a sociological point of view. Concurrently, it should be pointed out that an improper notification of a party to the proceedings about the date of a hearing might result in its invalidity due to the possibility of depriving the defending party its rights in the trial. Effective legal solutions in this area are therefore essential and necessary.

6. SYSTEM OF RANDOM ALLOCATION OF CASES TO JUDGES

Undoubtedly, an innovative solution in the Polish legal system, which actually applies to all proceedings conducted by courts, is the system of random allocation of cases to judges. From the viewpoint of functioning in the judiciary system, this regulation is relatively new and not devoid of critical assessments.

The key concerns associated with the administration of justice might be that cases are not fairly allocated to judges. Consequently, this leads to certain ambiguities. Firstly, cases could be identified differently depending on the legal position of a given judge. Secondly, considering the importance of cases and their level of difficulty, cases would burden one or more judges to a greater extent. As a result, the number of cases referred to a given judge for review would be greater than the number of cases referred to other judges. Such a situation could have occurred when in the previous system of work organisation, cases were assigned to judges by the President of the Division. Mutual sympathies and antipathies could unfortunately have been important here. Such elements cannot be excluded when the human factor is involved.

An element that seems to have quite significantly influenced the introduction of the system of random allocation of cases is that it can ensure that the judges are evenly burdened by cases. Additionally, considering the degree of difficulty of the cases, the system also assigns them evenly to judges. The above arguments indeed justify the claim that this system considerably improves and accelerates the course of the proceedings.

This system was introduced into the Polish legal system by the regulation of the Minister of Justice of 28 December 2017 and has been functioning in Polish courts since 1 January 2018. Thus, an evaluation of the system has already been conducted and its flaws have been identified. Some improvements are already being made.

The first premise of the system, which was necessary, was the division of the cases into categories. Each type of case (e.g. claims under a sale agreement, contracts for construction services, leasing contracts or divorce) has been provided with an appropriate statistical symbol. Subsequently, virtual baskets for drawing cases were created. Various cases were thrown into the baskets according to the indicative degree of difficulty. And so, for example: basket no. 1 includes cases considering claims regarding contracts for construction services, construction projects and currency derivative transactions. Within the given baskets, a draw takes place and the system assigns each judge an identical number of cases of the same category. This allows for the principle of objectivity to be respected when assigning cases to judges.

At the same time, it is worth indicating that the system contains a few more rules. First of all, there is a need to register a new case in the system within 14 days of its receipt in court. Moreover, drawings are usually held on working days at 8.00 pm. It is possible to draw multi-person court panels, e.g. a panel of 3 judges. Recently, an improvement has been introduced, which involves excluding judges from certain panels and the ability to evenly burden judges with adjudication in three-person panels.

The system also provides that judges, who are sick or are on holiday, are excluded from the draw. However, the condition is that this presence should last at least 4 working days. After a period of absence, the system starts assigning cases to judges until their papers are evened out.

The author of the idea also considered the aspect of the "weight of the case", which is quite fundamental.[5] The claims under a sales contract will not necessarily always be identical in terms of their degree of difficulty. The system assumes, however, that as default, each case has a weight status of "1". Certainly, the person operating the system can change it to a different level, which in effect means that the case is considered more difficult. The system will then draw fewer cases to a reporting judge, who received a more difficult case.

From a practical point of view, this solution is not entirely good and fair. It can be a space for manipulation. The ideal solution was to create a computer system that would analyse the probable course of the case and qualify its weight based on the case data. Such a solution would undoubtedly be desirable and is actually related to another issue raised in this article, namely the use of "artificial intelligence" in the justice system.

Several years of operation of the random case allocation system in Poland undoubtedly enables the identification of some disadvantages. First of all, it

[5] Council of Europe (CEPEJ). 2020. Case weighting in judicial systems. CEPEJ Studies no. 28, https://rm.coe.int/study-28-case-weighting-report-en/16809ede97 [accessed: 09.12.2021].

should be noted that sometimes the system assigns a large number of cases to judges, which is not justified. However, IT improvements have already been made in this respect. Moreover, the system does not identify situations, where a judge adjudicates in two divisions, part-time in each. When a judge is finally transferred to one division full-time, the system automatically completes their report to the full, including the whole year. Finally, the algorithm that the system uses to distribute cases is still unknown [Dervanović 2018, 209-34; Zagórna 2019].

Despite these few disadvantages of the system's operation, a number of its advantages should be recognised. In principle, it is an ideal tool to ensure that cases are assigned evenly to judges. It prevents excessive burden on one judge at the expense of another. Sociologically, it also has a positive effect on the morale of the work environment, as it enables working in an environment, where cases are distributed evenly and the speed of court proceedings is rewarded with a smaller burden. It solves many employee conflicts that may have been caused by the head of the unit, who assigned cases to judges in an unfair way, often only in their subjective opinion.

When assessing the system, one could be tempted to make some improvements. The possibility of dividing cases into more categories remains to be considered; however, in practice, this might also mean more errors. It is also difficult to predict a 100% identical scenario for the course of each case.

An improvement to the system would undoubtedly be the possibility of utilising "artificial intelligence", the main task of which would be to analyse cases in terms of the number of witnesses who have to be heard, the number of demands included in the suit, the complexity of the legal problem and the estimated duration of the proceedings. The results of such analysis would serve as a basis for assigning cases to a specific level of difficulty, e.g. on a scale from 1 to 5. If a judge draws cases with a higher level of difficulty, it would mean that they should have fewer of these cases. Such a solution would contribute to the fair distribution of cases among judges and, as a result, would affect the efficiency of the proceedings.

7. ELECTRONIC INSOLVENCY PROCEEDINGS

The novelty planned for 2021 is another electronic court proceeding. The Polish legal system also provided for the possibility of conducting proceedings in an electronic form in the case of insolvency proceedings. In the Polish legal system, it is a type of a legal proceeding conducted by the courts. The specificity of this proceeding is that after the declaration

of bankruptcy, the assets of the bankrupt are sold, and the funds obtained from this sale are divided among the creditors.

Electronic insolvency proceedings are in fact no different from other electronic proceedings. Documents as well as decisions of the judge-commissioner and bankruptcy court are submitted electronically via an ICT system.

What is important is that in the system supporting this proceeding, we will find information concerning it, in particular, the components to be sold from the bankruptcy estate, their estimated value as well as information about planned tenders. Conducting proceedings in such a system ultimately means that the proceedings become transparent for its participants, in particular for creditors, and therefore for those entities whose proceedings are in fact conducted [Goodman and Flaxman 2017, 56]. The main purpose of insolvency proceedings is to satisfy the claims of the creditors to the highest possible degree. There were many accusations that the bankruptcy trustee conducting the insolvency proceedings allocated too much money to the costs of the insolvency proceedings, sometimes suspiciously specially generated. Having electronic access to the case and all necessary information, the creditor is able to react in a situation, where the costs of the insolvency proceedings disbursed by the bankruptcy trustee raise their concern or the course of the insolvency proceedings is objectively too long.

Undoubtedly, electronic insolvency proceedings influence the transparency of these procedures and result in their improvement. The contact between the participants of the proceeding, the judge-commissioner, court and bankruptcy trustee is also easier. Introduction of this system is a good signal for further electronisation of other court proceedings.

8. CASE WEIGHT

An important issue for improving the course of civil proceedings is the need to create a solution, which would allow for an objective "weighing of the case". This aspect is significant because it influences the categorisation of cases and their assignment to judges according to "size/volume", and more specifically "difficulty". This is not an easy task and is the subject of many analyses, including those of the European Commission for the Efficiency of Justice (CEPEJ), which operates under the Council of Europe.

The basic method, which would enable categorising cases according to their degree of difficulty, is to direct the survey to the interested parties, i.e. the judges. They have the broadest knowledge on the cases they are conducting. It can be assumed that, for example, cases regarding claims under

a sales contract will as a rule be easier and shorter to handle than those concerning claims under a construction contract. However, this is not sufficiently obvious. One case concerning a sales contract might not necessarily be identical in course and difficulty to another case regarding the same claim.

Moreover, it should be noted that the degree of difficulty of a case will also depend on a particular legal system. Thus, the introduction of common determinators of cases, for instance, for all European countries, would also not be valid. The allocation of the case category ultimately depends on the legal provisions in force in a given country – in particular the procedural provisions.

The weight of a case will also often depend on the type of procedural steps that will need to be taken in its course, and this in turn is related to the issue of analysing the case progression. However, it should be pointed out that the basic method of categorising cases is the indicative determination of their progress based on the procedural steps that must be undertaken during their course. Establishing a certain time frame will enable "weighing of a case" and its classification into a specific category. Nevertheless, it is a plan for the future that requires the development of efficient case assessment methods.

The introduction of an efficient and reliable "case weighing" mechanism would also contribute to improving the control over the progress of the conducted proceedings. Taking into account objective factors, knowledge about the estimated time of examining a particular case would also determine whether the process of a given case was unjustifiably long. Consequently, we would have information about whether a particular judge is unjustifiably delaying the review request and whether they could hear the case faster without losing the quality of the judgment. Such knowledge would undoubtedly be valuable in determining a specific kind of time frame for ongoing court proceedings. As a result, it would improve their progression.

9. CASE PROGRESS ANALYSIS – ARTIFICIAL INTELLIGENCE

One of the methods, thanks to which the objective set out in the previous paragraph can be achieved, is to create a tool that would allow for an efficient analysis of a case and assignment of its category. Undoubtedly, bearing in mind the extensive developments in this area, we should undertake broader research in this direction.

The majority of the Internet computer systems used in our daily work are already based on artificial intelligence. It seems that artificial intelligence is able to carry out efficient analytical processes, the effects of which can

be used, for example, during the evaluation of research results in medicine. So why not be tempted to try out identical solutions in the judiciary system?

Research conducted by China revealed that artificial intelligence can be utilised to interview witnesses, and therefore collect information about the case and events related to the factual basis of the investigated claim. The procedures of most cases, especially the less complicated ones, are similar. Gathering of information on the actual state by the judge usually requires asking identical questions during the proceedings. When it comes to minor and simpler cases, the judges in China are replaced by special Internet applications [Lynn 2020]. An avatar, taking the form of a judge in an online communicator, asks the defendant questions about the incident (including the circumstances of the commitment of the offence) as well as the circumstances related to the claim. The avatar records, stores and then provides the judge with information [Flaga-Gieruszyńska 2019, 99]. The collected data is the basis for the judge's decision on the case.

Going even a step further could also be considered. It could be possible to allow artificial intelligence to propose a litigation decision, i.e. to let it settle a case after analysing the collected data and assessing the actual state. By providing information about the possible settlement of a case, artificial intelligence could propose them itself, comparing them with the applicable legal provisions. Certainly, the judge should make the final decision.

The same mechanism can be utilised to analyse the progress of a case that has not yet started. By providing artificial intelligence with information regarding the plaintiff's demands, the number of requested witnesses, the necessity to hear expert evidence (to what extent, etc.), it could develop a time scenario for cases, indicating how much time the judge should need to assess them. On the basis of the collected information, a case could be given a category and weight, which would effectively translate into a proportional distribution of cases between judges. A judge would get fewer cases requiring more time to be examined than those that are simpler. In fact, the activities indicated above could be performed by any court employee. However, in the case of human activities, such a process is associated with a higher risk of making errors and is more time-consuming.

At present, utilising artificial intelligence mechanisms in the judiciary seems to be a very good solution. The preparation of the case for examination, its assessment, and as a result assignment of its category could be conducted in an efficient and fast manner prior to sending it to the system of random allocation of cases. It seems that the chosen direction in the current age of omnipresent computerisation is necessary and inevitable. Nevertheless, it must not be forgotten that an artificial intelligence system cannot replace the administration of justice by judges, as only that guarantees respecting citizen's rights [Bues and Matthaei 2017, 89-109].

10. COURT RULING PORTAL

An institution in the area of e-justice, which has been successfully operating in Poland for many years, is the court ruling portal. Its formula in the Polish legal system provides for running the portal for judgments of common courts as well as the Supreme Court. Firstly, it should be noted that court rulings in the Polish legal system are announced openly, except for situations, where the openness of the proceedings is excluded by the court due to the circumstances provided by the law.

The court ruling portal is a database of judgments issued by courts. From the viewpoint of the interest in the study of law, access to judgments issued by the Supreme Court is more important, as it constitutes an image of the jurisprudence of the courts in Poland. The judiciary in the area of implementing legal provisions should be moving in this direction. Additionally, considering civil litigators, access to court rulings issued in a particular court is also important, as it determines the jurisprudence of a given court and significantly helps in formulating the content of charges in lawsuits and appeals.

Searching for information on the court ruling portal is conducted via a website, which contains a database of these judgments. The search is carried out by entering the file reference of the case, date of the decision or a word indicating the issue, in which we are interested. The system filters and displays cases from a given appeal, district or a specific district court. The rules of its operation are clear and the way of operating the system is simple.

The main drawback of the system is that the database of judgments is relatively sparse, in particular with regards to the courts of the general jurisdiction. The reason is definitely the fact that the courts themselves do not enter their rulings into the portal. The result is that the access to it is not very helpful for third parties. The blame lies with the courts of general jurisdiction, which do not popularise their rulings on the portal and do not publish them there. There are also no specific technical solutions, which would allow for rapid publication of court rulings on the portal.

In order to improve the functioning of the system, it might be necessary to postulate that courts of general jurisdiction make their decisions publicly available on the portal, as it constitutes a valuable base and knowledge about the jurisprudence of courts. In practice, the parties to the proceedings, and in particular their representatives, make much greater use of the portal of Supreme Court's decisions, as the information contained therein is more comprehensive. In addition, all of the most important and relevant decisions of the Supreme Court, together with their justifications, are published there.

CONCLUSIONS

In an era, where the access to the Internet is already a natural phenomenon, it is difficult to conclude that the courts could do without it. The electronic forms of documents and communication between citizens and institutions are displacing the paper forms. It is an irreversible process primarily due to the speed of communication as well as the low costs of its use and service.

Legal proceedings must be therefore based on the use of the indicated electronic instruments. It seems that the worldwide trend in this respect is already settled and targeted. We are currently conducting court hearings using electronic instruments for video conferencing and communicating with the participants of the proceedings via e-mail.[6] Moreover, as the example of China demonstrates, avatars are questioning witnesses and parties to the proceedings electronically, collecting information about a specific event, both for the purposes of criminal and civil proceedings.

The future of the judiciary is already known. Court records will be kept in an electronic form, court cases will be held through video conferences and we will start using other electronic instruments to accelerate the course of the proceedings.

Nevertheless, at present, another important challenge lies ahead. The judiciary should be supported with such electronic instruments, which would allow the case to be analysed by a system that would propose a procedural decision ending the case. Thus, we must start making greater use of artificial intelligence in the judiciary and creating systems of efficient case analysis, which would consequently constitute a reliable source of events reconstruction, eliminating the possibility of decision errors. In fact, law is the most exact field among other humanities. Hence, in a way, we can substitute actual events in a "formula", i.e. in legal provisions, so that the analysis of individual elements gives us an almost mathematical result.

However, it should not be forgotten that the judiciary is held by the courts, while the decisions are made by judges who take into account not only purely legal and factual issues, but also human factors.[7] Therefore, when passing a judgement, particularly in criminal proceedings, it is necessary to consider and assess the chances of improving the attitude of the accused, or for example in civil proceedings, to take into account the motivation that supported the specific action of the accused. It is essential to assess whether there are any grounds for justifying their actions. The issues of empathy cannot be irrelevant to the court case either. Artificial intelligence will not replace

[6] See Bieluk and Marciniak 2016, chap. 2, doc. 6.

[7] See Chłopecki 2021, chap. 4.

this analysis. Thus, it should be clearly emphasised that the courts cannot ultimately be replaced by avatars of judges, who would make the final procedural decision[8] [Martsenko 2020, 158]. Since the administration of justice is exclusively a human domain, it should remain the same.

In the near future, the implementation of intensive measures is therefore recommended to further electronise and digitise the judiciary to the fullest extent. New forms of technological solutions, and in particular the experiences of individual countries in this area, should be the subject of common exchange and analysis [Bundin, Martynov, Aliev, et al. 2018, 171-80]. The technological solutions will be useful for everyone and the level of computerisation of the judiciary will be the same throughout the world only by joining forces. It should not be forgotten that computer scientists, who are also lawyers, should be involved in the development of IT tools to a greater extent, because only they would be able to combine their knowledge of the functioning of procedural institutions with the adopted computerisation of proceedings as well as understanding of IT tools that could be used in the administration of justice.

Consequently, the actions taken should contribute to the improvement of the course of legal proceedings, which is a challenge for all legal systems [Płocha 2020, 287-88]. We must also not forget that courts are institutions, which are supposed to serve citizens, and the indicated facilitation of the access to court, and in conclusion, of the course of the proceedings, are to contribute to a better comfort of participation in these proceedings by citizens who take part in it, regardless of which side of the process they are on.[9] Finally, it should be emphasised that court proceedings should, above all, be fast, because only a quick decision is a guarantee of the efficiency of the courts. Additionally, court proceedings should be cheap, which can be ensured by the wider use of online electronic technological solutions.

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[8] See Kościółek 2019, chap. 5, doc. 5.

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THE ISSUE OF THE SCOPE OF APPLICATION OF SUBSTANTIVE LAW NORMS BY AN ARBITRAL TRIBUNAL

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Abstract. The issue of the scope of application of substantive law norms by a tribunal of arbitration remains a relevant topic in Polish legal doctrine. Among legal scholars, there are still discrepancies in assessing to what extent an arbitral tribunal should apply substantive law. These uncertainties arise from the interpretation of Article 1194 of the Code of Civil Procedure and the manner in which the aforementioned legal norm is sanctioned. The answer to the research problem posed required an analysis of the public policy clause, the violation of which constitutes the basis for a complaint to set aside an arbitral award. The paper covers some basic principles of the legal order whose violation can result in the highest sanction for an award rendered by an arbitral tribunal – the setting-aside.

Keywords: arbitration proceedings; substantive law; public policy clause; principle of non-interference of state court

INTRODUCTORY REMARKS

The proceedings before an arbitral tribunal have their source in the provision for an arbitral tribunal, whose source is the autonomous will of the parties. Autonomy of will in arbitration manifests itself from the moment of renunciation of state jurisdiction and submission of the dispute to an arbitral tribunal through the provision for an arbitral tribunal. The legal nature of the arbitration agreement cannot be unequivocally determined, and the doctrine in this regard is also inconsistent. However, without delving into the previously discussed considerations, it should be emphasized that there is an inseparable bond between the concept of the source of arbitration and the fundamental principle of substantive civil law, which is manifested externally by the will of the parties in the form of the conclusion of an arbitration agreement, which is a *sine qua non* condition of the arbitral proceedings [Czech 2017, 59]. The autonomous will of the parties also translates into a decision regarding the law applicable to the arbitration proceedings. The issue of the application of substantive law norms by an arbitral tribunal is still relevant in Polish legal scholarship. This issue was raised

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mainly before the amendment of the Code of Civil Procedure in 2005. Undoubtedly, despite a coherent line of case law on the application of substantive law by an arbitral tribunal, doubts arise in practice as to whether the limits established by the public policy clause are sufficient or whether the arbitral tribunal should be bound to a greater extent by substantive law, and whether its violation should be sanctioned in post-arbitration proceedings. This issue has recently returned to the academic agenda due to a case before the Arbitration Court at the National Chamber of Commerce regarding a claim for a declaration.[1] This paper analyses the views of legal scholarship and case law on the application of substantive law by an arbitral tribunal. To properly assess whether the current legal solutions are sufficient, the solutions of the German and French legal systems are also discussed. The above considerations lead to the conclusion as to whether the solutions indicated by the legislator in the Polish legal system are indeed sufficient.

1. THE NATURE AND SCOPE OF THE APPLICATION OF SUBSTANTIVE LAW NORMS BY AN ARBITRATION COURT IN THE POLISH LEGAL SYSTEM ACCORDING TO ARTICLE 1194 OF THE CIVIL PROCEDURE CODE

The issue of the scope of application of substantive law by an arbitration court has been and continues to be a subject of discussion among legal scholars. The source of this discussion is Article 1194(1) of the Code of Civil Procedure,[2] which states that an arbitration court shall resolve a dispute according to the law applicable to the given relationship, and, if the parties have explicitly authorized it to do so, according to general principles of law or principles of fairness. The current wording significantly differs from the previous version prior to the 2005 amendment. The former provision, Article 712(1)(4) CCP, allowed a party to demand the annulment of an arbitration award if the decision on the parties' claims is unclear, contradictory, violates the rule of law, or social coexistence principles. This provision laid the foundation for the discussion on the extent to which an arbitration court should be bound by substantive law. In Polish legal doctrine, two divergent views have emerged. P. Ballada was a proponent of the radical approach of binding the arbitration court to substantive law. In his argument, he maintained that it is necessary to observe the principles of substantive law by the arbitration court and, therefore, it has an obligation to apply it correctly; otherwise, it would pose a risk to the rule of law in the legal system

[1] Judgment of the National Chamber of Commerce of the Arbitration Court of 24 April 2006, ref. no. SA 193/05, Lex no. 1724100.

[2] The Act of 17 November 1964, the Civil Procedure Code, Journal of Laws of 2023, item 289 as amended [hereinafter: CCP].

[Ballada 2002, 93]. On the other hand, J. Sobkowski presented a different view, pointing out that the basis of the arbitration proceedings is the agreement of the parties to submit to the arbitration court, whose foundation is the autonomous will of the parties. Therefore, an arbitration court cannot make decisions based on the substantive law indicated by the parties or on principles of fairness [Sobkowski 1980, 69]. The doctrine also raised the argument that the former provisions of the law did not explicitly indicate that the arbitration court could make decisions independent of substantive law, but the view was expressed that the arbitration panel could act as amiable compositeurs. [Błaszczak 2010, 206]. Contemporarily, however, introduced by the amendment of 2005, Article 1194 CCP, which is modelled on Article 28(1) of the Model Law[3] obliges the arbitral tribunal to resolve the dispute on the basis of the law applicable to the specific legal relationship [Asłanowicz 2017, 116].

The discrepancy in the views of the doctrine, therefore, results from different interpretations of the norm of Article 1194 CCP. In particular, it should be noted that these doubts have arisen due to the fact that this provision is an example of *legis imperfectae* [Knoppek 2014, 71]. In the light of Article 1206 CCP, there is no such criterion that would constitute a basis for setting aside an arbitral award due to an erroneous interpretation of substantive law. However, in accordance with the established line of case law, the judiciary indicates that the setting aside of an arbitral award under Article 1206(2) may be justified only in the event of a breach of the substantive law applicable to the resolution of the relationship in respect of the basic principles of the legal order.[4]

At this point, attention should also be paid to the competence of the arbitrator, which is designated by the legislator under Article 1170(1) CCP, according to which the arbitrator may be a natural person regardless of citizenship, having full legal capacity. As follows from this legal basis, the legislator has not limited the competence of the arbitrator to individuals with legal education. Consequently, the lack of adequate understanding of the law due to the lack of appropriate education may lead to a mistaken interpretation of substantive law by the arbitral tribunal. In doctrine, it is emphasized

[3] Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf [accessed: 10.01.2023].

[4] Judgment of the Appellate Court in Warsaw of 27 January 2016, ref. no. I ACa 472/15, Lex no. 1999268. It should also be noted that in this ruling, the Appellate Court indicated that an incorrect interpretation of substantive law provisions, which formed the basis for resolving the dispute in question, does not necessarily constitute a violation of the public policy clause. The assessment of whether an arbitral award violates fundamental principles of the legal system should be formulated in a narrow manner.

that such an assumption, in light of Article 1194 CCP, is an argument in favour of the fact that the arbitral tribunal is not obliged to apply substantive law in a manner corresponding to the judgments of state courts [ibid.].

The above arguments indicate the validity of the claim that an arbitral tribunal, when rendering an arbitral award, evaluates substantive legal norms. Also noteworthy in this regard is the aforementioned judgment of the Arbitral Tribunal at the National Chamber of Commerce.[5] In this case, the Arbitral Tribunal applied the provisions of Article 189 CCP, i.e. the action for a declaratory judgment. The subject of the arbitration was the issue of legal interest, namely the legal interest as a prerequisite for the admissibility of the action for a declaratory judgment [Gessel-Kalinowska vel Kalisz 2020, 779]. As indicated by B. Gessel-Kalinowska Kalisz, the question of the validity and correctness of the application of Article 189 CCP in arbitration proceedings should not be subject to analysis, as the validity of the action for a declaratory judgment is based on the provision of the arbitral tribunal. However, the issue of the scope of the application of the provisions of Article 189 CCP, in particular the prerequisite of legal interest arising from this provision, should be subject to analysis [ibid., 782-83]. In view of the representative of doctrine, it is unjustified to apply limitations resulting from the interpretation of the provisions of Article 189 CCP in this case, in particular the legal interest [ibid., 787].

2. BASIC PRINCIPLES OF LEGAL ORDER

The public policy clause includes within its scope the fundamental principles of the legal order arising from procedural rules as well as substantive law norms.[6] In the case of a lack of conformity of the arbitral award with the fundamental principles of the legal order, it is not subject to assessment whether such conformity exists with all the absolutely binding norms of substantive law, but only the effect of the award – when it cannot be reconciled with the fundamental principles of the national legal order.[7] According to the established line of jurisprudence of the Supreme Court, the basis for setting aside an arbitral award under Article 1206(2)(2) CCP is considered to be such principles of the legal order, which "include constitutional norms of fundamental importance, as well as fundamental principles

[5] Ref. no. SA 193/05.

[6] Judgment of the Appellate Court in Warsaw of 30 September 2020, ref. no. VII AGa 2119/18, Lex no. 3160237.

[7] Judgment of the Supreme Court of 9 January 2019, ref. no. I CSK 743/17, LEX no. 2618514; judgment of the Supreme Court of 11 May 2007, ref. no. I CSK 82/07, OSNC 2008/6/64; judgment of the Supreme Court of 15 May 2014, ref. no. II CSK 557/13, LEX no. 1491130.

of individual areas of law, and constitutional-political and socio-economic principles."[8] The impossibility of appealing an arbitral award in case of an incorrect interpretation of substantive law also results from the fact that a state court, in proceedings for setting aside an award, does not examine the substance of the matter in terms of merit, nor in formal or legal terms.[9] The above primarily follows from the principle of non-interference of the state court in proceedings before an arbitral tribunal [Michalik 2021, 37]. The principle of non-interference of the state court in proceedings before a non-state court is mainly based on Article 5 of the Model Law, which states that in matters not regulated by the law of arbitration, the state court is not authorized to intervene unless the law expressly permits it. However, in assessing the principle of non-interference of the state court in proceedings before a non-state court under the Polish legal system, attention should be paid in particular to Article 1159(1) CCP, which states that the court may only take action in the scope regulated by the provisions of this part of the Code. The legislator refers to the fifth part of the Code of Civil Procedure in the legal basis mentioned. As stated by the Supreme Court in its judgment of January 21, 2016, Article 1159(1) CCP "limits the interference of the state court in the functioning of the non-state court and the course of proceedings before the non-state court in the scope regulated by Article 1154-1217 of the Code of Civil Procedure to cases defined by law."[10]

As indicated above, the catalogue of basic principles of legal order is an open catalogue, which consequently raises many discrepancies in the views of legal scholars. The following text analyses the case law of Polish common courts in order to assess which principles should be considered as basic principles of the legal order. The first principle to be distinguished is the principle of party autonomy. The Supreme Court indicated in a judgment of June 15, 2021 that the content of this principle is complex, but it can certainly be recognized that its basic aspect is the freedom to undertake legal actions in accordance with the will of the given entity, which is expressed in "the freedom to establish, modify and terminate a civil law relationship,

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[8] Decision of the Supreme Court of 7 June 2019, ref. no. I CSK 76/19, Lex no. 2688975.

[9] Judgment of the Supreme Court of 13 December 1967, ref. no. I CR 445/67, OSNCP 1968 No. 8-9, item 149; judgment of the Appellate Court in Szczecin of 23 April 2008, ref. no. I ACa 204/07, Legalis no. 298774; judgment of the Appellate Court in Katowice of 26 April 2018, ref. no. V AGa 570/18, Legalis no. 2654102.

[10] Judgment of the Supreme Court of 21 January 2016, ref. no. III CSK 429/15, OSNC-ZD 2017/3/47. The Appellate Court in Krakow, in its judgment of 17 June 2014, ref. no. I ACa 540/14, stated that Article 1159(1) CCP "indicates the exclusion of the jurisdiction of state courts in cases where the parties have submitted their dispute to arbitration. However, in situations where the possibility of taking action by a state court is an exception, each case must clearly result from the law, and an extended interpretation of exceptions is not permissible," Legalis no. 1185865.

to choose a counterparty (party) to a legal transaction and to shape a legal transaction."[11] The court also highlighted that, within the principle of party autonomy, it is essential to respect the actual will of the parties in the light of the provisions of civil substantive law on the interpretation of will. Judicature also indicates that one of the primary principles of the legal order of the Republic of Poland is the comprehensive consideration of the case, and failure to recognize its essence constitutes a breach of the public policy clause.[12] Moreover, within the scope of substantive law, jurisprudence emphasizes that the concept of public policy includes, inter alia, the principle of the restitutionary nature of liability for damages, the principle of freedom of contract and equality of parties, the principle of pacta sunt servanda, the principle of equal treatment of creditors in the reorganization proceedings, and the principle of economic freedom.[13]

Undoubtedly, therefore, it must be acknowledged that the range of principles that a court may deem to be fundamental principles of the legal order in the Republic of Poland is broad. Consequently, considering the fact that the concept of public policy is an indeterminate concept, it is subject to interpretation, and thus leaves the court with considerable discretion in proceedings concerning an application for the setting aside of an arbitral award.[14] However, as previously demonstrated, not every violation of substantive law resulting from an erroneous application of substantive law or a faulty interpretation leads to the recognition that there has been a breach of public policy. The above only justifies that the provision of Article 1194 CCP is fundamentally narrowly sanctioned within the proceedings for setting aside an arbitral award, as it is limited solely to the public policy clause.

3. THE SCOPE OF APPLICATION OF SUBSTANTIVE LAW BY AN ARBITRAL TRIBUNAL IN GERMAN AND FRENCH LAW

In German law, arbitration has a long and significant history both in practice and in law. The Civil Procedure Code, originating from the last century, has included Book X, which regulates arbitration proceedings from the very beginning [Böckstiegel 1997]. The provisions of the German Civil Procedure Code in Book X have always been characterized by respect for the parties' autonomy as the foundation of arbitration proceedings

[11] Judgment of the Supreme Court of 15 June 2021, ref. no. V CSKP 39/21, Lex no. 3245326.

[12] Judgment of the Court of Appeal in Warsaw of 18 November 2019, ref. no. VII AGa 804/19, Lex no. 2788564.

[13] Judgment of the Court of Appeal in Poznań of 27 June 2018, ref. no. I ACa 232/17, Lex no. 2549899.

[14] Judgment of the Court of Appeal in Katowice of 31 July 2017, ref. no. V ACa 129/17, Lex no. 2659678.

[Wojciechowski 2008, 105]. It is worth noting that the Polish legislator used the solutions of Book X of the German Civil Procedure Code during the legislative work on the reform of the Polish Civil Procedure Code in the field of arbitration proceedings [Wiśniewski 2015, 167]. The issue of the scope of application of substantive law by an arbitral tribunal is regulated in para. 1051 of the German Code of Civil Procedure.[15] According to para. 1051(1) of the German Code of Civil Procedure (ZPO), an arbitral tribunal decides a dispute in accordance with the laws that the parties have designated as applicable to the substance of the dispute. The reference to the law or legal system of a specific country, unless the parties have expressly agreed otherwise, is to be understood as a direct reference to the substantive law of that country, rather than its conflict of laws rules [Wojciechowski 2008, 105]. Pursuant to this legal provision, the choice of substantive law applicable to a given arbitration proceeding is governed by the parties' autonomous will. However, it should be noted that para. 1051 only applies if the place of arbitration is in Germany (para. 1025(1) ZPO).

In French law, the rules governing arbitration proceedings are set forth in Book IV. Moreover, it should be noted that these rules do not mirror the UNICTRAL Model Law, which served as the foundation for the German provisions on proceedings before a court of arbitration and, as mentioned above, also for the amendment of the Polish Code of Civil Procedure in 2005 [Idem 2009, 167]. The scope of the substantive law applicable to a court of arbitration is regulated by Article 1474, which provides that the arbitrator decides the dispute in accordance with the principles of law, unless the parties have authorized him to render a decision as an *amiable compositeur* (according to the principles of equity) in the arbitration agreement [ibid., 178]. It is worth noting the distinction between deciding as an arbitrator *ex aequo et bono* and as an *amiable compositeur* [Mońdziel 2015, 160]. Deciding ex aequo et bono directly expresses a decision based on the principles of equity. In this regard, the task of the arbitrators is to "make a subjective assessment according to their own concept of a fair settlement of the dispute" [Ereciński 2012, 793]. In contrast, the concept of *amiable compositeur* is much more significant in the French system of arbitration proceedings, as this concept originates from French law [Mońdziel 2015, 160-61]. As Article 1474 of the French Code of Civil Procedure indicates, the arbitral tribunal is obliged to decide based on the principles of law, unless the parties have authorized it to render a decision as an *amiable compositeur.* The difference between deciding on the principles of equity and as an *amiable* compositeur is significant in this regard, as an *amiable compositeur* is obliged to apply the law, but in a suitably modified way [Mońdziel 2015, 161].

[15] Zivilprozessordnung [hereinafter: ZPO].

FINAL CONCLUSIONS

From the conducted analysis of the scope of application of substantive law by an arbitration court, the first conclusion that emerges is the search for the source of the parties' will in the fundamental principle of civil law – the autonomy of the parties' will. It should be acknowledged that in arbitration proceedings, the arbitration court should primarily be guided by the parties' will and intention to submit to arbitration. Subsequently, in seeking an answer to the question of what should be the scope of application of substantive law by an arbitration court, in line with the developed case law, it is one that does not violate the clause of public policy. However, it should also be pointed out that, despite the fact that the clause of public policy is an indeterminate concept, it only includes those most important basic principles of the legal order within its scope. The narrow scope of sanctioning any violation of substantive law by an arbitration court, whether through failure to apply the criteria arising from the substantive norm or through erroneous interpretation, allows the arbitration court a broad range of decision-making. Finally, the issue of a claim for determination in arbitration proceedings deserves emphasis. It is the duty of the adjudicating panel to assess the validity of application, whether in the case of Article 189 CCP or in the case of another legal norm.

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LEGAL ASPECTS CONCERNING THE NEED TO DISTINGUISH BETWEEN THE CONCEPTS OF "ELECTION" AND "VOTING". STATE *DE LEGE LATA* AND POSTULATES *DE LEGE FERENDA*

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Abstract. The aim of this paper is to prove the thesis that there is a need to distinguish between the terms "election day" and "voting day". The following research methods will be used in the study: formal and dogmatic – to show the views of representatives of the legal doctrine, historical and legal in order to analyse documents of the National Electoral Commission and judicial decisions. Apart from the literature, the research is based on the sources of law in chronological order, taking into account their hierarchy. On the basis of terminological differences and linguistic inaccuracies in them, the author proposes to amend the law and formulates specific wording of the proposed provisions, expressing the hope that the results of the research will have an impact on the functioning of a legally aware society.

Keywords: electoral code; Constitution; voting; elections; legal terminology

INTRODUCTION

The purpose of this paper is to prove the thesis that it is necessary to distinguish between the terms "election" and "voting". The author used the linguistic and the historical-legal method to analyse court rulings, documents of the National Electoral Commission (NEC), normative acts, and statements made by representatives of legal doctrine and electoral practice. Finally, a proposal *de lege ferenda* is made with the hope that the results of the present research will impact the functioning of a legally aware society. On the basis of terminological differences and linguistic inaccuracies in legal acts, the author proposes to amend the law and formulates a specific wording of the proposed provisions.

1. PREMISES UNDERLYING THE RESEARCH

The need to undertake scholarly research on the title issue stems from the Constitutional Tribunal's view that the linguistic and logical correctness

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of a provision is a condition for examining it in respect of other criteria.[1] This requirement, as a principle of the rule of law, is treated as the essential element of decent legislation [Wróblewska 2010, 150]. Moreover, the central issue is justified by the import of the maxim *in legibus magis simplicitas quam difficultas placet*, which requires the legislator to use correct linguistic expressions in their basic and commonly accepted meaning [Sobczyk 2008, 154]; earlier, Kruk pointed out the errors of legislative technique in relation to the flaws in the wording of the Electoral Act [Kruk 1990, 26]. One must agree with Choduń that "the mere knowledge of colloquial language is not enough to edit the text of legal acts and to provide their proper linguistic interpretation" [Choduń 2006, 30]. For this purpose, I will examine the views of some legal scientists, judicial decisions, and normative acts forming the Polish legal system.

2. THE MEANINGS OF THE TERMS "ELECTIONS" AND "VOTING" IN NEC DOCUMENTS

It is worth noting that the *differentia specifica* between the concepts of "voting day" and "election day" were the subject of "Guidance proposals for amendments to the Act of 27 September 1990 on the election of the President of the Republic of Poland" submitted to the Sejm Extraordinary Committee[2] by the National Electoral Commission in 1999.[3] Also, representatives of the 2007 electoral practice distinguished the day of "voting" from the day of "election", writing about an "intention to participate in voting for the Sejm and Senate in the elections ordered on 21 October 2007."[4]

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[1] Judgment of the Constitutional Tribunal of 22 May 2002, ref. no. K 6/02, Lex no. 54067; judgment of the Constitutional Tribunal of 20 November 2002, ref. no. K 41/02, Lex no. 57092; judgment of the Constitutional Tribunal of 4 February 2003, ref. no. K 28/02, Lex no. 76811.

[2] The Sejm Extraordinary Committee for considering draft electoral codes for the Sejm and the Senate and draft amendments to the act on the election of the President of the Republic of Poland.

[3] It was pointed out that in Article 2 of the Act, the voting age limit (18 years) was referred to the election day, while in Article 62(1) of the 1997 Polish Constitution (Journal of Laws No. 78, item 483 as amended), this formula applies to the day of voting. A proposal was made to incorporate the constitutional formula in the provisions of the Act. Thus, the term "voting day" was considered as correct; "Przegląd Wyborczy. Biuletyn Informacyjny" 1999, no. 10-11, p. 6.

[4] Report on the elections to the Sejm of the Republic of Poland and the Senate of the Republic of Poland held on 21 October 2007, "Przegląd Wyborczy. Biuletyn Informacyjny" 2007, no. 11-12, p. 17; "the elections ordered for 21 October 2007, especially on the voting day, were met with great interest in the national media", ibid., p. 26; "The National Electoral Commission did not find any violations of the electoral law that could affect the voting results and election results", ibid., p. 27.

The legislative distinction between the concepts of "voting" and "elections" was illustrated best by the wording of Article 188(1) of the Local Government Ordinance of 1998,[5] whereby "if only one candidate has been registered in a constituency in elections to the council in a municipality of up to 20,000 inhabitants, voting is not conducted and the registered candidate is considered elected." The NEC explained that the provision "refers to a situation where no voting is conducted and seats are filled without voting, but elections are held."[6] A consistent distinction between the terms "voting" and "elections" was made by the Commission in a report on the elections to the Polish Sejm and Senate held on 25 September 2005, writing about the "time and place of voting."[7]

3. DOCTRINE'S UNDERSTANDING OF THE TERMS "ELECTIONS" AND "VOTING"

Prima facie, one might think that "elections" is an established concept, but I do not share this opinion. To prove this, in what follows I will present the views of the doctrine justifying the claim that not only a doctrinal distinction should be made between "election" and "voting", but it should also be reflected in legislation.

An "established concept" is understood to be a legal concept which, because of its earlier application in other legal acts or practice, has an established meaning, going beyond what could be inferred only from its literal interpretation, and in this sense it was incorporated in a given legal act. A word or phrase featured in the Constitution has in fact a certain "interpretative import", but it stems from the will of the constitutional legislator, who resolved to use a given concept in a specific meaning assigned to it at that time [Riedl 2015, 84].

As Mojak emphasized, the term "elections" should be understood narrowly, which mainly concerns the election act and activities directly related to it" [Mojak 1994, 162-63]. An analysis of historical studies leads to the conclusion that the doctrine representatives distinguished between "election" and "voting" (for example, Jarosz writes about "election in the act of voting";

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[5] Act of 16 July 1998, the Electoral regulations for commune councils, poviat councils and voivodship assemblies (Journal of Laws No. 95, item 602 and No. 160, item 1060); "Prawo Wyborcze. Samorządowe prawo wyborcze. Zbiór aktów prawnych oraz wyjaśnień i opinii Państwowej Komisji Wyborczej (stan na 30 kwietnia1999 r.)", p. 61.

[6] Guidelines of the National Electoral Commission (Wyb. 0101-3-T-198/98), "Prawo Wyborcze. Samorządowe prawo wyborcze. Zbiór aktów prawnych oraz wyjaśnień i opinii Państwowej Komisji Wyborczej (stan na 30 kwietnia 1999 r.)", p. 273.

[7] "Przegląd Wyborczy. Biuletyn Informacyjny. Wydanie Specjalne. Wybory do Sejmu i do Senatu Rzeczypospolitej Polskiej 25 września 2005 r.", p. 131.

Jarosz 1985, 36]). Representatives are elected through voting [Jamróz 1993, 41]. As Mordwiłko emphasized, the act of voting leads to an election [Mordwiłko 2001, 71]. According to Kulig, voting is an essential part of the electoral process [Kulig 1995, 122]. As Bożyk argued, "the principle of directness […] determines the degree of influence of voters, expressed in the act of voting, on the final result of the elections" [Bożyk 2000, 31]. According to Gebethner, "the will of voters is manifested in the act of voting" [Gebethner 2001, 21]. Dudek believes elections are a method of choosing individuals for the performance of public functions, while voting is a method of making decisions [Dudek 2008, 173]. However, the need to make a terminological distinction was most emphatically underscored by Skotnicki, who believed that elections are a long-term process split into many stages (voting is just one of them). He pointed to the incorrect use of the words "elections" and "voting" [Skotnicki 2001, 77]. The postulate was extended in 2011 to include the need to legally define "voting" and "voting day" (in the Constitution, "elections" denotes the day on which voting ends and the ballot boxes are opened [Rakowska and Skotnicki 2011, 23]).

As noted by Czaplicki, "making a choice in a voting act is the means by which in an organization based on democratic principles a decision is made" [Czaplicki 2008, 45]. Sokala and Michalak believe elections are "a cyclical process of voting representatives' appointment of citizens for specific positions or to perform specific functions. Since elections are a multi-stage process involving various activities, it is wrong to equate with elections only the act of voting, which is merely part of the electoral process" [Sokala and Michalak 2013, 271]. On the other hand, the concept of voting, according to Sokala, should be identified as "an electoral act externalizing the voting decision of the voter as to the selection of a candidate or candidates for a specific position or to perform a specific function" [Sokala, Michalak, and Uziębło 2013, 65]. Thus, the meaning of the term "elections" does not coincide with the term "voting". Also Chmaj and Skrzydło point out that "voting is one of the most important phase of the election procedure" [Chmaj and Skrzydło 2015, 88]. The studied terms can also be analysed semantically based on opinions of representatives of the doctrine on various institutions of electoral law. For example, in Muszyński's opinion, an election campaign is "a statutorily regulated period for the preparation and holding of parliamentary, local and presidential elections, as well as for determining the activities necessary to organize and hold voting" [Muszyński 2001, 72; Rakowska 2011, 116]. This statement confirms that voting is different from elections. Another argument supporting the distinction between the analysed concepts is the view on the principle of proportionality of elections. According to Banaszak, "the indisputable elements of the proportionality principle are: a ban on applying factually unjustified measures altering

the proportions between the number of votes cast and the number of mandates resulting therefrom, or credentials" [Banaszak 2008, 5-6]. In Skotnicki's view, "only in the act of voting do we get to know the real views of voters" [Skotnicki 2010, 18]. Thus, functional aspects call for a distinction between the concepts of "election" and "voting". Mołdawa claims that "the extent of voter participation in a vote for the Sejm and Senate, i.e. voter turnout, is extremely important for legitimizing the parliament, and thus the system of government" [Kuciński 2007, 81]. Therefore, voting in elections is called voter turnout [Żukowski 2011, 6]. Another argument supporting the thesis about the necessity to make a terminological distinction is the age criterion. According to Uziębło, "in the case of active electoral law, this age is typically identified with civil legal age, and sometimes even younger. In Europe, this is illustrated by Austria, where in the last parliamentary elections it was possible to vote at the age of 16" [Uziębło 2014, 16]. Witkowski also notices the need for conceptual refinement: "In the opinion of the supporters of compulsory voting, compulsory participation in elections (in voting, in fact) is a minimum civic obligation similar to paying taxes, constituting the minimum of civic decency" [Witkowski 2015, 8]. Similarly, Hermeliński emphasizes that "the principle of democratism and freedom implies the requirement to ensure free decision-making by voters and voting under conditions free from pressure or any control" [Hermeliński 2020, 11]. Making distinctions in the presented matter can be justified by the need to ensure that the correctness of legal norms is approved by their addressees. According to Banaszak, "the law should be as comprehensible and logical as possible to minimize difficulties in its application" [Banaszak 1993, 38]. Mordwiłko, on the other hand, argued that "the statutory regulations should be clarified in such a way as to eliminate the possibility of different interpretations by participants of the electoral process" [Mordwiłko 1995, 44].

As Bałaban claimed in 1978, "it is very important to align a constitution with reality..., among other things, by introducing new provisions reflecting the newly arising needs" [Bałaban 1978, 68]. I believe that both the constitutional legislator and the national legislator should distinguish between the terms "elections" and "voting". Due to the development of not only the institutions of electoral law but also research on them, it seems justified that in the process of interpreting constitutional concepts, it seems legitimate to reach beyond the constitutional law, taking into account the postulates of the doctrine of law, which should constitute an interpretative guideline allowing for the recognition of the exact content of a given term and thus the structure of the legal provision.

4. STATE *DE LEGE LATA* AND POSTULATES *DE LEGE FERENDA*

In regard to Article 5 of the Electoral Code[8] Banaszak emphasized that it contains in fact of glossary of definitions of EC terms and does that in the manner provided for by para. 146[9] of the annex to the Ordinance of the Prime Minister of 20 June 2002 on the Principles of Legal Technique.[10] The point is to specify the content of ambiguous or indeterminate concepts in the context of electoral law regulations so that they leave no room for doubt" [Banaszak 2015, 17-18; Idem 2018, 13]. I will humbly disagree with this view, precisely because the term "election day" does not take into account the situational context, which is legally regulated *in concreto*. According to Biłgorajski, "the provision at hand (Article 5 EC) presents the referents of the terms, with "elections" among them [Biłgorajski 2017, 33]. In my opinion, this catalogue should be supplemented with the term "voting", because according to para. 146(1)(4) of the Principles of Legal Technique, due to the scope of regulated matters, there is a need to redefine a given term. Therefore, we cannot agree with Kisielewicz and Zbieranek that "the provisions of Article 5 EC have an ordering and explanatory nature" [Kisielewicz and Zbieranek 2018, 42]. In 2010, Kubas argued that "the advantage of a code-based form of regulation would be its subjection to minor formal requirements provided for in the Principles of Legal Technique" [Kubas 2010, 112]. Although he did not refer to the issues at hand, in my opinion this opinion should be considered as an argument confirming the legitimacy of the above-formulated conclusion.

In the light of our considerations above, I deem it justified to distinguish the notion of "elections" in a broad sense, but also a narrow one, which comes down *de facto* and *de jure* to voting. Taking into account the views of the representatives of the legal doctrine, I propose changes in the law

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[8] Act of 5 January 2011, the Electoral Code, Journal of Laws No. 21, item 112 [hereinafter: EC].

[9] In accordance with sect. 1: "In a statute or other normative act, the definition of a given term is formulated if: 1) the term is ambiguous; 2) the term is vague and it is desirable to limit its vagueness; 3) the meaning of the term is not commonly understood; 4) due to the scope of regulated matters, there is a need to establish a new meaning of the term." And according to sect. 2: "If an ambiguous term appears in only one legal provision, its definition is formulated only if the ambiguity is not eliminated by placing it in the appropriate linguistic context." As ruled by the administrative court, "the provision of § 146 sec. 1 of the annex to the regulation allows the possibility of introducing a definition of a given concept in a normative act if it is ambiguous, unclear, and the meaning of the term is not commonly understood or due to the area of regulated matters there is a need to establish a new meaning of a given term. The regulation prohibited the formulation of a definition only if a given concept had already been defined by law"; judgment of the Provincial Administrative Court in Lublin of 5 December 2012, ref. no. II SA/Lu 830/12, Lex no. 1306210.

[10] Journal of Laws of 2016, item 283 as amended.

consisting in amending the provisions of the core acts concerning electoral law, i.e., the Constitution and the Electoral Code, hoping that this procedure would contribute to the terminologically correct formulation of acts of decision-making and law application, issued on their basis.

With regard to the constitutional law, the proposed amendment to the law would concern the following provisions: *de lege lata*, Articles 98(2), 98(5), 99(1), 99(2), 109(2), 127(3), and 128(2). In my opinion, the term "election day" should be replaced with the term "voting day".

The second legal act that wants changing is the Electoral Code. With regard to this source of electoral law, the proposed amendments can be divided into several groups.

First of all, I believe that in the provisions listed below, the terms "election day" should be replaced with the term "voting day". This treatment would apply to Article 11(1) and Article 12(4). A similar change, consisting in replacing the term "elections" with the term "voting" should be made in the provisions of the EC quoted below:

Article 12(5) and (6); Article 12(10); Article 13(2); Article 13a(2) and (4); Article 13b; Article 15(1) and (3); Article 16(1), (2), and (3); Article 26(11) and (12); Article 28(1); Article 29(3); Article 30(2); Article 34(2); Article 36(1); Article 37d(1) and (3); Article 51(2)(3); Article 51(4); Article 53b(1) and (9); Article 53c(2); Article 53e(1); Article 53l; Article 56(2); Article 117(1); Article 129(2)(2); Article 141(2); Article 142(1); Article 142(3); Article 158(1a); Article 160(1)(9a); Article 170(2); Article 170(3); Article 178(1); Article 182(5); Article 195(2); Article 202(3); Article 204(2); Article 204(4); Article 204(6); Article 211(1); Article 222(2); Article 247(4); Article 254(1); Article 279(1); Article 279(1)(5); Article 279(3); Article 299(4); Article 303(1); Article 305(2); Article 331(2); Article 364(2a); Article 400(1); Article 401(1); Article 402(1); Article 402(2); Article 410(3); Article 410(5); Article 422; Article 428(1); Article 436(2); Article 436(4); Article 437(2); Article 465; Article 478(3); Article 482(9); Article 483(2); Article 491(4); Article 495(2); Article 497a; Article 506(3).

The second group of provisions of the EC would be those in which the change would consist in replacing the term "election date" with "voting date". It would include Article 195(1): "in the event of the Sejm's term of office being shortened by virtue of its resolution or by order of the President of the Republic, the President shall order elections, setting the date of elections not later than 45 days from the date of entry into force of the Sejm's resolution to shorten its term of office or from the day of announcing the order of the President of the Republic to shorten the term of office of the Sejm. The decision of the President of the Republic to order elections is made public in the Public Information Bulletin and announced in the Journal of Laws of the Republic of Poland no later than on the 5th day of its

signing. The provision of Article 194(2) shall apply accordingly"; Article 371(1): "elections to councils are ordered not earlier than 4 months and not later than 3 months before the expiry of the term of office of the councils. The date of the election is set for a day off from work not earlier than 30 days and not later than 7 days before the expiry of the term of office of the councils"; Article 371(2): "The Prime Minister, after consulting the National Electoral Commission, shall set, by regulation, the date of elections in accordance with para. 1 and specify the days on which the deadlines for the performance of electoral activities provided for in the code (electoral calendar) expire".

The third group would be the EC provisions, the wording of which should be reformulated in a complex manner. They include:

– Article 372(1), which should read as follows: "If it is necessary to hold early elections to a given council before the end of the term of office or to elect a new council for reasons specified in statutes, elections are ordered and voting is held within 90 days from the date when this reason arises. The provisions of Article 371 shall apply *mutatis mutandis*, however in the electoral calendar the time limits for the performance of electoral activities may be shorter than those provided for in the code";
– *de lege ferenda* Article 377: "Voting, in the situation referred to in Article 372, shall not be carried out if its date should fall within 12 months before the end of the term of office of the councils. In such a case the Prime Minister shall appoint, at the request of the minister competent for public administration, a person holding the function of the council until the end of the term of office";
– *de lege ferenda* Article 386(5): "by-elections shall not be conducted if the voting day in them should fall within 6 months before the end of the term of office of the councils";
– *de lege ferenda* Article 387(3): "If, due to the expiry of mandates, which could not be filled under §§ 1 and 2, the composition of the council was reduced by more than 2/5, the council is automatically dissolved and a new council is elected. Elections are not held if the voting day should fall within 6 months before the end of the council's term of office";
– *de lege ferenda* Article 390(9): "Elections of new councils are not conducted if the voting day in them should fall within 6 months before the end of the term of office of the councils";
– *de lege ferenda* Article 390a(1): "Elections ordered pursuant to Article 371 are not conducted in a local government unit, in which, as a result of changes in the territorial division of the state, the council is dissolved, if the voting day in them should fall within the period of 6 months preceding the dissolution of this council. Elections to the new council are

held in the manner and on the terms set out in the Code after the entry into force of the changes in the territorial division of the state";

– Article 390a(2): "If the date of establishing a new local government unit, including in the cases referred to in Article 390(1) points 1 and 3, falls in the year immediately following the date of the elections ordered pursuant to Article 371, elections to the new council shall be held in conjunction with these elections". It should read: "after voting in the elections ordered […]".

Moreover, in Article 37a(1)(4) EC the terms "election date and voting times" should be replaced by "voting hours".

I believe that the justification for the proposed changes is that the provisions of the articles of the Constitution and the EC should be unambiguous and their understanding consistent with the rules of the Polish language. According to Czaplicki, "in the process of enacting electoral law, the principle of good legislation must also be applied, requiring the formulation of regulations in a correct, precise and clear manner" [Czaplicki 2009, 10]. Therefore, the postulated amendments to the law should not raise doubts or lead to results that would be unacceptable for any reason. Priority should be given to the results of the linguistic interpretation of the legal provisions under study. The separation of "election" and "voting" does not only concern the linguistic sphere, and the concepts cannot be assigned the same meaning in legal interpretation. Supreme Court in 1995[11] drew attention to the fact that "legal provisions apply specific terminology for their own purposes". An abstraction of the legal norm that elections refer to a fixed date would lead to a conclusion that cannot be ascribed to a rational legislator.[12] The term "elections" means the process of selecting person to occupy an office [Garner and Black 2014, 631], while the term "voting" is the casting of votes for the purpose of deciding an issue [ibid., 1808]. Thus, a linguistic interpretation confirms the legitimacy of making a distinction between them. Bearing the above in mind, I propose a rational use, and *de facto* the use of normative phrases[13] making proper use of the terms "elections" and "voting".

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[11] Order of the Supreme Court of 4 December 1995, ref. no. III SW 50/95, p. 8. „Przegląd Wyborczy. Biuletyn Informacyjny. Wydanie specjalne. Wybory Prezydenta Rzeczypospolitej Polskiej w 1995 r.".

[12] For terminological comments in another case, see Order of the Supreme Court of 4 December 1995, ref. no. III SW 1091/95, p. 12-13, ibid.

[13] Example of another normative phrase: „Przegląd Wyborczy. Biuletyn Informacyjny" 2012, no. 5, p. 39.

CONCLUSIONS

The research results led me to the conclusion that the term "elections" is not an established concept, it is characterized by a considerable degree of generality. The rationale for this view is primarily the analysis of statements made by representatives of the legal doctrine, which show a distinction between the terms "voting" and "elections" in the longer run. Thus, the thesis about the need to distinguish these notions in the electoral law is justified not only by the confirmed legislative imperfections of legal texts. The results of the analyses and research carried out indicate that "elections" are one thing and "voting" is another thing. The raised issue should be the subject of an in-depth analysis when amendments to the Constitution are considered. The proposed amendments to the law (the Constitution and the Electoral Code) in terms of terminology would take into account, first of all, the findings of legal scientists, judicial decisions, practice and the essence of the institution of electoral law. In conclusion, the above-formulated proposal to introduce legislative changes would reflect the practice of holding elections, and voting in them as one of the activities resulting from the electoral calendar. If, for any reason, it would be impossible to amend the constitution, I believe that at least the electoral code should be changed in the indicated scope. I hope that this study will spark a scholarly discussion on the specific issues indicated in this paper.

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REGULATIONS ON ORGANIC PRODUCT IN THE EUROPEAN GREEN DEAL IN THE CONTEXT OF FOOD SECURITY

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Abstract. Given the significant changes regarding organic products following from the European Green Deal and the Farm and Fork Strategy and the Biodiversity Strategy, the article seek to answer the question of whether the solutions proposed in the current geopolitical situation are reasonable, and whether they need to be made more flexible in order not to pose a threat to food safety. The author discusses the very concept of an organic product, its current legal status, position, and increase in market share. Further, the author ponders upon the problem of food safety and the interplay between legal regulations in this area and those regarding organic products. In order to broaden the topic discussed, the method of content analysis and document analysis is applied to expose the complexity of the issue and its significant importance from a legal point of view.

Keywords: organic product; food security; agriculture; strategies

INTRODUCTION

Organic farming is one of the fastest growing branches of agriculture in the world, especially in the European Union. Organic farming is defined as a farming system with sustainable plant and animal production, which results in an ecological product, produced with respect for natural life cycles [Siebeneicher 1997, 20]. The EU legislator, through changes in legal regulations, has significantly shifted the emphasis to the production and strengthening of organic production. The importance of the role of organic farming in the European Union has taken on a new dimension with the adoption of the European Green Deal. As part of the changes proposed in the Strategies that are part of the European Green Deal, i.e. the "Farm to Fork Strategy"[1] and the "Biodiversity Strategy",[2] an organic product is to be more widely

[1] Communication from the Commission to the European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system, Brussels, 20.5.2020 COM(2020) 381 final [hereinafter: Communication 381].

[2] Communication from the Commission To The European Parliament, The Council,

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available and more widely present in the minds of consumers. The introduction of the requirements will affect the amount and availability of agricultural products, affecting food prices and its availability.

1. ECOLOGICAL PRODUCT IN THE EU AND NATIONAL STRUCTURE

An organic product is produced using organic farming methods, using natural resources and methods, ensuring favorable conditions for the environment and animal welfare. Food can be considered organic if at least 95% of it is organic. the weight of its ingredients of agricultural origin are organic ingredients. The final "ecological product" can be spoken of when the ecological effect of agricultural production in the form of a final product is introduced, with an appropriate certificate, to the food market [Prutis 2013, 39].

The market for organic products in the EU is constantly growing and is now worth around €30.7 billion a year. A strong upward trend can be observed – over the past 10 years, by as much as 125 percent. Although the area of organic farming in the EU is increasing year by year, it still accounts for only about 7% of the total agricultural area. The market for organic products is one of the most dynamic sectors of EU agriculture, with approximately 400,000 more hectares of land dedicated to organic farming each year.[3] The value of the Polish organic food market is estimated at PLN 1.36 billion, which is only 0.5 percent. the entire food market, however, this segment is developing at a fast pace, and the pandemic has only accelerated this process. At the end of 2020, there were over 18.5 thousand operating in Poland. farms certified as organic. The largest number of such farms is located in the following voivodships: Warmińsko-Mazurskie, Zachodniopomorskie and Podlaskie. Relatively smaller farms are found in south-eastern Poland, while the largest ones are found in northern and north-western Poland. The largest percentage of organic farms in Poland (25%) are farms with a cultivation area of 5 to 10 ha. The largest farms, over 100 ha, account for less than 5% of the total number of organic farms.[4] In view of such a dynamically developing market, it has become necessary to introduce changes

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The European Economic And Social Committee And The Committee of the Regions EU Biodiversity Strategy for 2030 Bringing nature back into our lives, Brussels, 20.5.2020 COM(2020) 380 final

[3] See *Infografika: Nowe surowsze zasady dla żywności ekologicznej w UE*, europa.eu.

[4] See *Poradnik po rynku produktów ekologicznych – poradnik zamawiającego*. Material prepared by the Ministry of Agriculture and Rural Development in cooperation with the Public Procurement Office, 2018, p. 3. In 2022, no data updates were published in the cross-sectional reports of the organic products sector.

in legal regulations. Their goal was to harmonize EU regulations, and thus national solutions. The new rules were adopted after nearly four years of negotiations. Public consultation have shown that changes in legal regulations are not only desirable, but even necessary. The main challenges turned out to be the areas of enlargement and meeting demand.

2. ECOLOGICAL PRODUCT –LEGAL STATUS

The European Green Deal is the European Union's response to the implementation of the goals of the United Nations 2030 Sustainable Development Agenda and the commitment of the European Commission to address climate-related problems, assuming that the EU will achieve zero net greenhouse gas emissions by 2050 and decoupling economic growth from the use of natural resources [Jętkowska 2022, 8]. This plan envisages a just transition of the EU economy with a view to a sustainable future, which will make the European Union a world leader. In May 2020, the Commission adopted two draft strategies: the European Biodiversity Strategy 2030 and the Strategy and the Farm to Fork Strategy, which are part of the European Green Deal. These activities are aimed at a fair, healthy and environmentally friendly food system, called the strategy.[5] The main task of the strategy is to build a food chain that works for the benefit of consumers, producers, climate and the environment, creating a new eco-friendly circular business model. According to the "Farm to Fork" strategy, organic farming, which has a positive impact on biodiversity, will continue to be promoted, and the organic food market should grow. The European Union's goal is to allocate at least 25% of agricultural land in the EU to organic farming by 2030, as part of agricultural practices that are conducive to the absorption of carbon dioxide by the soil. As emphasized in this document, European food is famous for its safety, rich in nutrients and high quality, but it should also become a global standard.[6] It has been assessed that food production continues to pollute air, water and soil, contribute to biodiversity loss and climate change and consume huge amounts of natural resources, while a large proportion of the food produced is wasted. The document also notes that European food is already a global food standard that is safe, wholesome, high quality and in sufficient quantity, and that the Farm to Fork Strategy aims to reward these farmers, fishermen and others in the who have already made the transition to sustainable practices, and to enable and create for others to do so additional business opportunities [Wojciechowski 2021, 152]. However, it was emphasized that global challenges related to climate

[5] Communication 381.

[6] Ibid.

and environmental protection are a multiplier of threats and are a source of instability, while the ecological transformation will be a major challenge for many countries and societies. Therefore, it is important to introduce changes in such a way that the effects of climate policy do not become a source of conflicts, food insecurity, population displacement and forced migration.

In the EU, the regulations in force so far in this regard were not uniform, as a result of which different criteria for the production of organic products were in force in the Member States. In addition, the principle of equal treatment applied to imported food created situations where different standards were applied to producers from the same country. The revision of the regulation on organic production and labeling of organic products was necessary to take account of the significant changes that have taken place in the sector over the last two decades. It was also necessary assuming that an organic product is to significantly increase its market share in the food sector and be widely recognized by consumers. Solutions were introduced in Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labeling of organic products and repealing Council Regulation (EC) No 834/2007. All operators in the food supply chain will be inspected on the spot, at least once a year (in the case of producers whose annual inspections have not revealed any irregularities for three consecutive years, national authorities will be able to decide to inspect once every two years). have stricter controls. Manufacturers in third countries wishing to sell their products in the EU will have to follow the same rules as EU producers. Producers outside the EU will have until 2026 to adapt. Member States that have thresholds for prohibited substances in organic food can continue to apply them, but must allow other organic food products from other EU countries on their markets. A computerized database on the availability of organic seeds and animals has been set up in each Member State. Farmers will be able to produce both traditionally and organically, but the two must be "clearly and effectively separated."[7] Certification procedures for small farmers have been simplified. The list of products classified as organic has also been extended, where they can be found among others items such as salt, beeswax, vine leaves, and a list of additional rules for organic farming, such as rabbits. In turn, the new system of granting group certificates, e.g. for producer groups, is to support small farms. A common certificate will reduce the costs of certification or control, which will be spread over several people. The introduced regulations are intended to support organic production in the EU, guarantee

[7] Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labeling of organic products and repealing Council Regulation (EC) No 834/2007, PE/62/2017/REV/1, OJ L 150, 14.6.2018, p. 1-92.

the competitiveness of organic farms and protect consumers against fraud and unfair practices on the part of producers. The new solutions aim to provide a clear structure for the production of organic goods across the EU. This is to meet the demand for credible organic products while ensuring a fair market for producers, distributors and retailers. The introduced solutions will lead to the unification and simplification of procedures, which will result in savings for both producers and consumers. However, the introduction of the provisions presented above in the current geopolitical situation has another dimension.

3. FOOD SECURITY – AN ATTEMPT TO DEFINITION

Today, access to food is becoming a global issue and a key challenge for agriculture. In particular, in the face of the pandemic that disrupted the functioning of supply chains, positive population growth, environmental degradation, increasing interdependence between countries and Russia's aggression against Ukraine, food security has become a real threat. As well as the increase in the prices of fertilizers, farmers have limited their purchases, which in turn may lead to a reduction in crops and a significant increase in food prices. This can have a devastating impact on food security, especially in vulnerable regions of the world that are heavily dependent on imports of these products and which are already characterized by food insecurity.

The term food security appeared in the dictionary of food policy terms in the early 1970s.[8] Previously, this term was used by military staffs as part of warfare or economic and political dependence of countries that were not able to produce enough food on their own [Michna 1998, 39]. the volatility of food policy, both nationally and internationally. The concept of food security and its official definition was shaped during the first World Food Conference held in Rome in 1974 under the auspices of the Food and Agriculture Organization (FAO) [Rodríguez-Cachón 2019, 5]. According to her, food security is the availability at any time of an adequate supply of basic food products in order to satisfy the ever–increasing consumption and mitigate fluctuations in production volume and prices.[9] Subsequent modifications of the definition resulted in taking into account the demand side, understood as ensuring not only physical but also economic access to food. Then the definition was corrected, and in fact extended to include an approach at the individual and household, as well as regional and national levels. In the 1990s, the concept of food security was extended, among others,

[8] FAO, *Trade Reforms and Food Security. Conceptualizing the linkages*, Rome 2003, p. 26.
[9] Ibid., p. 27.

to issues of safety food, nutritional value of food and food preferences depending on social and cultural factors. In 1996, at the World Food Summit in Rome, it was assumed that food security, at the individual, household, national, regional and global levels, will be achieved when all people at all times have physical and economic access to sufficient, safe and nutritious food. food that meets their needs and food preferences for an active and healthy life.[10] It refers to the four pillars of food security: the existence of food, its availability, stability of supply and food adequacy. Another definition, formulated in the FAO report The State of Food Insecurity in 2001, additionally includes social access to adequate food.[11]

Ensuring food security in Poland is part of the national security strategy. It is defined as a situation in which all households have actual access to food needed for all people and are not at risk of losing this access [Mikuła 2012, 39].

In legal language, "food security" can be understood as a certain optimal state assumed by the legislator, which should be achieved in accordance with the relevant provisions of both international, EU and national law [Certomà 2010].

In the European Union, the issues of ensuring food security were regulated by the Treaty of Rome (currently the Treaty of Lisbon[12]), specifying in Article 39 objectives of the Common Agricultural Policy, according to which the aim of this policy is, inter alia, to guarantee the security of supplies and reasonable prices for consumers. The shape of today's EU agriculture was marked by the mid-term reform finalized in 2003, which aimed to the so-called decoupling, intended to break the link between the amount of EU support and the volume of production. In particular, due to the surplus of food, the need to support farmers' incomes was emphasized, and not to encourage agricultural production [Leśkiewicz 2012, 184].

The problem of food security was taken into account in the next reform of the Common Agricultural Policy. Referring to the Commission's document "The CAP towards 2020: meeting the challenges of the future related to food, natural resources and territorial aspects"[13] it is worth mentioning

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[10] FAO, *Rome Declaration on World Food Security and World Food Summit Plan of Action*. Rome, World Food Summit 13-17 November 1996, p. 1.

[11] FAO, "Food security". Policy Brief, 2002, p. 3.

[12] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ device EU C 2007, No. 306, item 1.

[13] European Parliament Resolution of 23 June 2011 on the CAP towards 2020: meeting the food, natural resources and territorial challenges of the future (2011/2051(INI)), Teksty przyjęte – WPR do 2020 r.: sprostać wyzwaniom przyszłości związanym z żywnością, zasobami naturalnymi oraz aspektami terytorialnymi – Czwartek, 23 czerwca 2011 r. (europa.eu) [accessed: 08.02.2023].

that, according to FAO estimates, the demand for food will increase by 70% by 2050. The reform of the Common Agricultural Policy indicated, inter alia, food security, within which it became important to ensure the production capacity of EU agriculture in compliance with the commitments adopted at the international level. Already at this point, it should be noted that it is an extremely difficult task to balance the production interests of agriculture resulting from the existing threat to the environment, and ensuring a sufficient amount of food [ibid., 186].

As can be seen, food security is, among other things, a resultant of the instruments used and the adopted political assumptions of the Common Agricultural Policy. It is significant that food security is regulated in legal acts of a "higher order"– in the Treaty or in acts of international law to which individual states are parties.

In November 2021, the Commission published a communication setting out a contingency plan to ensure food security in Europe in times of crisis.[14] The proposed measures are intended to help the EU deal with challenges such as extreme weather events, plant and animal health problems and shortages of key inputs such as fertilisers, energy and labour. The general principles of the strategy are not binding. However, the implementation of the assumptions set out in the strategy will be binding. Objectives and tasks will be achieved through various legislative measures, creating new policies and adapting existing ones, such as the common agricultural policy.

4. MUTUAL CORRELATIONS BETWEEN THE REGULATIONS OF ORGANIC PRODUCT AND FOOD SAFETY

In the light of the assumptions of the "Farm to Fork" strategy, there is no doubt that making food systems more sustainable means, on the one hand, the need to adapt them to the requirements of an ecological product – food production should support counteracting climate change, favor environmental protection and preserve biodiversity, on the other On the other hand, food must remain safe and rich in nutrients, and must maintain high quality, and above all, be affordable and in the right quantity [Wojciechowski 2021, 153]. The actions taken clearly show that there is a need to take them to maintain food security, while not giving up the introduction of regulations regarding environmental protection and without losing momentum in implementing the regulations on organic products and increasing its presence on the market. But is it possible?

[14] Communication 381.

It should be emphasized that the regulations on the organic product were created in the period before the pandemic and before Russia's aggression against Ukraine. The situation has changed dramatically since then. There is no doubt that the introduced regulations set a good pro-environmental trend, but in the face of the existing circumstances they may turn out to be too rigorous, difficult to implement and, above all, affect food security. Therefore, it is reasonable to divide the implementation into stages, which will allow the implementation of strategies in the long term. There is no doubt that the environmental elements and threats resulting from climate change are an extremely important aspect for which an effective policy must be implemented, but in the current situation it seems necessary to make the submissions more flexible and, at least in the initial phase, to relax the imposed requirements so that it does not result in a significant violation of food security. While in European countries it will manifest itself through high food prices, a slight reduction in the assortment (it may even have beneficial effects in the future in the form of less food wastage), for third world countries, due to the breaking of the loyalty approach to supporting them, it may result in a real threat to food security we had an example of in Ukraine. Addiction has shown how fragile the essence of food safety is, which means that in the current situation, such restrictive regulations regarding an organic product, in conjunction with the increase in costs, for example due to the prices of fertilizers and plant protection products of conventional production alone, may become an element affecting the scope of food security.

CONCLUSIONS

The regulations of, among others: the European Green Deal clearly shifted the emphasis to ecological production, integrated plant production, rational chemicalization of production, using non-chemical methods, mainly biological agents. However, the dynamic international situation and the imminent food crisis may verify this approach. The changes designed as part of the Strategy are intended to support organic production throughout the EU, guarantee the competitiveness of organic farms and protect consumers against fraud and dishonest practices by producers and distributors of organic food. The introduction of a more stringent control system will allow to increase safety and quality standards, improving the situation of the consumer. The new regulations should also result in the unification of regulations throughout the Union. Above all, however, they are designed to stimulate an increase in demand for ecological goods. Although their market share, especially in Poland, is not "high enough" and abuses at the production or distribution stage occur, it should be emphasized that

an ecological product is a dynamically strengthening trend on the European Union market.

However, the current EU policy on organic products needs to be made more flexible in the face of the geopolitical situation. The difficult situation on the fertilizer market and, at the same time, the tightening of ecological policies and standards, the introduction of increasingly radical ecological legislative solutions contribute to the violation of global food security. Therefore, the current regulations, especially those in the field of the European Green Deal, require verification and phased introduction.

This will allow, while conducting an effective pro-environmental policy, to support food security.

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REVIEW

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REVIEW OF THE TEXTBOOK "SPECIAL ADMINISTRATIVE LAW" UNDER THE EDITORSHIP OF BERND WIESER, YAROSLAV LAZUR, TETYANA KARABIN, AND OLEKSANDR BILASH

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Abstract. The review concerns the textbook "Special administrative law", published by the author's team of the Uzhhorod National University (Ukraine) and the University of Graz (Austria). This is the first textbook on Ukrainian Special administrative law. The review indicates that Special administrative law serves as a fairly new term for Ukrainian juridical science. But this is not just about a transformation in terminology; it is about the establishment of a completely new idea of administrative law. The Special Administrative Law is an approach to the final and irreversible rejection of the Soviet heritage in the content of the national administrative-legal doctrine and its irrevocable orientation to the best European practices.

Keywords: special administrative law of Ukrainian; systematization of administrative law; Ukrainian doctrine of administrative law

In recent years, progressive changes have been observed in the Ukrainian doctrine of administrative law related to the appearance of new authors, the preparation of interesting monographs, and the development of modern textbooks. However, despite these positive trends, the general outlook does not seem very encouraging, since the vast majority of scientific and educational literature on administrative law remains, on the one hand, morally outdated, and, on the other hand, irrelevant to pertinent law enforcement, in other words, it is created only for the sake of "itself", and not to in order to become a theoretical guide in the world of legal practice. Such a state of affairs, in my opinion, can be explained by a number of destructive factors, including the lack of scientific autonomy, the dependence of authors on "masters" and managers, academic inbreeding, devotion to "traditions", as well as a not pretty good sense of how modern administrative law of EU member states, to which Ukraine wants to join, looks like. Therefore, the domestic doctrine of administrative law lacks breakthrough ideas that would, in turn, lay a new vector for its development.

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Considering the above, the textbook on the Special Administrative Law of Ukraine prepared by the writing team seems extremely well-timed, the idea and content of which we would like to discuss both with its drafters and with other colleagues within the scope of this review. Of course, the review does not allow for a conversation in the form of a discussion, but it can lay some good grounds for it, so I am willing to participate in its continuation.

Special administrative law serves as a fairly new term for Ukrainian juridical science. The basis for its active use was the monograph "The Administrative Law System of Ukraine" [Mel′nyk 2010], prepared by the author of these lines, as well as the theses of E.V. Petrov [Petrov 2012], O.A. Morgunova [Morhunov 2013], and N.I. Tsekalova [Tsekalova 2016] which were created with the purpose to develop its provisions. It was bad timing because our opponents (some of whom, by the way, refused even to participate in defense procedures) were adamant that such a category (Special Administrative Law) does not exist; it is redundant; it cannot be introduced into the Ukrainian administrative-legal doctrine. And in this part, I share and fully support the opinion expressed on the pages of the textbook that Special Administrative Law is a reality within which separate material branches of administrative law are united (p. 19).

"Special administrative law" is not just about a transformation in terminology; it is about the establishment of a completely new idea of administrative law, focused on the implementation of the constitutional formula, enshrined in Part 2 of Article 6 and Part 2 of Article 19 of the Fundamental Law, which refers to the need to develop and preserve legal bases for the functioning of public authorities. In other words, each branch of Special Administrative Law, in fact, lays the legal basis for the functioning of the corresponding system of public administration subjects. And this task can be accomplished not at the expense of unclear and vague elements of the Special part of administrative law (management institutions), but owing to the relevant branch formations united within the Special Administrative Law.

Thus, the Special Administrative Law is an approach to the final and irreversible rejection of the Soviet heritage in the content of the national administrative-legal doctrine and its irrevocable orientation to the best European practices.

Referring again to the content of the textbook, it is worth paying attention to its structure. It is formed at the expense of 17 chapters, each of which (with the exception of the first) is devoted to the analysis of a separate branch of Special Administrative Law, the list of which, as the authors themselves emphasize (p. 19), is not exhaustive. Despite the fact that readers may have expected more specifics in the issue of the Special Administrative

Law content, the proposed list is nevertheless important. In this way, the writing team clearly shows those legal entities that include special norms of administrative law, which, in turn, are under the influence of General Administrative Law. This is extremely significant prior to the Law of Ukraine "On Administrative Procedure" coming into force, the scope of which will still have to be ascertained and clarified. However, within this part, the fact that the effect of this law must (will) apply to all those spheres of social relations that are in the "scope of responsibility" of the Special Administrative Law branches, the list of which, as noted above, is presented in the textbook is unequivocally clear.

Nevertheless, in view of the still-existing rejection of the concept of dividing administrative law into General and Special, as well as the efforts of a large group of authors who participated in the preparation of a textbook on the named field of law [Halun′ko, Dikhtiyevs′kyy, and Kuz′menko, et al. 2018], to introduce the category "Special Administrative Law" into circulation, it would be appropriate to dedicate additional attention to the justification of the concept and content of the Special Administrative Law in the first chapter. I am convinced that readers, and above all those who are just starting to study administrative law, did not have enough answers to these questions. Such clarification would not be superfluous for other colleagues, who still expect familiarization with the reviewed textbook, as well as the choice of the existing concept of the administrative law construction which they should support and which should serve as a benchmark in the process of their own professional activity.

Paying tribute to the members of the writing team in their desire to create a modern textbook on Special Administrative Law, I must admit that it is impossible to completely solve this task within such a format. If we are talking about dozens of specialized branch entities, which, in turn, are formed at the expense of thousands of regulatory acts, then it is obvious that the processing of this material requires completely different extent. More successful, in my opinion, would be the form of a multi-volume edition, each volume of which should be devoted to the analysis of a separate branch of Special Administrative Law. It is obvious that the textbook should contain a systematized and complete presentation of information, the processing of which allows the student to gain a comprehensive understanding of the relevant field of legal regulation. As for the revised version, as it is noted (p. 21), it contains only a superficial analysis of certain aspects of the relevant Special Administrative Law branches.

On this point, I am inclined to believe that the authors perfectly understand the cruciality and expediency of differentiated processing of the branches of Special Administrative Law, which, I am convinced, will be implemented by them in the future. As for today's book, its value lies not

in its content, but in the fundamentalization of the new system of administrative law of Ukraine, without which the further scientific development of this branch of law is impossible. In this part, I would also like to admit that I fully support the structure of the sections of the textbook proposed by my colleagues, which begins to be built by defining the subject and tasks of each branch, as well as its constitutional foundations. In this way, the authors, in fact, transfer to the national legal ground the idea of Prof. Werner that administrative law is a concretized constitutional law. This opinion is extremely important for determining the main guidelines both during the formation of administrative and legal norms and their implementation.

On the whole, making a general conclusion, I would like to note that the work submitted for review deserves attention from the Ukrainian legal community, contributing to the reformation of the administrative-legal doctrine in the direction of the best Western European legal traditions. Undoubtedly, the recent release of the peer-reviewed textbook translated into German, "Besonderes Verwaltungsrecht der Ukraine" by the Austrian publishing house Verlag Österreich together with the German publishing house Berliner Wissenschafts-Verlag, will influence the achievement of the tasks set by the textbook's author team. This, on the one hand, will contribute to the development of Ukrainian legal doctrine in general, its integration into the European context, and on the other hand, it will improve the awareness of European scientists with the problems that arise and are solved in Ukrainian administrative and legal science.

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