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FROM THE EDITOR-IN-CHIEF

Dear Readers,

On behalf of the Editorial Board, I present to you the next issue of the journal "Teka Komisji Prawniczej PAN Oddział w Lublinie" Volume XVII (2024), Issue 1.

In accordance with the Announcement of the Minister of Science of 5 January 2024 *regarding the list of scientific journals and peer-reviewed international conference proceedings*, the following disciplines have been assigned to the journal: legal sciences and canon law.

The current issue contains 28 scientific articles, structured by discipline. The authors of the published texts represent 19 research centres, including 6 foreign (Varna Free University "Charnorizetz Hrabar" in Varna – Bulgaria; Uzhhorod National University – Ukraine; Academy of Canon Law in Brno – Czech Republic; Sulkhan-Saba Orbeliani University – Georgia; Trnava University in Trnava – Slovak Republic; Palacký University Olomouc – Czech Republic) and 13 domestic (University of Szczecin; The Cardinal Stefan Wyszyński University in Warsaw; The Pontifical University of John Paul II in Cracow; Casimir Pulaski Radom University; WSEI University in Lublin; Nowy Sącz School of Business – National Louis University; University of Łomża; The University College of Enterprise and Administration in Lublin (WSPA); The John Paul II Catholic University of Lublin; War Studies University; University of Siedlce; Poznań University of Technology; Polish Academy of Sciences).

I would like to thank the authors, reviewers and members of the Editorial Board for their efforts in preparing this issue. I wish all of you an interesting read.

Rev. Prof. Dr. habil. Mirosław Sitarz
Editor-in-Chief

LEGAL SCIENCES

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HEARING OF A MINOR IN CIVIL PROCEEDINGS

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Abstract. The study delves into the issue of the hearing of a minor in civil proceedings. The aim of the analysis is to discuss this right in terms of domestic and international law regulations. The act of hearing is described in terms of both constitutional and procedural regulations, including a historical outline. Additionally, an assessment is undertaken to ascertain the efficacy of the recent amendments of 2023 in safeguarding the rights of minors and addressing long-standing concerns expressed in jurisprudence.

Keywords: hearing of a minor; civil proceedings; child welfare; Convention on the Rights of the Child.

INTRODUCTION

Civil proceedings, frequently protracted and intricate, intertwine property and non-property claims, often delving into inherently sensitive domains such as family matters. The most vulnerable participants in these proceedings are always minors.[1] Despite comprehensive legal provisions requiring representation for minors, indirect modes of participation may not fully capture their genuine intentions or provide pertinent information crucial for case resolution. Consequently, minors, despite their limited maturity and comprehension of rights and responsibilities or the consequences of their own actions, are inherently entitled to the right to be heard.

Primarily, this right finds paramount importance within the nucleus of society – the family – and the unique bonds shared between minors and their parents, legal guardians, or de facto guardians. It is within this context that fundamental social predispositions are shaped, and it is precisely in this realm that significant factual negligence may occur [Haberko 2015, 41-54]. The circle of individuals entrusted with the responsibility of listening to the child primarily encompasses key figures within the familial structure, such as parents, legal and de facto guardians, and other relevant parties who

[1] In this study, the term "child" will be used interchangeably with "minor", reflecting the common practice found in numerous national and international instruments where these terms are used synonymously to denote the same legal entity.

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may indirectly influence the rights of the child [Bucoń 2020, 24-25]. However, the right to be heard extends beyond the familial sphere to external entities, including public authorities such as courts, prosecutors, probation officers, family diagnostic and consultation centres, as well as other central and local authorities.

In the present study, the analysis will focus on the realisation of the right to a hearing at the stage of civil proceedings, where minors are guaranteed this right not only as a general directive but also in a number of specific provisions regulating the particular type of proceedings involving minors. The realisation of the hearing, introduced by the 2008[2] amendment to the content of Article 216[1] of the *Code of Civil Procedure*[3] partially meets both the constitutional and the Convention standard. However, it is important to distinguish the right to be heard from the mere procedural act of interrogation, although it still enables the elucidation of a number of circumstances relevant to the ongoing judicial proceedings. This means that through the prism of the institution of hearing minors, the principle of directness comes to the fore, as well as the right to information, especially when there is evidence of neglecting the rights of the child [Bodio 2019, 409-11]. The discussed institution requires closer attention, especially in light of the latest amendment in 2023[4], which expanded the regulation in question, partly bringing it closer to solutions in criminal proceedings.

1. CONSTITUTIONAL STANDARD

Pursuant to Article 72(3) of the Constitution of the Republic of Poland,[5] in the course of determining the rights of the child, public authorities and persons responsible for the child are obliged to hear and, as far as possible, take into account the opinion of the child. The explanatory memorandum to the draft law of 2008 introducing the institution of hearing directly referred to the need to achieve the goals arising from the aforementioned constitutional norm. For this reason, it should be considered that Article 216[1] CCP in litigation or Article 576 CCP in non-litigious proceedings constitute the transposition of the constitutional norm. In the fundamental law, not only a general principle of protecting the rights of the child

[2] Act of 6 November 2008 on amending the Act, the Family and Guardianship Code and certain other acts, Journal of Laws No. 220, item 1431.

[3] Act of 17 November 1964, the Code of Civil Procedure, Journal of Laws of 2023, item 1550 [hereinafter: CCP].

[4] Act of 28 July 2023 on amending the Act, the Family and Guardianship Code and certain other acts, Journal of Laws of 2023, item 1606.

[5] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 [hereinafter: the Constitution].

by state authorities was established, but also a part of the specific obligations that state authorities should fulfil was listed. It cannot be stated that each of the child's rights mentioned in Article 72 of the Constitution is guaranteed to the same extent because some regulations are outlined in a framework manner and their implementation is only found in ordinary legislation. Different emphasis is placed on protection against violence, cruelty, and demoralisation, and a different umbrella of protection is provided for procedural norms [Morawska 2007, 125-44]. Among these is the obligation to ensure the child's right to be heard as far as possible in the course of establishing their rights. The provision in question in the Constitution is also grounded in Article 30 of the Constitution, since one of the elements of the dignity of every human being and citizen is the right to be heard. Simultaneously, there is no conflict with the principle of equality expressed in Article 32 of the Constitution, even though several regulations grant the child a unique status, privileged over other citizens. The right to be heard applies to every child as long as they fall under the jurisdiction of the Republic of Poland within the meaning of Article 37 of the Constitution and is not subject to the limitations referred to in Article 81 of the Constitution [Knypl 2012, 13-17]. Consequently, the legislative system, in consideration of the content of Article 32 of the Constitution, does not differentiate legal protection depending on whether the child comes from marriage or another union, or whether the child possesses legal capacity [Bucoń 2020, 9-28]. The provision pertains to public authorities (vertical approach), although, as aptly highlighted in the literature, this does not preclude extending the scope to other private entities (horizontally). Additionally, the provision is unmistakably procedural in nature, serving the purpose of safeguarding the rights of the child [Morawska 2007, 125]. Therefore, the right to a hearing constitutes an integral part of the right to a fair proceeding, thereby constituting the right to a court, as stipulated in Article 45(1) of the Constitution [Bodio 2019, 406-23].

It should be noted, however, that the Constitution establishes a baseline level of protection regarding the consideration of the child's opinion, stipulating that public authorities are not bound absolutely by the child's viewpoint, but only "to the extent possible." This corresponds to the parental responsibilities and another constitutional norm contained in Article 48(1) or Article 53(3) of the Constitution, which recognises parental autonomy in the upbringing process, ensuring the direction of the child's upbringing in accordance with the parents' beliefs, their moral and religious teaching. Similarly, this is reflected in another procedural representation of the minor by a probation officer, where the minor can only be heard regarding the manner of representation, not the establishment of the probation officer in the proceedings.

This implies that the Constitution primarily safeguards the act of hearing the minor, rather than ensuring that the judicial decision aligns precisely with the minor's expressed position. The direction of the decision remains within the discretion of the judicial body and may not always, or even necessarily, correspond with the minor's expectations. This argument is further supported by the case-law of the Supreme Administrative Court. In one of the judgments, it was explicitly noted that the obligation of authorities to hear the position of the minor, whether expressed directly by the minor or through their representative, does not necessarily entail an obligation to consider the position in every decision-making process. The mere act of being heard depends on the minor's ability to form their own opinions, considering their age and level of maturity. Additionally, there are no specified forms of this hearing, which can also be expressed through a representative or in writing.[6]

As emphasised by the Constitutional Tribunal, the right to hear the child is a "self-standing constitutional value," nonetheless, it is subject to limitations since no legal sanctions are established for non-compliance with this obligation in the provision.[7] Similarly, there is no such sanction under the *Family and Guardianship Code*.[8] Pursuant to Article 95(4) FGC parents should listen to the child before making important decisions concerning the child's person or property, if the child's mental development, health condition, and level of maturity allow it, and to consider their reasonable wishes to the extent possible.

2. CONVENTION STANDARD

The minor's right to a hearing is also part of a number of norms of international law, constituting their procedural elaboration.[9] In accordance with Article 19 of the *International Covenant on Civil and Political Rights*,[10] every person has the right to hold their own opinions without interference, the right to freedom of expression, which includes the freedom

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[6] Judgments of the Supreme Administrative Court of: 29 August 2018, ref. no. II OSK 1041/18, Lex no. 2553581; 17 November 2020, ref. no. II OSK 3592/19, Lex no. 3173908.

[7] Judgment of the Constitutional Court of 21 January 2014, ref. no. SK 5/12, OTK-A 2014, No. 1, item 2.

[8] Act of 25 February 1964, the Family and Guardianship Code, Journal of Laws of 2023, item 2809 [hereinafter: FGC].

[9] Cf. the description of successive amendments increasingly taking into account the best interest of the child and the comparative legal analysis from other countries: Kallaus 2015, 96; Stojanowska and Kosek 2018, 41-56; Wybrańczyk 2020, 49-65.

[10] International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966, Journal of Laws of 1977, No. 38, item 167.

to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, orally, in writing, or in print, in the form of art or through any other media of their choice. The freedom of expression is also stipulated in Article 10 of the *European Convention on Human Rights*,[11] according to which everyone has the right to freedom of expression. As stated in the provision, this right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

More specific regulations of international law directly addressing the rights of a child before a state body are contained in Article 3 of the *European Convention on the Exercise of Children's Rights*.[12] This article lists the right to be informed and to express one's views in the course of proceedings as the first procedural right of the child. According to its content, a child recognised under domestic law as having sufficient understanding of the proceedings concerning them before a judicial body should be granted and may demand the following rights: a) to receive all relevant information; b) to be asked for their opinion and to express their position; c) to be informed about the possible consequences of their position and of the possible effects of any decision.

Undoubtedly, a highly important norm of international law for the subsequent interpretation of national law is Article 12 of the *Convention on the Rights of the Child*.[13] According to this provision, a child should have the opportunity to express themselves, directly or through a legal representative, in any judicial proceedings concerning them. The jurisprudence of Polish courts in family cases also clearly refers to the provisions of the aforementioned international treaty when discussing the advisability of taking into account the position of the minor by the court.[14] A comprehensive interpretation of the child's right to be heard in the context of the Convention on the Rights of the Child is provided in the analysis conducted by the United Nations Human Rights Committee in General Comment No. 12 (2009) "The right of the child to be heard." The importance of the right to be heard under the Convention is evidenced by the fact that its implementation is recognised as one of the four paramount principles, alongside non-dis-

[11] Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, as amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2, Journal of Laws of 1993, No. 61, item 284.

[12] European Convention on the Exercise of Children's Rights, drawn up in Strasbourg on 25 January 1996, Journal of Laws of 2000, No. 107, item 1128.

[13] Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989, Journal of Laws of 1991, No. 120, item 526. Cf. Smyczyński 1994, passim. See also Wiśniewski 1999, passim.

[14] Decision of the Supreme Court of 15 December 1998, ref. no. I CKN 1122/98, OSNC 1999, No. 6, item 119.

crimination, the right to life and development, and the principle of the best interest of the child [Andrzejczak-Świątek 2016, 112-21]. The provision of the Convention has a broader scope than the Constitution or the regulations of the *Family and Guardianship Code*. The Convention does not limit the right to be heard of the child only in cases before courts or administrative bodies, as this directive applies to all matters concerning the child [Gardziel 2022, 100-20]. This discrepancy was somewhat minimised in the 2009 amendment[15] if the content of Article 95(4) FGC is taken into account.

The above regulations also correspond to Recommendation No. R/84/4 of the Committee of Ministers of the Council of Europe on parental responsibility, which in its third principle postulates that decision-making bodies in matters concerning children should be acquainted with their positions [Safjan 1994, 202]. In the case-law of the European Court of Human Rights,[16] the issue of being heard was addressed when assessing a violation of Article 8 ECHR. The Court emphasises that it is necessary to maintain a balance between the interests of the child and those of the parents, and a parent cannot demand measures that could harm the health and development of the child, including contact against the child's will, which could seriously violate the child's emotional sphere [Nowicki 2005, 1311]. In criminal cases, the axis of disputes before the Court most commonly involves the collision between the right of the child to be heard and the right of the accused to defence.[17]

The guarantees of hearing the child are also fairly extensively regulated in Article 24 of the *Charter of Fundamental Rights*,[18] according to which children have the right to protection and care necessary for their well-being. The provision particularly emphasises the right to freely express their views, which are taken into account in matters concerning children, according to their age and level of maturity. According to this provision, in all actions concerning children, whether taken by public authorities or private institutions, the best interests of the child must be the primary consideration. However, it is argued in the literature that Article 24 CFR only considers the context of the child in relation to public authorities and private institutions, while omitting their relationships with parents or legal guardians, which is a regulation consistent with the provisions of Polish civil procedure [Kuźniar 2000, 208].[19]

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[15] Act of 6 November 2008 on amending the Act – Family and Guardianship Code and certain other acts, Journal of Laws No. 220, item 1431.

[16] Hereinafter: ECHR.

[17] Judgment of the European Court of Human Rights of 20 December 2001, P.S. v. Germany, Application no. 33900/96, Lex no. 75869; of 19 June 2007. W.S. v. Poland, Application no. 21508/02, Lex no. 290069.

[18] Charter of Fundamental Rights of 14 December 2007, OJ C. 2007. 303.1 [hereinafter: CFR].

[19] Cf. Jurczyk 2009, 92.

3. STATUTORY REGULATION

The institution of hearing was also known in earlier legislation. Already in Article 15 of the decree on proceedings regarding incapacitation from 1945,[20] the requirement of hearing the person to be incapacitated during the trial, as needed in the presence of a medical expert, was introduced. For this purpose, the court could order the compulsory appearance of this person, or if it was not indicated, their hearing by the designated or summoned judge. In the content of Article 28 of the Act on non-contentious proceedings in family matters and guardianship matters from 1950,[21] the provision had a narrowed character, without a punitive sanction against the minor. It required the hearing of the person to be adopted, who had reached the age of 13, regarding their consent to adoption, in the absence of such consent, to be informed of the reasons for refusal. This delineation of the age category raised several doubts, especially regarding the hearing of minors under the age of 13, which provided the basis for formulating this right in a more general way in subsequent amendments. Therefore, in contrast to these initial regulations, the legislature did not treat the institution of hearing as a general right, but incidentally used this form in individual proceedings. These regulations also equated the status of the person being heard with that of a participant in the proceedings, and the statements made had their direct consequences in the realm of guardianship case adjudication. It is worth noting that the original content of Article 576 CCP initially only dealt with hearing the legal representative of the person concerned by the proceedings, and in more important cases, the close relatives of that person to the extent possible. It was only in the amendment to Article 576 CCP in 1975[22] that section 2 was added with the following content: "The hearing of a minor in the course of proceedings takes place outside the courtroom if educational reasons justify it."

Currently, the institution of a hearing in civil proceedings is derived from the provisions of Article 216[1] and Article 576(2) CCP. The first of these provisions was introduced relatively recently, through the aforementioned amending act of 2008. In accordance with Article 216(1)[1] and (2) CCP, in cases concerning a minor, the court shall hear the child if their mental development, health condition, and level of maturity enable it. If the child refuses to participate in the hearing before the court, the court abstains

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[20] Decree of 29 August 1945 regarding incapacitation proceedings, Journal of Laws No. 40, item 225.

[21] Act of 27 June 1950 on non-contentious proceedings in family and guardianship matters, Journal of Laws No. 34, item 310.

[22] Act of 19 December 1975 on amendments to the Act on the Family and Guardianship Code, Journal of Laws No. 45, item 234.

from this activity. Depending on the circumstances, mental development, health condition, and level of maturity of the child, the court shall consider their opinion and reasonable wishes. The provision delineates a catalogue of matters concerning only the person of the child, whereas Article 576(2) CCP clearly lists both matters concerning the person and the property of the child in non-litigious proceedings. Against this background, there is justified criticism of the law, significantly limiting the application of the hearing compared to international and constitutional standards, especially in civil proceedings. As a result, the majority of proceedings in which the hearing is applied concern guardianship matters or property matters handled in non-litigious proceedings.

The content of the discussed provision applies both to situations where the child acts as a party or participant in the proceedings, as well as when the child possesses information relevant to the case. As specified in the case-law, the application of Article 216[1] CCP is also independent of who is entitled to represent the child in the process.[23]

However, national procedural regulations limit the application of the hearing in terms of the addressees of this norm. According to some representatives of legal literature [Ignaczewski 2010, 189],[24] civil procedure under Article 216[1] CCP provides for a hearing only before the court, whereas international law norms also consider so-called indirect hearing, with the participation of a probation officer, a specialist from a family diagnostic and consulting centre, or a mediator.

To some extent, the regulation in question, especially in the legal state prior to the latest amendment, introduced automatism, as it did not explicitly emphasise the premise of the child's welfare at any stage of the hearing.[25] This could lead to the conclusion that the hearing applies to every case, regardless of the assessment of the child's involvement in the conflict of their closest relatives and the resulting consequences. The only criterion limiting the hearing is the mental development, health condition, and level of maturity of the minor, which does not protect them from other negative aspects of the judicial process, regardless of their maturity level. In this context, the changes brought by the 2023 amendment to Article 216(1)[1] CCP, introducing the child's explicit refusal to participate in the hearing, binding the judicial authority and compelling them to refrain from this activity, should be positively assessed.

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[23] Judgment of the Constitutional Court of 21 January 2014, ref. no. SK 5/12, OTK-A 2014, No. 1, item 2.

[24] Decision of the Supreme Court of 16 December 1997, ref. no. III CZP 63/97, OSNC 1998, No. 6, item 108.

[25] Cf. Wybrańczyk 2022, 33-56.

However, it should be acknowledged that shifting the burden of this decision to the minor alone does not provide sufficient guarantee, and it would still be appropriate to explicitly include the criterion of the "best interests of the child" to legitimise the initial hearing procedure.[26] Although the 2023 amendment introduces the criterion of the child's best interests, it does so only at the stage of exceptional permissibility of repeating this activity, which, however, does not resolve the above-mentioned doubts. It must be noted with acceptance that the change introducing, in section 3, the principle of a one-time hearing is a step in the right direction. This solution, which has long been applied in criminal procedure, constitutes an additional guarantee against the abuse of the child's hearing by the conflicting parties in civil proceedings. The criterion verifying the repetition of this activity is the child's best interests but also ensuring that it should take place before the same court, unless the criterion of the child's best interests opposes it. Supplementing these changes is also the necessity to clarify in the protocol of the session or hearing the reasons why the court refrained from hearing the child. This is an additional filter for controlling the actions of the civil court, which will allow verifying the implementation of the right to be heard without significantly prolonging the proceedings. The necessity for the court to explain its decision to refrain from this activity is not a sanction for not applying the hearing, but it is a good legislative move to make this activity more realistic in civil proceedings.

In the literature, however, there is an observation of the omission of the right to information as a prerequisite for the implementation of the child's right to be heard under international regulations [Zajączkowska 2013, 65-67]. In the national context, such a solution would undoubtedly strengthen the use of this institution more frequently than only *ex officio*.

The institution of the hearing of a minor cannot be perceived as a procedural interrogation conducted during the evidentiary stage of the proceedings. For this reason, when submitting a motion for the hearing, the party is obliged to indicate the purposefulness of this activity and the grounds for its application arising from Article 216(1)[1]and (2) CCP. According to the content of this provision, the court shall consider the circumstances of the case and the extent to which it can take into account the position expressed by the minor in its decision.[27] While the case-law tends to more frequently deny this right in matters concerning property issues, it gains significance in cases involving non-property matters, such as guardianship, determining parental contact, potential child relocation abroad, giving consent

[26] In surveys conducted among judges, the aspect of individualising the hearing procedure depending on the subjective qualities of the child also emerges [Cieśliński 2017, 148].

[27] Judgment of the Court of Appeals in Gdańsk of 20 January 2016, ref. no. V ACa 607/15, Lex no. 2052629.

to medical procedures, or the right to know one's biological identity [Bosek 2008, 947-84].[28] The significance of this hearing is particularly emphasised after the minor reaches the age of 13. In addition to obtaining limited legal capacity, the court has an obligation to hear the minor based on other specific regulations, for example, in cases of adoption under Article 118 FGC or during placing the child in foster care under Article 4a of the Act on Supporting Families and Foster Care System.[29] In some situations, the hearing takes the form of qualified consent of the minor to perform specific actions, as is the case with changing the name and surname under Article 122 FGC (cf. Articles 88, 89, and 90 FGC) The impossibility of equating the hearing with interrogation is also defined by Article 430 CCP. According to its content, minors who have not reached the age of 13, and descendants of parties who have not reached the age of 17, cannot be interrogated as witnesses.

So far, according to Article 186 of the Rules Governing the Operation of Common Courts, the hearing of a minor was conducted, if possible, in a designated and adapted room for this purpose. If such a room was not available at the court's premises, the hearing could also be conducted in a suitable room located outside the court building, especially with the cooperation of non-governmental organisations dealing with children's rights protection. An official note was made of the hearing of the minor.[30] It is worth noting the content of the new Article 216^2 CCP introduced by the amendment of 2023, which regulates the course of a minor's hearing in a manner previously unseen in the CCP. It shall be held in closed session, in appropriately adapted premises at the seat of the court, or if the child's welfare requires it, outside the seat of the court. It is fully accepted to ensure, as stipulated in the amendment, that a psychologist expert may participate in the judge's hearing, subject to a number of statutory conditions. Similarly, the legislator addressed the demands to record the hearing using audio or audiovisual recording devices, which aligns with the principle of protecting the child from repeated hearings. An anticipated change, which cannot be denied its validity, is the detailed regulation of the preparation, conduct, and local conditions of this activity through the appropriate regulation of the Minister of Justice, guaranteed by the delegation contained in the content of Art. $216(4)^2$ CCP.

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[28] Cf. Feja-Paszkiewicz 2020, 182-95.

[29] Act of 9 June 2011 on family support and the foster care system, Journal of Laws of 2024, item 177. Cf. Łączkowska-Porawska 2020, 57-87.

[30] Regulation of the Minister for Justice of 18 June 2019 on Rules Governing the Operation of Common Courts, Journal of Laws of 2022, item 2514.

CONCLUSION

Undoubtedly, the right to hear a minor in civil proceedings is an expression of the child's subjectivity, regardless of the procedural role in which they appear. Nevertheless, until the entry into force of the 2023 amendment, the aspect of preparing, conducting this activity, including local conditions, remained at the discretion of the procedural authority, including the discretionary judicial power. Such a solution could not have favoured the guarantee of this activity and its frequency of use, when the law allowed almost the possibility of waiving it *in genere*. The standard guaranteed by the Constitution and a series of international law acts forced the legislator to involve the courts more in the implementation of the right to be heard, beyond the existing special provisions in guardianship cases. The lack of general conditions for the application of this institution, envisaged at least at the level of regulation, and a clear norm obliging the consideration of the child's welfare at each stage of this activity, was a catalyst for many abuses or the abandonment of the participation of minors in civil proceedings. Therefore, the recent regulations strengthening the role of this activity must be positively assessed. They contain guarantee provisions, limiting the discretion of the participants in the proceedings and the court deciding finally on the hearing in civil matters.

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A FEW REMARKS ON THE CORRECT INTERPRETATION OF ARTICLE 66(1)(5B) OF THE LAW ON THE BAR

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Abstract. The aim of this article is to solve the research problem of whether obtaining the scientific degree of a doctor of social sciences in the discipline of legal science and completing the attorney's training confirmed by an appropriate certificate constitutes the fulfilment of the statutory requirement specified in Article 66(1)(5b) of the Act of 26 May 1982 – the Law on the Bar. The thesis that the three-year period of training as an attorney a priori fulfils the requirement of acquiring three years of professional experience in the exercise of legal knowledge requiring activities directly related to the provision of legal assistance by an attorney and gives it a much broader dimension, enriched with many skills, which is denied to the person applying for registration without a completed application, is proven. *De lege ferenda* points out that the Bar Council should take legislative measures to fill the structural gap in Article 66(1)(5b) of the Act and, in the meantime, adopt a trainee-friendly interpretation of this provision.

Keywords: Law on the Bar; legal professions; attorney; trainee attorney.

INTRODUCTION

According to Article 66(1)(5b) of the *Law on the Bar Act*,[1] the legal basis for entering into the list of advocates by doctors of social sciences in the legal discipline, without fulfilling the requirement to complete professional training and passing the Bar examination, is, inter alia, that those persons performed legal activities requiring legal knowledge directly related to the provision of legal assistance by an advocate or by an attorney-at-law

[1] Act of 26 May 1982, the Law on the Bar, Journal of Laws of 2023, item 1860 as amended [hereinafter: the Act].

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on the basis of a contract of employment or a civil law contract in one of the places specified by the provisions of the examined provision. This requirement must be fulfilled within the period of 5 years prior to the application for registration on the list of advocates, and the activities must be carried out for a total period of at least 3 years.

The legislator *expressis verbis* indicated the conditions by which the authority refusing entry should be guided is Article 68(4) of the Act. According to it, the regional bar council can refuse entry on the list of advocates only if the entry violates the provisions of Article 65(1-3) of the Act. In case law, there is no doubt that Article 68(4) of the Act contains a closed list of conditions for refusing entry on the list of advocates.[2] Due to the lack of a statutory definition of equivalence of practical experience acquired as part of the performance of activities directly related to the provision of legal assistance and practical experience acquired during the professional training of an advocate, a research problem arises not taken so far in the literature of the subject,[3] leading to the question whether obtaining the scientific degree of a doctor of social sciences in the discipline of legal science and completion of the professional training confirmed by the relevant certificate constitutes fulfillment of the statutory requirement described in Article 66(1) (5b) of the Act?

This article puts the thesis that the three-year period of a professional training *a priori* fulfils the condition of acquiring three years of professional experience related to the performance of legal knowledge requiring actions directly related to the provision of legal assistance by the lawyer and makes this much wider, enriched with many skills, which the applicant is deprived of without a completed training.

1. DIFFERENCES IN THE STATUS OF TRAINEE ADVOCATE AND PERSON WITH THREE YEARS OF PRACTICAL EXPERIENCE

First of all, it is necessary to see the differences between the scope of the requirements that the legislator and the bar association impose on the trainee as an advocate and on the person who wants to effectively legitimize three years of practical experience, because the three-year period of acquisition of professional experience outside the application is not

[2] See sentence of the Supreme Administrative Court of 16 December 2008, ref. no. II GSK 594/08, Lex no. 570438; sentence of the Supreme Administrative Court of 10 July 2019, ref. no. II GSK 1766/17, Lex no. 2714796; sentence of the Supreme Administrative Court of 2 October 2020, ref. no. II GSK 27/18, Lex no. 3069442.

[3] See for example Buchalski and Nowak 2015, 54-68; Gawryluk 2012, *passim*; Kruszyński 2015, 123-28; Piesiewicz 2023, 330-33.

entirely equivalent to the completion of the application, however it allows to meet the minimum requirement of practical preparation for the practice of the profession of an advocate. On the other hand, the training period is enriched with a number of additional practical activities, not available to persons aspiring to the profession of advocate outside this path. The training is therefore a period of conducting – in the manner provided for by the training program – a series of tasks, performed under the direction of the patron, with the simultaneous, formalized supervision of the local council of barristers, also taking place through continuous verification of the skills acquired by the trainee advocate.

Perceiving these differences will determine how the situation of a person who has performed an advocate training as well as obtained a doctorate in social sciences in the discipline of legal science should be read. At the outset it should be noted that the period of three years of professional practice meets only the minimum conditions that the legislator provided for the person applying for enrolment outside the training mode. In this regard, it should be repeated after the sentence of the Constitutional Court that the completion of the training imposes on aspirants to the profession of advocate much more duties and involves much more effort and financial expenses than the implementation of the three-year contact indicated in the law with the practical application of law.[4] As the Constitutional Court further emphasises in the sentence cited above, an aspiring person is required nothing more than to perform a job involving the performance of activities requiring legal knowledge directly related to the provision of legal assistance by an advocate. According to the Constitutional Court, persons without an application are free from other obligations to which trainees are subject, hence both ways of accessing the legal profession are not entirely equivalent in terms of the degree of proper preparation for the profession.

Persons admitted to pass the professional examination without training do not attend classes aimed at deepening their theoretical and practical knowledge. It cannot be noted that the trainee's knowledge is verified several times in the application space, under the strict rule of deletion from the list of trainees. Trainees come to the colloquiums provided for by the application program, which, in addition to the oral (casual) part, provided for the preparation of a procedural document on the basis of court records. The control of the results of learning and the practical skills acquired is also verified during the compulsory curriculum contest and as part of practices held in courts and prosecutors, where applicants, under the supervision of the judge and prosecutor, prepare appropriate procedural decisions and participate in the hearings.

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[4] Sentence of the Constitutional Court of 7 March 2012, ref. no. K 3/10, Lex no. 1124353.

A significant difference in the predisposition of the trainee advocate and the person legitimizing himself only by legal experience is the improvement of professional skills by replacing a lawyer before courts and other bodies or institutions on the basis of the authorization of the patron (or another advocate with the consent of the patron). As stipulated in Article 77(1) of the Act, after six months of a professional training, an advocate trainee may replace am advocate before courts, law enforcement agencies, state, local and other institutions, with the exception of the Supreme Court, the Supreme Administrative Court, the Constitutional Court and the State Court. The advocate trainee may draw up and sign the procedural documents referred to in Article 77(5) of the Act on the basis of written authorization. This is a critical difference, because the person performing activities directly related to the provision of legal assistance, irrespective of the form of cooperation with an advocate, does not have the right to represent before courts and procedural bodies, according to the principles provided by the legislator for trainees of legal professions. Therefore, only the trainee, to the extent provided for in the law, is authorized to acquire typical practical skills related to the exercise of the legal profession in the form of representation of the parties before courts, law enforcement authorities, administrative authorities to sign procedural documents on the basis of the authorization received.

It should therefore be argued by the Provincial Administrative Court in Warsaw that practical experience acquired as part of the performance of activities directly related to the provision of legal assistance should – according to the legislature – replace practical experience acquired during the professional training and makes this to a minimum extent, although sufficient for entry on the list of advocates. Therefore, if you agree with this position established in administrative jurisprudence, an entity that at the same time fulfils the conditions for the training and practical experience acquired during the application period and has a scientific degree of doctorate, should be entered on the list of advocates, as it not only meets the requirements of the minimum normative, but also demonstrates additional skills verified during the training.

It is clear from the case-law of administrative courts that the professional practice necessary for entitlement to the list of advocates can be carried out in various ways, provided that it constitutes an equivalent practice to the practice of the advocate trainee.[5] This view also follows from the case-law of the Constitutional Court, according to which doctors of legal sciences, in order to meet the conditions of permissibility of the movement of persons between legal professions, must legitimize

[5] Ibid.

themselves with practical legal experience profiled so that it corresponds to practical skills acquired during professional training.[6] The requirement of a three-year period of performance requiring legal knowledge activities related to the provision of legal assistance by an advocate, corresponding to the duration of the training provides the opportunity to gain practical legal experience equal to training.[7] Given that the period of acquisition of professional practice outside the application does not take place under the supervision of the regional bar council, the legislator therefore provided for much higher requirements for documenting the actual performance of these tasks related to legal protection.

Three years of legal experience alone does not entitle to equate it with the professional training received, as the application sets higher requirements for the future adept of the legal profession than the non-application mode of investigation into the profession. Furthermore, obtaining a scientific doctorate is a substitute for legitimizing itself with a high level of knowledge in legal sciences, which is verified against persons without a doctorate in legal sciences by entering the professional examination. As the Constitutional Court further emphasizes in the sentence cited above, theoretical qualifications of doctors of legal sciences for the exercise of the profession of advocate are therefore established by a positive result of the doctoral examination, which verifies not only the ability to conduct independent scientific work, but also the theoretical knowledge of the candidate.[8]

Assuming the rationality of the legislator and the absence of mutual contradiction between the above statutory conditions, and thus somehow reducing these conditions in both configurations to a certain mathematical equation, we must also agree with the Constitutional Court that three years of experience gained outside the application mode is a substitute for a three-year lawyer application, and obtained academic degree is a sufficient form of verification of legal knowledge, which is also carried out on the Bar exam. From what has already been drawn up above, the identity of three-year periods in both configurations of entering the profession of lawyer is undeniably evident. If the legislator wanted to adopt a different normative solution, he would allow more precise requirements for carrying out activities for the employer, not only at the appropriate time, but also in a specified working time, a more formal legal form of cooperation with the employer, providing then also appropriate systems for the conversion of working hours provided during the application, sometimes leading to the extension of the period of carrying out applications if the applicant performed work

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6 Sentence of the Constitutional Court of 7 March 2012, ref. no. K 3/10, Lex no. 1124353.

7 Ibid.

8 Sentence of the Constitutional Court of 12 February 2013, ref. no. K 6/12, Lex no. 1271750. See also Szydło 2002, 51-62; Jakubowski 2020, 275-90.

for the employer in part-time. However, the legislator did not make such requirements for persons applying for law, but did so for persons choosing the non-training path to the profession of lawyer, which in itself is sufficient argument for the validity of the above assumptions.

2. THREE YEARS OF WORK EXPERIENCE

The aforementioned argument corresponds with the justification of the draft act of 20 February 2009 on amending the Law on Bar, the Law on Legal Counsellors and the Law on Notaries (Parliament Print VI.953), according to which the professional practice necessary to obtain entitlement to entry on the list of advocates can be carried out in different ways, so as to constitute an equivalent practice to the practice of an advocate trainee. The legislator explicitly assumed that the period of three years of professional experience corresponds to a three-year advocate training. The legislator did not make a similar reservation when qualifying for a three-year period of advocate training None of the legal acts provided for a minimum, required monthly period for the provision of training activities for the trainee as part of the training, leaving this to the will of the trainee and the content of the framework agreement concluded with the trainee.

In this respect, the self-government of the Bar entrusted the assessment of the acquisition of practical experience by the advocate trainee to the patron. The only form of supervision by the regional bar council over this condition of entering the profession in the application mode are both the increased requirements for the performance by the barrister of the patron functions and the specific duties directed to the patron, and concerning the assessment by him of the trainee's engagement. In accordance with the *Regulations*,[9] the Patron shall notify the regional bar council of interruptions in the performance of his or her duties, consent to the performance of duties by the applicant on behalf of another advocate, and is also obliged to immediately notify the regional bar council and the manager of the training about the failure of the trainee to perform his or her duties, as well as about the circumstances causing interruptions in the performance of his or her duties. The Patron cares for the proper course of the training and cares for the trainee's preparation for the profession, and in particular for the adoption by him of the principles of legal ethics, the ability to use

[9] Resolution No. 55/2011 of the Supreme Bar Council of 19 November 2011 with the amendments introduced by Resolution No. 21/2014 of the Supreme Bar Council of 22 November 2014, Resolution No. 51/2015 of the Supreme Bar Council of 13 November 2015, Resolution No. 5/2017 of the Supreme Bar Council of 21 January 2017 and Resolution No. 89/2020 of the Supreme Bar Council of 6 June 2020. Regulations.

legal literature, jurisprudence, discusses with the applicant how to appear before the court and other authorities, and is also interested in his intellectual development. An extremely important circumstance is the fact that the Patron submits a detailed opinion on the applicant and on the course of his application before the end of each training year in writing to the Regional Bar Council. The Dean of the Regional Bar Council may also request the patron to supplement the above opinion. The Patron has the possibility of issuing a negative assessment on suitability for the profession during the first two years of application, thereby leading to the deletion of the applicant from the list of advocate trainees in accordance with Article 79(2) of the Act. This is therefore a sufficient resource of funds that remain at the disposal of the Regional Bar Council, disciplining the applicant to properly and properly fulfil his duties in the law firm, as well as they are sufficient guarantee for the self-government of the Bar that, within the application, the applicant performed work in a dimension that allows in the future to properly exercise the profession of an advocate.

The administrative case law indicates that the subject of the examination of the existence of conditions for entry on the list of advocates is not, among other things, the duration (longitude) of the application, but its conduct.[10] In this sense, the administrative court explains the *ratio legis* of processing applications and the meaning of the period that was provided for this obligation. From the foregoing it clearly follows that when examining the conditions described in Article 66(5) of the Act, the regional bar council is obliged to determine whether it was completed within the period of 5 years prior to the submission of the application for registration.

3. THE LEGAL RELATIONSHIP BETWEEN THE ADVOCATE TRAINEE AND THE PATRON

It should also be clarified the critical normative nature of the applicant-patron relationship for the purposes of this paper. *De lege lata*, without developing in detail the issues concerning labour law, requires at least to recall case law, according to which the absence of a written contract does not mean that the employee without a contract has different rights than the rest of the employees.[11] The very fact that the employer allowed him to work, and he provided it, means that there was a contract of employment between the parties. A declaration of will may be expressed and made in writing, as required by the provisions of the Labour Code, or implied, resulting from

[10] Sentence of the Provincial Administrative Court in Warsaw of 20 September 2006, ref. no. VI SA/Wa 1203/06, Lex no. 921789.

[11] Sentence of the Supreme Court of 4 November 2009, ref. no. I PK 105/09, Lex no. 558562.

the behaviour of the parties. Such an implicit contract of employment usually exists when the employer allows the employee to perform work.[12] Despite the fact that the employment agreement is not concluded in writing – the person begins to perform the work, and the employer accepts and accepts this work and also in this case the employment relationship is established. The employment relationship can also be established *per facta concludentia*, since the legislator has not reserved for this contract a form under the principle of invalidity. It should also be noted that the normative structure of the applicant-patron relationship results directly from para. 10(1) of the Regulations according to which the applicant takes the application under the direction of the patron appointed by the dean of the regional bar council, while para. 5(1)(c) of the Regulations obliges the applicant in particular to improve professional skills under the direction of the patron.

In this context, attention should also be paid to the voice of the lawyer community, which rightly claims that Polish law prohibits the use of civil law contracts where the employment contract should be applied. I do not see the possibility of applying civil law contracts when employing applicants. By definition, the advocate trainee's activities are non-independent ones and he/she works under the direction and guidance of the advocate who employs him/her. By the time the trainees were employed by the bars, they were given employment contracts. Therefore, the employment contract should be the rule [Nogal 2016, *passim*]. It should also be pointed out that, in accordance with Resolution No. 31/2018 of the Polish Bar Council of 25 February 2018, the model of the advocate application, based on the patron-applicant relationship, should provide the applicant with a stable economic basis and social security in the scope of the work provided by the applicants for patrons. The Polish Bar Council calls on the Dean of the Regional Bar Council s to introduce solutions to ensure remuneration for applicants when appointing patron. The General Bar Council reminds barristers who cooperate with or employ barrister trainees that they are entitled to remuneration for their activities on behalf of advocates.

This leads to the conclusion that if the employer entrusts duties to the advocate trainee, under the same conditions as under the employment contract, the contract connecting the applicant with the patron can be considered as an employment contract regardless of the name of the contract concluded by the parties [Samol 2006, 101]. Even if it is assumed that the relationship between the trainee and the patron is not a working relationship, the contract between the patron and the applicant must be qualified as a special type of contract to which the provisions on assignment apply respectively

[12] Judgment of the Chamber of Labour and Social Security of 31 August 1977, ref. no. I PRN 112/77, Lex Polonica no. 318096.

[Szpunar 1976, 405-407]. In addition, the mutual performance of services by the employer and the trainee indicates that this is a mutual agreement, the peculiarity of which is that both parties undertake in such a way that the provision of one of them is to be equivalent to the provision of the other [Samol 2006, 101]. It is therefore clear from the present analysis that, irrespective of the interpretation adopted, the activities performed by the trainee fulfil the conditions of Article 66(1)(5)(b) of the Act, since the trainee carries out legal knowledge requiring actions directly related to the provision of legal assistance by an advocate on the basis of a contract of employment or a civil law contract in a law firm.

4. CONSEQUENCES OF THE ABSENCE OF AN OFF-THE-JOB ADVOCATE TRAINING

Undoubtedly, the training of an advocate is a basic form of professional preparation for taking up and exercising the profession of an advocate. As part of the advocate training, trainees undergo not only theoretical training, but – which is its specificity – improve practical skills, covered by the scope of the activities of the advocate. In particular, they undertake – so far under the supervision of their patron – professional activities typical for the exercise of the profession of advocate: they provide legal advice, prepare legal opinions, write procedural letters, and even – to the extent specified by law – undertake actions within the scope of procedural representation before courts and other bodies. For this reason, there was never a so-called non-working advocate training.[13] In view of the above, it is not possible to convert (reduce) the time of the advocate's training to the period of the activities referred to in Article 66.1(5)(b) of the Act. It should be noted that Article 66(4) of the Act refers only to the calculation of the actual time of performing legal knowledge requiring actions directly related to the provision of legal assistance by an advocate and is addressed to persons who do not receive am advocate application. In other words, it is possible to make a proportional calculation of the time of performance in/in activities as a substitute for the absence of an advocate training, and does not allow the conversion of activities performed in the framework of the advocate training as a substitute for a lack of professional experience of three years. If the possibility of such a two-way conversion of these activities in both systems of investigation into the profession of an advocate were permissible, the legislator would have explicitly provided for such a circumstance.

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[13] Sentence of the Provincial Administrative Court in Warsaw of 20 September 2006, ref. no. VI SA/Wa 1203/06, Lex no. 921789.

It is enough to mention that this would then be a solution that completely equalizes the duties of the trainee to the person only providing work for the advocate outside the application mode, which has been consistently excluded in the previously cited administrative case law and sentences of the Constitutional Court. Only on the margins would it be appropriate to raise the rationality of maintaining trainings in the legal system as a form of professional investigation, with the simultaneous burden of numerous duties, only among which should be mentioned, for example, the obligation to train including the verification of acquired knowledge, the financial obligation, the submission to the ethical strictness provided for persons exercising the profession of advocate and the provision of exclusive powers of representation before law enforcement authorities, judicial and administrative authorities, which are not owned by persons who do not apply but employed in Law Firms. The opposite conclusion allowing for a proportionate conversion of the period of completion of the advocate's training into the activities referred to in Article 66(1)(5)(b) is unacceptable. This follows from the basic legal assumption that in constructing provisions which establish the conditions for obtaining entry on the list of advocates without the requirement of completion of the application, the requirements which are imposed on persons who obtain the right to enter on the list of lawyers after completion of the lawyer's application, i.e. having adequate knowledge and skills in the field of law and being legitimized by appropriate practice, have been adopted as a reference point. This position was also reflected in the draft law of 20 February 2009 on amending the law – Law on Bar, Law on Legal Counsels and the law (Law on Notaries Journal of Laws 2009, item 37, position 286). If the legislator allowed such a possibility of calculation, he would have expressed it *expressis verbis* by a statutory provision, on the model of the already mentioned Article 66(5) of the Act, which refers to the possibility of proportionate conversion of the time of completion of the off time court, and prosecutor's training into the account of the barrister's training. It should be emphasized that there is no doubt in administrative jurisprudence and doctrine that analogy cannot be applied to the detriment of the individual [Walasik 2013, 242-44].[14]

In view of the quality of the activities belonging to the scope of the exercise of the profession of advocate and the proper professional preparation of advocate applicants for the future exercise of the professional training, it remains desirable to cover the entire course of the application of lawyer with the care of the local authorities of regional bar council aimed at the proper exercise of the profession. An element of this care is a significant influence on the rules of professional training. The training period

[14] See also Sentence of the Supreme Administrative Court of 11 April 2017, ref. no. II OSK 2088/15, Lex no. 2360161.

is therefore subject to accounting for the proof of legal experience consisting of performing legal knowledge requiring activities directly related to the provision of legal assistance by an advocate. However, as the Supreme Administrative Court correctly pointed out, the provisions of Article 66(1)(5)(b) should be understood broadly and should not be treated as a closed, enumerative catalogue.[15]

Furthermore, the Constitutional Court, *expressis verbis* indicates that the shaping of the process of obtaining a scientific degree allows to divide the legislator's assumption that doctors of legal sciences are persons who, despite not receiving applications, have the appropriate preparation, to exercise a free profession.[16] At the same time, the Constitutional Court, assessing the constitutionality of similar regulations included, indicated that the requirement of three years of performing activities requiring legal knowledge related to the provision of legal assistance by an advocate, corresponding to the duration of the application, ensures the possibility of acquiring practical legal experience equal to application.[17] This position has also been confirmed recently, where it was stated that the practice of the profession of advocate requires not only theoretical knowledge, but also experience, therefore, in order to meet the conditions laid down by the legislator for admission to the list of lawyers, applicants must legitimize themselves with practical legal experience profiled so that it corresponds to practical skills acquired during the training as an advocate.[18] In other words, it was stated that the practical experience acquired as part of the performance of activities directly related to the provision of legal assistance should – according to the legislature – replace the practical experience acquired during the training as an advocate.

CONCLUSION

The above analyses allow us to conclude that the requirement of acquiring three years of legal experience is fulfilled a priori by the very fact of completion of professional trainee, which is a period of acquiring practical skills in a much more extensive way, formalized and at every stage verified by the regional bar council. Obtaining an academic degree is a substitute for confirming legal knowledge on the advocate's exam, while experience

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[15] Sentence of the Supreme Administrative Court of 8 April 2014, ref. no. II GSK 60/13, Lex no. 1575501.

[16] Sentence of the Constitutional Court of 8 November 2006, ref. no. K 30/06, Lex no. 231207.

[17] Sentence of the Constitutional Court of 7 March 2012, ref. no. K 3/10, Lex no. 1124353.

[18] Sentence of the Constitutional Court of 7 June 2022, ref. no. SK 68/19, Lex no. 3350627.

is acquired through the work provided under the direction of an advocate during the advocate's training.

It should be recalled that the function of the constitutional principle of proper legislation is not only to ensure the correctness of the law governing relations between public authorities and citizens, but in general of the law which is necessary to achieve the goals of the regulation in question. Above all doubt, the need to guarantee legal certainty and security to citizens is highlighted, and this principle prohibits the adoption of legislation which leaves too much freedom for the state authorities and allows freedom of decision. This type of legislative defect may constitute a prerequisite for the declaration of unconstitutionality of the provision it affects [Garlicki and Zubik 2016]. Moreover, according to the case law of the administrative courts, any ambiguities and omissions cannot be interpreted to the detriment of the party.[19] It is clear from the foregoing that in case of doubt, the authority (in this case the regional bar council) should adopt the interpretation of the provisions that would be most favourable to the party, provided that the public interest is not against it. This results from the assumption that in the rule of law, the legal provisions will be clear, unambiguous and understandable. However, if this is not the case, the ambiguities and doubts regarding the content of the legal provision cannot be interpreted to the detriment of the party.[20]

In the light of the foregoing, it cannot be overlooked that, according to Article 1(1) of the Act, a Bar is called not only to provide legal assistance but also, and, probably above all, to cooperate in the protection of civil rights and freedoms and in the formulation and application of the law. Traditionally, the profession of advocate is classified as a public trust profession. With regard to the exercise of public trust legal professions, the fundamental values include full and integral respect for the law, including in particular – respect for constitutional values and procedural directives. What is important is that the scope of proper exercise of the profession of public trust concerns not only the individual action of persons performing these professions, but also cumulatively, i.e. the activities of a collective corporation of professions of public trust. This applies to the individual acts and activities of these bodies. It would be difficult to accept the view that the high requirements imposed on individual members of these corporations do not apply to corporate activities. In view of the above, the requirements imposed on the activities of persons exercising public trust professions should also

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[19] Sentence of the Provincial Administrative Court in Warsaw of 24 May 2005, ref. no. VII SA/Wa 1093/04, Lex no. 168038.

[20] Sentence of the Supreme Administrative Court of 6 May 1999, ref. no. IV SA 27/97, Lex no. 48158; sentence of the Supreme Administrative Court of Białystok of 6 March 1996, ref. no. SA/Bk 95/95, Lex no. 26613.

apply to the activities attributed by law to advocates' corporations.[21] Therefore, the advocates' bodies should take legislative action aimed at normatively filling the structural gap of Article 66(1)(5b) of the Act, and until then adopt an interpretation that is friendly to trainees.

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APPROVAL PROCEDURE OF ENVIRONMENTAL IMPACT ASSESSMENT IN THE LEGISLATION OF UKRAINE

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Abstract. The article is devoted to the institute of environmental impact assessment and the procedure for approval of this impact assessment in the legislation of Ukraine. The author singles out the subject of regulation of the institute and its tasks, which encompass clear and proper regulation of the environmental impact assessment procedure. The provisions of the Constitution of Ukraine related to this issue and the main directions of the state's environmental policy formulated in it are being analyzed. The article highlights the legal and organizational principles of environmental impact assessment aimed at preventing environmental damage, ensuring environmental safety, environmental protection, and rational use and reproduction of natural resources, which are regulated by the special Law of Ukraine "On Environmental Impact Assessment" and are in the process of adoption decisions on conducting business activities. The subjects of legal relations participating in the impact assessment procedure are determined and the scope of application of the impact assessment is defined. Special attention is paid to the procedure for approval of environmental impact assessment, which is multi-staged and consists of several steps defined by legislation. The article emphasizes ensuring transparency and public access to each of the stages of approval of the impact assessment, the need for timely, adequate, and effective public information in order to identify, collect, and take into account comments and suggestions of the public to the planned activity, funding public consultations.

Keywords: legal regulation; environmental impact assessment; environment; public consultations; assessment procedure.

INTRODUCTION

The subject of regulation of the environmental impact assessment institute is social relations arising in the sphere of assessment of the negative consequences of planned activities for the environment and human health, development of measures aimed at prevention, diversion, avoidance, reduction, and elimination of such an impact, as well as ensuring the strengthening of positive impact [Bilash 2023, 131].

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The task of the institute is to clearly and properly regulate the environmental impact assessment procedure, which ensures openness and transparency, accessibility and public participation in decision-making, approximation to EU legislation, and fulfillment of the requirements of international agreements [Idem 2022, 191]. In the last decade, strategic environmental assessments (SEA) have been increasingly conducted, which are aimed at evaluating not planned physical interventions (construction of facilities, starting harmful industries), but at the level of strategic planning, in particular, at the plans, programs or political guidelines of governments. This institution of special administrative law does not regulate SEA, although both types of assessments are aimed at avoiding the implementation of activities that have a significant negative impact on the environment, as well as at ensuring the strengthening of positive impact.

1. CONSTITUTIONAL PROVISIONS

The Constitution of Ukraine guarantees everyone the right to an environment that is safe for life and health and to compensation for damage caused by violationing this right. Everyone is guaranteed the right to free access to information regarding the state of the environment, the quality of food products and household items, as well as the right to its distribution. Such information cannot be classified by anyone (Article 50). At the same time, the Fundamental Law imposes an obligation on everyone not to harm nature and to compensate for the damage caused. This constitutional provision determines the content of norms regarding liability for violations of legislation in the field of environmental impact assessment [Lazur and Bilash 2021, 63].

Article 16 of the Constitution outlines the main directions of the state's environmental policy, namely: guaranteeing environmental safety; maintenance of ecological balance on the territory of Ukraine; overcoming the consequences of the Chornobyl disaster – a catastrophe of a planetary scale; preservation of the gene pool of the Ukrainian people. Article 13 of the Constitution also defines that the land, its subsoil, atmospheric air, water, and other natural resources located within the territory of Ukraine, natural resources of its continental shelf, and eclusive (maritime) economic zone are objects of ownership of the Ukrainian people.

Although the Constitution of Ukraine was adopted in 1996, and the above-mentioned provisions were enshrined by it only in the same year, legislative norms related to ecology and nature use, and the protection of environmental rights have appeared and become part of the national legal system even before its adoption.

A clear awareness regarding the significance of environmental issues and the need to regulate relevant social relations at the legal level occurred in the country after the Chornobyl nuclear power plant disaster in 1986. At that time, the state faced the task of not only overcoming the consequences of the accident but also of fundamentally restructuring management in the field of nature protection. At the end of the 1980s, acts were adopted that showed recognition of unresolved issues of nature protection and rational use of natural resources, failure to take into account the state of the environment, and possible environmental consequences when placing industrial facilities. In particular, this is evidenced by the joint Resolution of the Central Committee of the Communist Party of Ukraine and the Council of Ministers of the Ukrainian SSR dated November 18, 1988 No. 357 "On the radical restructuring of nature protection in the republic".

2. THE NOTICE ON THE PLANNED ACTIVITIES

The procedure for assessing the impact on the environment provided for by law consists of several stages: informing the authorized territorial body by the business entity about the intention to carry out the planned activity; publication of a notice on the planned activity, which is subject to an environmental impact assessment; notification on the commencement of public consultations on the environmental impact assessment report; ensuring the preparation of an environmental impact assessment report by the business entity; submission by the business entity of the prepared environmental impact assessment report and announcement of the start of public consultations of such report; public consultations in the process of environmental impact assessment; issuance of an environmental impact assessment opinion by an authorized central or territorial body [Aleksyeyeva 2018; Volkova 2021].

To ensure transparency and public access, each of these stages is reflected in the Unified Environmental Impact Assessment Register,[1] the management of which is determined by Resolution No. 1026 of the Cabinet of Ministers of Ukraine dated December 13, 2017.

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[1] The Unified Environmental Impact Assessment Register is an automated information system for collecting, processing, reviewing, accumulating, systematizing, storing, and providing access to environmental impact assessment information and documents. The register is maintained for the purpose of ensuring the access of environmental impact assessment subjects to current regulatory and methodological information, access to environmental impact assessment documents and the possibility of their submission through an electronic cabinet, centralized accumulation and processing of information and documents regarding planned activities, free access of all interested parties to information and documents regarding planned activities created in the process of environmental impact assessment.

The information on the website of the Unified Environmental Impact Assessment Register is open, free access to it is provided via the Internet.[2]

A registration case is formed in the register, which contains the following documents regarding the planned activity: the notice on the planned activity, which is subject to an environmental impact assessment; the request of the business entity to provide conditions regarding the scope of research; all concerns and suggestions of the public regarding the planned activity, the scope of research to be included in the environmental impact assessment report; concerns and suggestions provided by the authorized body; announcement of the commencement of public consultations of the environmental impact assessment report; environmental impact assessment report; report on public consultations; information about the decision to implement the planned activity; other documents related to the planned activity submitted by the business entity.

The business entity informs the competent local authority on the intent to carry out the planned activities and the environmental impact assessment thereof by submitting the notice. This notice is submitted in writing and in an electronic form and contain information on the business entity, the planned activities, its location, socio-economic impact of such activities, environmental and other restrictions applicable to the planned activities, area, sources, and types of the possible impact on the environment, envisioned scope of assessment and the level of detail of the information to be included in the environmental impact assessment report, contemplated environmental impact assessment procedure and opportunities for public participation therein, the nature of the decision on carrying out the planned activities and the public authority competent to take this decision.

The notice on the planned activity is submitted by the authority to the Unified Environmental Impact Assessment Register within three working days from the date of receipt, and in the following 20 working days the public can provide the authorized territorial body with comments and suggestions on the planned activity, the scope of research and the level of detail of information to be included in the environmental impact assessment report [Kovalenko 2023, 19-20]. At the same time, when preparing the report, the authority may take into account or reasonably reject the comments and suggestions of the public, provided in the process of public

[2] The website http://eia.menr.gov.ua/ of the Unified Environmental Impact Assessment Register is a separate unit of the register with open access via the Internet, which is intended to be integrated into the official websites of the authorized authority for the purpose of officially publishing environmental impact assessment documentation and providing information to the subjects environmental impact assessment entities and other interested parties about the progress and results of the environmental impact assessment of the planned activity.

consultations of the scope of research and the level of detail of information to be included in the environmental impact assessment report.

3. ENVIRONMENTAL IMPACT ASSESSMENT REPORT

The business entity submits the environmental impact assessment report signed by the authors and the announcement of the commencement of public consultations of the report to the authorized territorial body, and the latter enters the corresponding report into the Unified Environmental Impact Assessment Register, where it is stored throughout the duration of the planned activity, but not less than five years from the date of receipt of the decision on the implementation of the planned activity.

The environmental impact assessment report includes a description of the planned activities; a description of the reasonable alternatives relevant to the planned activities, and an indication of the main reasons for selecting the chosen option, taking into account environmental effects; a description of the current state of the environment and an outline of the likely evolution thereof without implementation of the planned activities; a description of the factors of the environment likely to be affected by the planned activities and its alternatives, including human health, state of fauna, flora, biodiversity, land (including land take), soil, water, air, climate factors, material assets, including architectural, archaeological and cultural heritage, landscape, socio-economic conditions and the interaction among these factors; a description and assessment of the likely effects on the environment; a description of the measures envisaged to preclude, prevent, avoid, reduce, offset significant adverse effects on the environment; all comments and suggestions, received after making public of the notification on the planned activities, showing information on acceptance or reasonable rejection; an outline of the monitoring and control programmes as to the effects on the environment of carrying out of the planned activities.

The announcement of the start of public discussion of the report must contain information about the planned activity (brief description); business entity; an authorized territorial body that ensures public discussion; the procedure for making a decision on the implementation of the planned activity and the body that will consider the results of the environmental impact assessment; terms, duration and procedure for public discussion of the environmental impact assessment report; the state body providing access to the environmental impact assessment report and other available information regarding the planned activity; the body to which questions, comments or proposals are sent, and the deadlines for submitting questions, comments and proposals; available environmental information regarding the planned activity; the location of the environmental impact assessment

report and other additional information determined by the business entity, as well as the time from which the public can familiarize themselves with them.

The notice on the commencement of public consultations on the report shall contain the information regarding the planned activities (outline); the business entity; the competent central authority ensuring the public consultations; the procedure for making the decision on carrying out the planned activities and the authority in charge of the examination of the environmental impact assessment findings; the terms, duration, and procedure for public consultations on the environmental impact assessment report; the public authority ensuring access to the environmental impact assessment report and other accessible information on the planned activities; the authority to which questions, comments and suggestions may be submitted, and the terms for the submission of questions, comments, and suggestions; the available environmental information on the planned activities; the place(s) where the environmental impact assessment report and other additional information identified by the business entity are located, as well as the time at which the public can examine them.

4. PUBLIC CONSULTATIONS

In the process of assessing the impact on the environment, timely, adequate, and effective public informing must be provided in order to identify, collect, and take into account the comments and suggestions of the public regarding the planned activities [Bilash and Karabin 2021, 349]. The public has the right to submit any comments or suggestions that it considers relevant to the planned activity, without the need to substantiate them. Comments and suggestions can be submitted in writing, including electronic form (following the procedure specified in Article 7 of the Law "On Environmental Impact Assessment") and verbally during public consultations, the procedure of which is regulated by the government resolution "On the procedure for holding public consultations in the process environmental impact assessment" No. 989 of December 13, 2017.

Public consultations are funded at the expense of the business entity, and the fee amount is determined by the order of the Ministry of Ecology and Natural Resources of Ukraine No. 182 of May 30, 2018. The following fees are paid for: expert services of expert commissions' members on environmental impact assessment, organization of public consultations (lease of premises for holding public consultations, technical support for holding public consultations, business trip, printing of materials, services for the organizing of public business trip, etc.) and conducting a public discussion

according to the transboundary impact assessment procedure, other expenses related to the maintenance of the Ministry of Environmental Protection.

Public consultations of the planned activity begin after submitting environmental impact assessment report from the day of official publication of the announcement of the commencement of public consultations of the report and provision of public access to the report for review. The legal deadline for the discussion is established: it must last at least 25 working days and no more than 35 working days [Patseva, Melnyk-Shamrai, and Lukianova 2022, 24]. The authorized territorial body considers all proposals and comments of the public and ensures the preparation of a report on public consultations. If public consultations were conducted in written (electronic) form, all the received written comments and suggestions from the public, as well as a table indicating information on the consideration or justified rejection of the received comments and suggestions are recognized as an integral element of the report on the public discussion. If public consultations were conducted in the form of a public hearing, then the minutes of the public hearing with all appendices and a table for taking into account the comments and suggestions of the public are included in the report on the public hearing. The organiser of the public consultation is obliged to report the conflict of interest to the authorised central body or authorised territorial body. In this case, the authorised central body or the authorised territorial body conducts the public meeting independently.

The public consultation report is entered into the Unified Environmental Impact Assessment Register at the same time as the conclusion of the environmental impact assessment.

5. ENVIRONMENTAL IMPACT ASSESSMENT CONCLUSION

The environmental impact assessment conclusion determines the admissibility or justifies the inadmissibility of the implementation of the planned activity and determines the environmental conditions of its implementation. The environmental impact assessment conclusion and ecological conditions of the implementation of the planned activity are mandatory for implementation.

The authorized territorial body issues a conclusion based on an assessment of the impact on the environment of the planned activity, the nature, intensity and complexity, probability, expected onset, duration, frequency, and inevitability of the impact, provided measures aimed at prevention, diversion, avoidance, reduction, elimination of the impact on the environment. When preparing the conclusion, the environmental impact assessment report and the report on public consultations are taken into account.

Article 9 of the Law "On Environmental Impact Assessment" defines the content of the environmental impact assessment conclusion. Thus, the descriptive part of the conclusion provides information about the environmental impact assessment procedure carried out, the consideration of the environmental impact assessment report, the considered and rejected comments and suggestions received during the public consultations. In the conclusion itself, the authorized territorial body determines: 1) the type, main features, and location of the planned activities; 2) ascertain the admissibility or justify the inadmissibility of the planned activities; 3) establish conditions for the use of the territory and natural resources during the preparatory and construction works and in carrying out the planned activities; 4) establish conditions for environmental protection and ensuring environmental safety during the preparatory and construction works and in carrying out the planned activities; 5) establish conditions for the prevention of emergencies and mitigation of consequences thereof; 6) establish conditions for the reduction of the transboundary impact of the planned activities, which underwent the transboundary environmental impact assessment.

The environmental impact assessment conclusion is granted to the business entity free of charge within 25 business days of the completion of the public consultations, and where the transboundary environmental impact assessment is conducted – of the date of completion thereof and approval of the decision on taking into account of the outcome of the transboundary environmental impact assessment. The report on public consultations is attached to the environmental impact assessment conclusion. The conclusion is made public and entered into the Unified Environmental Impact Assessment Register. The conclusion of the environmental impact assessment loses its validity after five years.

According to Article 12 of the Law "On Environmental Impact Assessment" the environmental impact assessment conclusion, other decisions, acts, or omissions of government authorities or local authorities in the process of the environmental impact assessment may be challenged by any natural or legal person through a judicial procedure.

CONCLUSIONS

The 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) recognizes that the public has access to information, has the opportunity to participate in decision-making, and has access to justice on issues related to the environment, without discrimination based on citizenship, nationality, or place of residence, and in the case of a legal entity – without discrimination based on its registered location or actual center

of activity. The state must ensure that the relevant bodies have accurate and up-to-date environmental information and that the procedures for providing the public with environmental information are transparent.

By ratifying the Convention, Ukraine undertook to take legislative, regulatory, and other measures to implement the convention's provisions into public life. However, the shortcomings of the procedure, defined at that time by the law "On Environmental Expertise" dated February 9, 1995, became the basis for recognizing Ukraine as one whose legislation does not comply with the provisions of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The implementation of the Association Agreement between Ukraine and the EU has become a qualitative impetus in solving the problems of Ukraine's non-compliance with international obligations (including such under the Espoo Convention and the Aarhus Convention). Without the fulfillment of the convention requirements, the approximation of legislation within the framework of the Association Agreement became impossible, and, on the other hand, the proper implementation of the provisions of the Agreement was able to ensure Ukraine's fulfillment of international obligations in accordance with the abovementioned conventions and the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context.

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LEGISLATIVE MATERIALS (LEGISLATIVE HISTORY) AND THE DERIVATIONAL THEORY OF LEGAL INTERPRETATION

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Abstract. The study addresses the issue of using legislative materials (legislative history) to interpret the law. This issue is considered from the point of view of the so-called derivational theory of legal interpretation formulated in Polish legal theory. The derivational theory of legal interpretation is treated as a framework and a starting point for developing an integrated theory of legal interpretation in Polish legal theory. The analyses contained in the article are theoretical in nature and apply a theoretical-legal method. The main thesis of the study is that the use of legislative materials should be included in the derivational model of interpretation, but with the application of the principle of their subsidiarity and the principle of assumed unanimity. The derivational theory is a comprehensive theory that formulates a normative (prescriptive) model of interpretation. The interpretive directives that make up this model refer to factors external to the actual legislator (in particular the rules of language) in order to objectify the interpretation process. It may seem that from the point of view of the derivational theory, the use of legislative history and the intent of the actual legislator for legal interpretation should be rejected. However, a closer analysis reveals that this is a false conclusion. One of the fundamental assumptions of the derivational theory is the postulate of striving for the greatest possible objectivity in the interpretation result. The subsidiary use of legislative materials may contribute to such objectification when reference to factors external to the actual legislator fails – it is inconclusive. However, the subsidiary use of legislative history is only possible if the analysis of legislative materials is conclusive, i.e. if it is possible to determine the clear legislative intent in accordance with the principle of assumed unanimity.

Keywords: theory of law; interpretation of law; legislative intent; intention in interpretation.

1. METHODOLOGICAL REMARKS

Legislative materials are a controversial instrument for interpreting law. Legal theorists in various countries and jurisdictions continue to argue about the permissibility of their use. The most famous version of this dispute is the dispute between intentionalists and textualists (especially in the United States). The use of legislative history is also the subject of discussion in Polish jurisprudence. This study examines legislative materials (legislative

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history) from the perspective of the derivational theory of legal interpretation, which is treated as a framework and "launchpad" for developing an integrated theory of legal interpretation in Polish legal doctrine.

At the very beginning, one methodological issue requires emphasizing. Different views on the applicability of legislative history as an instrument of legal interpretation are very strongly dependent on two factors: firstly, the practice and tradition of a specific legal culture, and secondly (and most importantly), a whole range of philosophical and theoretical assumptions related to law. This is primarily about assumptions answering questions such as: what the law is, what is the interpretation of law, what is the purpose of interpretation, and who is the lawmaker. It is impossible to answer the question about the admissibility of using legislative materials apart from these two factors. This means that there is no single universally valid answer to the question (valid in all legal systems and independent of theoretical assumptions). Therefore, it seems methodologically unjustified to simply transfer views on the interpretative role of legislative history from one legal system to another (in particular: transferring views expressed in American jurisprudence and directly applying them to the Polish legal system). Comparing the different views expressed in different jurisdictions can be instructive but cannot be taken as decisive. What should be decisive is the degree of coherence of the theoretical assumptions of a given view and the degree of their integration with a given legal system. The indicated belief constitutes the methodological assumption of this entire study.

2. INTRODUCTION

Polish legal theory has developed a very rich legacy in the field of legal interpretation. Many theories of various methodological and philosophical nature have been created. The so-called "derivational theory of legal interpretation" seems to be one of the most developed, comprehensive and influential normative (prescriptive) theories of contemporary Polish jurisprudence. However, there are many doubts related to some theses and directives of this theory, and some interpretative issues are not taken into account by it (one of them is the issue of legislative materials). For this reason, the need was expressed to reformulate the derivational theory and transform it into an integrated theory of legal interpretation [Bogucki 2023, 81-82]. This need is an expression of the idea that derivational theory should develop by striving for the greatest possible integration with other approaches to interpretation as well as with judicial practice [Zieliński, Bogucki, Choduń, et al. 2009, 23-39; Zieliński 2020, 163-73]. This study is intended to contribute to the achievement of such goals. Due to the limited framework of this study, it is not possible to analyze in more detail the principles of further

integration of the derivational theory, but it should be emphasized that such integration must in some cases make it necessary to give up certain theses of the derivational theory. We can therefore say that integration will entail the transformation of a derivational theory into a post-derivational theory.

The derivational theory of legal interpretation was formulated by M. Zieliński [Zieliński 1972; Idem 1987; Idem 2017] who based it on the distinction (made by Z. Ziembiński) between a norm of conduct and a legal provision [Ziembiński 1960, 105-22]. Since its introduction, the derivational theory has also been improved by other authors.[1] In this study, the name "derivational theory of legal interpretation" will refer to the original version of the theory developed by Zieliński. The derivational theory is a normative (prescriptive) theory. It formulates many more or less detailed rules (directives) specifying how the law should be interpreted. It is impossible to present all of them in this study.[2] However, it will be necessary to outline the general shape of the interpretation model according to this theory.

According to the derivational theory, the aim of legal interpretation is to reconstruct legal norms from legal provisions (to derive norms from provisions). A norm is defined as an unambiguous linguistic expression ordering specific addressees to act in a specific way in specific circumstances. A legal provision is defined as a sentence (in the grammatical sense) that is part of a legal text. According to the derivational theory, the process of legal interpretation includes three phases. The first phase (initial phase) includes determining the validity of the wording and validity of legal provisions at a given interpretational moment. The second phase (called "reconstructive") includes the reconstruction (from the relevant provisions) of an expression that will contain all the elements of the norm (order, addressee, circumstances, ordered action). The third phase involves disambiguating all linguistic expressions to obtain a norm of conduct.

According to the derivational theory, the interpretation of law should be a sequential process in which the interpreter first applies linguistic rules of interpretation, and then systemic and functional rules (including the rules of purposive/teleological interpretation). Systemic and functional rules are called extra-linguistic rules. Systemic rules refer to the way the legal system is shaped (especially its hierarchical structure). Functional rules refer to the knowledge, goals and values of a rational lawmaker. Their use is to lead to an interpretation that will have the best possible epistemic and axiological justification. The application of systemic and functional rules of interpretation is intended to confirm the results of the application of linguistic interpretation or to correct them. Correction may consist in selecting

[1] See for example Choduń 2018; Godek 2015.

[2] For a more extensive introduction in English, see Bogucki 2020, 617-36.

one of the linguistic meanings or in rejecting the linguistic meaning and establishing a different meaning.

From the perspective of this study, it is important to emphasize that, according to the derivational theory, the interpretation of law should be an objective process (as much as possible). This objectivity is to be ensured primarily by referring to the meaning of words recorded in the form of semantic and syntactic rules. An additional source of objectivity is to be a reference to instrumental rationality (selection of appropriate means to achieve specific states of affairs as well as preferences between states of affairs).

The derivational theory treats the principle of *omnia sunt interpretanda* as the fundamental, most important principle of legal interpretation. According to this principle, interpretation should be made even when the legal text *prima facie* seems clear. Derivational theory rejects the understanding of interpretation as a process that takes place only when the text is unclear.

It is also worth adding here that even though the derivational theory was created for the Polish legal system, it can be adapted for interpretation in other legal systems; for example, the legal system of the European Union [Godek 2015, 35-56; Helios and Jedlecka 2018, 131-44]. However, this requires taking into account the features of the language of legal texts in a given legal system as well as its institutional specificity (including the rules formulated in judicial practice).

3. DERIVATIONAL THEORY AND LEGISLATIVE MATERIALS

In the original version of the derivational model of legal interpretation, legislative materials were not taken into account at all [Zieliński 2017, 277-302]. Maciej Zieliński is skeptical about using legislative history as a tool for interpreting law [ibid., 269]. This skeptical attitude is most likely caused by the fact that in the derivational theory the lawmaker is understood in a specific way. On the basis of this theory, it is emphasized that the process of interpretation is about reading the norms created by the rational lawmaker (legislator), who is not identical with the actual (real) legislators [ibid., 258-70]. The concept of a rational lawmaker is an idealization concept aimed at objectifying the interpretation of law. It is assumed that rational lawmaker is instrumentally rational and that he has the best knowledge (in particular knowledge of the language in which the legal text is formulated), and the goals and values he pursues are socially approved [ibid., 258-70]. The extent to which actual legislators meet such characteristics is irrelevant from the point of view of legal interpretation (because it is assumed that a rational lawmaker possesses the above-mentioned characteristics). In other words – according to the derivational theory, the interpretation

of law consists in reconstructing the norms established by a rational legislator (lawmaker) and not in determining the intentions of actual legislators (lawmakers). What matters is what has been enacted, not what the actual (real) legislators intended to enact. The derivational theory of interpretation broadly analyzes the use of sources such as legal definitions, linguistic dictionaries, legal doctrine and court decisions in the interpretation process. Legislative materials are not treated as one such source because they reflect the intentions of actual legislators.

A few observations should be made in relation to the above. Firstly, in the judicial practice of Polish courts, legislative materials are used to interpret the law.[3] It is very difficult to statistically assess the scale of this phenomenon, but it is certainly not a marginal phenomenon and cannot be ignored. Some researchers claim that 73.8% of administrative court judges look for information about the legislator's intention in legislative materials [Bielska-Brodziak and Tyrybon 2019, 40]. It seems that if the derivational theory is to become an integrated theory, it cannot fail to expressly address the issue of legislative materials as an instrument of interpretation. The concept of a rational lawmaker does not necessarily entail the exclusion of legislative history. As Michał Krotoszyński shows, the use of legislative history in reasoning about a rational legislator does not violate the logical coherence of the concept of a rational legislator. Moreover, it should be assumed that a rational legislator is aware of the legislative history and the possibility of its use by courts for legal interpretation [Krotoszyński 2018, 57-73].

4. ADMISSIBILITY OF USING LEGISLATIVE MATERIALS

It seems that *a priori* there are three possible ways to resolve the issue of the applicability of legislative materials for the interpretation of law: (1) complete rejection of their applicability; (2) recognizing them as the most important instrument of interpretation and allowing their use without any restrictions; (3) recognizing their applicability but limiting it by certain conditions. Let us consider these possibilities below, paying particular attention to the context of the basic assumptions of the derivational theory of legal interpretation.

The first, most obvious argument that can be raised against the use of legislative materials is the fact that they are not sources of law, and it is difficult to accept that they will determine the content of law. However, such an argument can be raised against all materials used for the interpretation of law, such as language dictionaries or theses of legal doctrine. The need to use materials other than the legal text results from the fact that in many cases

[3] See an extensive empirical study on this issue Bielska-Brodziak 2017.

the text itself is unable to determine its meaning (in many cases there are no legal definitions, or they are unclear). Legislative materials or dictionaries are, of course, not sources of law, but they can be described as sources of knowledge about law – sources of knowledge necessary in the process of interpretation. It is worth adding that legislative materials have a greater connection with the lawmaker than, for example, language dictionaries [Konca 2021, 94].

Another argument that can be raised against the use of legislative materials is related to their subjective nature and susceptibility to abusive use. The fact that in relation to some legal regulations significantly different intentions are expressed in the legislative process and, therefore, interpretation may be made arbitrarily, does not in itself speak against the complete rejection of legislative materials. All interpretive materials can be used arbitrarily and abusively, and legislative history is no exception in this respect. This fact speaks not so much against the use of legislative materials, but against their use without any restrictions, which may lead to arbitrary quoting only those fragments of legislative materials that fit the pre-adopted interpretative thesis.

In the light of the derivational theory of interpretation, the content of legal norms is determined primarily by the semantic and syntactic rules of language. However, in the light of this theory, interpretation can never be limited only to linguistic interpretation. For an adequate reading of a legal norm, it is always necessary to take into account the lawmaker's goals and values. Even though semantic rules are not created by the legislator, the final meaning of the legal text is the "resultant" of the language rules and the legislator's goals. Referring to the rules of language can often be inconclusive (primarily due to syntactical and semantic ambiguities). In turn, information about the lawmaker's goals and values is often not included in the legal text itself.

It seems that one of the most important assumptions of the derivational theory is the pursuit of maximum objectivity of the interpretation process (hereinafter referred to as the "postulate of objectivity"). From this perspective, it is difficult to *a priori* exclude legislative materials, which in some cases seem to be a better tool for objectifying the interpretation than the "interpreter's intuition". Taking this into account, it can be said that from the perspective of derivational theory, the solution indicated above as (2) is unacceptable, and solution (1) seems too far-reaching. Therefore, it seems that the option that can be reconciled with the discussed theory of legal interpretation is option (3): allowing the use of legislative materials, but only under certain conditions.

5. THE INTENTION OF THE ACTUAL LAWMAKER (LEGISLATOR)

The legal doctrine indicates many, more or less fundamental, doubts related to the use of legislative materials for the interpretation of law [Bielska-Brodziak 2017, 95-130; Dubiński 2023, 61-76]. Due to the limited volume of this study, it is impossible to discuss all of them here. From the perspective of derivational theory, the basic question concerns: who the actual lawmaker actually is and when he "becomes" a rational lawmaker. In other words – which of the intentions expressed in the process of lawmaking are to be counted as the intention of the actual lawmaker and, moreover, when the intention of the actual lawmaker can be considered the intention of the rational lawmaker.

All documents accompanying the process of enacting legislation reflect the views of individual entities participating in this process (for example, proposers submitting the bill, parliamentary committees or individual parliamentarians), and in particular the discussion on the regulations being created. These documents can be called legislative materials *sensu largo*. This way of understanding legislative materials seems to be the most appropriate on the grounds of the Polish legal system [Dubiński 2023, 61-63]. Legislative materials reflect the intentions of the various actors involved in the legislative process, not the intention of the "actual legislator". The transition from the intentions of individual actors in the legislative process to the intention of the actual lawmaker requires certain rules for aggregating intentions. Unfortunately, however, it is very difficult to identify relatively uncontroversial rules of this kind.

If legislative materials reveal controversies between participants in the legislative process over the understanding of the meaning of certain linguistic expressions contained in the legislation being created or over the purposes or values that the legislation is intended to serve, then for the objectivization of interpretation such materials are worthless. In such a case, it is very difficult to assume that the vagueness of the text in light of the canons of interpretation that do not refer to the intention of actual legislators (in particular, linguistic rules of interpretation) can be overcome by referring to the understanding of the text by the people who create it. Legislative materials in such a case can be treated as interesting historical documents, but from the point of view of the postulate of objectivity they do not contribute anything to the interpretation of the law. The intention of the actual lawmaker in such a case is impossible to determine. A different conclusion would have to assume the existence of convincing rules for resolving inconsistencies arising from legislative materials. However, it is difficult to identify such rules. It is questionable to create a hierarchy of actors

in the legislative process. The "automatic" application of majority democratic rules is also problematic in this case.

In the Polish legal system, majority rules of parliamentary voting apply to votes taking place on the text of laws and not on the way this text is understood. At the same time, there is no identity between a vote for or against the establishment of a specific legal text (legal provisions) and a vote for or against its specific understanding (as expressing specific legal norms). Voters may agree on how certain provisions should be understood but differ in their views on whether they should be established. However, the opposite situation is also possible. Voting parliamentarians may agree on the text of the legislation being enacted, but actually differ in their beliefs about how it should be understood (what legal norms are included in it). The institutional way of majority determination of collective intention in the latter case is to vote on the establishment of the so-called "authentic interpretation of laws" (enacted by the body creating the legislation in question), but the Polish legal system (like many others) does not contain such a legal institution. Generally speaking, it can be said that the problems of clearly translating the vote on a particular piece of legislation into views about how it should be understood make the view that the opinion of the parliamentary minority should not matter for the interpretation [Nourse 2012, 77] difficult to accept.

The problems with the relationship between voting and beliefs about how to understand what is being voted on can be illustrated by two example situations. In the first case, the act passes unanimously, but during the legislative process significant discrepancies were revealed as to the understanding of some of its provisions. In the second case, there was agreement on how to understand the provisions, but the act passed with the minimum required majority of votes. Interestingly, from the point of view of objectivity in determining the intentions of the actual legislator, the second situation is much better than the first.

In the first situation, the way voters interpreted the provisions created was consistent. In the terminology of the derivational theory, we can say that there was no doubt that the voted provisions expressed certain legal norms. However, many voters opposed the establishment of such standards. Despite this, these norms "won" in the democratic vote. In such a case, the intention to enact these norms can be attributed to the actual lawmaker under democratic voting rules. In the second situation it is difficult to talk about the lawmaker's clear intention and the fact of unanimous voting is not decisive here. Consistency in voting may be deceptive here, because voters voted for specific legal provisions, but with different beliefs as to how they should be read (in fact, voters voted for something different – different legal norms).

6. THE PRINCIPLE OF PRESUMED UNANIMITY

In the light of the remarks made so far, it is worth emphasizing that the so-called "actual lawmaker" ("actual legislator") is also a certain conceptual structure (just like the "rational lawmaker"). The intention is conventionally attributed to such a legislator. Scholars believe that even though the legislator is a bicameral collective body, it is possible to attribute an intention to such an entity [Breyer 1992, 864-66; Raz 1996, 263; Ekins 2012, 218-43; Cross 2022, 2221-267]. The actual lawmaker is not a simple sum of actual actors in the legislative process. The actual legislator is "defined" by the adopted rules for assigning intention to him based on information about the beliefs of individual actors in the legislative process, and these rules may be constructed differently. It can be said that given the postulate of objectivity of interpretation and the problems of identifying ways to resolve inconsistencies in legislative materials, it is appropriate to adopt a relatively "safe" principle of attributing intention to the actual legislator. Such a principle seems to be the one that can be called the "principle of presumed unanimity".

According to the above-mentioned principle, what counts as the intention of the actual lawmaker is the unanimity of beliefs of the actors of the legislative process with regard to the understanding of the text of legal provisions that are created. In the light of this principle, only in such a situation can it be said that the intention of the actual lawmaker is clear (and may be useful for objectifying interpretation). It should be emphasized that this principle requires only (and as much as) unanimity in the way of understanding the regulations that are being processed. There may be fundamental controversy and disagreement as to whether these regulations should be established as law (which will be reflected in a heated parliamentary debate and voting). However, from the point of view of the principle in question, this is not important. It does not require complete agreement of views, but only agreement as to the content of the norms that are actually the subject of a specific legislative process.

In order to assume that the required consistency of intentions exists, two conditions must be met. Firstly, at least one of the entities participating in the legislative process has clearly declared the intention to assign a specific meaning to specific linguistic expressions or the intention to achieve specific goals or values through the provisions being processed. Secondly, in the light of the legislative materials, such intention was not denied by other actors in the legislative process, and even if it was, an agreement was reached during the discussion. This allows us to assume that there was no controversy as to the understanding of the provisions created, although of course there could have been significant controversies as to whether they

should have been enacted. Using the terminology of the derivational theory, it can be said that the votes were taken with the belief that these provisions express certain legal norms.

7. SUBSIDIARY USE OF LEGISLATIVE MATERIALS

Determining the intention of an actual lawmaker based on the principle of assumed unanimity does not in itself determine its interpretative role. The question arises about the relationship of legislative materials to other sources of information used in the interpretation of law. Derivational theory defines in quite some detail the types of these sources, their importance and the order in which they should be used [Zieliński 2017, 277-302]. From the point of view of the derivational theory of interpretation, the most important are the syntactic and semantic rules of the language in which the text of the regulations is written. This theory assumes that a rational lawmaker knows these rules and applies them. They are widely known and in derivational theory they play a primary role in objectifying interpretation. Since legal provisions are created by a rational legislator in language, this theory assumes that the starting point when reading them should be referring to the rules of language. A rational lawmaker may depart from them but must then express this clearly in the legal text (by formulating a specific legal definition).

Two important consequences follow from the above remarks. Firstly, when a clear meaning is established on the basis of linguistic rules, the intention of the actual lawmaker is irrelevant, and the analysis of legislative materials is unnecessary in such a case. Secondly, in the light of the assumptions of the derivational theory, it is impossible to assume that the intention of the actual lawmaker can be used to reject the clear meaning established on the basis of linguistic rules. Therefore, it seems that the only possibility of including legislative materials and the intention of the actual legislator into the derivational model of interpretation is to assign them a subsidiary role.

It is worth noting at this point that the derivational theory overestimates to some extent the possibilities offered by appealing to the rules of language (as well as other criteria "external" to the actual legislator). For this reason, it does not analyze in depth the situation when the reference to such rules is not conclusive and the legal text remains unclear despite taking into account legal definitions, meanings adopted in judicature and jurisprudence, linguistic dictionaries and syntactic rules, as well as the linguistic context. In such cases, derivational theory postulates the application of systemic and functional rules of interpretation. This involves, in particular, trying to determine the meaning that will best suit the goals and values of a rational

lawmaker. This concerns goals and values clearly declared by the legislator in the legal text, as well as goals and values reconstructed by abductive reasoning from the fact that legal norms with specific content are in force, and also goals and values recognized as socially approved [Zieliński 2017, 290-302]. The problem is that this method of determining meaning will not always provide conclusive results and lead to objectivization of interpretation. In a specific case, it may be that the legal text does not clearly indicate goals and values, abductive reasoning gives ambiguous results, and socially approved goals and values are difficult to determine.

In the above-mentioned cases, a subsidiary reference to legislative materials and an attempt to determine the intention of the actual legislator in accordance with the principle of assumed unanimity is an opportunity to objectify the result of interpretation. Of course, it may be that such an attempt will not bring any conclusive results. However, it is difficult to indicate reasons why such an attempt should be *a priori* rejected, and, in such cases, one should rely on the linguistic or axiological "intuition" of the interpreter. Rejecting such an attempt increases the danger of subjectivizing the interpretation of law, i.e. interpreting it according to the interpreter's own beliefs and choices. Such subjectivization, in turn, is something that the derivational theory tries to avoid at all costs. You could even say that this entire theory was created to reduce subjective elements in legal interpretation.

The concept of a rational lawmaker is a concept intended to increase the objectivity of interpretation. This is because the interpreter attributes objective knowledge and values to the rational lawmaker. Whether an actual legislator has this knowledge and recognizes these values is irrelevant to the interpretation of law. However, a modification can be introduced to such a position, which will be in line with the postulate of objectification (and, in fact, will increase its implementation). This modification consists in the assumption that in situations where the reference to the elements attributed to the rational lawmaker is not conclusive, the intention of the actual lawmaker becomes important. If it can be determined in accordance with the principle of presumed unanimity, it can be attributed to a rational lawmaker.

It should be added here that from the point of view of the postulate of objectivity, the use of legislative history (legislative materials) for interpretation should meet certain general minimum conditions. As Michał Krotoszyński points out: (1) if legislative history is to be used for legal interpretation, it must be publicly available (it must be accessible just as the law is); (2) all legislative materials should be accessible to the members of the legislative body before the vote; (3) the interpreter must examine the whole of the legislative process; (4) due consideration needs to be given to any amendments of a bill (must be critically analyzed whether the intention

expressed at earlier stages of the law-making procedure may still attributed to the form of the final provision) [Krotoszyński 2018, 70].

CONCLUSION

Prima facie, a derivational theory of legal interpretation should exclude the use of legislative materials (legislative history) and intention of actual legislator for legal interpretation. However, after a deeper analysis, legislative materials can be incorporated into the derivational model of legal interpretation. Such incorporation is not only possible, but also desirable from the point of view of the postulate of objectivity (which is a fundamental assumption of the derivational theory).

Including, on the principles described in the study, legislative materials and the intention of the actual lawmaker into the derivational model of interpretation improves the derivational theory and leads to its greater integration. This is an integration in two dimensions: on the one hand, with that part of judicial practice that refers to legislative materials, and on the other, with the increasingly popular position in Polish legal theory, according to which interpretation should aim to determine the legislator's intention.[4] If the derivational theory is to be a framework and starting point for developing an integrated theory of legal interpretation in Polish legal theory, it should address the use of legislative materials. In turn, the approach to legislative materials described in this study seems to fit best with the basic assumptions of the derivational theory.

In the light of the findings made in this study, the general principle of subsidiarity of legislative materials should be added to the derivational model of legal interpretation. This principle applies to both the so-called linguistic interpretation, as well as the so-called extra-linguistic interpretation (mainly the so-called "functional interpretation"). According to this principle, if, when performing linguistic interpretation, it is not possible to disambiguate the text by referring to legal definitions, findings of judicature and jurisprudence, language dictionaries and the linguistic context, the available legislative materials should be analyzed. If, in accordance with the principle of presumed unanimity, it is possible to determine the intention of the actual legislator to assign a specific meaning to specific linguistic expressions, such meaning should be accepted as the result of interpretation. With regard to extra-linguistic interpretation, the application of the general principle of subsidiarity of legislative materials is that when it is not possible to determine the goals or values of the legislator by referring to the legal

[4] Intentionalism in Polish legal theory appeared thanks to the work Tobor, which popularized the views present in American legal theory [Tobor 2013].

text, abductive reasoning, findings of judicature and jurisprudence, or social acceptance, then the interpreter should analyze available legislative materials. If, in accordance with the principle of presumed unanimity, it is possible to determine the intention of the actual legislator to implement specific goals or values, an interpretation result that implements them to the greatest possible extent should be adopted.

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LEGAL GUARANTEES AND REGULATION OF THE STATE LANGUAGE IN GEORGIA

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Abstract. The state language is not only a means of communication but also an important state symbol connected to national identity. The legal regulation of the state language in Georgia originates from the first constitution of 1921. Even under Soviet occupation, it remained a subject of constitutional regulation. The mass demonstrations of 1978, aimed at protecting the constitutional status of the Georgian language, played a significant role in the development of the national liberation movement. This article reviews the main aspects of the development of the legal regulation of the state language in Georgia, the existing legislation on the state language, and the primary issues related to its protection and provision.

Keywords: state language; Georgia; state language department; Constitution of Georgia.

INTRODUCTION

Language is not merely a determinant or result of national identity and historical processes; it plays a crucial role in the perception of law as a cultural phenomenon [Bix 2003, 5-6]. Law is expressed and interpreted through language. According to Kelsen, it is impossible to separate a legal norm from its content; the norm is its meaning [ibid., 8].

Language is the primary tool for lawyers, who use it in practice and research to convey their views. Most importantly, legislation is created through language. Legal acts and court decisions are written in linguistic forms,

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and both law and the state are embodied in language. Given this, a specific language (or languages) often holds a special legal status, with the state language becoming the universally recognized medium for communication within the state, ensuring the effectiveness of its unified structure.

In Georgia, the function of the state language is particularly significant. Historically, it has been a key mechanism for national identity [Shvelidze 2023, 219-25], a tool for resistance against conquerors, and a means of survival within empires. [Khetsuriani 2011, 14-15] It has facilitated self-determination. In the twentieth and twenty-first centuries, the Georgian language has undergone a long and fascinating journey from the First Republic of Georgia, through Soviet occupation, to the restoration of Georgia's independence.

The paper reviews the issues related to the regulation of the state language in Georgia, tracing the main trends of its constitutional regulation from the initial granting of special status to the state language to the present day. It analyzes the legal framework and the key aspects related to the legal protection of the state language in Georgia.

1. TRANSFORMATION OF REGULATION OF THE STATE LANGUAGE IN GEORGIA

1.1. Democratic Republic of Georgia

Article 3 of the Constitution of the Democratic Republic of Georgia, dated February 21, 1921, explicitly established Georgian as the state language of the newborn republic.[1] The inclusion of this provision in the very first chapter of the Constitution (General Provisions) underscores the importance and gravity of the issue. This move was driven by the young democracy's effort to assert its independence and free itself from the pervasive linguistic influence of the Russian Empire, thereby disrupting the status of Russian as the *Lingua Franca* in a multi-ethnic state.[2] Constitutional regulation of the state language played a crucial role in strengthening civil identity.

The government of the First Republic took active measures to promote the Georgian language. These included establishing Georgian as the language of judicial and administrative proceedings, changing toponyms, and restoring historical names for Georgian settlements and geographical features [Khobakhidze, Silakadze, Khvadagiani, et al. 2018]. Thus, during the First

[1] Constitution of the Democratic Republic of Georgia, 21 February 1921, Article 3.

[2] 1918: Government: The Principle of Democracy and Internationalism Requires Georgian to Be the State Language, https://civil.ge/ka/archives/248709 [accessed: 30.05.2024].

Republic, the issue of the state language was not merely a routine matter; it was considered a fundamental aspect of statehood and the rule of law. The Georgian government actively used means to strengthen democracy and build *Rechtsstaat* in the young republic [Gegenava 2014, 326-36]. However, the initiators did not have the opportunity to observe the long-term results of these efforts, as Soviet Russia occupied Georgia in the spring of 1921 [Gegenava 2021, 85-86].

1.2. Soviet Occupation

During the Soviet occupation, Georgia had 4 quasi-constitutions, none of them had real function of the constitution: limiting government and state power [Bradley, Ewing, and Knight 2015, 8]. Of course, like the constitutions of all conquered entities, they were actually copies of the central, Soviet constitution, with slight local specifics [Demetrashvili 2010, 9-10]. The Constitution of 1922 actually had the function of a temporary arrangement, it mainly concerned the governmental organization. However, despite this, the issue of the state language was still considered, and the status of the state language was defined for the Georgian language.[3] According to the 1927 Constitution, Georgian was declared the state language of the Soviet Socialist Republic of Georgia, and the right of national minorities to their native language was recognized.[4] This provision was purely symbolic, since rights and freedoms in the Soviet Union were largely imaginary. The Constitution of 1937 defined issues concerning the state language in Chapter 13, and this time it devoted three articles: Georgian was established as the state language, but in autonomous units, together with Georgian, the language of the autonomous republic or district was also mandatory for use.[5] The obligation to publish legal acts in Georgian and in the language of the autonomous unit was determined by the constitution itself.[6]

The Constitution of 1978 is particularly noteworthy. In addition to the fact that this constitution was used in the transitional period after the restoration of independence, with appropriate changes [Demetrashvili 2010, 9], it is of great importance from the point of view of the state language. This Constitution is the result of the processes related to its acceptance that April 14 is determined as the official day of the Georgian language. It was preceded by demonstrations and protests, since the constitutional commission published draft constitution and there was no the provision on the state language [Bakanidze 2023, 1-5]. The public protest attracted

[3] Constitution of the Socialist Republic of Georgia, 2 March 1922, Chapter II, para. 6.
[4] Constitution of the Socialist Republic of Georgia, 4 April 1927, Chapter I, para. 10.
[5] Constitution of the Socialist Republic of Georgia, 13 February 1937, Article 156.
[6] Ibid., Articles 157-158.

international attention [Bolkvadze 2023, 209-11]. As a result of tense discussions and mass demonstrations, Georgian remained the state language in the constitution of Soviet Georgia.[7] This fact is considered to be a key moment in the development of the national liberation movement [Shvelidze 2023, 219-20], these events played an important role in the restoration of Georgia's independence in 1991.

1.3. Restoration of Independence and Constitutional Regulation of the State Language

The Constitution of 1995 includes a provision on the state language. Article 8 of the original version of the Basic Law established that the state language of Georgia is Georgian, and in the Autonomous Republic of Abkhazia, it is also Abkhazian. Despite almost 40 amendments to the Constitution of Georgia, including three fundamental revisions, the provision regarding the state language has been preserved in all editions.

As a result of the 2017-2018 constitutional reform, the entire text of the constitution was revised, including its formal and structural aspects [Gegenava and Goradze 2024, 234]. Currently, Article 2(3) of the Constitution of Georgia retains the same content with one addition: it ensures the protection of the state language at the level of organic law. According to Georgian legislation, only very important issues are regulated by organic law, indicating that a special legal regime has been established for the state language from a formal perspective.

The constitutional norm provides a basic framework: at the national level, the state language in Georgia is Georgian. In the Autonomous Republic of Abkhazia, there are two state languages: Georgian, which is mandatory throughout the entire country, and Abkhazian, which is additionally recognized as mandatory within the administrative territory of Abkhazia.

2. LEGISLATIVE FRAMEWORK OF THE STATE LANGUAGE IN GEORGIA

2.1. Legal Status of the State Language

The current special act on the state language was adopted in 2015 as a law because the Constitution of Georgia did not establish a special form for state language legislation until 2018. In 2017, the Law "On State Language" was amended and elevated to the status of an organic law. Its purpose

[7] Constitution of the Socialist Republic of Georgia, 15 April 1978, Article 75.

is to strengthen the state status of the Georgian language (and the Abkhazian language in Abkhazia) throughout the entire territory of Georgia. This includes ensuring its use, protection, development, study, and promotion in all spheres of state and public life. It is worth noting that the adoption of this law was supported by professors and researchers, who submitted a statement to the Parliament of Georgia on December 25, 2014.[8] The Organic Law "On the State Language" provides detailed regulation of the status of the state language. According to this legislation, the state is obliged to continuously care for the preservation and study of the Georgian language and other languages, recognizing this as a crucial condition for the viability of the state language.[9] The Organic Law of Georgia "On the State Language" consolidates the constitutional status of the official language, establishes legal grounds for its use and protection, and regulates legal relations related to the functioning of official and non-official languages.

The scope of the organic law is broad, applying to both citizens of the country and stateless persons (including those without official status) as well as foreigners living in the territory of Georgia.[10] However, it does not apply to personal relationships.[11] The state language is used for communication between citizens and state authorities, and for the adoption of statutory and judicial acts. The use of the state language is mandatory in the proceedings of state and municipal bodies.[12] Proceedings are conducted in the state language, and individuals who do not know or do not adequately know the state language are provided with an interpreter. This ensures they can fully exercise all rights granted by the procedural legislation of Georgia. This right is guaranteed by the constitution of Georgia.[13]

Every citizen of Georgia has the right to demand the creation of appropriate conditions for the protection and development of the state language, the adoption of appropriate legal acts to ensure this, and more.[14] Through the state language, the population is integrated into various fields. It serves as a lever for achieving civil and societal unity and for resolving conflicts. Knowing the state language is not a privilege but a personal responsibility for every citizen of Georgia. Unfortunately, the issue of proficiency and use of the state language remains significant among ethnic minorities. Despite various efforts, including school education reforms, these measures have

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[8] Statement on the Law "On the State Language", https://www.tsu.ge/ka/news/ [accessed: 30.05.2024].

[9] Organic Law of Georgia "On the State Language", 22 July 2015, Article 4(3).

[10] Ibid., Article 1(2).

[11] Ibid., Article 1(3).

[12] Ibid., Article 11.

[13] Constitution of Georgia, 24 August 1995, Article 62(4).

[14] Organic Law of Georgia "On the State Language", 22 July 2015, Articles 9-10.

been less effective.[15] Consequently, non-achieving widespread proficiency in the state language within specific territorial units makes it difficult for all citizens of Georgia to access state services and fully exercise their basic rights. In this direction, it is necessary to plan effective measures and reflect them in state language and school education strategies. A unified action plan should be developed with the coordination of governmental bodies, setting measurable and realistic goals.

2.2. State Language Department, Protection and Development of the State Language

The main directions of the state language policy are determined by the Parliament of Georgia,[16] and the protection and promotion of the constitutional status of the state language are ensured by a special body – the State Language Department of Georgia. This department is responsible for determining and establishing the norms and special terms of the Georgian literary language, as well as implementing a unified state language policy.[17] The activities of the department are controlled, and the necessary regulations are approved by the Government of Georgia.[18]

State Language Department was created in 2017,[19] with its activities commencing in 2018. To effectively fulfill its assigned functions, the LEPL State Language Department launched an official website (www.enadep.gov.ge), which provides access to all necessary resources and action strategies used in its daily operations.

The State Language Department issues recommendations for the proper use of the state language to state and local self-government bodies, as well as public and private legal entities.[20] It also develops plans for the development of the state language(s) and the presentation of Georgia's linguistic diversity, applying various measures to achieve these goals. To effectively implement the 2023-2024 action plan project of the Unified State Language Program (Strategy),[21] the State Language Department announced public consultations

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15 Study of the Participation of Ethnic Minority Representatives in Political Life, Institute of Social Studies and Analyses, Tbilisi 2019, p. 3-4.

16 Organic Law of Georgia "On the State Language", 22 July 2015, Article 2(2).

17 See: Statute of the State Language Department, Approved by the Ordinance N540 of the Government of Georgia, 11 December 2017.

18 Organic Law of Georgia "On the State Language", 22 July 2015, Article 36(2)(4).

19 Ordinance N540 of the Government of Georgia "On Approving of the Statute of the State Language Department", 11 December 2017.

20 Statute of the State Language Department, Approved by the Ordinance N540 of the Government of Georgia, 11 December 2017, Art. 3.

21 See: Ordinance N629 of the Government of Georgia "On Approving of the Unified State Language Program (Strategy) for 2021-2030 and the Action Plan for 2021-2022", 21

on May 1, 2023. Information about these consultations was published on the department's social media platforms, including the official website, Facebook page, the website of the Center for Civil Integration and Interethnic Relations, and was sent to various television stations.[22] At the initiative of the department, transliteration rules have been revised, terminology across various fields has been corrected, and the grammar rules of the Georgian language are periodically updated to meet modern reality.

Despite the efforts of the department, the effectiveness of its activities remains one of the main challenges. Unfortunately, its activities are localized and quite limited, and its impact does not extend to lawmaking or law enforcement. A structural reform is necessary, integrating the body responsible for the protection and regulation of the state language into the legislative branch of government. The Department should be involved in the law-making process to make supervision on the compatibility of the statutes and by-laws with the standard and requirements of the literary language.

2.3. State Language, Broadcasting and Advertising

2.3.1. State Language and Broadcasting

It is important to protect the constitutional status of the Georgian language and encourage its use across all fields, especially in television broadcasting. Broadcasting news and socio-political programs in the state language enhances citizen awareness and engagement [Yunus 2013, 23]. Additionally, presenting university broadcasting programs in the state language helps to expand its use in education and science. Broadcasters aiming to attract a multilingual audience may face challenges due to Georgia's Law "On Broadcasting", which restricts the use of other languages.[23] However, dubbing or subtitling in the national language requires additional financial and human resources, which can be challenging for some broadcasters.

A television broadcaster authorized to carry out general national broadcasting in Georgia is required to broadcast programs in the state language.[24] This requirement allows for exceptions only as determined by Georgian

December 2021; "On Approving the Amendment in the Ordinance No. 629 of December 30, 2021 of the Government of Georgia "On Approving the Unified State Language Program (Strategy) for 2021-2030 and the Action Plan for 2021-2022" and the 2021-2030 Unified State Language Program (Strategy) 2023-2024 Action Plan, 10 August 2023.

[22] Summary Report of Public Consultations, Draft of the 2023-2024 Action Plan of the Unified Program (Strategy) of the State Language 2021-2030 (2023), https://enadep.gov.ge/uploads/matsne-5892558-0_1_____.pdf [accessed: 30.05.2024].

[23] Law of Georgia "On Broadcasting", 23 December 2004, Article 38.

[24] Ibid., Article 38(1).

legislation or the Communication Commission, which aims to protect the state language and encourage its active use by broadcasters. Authorized general local broadcasting TV stations must present news and socio-political programs in the state language,[25] particularly during prime time, to ensure that Georgian-speaking viewers have access to important information. This promotes the transparency and efficiency of the information dissemination and reception process.

For university broadcasters, the obligation is to broadcast programs in the state language of Georgia, except in cases specified by Georgian legislation or the Communication Commission.[26] This emphasizes the importance of university broadcasting and encourages the use of the state language in educational and academic contexts.

Encouraging the use of the state language and protecting its status is crucial, but achieving these goals involves certain practical difficulties that require the cooperation of relevant authorities and broadcasters, as well as effective management of resources. The Law "On Broadcasting" supports strengthening the position of the state language and encouraging its active use in society.[27] It acknowledges the multicultural environment and allows audiences to experience films in their original language through subtitles. Subtitling not only provides comfort for the audience by allowing them to enjoy films in their original language but also helps improve their knowledge of the Georgian language.

According to the law, any film produced in a non-state language and aired by a broadcaster must be dubbed in Georgian.[28] This rule ensures the strengthening of the state language's position and makes film content accessible to a wide audience. This restriction applies to all broadcasters, requiring that films created in a foreign language be dubbed into Georgian to minimize language barriers.[29] However, the National Communications Commission of Georgia is authorized to determine cases when a film produced in a non-state language can be broadcast in Georgian without dubbing, using only subtitles.[30] This flexibility allows broadcasters to air films in their original language under certain conditions.

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[25] Ibid., Article 38(2).
[26] Ibid., Article 38(3).
[27] Ibid., Article 511.
[28] Ibid., Article 511(1).
[29] Ibid.
[30] "Rules for Placing Programs in Non-state Languages in the Broadcasting Network", Approved by the Resolution N3 of the National Communications Commission of Georgia, 31 October 2016, Article 3(3).

The commission's resolutions specify how these obligations should be fulfilled, by which broadcasters, and under what conditions.[31] The quality of dubbing is a critical factor. Poor dubbing can negatively impact both the viewer's experience and the film's perception, while subtitling can be time-consuming and resource-intensive, especially when dealing with a large number of films. Moreover, cultural barriers must be considered, as the loss of the original language can sometimes lead to a blurring of cultural and emotional elements [Shabashvili and Gochitashvili 2020, 85]. The law strives to balance protecting and promoting the Georgian language while allowing viewers to watch movies in their original language with subtitles.

Only licensed or authorized broadcasters can exclusively broadcast major events in the state language in Georgia. This ensures that important events, news, and other critical information are provided to the public only by broadcasters that operate in accordance with Georgian legislation and have the appropriate license or authorization.[32] This legal requirement emphasizes the priority of the state language and ensures that all significant information is provided to the population of Georgia in a language they understand, contributing to the wide dissemination of information and raising public awareness. It also ensures the widespread use and protection of the state language, helping to strengthen its status.

Licensed and authorized broadcasters must be accredited by the state, which involves meeting certain requirements and standards [Gorgoshadze and Jakeli 2023, 86]. This accreditation ensures that broadcasters operate according to ethical norms and professional standards.[33] The main goal of this legislation is to protect the Georgian language, ensure the reliability of information, and improve the quality of broadcasting. This guarantees that important events are covered by professional and reliable broadcasters, ensuring high-quality information dissemination. Fulfillment of this requirement enhances public awareness and encourages the use of the state language, representing an important step toward the development and protection of the Georgian language.

2.3.2. State Language and Advertising

The Law of Georgia "On Advertising" plays a crucial role in the protection and promotion of the state language. The law mandates that advertisements must be understandable at the moment of presentation, without the need for

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31 Ibid., Article 3.

32 Law of Georgia "On Broadcasting", 23 December 2004, Article 58(2).

33 Resolution N2 of the National Communications Commission of Georgia "On the Approval of the "Code of Conduct for Broadcasters", 12 March 2009.

special knowledge or technical means, ensuring clarity and transparency for viewers or readers. The purpose of advertising, to directly and immediately influence consumer behavior, can only be achieved if its content and intent are easily understood.

Advertisements must be distributed throughout Georgia in the state language. Exceptions are made for programs and publications broadcast in other languages and for images of goods where inscriptions in other languages are permissible, according to specific exceptions defined by Georgian legislation and the commission. Trademark or service mark owners registered in another language are required to transliterate their marks into Georgian. In Georgia, signs must be written in the state language, with the option to include foreign language text. The size of the foreign language text should not exceed that of the state language text, emphasizing the priority of the Georgian language in public spaces and promoting its widespread use. For bilingual illuminated signs, all text (both Georgian and foreign) must be equally illuminated and legible, ensuring equal access to information and transparency. The language norms and rules used in advertising must comply with state legislation, ensuring adherence to language standards.[34]

The law strictly protects the position of the Georgian language in advertising, helping to strengthen and popularize its status. Requiring the use of the state language ensures that all commercial and informational content is accessible to the majority of the population. Making advertisements comprehensible without special knowledge or technical means lowers the information barrier and facilitates consumer decision-making.

Recognizing the multicultural environment and international business needs, the law allows for inscriptions in foreign languages. However, it requires transliteration into the local language to ensure information availability to the local population. Advertisers may find it challenging to meet these requirements, especially when presenting advertisements in different languages. Compliance with language norms and equal illumination of signs demand additional resources, complicating the activities of small businesses.

The Law "On Advertising" defines strict language norms for advertising, aiming to protect and promote the Georgian language. This ensures that the state language remains a priority in advertising and public spaces, simplifying the reception and distribution of information. However, these requirements can present difficulties for advertisers and businesses trying to attract multilingual audiences.

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[34] Law of Georgia "On Advertising", 18 February 1998, Article 4(1-5).

2.4. Administrative Responsibility for the breach the Rule of Using the State Language

The Code of Administrative Offenses of Georgia prescribes administrative responsibility for violations of the rules concerning the use of the state language. This includes the obligation for film exhibitors to comply with the law when showing films in cinemas, ensuring that films are accessible to all viewers through subtitling or dubbing in Georgian.[35] This applies to films shown in their original language; they must be subtitled or dubbed in Georgian to provide full access to the content for Georgian-speaking viewers [Jorbenadze 2019, 224]. Even non-original production (for example, translated versions of films) must be subtitled or dubbed in Georgian to prevent any language barriers and to promote the use of the Georgian language. The law imposes severe sanctions on demonstrators.

Tobacco products must be wrapped and sold with proper labeling; selling them without proper packaging is not allowed. Additionally, medical warnings on tobacco product packaging must comply with relevant regulations and be updated periodically to ensure consumers are consistently informed about the dangers of tobacco products. Proper packaging and updated warnings are crucial for presenting accurate consumer information.

Violations of this requirement, such as providing false, misleading, or incorrect information on packaging that suggests the product is less harmful than it is, are subject to severe sanctions, including fines and product confiscation. The law mandates that all information on tobacco product packaging and labels must be accurate and in the state language. Violation of this rule leads to administrative responsibility, which aims to protect consumers, prevent misinformation, and ensure accurate information about the harmfulness of tobacco products.[36]

Severe sanctions for repeated violations and the dissemination of false information serve as significant deterrents and underscore the necessity of complying with these regulations. These measures are designed to safeguard consumer rights and promote the use of the state language in all commercial and public communications.

In case of violation of the rules regarding the use of the state language, the National Communications Commission of Georgia may impose sanctions, including warnings and fines [Jorbenadze 2019, 223]. Television and radio broadcasters are required to provide subtitling or dubbing of programs in the state language.[37] Violation of this rule will result in a warning

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[35] Code of Administrative Offences of Georgia, 15 December 1984, Article 14410.

[36] Ibid., Article 1556.

[37] "Rules for Placing Programs in Non-state Languages in the Broadcasting Network", Approved by the Resolution N3 of the National Communications Commission of Georgia,

and potentially a fine. Additionally, services and products must be labeled in the state language. Incorrect, misleading, or harmful labeling will result in fines and product confiscation. The decisions and resolutions adopted by the Commission make it clear that violating the use of the state language in information provision leads to sanctions, ensuring the protection of consumer interests.[38] Violations of the state language usage rules will result in appropriate penalties, including warnings, fines, and product confiscation. These measures ensure the protection of users' rights and the prioritization of the state language.

CONCLUSION

The legal status and protection of the state language is crucial for any nation, especially in countries where the language is intrinsically linked with cultural and national identity. In Georgia, the protection of the state language at the constitutional level and its definition in the form of a special, organic law underscores the state/s policy and commitment to preserving its linguistic heritage.

The State Language Department is actively engaged in efforts to uphold and promote the state language. However, its activities are often not extensive, limited, and lack sufficient dissemination both within society and among state bodies. Structural reform and integration of the department into the organizational framework of the Parliament of Georgia would be appropriate. This integration would ensure its active involvement in law-making activities and elevate its status, thereby enhancing its legitimacy and effectiveness in interactions with other branches of government.

The academic community's involvement in the development of the state language is notably insufficient. Universities are less involved in this process, which is primarily managed by philologists and linguists. As a result, the language has remained outside of public and political discourse and has not kept pace with modern developments.

Reforming the mechanisms for the legal protection of the state language and creating a flexible legal environment, along with active integration at all levels of education, will facilitate the establishment of an effective practice for protecting the state language. Such reforms would ensure that

31 October 2016, Article 3(3).

[38] Decision No-22-18/570 of the National Communications Commissions of Georgia "On the Imposition of Administrative Responsibility on Ltd Alt-Info", 15 December 2022; Decision N95/18 of the National Communications Commissions of Georgia "On the Imposition of Administrative Responsibility on Broadcaster Ltd Stero+", 22 February 2018.

the Georgian language remains vibrant and integral to the national identity, reflecting both its historical significance and its contemporary relevance.

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FUNCTIONING AND MANAGEMENT OF HOUSING COMMUNITIES: SELECTED ISSUES

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Abstract. The article discusses selected problems related to the operation of housing communities, especially those related to the residents who do not pay their rent or disrupt domestic order. It is shown that the current legal regulations do not protect honest residents from the misbehaviour of other residents. New regulations are needed to facilitate the collection of rent arrears and the removal of disruptive residents from the housing community.

Keywords: housing community; cost; coexistence.

INTRODUCTION

There are many housing communities in Poland. Each multi-unit building may constitute a housing community or be part of the resources of a housing cooperative. It is difficult to indicate a specific number of housing communities,[1] because they are not subject to entry in any register, i.e. neither the national court register, or the central register and information on economic activity, nor any other. A large number of owners of independent residential premises or premises for other purposes in a housing community causes difficulties, including: management of common parts, settlements with people who sell premises and cease to be members of the community, disposal of associated rooms.

The text identifies selected areas in which functioning and administration of housing communities encounter difficulties and suggests directions for

[1] Information that can be found on the Internet about the number of housing communities in Poland indicates a large discrepancy from 5 million housing communities, https://obiektymieszkalne.muratorplus.pl/zarzadzanie-i-eksploatacja/wspolnota-mieszkaniowa-czym-jest-wspolnota-mieszkaniowa-o-czym-moze-decydowac-aa-1Wad-D7G2-wGbT.html [accessed: 23.05.2023], https://strefabiznesu.pl/mieszkanie-lub-dom-we-wspolnocie-znaj-swoje-obowiazki-korzystaj-z-praw-czlonka-wspolnoty-mieszkaniowej-radzi-ekspert/ar/c3-14302163 [accessed: 23.05.2023] to 183,775 housing communities that are in the database, https://www.coig.com.pl/wykaz_lista_baza-wspolnoty-mieszkaniowe.php [accessed: 23.05.2023]. The first result is quite realistic, because each block of flats can constitute a housing community.

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changes in legal regulations that would solve these difficulties. The starting point for the undertaken research is the thesis that legal regulations regarding functioning a housing community are, in their current form, insufficient to protect honest residents against dishonest residents who do not pay rent and other fees to the housing community or who disturb neighbourly relations The Act on the Ownership of Premises[2] indicates two types of housing communities: up to three separate premises and non-separate premises, the so-called small communities, and with more than three separate premises and non-separate premises, the so-called large communities (Article 19 AOP). The given study deals with large housing communities.

The article uses the dogmatic-exegetical method to analyse legal texts and the method of legal functionalism, illustrating the legal norm in practice.

1. THE COSTS OF MANAGING COMMON PROPERTY

Provisions of Article 18(1) and (2) AOP provide that the owners of premises may specify the method of managing the common property in an agreement establishing separate ownership of the premises or in an agreement concluded later in the form of a notarial deed. And in the event of successive separation of premises, the method of managing the common property adopted by the current co-owners also applies to each subsequent buyer of the premises. The provisions of Article 20 AOP and Article 199 of the Civil Code[3] define the statutory method of managing a housing community; the provisions of Article 18(1) AOP and Article 185 of the Real Estate Management Act[4] indicate the possibility of specifying the management of a housing community in an agreement, while the provisions of Article 203 CC, and Article 612, 938 of the Code of Civil Procedure[5] indicate the possibility of coercive management of the housing community [Gniewek 2013, 843, 854, 862-863]. The method of managing a shared property is most often specified in a notarial deed regarding the establishment of the first premises constituting separate ownership and its sale, by entrusting the management to a natural or legal person who is the property manager, i.e. an entrepreneur conducting business activity in the field of real estate management (Article 184a REM). In practice, the future first owner of the separated premises and the sold residential premises has no influence on the choice of the method of managing the common property.

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[2] Act of 24 June 1994 on Ownership of Premises, Journal Laws of 2021, item 1048 [hereinafter: AOP].

[3] Act of 23 April 1964, the Civil Code, Journal of Laws of 2023, item 1610 [hereinafter: CC].

[4] Act of 21 August 1997 on Real Estate Management, Journal of Laws of 2023, item 344 [hereinafter: REM].

[5] Act of 17 November 1964, the Code of Civil Procedure, Journal of Laws of 2023, item 1550.

Subsequent natural persons, legal persons, or organizational units without legal personality cannot change the method of managing the common property in subsequent agreements on establishing separate ownership of premises and their sale (Article 18(2) AOP). The method of managing the common property chosen during the first agreement to establish separate ownership of the premises and its sale in a housing estate consisting of several hundred apartments is often binding on the conclusion of the last agreement to establish separate ownership of the premises and its sale. An entrepreneur building a multi-apartment estate and selling residential premises and premises for other purposes (a developer) often decides in the first agreement establishing separate ownership of the premises and its sale that the common property will be managed by himself or by a manager chosen by him and organizationally related to him (e.g. a family member running a property management business) or capital (e.g. subsidiary). The purchaser of a residential premises or premises for other purposes has no influence on the shape and content of the management contract concluded between the developer and the manager (Article 185(2) REM). Outside para. 2 remaining paragraphs in Article 185 REM have been repealed, so the Real Estate Management Act does not indicate the *essentialia negotii* of real estate management contracts [Jaworski, Prusaczyk, Tułodziecki, et al. 2023]. The management contract is a paid contract [ibid.]. The amount of remuneration for managing common property can be set quite freely, and it directly affects the amount of rent paid by entities purchasing premises, e.g. for 1 m^2 of premises fees incurred for future renovations of common property, etc. This may be a source of extraordinary profits for the entity managing the common property. Whereas, for purchasers of the premises it may result in an excessive burden of the amount of rent paid and other fees for the common property, which are disproportionately high compared to the residents of housing communities whose inhabitants have changed the method of managing the common property to the so-called ownership (i.e. they elected a management board from among themselves or entrusted management to an entity of their choice).

This unfavourable situation for the owners purchasing premises in newly constructed multi-apartment buildings will last at least until the land and mortgage registers are established for premises whose area exceeds half of the building's area. The waiting time for establishing a land and mortgage register for a new mortgaged residential premises ranges from several days to a few weeks if the property is to be mortgaged, and up to one year or longer without a mortgage. Only then can the residents organize a meeting of the owners of the premises and adopt a resolution on changing the method of managing the common property, as they are able to outvote the developer. With the successive separation of premises, a question arises as to how

the entrepreneur (developer) is to vote during the meetings of the housing community. Is what he has not sold one unit or does he have as many votes as may be allocated in the future? In the latter case, the protection of minority owners resulting from Article 23(2) AOP is illusory when voting at community meetings, since the owner of non-separate premises can claim that he has as many votes as the number of premises he can theoretically separate (establish separate ownership) [Badura and Kaźmierczyk 2020]. It is assumed that the developer votes with a share in the common property, including a share in the common property equal to the area of non-separate premises to the total area of the building.

Adopting a resolution on changing the method of managing the common property from entrusted to owner-like allows the residents of the housing community to elect their own management board (Article 20(1) AOP), which may manage the common property or select the manager of the common property following the collection of offers. Only then is the fee paid by residents for managing the common property reduced and they have an influence on the amount of payments for the renovation of common property, i.e. roofs, gutters, facades, sidewalks, internal roads, garbage buildings, playgrounds, etc.

The free market and freedom of contracts in the initial period of operation of housing communities fail in terms of management costs. Owners of residential premises often incur excessive fees for managing common property. Such situations can be prevented by statutory regulation of the content of the common property management agreement in terms of maximum fees, among others, for management; the amount of rent paid by the owners of the premises per 1 m^2 of the premises; the amount of fees for future renovations, etc., in the period from the date of separation of the first premises to the date of the election of a new management board by the residents. As a *de lege ferenda* postulate, it can be indicated that the amount of the above-mentioned fees should not exceed the average fees applicable in the district for the management of housing communities.

The second financial issue that needs to be resolved is the problem of returning the funds that owners and residents contribute for possible renovations of the common property. The amount of these fees is usually calculated as the product of the area of the premises together with the area of the adjacent rooms multiplied by a specific amount of money, e.g. PLN 1, PLN 1.35, etc. Fees for future renovations are usually paid from the separation of the first premises. In new housing communities, there is often no need to carry out any renovation work on common areas, or only minor ones are carried out. People, selling premises shortly after purchasing them, may incur fees for future renovation expenses that will not be incurred while they are owners of the premises or the funds will only be partially used for these

purposes. It happens that the owner of the premises regularly pays contributions for possible future renovations, later sells the premises, and while he was a member of the housing community, no renovation of the common properties was carried out. After selling the premises, its owners should be reimbursed at least part of the fees paid for future renovations, but not all of them, because they contributed to the need for their renovation in the future while they were using the common properties. A resolution in this respect may be adopted by the owners of premises in a housing community, but this does not actually happen. This is another situation in which the market and the freedom of operation of entities fail. In this respect, it is also advisable for the legislator to intervene and introduce provisions into the Act on the Ownership of Premises, indicating the obligation to return part of the funds paid by the owners of the premises for renovation purposes when they sell the premises, if during the time they were residents of the housing community, no renovation work was carried out or they were carried out only to a limited extent.

2. THE PROBLEMS OF COEXISTENCE WITH TROUBLESOME RESIDENTS AND TENANTS OF THE PREMISES

The provision of Article 16 AOP stipulates that the housing community may, through a lawsuit, demand the sale of the premises by auction pursuant to the provisions of the Code of Civil Procedure on real estate enforcement if the owner of the premises has a long delay in paying the due fees, or grossly or persistently violates the applicable house order, or makes the use of other premises or common property burdensome through his inappropriate behaviour. The Constitutional Tribunal in its judgment of July 29, 2013, ruled that the provision of Article 16(1) AOP is consistent with Article 64(1) and (2) in connection with Article 64 (3) and Article 31 (3) of the Constitution of the Republic of Poland[6] in the scope which provides for the possibility of a housing community requesting an auction sale of premises belonging to a member of this community who is in arrears with the payment of due fees for a long time. The owner whose premises have been sold is not entitled to a replacement premises. This provision is difficult to apply in practice. The state of "long-term arrears" must persist at the time when the community brings the action and the judgment is adjudicated [Izdebski 2023; Dziczek 2021].

The arrogance of some owners of residential premises, who consciously and deliberately do not pay rent, fees for managing the common property,

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

or fees for future renovations for long periods of time, may last several years before the court issues a judgment allowing the sale of the premises by a court bailiff under court supervision. Qualifying the housing community's as a procedural claim allows the submitted application to be subjected to judicial review from the point of view of the prerequisites for the abuse of subjective rights provided for in Article 5 of the Civil Code, which would be difficult if it was assumed that the housing community would have the right to file a complaint under Article 16(1) CC [Izdebski 2023]. The Supreme Court ruled that the demand for the sale of premises may only apply to separate premises in its judgment of June 16, 2009, reference number V CSK 442/08. The Supreme Court adopted a rigorous grammatical interpretation which, without any justification, places the non-paying owner of premises that have not yet been separated, i.e. the developer, in a privileged position [Szymczak 2023]. If he fails to comply with his obligations in terms of paying the fees or the method of using these premises, in the opinion of the Supreme Court, excluding him from the housing community is inadmissible [ibid.]. The case law indicates that the right provided for in Article 16(1) AOP is a manifestation of the most far-reaching interference of the housing community in the ownership right to the premises, which should encourage the use of this measure of protection as a last resort when milder legal measures do not have the desired effect.[7] With this interpretation of Article 16 AOP by the courts, honest owners of premises pay fees for the maintenance of common parts of the property for those owners who do not pay. This may be the reason for increasing fees for the maintenance of common properties, only to ensure that payments from regularly paying residents cover the costs of managing the common property and bills for common utilities, i.e. electricity, gas, water, heating, etc. When the apartment of the owners who did not pay rent and other fees is sold, the community board usually does not adopt a resolution to refund to the residents (who regularly paid fees to the community) a part of what they paid for the former owners of the property that was sold in enforcement proceedings. This issue also requires statutory regulation in Article 16 AOP by adding paragraphs indicating how to settle and distribute the funds obtained by the housing community from the sale of the premises in enforcement proceedings.

The situation in housing communities is even more difficult, with owners of residential premises behaving in a nuisance way, disturbing the peace not only of the closest neighbours but of all the residents. Arguments, very

[7] Judgment of the District Court in Gorzów Wielkopolski of 21 August 2018, ref. no. I C 1095/17, Lex no. 2695507; judgment of the Court of Appeal in Cracow of 16 June 2020, ref. no. I ACa 84/20, Lex no. 3102812; judgment of the Court of Appeal in Warsaw of 8 November 2018, ref. no. I ACa 849/17, Lex no. 2605235.

loud use of radio and television sets, aggressive behaviour towards other residents of the community may last for many years before the court decides on the forced sale of the premises of the troublesome owner. This situation even makes it impossible for the neighbours of the troublesome resident to sell their premises when the potential buyer finds out how negatively the future neighbour behaves, which is easy to check and observe. A similar situation occurs in cases of renting premises to persons who behave in a way that is bothersome to other residents of the housing community. This may be a reason for terminating the lease agreement if such a condition is provided for in the agreement. For properly behaved owners of residential premises who would like to live in normal conditions, a troublesome tenant may also cause difficulties in selling their residential premises.

The provision of Article 16 AOP does not apply to co-owners of residential or non-residential premises. A housing community cannot effectively bring an action under Article 16 AOP against only one of the co-owners of the premises, which would then aim at the forced sale of his/her share in the ownership of the premises. Justifying the claim in question, the behaviour of one of the co-owners does not burden the other co-owners [Izdebski 2023]. Therefore, the community cannot pursue a claim against all jointly entitled persons in such a case.

The above-mentioned cases of troublesome owners or tenants of premises do occur and sometimes last for a very long time before the premises are forced to be sold, but this does not apply to the situations where the tenant is a nuisance. The lack of an efficient justice system, which responds with considerable delay to the situations of permanent disturbance of the peace of the residents, proves the inefficiency of the state, which tolerates inappropriate behaviour of some residents at the expense of the peaceful owners of the premises.

The proposals for improving the legal regulations contained in the Act on the Ownership of Premises include imposing a penalty of a temporary ban on living in a housing community together with the payment of compensation to the neighbours whose peace was disturbed, or a temporary arrest, as a way to temporarily isolate a resident who behaves inappropriately. In the case of tenants who grossly or persistently violate the applicable house order, the management board of the housing community should have the right to terminate the lease agreement with an immediate effect.

CONCLUSIONS

The legislator may approach the indicated cases of improper functioning of the housing community with indifference, concluding that since the Act

on the Ownership of Premises has not been amended in the above-mentioned scope since its entry into force on January 1, 1995, there is no need for legislative intervention. This approach is not entirely appropriate. Currently, difficulties in functioning housing communities include cases of residents who consciously and deliberately do not pay fees for the use of common property and rent, being aware that they can stop the process of forced sale when they pay several arrears of rent. Pathological behaviour of residents that blatantly and persistently violates the applicable house order also causes difficulties in functioning the residents' community. In this respect, there are no effective legal regulations that would make it possible to isolate a troublesome resident quickly for a specified period and, if this proves ineffective, to exclude the resident from the community. This proves the weakness of the state, which has long tolerated inappropriate social behaviour at the expense of honest, peaceful residents of housing communities. A ban on temporary living and staying in the community, together with a fine or temporary arrest for inappropriately behaving residents, should contribute to maintaining better neighbourly relations in the future.

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CONSTITUTIONAL POSSIBILITIES OF LIMITING HUMAN AND CIVIL RIGHTS AND FREEDOMS – SELECTED ISSUES

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Abstract. In a democratic state governed by the rule of law, the limitation of constitutionally guaranteed freedoms and rights may take place as an exception to the general principle of the protection of freedoms. This article examines the constitutional rights and freedoms of human beings and citizens, and the possibility of limiting them, as outlined in the Constitution of the Republic of Poland of 1997. Given the unprecedented circumstances of the COVID-19 pandemic, the discussion extends to the solutions adopted in Poland during this period, with an attempt to assess the constitutionality of these regulations.

Keywords: constitution; human and civil rights and freedoms; state of emergency.

INTRODUCTION

The rights and freedoms of human and citizen constitute the foundation of a democratic society, reflecting its values, norms and principles. However, in any constitutional system, there are situations where it may be necessary to restrict these rights for the benefit of the general public or to protect essential public interests. Adopted on 2 April 1997, The Constitution of the Republic of Poland contains a catalogue of basic freedoms, rights and duties of human and citizen.[1] They are written in Chapter II, right after the main principles of the political system. This clearly proves how important the rights and obligations imposed on the citizen are, and how important it is to fulfil them. In the Polish legal doctrine, it is claimed that freedom is a primal, immanent feature that a person acquires at the moment of birth. This means that a human being can decide their own fate, make such choices as they consider appropriate and undertake acts of power that seem to be most beneficial to them [Kazimierczuk 2014, 101].

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

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The Constitution of the Republic of Poland, in Article 31(1), permits any limitation upon the exercise of constitutional freedoms and rights to be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of others. Such limitations shall not violate the essence of freedoms and rights. This article aims to explore the constitutional rights and freedoms of human and citizen and the potential for their limitation, as per the Constitution of the Republic of Poland of 1997. It further examines the solutions implemented in Poland during the COVID-19 pandemic, with an attempt to assess the constitutionality of these regulations. The research method used in this work is a dogmatic and legal method, involving the analysis of applicable legal provisions and current views presented in doctrine and jurisprudence.

1. RIGHTS AND FREEDOMS OF HUMAN AND CITIZEN IN THE LIGHT OF THE CONSTITUTION OF THE REPUBLIC OF POLAND

The essence of man's rights is to protect the dignity and freedom of the individual. Freedoms and rights form a "shield" protecting the dignity of every human being. Human dignity is a source of freedom and rights for the individual, it is also a basic principle of law. It combines constitutional freedoms and individual rights, at the same time constituting one of the foundations of a democratic state of law, ensuring protection against objectification for every person [Chmaj 2002, 85]. As P. Tuleja points out, "Human dignity is the source and basis of the catalogue of constitutional freedoms and rights. The Constitution does not directly resolve the dispute about the positivistic or natural law nature of man's rights. By pointing to the inherent nature of dignity and assuming that it is the source of man's rights, the Constitution, however, determines their suppositive basis. The content of freedoms and rights does not depend solely on the will of the constitution-maker and the legislator. The Constitution does not so much confer or grant dignity and the fundamental freedoms and rights related to it, but rather declares their protection" [Tuleja 2023].

Pursuant to Article 30 of the Constitution of the Republic of Poland, the inherent and inalienable dignity of the human shall constitute a source of freedoms and rights of men and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities. Human dignity is the source and basis of the catalogue of constitutional freedoms and rights. The Constitutional Tribunal assumes that the prohibition of violating dignity is absolute and applies to everyone, while the obligation

to respect and protect dignity has been imposed on the public authorities of the state.[2]

Human freedom, i.e. the ability to freely decide for each person, is subject to legal protection. This means that freedom is a state to be protected by law, which is the task of public authorities. Therefore, the legislator is obliged to establish regulations that will prevent violations of freedom and create sanctions in the event of violation of freedom and will restore the lawful state [Wojtyczek 2001, 206]. The positive aspect of "individual freedom" consists in the fact that the individual is free to shape their behaviour in a given sphere, choosing the forms of activity that suit them best or refrain from undertaking any activity. The negative aspect of "individual freedom" consists in the legal obligation to refrain – anyone – from interfering in the sphere reserved for the individual. Such an obligation is incumbent on the state and other entities.[3]

Pursuant to Article 5 of the Constitution of the Republic of Poland, the Republic of Poland protects the independence and integrity of its territory, ensures the freedoms and rights of men and citizens, the safety of the citizens, protects the national heritage and ensures environmental protection, guided by the principles of sustainable development. The Constitution comprehends rights and freedoms in a holistic way, regulating both rights and freedoms of a personal and political nature, as well as rights and freedoms of an economic, social and cultural nature, and finally, the obligations of the individual towards the state [Garlicki 2006, 58].

As the Constitutional Tribunal stated in its judgment of 30 July 2014, "the legislator establishes the privacy of an individual, not as a constitutionally conferred subjective right, but as a freedom constitutionally protected with all the resulting consequences. First of all, it means the freedom of individuals to act within the framework of freedom up to the limits established by law. Only an unambiguous statutory regulation may impose restrictions on specific behaviours falling within the scope of a specific freedom. It is unacceptable to presume the competence of public authorities in the field of interference with individual freedom. [...] This standard applies to all constitutional freedoms of man."[4]

The Constitution covers rights and freedoms in a comprehensive manner, regulating both rights and freedoms of a personal and political nature, as well as rights and freedoms of an economic, social and cultural nature

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[2] Judgment of the Constitutional Tribunal of 24 February 2010, ref. no. K 6/09, OTK-A 2010.

[3] Judgment of the Constitutional Tribunal of 18 February 2004, ref. no. P 21/02, OTK ZU No. 2/A/2004.

[4] Judgment of the Constitutional Tribunal of 30 July 2014, ref. no. K 23/11, OTK ZU No. 7/A/2014, item 80.

and the obligations of the individual towards the state. The catalogue of freedoms and rights is contained in particular in Chapter II of the Constitution of the Republic of Poland, which guarantees, among others: the right to life (Article 38); inviolability and personal freedom (Article 41); right to a court (Article 45); the right to protection of privacy (Article 47); parental rights (Article 48); freedom of movement (Article 52); freedom of speech (Article 54); freedom of assembly (Article 57); the right to strike (Article 59); equal access to public service (Article 60); freedom to choose and practice a profession and place of work (Article 65); the right to safe and hygienic work conditions (Article 66); health care (Article 68) or the right to education (Article 70).

2. CONSTITUTIONAL POSSIBILITIES OF LIMITING THE RIGHTS AND FREEDOMS OF HUMAN AND CITIZEN

The Constitution of the Republic of Poland in Article 31(3) allows for the possibility of restrictions on the exercise of constitutional freedoms and rights, which may be established only by statute and only when they are necessary in a democratic state for its security or public order or for the protection of the environment, public health and morals, or freedom and the rights of others. This is confirmed in the judgments of the Constitutional Tribunal, stating that "the dependence of constitutional restrictions on freedoms and rights on statutory provisions should be referred to two issues. Firstly, it is a reminder of the so-called principle of exclusivity of the act for regulating the legal status of an individual in a state, which is the implementation of the idea of a state operating on the basis and within the limits of the law (legal state). Secondly, it formulates the requirement for appropriate details of the statutory regulation. This means that the act should independently determine all the basic elements of the limitations of a given freedom so that on the basis of reading the provisions of the Act, it is possible to determine the specific scope of this limitation. It is unacceptable to adopt blanket regulations in the Act, leaving the executive authorities the freedom to regulate the final shape of these limitations, and in particular to determine their scope."[5]

Each limitation of rights and freedoms must, therefore, be assessed in terms of its necessity, whether the same objective could not have been achieved by other means, less burdensome for the citizen and less interfering with the sphere of his freedoms and rights. However, the constitutional legislator did not define how to understand the concept of the essence

[5] Judgment of the Constitutional Tribunal of 12 January 2000, ref. no. P 11/98, OTK ZU No. 1/2000, item 3; judgment of the Constitutional Tribunal of 6 October 2009, ref. no. EN 46/07.

of freedoms and rights. The prohibition of violating the essence of freedoms and rights has been extended by the Constitutional Tribunal's jurisprudence to the principle of proportionality. It has been interpreted by the Court from the principle of a democratic state governed by the rule of law and contains a general directive so that the legislator's interference with the freedom or right of the individual should not be too great but appropriate to the situation. The Constitutional Tribunal, assessing whether a given limitation is proportional, conducts a three-point proportionality test, which consists in stating: 1) whether the controlled legal provision will lead to the achievement of the goal intended by the legislator, i.e. whether it will protect at least one of the values referred to in Article 31(3) of the Constitution (condition of suitability); 2) whether the controlled provision of law is the least burdensome possible means to achieve the goal set by the legislator (condition of necessity); 3) whether the good (constitutional value) lost as a result of the limitation of freedom or fundamental right remains in proportion to the good (constitutional value) achieved by the controlled provision (proportionality in the *strict sense*).[6]

Proportionality is a limitation clause, the nature of which results from the properties of the legal principles that determine the content of individual freedoms and rights. The principle of proportionality applies when assessing state interference in freedom or human rights. In a situation where the violation of human rights consists in abandoning or omitting their protection, then, according to P. Tuleja, one can refer to the so-called reverse proportion, which is used to determine whether the order to protect constitutional rights is implemented to the extent required by the Constitutions [Tuleja 2019, 117].

Limitation of human rights and freedoms is also possible in the event of the introduction of emergency states regulated in Article 228-234 of the Constitution of the Republic of Poland. The term "state of emergency" in a democratic state means a legal regime introduced in the event of a specific threat, the removal of which is possible only by means of exceptional measures. This regime is primarily characterised by the limitation (suspension) of certain rights and freedoms of the individual. There may also be a transfer of competences between public authorities or granting them special powers to remove the threat [Prokop 2005, 9].

It should be emphasised that the introduction of a state of emergency is a sovereign right of every state. The Constitution of the Republic of Poland

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[6] Judgments of the Constitutional Tribunal: of 29 June 2001, ref. no. K 23/00 OTK ZU No. 5/2001, item 124; of 17 May 2006, ref. no. K 33/05 OTK ZU-A 2005, No. 5, item 57; of 13 March 2007, ref. no. K 8/07, OTK ZU No. 3/A/2007, item 26; of 22 March 2017 SK 13/14, OTK ZU A/2017, item 19.

in Chapter XI provides for three states of emergency: natural disaster, exceptional and war. The catalogue of constitutional states of emergency is closed, which is tantamount to the prohibition of establishing by statute other states of emergency than those listed in Article 228(1).[7] A state of emergency can only be introduced if ordinary constitutional measures are insufficient, and in addition, each of these states can be introduced after additional conditions have been met. At the same time, it is very important that these restrictions must not violate the essence of freedoms and rights. They should, therefore, continue to be implemented, despite their narrowing, in the spirit of the values behind their introduction. In doing so, it is necessary that the restrictions introduced comply with the above-mentioned principle of proportionality. Pursuant to Article 228(2) of the Constitution, a state of emergency may be introduced only by regulation and which shall be additionally made public. Analysis of the Article 228 of the Constitution of the Republic of Poland suggests that all states of emergency should be characterised by the following principles: uniqueness, legality, proportionality, expediency, protection of the foundations of the legal system and protection of representative bodies [Prokop 2005, 17]. It should be emphasised that these rules apply to all states of emergency, regardless of their territorial scope and duration.

Pursuant to Article 228(3) of the Constitution of the Republic of Poland, the principles of operation of public authorities and the scope to which human and citizen freedoms and rights may be limited during individual states of emergency are specified by law.[8] It should be emphasised that the possibility of introducing them depends on the source of the threat, which requires extraordinary solutions. In the case of martial law, it is a matter of threat to an external state, armed attack on the country or joint defence resulting from allied obligations (Article. 229), in the event of an internal emergency threat to the system of the country, public order or the security of its citizens (Constitution, Article 230(1)), and in the case of a natural disaster, the occurrence of natural disasters or technical failures, and specifically the prevention or removal of their effects (Constitution, Article 232).

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[7] It should be added that Article 116 of the Constitution (in Chapter IV, entitled "Sejm and Senate") adds a state of war. The state of war was not accidentally regulated separately, which means that the constitutional legislator did not intend to classify it as a state of emergency. The state of war refers only to the international relations of the Republic of Poland and does not, in principle, cause direct changes in domestic law.

[8] Act of 29 August 2002 on Martial Law and the Competences of the Commander-in-Chief of the Armed Forces and the Rules of his Subordination to the Constitutional Authorities of the Republic of Poland, Journal of Laws 2022, item 2091; Act of 21 June 2002 on the state of emergency, Journal of Laws of 2017, item 1928; Act of 18 April 2002 on the state of a natural disaster, Journal of Laws of 2017, item 1897.

As noted by M. Brzeziński, the introduction of states of emergency affects, among others, the freedoms and rights of human and citizen in a radically different way from the restrictions applied in the conditions of ordinary threats, i.e. everyday and crisis threats [Brzeziński 2014, 171]. However, there are also rights that cannot be limited due to the state of emergency. When imposing martial law and a state of emergency, the scope of these limitations must not reduce freedoms and rights such as: human dignity, protection of life, humanitarian treatment, free access to court, freedom of conscience, religious freedom, and there must be no discrimination manifested in the lack of legal possibilities to introduce any limitations on grounds of race, gender, language, faith or lack of it, social origin, ancestry or property (Constitution, Article 233(1-2)). In the event of a natural disaster, the Constitution in Article 233(3) contains a positive clause, indicating the rights that may be subject to limitations by law, including the freedom to economic activity, personal freedom, inviolability of the home, freedom of movement and sojourn on the territory of the Republic of Poland, the right to strike, the right of ownership, freedom to work, the right to safe and hygienic conditions of work. This means that the legislator cannot limit any other rights and freedoms guaranteed in the Constitution.

3. LIMITATIONS ON HUMAN RIGHTS AND FREEDOMS ADOPTED BY THE POLISH LEGISLATOR IN THE ERA OF THE COVID-19 PANDEMIC

Due to the outbreak of the SARS-CoV-2 virus, the situation of many people has changed radically, as widespread and far-reaching restrictions have been introduced that affect the entire society, both in the sphere of official affairs, business transactions and everyday life. In Poland, first, a state of epidemic threat was announced, and then a state of epidemic.[9] The legislator did not decide to take advantage of the introduction of a state of emergency. However, the legislator decided to use Article 46 of the Act of 5 December 2008 on prevention and combating infections and infectious diseases in humans, according to which in the event of a state of epidemiological emergency or state of the epidemic, the competent authority may,

[9] The Regulation of the Minister of Health of 13 March 2020 regarding the announcement of the state of epidemic threat in the territory of the Republic of Poland (Journal of Laws item 433, as amended) and of 20 March 2020 on the cancellation of the state of epidemic emergency in the territory of the Republic of Poland (Journal of Laws, item 490) and of 20 March 2020 on the declaration of the state of the epidemic in the territory of the Republic of Poland (Journal of Laws of 2022, item 340), which was cancelled by the Regulation of 12 May 2022 on the cancellation of the state of epidemic in the territory of the Republic of Poland (Journal of Laws, item 1027).

by way of regulation, enter the sphere of civil rights and freedoms in a very broad manner. Therefore, it was decided to temporarily limit certain types of movement, introduce a ban on organising shows and other gatherings of the population, temporarily limit the functioning of certain institutions or workplaces, or introduce an obligation to carry out protective vaccinations.[10] The Act was amended by the Act of 2 March 2020 on special solutions related to the prevention, counteracting and combating of COVID-19, other infectious diseases and emergencies caused by them,[11] which added to the Act, among others, Article 46a authorising the Council of Ministers to issue a regulation specifying the area in which a state of epidemiological threat or epidemic occurs and to introduce solutions by means of which such a state is to be combated. According to P. Tuleja, during the pandemic, all constitutional conditions for issuing a regulation on the introduction of a state of natural disaster occurred [Tuleja 2020, 13]. In addition, as E. Kurzępa notes, the solutions introduced during the pandemic are "typical of the state of emergency, and the purpose of such a legislative procedure was to circumvent the provisions regarding a state of natural disaster. These solutions have been permanently included in the Act, the regulations of which are not limited only to counteracting the SARS-CoV-2 epidemic, so it is difficult to determine in which situations they will be used in the future" [Kurzępa 2021, 5-21]. In turn, according to M. Pietras-Eichberger, the COVID Act was the basis for the adoption of many implementing acts that created a special legal infrastructure for the time of the pandemic, but their time and substantive scope also apply to issues not related to the pandemic. In this way, there was a kind of "blurring" of the provisions of the Constitution regulating states of emergency [Pietras-Eichberger 2021, 334].

Due to the spread of the SARS-Cov-2 virus, the government pursuant to Article 46a and Article 46b points 1-6 and 8-12 of the Act on the Prevention and Control of Infectious Diseases in Humans introduced a number of restrictions that grossly violated the basic rights of the individual, such as: quarantine and isolation, ban on movement, organisation of events, cultural events and gatherings, including religious ones, use of public infrastructure, service, commercial and leisure activities, closure of enterprises and schools, restriction of international traffic (closure of borders). It is worth mentioning that all these restrictions were introduced by way of regulation and not by statutes, as provided for in Article 31(3) of the Constitution of the Republic of Poland, as well as the lack of use of solutions regarding the constitutional state of emergency. It should be emphasised that the Constitution

[10] Journal of Laws 2023, item 1284.

[11] Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them, Journal of Laws item 374.

allows for the possibility of limiting the basic rights and freedoms of the individual in states of epidemic emergency, however, these restrictions should be made in the Act, and at the same time, they should not violate the essence of constitutional rights and must be necessary and proportionate. Due to the pandemic, positions and views have emerged that many restrictions introduced in connection with this disease had no statutory basis and are, therefore, unconstitutional. According to R. Piotrowski, "an example of ignoring the Constitution was, in particular, the manner of [...] introducing an extra-constitutional state of emergency through statutory solutions regarding combating the epidemic" [Piotrowski 2022, 351]. However, in the opinion of P. Tuleja, the pandemic period "can be described as a hybrid state of emergency. The conditions for introducing a state of natural disaster are met, the Council of Ministers is obliged to issue a regulation introducing this state and announce it, but it does not fulfil this obligation. Therefore, there was no formal introduction of a state of natural disaster in accordance with Article 228(2) of the Constitution. There was a state of permanent violation of the Constitution" [Tuleja 2020, 10]. Z. Czarnik is of the opposite opinion "[...] the postulates demanding the introduction of one of the states of emergency: emergency or natural disaster are incomprehensible. Since the constitutional legislator itself provided for a different way of protecting rights and freedoms in combating the epidemic, and a different way for emergency situations regulated in Article 228 of the Constitution of the Republic of Poland. If this is the case, then it should be assumed that this is a rational choice" [Czarnik 2021, 24].

The legislator's actions consisting in introducing restrictions on constitutionally protected human rights and freedoms – on the basis of subordinate acts – became the subject of criticism and actions taken by the Ombudsman and the Helsinki Foundation for Human Rights, as they were perceived as violating the standard derived from Article 31(3) of the Constitution. According to the Ombudsman, the regulations were prepared in a hurry without a sufficient assessment of their compliance with the Constitution of the Republic of Poland. They were amended many times and at an extraordinary pace to eliminate numerous mistakes that should have been avoided with a properly conducted legislative process.[12] On the other hand, the Helsinki Foundation for Human Rights in the prepared report, pointed out the disadvantages of the legislative solutions adopted by the government during the pandemic, recognising that the scope and nature of the announced

[12] The Ombudsman's speech to the Prime Minister of 23.03.2020, VII.565.461.2020, https://bip.brpo.gov.pl/pl/content/raport-rpo-dla-premiera-nt-prawa-w-stanie-epidemii [accessed: 10.03.2024].

restrictions exceeded the statutory authorisation and were not admissible in the ordinary state.[13]

It is hard to disagree with the opinions of the representatives of the doctrine that a number of civil rights and freedoms – including constitutionally protected ones – have been limited on the basis of dozens of regulations issued by the government. The errors of regulation were also pointed out by the courts, which confirmed in their judgments the violation of the Constitution of the Republic of Poland when imposing restrictions on the freedoms and rights of the individual related to the epidemic [Czarnow 2023, 110]. As well as pecuniary penalties imposed administratively, they have become the subject of many court cases. Administrative courts waived these penalties and questioned their constitutionality and thus refused to allow the imposition of an administrative sanction for non-compliance with them, among others, restrictions on the freedom of assembly, an order for a specific manner of movement (an order to maintain a certain distance from other persons), an obligation of border quarantine or a ban on doing business [Kolendowska-Matejczuk and Mrowicki 2021, 45-50; Czarnow 2023, 111].[14]

CONCLUSION

Human freedom, i.e. the ability to freely decide for each person, is subject to legal protection. The legislator is obliged to establish regulations that will prevent violations of freedom and create sanctions in the event of a violation of freedom, and will allow the restoration of the state in accordance with the law. The Constitution of the Republic of Poland allows for the possibility of limiting the exercise of constitutional freedoms and rights, which can only be established by law and only if they are necessary in a democratic state. Limitation of human rights and freedoms is also possible in the event of the introduction of emergency states regulated in the Constitution. Without the introduction of the state of emergency, the authorities can only operate within the framework of ordinary constitutional limitation clauses appropriate for situations in which there are no specific threats.

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[13] *Prawa człowieka w dobie pandemii. 10 miesięcy, 10 praw, 10 ograniczeń, 10 rekomendacji na przyszłość.* Raport Helsińskiej Fundacji Praw Człowieka, 2021, https://hfhr.pl/publikacje/prawa-czlowieka-w-dobie-pandemii [accessed: 10.03.2024], p. 72.

[14] Examples of judgments: Provincial Administrative Court in Gdańsk of 28 January 2021, ref. no. III SA/Gd 780/20; Supreme Administrative Court of 28 October 2021, ref. no. II GKS 1417/21; Supreme Administrative Court of 23 September 2021, ref. no. II GSK 802/21 II GSK 844/21; Supreme Administrative Court of 12 October 2021, ref. no. II GSK 1245/21; Supreme Administrative Court of 8 September 2021, ref. no. II GSK 1010/21; Supreme Administrative Court of 19 October 2021, ref. no. II GSK 1137/21; Supreme Administrative Court of 28 June 2022, ref. no. II GSK 292/21.

During the fight against the COVID-19 epidemic, significant interventions in the sphere of freedoms and human rights were made, as well as significant changes in the functioning of public authorities. The legal regulations and activities of the state apparatus existing at that time largely corresponded to the constitutional characteristics of the state of emergency, although it was not formally announced. The actions of the state authority in Poland have, in fact, led to the introduction of an intermediate state between the state of emergency and the ordinary functioning of the state, although the Constitution of the Republic of Poland does not provide for this.

For 40 years – since 1981 – politicians have avoided introducing emergency states in Poland. For the first time since the adoption of the Constitution of the Republic of Poland, a state of emergency was introduced on 2 September 2021 in the border zone with Belarus, i.e. in part of the Podlaskie and Lubelskie voivodeships. The belt covered 115 towns in the Podlaskie Voivodeship and 68 towns in the Lublin Voivodeship.[15] The government requested the introduction of a state of emergency for a period of 30 days in connection with the so-called migration crisis on the border with Belarus. The state of emergency was then extended for another 60 days, i.e. until 2 December 2021, by the President's Regulation of October 1, 2021,[16] issued with the consent of the Sejm, expressed on 30 September 2021.[17] As of 3 December 2021, the state of emergency was lifted. According to S. Trociuk, "The state of emergency introduced at the border with Belarus significantly limited the use of constitutional freedoms and rights in the area covered by it. Some of these restrictions, in particular the introduction by the Council of Ministers of a general ban on staying in the area covered by the state of emergency and the related ban on entry for the press, as well as the ban on providing public information, raise doubts as to the correctness of their establishment. They go beyond the limits of permissible restrictions set out in the provisions of the President's Regulation" [Trociuk 2021]. As confirmed by the judgment of the Supreme Court of 18 January 2022, which indicated that the Regulation of the Council of Ministers of 2 September 2021, to the extent that it introduces an unlimited prohibition of staying in the area covered by the state of emergency, while not providing for the possibility of journalists staying in this area in connection with the exercise of their profession, exceeds the scope of the statutory delegation on which it was

[15] Regulation of the President of the Republic of Poland of 2 September 2021 on the introduction of a state of emergency in the area of part of the Podlaskie Voivodeship and part of the Lublin Voivodeship, Journal of Laws, item 1612.

[16] Regulation of the President of the Republic of Poland of 1 October 2021 on the extension of the state of emergency introduced in the area of part of the Podlaskie Voivodeship and part of the Lublin Voivodeship, Journal of Laws, item 1788.

[17] Resolution of the Sejm of the Republic of Poland of 30 September 2021 on consent to the extension of the state of emergency, Journal of Laws, item 1787.

based, and does not comply with the principle of proportionality specified in Article 228(5) of the Constitution of the Republic of Poland.[18] To sum up, it should be stated that ensuring respect for the rights and freedoms of human and citizen should be a priority for every democratic state of law, while the reality of the functioning of the state in connection with the COVID-19 pandemic, as well as the introduction of a state of emergency in the immediate vicinity of the eastern border of the state, have caused constitutional doubts.

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THE PERCEPTION OF SOURCES OF SELF-EFFICACY AND THE INTENSITY OF THE DIMENSIONS OF ATTITUDE TOWARDS FUNCTIONING IN CONDITIONS OF FREEDOM IN INDIVIDUALS SERVING A SENTENCE OF IMPRISONMENT

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Abstract. The path of integration into society is a complex and challenging one. Immediately after completion of a prison sentence, the moment when the prison walls are left behind, individuals are tasked with confronting a new reality that is vastly different from the one to which they have become accustomed. There are many factors that prove to be helpful in the readjustment process, one of which is the individual's attitude towards freedom. The purpose of this article is to examine the relationships between the intensity of the dimensions constituting attitudes towards functioning in conditions of freedom in prisoners and the perceived sources of self-efficacy. The study was conducted in the Lublin Voivodeship, on a group of 116 prisoners. The results show that the emotional dimension of attitudes towards freedom correlates in a statistically

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significant way with the perception of experienced achievements, the intensity of experienced stress and external persuasion.

Keywords: sources of self-efficacy; successes; failures; stress intensity; external persuasion; dimensions of attitudes towards functioning in freedom conditions; prisoners.

INTRODUCTION

Persons incarcerated in prisons face a number of challenges, such as loss of autonomy and, the most potent for the inmate, diminished control over their lives. Under such conditions, the concept of self-efficacy becomes particularly interesting. Whilst operating in a prison setting characterized by routine and set schedules, inmates are forced to confront limitations not only on their freedom, but also on their sense of agency. However, within these constraints, many inmates demonstrate resilience and adaptability to a variety of conditions, often due to their motivation to take control of their lives. This motivation, adaptability and resilience has a direct impact on how those serving prison sentences relate to the prospect of leaving the prison environment and functioning in the free world.

What is freedom? In psychology, freedom is often understood as a sense of autonomy, which is closely related to personal agency, through which people perceive their person as capable of making appropriate choices as well as controlling their lives. Freedom includes the ability to achieve goals set by the person as well as one's own values and beliefs, without the influence of external factors. It is stepping outside of prison bars, it is a return to normalcy and the opportunity to direct one's own actions, to take control of one's own life again. Some may perceive freedom as distant or even unattainable, while others may adopt a positive attitude and nurture and maintain a sense of agency and autonomy despite actual physical imprisonment and the limitations caused by it [Niewiadomska and Fel 2016].

The term "attitude" has multiple meanings and definitions and each scientific field dealing with the issue has its own definition which means that there is no single definition of attitude. The first use of the term was in the context of the mind as a state of readiness to listen and learn, proposed by philosophers Spencer and Bain [Fidelus 2012]. Allport, on the other hand, defines attitude as a state of readiness that is organized by experience and influences individuals' responses to various objects or situations [Mądrzycki 1997].

Attitudes toward functioning under conditions of freedom consist of three elements described in the structural concept of attitudes: a) cognitive – knowledge, beliefs and thoughts related to functioning in freedom conditions; b) emotional – feelings directed toward freedom conditions,

they can be positive or negative; c) behavioral – the range of actions taken by the individual, the absence of any action is also relevant here.

The process of reintegration into society after serving a prison sentence is a complex process full of obstacles. The end of a prison sentence marks the beginning of a new chapter full of challenges. After leaving the prison walls, ex-prisoners face numerous obstacles that hinder their smooth return to optimal functioning in prison, from social stigma to limited employment opportunities, these difficulties are multifaceted. How an inmate perceives his ability to overcome the obstacles has a direct impact on what his attitude toward freedom will be.

Janusz Sztumski (1995) presents three different attitudes towards social problems, and they are; 1) conformist attitude; 2) opportunistic attitude and 3) heroic attitude. Based on these attitudes, Fidelus (2011) describes them as follows: a) indifferent attitude: characterized by lack of interest or indifference to serious problems, including social problems. It can be caused by egocentrism or lack of knowledge about these problems. It is often the result of losing oneself in one's own troubles, which prevents one from noticing other problems; b) fatalistic attitude: associated with a belief in the inevitability of certain social phenomena. People with this attitude believe that life is directed by supernatural forces, which makes them not believe in the effectiveness of corrective measures; c) cynical attitude: characterized by a selfish attitude, where individuals are guided solely by their own interests and downplay existing social problems, considering others naive or irresponsible; d) religious attitude: based on a belief in supernatural forces that affect the world, including social problems. People with this attitude often engage in prayers to solve these problems; e) sentimental attitude: manifests compassionate involvement, but is often limited to combating the symptoms of problems rather than addressing their causes; f) conformist attitude: consists in having no opinion of one's own and following the opinion of the majority. A conformist avoids presenting his own views and does not take steps to develop his own position; g) opportunistic attitude: means not only a lack of commitment to solving social problems, but also exploiting these problems for personal gain; h) heroic attitude: expresses a willingness to take on social problems even in the face of risk. It is characterized by a strong emotional and intellectual commitment to defending the values threatened by these problems.

These approaches show how diverse people's attitudes towards social challenges can be, and consequently also the inmate's attitudes towards the difficulties of daily life outside prison walls. Along with the existing social challenges associated with leaving prison, a person's sense of self-efficacy also influences what attitudes toward the outside world he or she will adopt, and how the inmate will view freedom and functioning within it.

Perception of the sources of self-efficacy, according to Albert Bandura's Social Learning Theory, is a psychological mechanism used for modifying attitudes and taking action effectively, linking knowledge to behavior [Łaguna 2005]. The perception of self-efficacy enters the realm of personal action control, interpreted as a belief in one's ability and capacity to act toward set goals regardless of the obstacles encountered. This belief and related expectations are relatively permanent, formed in the process of individual development and differentiate people in terms of thinking, feeling and acting. Self-efficacy affects the choice of life goals – the higher they are, the more complex goals an individual chooses, as well as motivation and commitment to these goals, even in the face of setbacks and difficulties. Strengthening the belief that difficulties can be overcome increases motivation to take action and perseverance to solve them with a positive end result. Self-efficacy plays an important role in behavior change, enabling people to evaluate situations and seek effective coping strategies to overcome adversity, which can undermine motivation [Lewtak and Smolińska 2011].

Social Learning Theory [Bandura 1997] posits, self-efficacy is built through a variety of factors from sources such as: 1) mastery experiences – the individual's experience of success or failure; 2) affective and physiological states – emotions experienced when undertaking a task, affective states as well as the level of commitment to the action; 3) vicarious experiences – observation of successes by individuals in the environment; 4) verbal persuasion – receiving feedback [Bandura 1999; Niewiadomska et al. 2014].

These sources, influencing an individual's perceived self-efficacy, help shape subsequent attitudes toward an issue as well as subsequent actions or behaviors. Active task performance plays a key role in building this belief. Personal experiences provide the individual with relevant information as they are appropriately selected and acted upon, facilitating their integration into the existing belief system. Successes strengthen self-efficacy beliefs, while failures can weaken them, leading to avoidant or passive attitudes. Vicarious experiences, i.e., observing how others cope, also affect self-efficacy. Individuals seek coping strategies from people who have characteristics similar to theirs and whose opinions they consider relevant. Verbal persuasions, i.e., other people's opinions and evaluations of the behavior and performance undertaken by an individual, also have a significant impact on an individual's self-esteem [Pervin 1999; Bandura 2001; Kozicka 2004; Niewiadomska 2007].

1. METHODOLOGY

1.1. Research problem and hypotheses

The article attempts to find an answer to the following research question: What are the relationships between the sources of self-efficacy and attitudes toward functioning in freedom conditions? In connection with the research question posed, the following research hypotheses were formulated:

H1. It is assumed that there are significant correlations between the perceptions of sources of self-efficacy and the intensity of the cognitive dimension of attitudes toward freedom in people serving prison sentences.

H2. It is assumed that there are statistically significant correlations between perceptions of sources of self-efficacy and the intensity of the emotional dimension of attitudes toward functioning in freedom, in persons serving a prison sentence.

H3. Sources of self-efficacy are predictors of the intensity of the dimensions constituting the attitude towards functioning in conditions of freedom in persons serving a sentence of imprisonment.

1.2. Method

The study was conducted in 2023, participation in the pen and paper study was anonymous and voluntary. Inmates participating in a master's seminar in Family Science at the Center for Inmates of the Catholic University of Lublin's Center at the detention center in Lublin were responsible for distributing the questionnaires and their supervision.

1.3. Characteristics of the subjects

The study involved 116 inmates, who were differentiated on the basis of variables such as age, marital status, education, occupational status, type of crime committed and number of convictions.

The largest group was 30-49 year olds (62%), followed by those under 29 (24%) and those over 50 (14%).

Among the respondents, the majority were single (48%), divorcees accounted for 26% of the survey participants, and married people accounted for 21%.

Secondary level education (49%) and vocational education (34%) were the most common, while the rest consisted of people with higher education (10%) and primary education (7%).

Analysis of the results shows that prior to incarceration, 80% of the respondents worked professionally, the unemployed accounted for 16%, and only 4% received a pension.

The most common type of crime committed by the respondents was those against life or health (45%), 21% of the respondents had committed a crime against property, and other criminal acts accounted for 34%.

The vast majority of respondents had been convicted once (58%), 34% had served a second prison sentence, and 8% had served a third.

1.4. Tools for measuring variables

Two methods were used to verify the research hypotheses: 1) *Life Evaluation Questionnaire* by Iwona Niewiadomska; 2) *Questionnaire of Prisoner Attitudes Toward Functioning in Freedom Conditions* by Mirosław Kalinowski, Iwona Niewiadomska, Robert Rachuba and Weronika Remijasz.

The *Life Evaluation Questionnaire* was created to study perceived sources of self-efficacy and consists of two parts. The first part is used to assess the degree of difficulty in life situations, and the second part is used to determine the level of achievements. The first part of the questionnaire deals with the experience of stress. The questionnaire distinguishes seven types of difficult situations that lead to the development of stress; 1) lack of satisfaction of psychological and biological needs, 2) excessive physical and/or mental exertion, 3) physical and/or mental suffering, 4) internal and/or external conflicts, 5) a sense of threat, 6) frustration in achieving goals, and 7) new stimuli. Respondents answered test items by referring to a five-point scale: 1 – never, 2 – very rarely, 3 – sometimes, 4 – often and 5 – very often. The sum of the scores is an index of stress severity. The coefficient of internal consistency, αCronbach's of perception of current problem situations is 0.83, it was calculated on a group of 296 offenders.

The second part of the questionnaire examines the severity of successes. Four types of success are listed; 1) personal success, 2) family success, 3) professional success and 4) social success. Respondents refer to successes using a five-point scale: 1 – never, 2 – very rarely, 3 – sometimes, 4 – often and 5 – very often. The sum of the occurrence of achievements is an indicator of the intensity of the individual's successes. The αCronbach's internal consistency coefficient is 0.81 for the occurrence of achievements.

The third part of the questionnaire is designed to determine the severity of failures experienced by the respondent. This section includes four forms of failure: 1) personal failures, 2) family failures, 3) social failures, and 4) professional failures, and is answered using a five-point scale: 1 – never, 2 – very rarely, 3 – sometimes, 4 – often, and 5 – very often. The sum

of the appearances of failures from each listed form is an indicator of the severity of current failures. The αCronbach's coefficient is 0.86.

The last part of the method involves social persuasion, or more precisely, its ten categories: 1) concerning reassurance that a person is able to pursue his or her goals despite obstacles, 2) concerning the ability to cope with experienced fears, 3) concerning the ability to resolve conflicts, 4) concerning coping with mental and/or physical pain, 5) concerning professional success, 6) concerning family success, 7) concerning success in personal life, 8) concerning social success, 9) concerning effective satisfaction of needs, and 10) concerning effective task performance. A five-point scale also appears in this section: 1 – never, 2 – very rarely, 3 – sometimes, 4 – often, and 5 – very often, and the sum is an indicator of the intensity of feeling persuaded by others. The αCronbach coefficient is 0.93 [Niewiadomska et al. 2014].

The *Questionnaire of Prisoner Attitudes Toward Functioning in Freedom Conditions* by Miroslaw Kalinowski, Iwona Niewiadomska, Robert Rachuba and Weronika Remijasz, consists of 15 items. Respondents answer using a five-point scale of acceptance of each statement: 1 – strongly disagree, 2 – disagree, 3 – undecided, 4 – agree and 5 – strongly agree.

The first part of the questionnaire includes 10 statements based on the cognitive dimension of attitudes toward functioning in freedom: 1) You have a life plan after you are released – factor loading (f.l.): 0.564; 2) After you are released, you will look for a job – (f.l.): 0.659; 3) After you are released, you will take help from various support institutions – (f.l.): 0.482; 4) After you are released, you will fulfill all your dreams – (f.l.): 0.478; 5) After you are released, you will change your surroundings so that you do not return to prison – (f.l.): 0.539; 6) After you are released, you will go abroad to work – (f.l.): 0.516; 7) After you are released, you will repair the damage you have done – (f.l.): 0.456; 8) After you are released, you can return to crime – (f.l.): 0.693; 9) After you are released, you will find a well-paying job – (f.l.): 0.479; 10) After you are released, you will need the help of others – (f.l.): 0.536.

In the second part, there are 5 statements referring to the emotional dimension of attitudes towards functioning in freedom conditions: 1) You will prepare to be free – (f.l.): 0.654; 2) After you regain freedom, you will study or take courses – (f.l.): 0.518; 3) After you regain freedom, you will live honestly – (f.l.): 0.745; 4) After you regain freedom, you will start a family – (f.l.): -0.564; 5) After you regain freedom, you will be happy – (f.l.): 0.630. Cronbach's alpha internal consistency coefficient, calculated on a group of 116 respondents, is 0.734 for the cognitive dimension of attitudes toward functioning in freedom conditions and 0.634 for the emotional dimension

of attitudes toward functioning in freedom conditions in the *Questionnaire of Prisoners' Attitudes Toward Functioning in Freedom Conditions.*

1.5. Statistical analyses used

Pearson's r correlation test was used to analyze the relationships between perceptions of sources of self-efficacy and the intensity of dimensions constituting attitudes toward functioning in freedom conditions in persons serving a sentence of imprisonment. Subsequently, the regression analysis conducted allowed the determination of predictors of the intensity of the dimensions constituting the attitude of inmates towards functioning in conditions of freedom.

2. RESULTS

Table 1 shows the results of the correlation analysis, which were used to verify the research hypotheses. These hypotheses, assumed that there is a relationship between the self-efficacy perceived by inmates and the intensity of attitudes toward functioning in conditions of freedom in dimensions: 1) Cognitive (H1); 2) Emotional (H2).

Table 1. Correlation results between the sources of self-efficacy (measured by Iwona Niewiadomska's *Life Evaluation Questionnaire*) and the intensity of the dimensions of attitudes toward functioning in conditions of freedom (measured by Miroslaw Kalinowski et al.'s *Questionnaire of Prisoner Attitudes Toward Functioning in Freedom Conditions*) in people serving prison sentences (N = 116).

Sources of self-efficacy	Dimensions of attitude towards freedom	
	cognitive	emotional
Stress intensity	r=0,66	r=0,353***
Success intensity	r=-0,05	r=0,265**
Failures intensity	r=0,09	r=0,142
Persuasion from social environment intensity	r=0,135	r=0,271**

***p<0,001; **p<0,01; *p<0,05

Analysis of the results presented in Table 1, allows us to conclude that the intensity of attitudes toward functioning in conditions of freedom does not correlate with the perception of sources of self-efficacy at a statistically significant level in the cognitive dimension. Instead, there are statistically significant relationships between the perception of sources of self-efficacy

and the intensity of attitudes toward functioning in conditions of freedom in the emotional dimension. This means that in a person serving a prison sentence, emotional reactions correlate with a greater intensity of: 1) Experienced stress caused by factors such as deprivation of personal needs, mental overload and/or physical overload, conflicts of an internal and/or external nature, perceived threat, intensity of new stimuli or frustration related to the implementation of activities ($r=0.353;p<0.001$); 2) Experienced achievement in personal, family, social and/or professional contexts ($r=0.265;p<0.01$); 3) Experienced persuasion from the environment relating to reassurance that the person is able to pursue his or her goals in spite of obstacles, ability to cope with experienced fears, ability to resolve conflicts, ability to cope with mental and/or physical pain, succeeding professionally, succeeding in family life, succeeding in personal life, succeeding in social life, effectively satisfying needs and/or effectively completing planned tasks ($r=0.271;p<0.01$).

However, a lack of statistical significance appeared in the severity of the failures experienced, making hypothesis 2, which read "There are significant statistical relationships between perceptions of sources of self-efficacy and the severity of the emotional dimension of attitudes toward functioning in freedom in prison inmates," only partially confirmed. Hypothesis 1, which stated that there were significant statistical relationships between perceptions of sources of self-efficacy and the intensity of the cognitive dimension of attitudes toward functioning at liberty in prison inmates (H1), was not confirmed.

Hypothesis 4, which claimed that sources of self-efficacy are predictors of the intensity of the dimensions constituting attitudes toward functioning in freedom in people serving prison sentences, was verified using linear regression analysis.

Table 2. Linear regression results indicating the predictive functions of the source of self-efficacy for the emotional dimension of attitudes toward functioning in freedom conditions in persons serving a prison sentence (N=116).

A predictive model for the emotional dimension of attitudes toward functioning in a detention setting	B	SE	Beta	t	p
Constant	6,067	1,419		4,275	<0,001
Stress intensity	0,105	0,026	0,353	4,047	<0,001
F=16,380; p<0,001; R2=0,125					

Table 3. Linear regression results indicating the predictive functions of the source of self-efficacy for the emotional dimension of attitudes toward functioning in freedom conditions in persons serving a prison sentence (N=116).

A predictive model for the emotional dimension of attitudes toward functioning in a detention setting	B	SE	Beta	t	p
Constant	6,289	1,851		3,398	<0,001
Success intensity	0,141	0,048	0,265	2,947	,004
F=8,686; p=0,004; R2=0,070					

Table 4. Linear regression results indicating the predictive functions of the source of self-efficacy for the emotional dimension of attitudes toward functioning in freedom conditions in persons serving a prison sentence (N=116).

A predictive model for the emotional dimension of attitudes toward functioning in a detention setting	B	SE	Beta	t	p
Constant	6,690	1,680		3,983	<0,001
Verbal persuasion intensity	0,054	0,018	0,271	3,016	,003
F=9,097; p=0,003; R2=0,073					

FINAL CONCLUSIONS

The analyses conducted allow us to conclude that the intensity of experienced stress, experienced achievements and successes, as well as external, verbal persuasion – sources of self-efficacy, correlate with the emotional dimension of the attitudes of people in prison towards functioning in freedom conditions. The obtained regularities confirm the regularity that the behavior of people serving a prison sentence correlates significantly with the distribution (perceived gains and losses) of subjective management resources, which include self-efficacy [Niewiadomska 2008, 2010a, 2010b, 2010c, 2015].

Resource losses generating an increase in the severity of stress experienced by inmates can cause anxiety about their future out in the free world – including the difficulties faced by those leaving the prison walls. According to a study by Zhan et al, more than 80% of inmates experience high levels of stress associated with leaving an institution (2016). There are many reasons for this, including anxiety caused by the pressure to find employment or housing, the stereotypes society holds about people in prison, financial issues (Martin, 2018) or, of course, adaptation to new "free world"

conditions, even more so if the inmate has completed a long-term prison sentence.

A protective factor against the fear of freedom is social support, both from the family and from support institutions [Bahr et al. 2005]. Awareness that an inmate has access to support after leaving prison, including social persuasion or vicarious experiences, has a positive effect on self-efficacy as well as ultimately on attitudes toward functioning in freedom. The severity of the successes experienced, for example, when leaving the facility on a short-term basis thanks to a furlough, reinforces the inmate's belief that he will be able to cope outside of prison. This shapes his sense of self-efficacy.

Permission to leave prison on a short-term basis is seen as an opportunity for the inmate to plan or guarantee conditions that will allow him to function adequately upon his return to freedom [Cheliotis 2008; Hassin 1977]. As Bandura's theory demonstrates, the belief that one can succeed or accomplish an intended goal or task increases perceptions of self-efficacy [Bandura 1989]. The resource gains obtained by experiencing success have a positive effect on stress reduction [Hobfoll 2018] and, as the results of the study show, on attitudes toward functioning in freedom.

The research conducted can be useful in the context of building penitentiary and rehabilitation policies that will effectively support inmates in the process of social reintegration and reduce the risk of recidivism. Cooperation is needed between different sectors, including public administration bodies, aid institutions, non-governmental organizations and civil society. People leaving prisons should be provided with adequate psychological and social support.

Assistance institutions and rehabilitation programs available both during their sentences and after they leave prison can help inmates adapt to life outside and reduce stress about the future. No less important are activities aimed at changing social stereotypes and prejudices against former prisoners. Broad public education and information campaigns implemented by state institutions can contribute to greater social acceptance of people leaving prisons. According to the research, resource losses generating an increase in the severity of stress experienced by inmates can cause anxiety about the future in conditions of freedom, for example, in the professional aspect. Legal protection and anti-discrimination for ex-prisoners on the job market can improve their chances for social reintegration.

In summary, the state should provide access to psychological assistance, social support and rehabilitation programs after release from prison (including support in finding employment, building soft skills, learning new skills and/or psychological counseling) to help former prisoners maintain positive changes and strengthen subjective management resources, including self-efficacy.

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THE SUBJECT MATTER OF DISPUTES OVER COMPETENCES IN CASES NOT SUBJECT TO GENERAL ADMINISTRATIVE PROCEDURE

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Abstract. Differences in the assessment of individual authorities' competences are the cause of disputes between them. According to the categories of disputing authorities in the Polish procedure, these disputes are qualified as disputes over jurisdiction and disputes over competences. The category of authorities in dispute and the type of dispute also determine the procedure and the entity authorised to settle the dispute. The prevailing view in judicial decisions is that disputes over jurisdiction and disputes over competence can arise solely against cases pending in administrative proceedings. A review of statutory regulations and judicial decisions proves that disputes over competence of authorities are and may be initiated in cases that are subject to general administrative procedure. In view of the above, this study analyses the law in force and specific cases of such disputes. This analysis is carried out on the basis of examples of regulations and rulings, and attempts to assess them in the light of the legal measure discussed here.

Keywords: competence; jurisdiction; disputes over jurisdiction; disputes over competence; administrative procedure.

1. THE CONCEPT OF "COMPETENCE"

The literature points out that the term "competence" is used in two contexts in the study of administrative law. The first one involves a horizontal relation, where the term "competence" refers to a legal position of an authority of public administration examined in reference to the position of other authorities that operate at the same level in the hierarchy. This context presents a legal position of a given authority in relation to other authorities, not subjugated to it in a hierarchy and the use of the term "competence" effects in a presentation of how competences attributed to one administrative authority are separate from competences of other authorities. As a consequence, it is possible to settle which of the authorities of public administration may exercise a given competence [Matczak 2015, 415]. It is assumed that establishing competences serves to maintain order and specific work of administration. Where there are components making up a greater whole,

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the scope of operation of these components must be separated so that the whole may operate effectively [Mazurkiewicz 1988, 73; Matczak 2015, 427]. It is also emphasized that in the context of the horizontal relation, the term "competence" is also used in reference to so-called "disputes over competence" or "disputes over jurisdiction" [Matczak 2015, 416].

The second context in which the term "competence" is used refers to a vertical relation and appears in the aspect of the relation between a given public administration authority and entities subjugated to it that include entities that are subject to administration and other bodies of administration, such as those that are subject to a supervisory relation. It is highlighted that there are discussions in this context on the relation between a public administration authority and entities subject to administration or authorities subjugated through verification to a public administration authority in a decentralised system.[1]

2. COMPETENCE AND JURISDICTION

When it comes to the use of the term competence in reference to so-called "disputes over jurisdiction" and "disputes over competence", it is also reasonable to look at the relation between the terms "competence" and "jurisdiction". Legal writers see in as an ambiguous issue [Matczak 2015, 427]. There are views in which both these terms are treated as equal and used interchangeably, there are views that treat them completely differently and attribute different content to them, and there are still views that the term competence also covers jurisdiction [Rabska 1990, 110].

The claims that the term "competence" and "jurisdiction" are one and the same thing generally define them as a set of powers of an authority that concerns a specific scope of cases in which this authority has the right, and, usually, an obligation at the same time, to act [Wierzbowski and Wiktorowska 2019, 169; Woś 2017, 166; Chróścielewski 2002, 290; Idem 2004, 73]. In view of the above, the primary role usually goes to the term "jurisdiction", which seems to determine both the procedural aspect of settling disputes over jurisdiction and disputes over competence, and also the procedure and consequences of violating jurisdiction in administrative proceedings.

Therefore, when it comes to "jurisdiction" – identified with the term "competence" – it is emphasized that in the aspect of the principle of the rule

[1] Both contexts presented above show similarities to other means of analysis of the term competence presented by legal scholars and commentators, in a static and dynamic approach alike. Cf. Boć 2000, 132-33.

of law formulated in Article 7 of the Polish Constitution[2] which reserves that each organ of public authority shall function on the basis of, and within the limits of, the law, jurisdiction must not be assumed [Sawuła 2000, 82]. This applies, i.a., to cases examined in the course of administrative proceedings[3] where the said obligation also follows from Article 7 of the Code of Administrative Procedure,[4] which also reflects the rule of law, and from Articles 19-22 CAP, which concretize this principle and which expressly reserve that public administration authorities shall observe ex officio their jurisdiction [Olszanowski 2018, 282].

In the procedural aspect discussed, jurisdiction understood like this outlines a given authority's legal capacity to conduct administrative proceedings [ibid.; Chróścielewski 2002, 67; Idem 2004, 73], which is defined as a set of premises that determine the capacity to take procedural steps in administrative proceedings [Adamiak 2022, 145; Martysz 2000, 47].

There are three basic kinds of jurisdiction in general that define the foundation of a specific competence of an authority. They are: territorial jurisdiction, substantive jurisdiction and functional jurisdiction, also called jurisdiction relating to instance [Wierzbowski and Wiktorowska 2017, 38]. Territorial jurisdiction specifies which authority is competent to settle a given matter from the point of view of territorial reach of its operation. Substantive jurisdiction covers the administration authority's competence to take decisions in specific categories of cases. Functional jurisdiction, in turn, defines the instance competent to settle a given case [Wierzbowski and Wiktorowska 2019, 162-85; Niczyporuk 2001, 346-47; Wajda 2020, 201].

3. DISPUTES OVER JURISDICTION AND DISPUTES OVER COMPETENCE

Legal scholars and commentators point out that disputes over jurisdiction in general, including those between bodies of local government units and bodies of central administration, arise due to the different assessment of the scope of competence of these bodies stipulated in the law (in turn, if these competences are to be exercised by examining and settling cases in administrative proceedings, that is by application of norms of administrative law through issuing acts that concretize its norms, administrative

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

[3] Judgement of the Polish Supreme Court of 29 May 1991, ref. no. III ARN 17/91, Lex no. 10902.

[4] Act of 14 June 1960, the Code of Administrative Procedure, Journal of Laws of 2023, item 775 as amended [hereinafter: CAP].

decisions, it applies then to the scope of jurisdiction). Therefore, the reasons for these disputes arising include but are not limited to imprecise or incomplete regulations in this regard what give rise to differences in interpretation in practice [Woś 2016, 152-53].

The established line of judicial decisions and legal scholarship uniformly point out that a dispute over jurisdiction may be defined as an objectively existing legal situation in which there are differences of opinion among public administration authorities as to the scope of their operation, including most of all as to their authorisation to examine and settle the same administrative case; at that, we may claim that cases are the same when entities involved in them, their subject matter and their basis in law and in facts are identical [Defecińska 2000, 101-102; Skoczylas 2008, 18-21].[5]

The literature emphasises that a dispute over jurisdiction and a dispute over competence that arises in connection with initiating and conducting administrative proceedings (complexity of the case) is a positive dispute, while one that arises due to ineffectiveness of the claim to initiate administrative proceedings is a negative dispute [Zimmermann 1989, 50-51]. These two categories of disputes, that is positive and negative, are most frequently classified in legal writings so as to mean that a positive dispute occurs where two public administration authorities recognize themselves at the same time as competent to examine and settle a case. On the other hand, a negative dispute, predominant in practice, occurs where two or more public administration authorities deem themselves not competent to handle a given case [Woś 2016, 156].

When it comes to a formal separation of disputes over jurisdiction and disputes over competence it needs to be pointed out that the essence of this division – in light of the CAP regulation – was based on the categories of bodies that may be in dispute with each other. Namely, it is assumed that a dispute over jurisdiction will involve different opinions on authorisation to examine and settle the same case that occurred between public administration authorities that fall under the same systemic pillar of administration (central or local administration). On the other hand, a dispute over competence is understood as a difference in this kind of opinion that occurs between local government authorities and central administration authorities [ibid., 156-57]. Given the above aspect, in many instances legal scholars and commentators and judicial decisions offer comments on the question of disputes over different opinions of authorities as to their authorisation to examine a given case and such comments may be applied in parallel to both categories of disputes.

[5] Order of the Polish Supreme Administrative Court (SAC) of 23 December 2023, ref. no. II GW 104/23, CNOSA.

4. PROCEDURES FOR SETTLING DISPUTES OVER JURISDICTION AND DISPUTES OVER COMPETENCE

The procedure for settling disputes over jurisdiction and disputes over competence is reflected in CAP regulations and in the regulations on procedures in administrative courts.[6] The literature points out that the fact that a dispute over jurisdiction or a dispute over competence arises in connection with the initiation and conducting of administrative proceedings advocates that measures for settling disputes over jurisdiction and to some extent disputes over competence should be included under CAP regulations [Żukowski 2012, 33; Krzykowski 2010, 27].

Pursuant to Article 1(3) CAP in connection with Article 1(1) and (2) CAP, the Code of Administrative Procedure regulates, i.a., the proceedings in matters involving disputes between authorities of units of self-government and government administration authorities over authority and competence and between other state authorities and before other entities where they are appointed to handle individual matters settled by way of administrative decisions or handled tacitly.

Article 22(1) CAP lists authorities competent to settle disputes over jurisdiction between individual categories of public administration bodies. Article 22(1)(1) CAP reserves, however, that in the case of disputes over jurisdiction between authorities of units of self-government, in the event of absence of a superior authority competent for both of them, the dispute is settled by an administrative court.

Pursuant to Article 22(2) CAP, disputes between authorities of units of self-government and government administration authorities regarding the scope of their powers shall be resolved by an administrative court. Pursuant to Article 22(3) CAP, the application to have the dispute resolved by the administrative court may be submitted by: 1) the party; 2) an authority of the unit of self-government or other public administration authority being in dispute; 3) the minister responsible for public administration matters; 4) the minister responsible for justice or the General Public Prosecutor and 5) the Commissioner for Human Rights.

Legal scholars and commentators emphasise that proceedings in settling disputes over jurisdiction have an accessory character towards general administrative proceedings referred to in Article 1(1) and (2) CAP [Gołaszewski and Wąsowski 2020, 48]. These proceedings do not decide with authority about the rights or obligations of individually designated addressees that do not fall organization-wise under the body that issues the decision,

[6] Act of 30 August 2002, Law on proceedings before administrative courts, Journal of Laws of 2023, item 1634 as amended [hereinafter: PBAC].

but the procedure and rules specified in Article 22 CAP serve as a basis to determine which authority is competent to issue a decision in a specific individual case [Borkowski and Krawczyk 2017, 97].

In turn, pursuant to Article 4 PBAC, administrative courts settle disputes over jurisdiction between bodies of local government units and between self-governing appeals bodies, unless a separate act provides otherwise, and disputes over competence between bodies of these units and central administration bodies.

In Article 15(1) PBAC the legislator specifies that disputes referred to in Article 4 of this act are settled by the Supreme Administrative Court. Article 15(2) also reserves that settlement of disputes referred to in Article 4 PBAC shall be done with application of provisions on proceedings before a voivodeship administrative court, though disputes referred to in Article 4 PBAC are settled by the Supreme Administrative Court, upon a request, by an order, in the panel of three judges in a closed session, by establishing the authority competent to settle the case.

5. DISPUTES OVER COMPETENCE COVERED BY ADMINISTRATIVE PROCEEDINGS

As signalled before, legal scholars and commentators point out that inclusion in the CAP regulation of measures to settle disputes over jurisdiction and disputes over competence results from the fact that such disputes arise due to initiation and conducting of administrative proceedings. Decisions of administrative courts also note - in the context of regulation of Article 1(3) CAP – that this provision entails that regulations of this code on settling disputes over jurisdiction and disputes over competence refer only to proceedings in individual matters settled by administrative decisions. This, in turn, leads to a conclusion that this provision may be applied only where there is a dispute between bodies of public administration as to their having or not having the jurisdiction (competence) in individual matters settled by an administrative decision in which proceedings regulated by CAP are pending.[7]

At that, judicial decisions point out that a possible dispute (over jurisdiction or over competence) cannot be abstract and cannot concern interpretation of provisions of the law, and a dispute over jurisdiction may arise only in connection to an individual matter which exists in fact and in which the proceedings are carried out.[8] The condition for settling a dispute over

[7] See Order of the Polish Supreme Administrative Court of 5 June 2014, ref. no. II FW 3/14, CBOSA.

[8] Cf. Order of the Polish Supreme Administrative Court of 17 January 2023, ref. no. III OW

competence by pointing to the body competent to handle the case is a claim that differences in interpretation of bodies against the competence regulation are real (not apparent), timely (not potential) and specific (not abstract).[9]

Therefore, if a request for settling a dispute over competence (jurisdiction) is abstract, detached in its content from a specific case, such a request must be deemed inadmissible in the understanding of Article 58(1)(6) in connection with Article 64(3) PBAC. On the other hand, inadmissibility of the request must in consequence lead to a dismissal of the request for settling a dispute over jurisdiction.[10]

It is also pointed out in judicial decisions that when settling a dispute over competence, the Supreme Administrative Court points to a specific body competent to examine a given case. Therefore, if an organ that files a request for settling a dispute over competence does not formulate this request against a specific case in which the dispute arose, the SAC cannot examine this request as to its substance because the court's ruling that settles the dispute over competence cannot be abstract, devoid of a reference to a specific case.[11]

The occurrence of disputes over jurisdiction or over competence must at the same time be proceeded by a precise, thorough and detailed establishment of the state of facts and of law in a given case. Absence of such findings means that a request for settling the dispute must be deemed premature, which is a basis for dismissal.[12]

6. DISPUTES OVER COMPETENCE NOT COVERED BY ADMINISTRATIVE PROCEEDINGS

Provisions of the CAP and PBAC pertaining to the procedure of settling disputes over jurisdiction and disputes over competence, given the location, scope and manner of regulation, including their compatibility, are not only confirmation, but an actual expression of affiliation of such disputes with the course of general administrative proceedings. This relationship is interpreted at that in quite a narrow and detailed scope. As emphasized

31/22, CBOSA.

[9] See Order of the Polish Supreme Administrative Court of 7 December 2023, ref. no. II GW 104/23, CBOSA.

[10] See orders of the Supreme Administrative Court of 21 October 2008, ref. no. II OW 48/08; of 12 August 2005, ref. no. II OW 25/05 and of 7 January 2009, ref. no. I OW 188/08, CBOSA.

[11] Cf. Order of the Polish Supreme Administrative Court of 12 August 2005, ref. no. II OW 25/05, CBOSA.

[12] See Order of the Polish Supreme Administrative Court of 2 March 2018, ref. no. II OW 292/17, CBOSA.

by the Supreme Administrative Court, a dispute over competence (over jurisdiction) in the understanding of Article 22(2) CAP may only pertain to cases in which the subject involves settlement of an individual administrative case by way of a decision. For this reason, examination of a dispute over establishing a body competent to examine a complaint filed under proceedings for complaints and requests (Section II CAP) does not fall under the capacity of the Supreme Administrative Court.[13]

In the aspect of the material scope of disputes over jurisdiction, the Supreme Administrative Court in one of its rulings even assumed that disputes over jurisdiction between bodies of local government and local bodies of central administration, in connection with the regulation of Article 22(2) CAP, may apply only to individual cases that these bodies are competent for and that are settled by way of an administrative decision.[14]

Despite the emphasis in judicial decisions given to this relationship between the institution of a dispute and administrative proceedings, legal scholars and commentators point out that the claim quoted above is not correct [Woś 2016, 154] and by no means entails that disputes over jurisdiction or disputes over competence in other cases that public administration authorities are competent to cannot arise. It is reserved at that, though, that disputes over jurisdiction in cases other than those individual that are settled by way of a decision are regulated by separate provisions [Przybysz 2021, 138].

Moreover, legal scholarship emphasises that Article 22 CAP – reserving that the SAC should settle disputes over jurisdiction somehow as the last option – applies also to all disputes in cases in which the CAP is applied directly and exclusively, and, moreover, in cases where these provisions are applied respectively or as supplementary norms in the scope in which other statutes do not regulate questions of settling disputes at all or regulate them differently [Woś 2016, 154-55]. Article 18 of the Law on enforcement proceedings in administration[15] is given as an example here, which refers to an appropriate application of CAP provisions, emphasising at that that rulings in the legal form of an administrative decision are not given at all in such proceedings [Defecińska 2000, 101; Woś 2016, 155].

The above claim was also reflected in judicial decisions,[16] and the Supreme Administrative Court went even further when it comes to interpre-

[13] See Order of the Polish Supreme Administrative Court of 18 February 2005, ref. no. OW 166/04, CBOSA.

[14] See Order of the Polish Supreme Administrative Court of 16 January 1995, ref. no. I SA 40/95, CBOSA.

[15] Act of 17 June 1966 on enforcement proceedings in administration, Journal of Laws of 2023 item 2505 as amended.

[16] See Order of the Polish Supreme Administrative Court of 20 September 2007, ref. no. II GW

tation of the subjective scope of disputes over jurisdiction and disputes over competence assuming that Article 4 PBAC may also be applied in cases in which acts and steps enumerated in Article 3(2)(4) are made and which concern a right or an obligation resulting from provisions of the law.[17]

When it comes to the possibility of application of provisions on settling disputed over jurisdiction to proceedings in which decisions or orders under CAP are not issued, but to which provisions of the CAP are applied respectively, it is reasonable to refer to the example from court decisions, though through which the suitable possibility may only be inferred indirectly.

When it comes to examination of disputes over jurisdiction which arose between units of self-government that have seats in different voivodeship, the Supreme Administrative Court, deeming itself not competent to settle the dispute, pointed out that since the dispute concerned assistance granted under an individual integration programme, that is assistance referred to in Article 20(1) of Social Assistance Act,[18] it may be assumed that it concerned a task that belongs to central administration. The Supreme Administrative Court then pointed out that given that poviats whose bodies are also in dispute are parts of different voivodeships and that the case that the dispute concerned falls under the commune's tasks relating to central administration, it had to be stated that, pursuant to Article 22(1)(4) CAP, it is the minister competent for public administration matters that is competent to settle this dispute.[19]

Assistance granted to third-country nationals as part on an individual integration programme do indeed fall under tasks of central administration pursuant to Article 20(1)(1) of the Social Assistance Act. These tasks are not, however, implemented in the legal form of an administrative decision. Legal scholars and commentators assume that individual programmes of integration are most similar to an agreement in their nature [Misztal 2013, 359-60]. However, pursuant to Article 14 of the Social Assistance Act, for cases not regulated under the SSA, provisions of CAP are applied unless the statute provides otherwise. Thus, one could assume that a relevant application of CAP, even though the procedure regulated by provisions of this code does not apply in establishing an individual integration programme, could also include, respectively, measures for settling disputes over jurisdiction. However, it would seem that the absence of a reservation about a relevant

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3/07, CBOSA.

[17] Order of the Polish Supreme Administrative Court of 14 December 2005, II OW 60/05, CBOSA.

[18] Social Assistance Act of 12 March 2004, Journal of Laws of 2023, item 901 as amended [hereinafter: PBAC].

[19] Order of the Polish Supreme Administrative Court of 19 October 2023, ref. no. I OW 64/23, CBOSA.

application of CAP provisions towards the entire act (because relevant reservations are sometimes put in place for individual parts of the normative act, e.g. chapter) would make settling of a dispute under the CAP inadmissible.

When it comes to the previously presented positions of the Supreme Administrative Court, including one that excludes the option for the court to settle disputes arising in the course of proceedings for complaints and requests, a conclusion comes to the fore that disputes over jurisdiction or disputes over competence may be the subject of examination by an administrative court if they arise in the course of proceedings - not only administrative – in which acts or steps are made which may be appealed against at the administrative court in the scope specified in Article 3(2) and 3(2a) PBAC or in special rules. While admittedly the individual integration programmes referred to would have been breaking out from the rule, because they fall within the scope of tasks attributed to central administration disputes relating to them were anyway excluded from the scope of examination of cases carried out by administrative courts. This breakout would have inevitably caused a discrepancy in the question of uniformity of CAP and PBAC regulation of procedures for settling disputes.

Irrespective of the above, there are disputes in the practice of operation of bodies of administration that in other aspects also seem to break the previously presented models of procedure and rules concerning the subject-matter aspect of admissibility of examination of such kinds of disputes.

This concerns disputes that arise against the regulation of Article 25(5) of the Family Benefits Act,[20] which lays down that upon learning of the change of a place of residence of a person who has been granted a family benefit, the currently competent authority transfers the decision along with the case file to the authority competent for the new place of residence so that it may administer this benefit further. This provision proceeds to stipulate that the authority competent due to the beneficiary's new place of residence implements the decision they have received without having to issue a new one and is competent to revoke it, change it or to establish and claim back benefits paid unduly if the circumstances have changed or if new circumstances have emerged that may affect the individual's right to benefits. Article 3(11) FBA, in turn, regulates the legal definition of a competent authority. Pursuant to this provision, whenever the FBA talks about a competent authority, this shall mean a commune head, a mayor or a president of the city competent due to the place of residence of a person requesting or receiving a family benefit.

[20] Act of 28 November 2003 on family benefits, Journal of Laws of 2024, item 323 as amended [hereinafter: FBA].

Therefore, the content of Article 25(5) in connection with Article 3(11) FBA means that it regulates the question of jurisdiction of an authority for implementing a public task related to exercising rights resulting from a final decision issued by a different organ – territorially competent on the date of issuing of the decision – due to the change of the place of residence of the person entitled. There are often disputes between authorities with regard to this provision as to the validity of transferring the case file so that the designated authority should continue providing this benefit. The disputes focus, for example, on doubts as to the circumstances of the place of residence or that the change is relatively short-term, not permanent.

It needs to be noticed, that, as a rule, no administrative proceedings are pending in the case associated with issuing a decision (referred to in Article 25(5) FBA) to grant family benefits, save for the possibility to initiate procedures for verification of the final decision. A final decision is assumed to have been issued already and this provision is to specify the organ that will be obliged to ensure correct realization of rights that result from the decision that has not yet been fully exercised [Lisowski and Ostapski 2023, 540].

The measure adopted in Article 25(5) FBA undoubtedly shows a special character. On the one hand, the competence granted to the competent body in this provision refers to the implementation of rights resulting from the already established relationship under substantive law, and this refers to the past. We may add here that the concept of a competent authority used above is not based on procedural regulations, but on a statutory definition of this term. In turn, this definition – by referring to the criterion of the place of residence through repetition of the CAP regulation when it comes to rules to establish territorial jurisdiction – thus allows for the designation of an authority that will be responsible for taking over the decision for its further implementation.

On the other hand, when it comes to competence, Article 25(5) FBA includes the same future-facing measures. It reserves that the authority competent for the new place of residence of the entitled persons will at the same time become competent to revoke or change this decision and to establish and claim unduly paid benefits if there are premises to initiate or conduct such proceedings. Legal scholars and commentators point out that this regulation covers succession of certain competence pertaining to taking decisions associated with the granting of a decision that has been accepted for implementation [ibid., 540-41]. It will be possible to exercise these competences, thus they will be updated, though only in the event of initiation of proceedings. Therefore, this provision determines for the future at the same time the question of jurisdiction of the body that has taken over

the decision for implementation, in the scope of specific provisions that may, but do not have to, be initiated.

As a consequence, there is no basis to believe that where a given authority took over for implementation a final decision that grants family benefits there would be any other proceedings pending resulting from the mere fact of such a transfer.

Given the above, a question comes to the fore: where there is a discrepancy between two bodies as to which of them, in the context of Article 25(5) FBA, will be responsible for implementing rights resulting from the final decision (which will at the same time determine the question of the possible future jurisdiction of one of these bodies in the context of designated categories of administrative proceedings) will there be a dispute over jurisdiction in the meaning of Article 22(1) CAP? In the case above, the condition referred to by legal scholars and commentators and in judicial decisions that an individual case must be brought before a court in the meaning of Article 1(1)(1) CAP will not be met.

Perhaps one may also consider – in light of the views presented above – whether in this case the question of resolving disputes is regulated by a separate provision or whether provisions of the Code of Administrative Procedure should be applied respectively. However, it is difficult to try to find measures in Article 25(5) FBA that are separate from those under the CAP and PBAC when it comes to settling disputes. One should rather consider the question of having to apply CAP provisions appropriately, since in the context of the definition of a competent authority adopted in Article 3(11) FBA the legislator relied on the premise of establishing jurisdiction adopted in administrative procedure, and the regulation of Article 25(5) FBA itself concerns a case closed with a final decision in which the procedure regulated in the Code of Administrative Procedure is applied.

It is worth noting that these questions did not trigger any doubts for the Supreme Administrative Court which had already been settling disputes that arose against Article 25(5) FBA based on regulations of Article 4 PBAC in connection with Article 22(1)(1) CAP. In one such case the Supreme Administrative Court first explained (relying on Article 22(1)(1) CAP) that the dispute between bodies of local government units that do not share a superior authority is not a dispute over jurisdiction settled by an administrative court. It then pointed out that in these circumstances the case concerned a negative dispute over jurisdiction because neither of the bodies in dispute considered themselves competent to further implement decisions issued by one of these bodies in cases of granting family benefits

with supplements.[21] Therefore, it was the question of jurisdiction for further implementation of the decision that was considered the object of dispute.

In general, the way the Supreme Administrative Court acted deserves credit. It is because two bodies received a clear stance on the question in doubt and in dispute associated with the implementation of a public task, which was significant in the public and individual dimension alike. However, this means that the criteria that are the basis of admissibility of examining these disputes become ambiguous. In these cases, the Supreme Administrative Court was competent to settle the dispute only because the disputing bodies did not share a superior authority, pursuant to Article 22(1)(1) CAP. Nevertheless, how are administration authorities supposed to act in similar situations if there is no such absence? One cannot accept that the competence of the Supreme Administrative Court in this case was realised only under Article 4 PBAC because in connection with Article 1(1)(3) CAP provisions of this Code when it comes to examining such disputes did not apply here. The Supreme Administrative Court should then be competent for all such disputes, but this Court reserved that this case was its to examine only because there were no shared superior authorities for the disputing bodies.

CONCLUSIONS

The question of competence to handle a given case by administration authorities is an essential systemic, procedural and substantive factor. The consequences of violating provisions on jurisdiction, especially in administrative proceedings as a decision may be declared invalid, are essential in as much that none of the bodies would wish to take action in violation of such regulation. Implementation of certain tasks by administration authorities may involve significant costs, which is why they are often determined to launch procedures that make it possible to state that there is no basis for them to be attributed competence to handle a given matter. When such disputes arise in connection with cases brought before a court and examined under general administrative proceedings, then in the light of Article 1(1)(3) and Article 22 CAP and Article 4 and Article 15 PBAC admissibility and the procedural aspect of such disputes do not cause much difficulty. The abundant line of judicial decisions may prove helpful here. However, the positions presented in them may trigger doubts when it comes to disputes that arise not in cases examined under administrative procedure,

[21] See Order of the Polish Supreme Administrative Court of 9 November 2023, ref. no. I OW 141/23, CBOSA. Cf. also Order of the Polish Supreme Administrative Court of 20 April 2023, ref. no. I OW 138/22, CBOSA.

but those that concern public tasks for which the question of the entity responsible for their implementation may be not unequivocal or disputed. Since they are not handled under the administrative procedure, formally, in the context of the wording of Article 1(1)(3) in connection with Article 1 and 2 CAP, the procedure for examining disputes over jurisdiction regulated in this Code should not apply either. The above may concern, however, different kinds of tasks that may rest with bodies, e.g. necessary to be carried out in crisis situations or in situations involving maintenance of public roads. In such situations, these bodies may be left with an unresolved problem and the form of handling the case and interpretation of provisions done against a given regulation may turn out to be the determining factor for the question of whether there will be a basis to examine them within a given category of disputes. Looking from the point of view of operation of administration bodies, it is difficult to find a clear and convincing explanation to a situation where it is admissible to settle a dispute over jurisdiction under CAP for cases handled in the form of an agreement (by application of relevant CAP regulations), but at the same time such a procedure is excluded for complaints and requests regulated under CAP. Perhaps the question of the personal and material scope and procedures for settling disputes over jurisdiction and disputes over competence should be at least analysed given the changing regulations, including forms in which administration operates and increasingly dynamically changing social relations; even if only in terms of existing rules for conducting such proceedings.

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DILEMMAS OF JUSTICE IN LAW – THE HISTORICAL-LEGAL AND SEMANTIC ASPECTS OF JUSTICE

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Abstract. The article focuses on the dilemmas of justice in law, and especially on linguistic (semantic) and legal-historical issues. This study is part of a broader research project devoted to the study of justice in law – in particular, its understanding, formation and impact, as well as its possible use today (e.g. in legislation). Due to the complexity of the research problem examined, the article presents some introductory remarks and clarifies certain limitations. This is followed by the presentation of historical and legal considerations, and a series of linguistic and semantic considerations. These lead to particularly spectacular results, as it turns out that the concept and understanding of justice have shaped the concept and understanding of law.

Keywords: theory and philosophy of law; justice; just law; dilemmas of justice in law; history of law; semantics; legalese

INTRODUCTION

The concept of "justice" has accompanied humanity since ancient times, or at least this is our belief. Many analyses, some of which are presented in this text, make it possible to formulate such statements. Justice is an extremely complex concept. One can therefore discuss its multifaceted nature. It refers to many phenomena, not only legal ones. So, for example, we discuss justice in law, but also *a contrario* – injustice in law. We can relate analogous antagonisms to the economy, in science, education, politics or social relations. It is also common, in many language systems, to discuss "justice" (in polish *wymiar sprawiedliwości*) as a term for the exercise of judicial power.

Justice is debated – sometimes extremely emotionally – by various social groups; lawyers, politicians, businessmen, medical doctors, priests, journalists,

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scientists, workers, farmers; young and old. Discussions about what justice is and is not, ignite debates among ethicists, moralists, theologians, religious scholars. Justice is a slogan that sometimes unites but also sometimes divides [Raiser 1992, 154]. Justice is present in mass culture taking prominent places in the titles of movies, TV series, books. Justice can be discussed from the division of scarce goods such as a cake by two children or food supplies during a siege, for which Pythagoras is said to have created the famous "cup of justice" causing the drink poured into it too greedily and to the detriment of others to flow out of the vessel and the delinquent was left with nothing, to setting rules for the equitable redistribution of financial resources at the multistate level (e.g., the "European budget").

Dilemmas of justice in law – this is the guiding idea of a research project involving a series of studies and publications on this highly relevant topic. Originally, it was initiated by one of the co-authors of this article through the publication of a scholarly monograph [Kokoszkiewicz 2022] and then through the joint work of both authors. For we thought it worthy of attempting to explain what justice in law is? What does it mean? Is it universal for all legal systems? Finally, we can ask – what is a just law? What specific regulations (legal provisions) should it contain for such a law to be defined in this way? And additionally *a contrario* – what will the injustice of this law consist in? We instinctively feel that answering such numerous and capacious questions may pose many difficulties, or even be impossible. As L. Kołakowski notes with characteristic irony, "since almost all philosophers, moralists and legal theorists have tried to clarify what justice, a righteous deed, a righteous man and a righteous state consist in, it must be thought that they have not reached clarity and agreement on this matter" [Kołakowski 2000, 50]. Because of the above problem, that is, that justice is a very complex concept, we make an assumption – of limiting the research area. On the ground of this article we will focus only on selected aspects accompanying justice in law. These will be the historical-legal aspect and the semantic aspect. We want this article and the considerations contained herein to become a contribution to a broader discussion on justice in law. At the same time, we wish to avoid accusations about other topics not being reported on.

Underlying this choice is the conviction that it is of interest from the perspective of the study of the state and law, and is also multifaceted. In developing such a judgement, we point to two main arguments. Firstly, we are convinced that historical, and in particular historic-legal, experiences often have a measurable impact on shaping the phenomena we face today. Historical-legal experiences, therefore, can have an impact on the contemporary legal system. Historical experience can be used in lawmaking activities. Secondly, research on justice in law, reveals an interesting semantic problem.

For it turns out that the concepts of "justice" and "law" are sometimes linked at this level – and thus not only at, for example, the ontological level. The question of how the understanding of justice can be determined by language and how such a phenomenon presents itself in different languages thus arises somewhat naturally [Gizbert-Studnicki 1986]. In the polish "Encyclopedia of Law" [Kalina-Prasznic 2007, 801] we read that justice is the characteristic of one's conduct toward others, which consists in treating all persons belonging to the same category equally. Justice boils down to the rejection of arbitrariness, that is, treating people according to a certain formula. The following formulas of justice are most often mentioned: "to each the same", "to each according to his merits", "to each according to his works", "to each according to his needs", "to each according to his position", "to each according to what the law grants him". And although almost everyone is in favor of justice, however, there is no consensus on how to understand this concept, i.e. what specific conduct is just. In the practice of social life, following only one formula of justice either does not occur, or leads to injustice in other respects. It is also a feature of acts of application of the law consisting in issuing compliant decisions (rulings) that are the same in similar (or at least very similar) cases; sometimes justice also means the compliance of acts of application of the law with certain rules considered by the evaluator to be principles of justice. From this encyclopedic definition or, rather, an attempt of definition, the claim of the multiplicity of views and the fact that there is no consensus in principle on how to understand the concept. However, it seems reasonable to assume that the meaning of justice can also be learned by learning about its opposites. To this end, we can pose the question – what does it mean to act unjustly? On the basis of opposites, after all, we can attempt to study the main problem. The ethical literature explains that it can mean treating people unequally in some matter that presupposes the assignment of good or bad things to them and such that no moral considerations [principles] that would require inequality play a significant role in the given circumstances this definition also implies that injustice is essentially unequal treatment, which is consistent with the traditional belief that equality is a value also makes it possible to accept the traditional adage that "justice is giving everyone what they deserve" which can be interpreted very broadly it also makes it possible to understand the close relationship between "unjust" and "bad" – assuming that for some reason we believe it is wrong to treat people unequally when there are no particular moral reasons for doing so [Brandt 1996, 694]. Such an ethical perspective also does not provide a satisfactory answer, but it directs to certain characteristics of just and unjust behavior. It therefore prompts the search for answers on other levels – and thus justifies, in our view, reaching for a historical perspective.

On the basis of the above introduction, we can therefore pose the following exemplary research questions: what references do we find to attempt to explain justice, is this concept complex? Has it undergone changes, depending on the legal culture? What might be useful research perspectives for jurisprudence, for the study of justice in law? Is the discussion of justice in the law characteristic to the present day or was it present earlier? What is the relationship of the words "law" and "justice" in different languages? What conclusions does such an analysis lead to? Is it relevant to contemporary jurisprudence?

1. HISTORICAL-LEGAL PERSPECTIVE ON JUSTICE IN LAW

Now let's reach to historical experience. After all, according to the study of dozens of texts, considerations of justice have accompanied mankind for a very long time, having held its rightful, supreme place in the hierarchy. Legal writing points out that for centuries, the social attribute of justice has been assigned a prominent place among other characteristics of a well-organized community [Wilczyńska and Wilczyński 2015, 54]. It is significant and interesting that the understanding of the concept of justice has been and is constantly changing. One would like to write "evolution" however, such a statement may be incorrect. For example, an important component of 16th-century and later Polish criminal justice was the methodology of administering one of the punishments, the gallows. Historical sources describing Polish city of Lublin, which played a significant role in the pantheon of criminal justice at the time (for it had the privilege of an executioner), indicate that the gallows (*suspensium, patibulum*) was important in the administration of justice. Lublin's patibulum was erected on the city's most important route to Krakow near the statue of the Passion of Christ [Kus 2002, 50]. Certainly, it is necessary to go back much earlier. Through a review of selected historical sources, we can observe that justice as applied to the state and the law is not something new, applied only to the modern state, and that the content of the concept of justice, its understanding, has undergone and continues to undergo various interpretations and changes.

However, as we signaled earlier, the roots of the understanding of justice as well as attempts to realize it should be sought much earlier. It seems that even with the emergence of humanity, and certainly from the time of organized communities. After all, justice is a value that allows for survival, a kind of regulator of social relations. In this context, K. Fokt draws an interesting separation – into tame and untamed justice, explaining that if one proceeds from the assumption that the accepted model of justice is related to the degree of complexity of a given society, untamed justice would have to refer to pre-state societies, organized into

tribes and chiefdoms. These societies, oriented mainly to biological survival, lived, as it were, in the eternal now, relying on unshakeable tradition and collective action [Fokt 2006, 10].

In fact, for example, in the Code of Hammurabi we find references to justice in law. The purpose of this codification was indicated as "to bring justice to the country, to exterminate the wicked and the evil, so that the strong do not harm the weak"[1] adding in its continuation also "so that the strong do not harm the weak, so that the orphan (and) the widow may be given justice."[2] This demonstrates the significant, measurable and multidimensional importance of justice as values that can or should guide the state and the laws it creates. Two aspects are noteworthy in this codification. On the one hand, a kind of brutalism in the understanding of justice, which is incompatible with the standards of the modern rule of law. For the codifier understands justice as a value in which "evil and wicked" persons will be exterminated. This is characteristic of the normative systems of the time (but also of later ones). On the other hand, however, and very importantly, and perhaps surprisingly for some, the universality of this codification draws the reader's attention. It should be reminded that the code was issued around 1772 BC. "That the strong do not harm the weak" contains a normative charge characteristic of modern legal systems, including the Polish system. It is about the preservation of a certain equality of parties and also procedural means to prevent injurious actions or to defend effectively in case of their realization. We also read about the need for special protection for those in particular need of it – the reference is to "orphans and widows." This is a normative solution also familiar to contemporaries and appearing, for example, in Polish social legislation.

Justice is also mentioned in the Old Testament or the laws of ancient Egypt [Kuryłowicz 2006, 207-22]. M. Weinfeld, exploring the meaning of justice, points out that in ancient texts (Hebrew, Egyptian or Mesopotamian) it is often juxtaposed directly with righteousness; and "justice and righteousness are considered a lofty, divine ideal" [Weinfeld 1994, 230]. Interestingly, the author concludes that the judge (who exercises this justice – own footnote), although subject to the laws, cannot overlook considerations of fairness and righteousness, which leads to "true judgment". "Justice and righteousness" is therefore not a concept that belongs exclusively to the legal community but is much more appropriate for socio-political leaders who create laws and see to their execution [ibid., 245-46]. This is an interesting point demonstrating the relatively broad meaning given to the concept

[1] Code of Hammurabi (translated by M. Stępień), p. 9.

[2] Ibid., p. 71.

of justice in ancient thought – referring not only to the (as we would say now, in legal aspect) positive sphere, but having a general meaning.

Also interesting observations are provided by the analysis of legal norms contained in the Bible, which is, after all, excellent historical research material. P. Bovati, after conducting research on a wide range of biblical texts, indicates that this has allowed to expose an important fact: legal vocabulary can be found, albeit with varying frequency, in many biblical texts. The concern for justice, both in human history and in the relationship between God and humanity, appears as one of the most important themes in the text of the Bible [Bovati 1994, 389].

Richard Hiers, discussing (as if by reference to modern jurisprudence) legal norms grouped according to typology: civil law norms, criminal law norms, and social legislation, concludes that a significant number of biblical laws provide the accused with what can aptly be described as due process protection [Hiers 2009, 221]. Of course, it makes no sense to relate the legal norms envisaged for use among an extremely different society than we face today in Western democracies. Nevertheless, it points to certain points of reference that may prove valuable even today. They also testify to a certain universality of values, as does the example from the Code of Hammurabi discussed earlier. So, too, the legal norms contained in the biblical texts point to certain universal values attributed to justice, such as the provision of procedural guarantees to a party. From the research perspective adopted, it is particularly important to pay attention to biblical social legislation, which we can relate to modern administrative law legislation. This is due to the somewhat surprising discovery that biblical legal texts imposed a number of provisions that, taken together, can reasonably be considered a well-developed system of social welfare [ibid., 174]. Author highlights the – also well-known contemporary elements of the social law system whose essential element of functioning is also the need to ensure due process standards – full, fair and equal justice in the courts, provisions against oppression or mistreatment of protected classes (including consumer protection, provisions against corruption in trade or the use of false weights and measures) relating to, among others, widows, orphans, wage earners, foreigners, disabled people [ibid., 175-211]. These values are linked directly to justice in the biblical texts, personifying its essence. In other words, justice is treated uniformly here, without typologizing into, for example, material or formal justice – what is just in the biblical sense is unitarian in both the material and formal sense, and both aspects are meant to embody the assumptions of the concept adopted. This, therefore, may prompt the search for certain universals of the concept of justice, especially in law. However, there is a risk that in other religious or ethical systems, the above concept will not gain acceptance, so that the hypothesis of the universality

of the concept falls. Accepting certain limitations, nevertheless, and examining, for example, the normative systems of the democratic legal state of the Western model based on the idea of Christian justice, we can already make such a search with a certain degree of efficiency, assuming that it will give a measurable effect and not provide only slogans. It is worth underlining at this point, following M. Sandel, that almost all of the great reformers in the history of the United States – were not only guided by their faith, but also constantly used the language of religion to argue their case. So it would be absurd to argue that men and women should not bring their personal morality into the debate about public policy [or justice – Authors' note]. Our law is by definition a codification of moral norms, growing largely out of the Judeo-Christian tradition [Sandel 2020, 334]. So, a certain moral particularism, as a kind of research optics, which is also presented by us, does not, interfere with the possibilities of an effective search for the truth about certain universal characteristics of justice.

2. SEMANTIC PERSPECTIVE ON JUSTICE IN LAW

Knowledge of justice in both titular aspects (historical-legal and semantic) is provided by Antiquity. A "mine" of knowledge about justice in the state and law is the output of Roman jurists. The partial acquisition and then development of philosophical and legal thought, including considerations of justice, together with a good study of the area, gives very interesting scientific results [Dziedziak 2012, 90]. Considerations of the concepts related to *iustitia* or *aequitas* remain universally relevant and are certainly valuable in finding answers to numerous research questions. M. Kuryłowicz explains that at the root of the concept of law, which included the principle of equity – *aequitas*, was, according to Roman jurists, justice (*iustitia*) as a constant and unchanging will to grant everyone his due: *Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*. Despite a certain amount of pathos, it is impossible, in considering the concept of justice, to omit the commonly known from the Justinian Digests, the definition of law as the art (skill) of finding and applying what is good and right – *Iuri operam daturum prius nosse oportet, unde nomen iuris descendat, est autem a iustitia appellatum: nam, ut eleganter Celsus definit, ius est ars boni et aequi* [Kuryłowicz 2003, 161-65].

In ancient Greek, too, the connection between law and justice is significant. It is necessary to note that law and justice have always been closely linked, as evidenced, among other things, by the fact that the Greek word *dike* meant both [Woleński 2010, 200]. So there are undoubtedly strong – in the crudest assumption in the linguistic area – links between law and justice.

It will be very important here to give special attention to the concepts of *ius* and *lex* in Roman law. The relationship of *ius* and *lex* is an excellent exemplification of certain problems between law understood strictly in a positive way, and law understood more intangibly – as a set of certain abstract values. This particular relationship, has happily received a significant literature on the subject. In the literature it is explained that this distinction, which originated in Latin, was and is invoked as an expression of the belief in the dual nature of law, according to which the concept of law is not exhausted in legislated norms, but also includes standards of other origin and type. Thus, it can be said, roughly speaking, that the expression *lex* denotes the law that is legislated by a competent subject, while *ius* denotes those legal standards that do not come directly from the legislator and are usually considered not dispositive of his actual will [Pichlak 2017, 49].

Therefore, it is necessary to pay the utmost attention to the fact that *ius*, which means the law not dispositive of the will of the legislature, is the component of justice, which expresses *iustitia*. It is not *lex*, as legislated law (we do not have the phrase *lextitia*). From such a cursory linguistic analysis, we can deduce that the vocabulary of justice is associated with a value that is in some way universal, ontological. This, in turn, may prove the attribution of justice to a broader meaning than that referring exclusively to the currently established law.

Similar linguistic considerations can be made on the ground of German. Two phrases are in use there: *recht* and *gesetz*, which can be compared to *ius* and *lex*. The phrase *gerechtigkeit* is used to describe justice. As can be seen, in linguistic terms, *recht* not *gesetz* is the component of *gerechtigkeit* (justice). A similar relationship can be seen in Chinese philosophy of law, where we observe deliberations on the *li* – *fa* line by proponents of Confucianism and Chinese Legalism. A. Kość points out that Confucian *li* motivates man to free, internal obedience, legistic *fa* leads to external obedience by using punishments, *li* creates harmony and peace, *fa* external order, *li* emphasizes the practice of virtues, *fa* on conformism and procedural conduct, according to *li* man should act, so as to avoid disputes, according to *fa*, however, disputes should be resolved by trial [Kość 1998, 84].

In Polish, unfortunately, we do not observe such a relationship. This is because we use only the term *prawo* (law); only its specification by adding some adjective (e.g. natural or positive), determines the meaning given to it. However, it is found in the phrase *sprawiedliwość* (justice) constituting its literal (and not only) quintessence. It is rightly emphasized by S. Karolak that in the Polish language, in the term of interest here "justice" is included the subject of the word "law". Such a phenomenon is not the rule, and in many languages such a coincidence does not occur. Therefore, there is no doubt that when speaking of justice we often connect it with the law,

with its content, its observance or failure to observe it, or even breaking it [Karolak 2007, 11-12].

From the above examples, the primacy of *ius* over *lex* is evident, which today, it seems, is sometimes questioned. It is pointed out that the primacy of *ius* over *lex* was challenged only in post-Hegelian philosophical and legal reflection, which consisted of transforming the previous formula of legal thinking "law before statute" into the formula "statute before law" [Płeszka 2006, 98]. There may have been at least two reasons for this variation. First, there was a contemporary turn to the natural sciences and the empirical method. The modeling of the natural sciences as providing universally valid and enduring laws of natural reality prompted the science of law to seek analogous regularities relating to law. These regularities were much easier to identify in relation to the statute *lex* than in relation to the discursive *ius* [ibid.].

It seems that a similar turn is currently observed in at least Polish science, which implies the search for a uniform method for all disciplines, which is obviously impossible. The second reason is a type of practical destruction of the *lex* through the use of non-statutory solutions through the application of extraordinary institutions (e.g., punishments that have no statutory basis or for acts that are not specified in the law), or the appeal in the practice of adjudication to reasonable judicial discretion. This state of affairs led to the abrogation of formal guarantees of the legal order, and the liberation of judges from subordination to the law led to almost complete legal uncertainty. In place of justice there was arbitrariness. Hence, not only jurists recognized that only the law and the strict binding of its contents on both adjudicators and executors would ensure the protection of individual liberty from the power and arbitrariness of the state [ibid., 99].

So in such a situation, despite the supremacy of *ius* over *lex*, and the semantic inscription of *ius* in justice, such action was a facade of justice. For this one requires guarantees in order to be realized. Such, in turn, cannot exist solely in the abstract realm. On the backdrop of linguistic considerations, it is worth signaling finally that it is "from the Latin term *iustitis*, derived from *ius* (law), that it is derived in Italian – *giustizia*, Maltese – *gustizzia*, Portuguese – *justica*, Romanian – *justipie*, English – *justice*, German – *justiz*. It is related to the German term *recht* (law) in Dutch – *rechtvaardigheid*, Danish – *retfaerdighed* and Swedish – *rättvisa*, while it is related to the native sound of the term 'law' in Serbian – Правосуде, Bulgarian – Правосъдие, Slovenian – *pravica*. From the name of the goddess of justice *Diké* (Greek Δίκγ) comes the name 'justice' in Greek – *diakoisyne* (Δικαιοσύνη) and probably Estonian – *oiglus* and Finnish – *oikeus* [...] The Polish-language noun 'justice' comes from the adjective 'just' as a borrowing from Old Czech *spravedlivy*, being a transformation of the earlier form

spravedlny. Similar sounds are found in Russian – справед ивость, modern Czech – *spravedlnos*t and Slovak – *spravodlivost*" [Tokarczyk 2016, 13-14].

In our subjective opinion (especially as a persons who are not a qualified linguists), such statements are extremely interesting and of value to legal science. The process of vocabulary and the interrelationships between words defining the concepts of "law", "justice" in different languages can indicate certain views of people. What I want to convey with this is that since at that time certain assumptions of a philosophical (or perhaps more, ontological) nature were made, which consequently determined the formation of subsequent words, this is interesting and valuable for modern science. It may also prove, as I pointed out earlier, some fairly universal qualities that could be attributed to the studied concepts. In addition, from the perspective of considering the methods used in the study of law, it shows how valuable and interesting it is to draw on historical or linguistic methods.

CONCLUSIONS

We will begin the concluding section with a brief consideration of symbolism. It is important but also directly related to the aspects that have been touched upon above. Finally, it is also interesting to depict, illustrate and attempt to embody the concept of justice by creating corresponding symbolism. Justices of antiquity; Greek and Roman still today occupy prominent places in public institutions: offices or courts as well as many law offices. It is significant that they embody the qualities of justice. As J. Warylewski writes what do the Roman (*Iustitia*) and Greek (*Temida*) personifications of justice do? Variously depicted, but they are always women. Most often clad in white (she must be undefiled by self-interest and emotion), sometimes with a blindfold over her eyes (the senses, including sight, should not interfere with reason and symbolize impartiality), holding in her left hand a bundle of rods with an axe (carried in Rome before the Consul and the Tribune of the People) and fire (the judge's mind should be directed toward Heaven) or a sword and a scale. With the scales and sword they deal with the consideration of guilt and punishment. The scales are a symbol of justice, balance and legislation, judging and public administration of justice. In Christian iconography, the scales are used by the Archangel Gabriel, weighing souls at the Last Judgment [Warylewski 2016, 446].

Justice, therefore, has enlivened and enlivens minds, and is the subject of volatile discussions aimed at capturing its essence and developing solutions to suit it. Given that it is an issue that is very rich in content, deep and, perhaps most importantly, belongs to many scientific disciplines, it is worth undertaking research on it. In my opinion, such multifaceted research on justice in the law, on the dilemmas of this justice can lead

to the discovery of some of its features. In particular, I find interesting here a kind of "historical return" to a broader view of justice in law and reading it through the prism of *ius* in the face of the currently dominant primacy of lex. In doing so, this does not mean rejecting either one or the other, but seeking a scientific platform of understanding. Both the one and the other are arthritic. For we cannot speak of an efficient and just system of law in a modern democratic state of law of the Western model without justice. Although, at the same time, it can be reduced to partisan slogans, thus giving rise to disputes "whose justice is at stake"? This is all the more of a challenge to seek, on the one hand, the values that are paramount to the law (based precisely on justice) and derive from it (and legislate) the laws that make it a reality. And this, in our opinion, is the biggest challenge for jurisprudence for the near future. Even rejecting the aforementioned aspect of *ius* and the typically positivist, dogmatic-legal approach, it will in its essence be an extension of some overarching idea.

In a final attempt to summarise and answer the research questions posed at the outset, it can be concluded that the concept of justice is undoubtedly of a complex, multifaceted nature. Any attempt to define it and enclose it within a specific framework is therefore risky. Justice belongs to scientifically multidisciplinary values and is of interest to various scientific disciplines – among them the science of law. In the scientific literature we find a great many attempts to explain justice, none of which is definitive. A diversity of approaches to explaining the concept is apparent. It has been (and is) changing. It is undoubtedly influenced by the context of the legal culture in which we try to explain the concept of justice. For there was a different conception of justice in Mesopotamian times, a different one in ancient times, and a different one in the Middle Ages or today. Therefore, it seems that the historical or semantic perspectives of justice research might be useful for contemporary jurisprudence. Of course, this in no way detracts from other approaches to the topic. The aforementioned historic-legal perspective reveals that the discussion of justice in law is not characters only for the present day. References to justice – both explicitly in legal systems and more broadly – are found in past cultures. Nowadays, justice in law is also discussed, although we make the cautious thesis that in recent years, not very intensively. There is certainly a great deal of scope and perspective for researchers here. The state and the law, contemporary jurisprudence, need a consideration of justice in law. This allows for a better understanding of the essence of law and thus, for example, for the creation of better regulations within the legal system. Against the backdrop of linguistic considerations, which are also useful for contemporary jurisprudence, the relationship of the words "law" and "justice" in different languages is particularly intriguing. The juxtaposition of this relation leads to the conclusion

that in some languages, law understood in an ontological way (as an entity, value, and not as a legislated law, rules of law, although one cannot deny the ontological value of the latter either) is a component of the word justice. Thus, it is possible to pose a thesis about the mutual, indispensable, interrelation of these two concepts. Such a perspective is undoubtedly important for contemporary jurisprudence, making it possible to develop research e.g. on lawmaking based on the postulate of prohibition of its instrumentalisation and obligatory basing it on justice understood as a value. However, this is a subject for further, complex analysis.

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MARKET RESPONSES OF CONSUMERS AND ORGANIZATIONS TO TAXATION IN THE CONTEXT OF MANAGERIAL DECISION-MAKING PROCESS

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Abstract. Managers of business entities must consider tax regulations in their decision-making processes. If the tax system is characterised by high tax rates, the following effects should be expected: a weakening of the economic growth rate, the development of the economic "grey zone", the outflow of capital abroad while limiting the inflow of external capital. With regard to enterprises, three basic economic effects of taxation can be distinguished: in terms of liquidity, property and organisation. The article discusses models of theoretical forms of reducing the tax burden, thus drawing attention to the significant role of tax planning by business entities, in the context of both the domestic and the international markets.

Keywords: tax law; financial law; tax liability; financial policy; decision making; tax management; process management.

INTRODUCTION

Making rational decisions in an enterprise, both current and strategic, requires knowledge and taking into account external conditions of the business.

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The accuracy of decisions made, as well as the ability to adapt to the changing external environment, determines not only the effectiveness of functioning enterprise, but also about its ability to continue its operations. Taxpayers often find themselves in a situation that generates the need to make quick decisions and implement economic actions. It is therefore worth referring to three interrelated microeconomic issues, i.e. rationality of expectations, rationality of conduct (economisation of actions) and economic calculation. The starting point is to define the concept of rationality as conduct based on the principles of correct thinking and effective action. Thus, the rationality of expectations refers in the microeconomic dimension to the behaviour of households and enterprises, assuming that market actors will behave rationally, i.e. that they are able to rank their preferences from most to least preferred and act under market conditions according to these (established) priorities. The recognition of the fact that state economic policy is partly dependent on the extent to which consumers correctly anticipate its effects and act in accordance with their own predictions is an important contribution of rational expectations theory [Feldstein and Samwick 1996, 5-10].

The tax system significantly affects the material and legal situation of households (through the level and nature of fiscal burdens and the taxation structure) and business entities (constituting a cost element for companies and their owners). Managers of business entities must take tax regulations into account in their decision-making processes. Bearing in mind that in a market economy the profit motive is the basic premise of economic development, the tax legislator must be aware that only a specific part of the national product gross can be (is) taken over by taxes without causing negative financial and economic effects. The creators of the tax system should therefore take into account the fact that each tax burden is treated by the entity as a reduction of its current or future status. "High rates taxation, the following effects should be expected: a weakening of the economic growth rate, the development of the economic "gray zone", the outflow of capital abroad while limiting the inflow of external capital. Legal regulations that create the framework for the functioning of business entities and the taxation of income and capital of households have a significant impact on market power, consumer and investment expenditure, enterprise development and economic growth" [Wołowiec, Skica, and Gercheva 2014, 52-64].

One of the most controversial issues in economics is whether it is possible to stimulate economy to quicker growth rate by lowering income taxes. In "2000 two authors, J. Agnell and M. Persson published the paper in which they checked the effects of tax reduction on economic growth rate based on endogenous growth model, checking in this way the potential effect of Laffer" [Agnell and Persson 2000, 1-25]. The authors verified potential effects of tax reduction among 16 OECD countries and basing on simulation

on an econometric model they reached the conclusion that the best growth effects can be obtained by lowering taxes in Sweden, Finland and Denmark, that is countries with the highest tax and para-tax burden. The authors also indicated that the effect of economic growth acceleration depends on policy concerning public expenditure adopted by the governemnt. It is generally possible only in conditions in which after the period of public expenditure acceleration they are experiencing slow-down. If we assume that period after period the share of government expenditure in GDP increases, lowering taxes will not influence the economic growth rate. This conclusion seems obvious. Tax reductions, according to Laffer's concept, are made in order to enhance dynamics of private sector development at the costs of public sector, which requires limiting the public expenditure growth rate (or even their stagnation or reduction).

The height of tax rates and the nature of income tax rates table can be a factor affecting job turnover. This issue has been analyzed by two economists: W.M. Gentry and R.G. Hubbard, who wrote a book on this topic [Gentry and Hubbard 2002, 1-43]. They analyzed relations between tax rates, tax roundness and Job Turnover based on TAXISM model used by National Bureau of Economic Research. As the authors pointed out, job turnover affects both rate changes and roundness of tax table (measures of progressiveness). "We estimate that a 5% reduction of extreme tax [...] increases the likelihood of moving to a better job by 0.79%, while decreasing the tax system roundness measure by 3.12% (the value of one standard deviation) increases the likelihood of moving to a better job by 0.86% [...]. For married men these results are slightly higher" [ibid., 33]. This means that tax reductions encourage seeking a better job as employees are certain that possible additional pay will not be covered with higher tax rate. These results show that tax reductions positively motivate employees and this influence is statistically significant. We can also formulate a conclusion that the less progressive the tax system, the greater inclination to look for a better job. The authors also stated, quoting another research of theirs [ibid., 1-10], that the roundness (progressiveness) of tax system exerts relatively large negative influence on entrepreneurial decisions, such as entering a new market.

An important factor determining the height of optimal tax rates is labor supply and its indirect measure – taxable income. The issue of the power of labor supply reaction and, what is connected with it, taxable income, on changes to tax rates is a key dilemma in the theory of optimal taxation. Full measure of taxable income flexibility level was performed in American conditions by J. Gruber and E. Saez [Gruber and Saez 2000, 3-38]. Their research covered the period of 1980s, the time of significant reductions of federal and state taxes. They used a full panel of observations covering data from 46000 tax return forms from 1979-1990. Research showed that

flexibility of taxable income grows along with income growth. So taxpayers from higher tax ranges strongly react to increasing and decreasing tax rates. General flexibility of taxable income to tax rate changes is mostly determined by taxpayers from the highest income group. These results indicated also that in American reality, in 1979-1990, as a result of implementing the tax reduction program, especially for the highest income group, the growth of taxable income in the highest income groups caused major growth of global taxable income.

A. Goolsbee [Goolsbee 1997, 1-35] in his book *What Happens When You Tax the Rich? Evidence from Executive Compensation* deals with a fascinating issue of how taxable income of stock exchange companies boards reacts to changes to extreme tax rates in personal income tax. The author used the data provided by companies obliged to do so by securities regulations in the USA: stock exchange companies have to inform about remuneration of five most important representatives of the board. The survey covered the period of 1991-1995.

G.D. Myles [Myles 2000, 141-68] made a review of growth models from the perspective of the influence taxation has on economic growth. He proved that in theoretical models we can isolate a series of channels through which taxation may influence growth and that this influence can be significant. Some models predict that the growth effect is minor, other predict that it could be major. What differentiates these models is the number of key parameters, especially physical capital share in generating human capital, flexibility of usefulness function and depreciation rate. In principle, these figures could be isolated empirically and the size of growth effect precisely determined. However, in order to do so, one would have to make a review of a series of fundamental issues concerning model assumptions.

On the other hand, as shown by Mendoza, Milesi-Ferrati and Asea in their models of regression, relation between taxation and economic growth rate is small [Mendoza, Milesi-Ferrati, and Asea 1997, 119-40]. Contrary evidence was supplied by Leibfritz, Thronton and Bibbee [Leibfritz, Thorton, and Bibbee1997, 1-20]. They calculated that in OECD countries in 1980-1995, the growth of tax rate by 10% was accompanied by the decline of economic growth rate by 0.5%, with direct taxation limiting this growth more than indirect taxation. The quoted research provides one clear conclusion. Economists cannot unequivocally determine how taxation affects economic growth rate in the long term. The proofs that taxation considerably influences growth rate are weak**.** Such conclusion may be shocking, but on the basis of current results of economic research we cannot make any other conclusion.

Taxpayers' reactions are dictated by their subjective perception of the tax burden, which is expressed as the amount of taxes that reduce the taxpayer's

income, being the difference between the income that would be available to the taxpayer if no tax had to be paid and the actual income available to the taxpayer after paying taxes. These taxpayer responses determine both economic and political incentives [Gomułowicz and Małecki 2011, 110-11]. Every form of taxation carries with it the effect of reducing the income that the individual expected to obtain from the original appropriation, production, or exchange. Since these activities require the use of scarce resources – such as time and the use of one's body – that could have been used for consumption or leisure, the opportunity cost of these activities increases. The marginal utility of appropriation, production and exchange becomes lower and the marginal utility of consumption or leisure becomes higher. Thus, by forcibly transferring valuable, not yet consumed goods from producers (production in a broader sense also includes primary appropriation and exchange) to people who have not participated in production, taxation reduces the current income of producers and their potential level of consumption. Moreover, the current incentives for future production of valuable goods also weaken, with a consequent reduction in future income and levels of future consumption [Wołowiec 2019, 237-47].

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. The article is written according to the traditional methods used in legal research sciences, linguistic analysis (dogmatic-legal method and linguistic-logical method), and comparative (comparative) and economic method of legal analysis.

2. TAXES *VERSUS* MANAGERIAL DECISIONS

Decision-making is a procedural feature of the management process with multiple economic and psychosociological determinants. Decision-making can be considered in two senses . In a broad sense, it is a complex process consisting of the recording and grading of information, the identification of the decision problem and the application of the adopted selection criterion, the definition and issuing of the decision (decision task) and the recording of information on its execution. In the second – narrow – sense, decision-making is only one stage of the decision-making process and implies a

conscious act of will by the decision-maker making a non-random selection of one, from a set of possible options for solving the decision problem (these options must, of course, be identified or designed in advance). "The company existence in the long run depends on activities adjusting it to changing environment. Adaptation activities taking place both inside the company and in all its contacts with the environment, can also be forced by fiscal policy of the economy " [Wołowiec 2009, 185-203].

Tax system significantly influences material and legal situation of households (through the level and nature of fiscal burden and taxation n structure) and economic entities (being a cost element for companies and their owners). Thus running business entities must take tax regulations into account in their decision-taking processes. Remembering that in market economy the profit motive is a fundamental premise for economic development, tax legislators must be aware that only a part of gross domestic product may be (is) taken over by taxes without causing any negative financial or economic effects. Creators of tax system should take into consideration the fact that each tax burden is treated by entities as lowering their current and future wealth status. If there are high tax rates in the tax system, we can expect such effects as: weakened economic growth rate, development of 'grey zone' economy, capital flow abroad and simultaneously limited inflow of capital from outside. Legal regulations providing frameworks for operations of economic entities and taxation of income and capital owned by households significantly influence market forces, consumption and investment expenses, development of enterprises and economic growth [Wołowiec 2017a, 173-96].

With reference to companies we can distinguish three elementary economic effects of taxation: those regarding liquidity, assets and organization. Personal and corporate income taxes mainly negatively influence entrepreneurs' liquidity, as they lead to definite burden placed on the entrepreneur (taxpayer). Both personal and corporate income taxes are 'expenses' which are not costs of obtaining revenue and they lower company liquidity. Company liquidity is affected by the way of determining tax base alone. If taxable revenues from conducted economic activity are due revenues, even if they have not been obtained yet, while payments received for deliveries of goods and services to be performed in the next tax years do not constitute taxable revenue in a year in which they have been obtained. This means that usually revenues and costs are determined on the basis of the accrual method. The appearance of dues from, for example sales on installment basis leads to appearance of revenue on the day the invoice was drawn, not later than on the last day of the month in which the goods were delivered. The appearance of due revenue leads to origin of tax obligation, usually in form of down-payments during the tax year, even though the taxpayer

has not received the payment yet. With reference to revenues from interests, exchange rate differences determined on tax principles and compensations and contractual penalties, the legislator usually adopts the cash rule of revenue origin. This means that the revenue and the obligation to pay tax appear at the moment of receiving money. Also personal tax returns do not lead to improved liquidity, as tax return (inflow) is preceded by too high liquidity of tax (expense), which causes negative effects in liquidity. Company liquidity is also affected by the way of calculating irrecoverable claims in costs of obtaining revenue [Hundsdoerfer and Jamroży 1999, 13-17]. If these claims are tax cost only at the moment of obtaining a confirmation (decision) that they are irrecoverable, issued by the enforcement organ, or a court decision to reject the motion for bankruptcy or for discontinuing bankruptcy proceedings covering liquidation of assets [Sokołowski 1995, 12-15]. Taking into account the fact that the process of documenting irrecoverable claims may last several months, this may generate negative interest effect, resulting from the length of time between the day of paying tax on due revenue and the day of accepting the claim as tax costs and lowering the size of tax burden. Also the process of making the claim causes some additional (non-tax) payments (expenses on the proceedings, enforcement and others) [Kudert and Jamroży 2007, 5-19].

On the other hand, an entrepreneur has depreciation write-offs at their 'disposal', that is tax costs affecting lower tax base, which are not tax expenses. Taxpayers may make depreciation write-offs on fixed assets and intangible assets following allowed methods and depreciation rates. Postponing tax payments is possible through: using the digressive method, one-off depreciation write-offs, increasing depreciation rates, determining individual depreciation rates and choosing the method of valuation for homogenous, material elements of current assets (FIFO, LIFO, weighted average). In many legislations reserves and updating write-offs are treated as tax costs which do not cause tax appearance [Wołowiec 2017b, 29-45].

The size of tax expenses is also affected by activities related to balance sheet events. Transferring or increasing tax costs takes place within the possibilities offered to the taxpayer in form of the right to choose or decide, for instance what method of fixed assets depreciation to choose. The taxpayer may also have some freedom in determining the costs of generating fixed assets, depending on the adopted method of cost calculation. Restructuring activities in an enterprise also influence liquidity in the area of income taxation. The selling of an enterprise generates disclosure of quiet reserves included in the assets of the sold enterprise and growth of company value, which is translated into taxation of income generated as a result of the sale. Taxation of quiet reserves may be a factor limiting such transactions (the so-called *asset deal*). It is possible to avoid paying taxes on the day of selling

the company by contributing the company as monetary contribution, which postpones taxation until the shares obtain in return for contribution in kind are sold. Reliefs of this type can be divided into: facilities in payment which do not lower the amount of paid tax, decreasing the amount of paid tax and exemptions from payment of tax. This can be illustrated with the following example showing the influence of taxation and transfer of tax payments on maintaining liquidity.

3. THE POLICY OF SHOWING INCOME IN CASE OF RESIDENTS

The policy of showing income (in case of residents) allows to move in time taxable incomes in order to minimize discounted value of income tax, due to the periodical nature of tax payments. We should assume that there are no relations between paid income taxes and other non-tax cash flows. In case optimization (decreasing) of paid income taxes may influence changes of other – non-tax – cash flows (for example size of net revenue from hotel services sale), the goal of minimizing discounted value of tax payments is not always balanced with maximization of current net value. So limiting only to minimization of income taxation could lead to resignation from generating incomes.

Within the policy of showing income we can discern activities aimed at shaping the actual state and its interpretation. Shaping the actual state, an entrepreneur may take up actions leading to appearance of some future events, thus changing the actual state circumstances. Within the interpretation of the actual state, activities may concern the right to present past factual states in the balance account and at the same time they may provoke different tax effects. The effect of the policy of showing income is the implementation of the process of moving incomes (paid income tax) in time, which may result in the tax rate effect, interest effect or progression effect. Tax rate effect is the consequence of changes to tax rates or scales. For example, if the rate(s) of personal income tax are supposed to (may) be lowered next tax year, it is rational to move some (all) incomes to the next tax year. Interest effects depend on the applied means within the policy of showing income. In a situation when incomes are moved due to due to interpretation of actual state, there are differences in tax burden, leading to temporary tax savings. Tax savings may be put on a deposit account generating tax interest effect. In case of moving incomes in the shaping actual state effect, there might also be differences in tax burden, leading to temporary tax savings. Generated savings may also be put on bank deposit account and generate the tax interest effect. Moreover, regardless of the tax aspect, there might be non-tax interest effect visible [Zhuravka, Filatova, Šuleř, et al. 2021, 65-75].

So, if the taxpayer arranges delivery of goods in the new tax year rather than in the current one, the payment for goods will be postponed by one month and showing particular income will be postponed by a year (assuming that the taxpayer uses the down-payment form of settling taxes). Such behavior shapes two contradictory effects. One hand, there is a delay of income tax payment for a year, and taking into account particular tax rate(s) and market interest rate, we experience tax interest effect – the discounted value of tax payment is decreased. On the other hand, postponing payment for goods results in appearance of negative non-tax interest effect in shape of decreased current net value before taxation. With moved incomes, progression effect will only appear in case of progressive tax scales used in constructing income taxes. With the implementation of the policy of showing income using the means of interpretation of actual state, only tax interest effect will be visible. As discounted value of tax payments decreases as we move forward the payment of tax, the taxpayer should aim at delaying the moment of showing the whole (part) of taxable income. Comparing discounted tax rates for particular periods, we should break down (dispose of) income so that it is taxed in periods with the lowest discounted tax rate. Using the shaping of actual state we achieve the same effect (with proportional rates), the only difference being that apart from tax interest effect, there will also be non-tax interest effect. The policy of showing incomes in progressive tax scale makes it necessary to take into account, apart from interest effect, also progression effect. The strategy choice must be preceded with the analysis of type and course of progression scale, reflecting the so-called "bumps" at the end of particular range, which is show in the figure below.

In implementing the policy of showing income with gradual progression, we should consider the same strategy which is optimal with proportional rates, but in each analyzed period we should take into account numerous (discounted) extreme rates. Taking managerial decisions, the taxpayer should first move income to the period with the lowest discounted tax rate and then to the period with the next lowest discounted tax rate, and so on. If the taxable income movements are realized not as a result of the means of interpretation of the actual state, but as a result of shaping the actual state, then the taxpayer must consider non-tax interest effect. The activity consists then in maximizing the difference between discounted (beneficial) tax effect and discounted (detrimental) tax effect.

Taxation also affects the profitability of a particular method or structure of financing the company. Due to the fact that particular forms of financing are treated differently as far as taxes are concerned, we should take into account tax effects of financial decisions we take. From the point of view of managerial decisions, income tax burden should reflect [Wołowiec and Żuk 2020, 253-75]:

- The method of taxing the remuneration of a partner in a capital partnership (it is more beneficial from the tax point of view to pay interests on a loan than the dividend). In case of a partner which is a capital partnership taxation is neutral for tax decisions, assuming that there are no limits due to "thin capitalization").
- The method of taxing the remuneration of a partner in a personal partnership. From the tax perspective it is more beneficial to pay remuneration in form of shares in profit instead of interest on loan. Financing from borrowed capital coming from a partner is disadvantageous for financing from own capital, as there is no legal possibility of deducting interest when establishing the income of a partner-lender (regardless of whether the partner is an individual or a legal entity).
- Income taxes affect company financial liquidity, which is evidenced in the comparison of the possibility of preserving continuity of financial liquidity by delaying in time tax payment, using principles of line and digressive depreciation.
- Essential elements of the policy of showing incomes are: tax rate effect, tax interest effect, non-tax interest effect and progression effect.
- Depending on the course of tax scale, it is desirable to implement two different strategies within the policy of showing incomes. When using the means of actual state interpretation, the goal may be to minimize discounted value of tax payments, while using the means of shaping the actual state, the goal is maximization of NPV after taxation.
- Analyzing progressive tax rates (continuous progression), it is important to seek equality of discounted extreme rates in all analyzed periods. With reference to proportional rates and graded progression, it is vital to compare discounted extreme rates in particular periods and to move incomes to the periods (or time ranges) with the lowest discounted extreme rates.
- Obviously, with graded progression (contrary to continuous progression), we might not have the optimal discounted extreme rate, and optimization criteria may not be applicable in form of leveling discounted extreme tax rates.
- Taking managerial decisions we should be aware that in income tax putting incomes forward to future years cannot always be optimal due to both progression effect in progressive scales and non-tax interest effect in proportional scales.

4. NON-RESIDENT TAXPAYER VS. INCOME REPORTING POLICY

Non-resident taxpayer and income reporting policy. When making managerial decisions, an important element is to evaluate the application of the methods presented to analyze the income reporting policy of non-resident taxpayers in European Union countries. If an individual is subject to unlimited tax liability in country A and, in addition, earns income in country B (country of residence) as well as country A (country of source), and the income earned in country B (according to the double tax treaty) is excluded from taxation in country A, with the effect of tax progression. The analysis assumptions cover a period of two tax years (Y1 and Y2). Income earned in country B (A1 x I + A2 x I) is subject to income tax, using the exclusion method in country A, and income earned in country A (B1 x I + B2 x I) is subject to income tax according to the rules applied in that country. The goal to be pursued by the taxpayer is to minimize the discounted value of tax payments over two tax years, by optimally distributing income (I) over its sources located in two countries (A and B) and over two periods:

$$I = I\,(Y1) + I\,(Y2) = (A1 + A2 + B1 + B2) \times I$$

Optimization criterion: (1): discounted value of tax payments = Σ (PIT B + PIT A x 1 /(1 + r) = min. Assumptions: (1) (A1 + A2 + B1 + B2) = 1; (2) (A1, A2, B1, B2) 0; (3) invariability of tax rates and interest rate over the two years under consideration; (4) comparable rules for determining tax income in countries A and B; (5) full divisibility of tax income (I) between accounting periods and both countries; and (6) not taking into account other additions to income taxes in both countries (e.g., crisis, solidarity, church and other additions).

(1) Assuming a single accounting period and assuming that the exclusion method is not applicable to country A, then the total income should be divided between the income earned in country B and country A, and in a way that minimizes the amount of tax liability. Thus, the optimization criterion can be written: (2): PIT = PIT B [A1 I] + PIT A [B1 I] = min, assuming that (A1 + B1) = 1, that is: (2): PIT = PIT B [A1 I] + PIT A [(1 - A1) x I] = min. The share of income from sources located in country B should be increased (decreased) as long as the marginal tax rate attributable to income earned in country B is lower (higher) than the marginal tax rate applied to income earned in country A.

The tax wedge is the difference between the total cost of employing a person to work on the basis of an employment contract, contract of mandate or contract for specific work (including other types of contracts) and the salary that such a person receives in hand after paying tax and social security contributions. Otherwise, it is also defined as the sum of tributes

paid by the employee and the employer under the employment contract. The amount of these charges is of great importance in terms of the volume of supply and demand for labour. Such burdens can be divided into three different types, including income taxes, social security contributions paid by employees and social security contributions paid by employers. All these burdens have an adverse effect on working people in the economy due to the increased expenses of hiring employees. The size of the tax wedge exists in close correlation with state expenditure on social benefits, as the fiscal burden of labour in the form of social contributions serves to finance the state's social transfers. High social expenditure implies a high tax wedge, which is particularly evident in the case of countries that are described as welfare states [Cienkowski and Wołowiec 2014].

CONCLUSIONS

Organizational effects of taxation can be analyzed in two aspects. Firstly, entrepreneurs must take organizational steps to ensure timely payment of tax obligations. They refer both to the activities related to one's own tax obligations (bookkeeping, making tax declarations or returns, supplying tax information) but also to the performance of the payer's functions related to transferring taxes collected at source. Secondly, we should take into consideration the fact that business decisions taken by entrepreneurs cause definite tax effects. Therefore taxes must be taken into account in management process, so we should create appropriate organizational conditions. The organizational problem can be solved in two ways: a) by establishing one's own tax department or; b) by using the services of an external tax advisor (tax *outsourcing*).

The above solutions are non-exclusive, as they can be combined. Obviously, the choice is preceded by the cost and benefit analysis. Especially in small and medium-sized businesses, it is not profitable to keep own bookkeeping and tax offices, as the costs of organization and maintenance exceed the fees paid to the external service provider. In case of bookkeeping and tax *outsourcing* the main reasons are usually cost reductions and access to expertise. Reduction of costs not only means lower expenses (usually it costs less to hire the accounting agency than to employ a full-time specialist), but also the reduction of costs of applying tax law. The entrepreneur does not feel uncertain and is released from the unpleasant duty of checking and interpreting the law on his own. The tax risk taken by the company also decreases. Tax risk can generally be understood as the risk of possible argument with tax organs. Depending on the attitude of a given enterprise, the risk can be pure or speculative. Pure risk brings only the possibility of incurring a loss, while speculative risk also offers the possibility

of gaining some benefits. What is more, speculative risk is usually an outcome of a conscious decision – it is taken to gain something, the bigger the risk, the greater potential benefits. Thus intentional violating or dodging the law by the company means taking speculative risk. Pure risk, on the other hand, refers to entering into conflict with tax organs when: 1) the activity of a company was unlawful, but this unlawfulness was not intentional (a mistake, ignorance, etc.), 2) the activity of a company was lawful (usually it is determined by the court or possibly a higher instance tax organ), but it was not considered as such by tax organs, 3) the activity of a company was lawful and was considered as such for some time by tax organs, but they changed their opinion and the conflict arose.

Both these risks describe potential reality, that is the possibility of entering into conflict with tax organs. Their realization is random, and this is the case of the so-called double randomness – we do not know the time of the event (conflict) and its depth, that is effects. These effects are mainly financial (arrears, financial penalties, etc.) though the company may also lose its credibility. What is important, these two types of risk are related to uncertainty, each – its different kind. Speculative risk is associated with uncertainty whether unlawful activity will be revealed, while pure risk – with uncertainty which is an inherent part of the tax system. Risk differs from uncertainty in that it is measurable. The measurement of risk is done based on probability calculus and the variance of possible outcomes: gains and/or losses. In the case of speculative risk, to measure it one would use data on the detectability of fiscal crimes, however, taking into account only crimes actually committed intentionally.

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THE IMPACT OF DEEPFAKES ON ELECTIONS AND METHODS OF COMBATING DISINFORMATION IN THE VIRTUAL WORLD

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Abstract. The malicious use of deepfake technology can lead to violations of human rights and freedoms, or even facilitate criminal activities such as financial fraud. However, creating manipulated images can also pose other threats, including those to democratic states and the principles that govern them. The upcoming presidential elections in the United States and the recent parliamentary elections in European and non-European countries have delivered an impulse for a discussion on the impact that deepfake can have on elections, on the ethics of holding elections and on the principles of democracy, on how countries fight these threats, and on how sufficient and effective the implemented methods really are.

Keywords: deepfakes; elections; democracy; disinformation; manipulation.

INTRODUCTION

Deepfake may take the form of an image or sound manipulated using artificial intelligence that shows behaviour or statements of a person who has never behaved in a given way or uttered specific words. The threats resulting from creating false images are usually considered in terms of violation of human rights, especially the right to privacy or the right to good reputation. Unauthorized use of someone's image often involves compromising the person's reputation. The most high-profile cases involved famous people whose images were used to create pornographic deepfakes [Gosse and Burkell 2020, 497].[1] The use of deepfakes was also often used for criminal activities, for example financial fraud. The literature describes cases in which audio recordings prepared using deepfake technology were used to mislead an unsuspecting person, who then transferred money to the account indicated by the fraudster. One of the most striking examples is probably the case from Hong Kong, where bank employees made transfers for a total of USD 35 million, thinking that they were taking orders from the branch manager

[1] Gosse and Burkell pointed out that 90-95% of all deepfakes on the Internet may have a pornographic nature.

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[Ghandi and Sharma 2023]. However, another danger posed by misused deepfake technology is a threat to democratic systems otherwise free from electoral manipulation. Electoral manipulation and disinformation have now become extremely common and have accompanied many elections, both European and non-European, for years. This year, over 40 different types of elections are planned to be held globally, ranging from presidential, to parliamentary and finally to local government elections. The possibility of using deepfake technology only intensifies the potential threat of disinformation and makes the holding of manipulation-free elections seem a major challenge now.

Cases of use of deepfakes in election campaigns in many countries are common. Suffice it to mention the recent elections in Indonesia, when voters, using deepfakes, had the opportunity to see and hear the late President Suharto, who encouraged them to vote [Culloty 2024]. This recording was considered unethical due to the fact that it was generated by the political party that the deceased had headed during his life. Another example is last year's parliamentary elections in Slovakia, where during the election campaign, two days before the vote, a voice recording appeared on Facebook in which the leader of the Progressive Slovakia party, Michal Šimečka, allegedly talked to a journalist about election fraud [Meaker 2023]. A similar procedure was used in February 2023 during elections in Nigeria against one of the presidential candidates [Mirza 2024]. Deepfakes were also distributed on a large scale in Taiwan, where the target of the attack was Ko Wen-je, one of the presidential candidates from the Taiwan People's Party [Lau 2024]. Deepfakes were also used during the last elections in India, where on the eve of the vote a recording was released in which the President of Delhi State Manoj Tiwari from BJP allegedly criticized his political opponent. The actual recording that was manipulated involved Twari speaking on a completely different topic [Safiullah and Parveen 2022, 256]. These numerous examples from different countries only prove that the problem is extremely serious and global.

Deepfakes are used in the ongoing presidential campaign in the United States. While fake news was spread and manipulated in the course of previous election campaigns, currently the United States must face a new technology that escapes all existing legal regulations. In February 2024, President Joe Biden himself fell victim to deepfakes, when using this technology an audio recording very similar to the president's real voice was generated, in which he allegedly urged his voters not to take part in the primaries organized in New Hampshire. This recording was then distributed through two telecommunications companies in Texas: Life Corporation and Lingo Telecom using robocalls [Leinigang 2024]. Steve Kramer, a consultant to the staff of Dean Phillips – Joe Biden's opponent in the Democratic

primaries – admitted to the idea of preparing and disseminating a deepfake. He pointed out that he had acted independently, and his actions, although at the peripheries of ethical behaviour, resulted in a campaign worth several million dollars at a much lower cost.[2]

This case (although there is no confirmed data on how many people actually did not take part in the primaries after receiving the generated and spread deepfake) shows how easy it is now to spread information chaos on a large scale. Specialists and voters themselves were involved in generating fake news in the previous presidential elections (both in 2016 [Bovet and Makse 2019, 1-14] and 2020 [Starbird, DiResta, and DeButts 2023, 1-17]), which mostly meant that they produced and then shared on a massive scale false information on their social media profiles (including Facebook-Meta, Instagram, Twitter). Currently, at very low costs and using AI, political opponents are able to achieve much better results in reaching potential recipients than using "traditional" social media. This fact makes the use of the latest technologies with malicious intentions a very serious threat to the entire electoral process and the principles of democracy.

Taking all this into account, the aim of this publication is to present what impact deepfakes may have on elections, on the ethics of holding them and on the principles of democracy, on how countries fight these threats and on how sufficient and effective the methods implemented really are.

1. THE IMPACT OF DEEPFAKES ON ELECTORAL PROCESSES

The use of deepfake technology to manipulate the electoral process carries basically similar threats to the electoral process and democracy as the creation and dissemination of fake news using already known techniques, e.g. bots. This is because, although the manipulation technique is different, it is still false information intended to intentionally mislead the recipient. However, it should be noted that although the threats generated by fake news and deepfakes may be the same, the effects of the latter are much more serious.

Firstly, it is because it is increasingly difficult now to distinguish real recordings from images and sounds manipulated using AI. The technique of creating deepfakes is almost so perfect that research shows that most people are unable to distinguish a recording depicting real events from a synthetically produced one [Köbis, Doležalová, and Soraperra 2019, 1-18]. Moreover, there is no widely available tool that would allow anyone to check

[2] See *Kolejny deepfake zebrał żniwa. Tym razem celem był Joe Biden*, https://www.bankier.pl/wiadomosc/Kolejny-deepfake-zebral-zniwa-Tym-razem-celem-byl-Joe-Biden-8701675.html [accessed: 03.03.2024].

the authenticity of an image or audio. Secondly, the reach of deepfakes is much wider, because they can be spread in various ways, not only online, as in the case of "traditional" fake news. Thirdly, deepfake technology is very easily available, anyone can use it without having to incur large financial outlays [Pawelec 2022, 3]. Fourthly, content generated using AI can affect the recipient with a much greater impact than the content so far created by paid people, because Artificial Intelligence is able profile the content recipient much more easily than a human being who does not know the recipients' cultural context well [Goldstein, Sastry, Musse, et al. 2023, 2]. And finally, fifthly, an appropriate tool has not yet been created that would help identify deepfakes and remove them while signalling to recipients that the content has been manipulated (such tools exist for traditionally manipulated information posted on social media, e.g. Facebook – Meta, Instagram, or Twitter) [Tan 2022, 513-36]. All this means that in the face of deepfakes, the existing legal basis and IT tools are helpless, and society's distrust in the information presented to them increases [Olan, Jaywickrama, Arakpogun, et al. 2022, 443-58].

The widespread occurrence of fake news, social bots and now deepfakes in the public space forces recipients of messages to be vigilant and to verify every piece of information that could have been accepted with faith in its authenticity before the era of computerization of society. This significantly hinders access to information, which not only is provided by democratic constitutions, but is also guaranteed by international legal acts, such as the Universal Declaration of Human Rights[3] or the Convention for the protection of human rights and fundamental freedom.[4] Ultimately, this situation may lead to two extreme behaviours – excessive distrust and the need to verify every piece of information, or excessive gullibility, also caused by the lack of appropriate tools to verify facts. Both behaviours do not only have a negative impact on social relations [Al-Khazraji, Saleh, Khalil, et al. 202, 429-41], between representatives of authorities and citizens or between private individuals in everyday contacts, but they also have a great impact on people's voting behaviour.

The spread of false information on the Internet using deepfake technology significantly contributes to the possibility of manipulation in elections [van der Sloot and Wagensveld 2022, 6]. These activities may be organized at the national level, with deepfakes targeting political opponents. With their help, public trust in the candidate may be reduced because his image and credibility may be lost. In extreme cases, this may even lead to the elimination of such a person from public life and the end of their political career.

[3] Universal Declaration of Human Rights published on 10.12.1948, UNGA, 217 A (III).

[4] Convention for the protection of human rights and fundamental freedoms published on 4.11.1950, ETS 5.

As a rule, the onus will be on the victim of a deepfake to prove that the materials presented are not true. Barack Obama was put in such a situation, having to explain the widespread deepfake in which he was allegedly mocking Donald Trump [Chawki 2024, 6]. These behaviours should, of course, be considered unethical, because using new technologies to discredit a political opponent is reprehensible and political disputes should be resolved in a political debate, using substantive arguments by the parties. Moreover, it should be noted that a control of voters deprives them of the ability to make informed electoral decisions to which they are entitled.

Politicians also begin to manipulate the electorate when they want to force certain attitudes on their voters. We can mention here the deepfake involving Donald Trump who allegedly spoke about climate change in the context of Belgium. The recording caused a lot of emotions in Belgium and people who believed in the deepfake spoke critically of the US President for interfering in the affairs of a foreign country. In fact, it was a production created by one of the Belgian political parties, whose aim was to mobilize people in Belgium to sign an appeal calling on the Belgian government to take immediate action to combat climate change [ibid.]. Deepfakes can therefore become a tool that will shape citizens' attitudes but they may also influence actions taken by governments and heads of state. On the other hand, they can also be used to polarize society, just as "traditional" fake news has been used for this purpose so far [Olan, Jaywickrama, Arakpogun, et al. 2022, 443-58].

Political manipulation using deepfakes can also happen at the international level. This usually happens when one country wants to achieve its own benefits by interfering in another country's elections. The impetus for such action is primarily the specific political interests of the interfering state. An example of such activities may be China's interference in the elections in Taiwan, when the Internet was flooded with deepfakes against a presidential candidate who opposed Chinese claims to make Taiwan part of Chinese territory.[5] Similar methods, aimed at disinformation and weakening trust in a specific person, were used by Russia in the context of the war in Ukraine, creating and spreading a deepfake in which President Volodymyr Zelensky allegedly called for Ukrainians to refrain from fighting [Wakefield 2022]. These activities lead to information chaos, but also to a decline in public trust in other presented facts. Therefore, there is an increasing tendency in society to question even true information. All this makes such a society easier to manipulate, and foreign countries take advantage of this situation to achieve their political goals. It should be recognized that

[5] See *Taiwan voters face flood of pro-China disinformation*, https://www.france24.com/en/live-news/20240110-taiwan-voters-face-flood-of-pro-china-disinformation [accessed: 05.03.2024].

traditional methods of protecting the state and politics as well as the electoral process (such as: transparency of financing of political parties, prohibition of financing political parties by foreigners, etc.) against foreign influences are therefore no longer sufficient, because foreign states currently can, with great ease, noticeably interfere in the electoral, political and social processes of other countries.

Another threat posed by deepfake technology in the context of elections and broadly understood politics is the "liar's dividend" phenomenon. This term was coined by T. Chesney and S.K. Citron, who pointed out that the more society becomes aware that both video and audio can be faked in such a way that it will be difficult to tell whether it is real or not, the more this situation can be taken advantage of by people who, wanting to avoid responsibility for their actions or spoken words, will question their veracity, claiming that image or audio recordings are simply deepfakes [Chesney and Citron 2018, 1785]. Such situations have already occurred, among others, in the context of elections in Turkey, where the disgraced candidate Muharrem İnce announced that the presented recordings, although they were in fact authentic, were only an AI-generated deepfake [de Mesquita, Canes-Wrone, Hall, et al. 2023, 6]. Such actions are very unethical and at the same time do not only violate the subjective right of access to reliable information, but also have a negative impact on the electoral process. The electorate does not have a full, real picture of the situation, which means that an electoral decision may have to be made only on the basis of trust or lack thereof in a given candidate.

2. METHODS OF COMBATING MALICIOUS USE OF DEEPFAKES

Democratic countries are aware of the threat posed by deepfakes, which is why they are fighting against their misuse, also in the electoral aspect. The range of proposed protection measures against deepfakes is extremely wide. The most stringent idea is probably to introduce a legal ban on the creation and distribution of deepfakes. Considering the threats they pose in the social, political and economic spheres, as well as the negative impact they may have on the functioning of democratic states, adoption of such a solution was considered [Songja, Promboot, Haetanurak, et al. 2023, 6]. However, no country as yet has decided to implement this measure pondering the possibility of violating the protection of fundamental freedoms and human rights, including: freedom of expression and creative freedom. A complete ban on the use of deepfakes would also eliminate those deepfakes whose use has certain social and educational benefits, such as "reviving" dead artists in museums (e.g. Dalí Museum in St. Petersbug [Mihailova 2021, 882-98]).

Another way to combat malicious use of deepfakes is to introduce restrictive legal regulations that will enable the state and its bodies to prevent the spread of disinformation. An example of such a country is China, which has introduced an obligation to always obtain the consent of the person whose image or voice is to be used in deepfakes. Moreover, Chinese legal regulations also provide for the obligation to mark deepfakes so that it is easy to find the source of the creation.[6] Regulations that require that content be marked as deepfake have also been prepared in the US at the federal level.[7] Apart from this, state regulations are also being created to combat disinformation in the electoral aspect. For example, Nebraska has was proposed to introduce a ban on disseminating election deepfakes within 60 days before the vote [Mirza 2024]. In Virginia and California laws were passed prohibiting the creation and distribution of videos that would present false behaviour or statements of politicians. The only exception to this rule are deepfakes that constitute parody or satire, and they must clearly indicate that they are deepfakes [Wasilewski and Lenart 2020]. The US has also adopted *ad hoc* response tactics to threats arising from the malicious use of deepfakes. In the case of the deepfake of President Biden spread during the Democratic primaries, the Federal Communication Commission declared the use of AI-generated voices in robocalls illegal.[8]

When it comes to European Union regulations, a kind of novelty in relation to the other methods already discussed is the introduction has been introduced: an obligation addressed to social media giants (e.g. Meta, Google, Twitter), which calls upon them to mark content recognized as deepfake on social media platforms.[9] This means that the European Union has extended the responsibility for detecting and reporting modified videos and audio to technology companies as well.

The activities discussed above largely overlap in all countries, whether European or non-European. The most common model for combating deepfakes is the obligation imposed on creators to inform that a given material has been manipulated using artificial intelligence generators. Additionally, sometimes, as in the case of EU regulations, the information obligation is also extended to other entities. In this case, however, this method may fail. Artificial intelligence is developing faster and faster and becoming

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[6] Administrative Provisions on Deep Synthesis Technology, https://perma.cc/JE3W-PF26 (original), https://perma.cc/LZ3S-FERY (English) [accessed: 10.03.2024].

[7] H.R. Deepfakes Accountability Act, https://www.congress.gov/bill/118th-congress/house-bill/5586/text [accessed: 10.03.2024].

[8] Declaratory Ruling of Federal Communication Commission from 8 February 2024, https://docs.fcc.gov/public/attachments/FCC-24-17A1.pdf [accessed: 15.03.2024].

[9] 2022 Code of Practice on Disinformation, https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation [accessed: 10.03.2024].

more and more perfect. However, there are no commonly available tools that would make it possible to recognize and track deepfakes on the Internet. Only the largest companies have such generators, and even these tools do not always work flawlessly [Albahar and Almalki 2019, 3247-249]. This does not mean, however, that the actions taken are pointless. This rather shows that legal regulations alone cannot adequately protect society against the effects of deepfakes, and cooperation is also needed at the technological level. Moreover, the literature indicates the need to carry out activities to raise public awareness of the threats posed by new technologies [Chawki 2024, 1-13]. Only such a comprehensive approach may provide a chance for the fight against malicious deepfakes to be effective.

CONCLUSIONS

The electoral process, which begins from the moment the elections are announced and which consists of many interconnected stages, is extremely complex. The electoral law that regulates this process in many countries is created in such a way as to protect each stage from possible abuses, in order to protect the electoral act, as well as the voters themselves, against distortion of their will by the use of techniques of external influence [Colomina, Margalef, and Youngs 2021, 14-15]. The manipulation tools used may result in appointing a body that does not correspond to the actual will of voters. This is because some people may not verify the information and believe the fake news. Sometimes, as in the case of the elections in Taiwan, a deepfake may be spread several days before the vote, making it impossible to correct the manipulated message. It should also be noted that some dishonest politicians may claim that their behaviour or statements have been manipulated with deepfake technology, which in fact did not happen and is only intended to mislead voters.

Spreading disinformation using deepfakes also has a number of other negative effects on state democratic mechanisms. First of all, it causes a lack of social trust in state authorities, which weakens their position and prestige [Ternovski, Kalla, and Aronow 2022, 1-16]. It contributes to enabling unethical fighting between political opponents and may also lead to the polarization of society (simultaneous acquisition of new supporters and destruction of the image of political opponents). Deepfakes can also threaten the emergence of uncontrolled influence of a foreign state on political and social issues.

Controlling the integrity of the electoral process is now even more difficult due to ongoing technological development and the emergence of many new spaces for disseminating false information that may influence voters' attitudes and final choices. The fight against the spread of deepfakes

is also difficult due to the fact that when applying certain legal or technical solutions, the authorities must also take into account other human rights and freedoms than just electoral rights (e.g. freedom of expression, the right to protest, the right to object, etc.) [Dias, Doca, and Silva 2021, 1-14]. Therefore, any restrictions they may impose on the creation and use of new technologies must be proportionate. It should be noted that the most frequently adopted legal measures, which involve the obligation to mark content created with the use of AI, are not sufficient due to the lack of effective tools for detecting deepfakes and due to the continuous development of new technologies, which means that legal provisions quickly cease to fulfil their role. Therefore, in order to protect the electoral process against manipulation (but also more broadly in the context of protecting other human rights against the threats posed by deepfakes), it is recommended that comprehensive actions based on cooperation of legislative entities of states, international entities and technology concerns be taken, while supporting public awareness by educational activities and by providing information about possible violations of law caused by deepfakes technology.

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MARRIAGE AND FAMILY IN EU COUNTRIES. AN OVERVIEW OF CONSTITUTIONAL PROVISIONS

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Abstract. The institutions of marriage and family has become a prominent topic of debate in contemporary social discourse. Their recognition, existence and functioning, as well as their ongoing evolution, have led to a shift of this discourse into the realms of politics and law. The recognition of the right to marriage and family entails a number of rights and freedoms. This article seeks to explore these dimensions within the constitutional frameworks of European Union member states. It begins with an analysis of international and EU approaches, followed by an overview of constitutional provisions in different EU countries.

Keywords: marriage; sacrament of marriage; family; constitution; European Union.

INTRODUCTION

The institution of marriage and family has become a prominent topic of debate in today's social discourse. Their recognition, existence and functioning, as well as the ongoing changes within them, have prompted a shift of this discourse into the realms of politics and law. The right to marry and start a family entails a number of rights and freedoms. These include the freedom to voluntarily decide whether to get married and whom to marry (though this freedom is restricted in some countries, e.g. due to sex). It also often involves recognising that neither spouse holds a privileged position over the other, and that their rights and responsibilities are equal. These rights, however, are not universally respected; they are influenced by culture, religion or tradition. They are prevalent in Europe and in countries that are categorised as part of the "Western world". The constitutions of European nations recognise and underscore the role of marriage in establishing a family, and grant them special protection.

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Furthermore, the institution of Catholic marriage, which serves as a cornerstone of the family – the fundamental unit of social life, is of particular concern for both the political community (the State) and the religious community (the Church). This concern is primarily manifested in legislation (both state and church legislation), where marriage and family law find their rightful place. While the state legal systems are based on norms exclusively developed by legislative bodies, canon law primarily incorporates precepts of divine law. The binding matrimonial and family law of the Catholic Church, as set forth in the 1983 Code of Canon Law,[1] represents the sole legal system developed over centuries in which elements of divine and human law intersect and coexist [Góralski 2011b, 127]. The Church invariably considers sacramental (canonical) marriage as the only valid and binding union for its faithful, governed by its own laws and subject to its exclusive jurisdiction. On the other hand, civil marriage is recognised as a valid union for individuals outside the Church community. In the Church, it holds no legal significance for those who belong to the Church, i.e. baptised members or those formally accepted into its fold [Idem 2011a, 17].

The article seeks to explore the above aspects at the constitutional level. It begins with an analysis of international and EU approaches, which is followed by an overview of constitutional provisions in different EU countries. The aim is to demonstrate some differences in the approach to family and marriage, as well as to highlight some characteristics dependent on the region or culture that has been shaped by history and tradition.

1. MARRIAGE IN INTERNATIONAL AND EU LAW

In international law, regulations regarding marriage are included in the Universal Declaration of Human Rights (Article 16), which states that men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and that marriage must be entered into only with the free and full consent of the intending spouses. They also have the right to found a family, which is entitled to protection by society and the State.[2] Similar provisions can be found in the International Covenant on Civil and Political Rights (Article 23(2) and (3)),[3] and the issue of free consent is reiterated in the International Covenant on Economic,

[1] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, pp. 1-317.

[2] The Universal Declaration of Human Rights (10.12.1948), http://libr.sejm.gov.pl/tek01/txt/onz/1948.html [accessed: 28.04.2024].

[3] The International Covenant on Civil and Political Rights (16.12.1966), Journal of Laws of 1977, No. 38, item 167.

Social, and Cultural Rights in Article 10.[4] These regulations concerning fundamental rights and the institutional protection of marriage and family are inherently linked to human dignity and the right to privacy. These documents explicitly define marriage as a union between individuals of opposite sexes that is entered into by two persons. No one can enter into marriage alone, such a decision is made by two individuals, on the principle of complementarity. Therefore, the rights of spouses should be interpreted in relation to each other [Drinóczi and Zeller 2006, 16-22].

The European Social Charter, in addition to recognising the family's right to social, legal, and economic protection, ensures assistance to newly married couples through benefits and other appropriate means.[5]

It should also be noted that under the European Convention on Human Rights (Article 12), men and women of appropriate age have the right to marry, in accordance with the national laws of Member States.[6] However, the Charter of Fundamental Rights of the European Union, published 60 years after the ECHR, leaves out the issue of gender, referring only to national laws in individual states.[7] This omission likely stems from the ongoing 21st-century discourse regarding the redefinition of marriage, which no longer requires spouses to be of opposite sexes. It also reflects changes in the legal recognition of same-sex marriages in some Member States [Molnár 2021, 184].

2. MARRIAGE AND FAMILY IN NATIONAL CONSTITUTIONS

At the beginning of our considerations, it is pertinent to note the varying approaches towards marriage evident in the constitutions of EU Member States. These have been categorised based on methodology and content into the following groups.

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[4] The International Covenant on Economic, Social, and Cultural Rights (19.12.1966), Journal of Laws of 1977, No. 38, item 169.

[5] The European Social Charter (03.05.1996), https://rm.coe.int/europejska-karta-spoleczna/16808b6383 [accessed: 28.04.2024], Article 16.

[6] The European Convention on Human Rights (04.11.1950), https://www.echr.coe.int/documents/convention_pol.pdf [accessed: 28.04.2024].

[7] The Charter of Fundamental Rights of the European Union, https://oide.sejm.gov.pl/oide/?option=com_content&view=article&id=14428&Itemid=422 [accessed: 28.04.2024], Article 9.

2.1. Regulations concerning gender of spouses at the constitutional level in EU Member States

The issue of gender has garnered significant attention, particularly in the past two decades. In scholarly discourse, considerable attention has also been devoted to researching the challenges facing marriage and family in this context, including divorce and family breakdown. Another prominent topic is the legal recognition of same-sex marriages. However, it is noteworthy that this issue affects relatively few people compared to the longstanding concept of traditional marriage, which remained unquestioned for centuries. Civil marriages have a rich historical tradition, dating back to the inception of human rights. This tradition is rooted in specific cultural and historical contexts. The family model and the roles of family members are influenced by biological differences between men and women. The 21st century has witnessed the emergence of new voices advocating for a reconsideration of the approach to marriage and the recognition of same-sex marriages. This shift is also reflected in evolving legal frameworks.

Most Member States' constitutions explicitly establish a right to marry. In many of them, marriage is defined as a union of two persons of the opposite sex [Toggenburg 2020]. This is the case in Poland under Article 18 of the Constitution.[8] Marriage, as the only interpersonal bond consisting of a woman and a man, has not only been codified, but also placed under the protection and care of the State at the constitutional level. It should also be noted that no other relationship between individuals has been acknowledged as much as marriage [Maksymiuk 2024; Mączyński 2013, 94-95]. Moreover, Article 18 is included in the first chapter of the Constitution, which means that it constitutes part of the constitutional principles, and changing the wording of this provision is possible only as provided in Article 235(6). It constitutes the *lex generalis* of all other constitutional regulations regarding marriage and family.[9]

In Hungary, the Constitution also defines marriage as a union between a woman and a man, which is entered with the free consent (Article L(1)). Furthermore, it describes family ties as those that are based on marriage or kinship between parents and children. The opposite-sex is emphasised as a conceptual element of marriage.[10] A similar provision can be found in the Constitution of Bulgaria, where Article 46(1) states: "Matrimony shall be a free union between a man and a woman. Only a civil marriage

[8] "Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland." See the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483.

[9] See judgment of the Constitutional Tribunal of 11 May 2005, ref. no. K 18/04.

[10] The Constitution of Hungary (25.04.2011), https://njt.hu/jogszabaly/en/2011-4301-02-00 [accessed: 28.04.2024]. See Molnár 2021, 185.

shall be legal."[11] In Spain, Article 32, which relates to marriage, reads: "Men and women have the right to marry with full legal equality." It is worth noting that the Spanish Constitution has not been amended, despite the 2005 statutory regulations that allow homosexual couples to get married.

In Croatia, changes in this area were made in 2014. Article 61 of the Constitution of the Republic of Croatia of 22 December 1990, which stated: "The family is under special protection of the State. Marriage and legal relations in marriage, common-law marriage and in families shall be regulated by law," was amended to "Marriage is a living union between a man and a woman. Marriage and legal relations in marriage, common-law marriage and family shall be regulated by law."[12] This amendment was introduced following a referendum held on 1 December 2013, in which 66% of voters were in favour of defining marriage as a union between a man and a woman in the Constitution.[13]

A similar requirement is included in Article 38 of the Constitution of Lithuania, which states that "[…] Marriage is concluded with the free mutual consent of a man and a woman […]."[14] In the Constitution of Slovakia, marriage is defined as a unique bond between a man and a woman. Just as in Croatia, the content of this article was amended, as the Constitution of 1 September 1992 did not define marriage but merely stated that: "Marriage, motherhood and family shall be protected by the Constitution. Special protection for children and young people shall be guaranteed."[15] This amendment was introduced following a bill put forward by the Christian Democratic Movement, banning same-sex marriages. It was adopted and signed by President Ivan Gašparovič in June 2014.[16]

Some Member States allow same-sex couples to marry within their legislative frameworks. These include (in alphabetical order):Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Slovenia, and Sweden).[17] However, it is only the Constitution of Ireland that includes the provision about same-sex marriages; pursuant to Article 41(4), "Marriage may be contracted

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[11] The Constitution of Bulgaria (13.07.1991), https://www.parliament.bg/en/const [accessed: 28.04.2024].

[12] Decision of the Constitutional Tribunal of 14 January 2014, no. SuP-O-1/2014.

[13] See more https://www.theguardian.com/world/2013/dec/01/croatia-vote-ban-gay-marriage-referendum [accessed: 28.04.2024]; Marczewska-Rytko 2019, 78.

[14] The Constitution of the Republic of Lithuania, consolidated version of 22.05.2022, https://lrkt.lt/en/about-the-court/legal-information/the-constitution/192 [accessed: 28.04.2024].

[15] Article 41 of the Constitution of the Slovak Republic (01.09.1992), https://www.prezident.sk/upload-files/46422.pdf [accessed: 28.04.2024].

[16] See https://europa.eu/youreurope/citizens/family/couple/marriage/index_pl.htm [accessed: 28.04.2024].

[17] Ibid.

in accordance with law by two persons without distinction as to their sex."[18] This provision was amended following a referendum on 22 May 2015.[19] In contrast, other Member States permit same-sex marriages at the statutory level.

2.2. Constitutional guarantees of spousal equality

As human rights have evolved, equality between men and women has gained legal recognition. Protection of equality by law and the implementation of anti-discrimination measures have facilitated changes in social institutions such as marriage and family. These changes are reflected in the equality of rights of both spouses.

Several European constitutions explicitly require that both spouses have equal rights in marriage. Furthermore, they also frequently highlight that spouses are equal in performing duties. This equality forms the foundation for maintaining the unity of the family, which is understood to arise from marriage. Countries that have enshrined equality between spouses in their constitutions include: Bulgaria, Estonia, Spain, Italy, Lithuania, Portugal, Slovenia, and Romania.[20]

In Bulgaria, Article 46(2) of the Constitution stipulates that spouses have equal rights and obligations in marriage, but also in the family, which arises from marriage. Similarly, In Estonia, Article 27 simply states that spouses have equal rights.[21] The Constitution of Italy addresses this issue more comprehensively in Article 29, which reads: "Marriage shall be based on the moral and legal equality of the spouses within the limits laid down by law to ensure family unity." Thus, it emphasises that spouses have equal rights, and these equal rights form the basis and condition of family unity.[22] In Lithuania, the Constitution stresses equal rights for spouses within the family, reinforcing the institution of family based on equality. In the Constitution of the Portuguese Republic, Article 36 regarding family, marriage and filiation, defines equality in two aspects. Firstly, it recognises the right to found a family and marry under conditions of full equality.

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[18] Constitution of Ireland (01.07.1937), https://www.irishstatutebook.ie/eli/cons/en/html [accessed: 28.04.2024].

[19] See https://www.irishtimes.com/news/social-affairs/president-signs-same-sex-marriage-into-constitution-1.2333882 [accessed: 28.04.2024].

[20] See https://www.eurac.edu/en/blogs/eureka/the-9th-of-all-eu-r-rights-marriage-founding-a-family-and-how-the-charter-contributes [accessed: 28.04.2024].

[21] Constitution of the Republic of Estonia (28.06.1992), https://president.ee/en/republic-of-estonia/the-constitution [accessed: 28.04.2024].

[22] Constitution of the Italian Republic (27.12.1947), https://www.senato.it/application/xmanager/projects/leg19/file/repository/relazioni/libreria/novita/XIX/Costituzione_INGLESE_2023.pdf [accessed: 28.04.2024]. See also Pańtak 2021, 91-93.

Secondly, it states that spouses have equal rights and obligations in relation to their civil and political capacity and to the maintenance and education of their children. Therefore, it defines the catalogue of areas to which equality of rights and obligations applies.[23] The Constitutions of Romania and Slovenia recognise full equality between spouses without specifying what it refers to.[24] The Constitution of Spain, mentioned earlier, in Article 32 refers to full equality before the law.

2.3. The right to found a family and guarantees of family support

In addition to marriage, European constitutions refer to the concept of "family". By including this concept in national constitutions, legislators affirm the significance and role that families hold in society, and more broadly, within the state. When constitutional provisions address both marriage and family, this is often done in consecutive articles or within a single chapter, which underscores that family formation is a consequence of marriage, without prejudicing against other forms of unions permitted in certain European countries. Several European constitutions specify that marriage results in the establishment of a family. These two are inextricably linked. Such provisions were adopted, for instance, in Ireland (Article 41(3)(1)) or Italy (Article 29).

In the Constitutions of Lithuania, Estonia, Greece, and Ireland, the family is regarded as a fundamental element crucial for the preservation and advancement of society. In Ireland, the family is even described as an institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. The Constitution of Estonia underscores that the family serves as the cornerstone of society, ensuring Estonia's survival and development (Article 27(1)).

Moreover, constitutional arrangements in Italy, Spain, and Poland ensure support for families through pro-family policies. In Italy, Article 31 of the Constitution states: "The Republic shall, through economic measures and other benefits, encourage the creation of families and the fulfilment of corresponding duties, with special regard to large families. The Republic shall protect mothers, children and the young, favouring the institutions that are necessary to that end." In the Constitution of Spain, Article 39(1) reads: "The public authorities shall ensure the social, economic and legal

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[23] Constitution of the Portuguese Republic (02.04.1976), https://biblioteka.sejm.gov.pl/wp-content/uploads/2016/03/Portugalia_ang_010116.pdf [accessed: 28.04.2024].

[24] Article 48(1) of the Constitution of Romania, https://www.presidency.ro/en/the-constitution-of-romania [accessed: 28.04.2024]; Article 38 of the Constitution of the Republic of Slovenia (23.12.1991), https://www.varuh-rs.si/en/about-us/legal-framework/the-constitution-of-the-republic-of-slovenia/ [accessed: 28.04.2024].

protection of the family."[25] In the Constitution of the Republic of Poland, Article 71 states: "The State, in its social and economic policy, shall take into account the good of the family. Families, finding themselves in difficult material and social circumstances – particularly those with many children or a single-parent families – shall have the right to special assistance from public authorities."[26] However, the Constitution does not explicitly define the concept of family, treating it as given. The doctrine clearly states that assistance is guaranteed regardless of the size of the family and its wealth [Borysiak 2016, 1673]. In Greece, large families are promoted under Article 21(2) of the Constitution, just as it is the case in Poland under Article 71. In Hungary, the state undertakes to assist those with children (Article L(2)).

2.4. Constitutional protection of marriage and family

Some European Union Member States include provisions for the protection of marriage within their constitutional frameworks. This institutional protection involves the state providing support for marriage through its social policies, as it bears the responsibility of ensuring conditions conducive to marital and family life. For instance, Hungary's Constitutional Tribunal has affirmed the protection of the institution of marriage, despite the fact that the Constitution of Hungary mentions only the family in this regard [Molnár 2021, 193-94]. In the Basic Law for the Federal Republic of Germany, Article 6(1) expressly states that "Marriage and the family shall enjoy the special protection of the state."[27] Marriage is the only union that is formally recognised and protected by law. Other unions cannot be favoured over marriage.[28] This wording in the Basic Law is intended to safeguard the family under law. Furthermore, the Constitutional Tribunal in Germany has ruled that if unions of same-sex couples cannot produce children, marriage cannot be extended to them [Molnár 2021, 193]. In 2001, Germany recognised registered partnerships for same-sex couples by the Act on Registered Life Partnerships, reinforcing the special protection afforded to traditional marriage under Article 6 of the Basic Law, as same-sex couples are not covered by its provisions.

The institutions of marriage and family are also protected under the Greek Constitution in Article 21(1), which defines the family as the cornerstone for

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[25] The Constitution of Spain (27.12.1978), https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf [accessed: 28.04.2024].

[26] See more Prokopowicz 2017, 57-75.

[27] Constitution of the Federal Republic of Germany (23.05.1949), https://www.bmi.bund.de/EN/topics/constitution/constitutional-issues/constitutional-issues.html [accessed: 28.04.2024].

[28] See more Perelli-Harris and Sánchez Gassen 2021, 435-67.

the preservation and development of the Greek Nation.[29] Similarly in Ireland, Article 41(3(1)) reads: "The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack." The Constitution of Ireland also includes protection of the family as the necessary basis of social order and as indispensable to the welfare of the Nation and the State (Article 41(1)(2)). The Latvian solutions are included in Article 110 of the Constitution, which declares not only protection but also support for marriages and families, and recognises the rights of parents and children[30]. Such provisions are also included in Article 36(1) of the Constitution of Portugal, which provides general, though implicit protection of marriage, through the guarantee that everyone has the right to found a family and marry on the principles of full equality. The doctrine has repeatedly pointed out that cohabitation cannot be granted the same protection as marriage, as this would infringe upon the freedom of marriage and the right to enter into it [Oliveira, Martins, and Vítor 2015].

2.5. Lack of marriage and family regulations in constitutions of EU Member States

The constitutions of some countries, especially of Western and Northern Europe, do not contain provisions regarding either the right to marry or found a family. There are no such regulations in France or Finland [Toggenburg 2020], for example. There are also no constitutional provisions concerning marriage in Norway, Sweden or Denmark [ibid.]. Similarly, there are no constitutional provisions on family and marriage in the Kingdom of the Netherlands or the Czech Republic. The Czech Republic grants the protection to parenthood and family, but under the Charter of Fundamental Rights and Freedoms.[31] Malta recognises only the right to respect for private and family life. Family protection and support are regulated by the Civil Code.

CONCLUSIONS

It seems that these deliberations have allowed for reflection on how the right to marry and found a family is construed in national constitutions of EU Member States. An analysis of different constitutional provisions

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29 The Constitution of Greece (revised 25.11.2019), https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/2019_SYDAGMA_EN_2022_WEB.pdf [accessed: 28.04.2024].

30 The Constitution of the Republic of Latvia (15.02.1992), https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia [accessed: 28.04.2024].

31 Article 32(1) of the Constitution of the Czech Republic (16.12.1992), https://www.hrad.cz/en/czech-republic/constitution-of-the-cr [accessed: 28.04.2024].

concerning marriage and family demonstrates some pattern, mirroring the geographical location of the country in Europe, but also influenced by its history, tradition and culture. Although drawing clear distinctions may not always be possible, it is worth noting that policies and constitutional provisions vary slightly between countries in Western Europe compared to those in Eastern Europe. Additionally, the time when a constitution was adopted in a given country also appears to be significant. With some exceptions, European constitutions can be categorised into "older" ones (adopted before the changes of the 1980s and 1990s) and the so-called "new democracies", i.e. countries that transitioned from Communism and strengthened their democracy by adopting new constitutions. In these constitutions, provisions concerning marriage and family are generally more detailed, and the very concept of marriage is most often associated with the traditional concept of marriage as a union of a man and a woman. Religion has also played a significant role in shaping the concepts of marriage and family in this part of Europe, as well as in Southern European countries.

It is noteworthy that in the last 20 years, there have been new proposals regarding the possibility of recognising same-sex couples as married. While some countries have decided to recognise same-sex marriages in their legal frameworks, only very few have done it at the constitutional level. For instance, Spain has allowed same-sex marriages at the statutory level despite a clear stipulation in the constitution. This trend depends on the geography, but is also shaped by historical and cultural contexts.

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DRAFT AMENDMENT TO ACT NO. 370/2019 COLL. ON FINANCIAL SUPPORT FOR THE ACTIVITIES OF CHURCHES AND RELIGIOUS SOCIETIES*

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Abstract. Churches in Slovakia have long been supported by the state. This has to do with the nationalisation of their property in the past and the only partial return of church property after the fall of the communist regime. Five years after its creation, and in a changed economic environment, the 2019 Act on Support for the Activities of Churches needs to be amended. The Ministry of Culture has submitted a draft Act that would modify the way churches are funded. It is proposed to link the calculation of the amount of the state contribution to the growth rate of the minimum wage. The proposal also includes a one-off increase in the contribution in 2025, reflecting the sharp increase in the minimum wage compared to the increase in the state contribution from 2019. We note the development to date and the method of the new calculation of the state contribution to the activities of churches and religious communities.

Keywords: churches; economy; financing; state budget; religious societies; salaries.

INTRODUCTION

Financing of churches and religious societies is one of the main topics of the Slovak Republic's church policy. The primary reason for this is both the country's experience with the Nazi regime, which, of course, not only regarding property, affected Jewish religious communities the most, and the experience with the communist regime, which adversely affected (not only) the economy of all churches and religious societies. Developments in the country after 1989 were, among other things, characterised by the search for a balanced relationship between the state and religions. The experts' discussions concentrated on trying to answer questions about what the religious neutrality of the state really means. It was often an oscillation on a relatively wide spectrum between state atheism and national religion, or the religion of the most numerous and historically long-standing religions in the country. It was necessary to take into account the historical

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facts that testified to the nationalization of the property of Jewish religious communities after 1936 and of other churches and religious societies after the communists took power in 1948. The issue of church funding has long been the subject of political struggles and the opposition of individual political entities to religion as such, especially in the run-up to the elections. The question of restitution of church property was constantly raised. For some, it was really only a partial redress of the property wrongs committed by the communist regime. For others, any idea of compensation for churches and religious societies was hardly acceptable. Perhaps the issue was all the more valuable because it provided political legitimacy to the otherwise bland political parties and movements that profiled themselves through the relationship to religion and the state. Finally, after three decades of searching for a new model of financing churches, the Slovak Republic modified the previous "transitional" system, which was a continuation of the state-subsidy model of financing churches from the state budget.

On 16 October 2019, the National Council of the Slovak Republic approved Act No. 370/2019 Coll. on Financial Support for the Activities of Churches and Religious Societies. Slovakia has not abandoned the principle of financing churches, which was introduced by the law No. 218/1949 Coll. on the economic support of churches and religious societies. Restitution of church property was only partial, and no compensation was paid to the churches for unreturned property. By maintaining the subsidy system from the state budget, it is generally expected that the issue of restitution will no longer be raised by churches and religious societies. However, the 2019 law does not seem to contain a formula for calculating the contribution to churches from the state budget that would be able to respond flexibly to economic developments and the evolution of the state's wage policy that reflects that evolution. Slovakia is therefore facing the first amendment of the act on the financial support of church activities as early as 2024, although the churches have been calling for it almost immediately after the entry into force of the law.

1. A MODERN HISTORY OF THE FINANCING OF CHURCHES AND RELIGIOUS SOCIETIES IN SLOVAKIA

After 1948, only the sacral buildings remained the property of the churches, which made it completely impossible for them to manage their own economy. At the same time, this meant the complete economic attachment of the churches to the state. This attachment to the state, which paid not only the salaries of the clergy but also strictly limited other material costs associated with the activities of the clergy, also brought about the absolute directive management of the activities of the churches and religious

societies themselves. The law No. 218/1949 Coll. on the economic support of churches and religious societies came into force on 1 November 1949. Article 1 of this Act provided that the State shall grant personal emoluments to clergymen of churches and religious societies who serve with the approval of the State as a clergy, in church administration or in institutes for the education of clergy. Exceptionally, the State Office for Ecclesiastical Affairs may, in agreement with the Ministry of Finance, also grant personal emoluments to clergy who are otherwise active. According to this law, section 2, state approval may be granted only to clergymen who are Czechoslovak citizens,[1] who are reliable and above reproach, and who otherwise meet the general conditions for admission to state service. Particularly problematic here is the then newly introduced institution of state approval, which was granted by the State Office for Ecclesiastical Affairs. This law provided for the salaries of the clergy.[2] Article 4 also provided that clergymen who are entitled to personal emoluments are also entitled to reimbursement for travel, moving and other expenses under the general regulations. Clergymen engaged in spiritual administration were, by virtue of this law, also obliged to teach religion free of charge in schools, unless the teaching of religion was otherwise provided for. The extent of this obligation and the details thereof were determined by the Minister in charge of the State Office for Ecclesiastical Affairs, in agreement with the Minister of Education, Sciences and Arts, by regulation. Social benefits, in particular benefits for dependent children, and pensions for clergy and their family members were provided according to the analogy of the regulations applicable to civil servants.[3]

The Act also stipulated that only persons who have state approval to do so and who have taken an oath of allegiance to the Republic may engage in pastoral (preaching, etc.) activities in churches and religious societies. Any appointment (election, appointment) of such persons required the prior consent of the state. Representatives of churches and religious societies and administrators of church property were obliged to draw up budgets and final accounts and submit them to the State Office for Ecclesiastical Affairs for approval. The budgets for ordinary material costs were to be drawn up according to actual needs, in accordance with the principles of the State budget; the details were determined by the State Office for Ecclesiastical Affairs in agreement with the Ministry of Finance.[4] The state, according to this Act, supervised the property of churches and religious societies.

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[1] The State Office for Ecclesiastical Affairs may waive the condition of citizenship in cases of special consideration.

[2] Basic salary, seniority bonus and, if applicable, remuneration for higher achievement.

[3] Para. 6 Social benefits.

[4] Section 9 Budgets.

Representatives of churches and religious societies and administrators of church property were obliged to compile an inventory of all movable and immovable property and property rights of churches and religious societies, their branches, communities, institutes, orders and funds and to submit it to the State Office for Ecclesiastical Affairs within three months of the entry into force of this law.[5] Any alienation or encumbrance of the property of churches and religious societies required the prior approval of the State Administration.[6] All private and public patronage of churches, congregations, pensions connected with the exercise of ecclesiastical office and other religious institutions passed to the state. By this Act, the State also committed itself to financing seminaries and schools for clergy.[7] The real wages of the clergy are very low and other activities of churches are hardly supported at all by the state, even though it has committed itself to do so in the Act. This has had an extremely negative impact on the considerable devastation of sacral objects, including movable and immovable cultural monuments [Moravčíková and Valová 2010, 9-10]. By Act No. 218/1949 Coll. on the Economic Security of Churches and Religious Societies, churches lost the character of a subject of public law and became dependent on the state. The State introduced control of churches and made it compulsory for churches to register. In combination with the previously adopted Act No. 142/1947 Coll. on the revision of the land reform and Act No. 46/1948 Coll. on the new land reform, the churches lost almost all its land and thus one of its most important sources of income. Apart from the fact that the state was underfunding the salaries of the clergy as well as all material costs, it can be stated that the contributions from the faithful helped to meet the most pressing needs of the churches [Šabo 2019, 56].

After 1989, provisions restricting religious freedom were removed in Act No. 218/1949 Coll., but the actual change in the method of financing churches proved to be a serious problem, requiring a great deal of effort on the part of both state and church representatives [Šabo 2010, 17]. Much effort was devoted especially to the preparation and implementation of the restitution of church properties, which was partial, as we have already noted. Some properties, especially land on which roads or strategic or public utility facilities had been built over time, could not be returned to the churches. In the subsequent period, much attention was paid to the contractual relations between churches and religious societies. The basic treaties between the Slovak Republic and the Holy See and between the Slovak Republic and eleven non-Catholic churches were gradually concluded. Subsequently, the so-called partial agreements between these churches were concluded

[5] Para. 10 Property (1) (2).

[6] Para. 10 Property (3).

[7] Para. 12 Schools for the education of the clergy.

by the Slovak Republic. These were agreements on Catholic and religious education and upbringing and the service of the faithful in the armed forces and armed corps [Šmid and Moravčíková 2009, 337ff]. The Basic Covenants anticipate the conclusion of additional financial agreements for both the Catholic Church and the non-Catholic churches that are signatories to the agreement with the Slovak Republic [Moravčíková 2019, 161].

2. ACT NO. 370/2019 COLL. ON FINANCIAL SUPPORT FOR THE ACTIVITIES OF CHURCHES AND RELIGIOUS SOCIETIES

The Act on Financial Support for the Activities of Churches and Religious Societies is the result of a long-standing discussion between the state and the churches. Although its implementation is not negatively evaluated, the economic factors that influence the amount of the contribution to the churches are dynamic indicators that naturally change according to the state of the whole economy of the country. The amount of the State's contribution to the churches is currently adjusted according to the inflation rate in the Slovak economy and the rate of valorisation of salaries of employees in the performance of work in the public interest. However, the recent period, influenced by unfavourable economic trends and international externalities, does not optimally reflect the need for the financial contribution of the churches. Although churches use almost all the state contribution for salary requirements, they are only able to provide almost the minimum wage for their employees, especially the clergy. The amendment simplifies the calculation of the state contribution to the churches and ensure better predictability and transparency, as the macroeconomic indicators for the calculation are already known each year in the middle of the budget period. Another factor influencing the contribution is the number of members of the churches as determined by the official census, where it is necessary to specify the relationship between the amount of the state contribution and any change in the number of members of a particular church.

Act No. 370/2019 Coll. on Financial Support for the Activities of Churches and Religious Societies. approved by the National Council of the Slovak Republic on 16 October 2019. This Act was published in the Collection of Laws on 18 November 2019 and entered into force on 1 January 2020. This is a modification of the system of direct subsidies from the state based on the principles of fairness, transparency, solidarity, independence of churches and respect for the economic possibilities of the state. The new solution envisaged maintaining continuity so that the amount of the contribution for individual churches remained at least at the level of 2019, which significantly helped smaller churches. The law introduced the calculation of the total amount of the state contribution, which was the result of adding

the then level of the subsidy for churches and the annual increase of the subsidy (indexation) taking into account the inflation growth and the valorisation of salaries in the public service. The distribution of the indexed amount was based on a single factor – the number of members of the churches. Under this law, churches may use the state contribution to finance, for example, worship-related expenses, educational and cultural activities of the church, including salary and overhead costs. But at the same time, this law brought about the expansion of the possibility of using the financial contribution by churches is part of the intention to support the socially beneficial activities of churches and strengthens their autonomous status. On 4 July 2019, a draft law on financial support for the activities of churches and religious societies was submitted to the inter-ministerial comment procedure. The comment procedure lasted until 25 July 2019. Comments from participants in the inter-ministerial comment were of both substantive and legislative-technical nature. The preparatory report to the draft law began with the comment that the Government of the Slovak Republic declared in its programme statement its intention to develop a new legislative regulation the financing of churches and religious societies. It also recalls that the financing of churches and religious societies is still governed by Act No. 218/1949 Coll. on the economic security of churches and religious societies by the state, as amended, which originated in a diametrically different political and social situation. Even in its present amended version, it contains the following Act contains obligations of the state which are not claimed by the churches. The law and its concept are outdated and do not sufficiently reflect the current social situation. In this context, the Ministry has set up an Expert Commission to address the issue of financing of churches and religious societies, composed of representatives of the state and the churches. The Expert Commission concluded that the optimal solution is to maintain the state-subsidised system of financing churches, but in an updated form. Proposed model is a modification of the system of direct subsidies from the state budget based on the principles of fairness, transparency, solidarity, independence of churches and respect for the economic possibilities of the state. It justifies the maintenance of the subsidy system by stating that the principle of direct subsidies from the state budget can be justified by its historical tradition dating back to 19th century, the degree of religiosity, the activities of churches in the field of education, training and social work, culture and care of national cultural monuments, as well as the historical contribution of the churches to the maintenance and development of national identity and social reconciliation.[8] Contribution levels for individual

[8] Submission Report. LP/2019/67 Act on Financial Support for the Activities of Churches and Religious Societies, https://www.slov-lex.sk/legislativne-procesy/SK/LP/2019/67/ [accessed: 19.06.2024].

churches remained at least at 2019 levels, which helped smaller churches significantly. Also, the calculation of the total amount of the state contribution, which is the result of the addition of the then (2019) level of the subsidy for churches and the annual increase in the subsidy (indexation) taking into account the growth of inflation and the rate of valorisation of the salaries of employees in the performance of public work. The distribution of the indexed amount is based on a single factor – the number of worshippers. The law also provides for a broader use of the state budget contribution, whereby churches may use it, for example, to finance expenses related to the church's worship, educational, social and cultural activities, including salary and overhead costs. This law has the ambition to ensure the continuity of the level of relations between the state and the churches and clear and transparent rules for the support of their activities, while maintaining mutual solidarity with smaller churches. The essential element is that the starting point for the financing of registered churches and religious societies is the financial status quo in 2019, furthermore, that the autonomy of churches and religious societies will also be applied in this area and that churches will create their budgets independently, and finally, the new law foresees that if the number of members of churches compared to the last survey decreases or increases by more than ten percent, the state's contribution will be reduced or increased by the Ministry of Culture on a one-time basis, but no more than by 1/3 of the percentage decrease or increase in the number of believers. In the following years, the contribution to the churches from the state budget will be indexed to inflation and the indexation of salaries of public employees as before. The inflation parameter has thus entered the calculation of the contribution for the future. The formulas used for calculations for the following year and subsequent years are part of the Act.

Formula for calculating the amount of the State contribution for 2020:

$$P2020 = P2019 \cdot 0.2 \cdot (1 + CPI2018) + P2019 \cdot 0.8 \cdot (1 + V2020)$$

P2020 is the State contribution for the budgeted calendar year 2020 for which the State contribution is determined. P2019 is the state contribution provided to churches for calendar year 2019. CPI2018 is the average annual rate of inflation in the Slovak economy reported by the Statistical Office of the Slovak Republic, expressed as a percentage of the CPI for the calendar year 2018, with the percentage being inserted in the formula in the form a decimal number rounded to three decimal places (e.g. 1% = 0.010). V2020 is the rate of increase in the basic salary scale for staff in the performance of work in public interest approved for the calendar year 2020, expressed as a percentage, where the percentage is entered in the formula as a decimal number rounded to three decimal places (e.g. 1% = 0,010). Pursuant to Section 4(2), the State contribution for each calendar year thereafter shall be the contribution for the preceding calendar year, increased at a rate

which takes account of one fifth of the annual rate of inflation in the economy of the Slovak Republic as reported by the Statistical Office of the Slovak Republic Office of the Slovak Republic for the calendar year two years preceding the calendar year for which the State contribution is determined, and by four-fifths the rate of increase in the basic scale of salary scales for employees in the performance of public work pursuant to a special regulation.[9]

Formula for calculating the amount of the State contribution:

$Pt = Pt\text{-}1 \cdot 0{,}2 \cdot (1 + CPIt\text{-}2) + Pt\text{-}1 \cdot 0{,}8 \cdot (1 + Vt)$

$CPIt\text{-}2 \geq 0$ If the reported value of $CPIt\text{-}2 < 0$, $CPIt\text{-}2 = 0$ is entered in the formula, where

Pt is the government contribution for the relevant budgeted calendar year (t) for which the contribution the State contribution is determined. Pt-1 is the State contribution for the calendar year preceding the relevant budgeted calendar year. CPIt-2 is the average annual rate of inflation in the Slovak economy reported by the Statistical Office of the Slovak Republic expressed by the CPI for the calendar year two years preceding the relevant budgeted calendar year the year for which the State contribution is determined, expressed as a percentage, with the following formula the percentage in the form of a decimal number rounded to three decimal places (e.g. 1% = 0,010). Vt is the rate of increase in the basic salary scale for staff in the performance of their duties approved for the calendar year for which the State contribution is determined, expressed as a percentage, with the percentage in the form of a decimal being inserted in the formula rounded to three decimal places (e.g. 1% = 0,010).

Section 4 of the Act provides that if the number of members of the churches to which an allowance is granted the State's contribution decreases or increases by more than 10% compared with the last survey, the State's contribution for the following year, under the conditions set out in paragraph 1, the Ministry of Culture shall reduce or increase by one-third of the percentage decrease or increase in the number of worshippers. The change in the number of members of the churches shall be based on a comparison of the average of two consecutive censuses of the population carried out after the entry into force of this Act with the average of the two censuses immediately preceding the last census. This provision shall ensure the possibility of maintaining a balance between the amount of the contribution and the change in the number of worshippers of the churches in their percentage according to the census.[10]

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[9] Act No. 553/2003 Coll. on remuneration of certain employees in the performance of public work and on amending and supplementing certain acts, as amended.

[10] Explanatory Memorandum – separate part. LP/2019/67 Act on financial support for

The provisions of Section 5 regulate the manner of distribution and provision of the state's contribution to churches. Article 1 provides that the church must apply to the Ministry for a state contribution in advance. The state contribution shall be granted to a church on the basis of an application submitted to the Ministry at the latest six months before the beginning of the calendar year for which the state contribution is to be granted. Those churches which have already been granted a contribution in 2019 are exempted from this obligation if the state contribution have already received it under the previous legislation. Churches that have not applied for a state contribution or churches that will be registered after the proposed law comes into force remain under this obligation. Churches that have not been granted a contribution for 2019 will, upon application, be granted the amount of the contribution under section 5(2)(b), i.e. according to the number of their worshippers. Subject to paragraph 2(a), the amount of the state's 2019 contribution shall be distributed to the individual churches to which a contribution has been granted for 2019, on the basis of the proportion The remainder of the contribution, pursuant to paragraph 2(b), shall be distributed to all churches that have applied for a contribution from the state in proportion to the number of their worshippers, that is to say where applicable, among those which have not yet received the contribution.

Article 3 stipulates that the Ministry must publish and communicate the amount of the contribution to a particular church by 31 December of the previous year at the latest, and that this information must be published on the Ministry's website. Until 2019, the state contribution was provided to the headquarters and legal entities of individual churches (33 entities in total). As of 2020, this legislation provides for the state contribution to be granted to the church (12 entities in total). The provision in Article 4 confirms that the state's contribution to churches is not subject to tax, fee or other similar monetary benefit. The state contribution is intended to finance expenditure relating to related to the activities of churches and entities deriving their legal personality from them, in particular for religious, educational, cultural and social activities of churches, salaries of church employees, contributions for church employees for health insurance and social insurance, other statutory social overheads of the churches. Article 6 provides that the state contribution is intended to finance expenditure relating to related to the activities of churches and entities deriving their legal personality from them, in particular for religious, educational, cultural and social activities of churches, salaries of church employees, contributions for church employees for health insurance and social insurance, other statutory social overheads of the churches.

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the activities of churches and religious societies, https://www.slov-lex.sk/legislativne-procesy/SK/LP/2019/67/ [accessed: 19.06.2024].

After three decades of churches and religious societies operating in democratic conditions, the possibility of fulfilling their right to autonomy and to manage their own affairs, including budgeting. Article 6 lists the purposes for which the State's financial contribution may not be used: a) the granting of loans and credits to natural or legal persons, b) a deposit under a silent partnership agreement, c) the business of a commercial company set up by the church or an organisational unit thereof; or has become a shareholder thereof, d) the establishment of another legal person, e) support for the activities of political parties, f) guaranteeing the obligations of natural persons or legal persons, g) donations to natural or legal persons, h) the payment of fines and other pecuniary sanctions.

Article 7 lays down the obligation for churches to submit reports on their management to the Ministry of culture with the state contribution for the previous year annually by 30 April of the year in question at the latest in paper and electronic form. The reports are public. The Ministry publishes them on its website. The churches declare its commitment to ensuring transparency in the use of public funds. In order to ensure the correct use of the state's contribution by the churches, the state may, as Article 7(2) provides for the control of the management of the contribution according to special regulations, such as the Act of the National Council of the Slovak Republic No. 39/1993 Coll. on the Supreme Audit Office of the Slovak Republic, as amended, Act No. 523/2004 Coll. on budgetary rules of public administration and on amendment and supplementation of certain acts, as amended by Act No 357/2015 Coll. on financial control and audit.

The old-new model of church funding enshrined in this law is a continuation of the old 1949 model with some modifications. It is a workable approach if both the churches and the state want it that way and have reached a consensus. Also to be highlighted is the exercise of autonomy of the churches in the financial sphere, when after a long time the churches will be able to create their own budgets. This process is new and challenging for them. However, mechanisms will gradually be built up for negotiation and consensus on the shape of the forthcoming budgets within individual churches and religious societies. Linking the calculation of the state contribution to the activities of churches and religious to the results of the census has always been a highly debated topic at both professional and societal levels.

3. A BILL AMENDING ACT NO. 370/2019 COLL. ON THE FINANCIAL SUPPORT OF THE ACTIVITIES OF CHURCHES AND RELIGIOUS SOCIETIES

On 17 May 2024, the Ministry of Culture of the Slovak Republic submitted to the inter-ministerial comment procedure a bill amending Act No. 370/2019 Coll. on the financial support of the activities of churches and religious societies. In the Slovak Republic, the Ministry of Culture is the central state administration body designated for relations with churches and religious societies and is also the administrator of the state budget chapter from which the state contribution is provided to support the activities of registered churches and religious societies. As of the date of this writing, the results of the inter-ministerial comment procedure, which closed on 6 June 2024, have not been published. It can be assumed that the comments may not be merely of an administrative and technical nature.

In the accompanying documents, the proponent states its objectives. The primary objective is to change the calculation of the allowance for churches. The reason for changing the calculation of the contribution to churches from the state budget is to increase the degree of solidarity with smaller churches and to ensure better predictability and transparency. The application practice of the Act and the requirements of the affected subjects have led to the need to change the factors influencing the amount of the state contribution and to clarify certain terms in the Act. The amendment of the Act is in line with the Programme Statement of the Government of the Slovak Republic 2023-2027, according to which the Government "is aware of the importance of the social position of churches, religious societies and will support their involvement in matters of public interest, including their sufficient financial evaluation."[11]

Terms clarified in the amendment are: Terms explained in the amendment: a) the state contribution is the amount of funds provided annually to the church from the budget chapter of the Ministry of Culture of the Slovak Republic, b) the number of believers, data on religious denomination obtained from the last census of population, houses and dwellings (as ascertained by the Statistical Office of the Slovak Republic or data on the number of members of the church as ascertained from another source) of the Ministry of Culture or the Statistical Office.

The thrust of Article 4 has been changed, according to which the State contribution for each year shall be determined from the amount of the State

[11] LP/2024/230 Zákon, ktorým sa mení a dopĺňa zákon č. 370/2019 Z. z. o finančnej podpore činnosti cirkví a náboženských spoločností, https://www.slov-lex.sk/legislativne-procesy/SK/LP/2024/230 [accessed: 19.06.2024].

contribution for the preceding year increased by 1.1 times the amount of the year-on-year increase in the State contribution for the budgeted year according to the rate of year-on-year increase in the amount of the minimum wage for an employee remunerated by a monthly wage (the amount of the monthly minimum wage) determined for the calendar year in question pursuant to a special regulation[12] preceding the year for which the state contribution is determined, compared to the year two years preceding the year for which the State contribution is determined. The formula for calculating the State contribution is: Pt = Pt-1 + 1,1 * (Pt-1 * (Mt-1/Mt-2) - Pt-1), where (Mt-1/Mt-2) ≥ 1, If (Mt-1/Mt-2) < 1, the value (Mt-1/Mt-2) = 1 is added to the formula, where Pt is the state contribution for the budget year (t) for which the State contribution is determined, Pt-1 is the state contribution for the year preceding the budget year concerned, Mt-1 is the amount of the monthly minimum wage determined for the year (t-1) preceding the year for which the state contribution is determined, Mt-2 is the amount of the monthly minimum wage determined for the year (t-2) two years preceding the year for which the state contribution is determined.

Pursuant to Section 5 The State contribution shall be provided as follows: a) an amount equal to the State contribution granted to the churches in the previous year, increased according to the rate of year-on-year increase in the amount of the monthly minimum wage, shall be distributed among the churches to which the State contribution was granted in the previous year, in the same proportion as in the previous year, b) the amount of the State contribution under Article 4, after the deduction of the amount of the state contribution under point a), shall be distributed among the individual churches which have applied for the State contribution in proportion to the number of their members of the congregation. The amount of the state contribution to specific churches for the relevant year shall be announced by the Ministry of Culture by 1 January of the relevant year and published on its website. The Ministry of Culture shall provide the churches with the State contribution in the amount of one-twelfth of the state contribution, as a rule, on the first working day of the calendar month. The state contribution to a church to which a state contribution was provided in the previous year shall be provided directly without application. Transitional provision to the arrangements in force from 1 January 2025 states that the state's contribution for 2025 determined pursuant to Section 4 as in effect on January 1, 2025, shall be increased by an amount equal to ten percent of the amount of the State's contribution to the churches in 2024. The amount pursuant to the preceding sentence by which the State's contribution for 2025 is increased shall be distributed to the individual churches

[12] Act No. 663/2007 Coll. on the minimum wage, as amended.

in the same proportion as the State's contribution to the individual churches in 2019, as set forth in Attachment No. 2. of the present amendment, which sets forth the specific amounts of funds for the individual churches and religious societies.

Although the inter-ministerial comment procedure has not yet been evaluated, it can be expected that after the incorporation of comments and proposals, the draft law will be submitted to the next autumn session of the National Council of the Slovak Republic and approved so that it enters into force in 2025.

CONCLUSIONS

The current period presents us with many important questions concerning the allocation of public funds. One of the topics under discussion is the financing of the churches from the state budget. This issue is not only a matter of religious freedom, but also an important factor in the context of state management. The relationship between churches and the state is a regularly discussed topic on the Slovak political scene. For almost three decades, experts have been discussing the question of whether churches should be disconnected from the public administration or whether their financial support from the state should be maintained. For the time being, the answer seems to have been found for the Slovak Republic. However, it should be borne in mind that a democratic polity often brings about very dynamic changes.

The current law on financial support for the activities of churches and religious societies is the result of years of discussion between the state and the churches. Individual churches receive financial contributions from the state, up to 97 per cent of which are used for salary matters. However, from this amount they are only able to provide a minimum wage for their employees, especially the clergy. The average salary of a clergyman in 2023 was EUR 763 from the state contribution. The amount of the state's contribution is also influenced by the number of believers as determined by the official census. The bill clarifies the relationship between the amount of the state contribution and any change in the number of worshippers of a particular church. In terms of the total amount of funds for registered churches that receive a contribution from the state, 47 million euros is not an amount that the state could not increase in case of need. In terms of the country and the state's economy, these are per mille, not percentages of the state budget. In terms of political ideas and their applications, financial support of churches and other religious entities is often a crucial question of the relationship between the state and religion and a question about the nature of the neutrality of the state. Under the influence of political developments

on the continent and globally, it is undoubtedly necessary to compare different models and to seek universal models reflecting historical and social realities.

For now, this change is perhaps a technocratic solution for the long term. However, what will happen next in the area of funding for churches and religious societies will depend not only on the composition of the government coalition, the mood in society and in parliament, but also on the visible effects that this funding brings to society. Churches are faced with the challenge of both responding to the challenges of modern times and preserving and capitalising their very essence. This is an extremely difficult task, because pointing out the importance of the "vertical orientation of man", the metaphysical realities and the meaning of life somewhere beyond the accumulation of things and experiences does not always meet with deep understanding, as evidenced by the state of society, the questioning of moral principles, the laws of nature, and the resolution of conflicts by brute force, and insecurity.

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THE LEGAL NATURE OF SUBSIDY RELATIONS BETWEEN THE STATE AND THE LOCAL GOVERNMENT IN THE LIGHT OF THE CASE LAW OF THE CONSTITUTIONAL TRIBUNAL AND COURTS

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Abstract. In the discourse on the reform of the finances of local government units in Poland, which has been ongoing since the beginning of 2024, there has been a proposal to abolish the historical division of local government tasks into their own tasks and the state government administration tasks assigned to local government units. This postulate, which is quite surprising from the constitutional point of view, becomes particularly justified after analysing the long-term subsidy disputes between the state (State Treasury) and local government units of all levels (lasting since the beginning of the first local government reform in 1990). It can be assumed that the above postulate appeared as a response to numerous rulings of common courts, administrative courts and the Constitutional Tribunal on targeted subsidies granted to local government units from the state budget, most of which, unfortunately, were unfavourable to these units. In particular, the case law on targeted subsidies for public administration tasks, despite the commission nature of these subsidies, has systematically revealed and confirmed the strong inequality of the parties to the subsidy legal relationship between the state and local government. This has led to a widespread acceptance of the phenomenon of co-financing of the costs of the implementation of state tasks by local governments and, at the same time, to a general discussion on the legal admissibility of such co-financing. The purpose of the article is to analyse the legal nature of the subsidy relations between the state and local governments and to indicate the direction of their urgent reform (modification). The above analysis was carried out on the example of targeted subsidies granted to Polish local government units for the implementation of tasks delegated (commissioned) from the scope of state administration – based on court decisions and the case law of the Constitutional Tribunal made in this regard. The analysis used a dogmatic method (literature research) and an empirical method based on the study of judgments and decisions of administrative courts, common courts and the Constitutional Tribunal.

Keywords: subsidisation of local government; the state and local government; targeted subsidies.

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INTRODUCTION

In the modern system of public finances, including those of the European Union, grants, subsidies, co-financing and financial support are common instruments used in the redistribution of public funds. The huge number and variety of subsidies granted from public funds (from the EU budget, the state budget, the budgets of local government units) also affect the ambiguous (non-uniform) legal nature of the subsidy relationship between the subsidizing entity (often incorrectly called the donor) and the subsidized entity (the beneficiary of the subsidy) [Ostrowska 2018b, 57]. However, subsidizing non-public entities has a different problematic dimension than subsidizing public entities, such as local government units. In the area of subsidies granted from public funds, the Polish legal system reveals in a special negative way the lack of regulation of the institution of the so-called "administrative contract", which for decades has had its code regulation in other European countries, such as France, Germany, Spain, Estonia, Finland [Doliwa 2012, 294; Gonet 2011, 58-62; Śledzińska 2008, 179-92; Ostrowska 2018a, 13-17]. However, the administrative contract has not been regulated in the Polish Code of Administrative Procedure. The above is also reflected in the still unresolved legal nature of not only subsidy agreements (subsidy contracts), but also the nature of the subsidy legal relationship, which is described as hybrid or mixed (administrative-civil). The analysis of the nature of the legal subsidy relationship is also made difficult by the lack of regulation in Polish administrative law of the so-called non-authoritative or bilateral forms of administration actions. "Both Polish administrative legislation and the Polish administrative law doctrine have not yet adequately developed the issue of bilateral actions. Bilateral forms of administrative action are introduced into our legislation chaotically and sporadically" [Zimmermann 2016, 398].

The above-mentioned shortcomings and omissions in the regulation of bilateral forms of administration activity also have their consequences in the so-called public subsidy relations between two public entities. A clear example here is the relationship between the state (granting a subsidy from the state budget) and the local government unit (receiving the subsidy). The same legal status of these entities (public) seemingly suggests equality of rights and obligations of the parties to the grant-law relationship. Numerous case law of administrative courts and the case law of the Constitutional Tribunal in most cases give a stronger position to the state (legislator). This means resolving subsidy disputes to the detriment of local government units.[1]

[1] Hereinafter: LGU.

The aim of this article is to analyze the legal nature of the subsidy relationship between the state and local government units on the example of subsidies granted from the state budget for the implementation of tasks entrusted to local government units in the field of state government administration. The research hypothesis was that the structure of commissioning tasks in the field of state government administration to local government units (provided for in Article 166(2) of the Constitution of the Republic of Poland) and the subsidy mechanism of their financing should be transformed into a completely contractual model of commissioning tasks.

1. SUBSIDIES FROM THE STATE BUDGET AS INCOME OF LOCAL GOVERNMENT UNITS

Both the provisions of the Constitution of the Republic of Poland[2] (Article 167(2)) and the European Charter of Local Self-Government[3] (Article 9(7)) provide that the income structure of local government units may include transfer income (subsidies and subsidies from the state budget). However, there is a uniform opinion in the doctrine that the institution of a targeted subsidy transferred from the state budget to the budgets of local government units constitutes a significant limitation of the financial independence of these units. "Making the possibility of subsidizing local government tasks a regular, permanent instrument for financing these tasks is contrary to the idea of decentralization of public authority" [Gilowska 1999, 50].

The threat of excessive use of the institution of targeted subsidies (subsidies) by the central authorities was noticed by the creators of the EKSL, who included in it Article 9(7) which states: "As far as possible, grants to local authorities shall not be earmarked for the financing of specific projects. The provision of grants shall not remove the basic freedom of local authorities to exercise policy discretion within their own jurisdiction." In the official commentary on the above provision of the Charter, its signatories expressed the position that "block grants or even sector-specific grants are preferable, from the point of view of local authority freedom of action, to grants earmarked for specific projects." Taking into account internal conditions, the predominance of earmarked subsidies over the general subsidy, may be acceptable, but only if the subsidy income does not constitute a dominant

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

[3] European Charter of Local Self-Government, Strasbourg, 15.10.1985, Council of Europe, European Treaty Series No. 122 [hereinafter: ECLG], https://rm.coe.int/168007a088 [accessed: 20.03.2024].

part of the total income of the local government. At the same time, the signatories of the Charter acknowledge that the complete elimination of targeted subsidies from the budgets of local governments is unrealistic, especially with regard to investment tasks.[4]

It seems that the demand expressed in the above provision of the Charter for limited use of earmarked subsidies is respected in most European countries, although in recent years there has been a phenomenon of increasing reliance of local governments on so-called transfer revenues. It is assumed that the higher the intergovernmental transfers, the greater is the financial dependence of local governments on other tiers of government and the lower is the local autonomy. The average for the OECD-European countries is 49.8%, which shows a strong dependence of local governments on intergovernmental transfers.

Research conducted by the Center for Public Administration Research shows that the highest rate of Local Government Dependency on Intergovernmental Transfers in 2021 occurred in such European countries as Lithuania (87.9%), Estonia (85.8%), Slovakia (77.8%), the Netherlands (74.7%), the United Kingdom (67.8%), and Austria (64.5%). On the other hand, the lowest rate occurred: in Switzerland (10.4%), France (22%), Portugal (31%), Spain (37.9%), Finland (31.7%), Sweden (37%). Poland, like other European countries (Germany, Italy, Belgium, Hungary) is in the group of countries with medium dependence of local governments on central transfers, where the dependence rate is in the range of 40-60%.[5]

According to the ECLG recommendation, a smaller part of the so-called transfer income of local governments in Europe should be earmarked grants. In Poland, the share of earmarked subsidies and earmarked funds in the total budget revenues of local government units in 2022 was 29.5% of their total revenues, and the structure of this group of revenues is as follows:

- subsidies for state government administration tasks assigned (commissioned) to local government units – 42.3%,
- subsidies for co-financing local government units own tasks – 21.8%,
- other subsidies and funds, including subsidies implemented on the basis of agreements and received from special purpose funds – 10.7%.[6]

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[4] Explanatory Report to the European Charter of Local Self-Government, Strasbourg, 15.10.1985, Council of Europe, European Treaty Series No. 122, p. 9, https://rm.coe.int/16800ca437 [accessed: 18.09.2023].

[5] Centre for Public Administration Research, *Local Government Dependency on Intergovernmental Transfers*, https://www.kdz.eu/en/news/blog/european-local-government-finances-and-local-autonomy [accessed: 20.03.2024].

[6] See https://rio.gov.pl/download/attachment/129/sprawozdanie_za_2022_r.pdf [accessed: 20.03.2024].

From 2022, the group of targeted subsidies as the income of local government units also includes the so-called funds received by local government units from government earmarked funds operated by BGK (COVID-19 Response Fund and Ukraine Aid Fund). However, to this day, these measures do not have their own separate regulations in the public financial law of local government units similar to those that apply to general subsidies or targeted subsidies from the state budget [Ostrowska 2023, 259].

Poland can therefore be considered a country with an "average" level of decentralization of public revenues, because subsidies and earmarked funds do not constitute the dominant amounts in the total revenues of local government units. However, the majority of this group consists of subsidies for state government administration tasks assigned (commissioned) to local government units (42.3%), which should not necessarily be interpreted negatively. It is believed that local government units' own tasks should, in principle, be financed with their own revenues, so the structure of local government units' incomes should not include targeted subsidies to finance local government's own tasks.

Each level of local government in Poland performs a certain number of state government administration tasks delegated by law. The applicable regulations in this area can be divided into two groups:

1) provisions of laws regulating the general principles of financing (subsidizing) tasks commissioned to local government units in the field of state government administration and other tasks commissioned by statute – Article 49-50 AILGU,[7] Article 8(3-5) AMSG;[8]
2) provisions of separate laws establishing the obligation (order) to perform these tasks by local government units and specific rules for their implementation and financing, as well as the provisions of the ordinances to these laws regulating the procedure for granting and accounting for subsidies.

At present, the state government administration tasks carried out by the municipal government include: the payment of alimony fund benefits, the day-to-day operations of community care homes, the provision of textbooks to public schools, the reimbursement of excise tax on "agricultural fuel", population registration, the issuance of identity cards, the payment of health premiums for eligible persons (such as the unemployed), and the preparation and holding of elections. The district government carries out tasks in the field of state government administration, such

[7] Act of 13 November 2003 on the Income of Local Government Units, Journal of Laws of 2024, item 356 as amended [hereinafter: LGIA].

[8] Act of 8 March 1990 on Municipal Self-Government, Journal of Laws od 2023, item 40 as amended [hereinafter: MGA].

as: management of the State Treasury's real estate resources, activities of the State Fire Service headquarters, activities of the district commission for assessing disability, and activities of the district construction supervision inspectorate. The voivodeship government, in turn, carries out such state government tasks as: subsidies for free and discounted travel in bus transport, payment of compensation for damage caused by game animals, tasks related to the issuance of ADR certificates and transport psychology.

The obligation for local government units to perform specific tasks in the field of state government administration results from separate acts. On their basis, a regulation of a given minister (ordinance) is also issued, establishing a detailed procedure for providing local government units with a targeted subsidy for the implementation of these tasks. In most cases, these subsidies are granted on an "application" basis – the executive body of the local government unit is obliged to submit an application for a subsidy to the local voivode. The above application procedure indirectly contradicts the obligatory nature of these subsidies specified in Article 49 LGIA and Article 8(1) MGA. Most often, these subsidies are transferred to local government units in the form of a decision of the granting authority (e.g. the voivode), although the provisions of the laws also provide for the form of an agreement between the local government unit and a state government administration body.

2. SUBSIDIZING LOCAL GOVERNMENT IN THE LIGHT OF THE JURISPRUDENCE OF THE CONSTITUTIONAL TRIBUNAL

In the jurisprudence of the Constitutional Tribunal[9] matters related to the income of local government units, including income from subsidies, have been resolved basically since the beginning of the restoration of local government in Poland in 1999. The Polish Constitution uniquely contains separate regulations regarding the revenues of local government units (Article 167 and Article 168), which became constitutional models in cases of complaints initiated by local government units against statutory and executive provisions adopted by state authorities in this respect.

In addition to constitutional models, Polish local governments, in disputes regarding their revenues, also refer to Article 9 of the European Charter of Local Self-Government, ratified by 46 member states of the Council of Europe, including Poland, in 1994 (in its entirety and without any reservations). The Charter provides local governments with strong financial guarantees, which is why it is taken into account in court decisions, although its importance would certainly be strengthened by incorporating its provisions

[9] Hereinafter: CT.

into the European Union legal system. The literature emphasizes that "The European Charter of Local Self-Government does not refer to the European Union in the sense that the Union is not a party to this agreement, which well illustrates the complexity of the relationship between the Council of Europe and the European Union. The European Charter influences the system of the Union indirectly – through the member states that are (independently) bound by this legal act" [Lipowicz 2019, 147].

Both the Constitution of the Republic of Poland and the ECLG, with regard to the performance of state government administration tasks by local government units, provide for a formula of delegation of tasks and competencies. The provision of Article 166(2) of the Constitution of the Republic of Poland states that: "If the fundamental needs of the State shall so require, a statute may instruct units of local government to perform other public duties. The mode of transfer and manner of performance of the duties so allocated shall be specified by statute." In turn, Article 4(5) of the ECLG defines the above delegation as "the delegation of competences to local communities by central or regional authorities," and stresses that local communities should have full freedom to adapt the way they exercise these competences to local conditions.

However, the provisions of the Constitution and the ECLG do not refer to financial issues, nor do they specify the form and manner of financing of state government administration tasks carried out by local government units. Hence, Article 167(1) of the Constitution of the Republic of Poland is indicated as a constitutional guarantee of adequate state financing of these tasks, stipulating that territorial self-government units shall be provided with a share of public revenues adequate for the performance of the duties assigned to them. However, the term "share of public revenues" cannot be considered an unambiguous indication of the state's obligation to fully cover the costs of implementing the above-mentioned tasks.

It was the principle of adequacy (proportionality), regulated twice in Articles 167(1) and (4) of the Polish Constitution and in Article 9(2) of the ECLG, that was the primary benchmark on the basis of which Polish local governments complained about regulations governing the determination and transfer of subsidies to them from the state budget or state purpose funds. More often, however, the subject of applications submitted by local governments to the Constitutional Tribunal were subsidies for co-financing their own tasks (their reduction or elimination) than subsidies for tasks assigned to them by the state government administration. The constitutional principle of adequacy has been widely analyzed in the doctrine of both administrative law and public finance law [Dębowska-Romanowska 2010, 239; Wójtowicz 2015, 2; Kornberger-Sokołowska 2001, 37; Ofiarska 2015, 183-96; Niezgoda 2012; Kłosowiak 2020, 288-99; Ostrowska 2014, 59-78].

However, despite repeated emphasis on the above constitutional and international standard guaranteeing local government units to adapt the financing of the tasks performed to their real costs, the Constitutional Court very rarely finds statutory or regulatory provisions regulating the income of local government units, including grant income, to be unconstitutional. The judgments or decisions of the CT issued in this regard almost unanimously illustrate the legal-financial relationship between the state and local government, interpreting it in favor of the state (legislature), granting it the exclusive right to determine the amount of funding for government tasks carried out by LGU. Taking into account the fact that the above-mentioned provisions of the Constitution do not specify the level (indicator) of adequacy, their interpretations carried out by the Constitutional Court usually granted the legislature a broad right to determine this level on its own. Only when, as a result of the introduction of a new regulation by the legislator (e.g., assigning a new task without indicating the sources of financing[10]), the level of adequacy became drastically low, causing the inability of LGUs to carry out the tasks assigned to them by law, and this inability was proven in detail by the applicant, the regulation was declared unconstitutional by the Constitutional Court.

"In the jurisprudence of the Constitutional Court, high formal requirements have been formulated for the entities initiating the proceedings regarding the manner of demonstrating that there has been a violation of the principle of adequacy of local government financing, derived from Article 167(1) and (4) of the Constitution. This is because, in this regard, the Court's interference may take place only in cases of evident, sufficiently large or gross financial disproportionality between the scope of tasks of local government units and the level of their share of public revenues."[11] Such a restrictive interpretation of the principle of adequacy has been adopted by the Constitutional Tribunal both in adjudicating cases of subsidy compensation mechanisms,[12] revenues from local taxes and fees,[13] as well as in cases of revenues of TSUs from subsidies. The Constitutional Court stressed that it does not have the instrumentality to independently determine the correctness of the legislature's implementation of the principle of adequacy. This is due to the lack of constitutional regulation of the standards

[10] Judgment of the Constitutional Tribunal of 25 July 2006, ref. no. K 30/04, Journal of Laws No. 141, item 1011, OTK ZU 7A/2006, item 86.

[11] Judgment of the Constitutional Tribunal of 13 December 2018, ref. no. K 34/16, Journal of Laws item 2388.

[12] Judgment of the Constitutional Tribunal of 6 March 2019, ref. no. K 18/17, Journal of Laws item 525; judgment of the Constitutional Tribunal of 31 January 2013, ref. no. K 14/11, Journal of Laws item 193.

[13] Judgment of the Constitutional Tribunal of 26 September 2013, ref. no. K 22/12, Journal of Laws item 1185.

for the implementation of individual tasks, and the Court cannot determine the appropriate or optimal level of their implementation, and therefore state unequivocally what level of measures would be adequate.

The inadequacy of the amount of the targeted subsidy provided to LGUs for the implementation of tasks was examined by the CT, among others, in the following cases (in which the decisions were made, unfortunately, to the disadvantage of the requesting LGUs):

– introduction in 2014, on the basis of the Act of June 9, 2011 on support for the family and the system of foster care,[14] of new own tasks of municipalities and counties related to the obligation to employ foster care coordinators and family assistants without an adequate mechanism for financing these tasks, i.e. an increase in the targeted subsidy provided for this purpose from the state budget;[15]
– introduction in 2005 of an earmarked subsidy to subsidize the municipalities' own task of paying material assistance benefits to school students, which, according to the requesting municipalities, did not fully cover the costs of performing this task. The request of the municipalities, however, was not shared by the CT in its judgment.[16] However, the previous system for the payment of material assistance benefits to school students, which did not provide for a source of funding for this task at all, was declared unconstitutional by the TC;[17]
– liquidation in 2004 of the subsidy transferred to communes to co-finance their own task consisting in the payment of housing allowances, which was found to be consistent with the Constitution by the Constitutional Tribunal, because the applicant communes did not demonstrate that the balance of their income referred to in Article 167(1) and (4) of the Constitution was shaken. Moreover, the Constitutional Tribunal stated that "the legislator is entitled to legislate in accordance with the political and economic assumptions it adopts, and the Constitutional Tribunal does not have the competence to assess the purposefulness of these regulations. Interference is permitted only in the event

[14] Journal of Laws 2024, item 177.

[15] Decision of the Constitutional Tribunal of 11 April 2017, ref. no. K 24/14, OTK ZU A/2017, item 26. In this case, initiated by 6 municipalities, the Court discontinued the proceedings as a result of the withdrawal of the application by the attorney for these municipalities due to the circumstances of the participation of Judge M.R. Muszyński appointed instead of Judge M. Zubik, which, according to the applicants, did not guarantee basic standards of procedural fairness.

[16] Judgment of the Constitutional Tribunal of 20 March 2007, ref. no. K 35/05, Journal of Laws No. 53, item 358.

[17] Judgment of the Constitutional Tribunal of 26 April 2004, ref. no. K 50/02, Journal of Laws, No. 109, item 1161.

> of violation of constitutional norms. […] The fact that an act expands the tasks of local government units cannot determine the unconstitutionality of a given regulation if revenues from other sources enable the implementation of individual public tasks. […] The basis for determining the non-compliance of the Act with Article 167(1) of the Constitution may constitute only obvious disproportions between the scope of tasks and the level of income, occurring in the division of funds between government administration and individual levels of local government."[18]

An analysis of the case law of the Constitutional Tribunal indicates that the constitutional and international principle of the adequacy of financial resources to the costs of public tasks performed by local government units has very rarely become the basis for determining the inconsistency of a specific provision of an act or regulation with the Constitution. Only when given provisions imposed a new task on local government units without indicating the source of their financing, the Tribunal ruled that they were inconsistent with the principle of adequacy resulting from Article 167(1) and (4) of the Constitution of the Republic of Poland and Article 9(2) EKSL, but this happened extremely rarely. Basically, only two such judgments can be mentioned.

The first is the aforementioned 2004 CT ruling on the obligation imposed on municipalities to pay material assistance benefits to school students without specifying the source of funding.[19] The second judgment (from 2006) concerned the own task imposed on regional governments in the form of financing statutory entitlements to discounted travel by public transport in the form of the obligation to make additional payments to authorized carriers.[20]

In the above judgment (of 2006), the Constitutional Tribunal made an extremely valuable interpretation of own tasks and tasks commissioned by local government units, which should also be used when designing the method of financing these tasks. The Constitutional Tribunal pointed out that "the legislator gives special meaning to the adjective 'own' when defining this type of tasks. Own task is a task which, in the light of Article 16(2) of the Constitution, the self-government shall exercise on its own behalf and under its own responsibility; while in the case of delegated tasks, we are dealing with delegating the task only for execution. From Article 166(1) 2 of the Constitution, therefore, it follows that in relation to delegated tasks,

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[18] Judgment of the Constitutional Tribunal of 31 May 2005, ref. no. K 27/04, Journal of Laws No. 102, item 861.

[19] Judgment of the Constitutional Tribunal of 26 April 2004, ref. no. K 50/02, Journal of Laws No. 109, item 1161.

[20] Judgment of the Constitutional Tribunal of 25 July 2006, ref. no. K 30/04, Journal of Laws No. 141, item 1011, OTK ZU 7A/2006, item 86.

the role of local authorities is reduced to executive functions, not creative functions, because the law determines the manner of their performance. It is difficult to talk about the local (regional) nature of the task, especially to the extent that the regional government covers the costs of discounts for transport on a national scale to a carrier that could also sell tickets in another region (voivodeship). Therefore, in its current form, financing subsidies can hardly be considered a local task, in the sense given to this concept by Article 166 of the Constitution. It serves to implement the tasks of national policy."

The jurisprudence of the Constitutional Tribunal shows significant differences between own tasks and tasks in the field of state government administration entrusted to local government units on the basis of acts, which should also be a model in determining the form and scope of financing these tasks. These differences are illustrated in the table below.

Table 1. Constitutional features of local government units' own tasks and tasks entrusted to local government units in the field of state government administration – resulting from the jurisprudence of the Constitutional Tribunal

Constitutional features of local government tasks	
own tasks	**tasks assigned in the field of state government administration**
legal nature and manner of execution	
they are local in nature and serve to meet collective local needs	they are of a state-wide nature and serve to meet collective state-wide needs
they are typical local government tasks related to the functioning of the local community	they are typically state tasks related to the functioning of the state.
assigning them to be implemented by a given level of local government unit has a systemic nature and is related to the principle of decentralization of public authority (Article 15 of the Constitution of the Republic of Poland)	they are passed on to local government authorities for implementation only for pragmatic reasons (thanks to this, state tasks can be performed "closer to the citizen")
they are permanently and statutorily assigned to the local government of a given level for independent implementation	they are temporarily or permanently transferred (commissioned) by law to the local government for implementation
the local government performs them creatively and independently	the local government performs them according to strictly defined rules, instructions and guidelines
they are performed on behalf and under the responsibility of the local government units	they are performed on behalf and under the responsibility of the State Treasury

source and form of financing	
they are financed from own income with the possibility of obtaining subsidies to co-finance own tasks	they are financed from a targeted subsidy from the state budget for tasks commissioned in the field of state government administration
their financing is independent and creative - local government bodies have the right to decide on the scope, method of implementation and financing of a statutorily defined task	their financing is not independent and creative - the scope, method of implementation and financing of the tasks statutorily entrusted to local government units are decided by the legislator and government bodies of executive power (minister, voivode)
they should be financed in compliance with the constitutional principle of adequacy (Article 167(1) and (4) of the Constitution, Article 9(2) ECLG)	they should be financed in compliance with the constitutional principle of adequacy (Article 167(1) and (4) of the Constitution, Article 9(2) ECLG)

Source: *own study based on the jurisprudence of the Constitutional Tribunal.*

The above differences between local government units' own tasks and tasks entrusted to local government units in the field of state government administration should also be reflected in the method and source of their financing – the sources and methods of financing them should be different. Most often, however, the Constitutional Tribunal pointed out that also when implementing and financing tasks in the field of state government administration, local government should use its attributes of independence, and therefore has the possibility of co-financing these tasks from its own revenues.

Paradoxically, it is the constitutional patterns regulating the independence of local government (Article 165 of the Constitution of the Republic of Poland) and the presumption of the implementation by local government of public tasks not reserved by the Constitution or statute for bodies of other public authorities (Article 163 and Article 164(3) of the Constitution) that are cited by the Constitutional Tribunal as the basis for the possibility of co-financing state government administration tasks from local government units' own revenues. However, in most cases, regional audit chambers (which are the supervisory bodies over local government units in financial matters) do not allow local governments to finance tasks commissioned in the field of state government administration from their own revenues.

In the 2001 judgment, the Constitutional Tribunal even stated that "the principle of appropriateness of the share in public revenues to the tasks assigned to the local government cannot be reduced only to the aspect of providing the appropriate amount or percentage of public revenues." According to the Constitutional Tribunal, Article 167(1) of the Constitution "is primarily of a systemic and guarantee nature" and will apply in situations in which "the revenues flowing from the statutory revenues are so negligible

or insignificant that this leads either to forcing the local government to finance the entire task from other own income, or to refrain from carrying out this task, even though its performance is a statutory obligation of the local government."[21]

3. SUBSIDIZING LOCAL GOVERNMENT IN THE LIGHT OF THE JURISPRUDENCE OF COMMON AND ADMINISTRATIVE COURTS

The unique role of local government units in the system of public authorities (as bodies carrying out a significant part of public tasks) means that subsidy relations between the state and local government are now the main issues of local government finances (which have not had such a problematic dimension as before). The doctrine of financial law also indicates that an important challenge for the science of public finance is "creating a model of legal subsidy relations and defining its inalienable features. At a time when financing various types of public tasks (including from EU funds) through grants is becoming common, research on the relationship between the grantor and the recipient of grants is a priority" [Dębowska-Romanowska 2010, 49]. These studies are particularly desirable in the case of targeted subsidies granted to local government units from the state budget for tasks commissioned in the field of state government administration. In the light of Polish regulations, the legal subsidy relationship between the state and local government units is of a mixed nature (administrative and civil).

On the one hand, these subsidies have the nature of an administrative and obligatory benefit to the local government unit (which means that the state may seek refund of the subsidy in an administrative manner), and on the other hand, they have the nature of a civil payment for the tasks performed (which means that the local government unit can claim their payment or additional payment under civil proceedings). The above dualistic legal nature of the subsidy relationship between the state and local government is illustrated in the table below.

[21] Judgment of the Constitutional Tribunal of 28 June 2001, ref. no. U. 8/00, Journal of Laws No. 69, item 723.

Table 2. Civil and administrative law nature of targeted subsidies for tasks commissioned to local government units in the field of state government administration

Legal nature of targeted subsidy for tasks commissioned to local government units in the field of state government administration	
civil	administrative
Article 49(6) LGIA In the event of failure to meet the condition of providing the local government unit with a special-purpose subsidy from the state budget for tasks commissioned within the scope of state government administration in a manner enabling full and timely performance of the commissioned tasks – the local government unit has the right to claim the due benefit together with interest in the amount determined for tax arrears, in court proceedings (in civil court).	Article 168-169 PFA* Subsidies granted from the state budget: 1) in the unused part, 2) used contrary to its intended purpose, 3) collected unduly or excessively – are subject to return to the state budget along with interest in the amount specified for tax arrears. Article 60-61 PFA* The refundable subsidy amounts constitute non-tax budgetary receivables of a public law nature. The administrative decision on the refund of the subsidy is issued by the authority granting the subsidy. The decision to return the subsidy may be appealed to the second instance administrative body and to the administrative court.

* Public Finance Act of 29 August 2009 (PFA), Journal of Laws of 2023, item 1270.

Source: *own study*.

The analysis of court jurisprudence regarding targeted subsidies from the state budget for tasks entrusted to local government units in the field of government administration indicates that administrative courts very rarely rule in favor of the local government unit (upholding the administrative decision to return the subsidy), while civil courts more often issue judgments in favor of the local government unit (recognizing an action by a local government unit for payment or additional subsidy). Many Polish local government units (like the city of Poznań, the city of Kraków or the local government of the Masovian Voivodeship) file lawsuits in civil courts against the State Treasury for payment (compensation) of subsidies received from the state budget pursuant to Article 49(6) of the LGIA, and civil courts recognize these claims, awarding outstanding amounts of subsidies to local government units.[22]

[22] Judgment of the District Court in Warsaw of 18 June 2014, ref. no. II C 322/09, Lex no. 2088444; judgment of the District Court in Poznan of 22 October 2014, ref. no. XII C 1830/13, Lex no. 189281; judgment of the Court of Appeal in Katowice of 22 June 2022, ref.

The argumentation that was particularly favorable for local government units was presented by the Supreme Court in its judgment of April 12, 2023, examining the case of the Małopolska Regional Government's (Voivodeship's) lawsuit against the State Treasury (the Małopolska Voivode). The lawsuit concerned the payment of a special-purpose subsidy from the state budget to cover the implementation of a task commissioned from the government administration consisting in the construction of water improvement facilities and their maintenance (transferred to the voivodeship on the basis of the provisions of the Act and the concluded agreement). In this judgment, the Supreme Court rightly pointed out that "the source of the State Treasury's obligation to pay a special-purpose subsidy was from the beginning of Article 49 of LGIA, and not any agreement concluded between the parties. Targeted subsidy referred to in Article 49 is an obligatory subsidy. In this respect, the legislator assumed full responsibility of the government administration for financing public tasks commissioned to the local government, and no statutory provision imposes on local government units the obligation to finance the tasks commissioned within the scope of state government administration from their own revenues."

In another judgment in favor of local government units, the Supreme Court stated that the provision of Article 49 of LGIA constitutes "an independent basis for a claim for payment of the amount actually needed to fully perform the assigned tasks. It applies both in cases of transfer of the granted subsidy in an incomplete amount or in violation of the statutory deadline, as well as in cases of transfer of subsidies specified in the budget in an amount that does not ensure proper implementation of tasks."[23]

However, in the cases under consideration regarding the decision to return the subsidy in question by the local government unit to the state budget, administrative courts carry out a different interpretation, unfavorable for the local government unit, of the subsidy legal relationship between the state and the local government unit. Refunds of subsidies used contrary to their intended purpose were quite often sought by voivodes from municipal governments in the case of subsidies provided for state government administration tasks related to population registration.

What is problematic in this respect is Article 49(3) LGIA, which states that the amounts of targeted subsidies for tasks entrusted to local government units in the field of government administration "are determined

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no. I ACa 602/22, Lex no. 3435690; judgment of the Supreme Court of 12 April 2023, ref. no. II CSKP 1911/22, Lex no. 3594016.

[23] Judgment of the Supreme Court of 20 February 2015, ref. no. V CSK 295/14, Lex no. 1677176. See also: judgment of the Supreme Court of 1 March 2018, ref. no. I ACa 953/17, Lex no. 2665383; judgment of the Supreme Court of 28 March 2019, ref. no. I CSK 94/18, Lex no. 2652348.

in accordance with the principles adopted in the state budget for determining expenses of a similar type." Therefore, even the adopted objective and nationwide indicators for determining the amount of subsidies for tasks in the field of population registration (i.e. calculated positions or man-hours) do not allow to cover the actual costs that Polish municipalities incur for the implementation of these very strategic state tasks. Another source of increased costs are different rules for determining the remuneration of state administration officials and local government officials. However, administrative courts do not take these different principles into account, acting only within the limits of the complaint filed against the decision to return the subsidy.

In the judgment of April 13, 2023, the Supreme Administrative Court clearly described the limited possibility for local government units to question the rules for determining the amount of subsidy granted from the state budget.[24] "In administrative and administrative court proceedings regarding the return of a subsidy used contrary to its intended purpose, it is not possible to question the principles adopted to determine the amount of a special purpose subsidy for this purpose, and indeed the principles adopted in the state budget for determining the amount of expenses of a similar type, according to which it is then determined by the competent the minister, the amount of targeted subsidies for the implementation of government administration tasks. The amount of expenditure allocated in the state budget for targeted subsidies and the principles adopted in this budget for determining expenses of a similar type escape from judicial control."

When examining the issue of subsidies granted to local government units from the state budget for the implementation of commissioned tasks in the field of government administration, the Polish Supreme Audit Office indicated that currently the most important task of the state is to provide local government units with appropriate funds to finance the commissioned tasks, taking into account objective factors differentiating the amount of expenses incurred by them. At the same time, the Supreme Audit Office emphasizes that "estimating the expenses necessary to carry out the assigned tasks, taking into account the principle of economical management of public funds, is an extremely difficult task due to the occurrence of local factors influencing the differentiation of expenses in individual units. [...] On the one hand, the interest of the State Treasury and the principle of economic management of public funds

[24] Judgment of Supreme Administrative Court of 13 April 2023, ref. no. I GSK 159/19, https://orzeczenia.nsa.gov.pl/doc/EB29B5392B [accessed: 20.03.2024].. See also: judgment of Regional Administrative Court in Warsaw of 12 October 2018, ref. no. V SA/Wa 28/18, https://orzeczenia.nsa.gov.pl/doc/CC3B2E8829 [accessed: 20.03.2024].

should be taken into account, and on the other hand – the independence of local government units in terms of shaping the level of remuneration and the obligation to treat employees performing their own and delegated tasks equally."[25]

CONCLUSIONS

The analysis of the jurisprudence of the courts and the Constitutional Tribunal on subsidy relations between the state and local government units showed the inequality of the parties to this relationship that has been maintained for years. Despite the equal legal status of these parties (public legal persons), the jurisprudence of the Constitutional Tribunal and administrative courts is dominated by granting the state (legislator) a stronger legal position to which the local government unit must submit. However, the jurisprudence of civil courts more often rules in favor of local government units, recognizing their claims for payment or additional subsidies.

The *in dubio pro tributario* interpretative principle introduced into Polish tax law in 2016 does not therefore have an adequate impact on local government subsidy law in the form of the *in dubio pro donatario* principle (doubts should be resolved in favor of the subsidized entity). However, it is noticeable that in civil jurisprudence (usually initiated by the subsidized party) the *in dubio pro donatario* principle dominates, while in administrative jurisprudence (administered in the appeal process against the administrative decision on the refund of the subsidy) the *in dubio pro donator* principle dominates.

The above-mentioned inequality between the parties is particularly visible in the case of targeted subsidies granted from the state budget for the implementation of tasks entrusted to local government units in the field of state government administration. It is a common practice in Poland that local governments co-finance state government tasks in significant amounts in order to maintain their implementation for the benefit of residents at an appropriate level [Królikowski 2022; Hendrysiak 2019]. As it turns out, even the principle of adequacy of the amount of financial resources held by local government units to the costs of tasks performed, even twice regulated in the Polish Constitution, is not a sufficient constitutional model to protect the legal interest of local governments. It should be assumed that the subsidy form of financing state tasks entrusted to local governments is conducive to maintaining the above inequality between the parties to the subsidy legal

[25] See *Informacja o wynikach kontroli, Dotowanie zadań zleconych jednostkom samorządu terytorialnego z zakresu administracji rządowej i innych zadań zleconych ustawami*, Najwyższa Izba Kontroli, Warszawa 2017, https://www.nik.gov.pl/kontrole/P/16/009/ [accessed: 20.03.2024].

relationship. Therefore it should be transformed into a strictly contractual form of outsourcing tasks, or consideration should be given to transforming the tasks delegated to local government units in the field of state government administration into the local government's own tasks with an appropriate allocation of permanent own revenues.

As I. Lipowicz rightly points out, "the leniency of Polish administrative courts in the event of failure to provide the necessary financial resources for the implementation of tasks has, in my opinion, significantly facilitated the process of 'creeping' centralization. The key to maintaining balance in this respect is to divide tasks into those of a local nature and those of a supra-local nature. This division, in turn, is the source of the division of tasks into local government's own tasks and tasks commissioned (by the state). It is interesting that over the past 40 years, the duality of local government tasks has still been preserved even in Western European countries. […] The vagueness of the criteria for dividing tasks into own and commissioned tasks is commonly criticized in the literature, but the attempt to abolish this dichotomy did not bring any fundamental change" [Lipowicz 2019, 195-200]

Regardless of the long-standing disputes over the financing of tasks entrusted to local governments in the field of state government administration, the current form of subsidy financing should undoubtedly be urgently reformed.

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PROJECTS FOR THE REGULATION OF SPACE TRAFFIC MANAGEMENT*

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Abstract. The elements of the STM regime are the two dimensions of space traffic (in the scientific-technical and regulatory domains) and the three phases of space traffic: the launch, the on-orbit operations and the return. Examples of traffic regulations include launch safety rules, a specific air-space regime, manned spacecraft safety rules, regulations governing debris removal, traffic laws for orbital phases, return safety regulations (e.g. descent corridors), frequency use and avoidance of interference, environmental regulations, etc. Implementation and control mechanisms are primarily national regulations for licensing, arbitration and enforcement, operational assessments, coordination, and civil-military cooperation. This article is based on the concept of STM, which emphasises the need to respond quickly to unexpected events in space by creating a regime that encompasses all aspects of space activities.

Keywords: Space Traffic Management; ITU; UN COPUOS; Space Situational Awareness; space safety.

INTRODUCTION

Space operations today are mainly managed separately by individual countries and activities: the ITU, the IADC Committee and the Committee on Earth Observation Satellite (CEOS), as well as companies and private initiatives (e.g., the Space Data Association). Concept STM emphasizes the need to respond quickly to unexpected events in space, by creating a regime that includes all aspects of space activities. One of the main provisions for the future management of Space would be to assign resources for managing space debris control, collision avoidance and frequency interference.

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This concept was presented in a 2006 report (International Academy of Astronautics – IAA) prepared by the STM working group.

Also involved in the development of this system were: International Space University (ISU) and IAASS. STM is defined, as a set of technical and regulatory rules for guaranteeing safe access to space, operations in space and return from space to Earth without physical interference and without radio frequency interference. STM is treated as a navigation system, not as a system that excludes the activities of states. It can be a good solution to safety and security issues in Space. So far, only a few research studies and working group conferences on this topic have been published. Three STM-related initiatives on governmental grounds are working groups: the group working on the draft 2007 EU Code of Conduct: The Long-Term Sustainability of Outer Space Activities Working Group in the Scientific and Technical Subcommittee of the UNCOPUOS, The Governmental Group of Experts (GGE) on Outer Space and TCBM; the latter two were established in 2010. The reasons behind the topic is the large increase in the activities of sundry entities in space. The new approach to STM focuses on broad regulation (based on a functional principle).

1. ACTIVITIES OF UN ORGANIZATIONS-COPUOS AND UNOOSA

Space activities are not only linked to the scientific and technical domain, but also provide a range of services to humanity (for example, information in the event of flooding). The broad application of space for many millions of people has contributed to a new perception of space, in which so many different systems operate. Hence, security on Earth is strongly linked to security in space. Global governance in Space is made by two main bodies: COPUOS and UNOOSA. They are both responsible for promoting sustainable development in peacefully use and development of Outer Space for all humankind. Recently there are new global topics such as climate change or Earth observation of natural disaster risks [di Pippo 2014, 16-17].

COPUOS is the only forum where representatives of the States, currently 70, have been elected and they have the opportunity to raise any question related to using space. Currently at the international space fora the following topics are widely discussed: space weather disaster recording and reporting, cleaning-up space debris, national legislation, international cooperation mechanisms, long-term space activity, definition and delimitation of space, exploitation, space for social and technical development, gathering and providing information on space objects located nearest to the Earth.

COPUOS and its subcommittees work on the basis of consensus and make recommendations to the UN General Assembly for consideration

and adoption, in the form of a resolution. There are also working groups within the subcommittees (3) dealing with such issues as nuclear weapons in space (in 1980 the group was supposed to be involved in research and control of practices in the use of nuclear weapons sources). In 1983, the mandate changed and this group has been used to develop techniques for the safe use of nuclear sources. In doing so, COPUOS has submitted a series of rules concerning the use of nuclear sources by the Assembly. The principles have been implemented by United Nations General Assembly (UNGA) in Resolution 47/68 of 1992.[1]

There is also expert group on space weather and global health. Subcommittee on Legal Affairs has three working groups dealing with issues such as national status space treaty, definition and delimitation of space, international review mechanisms for cooperation in the peaceful exploration and use of space. COPUOS also deals with the development of standards for handling space debris. Inter-Agency Space Debris Coordination Committee (IADC) recommendations were adopted by COPUOS as Guidelines on Space Debris [Jakhu, Sgobba, and Dempsey 2011, 30-31].

COPUOS has been very successful in its first 25 years of existence and operation in international cooperation, negotiations and adoption of fundamental principles of law Space Council (5 treaties). Since 1979, COPUOS hasn't drawn up a treaty. In the 1980's and 1990's, the inspirational role of the General Assembly of the United Nations in the development of international space law diminished. The slowdown in the pace of UN's work on space legal issues is sometimes explained by the fact that the UN has already developed and adopted the general principles and norms necessary to regulate the cooperation of states in space activities.

However, a limited number of countries are involved and these activities are not as intense as in the field of air transport, for example. It is also believed that there is no need for a similar regulation of space activities so far. The position of some countries opposed to new treaty regulations in this area is important. States directly involved in space activities, including the US, are concerned about imposing unjustified restrictions on them by further regulating these activities, which could hamper their national space programs [Łukaszuk 2006, 15].

On the other hand, common rules are needed in order to develop an integrated approach to use of space between States and space organizations. Today instead of the treaties, COPUOS is only preparing UN Assembly resolutions. Other international organisations have addressed specific cooperation issues international and regulatory environment. COPUOS has

[1] A/RES/47/68, 85th plenary meeting, 14 December 1992, 47/68 – Principles Relevant to the Use of Nuclear Power Sources in Outer Space.

therefore become more static and potentially obsolete. The UN is currently being criticized for short-sightedness and a lack of future prospects, but it is not the Secretariat organisations are guilty of a lack of vision. This remains a matter for the states, which have the choice between activity and inactivity.

The principle of consensus has never been a problem if Countries would like to discuss the issue in a forum. COPUOS actively cooperated with the Third UN Conference on Exploitation and the peaceful uses of space (UNIPSACE III), held in Vienna in 1999. The topic outside UNISPACE III was the coordination of navigation systems (GNSS), for which a separate forum has been set up (ICG) assisted by UNOOSA in its secretariat functions.

COPUOS is not involved in arms issues and does not play a role in trials of commercialisation and privatisation. COPUOS is currently working, *inter alia*, on a code of conduct in space or in integration with Space Data Association (SDA). The Hague Code on the ballistic missile proliferation procedure was accepted emissions of most countries and has gained more ratifications than the 1967 The Outer Space Treaty (OST). Some people ask themselves how to activate COPUOS. It seems there is no need for organisations such as ITU (International Telecommunication Union) to cooperate with COPUOS.

Similarly for Earth observation, the Committee on Earth Observation Satellites (CEOS) manages on its own. Other specialised organisations shall have its own space programmes (UNESCO, WHO, FAO). Outside COPUOS, the following shall remain also two very important issues: i.e. space exploration (International Space Exploration Coordination Group – ISECG) and private space. COPUOS faces the challenge of involving private stakeholders in its work.

UNISPACE II has provided basis for a Non-Governmental Organisations Contact Platform (NGO). At present, the Member States are characterized by different set up of their delegations: some send their government experts, others send their inspectors researchers from academic centers or industry. Each institution may be observer of COPUOS sessions, with the exception of the private sector (otherwise ITU). COPUOS could explore a list of potential stakeholders to closer cooperation. It is important that the Committee the participation of the non-governmental sector in their work.

Karl Schroegl thinks that COPUOS could address issues that need more attention or guaranteed the coherence of space law activities and regulation. In other areas COPUOS should only be involved if it brings added value. It could be a consultative forum for the development of initiatives. COPUOS should define its tasks in the UN system taking into account current needs. It must also fulfil its regulatory function as a platform for

exchange and coordination with other governmental and non-governmental international institutions in the field of space activities. Schroegl states that the oversight functions in the UN system should provide guidance for the programming of UNOOSA, to support and lead space applications in a wide range of initiatives UN.

UNCOPUOS could oversee these efforts. There is a need for more activity of UN specialised agencies in the Committee sessions and greater interaction between COPUOS and the governing bodies of these institutions. It should also be considered whether the structure of a body with two subcommittees is still justified or not. Perhaps one would suffice a lead committee with ad hoc working groups (open to all) under the authority of to the head commissioner [Schrogl 2011, 93].

Since its creation the role of the Committee has decreased under the major space treaties. It is a result of the policy of the states. States prefer to establish its principles and declarations in the form of the UN resolutions because they don't want to be bound by hard law regulations. Perhaps it would be a good idea to initiate such action again, particularly in face of major problems such as suborbital flights or exploration and removal of contaminants in space Some authors even put forward the idea of creating a new international treaty, taking into account definitions such as orbital and suborbital flights, open skies and the creation of a mechanism for controlling States liability for accidents [Halstead 2010, 205].

In an attempt to strengthen the global governance of outer space activities in the twenty-first century, the Committee on the Peaceful Uses of Outer Space, its subsidiary bodies and the Office for Outer Space Affairs should strengthen the Committee's unique position as the primary intergovernmental platform for international space cooperation and the negotiation of instruments pertaining to space activities, and work towards further increasing its membership. Promote the Committee's role as the main center for space-related international coordination and cooperation mechanisms, to ensure better information flow with member States; promote the universality of the United Nations treaties on outer space by developing, by 2020, a guidance document that will assess the existing legal regime on outer space and identify possible gaps with a view to fostering an international regime of responsibility and liability and ensuring that space law is a strong pillar of global space governance.

Also by strengthening capacity-building and technical assistance provided by the UNOOSA in the field of international space law, policy and space-related institutional capacity-building as fundamental tools in those efforts, promoting the United Nations Register of Objects Launched into Outer Space of the UNOOSA by improving existing registration practices and information exchanges on the basis of existing mandates, including measures

that seek to increase transparency and improving the efficiency of the registration mechanism; restructure the Committee's agenda in order to address, in a comprehensive manner, the use and utility of space as a driver of sustainable development and the issues of safety, security and sustainability of outer space activities, including the exchange of information on space objects and events, in-orbit collisions and interferences, space operations and space traffic management; strengthen coordination between the three intergovernmental platforms, namely, the Scientific and Technical Subcommittee, the Legal Subcommittee and the Committee on the Peaceful Uses of Outer Space, to enable agenda items to be addressed in a comprehensive, cross-cutting manner combining scientific, technical, legal, policy and decision-making dimensions; strengthen cooperation with the United Nations entities dealing with space, in line with the United Nations system-wide efforts to increase coherency.[2]

The theme of the global governance appeared at the fifty-ninth session of COPUOS, which prepared the UNISPACE+50 high level conference 2018 priorities. The proposed thematic priority 2, has been entitled "Legal regime of outer space and global space governance: current and future perspectives", with some objectives and mechanism for implementation (A/71/20, § 296) such as promoting the universality of the five United Nations treaties on outer space, assessing the state of affairs of those treaties and their relationship with other relevant international instruments (principles, resolutions and guidelines) governing space activities, analyzing the effectiveness of the legal regime of outer space in the twenty-first century, with a view to identifying areas that may require additional regulation. The evaluation will be performed by developing the questionnaire of the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space to encompass an assessment of the legal regime of outer space as a pillar of global space governance, studying potential future legal and institutional initiatives intended to ensure that outer space is explored and used for peaceful purposes and to ensure that access to outer space remains open and free for the benefit of all countries, in order to establish that international space law is a relevant part of global space governance in the twenty-first century in the light of the significant scientific developments and technical advances that have affected space activities [Schrogl 2010, 132].

The proposed questions relate to the legal regime of outer space and global space governance, Moon Agreement, international responsibility and liability, registration of space objects. The role of the Office for Outer Space Affairs as a focal point for information exchange and a forum for discussing

[2] A/AC.105/1166, 13 December 2017, General Assembly, V.17-08851, p. 10, COPUOS, The "Space2030" agenda and the global governance of outer space activities, Note by the Secretariat.

the progressive development of international space law should be strengthened, especially at the administrative and executive levels. In the future, the UNOOSA should be officially encouraged to conduct targeted capacity-building, education and training in space law and policy, building upon the United Nations Platform for Space-based Information for Disaster Management and Emergency Response programme, with the objective of establishing a capacity-building platform.

In the guidance document, it was considered important that the Office for Outer Space Affairs would be given the necessary mandate to develop, in close cooperation with States and regional organizations and mechanisms, as appropriate, the prerequisites for targeted technical legal assistance aimed at governmental and regulatory authorities, and to take action to foster holistic cross-sectoral capacity-building efforts that address the broader space community, in order to be able to tailor such efforts to the particular needs of developing countries. In that regard, the Office should also be mandated to develop a model for national space legislation.

2. PROJECT FOR INCLUSION OF SPACE ISSUES IN ICAO

Global governance of space in UN is also connected to the cooperation with other UN bodies, such as ICAO. According to some authors, it seems to ICAO appears to be the most appropriate forum to deal with space activities related to security issues, mainly if it is about air navigation. ICAO has, so far, developed legislation on governance ATM (Air Traffic Management) airspace through SARP's (standards and recommended practice) to aircraft in airspace above sea areas full capacity (72% of the airspace)125. ICAO has extensive legislation (technical annexes to the Chicago Convention) and the implementation system [Sgobba 2014, 15-18].

These annexes could be amended by adding specific provisions on space issues (e.g. spacecraft, licensing regulation), the Chicago Convention could be updated by establishing ICAO's jurisdiction in space. Due to possible risk potential in the event of a collision between a spacecraft and an aircraft, the amendment of the rules shall consider prevention, i.e. as soon as possible. This applies in particular to suborbital vehicles, which will soon be operating commercial flights. When establishing new SARP's and complementing existing SARP's, ICAO shall take into account the problems and areas that exist today (e.g. security or environmental protection) rather than in times of need the creation of the Chicago Convention in 1944, hence space should not be a topic foreign to ICAO.[3]

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[3] One of the working documents for the 175th Session of the ICAO Council of 30 March 2005 presented by the ICAO Secretary General concerned space matters and was under

Due to uncertainties as to the correct classification of commercial ships operating in supra-airspace under the Chicago Convention, some of the investigators propose to update it (create broader definition of an aircraft) and the creation of a new Annex 20 dedicated to space also to review the aviation conventions in terms of their applicability to space objects, such as in the 1999 Montreal Convention on the air carrier liability or the Beijing Convention on Safety in the concept of "security".[4] ICAO could also deal with security audits in the field of space, and oversee the implementation of the technical Annexes aspects of space through national surveillance.

Within itself the ICAO could also set up a team responsible for investigating and researching the space accidents (without supervisory functions). A new organizational structure with a new space division is proposed under the direct authority of the Secretary-General of ICAO. ICAO would also be competent enough to establish rules for the certification process of spacecraft. ICAO distances itself to immediate necessity of a regulation of space. ICAO refers to the legislative experience of COPUOS and declares mutual cooperation. ICAO notes the rapid development of space technologies and new trends (commercialization of space activities, more and more convergence points with civil aviation, e.g. in the area of aircraft and space object constructions). ICAO is not enthusiastic about creation of the new Annex and believes that it is necessary first to get to know and understand the existing problems, and only then create with the help of a study group guidance material. In one of the working documents for the 175th Session of the ICAO Council of 30 March 2005 presented by the ICAO Secretary General concerned space matters and was under consideration by the Council. One of the conclusions of the document was the suggestion that the future topic of suborbital f lights should be addressed by ICAO (Aviation law and technical standards).

ICAO Resolution A29-11 provides that ICAO will continue to be responsible for determining the position of civil aircraft in all matters relating to space In June 2014 ICAO has sent a State Letter to Member States (AN 1/64-14/41) requesting information on the activities of the space sector in their territories and forthcoming plans on this subject. According to ICAO, it is too early to develop SARP's; at present there is not enough understanding of the subject to integrate it into the work cycle

consideration by the Council. One of the conclusions of the document was the suggestion that the future topic of suborbital f lights should be addressed by ICAO (Aviation law and technical standards). ICAO Resolution A29-11 provides that ICAO will continue to be responsible for determining the position of civil aircraft in all matters relating to space.

[4] See more at: www.icao.int [accessed: 09.08.2018].

of the organisation. Raising awareness among countries is essential and further research is therefore required.[5]

Under the auspices of ICAO, the ICAO Space Learning Group has been established to assist the Secretariat in his space-related work. Relevant international organisations were invited to nominate their experts to participate in the group. The group's task shall be to examine questions relating to civil space transport in order to better understand the future needs of industry and, in particular, to start plan safe, effective and routine activities in an unoccupied space. The aim of the learning group is to check the relevant regulations and recommendations prepared by Member States and develop a work programme for consideration by the ICAO's Air Navigation Commission, including the space theme within GANP and GASP (Global Air Navigation and Global Aviation Safety Plans) [Abeyratne 2013, 387].

The group goal is to inform ICAO of important matters relating to suborbital flights, collecting and sharing best practices on these activities in the coming years and determine whether the space component should be included in future plans for navigation and safety. ICAO encourages the participation of the Commission, in close cooperation with the industry and international organisations, carries out questionnaires on transport issues, initiates discussions on the use of airports/spaceports, in order to support suborbital flight operations, space delimitation and aircrafts space and air delimitation, integration of the navigation system, responsibility for space activities or needs of creation of a new annex on space. The concept of legal security for suborbital flights was established at the 175th ICAO Council meeting in June 2005. The Council, due to increasing importance of commercial transport of passengers has been exchanging views, whether such flights fall within the scope of the 1944 Chicago Convention and are subject to under the ICAO regulatory regime. The Council noted that COPUOS had considered possible legal scenarios, with regard to suborbital vehicles, in order not to duplicate tasks.

The Council decided to follow the work of the subcommittee and to be kept informed of the outcome of its. ICAO has participated in several meetings of the subcommittee to see the scope of activities in which it could be involved with ICAO. From 18 to 20 March 2015, the first ICAO meeting took place in Montreal on a space seminar organised together with UNOOSA. The symposium gathered about 300 experts from all over the world, representatives of industry and scientific centres, Universities and academics from various aviation and space organisations. The idea of the symposium was to develop an agreement between ICAO and UNOOSA on maritime

[5] 129 Informal briefing to the Council 21 October 2013, performer by N. Graham, Director of Navigation Bureau, ICAO.

challenges for aviation as well as space activities. Next year the symposium was continued, in 2017 in UNOOSA headquarters. As there is currently no international body to deal with space safety as ICAO for aviation, some authors' note that ICAO should be involved in space matters, hence the proposal for amending the technical annexes and possible addition of a new one on space [Fitzgerald 2014, 3-34].

Aeronautical and space issues have very much in common for example: the international dimension of space accidents, involving: passengers, astronauts or private crew and passengers. ICAO's activities would be based on four pillars, i.e. policy and regulation, safety oversight, monitoring (inspection, search and rescue) and independent accident investigation (to prevent and determine the causes). The current ICAO structure would be expanded to include a new compartment (Space Navigation Bureau) subordinate to the ICAO Secretary General and Deputy Directors. It would be responsible for issues relating to launching (site related certificates), accident prevention, traffic management (Space Traffic Management), maritime safety oversight and certification and space medicine (including crew and passenger medical examinations).

In addition, the new section would be under the direct authority of the ICAO Secretary and would be independent the accident office and the Space Safety Oversight Audit. The idea to change the scope of ICAO's activities was based on the fact that COPUOS was not been able to amend existing space conventions for many years. It was therefore considered that ICAO's competence should now be extended, while clarifying the questions that are still open, such as those concerning the differences between different kinds of spaces or the classification of space objects. ICAO could also develop a certification procedure security for commercial space service providers, Operators call on the ICAO to adopt the task of harmonising air and space law in the following years [Dempsey and Mineiro 2010, 250-52].

It is important here to harmonise the rules within SARP's (as provided for in Article 37 and 38 of the Chicago Convention). Since, in accordance with the ICAO Convention, it is responsible for emissions from air navigation should also have an impact on air traffic and the associated space movement.

Therefore, it is proposed that the Council of ICAO broadens the organisation's scope of activities and amend the annexes (so that ICAO's oversight also covers e.g. suborbital and air traffic related to suborbital flights). Another solution would be to adopt a new treaty. The existing ICAO Air Navigation Bureau would therefore extend the scope of its own activities. A separate office could solve the problems with the interface between air and space navigation. The sooner these matters are settled, more collisions

in space will be avoided. At present there are no common standards for aerospace operations, there is no vision for the future or hope for new regulations. It is certain that space objects cross the air border at they enter into space. It is often an international space, because many of the launches take place from areas located close to the oceans (for safety purposes). ICAO currently has regulation in place ATM for aircraft over the high seas. Object classification should be based of functional approaches. Another way to address space security issues is to create a new organisation, following the example of EASA in Europe. Such an organisation (some do not explicitly mention the restructuring of EASA and the appointment of a section to deal with the following issues including e.g. suborbital flights would be involved in, *inter alia*, certification [Marciacq, Tomasello, Erdeleyi, et al. 2014, 261-306].

3. THE EUROPEAN UNION AND SPACE

Under the Treaty on the Functioning of the European Union (TFEU),[6] which codified the Union's competences in the field of space, space activities have become a domain not only for individual Member States. The European Space Policy has become an area of so-called shared competence between the EU, the Member States and ESA, on the one hand, and the EU, on the other (European Council, Parliament and Commission). The Lisbon Treaty of 2007,[7] in Article 189, concerns the promotion of scientific and technological development, industrial competence, the implementation of space policy, and so on. This provision gives the EU a clear mandate to intervene in space-related matters, and therefore plays an important role for Europeans. The EU has been given legal competence under the Treaty to deal with all space policy issues, be they human activities, satellite applications or international cooperation. The Treaty indicates European competence in the space domain. The subsidiarity principle still applies (the EU can only act if it does something more effectively than the Member States). The exception is cooperation for research, technological development and space. Shared parallel (cumulative) competence does not block national activities.

Regional space law is a law mainly developed by the EU institutions, together with implementing and initiating legislation (communications, green papers and white papers) and the case law of the European Court of Justice (ECJ) in the Lisbon Treaty (EU space policy upgraded to the core categories and areas of EU competence (1998, 2000 and 2001). Communications

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6 Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 1.

7 Treaty of Lisbon amending the Treaty of European Union and the Treaty establishing The European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, pp. 1-271.

to the European Council calling for a coherent space policy have contributed to the resolutions of the Council on the European Space Strategy and on signing of the Framework Agreement between the European Community and ESA in 2003. The three main sets of EU/EC space law sources are: acts of international space law adopted under UN systems implemented in the EU/EC system, acts in the form of EU/EC institutional regulations, i.e. regulations, directives and decisions, and 237 agreements between the Member States and international organizations and arrangements for the participation of EU Member States in specialized international space cooperation programmes, such as Ariane or ISS.

The 2007 Treaty of Lisbon is crucial in this respect. 2003 White Paper – Action Plan and the Framework Agreement with the European Space Agency (ESA) in 2003[8] set out fairly broad principles for institutional cooperation. EU/EC law governs space policy (satellite technology, market relations) and the EU economy (satellites, space infrastructure, space launch systems). EU policy refers to freedom of access, exploration and use of space. It refers to the use of space for self-defence and calls on Member States to explore and use space peacefully.[9] It encourages countries to implement ITU recommendations and regulations and to adopt Space Debris Mitigation Guidelines (COPUOS). New problems for EU law include the development of space transport, space tourism, insurance, liability, the extraction materials from the Moon, space debris and the risk of collision with debris. Space law is therefore applicable in the institutional sphere (policy, operational activities, agendas, ESA, Space Council, EU Satellite Centre, European Space Law Centre, ESA). There are also areas subordinate to the old pillars (scientific, technical, economic, GALLILEO, GMES – Global Monitoring for Environment and Security, and tasks for the EU's Common Foreign, Security and Defense Policy, cooperation outside the EU).

EU space law is evolving. New elements of the EU regulatory areas (analogical with air law) and the important role of international organizations (regional cooperation), i.e. ESA, ITU or ISS, have just been developed and should be highlighted. European space law is confronted with new trends (technical, market, privatization, liberalization, globalization).Cooperation with the private sector is among the most important roles of international organizations and Europe (e.g. in the Earth observation sector). ESA has broad competence to coordinate Member States' space policies. Therefore, given that European space law is rich in normative content (attempts

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[8] White paper – Space: a new European frontier for an expanding Union – An action plan for implementing the European Space policy SEC (2003) 1249; COM (2003) 673 final.

[9] Opinion of the European Economic and Social Committee on the Communication from the Communication to the Council and the European Parliament: European Space Policy COM (2007) 212 final, OJ 162, 25.6.2008, p. 3.

to introduce new legal regulations, e.g. concerning intellectual property), there is a need to harmonize activities in a various areas and to strengthen cooperation between space law and universal environmental law.

According to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions The EU Space Industrial Policy – unlocking the growth potential of the space sector states *inter alia* that "Space is not only a technical challenge. It has and will continue to have a strong political dimension, which has not yet been sufficiently developed at European level."[10]

Thus it is important for Europe to remain a long-term leader and independent actor in access to space, both in the telecommunications industry and in navigation and Earth observation. In order to meet these challenges, Europe needs to achieve technological independence, security of supply and maintain independent access to space in order for the European space industry to grow sustainably. The political dimension of space has been driven in recent decades by those European countries which are the most active in space. However, the political power of these countries may not be sufficient to cope with future challenges in the face of increasing competition from new emerging spacefaring nations. An EU space policy could strengthen European identity at international political level. At the same time, EU intervention could provide a stronger political impetus to space policy, for example by introducing appropriate framework conditions to sustain and support European space activities and the competitiveness of European companies in the global marketplace.

The EU's space industrial policy focuses on five specific objectives: creating a coherent regulatory framework; further developing a competitive, efficient and sustainable industrial base in Europe; supporting the global competitiveness of the European space industry and encouraging industry to become more cost-effective; developing markets for space applications and services; and ensuring technological independence of spacefaring nations and independent access to space.

The Communication also devotes much attention to research and innovation. They are not only key elements of industrial space competitiveness, but also essential components of sustainable economic growth in the short and long term and affect the EU's ability to remain competitive in an increasingly globalized economy. The space budget under Horizon 2020 will cover research, development and innovation with an option of creating the right conditions for Europe to be competitive in space, creating the right conditions for progress in space technologies, space data exploitation including

[10] COM(2013) 108.

scientific missions and commercial exploitation of space data, creating the right conditions for European research and development in the context of international space partnerships (e.g. ISS).

The Communication also refers to the need of broadening the range of available and existing financial instruments, to making a better use of public procurement policies, establishing and implementing a genuine European policy on as-built systems, and to ensure the sustainability of space activities in Europe. The Communication sets out in an annex the envisaged space-related industrial policy measures, including the development of a legislative framework for space to strengthen the European space market, the monitoring and improvement of the framework for export control and intra-EU transfers, ensuring the availability of radio spectrum, exploring the need to embed commercial space activities in a regulatory framework and supporting research and technology or European industry access to the global market.

Some believe that the EU should become a member of COPUOS. It is important for the European and international parties to cooperate on the International Code of Conduct for Outer Space Activities. The proposed EU Code is an international diplomatic initiative on security, defense and disarmament in space. The code is addressed to all countries and upholds the principle of self-defense. The Code introduces principles of international government cooperation in order to counteract the threats of The Code promotes the sharing of SSA (Space Situational Awareness) data and the communication of all abnormalities of significant risk (e.g. re-entry or orbital collision).

4. RULES OF STM PROGRAMMES

Space Traffic Management (STM) concept has caught wide attention, above all due to the growing number of entities (both state and private) operating in Space. Both LEO and GEO orbital systems involve a continuous collision risk. In order to mitigate this risk, satellite operators that track Space objects and their dynamics are required to keep vigil at all times for the purpose of ensuring safe and effective use of Space.

Indeed, the STM concept is not new; the first mention about such a project regarding military aviation dates back to 1932. Later, this idea was revived in France, when its satellite was damaged by Space debris. The tasks of STM include in particular orbit management and collision avoidance but solid studies are required in this regard because there are few publications concerning the civil application of STM. The military is the party that is most interested in this system now. For the time being, there are still

more questions than answers regarding STM [Dickinson 2018]. Space flights include various stages (e.g. launch, orbiting and return); the STM system would cover them all. Such traffic should be organized and transparent for each operator. It must be remembered that spaceships cannot reach Space and return to Earth without crossing the airspace, which is used by aircraft. Therefore, the Space Traffic Management system must not pose a threat to the security and safety of both aircraft and Space objects. Moreover, there is a high risk of collision of active and defunct objects in Earth orbit.

The research on STM were reflected in, among others, the 2006 report titled "Cosmic Study on Space Traffic Management", which was prepared by the research group of the International Academy of Astronautics (IAA). Said report defines STM as: "the set of technical and regulatory provisions for promoting safe access into outer space, operations in outer space and return from outer space to Earth free from physical or radiofrequency interference." Another proposed definition of STM is: Space Traffic Management covers activities related to surveillance, coordination, regulation and promotion of activities (including Space environment protection) during several separate mission stages, such launch, Space operations and return from Space.

As pointed by experts, data for STM must be appropriately gathered, processed, stored, managed, adjusted, used and disseminated. Particular caution must be exercised when issuing final messages, and presumptions which are not confirmed by the gathered information must be avoided. Many observers are able to reconstruct events and trajectories but few can predict them because prediction requires knowledge and understanding of many variable data [Jah 2021].

Discussions on this topic mention three possible management regimes: high, medium and low. In the case of the high regime, a superior authority with a range of operational and penal authorisations (among others, prohibition to act in orbit and levying fines) must be established. The medium regime takes into account the national laws and standards, focuses on consensus and soft law. The low regime is based on the national law and its institutions. STM is supposed to be exclusively civil while SDA and, to a lower extent, SSA – military in nature. A question arises whether operators will understand the requirements of both these domains and be able to act for the benefit of them both.

The United States has long regarded Space as an integral part of its strategic and geopolitical programmes. Successive American administrations consistently included Space in their policies, and the other way round. Although the approaches and priorities differed over the years in line with the political colour of different administrations, the general direction remained rather consistent around the primary strategic goal being the achievement

of the US leadership in Space. This goal applies to all aspects of the domain of Space, namely:

1) economy and trade in Space; the United States supports the development of its leading global Space industry, in particular by means of an ambitious technology and innovation policy, a beneficial regulatory system and an assertive trade diplomacy;
2) defence of Space and national security; Space is the key asset of the military advantage of the United States and a potential weakness of the national security. Given the objective being achievement of full supremacy in the full spectrum, the United States strives for maintaining the dominance and control in the domain of Space. This entails development of the capability of containing, counteracting and defeating hostile threats, as well as of mitigating the problems related to security and sustainable development which affect the Space infrastructure and the operational environment;
3) cooperation in the field of Space and foreign policy; acknowledging the importance of cooperation for promotion of division of burdens and for reaction to threats and the value of the international environment that facilitates trade in Space, the United States tries to ensure that bilateral and multilateral agreements protect and support its interests.

As part of the "America First" policy, Trump's administration additionally confirmed the leading role of the United States in Space. The national Space Traffic Management policy of the United States constitutes a link connecting security, trade and foreign policy and is supposed to be an instrument that supports the American leadership in Space. The policy states clearly that "through this national policy for STM and other national Space strategies and policies, the United States will enhance safety and ensure continued leadership, preeminence, and freedom of action in Space".

The US STM policy aims to support the leadership of the United States through three complementary goals being: protecting the US vital interest in Space, providing unrestrained access to and freedom to act in Space, and remaining the world leader in creating the conditions for a safe, stable, and operationally sustainable Space environment.

It is stated subsequently that as Space is becoming increasingly congested and contested, and that trend poses a challenge for the safety, stability, and sustainable development of US Space operations, a new approach to Space Traffic Management (STM) must be developed that would address the current and future operational risks. Another goal of the policy of the United States is to "encourage and facilitate U.S. commercial leadership in Science and Technology, Space Situational Awareness, and Space Traffic Management." This goal matches the efforts of the United States

to "prioritize regulatory reforms that will unshackle American industry and ensure [the United States] remain the leading global provider of Space services and technology."

Beyond the primary role of the USA in science and technology, SSA and STM, the policy aims to guarantee favorable safety and regulatory conditions for the creation and development of new commercial Space undertakings and activities related to, for example, in-orbit servicing, debris removal, manufacturing in Space, Space tourism, small satellites or very large constellations.[11] The American policy repeatedly underlines the principle of responsibility of countries for their actions in Space, respect for other countries acting in Space, and skillful, professional collaboration (i.e. avoiding Space pollution and disturbance of others' work, by communicating and reporting potential threats to one another in order to increase Space security and safety).[12]

A pilot programme of the US STM is supposed to be prepared by the Office of Space Commerce (OSC) being part of the Department of Commerce of the United States. The legal basis for the project is the National Space Policy Directive no. 3 of 18 June 2018 and the mandate from the US Congress. Above all American private Space companies insist on the preparation of a new STM programme [Jah 2021].

5. STM IN OTHER COUNTRIES

Although no national STM policy framework comparable to that applicable in the United States has been formally introduced in any country, most countries have already taken various measures which are part of the STM concept. Three primary areas of activity should be mentioned among them:

1. Establishment and operation of Space traffic surveillance functions by creating local SSA capabilities or exchanging data in order to obtain more precise and up-to-date information and to increase own capabilities. While the United States still maintains the most robust SSA system worldwide, other countries, such as Russia, China, Japan and India, are at the stage of preparation of their own Space surveillance programmes.
2. Preparation, implementation and review of STM-relevant regulations (on an international or national level): e.g. contribution to the preparation of guidelines for measures to reduce the quantity of waste, preparation

[11] ESPI Report 71, pp. 31-33.

[12] PSSI Space Security Roundtable April 22, 2021 – Strategic Competition for International Space Partnerships and Key Principles for a Sustainable Global Space Economy, https://www.pssi.cz/download/docs/8609_pssi-space-security-roundtable-participants.pdf [accessed: 29.04.2021].

of a national system of statutory and implementing provisions, standards, licence granting procedures etc. There are more and more countries that are equipped with special regulatory frameworks or special national regulations concerning Space, which ensure safe and responsible behaviour in Space.

3. Intensification of efforts in the area of Space traffic coordination, including in particular measures based on bilateral and multilateral exchange of information. In 2015, UNCOPUOS member states agreed for the first time to enter STM to the agenda of the Legal Subcommittee. Over the first three years of discussions, 11 countries took an active part in the sessions devoted to the legal aspects of STM (Austria, Germany, Indonesia, Japan, Morocco, the Netherlands, Pakistan, Russia, the United Arab Emirates and the USA). It was stated as a result of the sessions that numerous components of STM were already present and that the current international Space law already had relevant provisions concerning this programme and the LTS guidelines contained significant recommendations in this regard.

For example, guideline B.1 recommends to "provide updated contact information and share information on space objects and orbital events," while guideline B.2 is to "improve accuracy of orbital data on space objects and enhance the practice and utility of sharing orbital information on space objects." Also Europe reports its interest in the preparation of a civil Space Traffic Management project, which might govern, among others, the field of Space communication, access to and action in Space, and return to Earth. Taking all three above stages into account will be a response to a possible future situation in which state and private Space airlines will act next to each other [Rathgeber 2008].

Although many components already exist and constitute a solid base for developing a more integrated and operational approach to Space Traffic Management in Europe, the progress in this domain will pose a serious political and technical challenge. Thus, it is necessary to:

a) strengthen European cooperation and reach a required political consensus regarding the objectives and rules of a European STM policy and regarding a suitable governance (i.e. leadership, division of responsibility and cooperation arrangements);

b) develop European capabilities and best practices to mitigate the present and future operational threats and find an acceptable compromise between the strive for strategic autonomy and the necessity to achieve demanding technical objectives at effective economic conditions;

c) contribute to the progress of international attempts in the area of Space Traffic Management, at the same time continually promoting the European standpoint and protecting European interests.

Every effective approach to STM involves an enhanced coordination and collaboration among various entities due to the interdependent nature of a given operational risk and collaborative dimension of risk mitigation solutions. A global framework would be perfect to best achieve the goals related to Space safety and sustainability and therefore multilateral efforts in the domain of STM should be supported. As regards Europe, it would be most desirable to develop a "regional" approach, based on already well-established cooperation arrangements between governmental and industrial entities. Preparation of a joint policy and framework for the safe and sustainable management of European Space traffic and operations requires in particular:

a) tapping the potential, expertise and added-value of all relevant European public and private stakeholders;
b) dividing the financial burden among respective parties and maximising cost effectiveness by avoiding duplication of efforts;
c) harmonising and updating the best practices and safety standards applicable to Space activities in Europe;
d) enhancing the European contribution to multilateral efforts by promoting clear, common and consistent European standpoints in the international arena.

The preparation of a joint European STM policy and framework implies reaching a broad political consensus among member states regarding:

– common goals and principles, which must be set for European efforts in the area of STM;
– mechanisms ensuring an effective and efficient coordination among the stakeholders;
– an appropriate separation of roles, division of responsibilities and activities. Reaching consensus regarding a framework satisfying the needs, interests and limitations of numerous stakeholders will probably prove difficult and will require reconsidering certain arrangements. Designed to accommodate the interests of various stakeholders, the present European structure allowed to achieve considerable progress in the case of many technical and cooperation challenges. However, questions emerge on its ability to overcome future operational threats. From a purely practical point of view, two immediate threats appear: 1) a risk of diverging interests among stakeholders, which make it difficult to implement a coordinated policy. This risk is intensifying because stakeholders' concerns and standpoints on STM related issues tend to progress faster than

European integration and leadership; 2) a risk of duplication of efforts and decrease in cost effectiveness, if motives to develop specific national capabilities surpass the willingness (and readiness) to concentrate on distribution and complementarity across Europe.[13]

Congested and contested, and that trend poses a challenge for the safety, stability, and sustainable development of US Space operations, a new approach to Space Traffic Management (STM) must be developed that would address the current and future operational risks. Another goal of the policy of the United States is to "encourage and facilitate U.S. commercial leadership in Science and Technology, Space Situational Awareness, and Space Traffic Management." This goal matches the efforts of the United States to "prioritize regulatory reforms that will unshackle American industry and ensure [the United States] remain the leading global provider of Space services and technology."

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[13] ESPI Report 71, p. 35.

[14] PSSI Space Security Roundtable April 22, 2021 – Strategic Competition for International Space Partnerships and Key Principles for a Sustainable Global Space Economy, https://www.pssi.cz/download/docs/8609_pssi-space-security-roundtable-participants.pdf [accessed: 29.04.2021].

[15] See https://trumpwhitehouse.archives.gov/presidential-actions/space-policy-directive-3-national-space-traffic-management-policy/ [accessed: 23.02.2022].

CONCLUSION

The elements of the STM regime are the two dimensions of space traffic (in the scientific and technical and regulatory domains) and the three phases of space traffic: the launch phase, the on-orbit operations phase and the return phase. Examples of traffic regulations include safety regulations for launches, a specific regime for space between air and space, safety regulations for manned vessels, regulations governing debris removal, traffic laws for orbital phases, safety regulations for returns (e.g., descent corridors), frequency use and avoidance of interference, environmental regulations, etc.. Implementation and control mechanisms are primarily national regulations for licensing, arbitration and enforcement, operational assessments, coordination, and civil-military cooperation. The German space agency DLR has conducted expert studies on, among other things, priorities for European STM and the implementation process for a system that would become operational between 2030 and 2035.

A number of non-governmental organizations are addressing the issues of developing a space traffic rule. Thus, for example, the International Association for the Advancement of Space Safety (IAASS) has developed a six-point manifesto on this issue. It proclaims the need to protect citizens of all countries from risks caused by the launch, flight and return of space devices, as well as from chemical and radioactive contamination (caused by falling debris). The document proposes establishing international regulations for launches, operations of satellites in orbit and their return to Earth to avoid collisions or interference with other space systems and aviation. The manifesto also proposes establishing common regulations for emergency assistance for space missions.

In addition to government and international programs, there are also commercial programs aimed at reducing threats to the safety of space operations. The most notable is the formation in 2010 of an association that set as its goal the reduction of collisions and radio interference in GEO318 orbit (Space 315 “Space Traffic” is defined as the totality of projects that make it possible to determine, relative to a designated space-time reference system, the position of various objects on the basis of observations and measurements of the position of celestial bodies and space objects.

The authority whose responsibility it is to allocate GEO slots and internationally coordinate AMOS (Advanced Maui Optical and Space Surveillance Technologies Conference), radio frequency spectrum is the ITU. ITU regulations are an independent legal regime, albeit embodied in UN treaties and principles. The ITU has a “first come first serve” principle.

SDA was founded by private operators (including INTELSAT and INMARSAT). These collisions and disruptions cost commercial operators millions of dollars a year. SDA is also concerned with the issue of space debris. The organization is supported by the Satellite Users Interference Reduction Group (SUIRG), which represents industry. Another private sector initiative is the working committee of the International Satellite Operations Group (ISOG) of the UITC World Union. All these initiatives are very needed in case to respond to the increasing congestion of orbits due to the growing interest of states in exploring outer space. Therefore STM formula as guidelines proposed by LTS UNCOPUOS can be useful as a first step to protect the activities of states and their assets in space.

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THE NEED FOR COMPARATIVE STUDIES OF PRINCIPLES RELATED TO THE PERMISSION FOR TEMPORARY TRANSFER OF HISTORICAL ARTEFACTS TO THE TERRITORY OF ANOTHER EUROPEAN UNION MEMBER STATE, ISSUED BY THE PROVINCIAL CONSERVATOR OF MONUMENTS*

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Abstract. This article discusses the rules of temporary export of historical artefacts abroad in relation to the regulations on the permits for the temporary transfer of historical artefacts abroad to the territory of another European Union Member State, issued by the provincial conservator of monuments. Polish law distinguishes between three basic approaches to the transport of historical artefacts across the border. Some artefacts can be removed without the need to obtain an export license, some can be exported with an export license, while some cannot be exported from Poland at all. The problem of historical artefacts is related to determining the limits of the owner's disposal of this particular item. Within the limits specified by the laws and rules of social coexistence, the owners, with the exclusion of other persons, may use things in accordance with the socio-economic purpose of their right, in particular, they may receive benefits and other income from these objects. Within the same limits, they may dispose of the thing, as provided for in Article 140 of the Civil Code. The administrative

* Quotations in the article, translated by the author into English, come from sources published in Polish. The term "provincial monument conservator" can also be translated into English as "voivodeship inspector of monuments", „Provincial Heritage Conservation Officer". A Polish word "zabytek" has a wider context than the English word "a monument". In Polish the word "zabytek" does not only mean immovable monument. The law on protection and guardianship of monuments [hereinafter: APM] provides a definition of a monument in Article 3(1-4). The expressions used in this Act shall have the following meaning: 1) monument – real estate or a movable, their parts or complexes, being the work of human being, or connected with their activity, and constituting a testimony of the past epoch or event, the preservation of which is in the social interest because of historical, artistic, or scientific value; 2) immovable monument – real estate, its part, or a complex of the real estate referred to in Point 1; 3) movable monument – a movable, its part, or a complex of the movables referred to in Point 1; 4) archaeological monument – an immovable monument constituting onground, underground, or underwater remains of the existence and activity of human being consisting of cultural strata, and products, or their traces contained in them, or the movable monument being such product. Cf. about the temporary moving of historical artefacts abroad: Sienkiewicz 2014.

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situation of the owner of historical property results in restrictions in this respect. This also applies to the transfer of such an object across the border. The transfer of historical artefacts abroad is a de facto act subject to administrative regulation. The analysis of legal norms in the context of norms related to extra-legal knowledge will give a full picture of the state's will to protect national heritage, as well as reveal the theory of public administration activity in this area, which can be called the theory of state intervention in the export of historical artefacts abroad.

Keywords: monument; administrative regulation; provincial monument conservator.

1. THE COMPARATIVE STUDY OF LEGAL ACTS

The comparison can be made in a various dimension. Despite the fact that the administration applying the law can not rely directly on non-binding normative acts, their analysis may indicate the directions of interpretation that were well-established way of determining the scope of a given concept or a method of action.[1] The correct application of the law cannot be deprived of comparisons, for example, when an interpreted norm requires an evaluation of the occurrence of the conditions for its application, especially when those conditions contain a reference to non-legal knowledge. Subsumption alone requires a comparison. The legal norm should be therefore first compared with the factual state to determine whether the fact can subsumed under the legal norm. Therefore it can be assumed that the use of terms "comparative law", "comparative study of the law" is fully justified in examining the law, because the law as other phenomena of human life is subject to comparisons in many respects, legal and extra-legal ones. The subject of the comparative study of the law, by its nature, will impose a multi-faceted quality of the study. All of the following can be compared: legal cultures of the world, legal education in different countries, different lawyer occupations, legal systems, branches of law, individual national and international norms, constitutional norms, substantive procedural norms, institutions of the law.[2] This is not, of course, a closed list, but rather an example of research areas within the framework of comparative law. "Traditionally,comparative law appears to be a comparison of legal history (comparative history of law), comparison of laws (comparative legislation) and comparison of legal systems (descriptive comparative law)" [Brodecki,

[1] "To what extent is the study of the past is required? In many works scholars point out that discovering the past makes sense primarily in the law, where the traditions shape the mindset of lawyers and common traditions are the foundation of the general principles of a transnational or international nature" [Brodecki, Konopacka, and Brodecka-Chamera 2010, 17].

[2] About multi-faceted quality of comparative study of the law see Tokarczyk 2002; about comparison of legal cultures see Idem 2003.

Konopacka, and Brodecka-Chamera 2010, 16]. Multi-faceted quality refers to a comparative term itself. Defining comparative law, comparative study of the law is not simple. Difficulties with the name and content have been the subject of a legal dispute among scholars researching comparative study of the law since the creation of this field of research. Some treat a comparative study of the law as a branch of the law, others consider comparative law a method of legal study and research [Tokarczyk 2002, 27-28]. The view that comparative law is not considered as an independent scientific discipline is present in the literature,[3] and some point out that this is a comparison of laws, which is a part of the comparative literature.[4] When monument protection law uses comparative legal method many concepts undefined by the legislator can be clarified.[5] The comparison of legal acts of monument protection shows the conditions of making positive and negative decisions in the whole system of these acts.

The comparative study may involve legal institutions[6] also compared in administrative dimension. It is an utilitarian art.[7] In this utilitarian sense, it is worth using a comparative method to determine the meaning of norms which contain general clauses when a literal interpretation does not provide a complete answer to the question about the scope of application of a norm. It is also often a necessary measure to determine the correct interpretation.[8] The usefulness of the method of comparative study was appreciated by many generations of lawyers. As indicated by M. Rybicki, "comparative method was used from ancient times, primarily for practice in the process of preparing new legislation. In ancient Greece and Rome the laws of foreign countries were studied comparing them both among themselves and with their own national law. For example, as tradition says, the codification of the law by the Solon of Athens, and the oldest codification of the Roman law – The law of twelve tables – was preceded by a study of the laws of other countries of the then-known world" [Rybicki 1978, 29]. In the history of Polish law

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[3] "There is no sufficient arguments to consider «comparative law» as an independent, autonomous discipline" [Rybicki 1978, 31].

[4] "Comparative law is essentially a comparison of rights, comparative study of the law, which belongs to the broader concept of comparative literature" [Tokarczyk 2002, 28].

[5] "The use of a comparative legal method could also foster better explanation of different points of view and different concepts underlying the different systems and legal institutions" [Rybicki 1978, 35].

[6] "Comparing legal institutions, understood as a set of legal rules governing certain types of separate social relations, it is a highly-rated and most often undertaken task by the scholars of comparative study of the law" [Tokarczyk 2002, 70].

[7] "The usefulness of comparative law is its decisive quality" [Brodecki, Konopacka, and Brodecka-Chamera 2010, 15].

[8] "Why should we be especially interested in comparative law today, is the same question as in what respect this aspect of legal knowledge is necessary" [Ancel 1979, 157].

a method of comparative study found its practical application. A comparative legal method was used since regaining independence after the World War I because of the need to unify several legal systems of the occupying powers into one Polish legal system on the territory of a reborn country. "The co-existence in one country a few legal systems required what M. Ancel called inner comparative law, needed until national unification law" [Poźniak-Niedzielska 1984]. Comparing different phenomena, including the law is a characteristic of human action. Every day, a person makes multi-faceted comparisons without being aware of it as the judgement refers to their ideal notions of reality. Comparing is a method of obtaining information about the surrounding world[9]. It is also a part of the evaluation of the law, for example its quality. Comparing is also used in public institutions during various processes related to their functioning. There are also various criteria for comparison.

2. THE ATTITUDE OF THE STATE TO TRANSPORTING HISTORICAL ARTEFACTS ACROSS THE BORDER

Polish law distinguishes between three basic approaches to historical artefacts being transported across the border. Some artefacts can be removed without the need to obtain an export license, some can be exported with an export license while some of them cannot be exported from Poland at all. The problem of historical artefacts is related to the determination of the limits of the disposal of this particular item by the owner. Within the limits specified by the laws and rules of social coexistence, the owners may, with the exclusion of other persons, use things in accordance with the socio-economic purpose of their right, in particular, they may collect benefits and other income from those things. Within the same limits, they can dispose of the thing, as provided in Article 140 of the Civil Code.[10] The situation of the owner of historical property under administrative law results in limitations in this respect. This also applies to the transfer of such an object across the border. Moving historical artefacts abroad is a factual act [Paczuski 2010, 409] subject to administrative regulation. This article concerns the rules of temporary export of historical artefacts abroad regarding regulations on permits for the temporary moving of historical artefacts abroad to the territory of another European Union Member State, issued by the provincial monument conservator.

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[9] "Comparison is a generally accepted epistemological practice, whose main objective is to obtain new knowledge – learning." "If we have accepted already fixed idea that all human knowledge is based on comparison, then any knowledge would lead to comparisons" [Tokarczyk 2002, 34].

[10] Act of 23 April 1964, the Civil Code, Journal of Laws of 2020, item 1740 [hereinafter: CC].

Historical artefacts are objects of a special kind in the Polish legal system.[11] Transporting them across the border without referring to legal regulations may lead to far-reaching legal consequences for the exporting party. Pursuant to Article 4 of the Act on the protection and guardianship of monuments,[12] their protection includes, among others, counteracting the illegal export of historical artefacts abroad. Protection in the legal sense is also implemented through penal sanctions stipulated in this Act. Safeguarding national heritage is a task and obligation imposed on public administration by the Constitution of the Republic of Poland,[13] as stipulated in Article 5. From the very definition of a monument indicated in the Act on the protection and guardianship of monuments (Article 3(1)), it follows that their preservation is in the public interest due to their historic, artistic or scientific value. The purpose of this article is to present the main principles pertaining to the above-mentioned temporary moving of historical artefacts.

3. THE PRINCIPLE OF CONSTITUTIONAL GROUNDS FOR PROTECTING NATIONAL HERITAGE

The actions of public administration in the area of regulatory measures as well as law enforcement with regard to moving historical artefacts across the border find their legal justification in the Polish Constitution. Pursuant to its Article 5, the Republic of Poland safeguards the national heritage. For this reason, the monument protection authorities have been equipped with the powers to "safeguard", expressed in their regulatory interference in the rights of the owner or holder of an artefact in a situation when they temporarily or permanently move the historical object abroad. The protective function is carried out for the common good, and for the implementation of the public interest expressed in preserving the cultural heritage for future generations [Zalasińska 2010, 141].

Regulatory actions in terms of granting permits for the export of a historical artefact abroad implement the aim of the law, i.e., the common good. In the case of Poland, they are also of particular historical importance, because during the Second World War, collections of Polish heritage were noticeably decimated. A significant number of monuments was destroyed,

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[11] About Cultural Heritage Protection Law and monument protection law see Zeidler 2014, 23, note 1: "Cultural Heritage Protection Law shall remain in such a relationship to monument protection law like the concept of cultural heritage as a wider concept compared to the concept of the monument as a narrower one." Cf. Sienkiewicz 2013; Idem 2014. About rules of monuments protection see Dobosz 2020.

[12] Journal of Laws of 2021, item 710.

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

and moreover, the German and Soviet occupiers appropriated works of art that have not been found or returned to Poland to this day [Pruszyński 2001, 478; Idem 1989, 110ff]. Therefore, the care of the administration to preserve the achievements of past generations in the territory of Poland protects the legally and factually justified social interest. The legal significance of these actions is evidenced by the fact that the protection of the national heritage was raised to the constitutional level [Chmaj 2009, 27]. It is a crime to move an artefact abroad without prior permission.[14]

4. THE PRINCIPLE OF COUNTERACTING ILLEGAL EXPORT OF HISTORICAL ARTEFACTS ABROAD

For a practical assessment of the scope of protection of historical artefacts, the legal definition of monument protection is very important, which is very broad. It is included in Article 4 APM. One of the activities listed in this provision, which falls under the above definition, is the prevention of theft, loss or illegal export of historical artefacts abroad.

When analysing the normative acts regulating the sphere of export of historical artefacts abroad, a reservation should be made that it is an extensive subsystem in administrative law, covering not only national regulations, but also international legal norms. This article focuses only on a few types of permits which are issued by the provincial conservator of monuments, pursuant to the Act on the protection and guardianship of monuments, and which relate to the export of historical artefacts abroad to the territory of another European Union member state. This of course does not mean that the problem of export permits has been exhausted. The author points out that there are also other administrative decisions regarding the export of artefacts outside Poland, but they will not be discussed in this article. There are several types of permits for the export of artefacts abroad, issued under Polish law. This study discusses three types of temporary export permits: a single permit for the temporary moving of a historical artefact abroad, a multiple individual permit for the temporary moving of a historical artefact abroad, and a multiple general permit for the temporary moving of a historical artefact abroad. The authority issuing these permits is the voivodeship (provincial) conservator of monuments, or in relation to library materials – the Director of the National Library of Poland. A single permit for the temporary

[14] Article 109(1) and (2) APM: "Whoever, without a permit, exports a historical artefact abroad or, after having taken it abroad, does not import it within the period of validity of the permit, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 3 years. If the perpetrator of the act referred to in Section 1 acts unintentionally, he is subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years."

export of a historical artefact listed on the Heritage Treasures List is issued by the minister competent for culture and protection of national heritage at the request of a natural person or organizational unit in whose possession the artefact is and who intends to move the artefact abroad one time for practical operation, exhibition purposes, or for carrying out conservation works (Article 53(1) APM). The present discussion concerns the permits issued by the provincial conservator of monuments.

5. THE PRINCIPLE OF FORMALIZING THE CONDITIONS FOR THE EXPORT OF HISTORICAL ARTEFACTS ABROAD

When discussing the scope of formalization and administrative recognition of the above-mentioned permits, it should be noted that on 18 April 2011, the Minister of Culture and National Heritage issued a regulation on the export of historical artefacts abroad,[15] which entered into force on 29 April 2011. This regulation specifying the detailed scope of formalization and discretionary power, along with the general norms indicated in the Constitution of the Republic of Poland, together with the Act on the protection and guardianship of monuments and the Code of Administrative Procedure[16] constitute the main legal research field. The detailed framework of this reflection on the law is set out in Articles 53-55 APM.

When analysing the legal grounds for issuing permits, it should be noted that Article 4 APM, which should define the legal framework for protection, stipulates that it "consists, *in particular*, in actions by public administration bodies aimed at: 1) ensuring the legal, organizational and financial conditions enabling the permanent preservation of monuments as well as their use and maintenance; 2) *preventing threats* that may harm the value of monuments; 3) *preventing the destruction and misuse* of monuments; 4) *counteracting the theft, loss or illegal export* of monuments abroad; 5) control of the state of preservation and use of monuments; 6) inclusion of protective tasks in planning and spatial development and in environmental management" [emphasis – T.S.].

It should be noted that these norms are not directly related to the norms pertaining to the permits. As evidenced by the use of the phrase "in particular" in this provision, it is not a closed but an open catalogue. An assessment of the harmfulness of planned activities on any historic substance may also be justified by other reasons, not mentioned in this provision.

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[15] Journal of Laws No. 89, item 510.

[16] Act of 14 June 1960, the Code of Administrative Procedure, Journal of Laws of 2021, item 735 [hereinafter: CAP].

The wide scope of administrative discretion is evidenced in the use of indeterminate phrases in conjunction with the phrase "in particular", which gives an undefined catalogue of negative premises.

On top of all this, there is a problem with the interpretation of the legal definition of monuments and artefacts, which does not link the "historicity" of objects with their legal status, e.g. being listed in the register, but rather with the factual status. Pursuant to Article 3(1) APM, a historical artefact is understood as "a real estate or movable object, their parts or complexes, created by man or related to his activity and being a testimony to a bygone era or event, the preservation of which is in the public interest due to their historic, artistic or scientific value." Therefore, all activities that pose a threat to the protection of a monument or artefact should be interpreted in terms of possible threats to the values indicated in this definition, that is, first of all, possible damage to the preservation of evidence of a bygone era or event, in the light of its historic, artistic or scientific value. Moreover, it should be noted that the very definition of a monument refers to "public interest". Thus, should only this public dimension of monument protection be of interest to the provincial conservator of monuments?

6. THE PRINCIPLE OF TAKING INTO ACCOUNT THE INTEREST OF A PARTY TO THE PROCEEDINGS AND THE PUBLIC INTEREST

After all, the protection of monuments requires taking into account the interests of the owner of the monument as well as the public interest. These interests might not coincide. It should be noted that, pursuant to Article 7 CAP, an administrative body is "obliged to settle the matter while taking into account both the public interest as well as the legitimate interest of citizens." Therefore, this provision does not assume the priority of any interest or purpose. It is the duty of a public administration body to balance and establish the priority of objectives in administrative regulatory procedures or in police activities. The hierarchy of values indicated by law, and what follows – the significance of individual interests, are not only a theoretical issue, but also have a practical dimension. Public interest is not always and unconditionally more important than the interest of an individual. The legislator adopted the concept of reconciling these two interests rather than rigid setting of priorities [Adamiak and Borkowski 2004, 72-23]. Establishing the priority of these objectives cannot be made while disregarding the values on which the legal order is based. The legislator who tries to reconcile various individual or collective interests must face the problem of determining a common value [Zdyb 1991, 221] with respect to which the boundaries of regulatory practices or police activities will be defined. The balancing of these objectives must be reflected in the statement

of reasons of a given administrative decision, otherwise the party dissatisfied with the decision will try to challenge it, pointing to, for example, the lack of reconciliation of the social interest and the legitimate interest of citizens, omission of some interests in the process of balancing them, unjustified assumption of domination of any interest or unequal treatment of interests, or the violation of the principle of justice [Zdyb 1991, 240; Jaśkowska and Wróbel 2009, 136-38]. Public administrative bodies dealing with monument protection are responsible for the implementation of the values defined by law. Public administration realizes the public interest [Kocowski 2009, 155] as well as individual public subjective rights [Chaciński 2004, 16ff]. Therefore, after issuing a permit, it should pay attention to the manner of its implementation and react to any instances of breaching the limits of freedom, in particular when it concerns not only the formal violation of legal norms, but also when it results in violation of the rights of other entities.

The basic purpose of the statutory regulation is to define the subjective and objective scope of regulatory procedures and police activities in terms of protection of monuments. While discussing the issue of the statutory discretionary powers, one needs to mention the fact that this power will result not only from the provisions of the Act on the protection and guardianship of monuments, but also from the provisions of the Code of Administrative Procedure. As an example, the legal problem related to establishing the parties to the administrative procedure should be mentioned. Article 28 CAP links the concept of a "party" to proceedings with demonstrating a legal interest. Already at this stage, attention should be paid to the controversy related to the concept of party viewed in an objective or subjective way. This phenomenon may be compounded by the problem of a different understanding of the scope of legal interest in administrative regulatory procedures or in administrative police activities [Sienkiewicz 2011a]. The scope of entities with a legal interest in the permit granting procedure may be perceived differently than in the permit revocation procedure. The legal interest, and thus in practice the status of the party, is determined by the provisions of the Act on the protection and guardianship of monuments. When formulating the catalogue of applicants, the legislator refers to the legal or factual status of the matter, and sometimes to the legal status of the applicant.

7. THE PRINCIPLE OF LINKING THE SUPERVISION OF THE TRANSPORT OF ARTEFACTS ACROSS THE BORDER WITH POSSESSION

Some permits connected with the movement of artefacts across the border relates to the factual status – possession. "A single permit for the permanent export of a historical artefact abroad" is issued at the request of a natural

person or an organizational unit in whose possession the artefact is (Article 52(2) APM). "A single permit for the temporary export of a historical artefact abroad is issued by the provincial conservator of monuments at the request of a natural person or an organizational unit in whose possession the artefact is and who intends to move the artefact abroad one time for practical operation, exhibition purposes, or for carrying out conservation works" (Article 53(1) APM). A "multiple individual permit for the temporary export of a historical artefact abroad is issued by the provincial conservator of monuments at the request of a natural person or an organizational unit in whose possession the artefact is and who intends to repeatedly export this artefact abroad for practical operation or exhibition purposes" (Article 54(1) APM).

Another type of permits relates to the legal status of the applicant. "A multiple general permit for the temporary export of historical artefacts abroad is issued by the provincial conservator of monuments at the request of a museum or other cultural institution which, in connection with its activities, intends to repeatedly export its collections abroad, in whole or in part, for exhibition purposes" (Article 55(1) APM).

When assessing the regulation, it is impossible to ignore the history of application of individual provisions. Therefore, it is worth referring to the body of jurisprudence or cases illustrating the application of law in practice. In the case of exporting artefacts abroad, the question arises whether the current regulation includes a general ban on export, or the mere movement across the border is allowed, and the prohibition applies only to acting without a permit? Should permanent export be treated differently than temporary one? A pro-freedom interpretation regarding the export of artefacts abroad was provided by the Provincial (Voivodeship) Administrative Court in Warsaw in the judgement of 13 March 2006.[17] The statement of reasons of the judgement provides arguments that the general rule is consent to export, and the prohibition is the exception to the rule. This confirms the hypothesis that the action itself, resulting from subjective rights, is allowed, while it is forbidden to act without prior permission, but taking into account the provisions of administrative and criminal law related to the unauthorized transboundary movement of artefacts, one may doubt whether this freedom is real or apparent.

[17] Ref. no. I SA/Wa 1019/05, Lex no. 197565.

8. THE PRINCIPLE OF PROTECTION OF HISTORICAL ARTEFACTS *EX OFFICIO* AND THE PRINCIPLE OF PRESUMPTION OF AWARENESS OF THE HISTORIC FEATURES OF THE TRANSPORTED GOODS ON THE PART OF THE EXPORTING ENTITY

"The provincial conservator of monuments may issue an ex officio decision on the entry of a movable artefact in the register of monuments in the event of legitimate concern of its destruction, damage or illegal movement of the artefact abroad, or export of a monument of exceptional historic, artistic or scientific value" (Article 10(2) APM). Pursuant to Article 3(1) APM, a monument is understood as real estate or a movable item, their parts or assemblies, created by man or related to his activity and being a testimony to a bygone era or event, the preservation of which is in the public interest due to their historic, artistic or scientific value. It should be noted that the "historicity" of a given object is determined by the factual status, and not by the legal form of protection. A historical artefact may also be an item not listed in the register of monuments or not covered by any other form of protection indicated in Article 7 APM.[18] This may cause interpretation doubts in a situation where the Border Guard or the customs authority undertake actions against a person crossing the border while transporting an item with the features of a historical artefact but not listed in the register. In case of doubt, they may require the exporting person "to present a document confirming the fact that the exported artefact does not require a permit (Article 59(2) APM). Specific regulations related to this issue can be found in Article 59(3) APM.

Thus, the law shifts the burden of proving exportability to the exporting party. It requires a certain precaution of the person moving an item with the features of a historical artefact, who should think in advance about possible controversies on the border concerning the item in question.

If the document confirming that the artefact may be exported is not presented, or there is legitimate concern that it is not a reliable document, "the authority of the Border Guard or the customs authority may keep the monument for the time necessary to determine whether the export of the monument could have been made without a permit" (Article 59(4) APM) for permanent or temporary export.

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[18] "The forms of protection of monuments are: 1) entry into the register of monuments; 1a) entry on the List of Heritage Treasures; 2) recognition as a monument of history; 3) creation of a cultural park; 4) establishing protection in the local spatial development plan or in the decision on the location of public purpose investment, decision on conditions of development, road investment permit, decision on the location of the railway line or the building permit for public use airports."

It should be mentioned here that pursuant to Article 10 of the APM, "the provincial conservator of monuments may issue an ex officio decision on the entry of a movable artefact in the register of monuments in the event of legitimate concern of its destruction, damage or illegal movement of the artefact abroad, or export of a monument of exceptional historic, artistic or scientific value."

The Act on the protection and guardianship of monuments tries to simplify the situation somewhat in this respect by indicating a catalogue of artefacts for the moving of which a licence in the form of an export permit is required. The prerequisites for obtaining a permit are, in particular, the age of the item or its value.

The export permit is a manifestation of regulatory actions of public administration. There are several types of permits for the temporary export of artefacts abroad, issued by the provincial conservator of monuments. The Act requires prior obtaining of: "1) a single permit for the temporary export of a historical artefact abroad, or 2) a multiple individual permit for the temporary export of a historical artefact abroad, or 3) a multiple general permit for the temporary export of a historical artefact abroad" (Article 51(3) APM).

The authority issuing these permits is the provincial conservator of monuments (cf. Article 53(1), Article 54(1), Article 55(1) APM), or in relation to library materials – the Director of the National Library of Poland (Article 58 APM). They may also withdraw this permit by means of a decision (Article 56(1) APM), "if the state of preservation of the artefact has deteriorated or new facts and circumstances have come to light proving that the applicant does not give any warranty" (Article 56(2) APM), "that it will not be destroyed or damaged and will be brought back to the country before the expiry of the permit" (Article 51(2) APM). The provincial conservator of monuments (or, respectively, the Director of the National Library) notifies immediately the customs administration authority about the revocation of the permit (Article 56(3), Article 58 APM).

A single permit for the temporary export of a historical artefact abroad and a multiple individual permit for the temporary export of a historical artefact abroad is issued at the request of the holder of an artefact (a natural person or an organizational unit), intending, respectively: one time or repeatedly, "to export this monument abroad for practical operation or exhibition purposes, or for conservation works" (Article 53(1), Article 54(1) APM). The permit has a limited validity period, which "may not exceed 3 years from the date of issuing the permit" (Article 53(2), Article 54(2) APM).

The multiple general permit for the temporary moving of a historical artefact abroad has been regulated somewhat differently. The group of entities

that may apply for it has been narrowed. They are issued "at the request of a museum or other cultural institution which, in connection with its activities, intends to repeatedly export its collections abroad, in whole or in part, for exhibition purposes" (Article 55(1) APM). The validity period of this permit is extended compared to the previous two and is 5 years from the date of its issuance (Article 55(2) APM).

An entity that used a permit for the temporary export of a historical artefact abroad is required to notify the provincial conservator of monuments (or, respectively: the Director of the National Library of Poland) on bringing the object to the territory of the Republic of Poland, not later than within 14 days from the expiry of the permit, and is also obliged to make the artefact available for inspection at the request of the conservator (Director of the National Library) (Articles 57 and 58 APM).

Pursuant to Article 51(1) APM, a permit for the export of a historical artefact abroad is required for objects included in one of the categories pointed in this regulation (Article 51(2) APM).

Regardless of the age or value of the artefact, a permit will be required to export objects that are: "1) listed in the register, 2) included in public collections, which are the property of the State Treasury, local government units and other organizational units included in the public finance sector, 3) part of museum inventories or the national library resource" (Article 51(4) in conjunction with Article 51(3)).[19]

The condition for obtaining a positive review of the application for a permit for the temporary moving of a historical artefact abroad is the fact whether "the state of its preservation allows it, and the natural person or organizational unit in whose possession the artefact is gives a warranty that it will not be destroyed or damaged and will be brought back to the country before the expiry of the permit (Article 51(2) APM). A permit to export abroad is not required for the categories pointed in Article 59(1) APM.

9. THE PRINCIPLE OF PURPOSEFULNESS OF MONUMENT PROTECTION

The general constitutional order to protect the national heritage is reflected in specific negative premises in the procedure for issuing a permit for the export of a historical artefact abroad. They define the specific objectives of the conducted proceedings, which should be referred to in the justification of the refusal to grant the permit. The files of the administrative

[19] Historical artefacts included in the List of Heritage Treasures may be temporarily exported abroad, but the permit in this respect is issued by the minister competent for culture (Article 53(1) APM).

proceedings should also show that specific conditions indicated in the procedure for obtaining the permit were subject to in-depth examination, pursuant to Article 12(1) CAP.

The general objective is to "prevent threats that may harm the value of monuments, and to counteract the theft, loss or illegal export of monuments abroad" (Article 4(2) and (4) APM). Moving a historical artefact from the domestic legal area is connected with the risk of insufficient protection of the object's substance and its being retained in Poland due to the different degree of protection of monuments in the internal regulations of other countries [Drela 2006, 234]. The risk of loss or destruction of an artefact also increases as a result of the process of its physical movement, but also due to possible insufficient legal protection in a foreign territory. One of the aims of monument protection is preserving their physical substance [Bąkowski 2010, 101]. Article 4 APM indicates only an exemplary catalogue of monuments protection activities, by using the phrase "in particular", and therefore the conditions for issuing negative decisions on the export of artefacts abroad should be analysed. The objectives of the administrative procedure for the issue of an export permit are different for the application for a permanent export permit than in the case of temporary export. The legislator did not explicitly indicate the purpose of the proceedings, but indicated premises the occurrence of which causes the applicant to be refused the permit.

10. THE PRINCIPLE OF USING NON-LEGAL ASSESSMENTS AND KNOWLEDGE-BASED NORMS

In the case of proceedings for the issuance of a permit for the temporary moving of an artefact abroad, the specific purpose of the procedure will be to determine whether the state of its preservation allows its export abroad, and whether "the natural person or organizational unit in whose possession the artefact is gives a warranty that it will not be destroyed or damaged and will be brought back to the country before the expiry of the permit" (Article 51(2) APM).

Thus, the legislator assumed that in this case it is not necessary to examine the significance of the artefact for cultural heritage, but pointed out that one should ensure, from the point of view of the public interest, the probability of the item's return to the national territorial area as well as minimize the risk of its loss or damage.

The use by the legislator of the terms "special significance for cultural heritage", and "state of preservation of the monument" allowing its export abroad, or the warranty that the artefact will not be "destroyed or damaged

and will be brought back to the country before the expiry of the permit" imposes on the authority examining the export application an obligation to use in this procedure justifications also related to non-legal assessments. In the circumstances shaping the administrative matter, it is not enough to be guided only by a literal interpretation of the provision. One should also take into account the interpretation of a specific provision in the light of the axiological foundations of a given branch of law, in terms of logic, intent, and the entire system of provisions, i.e. the purpose and meaning of the application of the norm [Zdyb 1999, 21; Idem 1991, 75-76]. In this broader sense, one should look for a specific scope of the norm based on indeterminate phrases and general clauses. Phrases like: "Special significance for cultural heritage", "state of preservation of the monument" allowing its export abroad, or the warranty that the artefact will not be "destroyed or damaged and will be brought back to the country before the expiry of the permit" are indeterminate phrases, or general clauses, the application of which in practice makes the law more flexible, making it possible to adapt a decision to a specific situation in the most equitable way. In other words, they make it possible to use non-legal assessments and rules [Adamiak and Borkowski 2004, 71-72; Sienkiewicz 2011b, 16-38]. Therefore, they enable the fullest achievement of the objectives of the procedure.

It should be noted directly that an assessment made on the basis of statutory premises is not an easy task. While the special significance for cultural heritage or the state of preservation of a monument enabling its movement can be determined by visual inspection, participation of experts in the proceedings or through the report of an authorized expert, what method can be used to measure the premise of giving a warranty by a natural person or an organizational unit in whose possession the artefact is that it will not be "destroyed or damaged and will be brought back to the country before the expiry of the permit"? The legislator ordered here an assessment of the applicant's attributes, which, in the light of the necessity to provide a statement of reasons for a negative decision, will be a source of much controversy. It should be noted that the issue of examining the warranty of the return of artefacts to Poland will not only apply to natural persons, but also to universally respected public institutions.

11. THE PRINCIPLE OF FORMALIZATION OF THE APPLICATION FOR THE EXPORT OF A HISTORICAL ARTEFACT ABROAD

In order to obtain a permit to export a monument abroad, a formal application must be submitted. Its mandatory elements are specified in the regulation of the Minister of Culture and National Heritage of 18 April 2011

on the export of historical artefacts abroad,[20] the regulations of which "apply to the export of historical artefacts from the territory of the Republic of Poland: 1) to the territory of another member state of the European Union; 2)outside the customs territory of the European Union, if artefacts do not constitute cultural goods within the meaning of Article 1 of Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (Official Journal UE L 39 of 10.02.2009, p. 1)" (para. 1(2)).

Some of its provisions (para. 6(1)(2) and para. 6(2)(3) as well as para. 7 and 8) shall "also apply to applications for the export of monuments constituting cultural goods, within the meaning of Article 1 of Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods, from the territory of the Republic of Poland outside the customs territory of the European Union" (para 1(3) of the regulation of the MKiDN).

Applications: a) for a single permit for the permanent export of a historical artefact abroad, b) for a single permit for the temporary export of a historical artefact abroad, c) for a multiple individual permit for the temporary export of a historical artefact abroad, include: "1) name, surname, place of residence and address of the applicant or the name, seat and address of the organizational unit being the applicant; 2) definition of the artefact with a description enabling its identification; 3) justification" of the application (para. 2(1, 2, 3) of the regulation of the MKiDN; cf. para. 3(1, 2, 6); para. 4(1, 2, 4) of the regulation of the MKiDN).

In addition, the application for a single permit for the temporary export of a historical artefact abroad includes: "indication of the country to which the artefact is to be exported; planned date of importing the monument to the territory of the Republic of Poland; an indication of the period for which the permit is to be issued" (para. 3(3-5) of the regulation of the MKiDN), and the application for a single permit for the temporary export of the monument abroad includes an "indication of the period for which the permit is to be issued" (para. 4(3) of the regulation of the MKiDN).

The fourth type of application – for a multiple individual permit for the temporary export of a historical artefact abroad, includes: "1) name, seat and address of the museum or other cultural institution being the applicant; 2) an excerpt from the register of cultural institutions; 3) an indication of the period for which the license is to be issued; 4) an indication of at least 2 persons authorized to sign the list of exported monuments, attached to the permit; 5) justification of the application" (para. 5 of the regulation of the MKiDN).

Attachments to the applications documenting the artefact have also been formalized. They should be accompanied by "2 colour photographs

[20] Journal of Laws No. 89, item 210 [hereinafter: the regulation of the MKiDN].

of the artefact, sized no less than 9 x 13 cm" (para. 6(1)(1) of the regulation of the MKiDN).

In addition, one must attach either: "a declaration of the owner of the artefact that the registered monument is his property, it is legally unencumbered, and is not subject to seizure under the provisions on judicial enforcement or administrative enforcement" (para. 6(1)(2) of the regulation of the MKiDN; cf. para. 1(3) of the regulation of the MKiDN), or "if the applicant is not the owner of the artefact, the applications [...] shall also include the consent of the owner of the monument to its export abroad by the applicant" (para. 6(2) of the regulation of the MKiDN; cf. para. 1(3) of the regulation of the MKiDN). In the event that there are several co-owners of a historic artefact, the consent of all co-owners should be attached, because the export of the item abroad is, in the author's opinion, an activity that exceeds the scope of ordinary management of the item within the meaning of Article 199 CC,[21] it is also associated with the risk of loss, destruction, or damage, as well as the risk of reduced legal protection in a foreign territory. In the event of lack of authorisation of all the co-owners, the public administration body should not issue a permit for the export of the artefact abroad. This particularly concerns the case of the single permit for the permanent export of an artefact abroad. Such an application should "also be accompanied by the applicant's declaration that the artefact is not listed in the register of monuments, is not part of public collections, which are the property of the State Treasury, local government units and other organizational units included in the public finance sector, and that it is not in a museum inventory or the national library resource" (para. 6(3) of the regulation of the MKiDN; cf. para. 1(3) of the regulation of the MKiDN).

In the context of considerations on the ownership of an artefact, attention should be paid to the group of applicants defined in the above-cited Act on the protection and guardianship of monuments. The group has been defined very broadly. The proceedings are initiated at the request of the holder – a natural person or an organizational unit (Article 52(2), Article 53(1), Article 54(1) APM), and in the case of the multiple general permit for the temporary export of historical artefacts abroad – "at the request of a museum or other cultural institution which, in connection with its activities, intends to repeatedly export its collections abroad, in whole or in part, for exhibition purposes" (Article 55(1) APM). It is obvious that in the case of possession, i.e. the factual status, and not the legal status, there may

[21] "To dispose of joint property and to perform other activities that exceed the scope of ordinary management, the consent of all joint owners is required. In the absence thereof, co-owners whose shares amount to at least half, may request a decision by a court that will rule taking into account the purpose of the intended activity and the interests of all co-owners."

be differences of opinion about the export of the artefact abroad between the owner and the holder. In order to avoid controversy in this context, the above-mentioned regulation stipulates the need to attach the owner's consent to the application. While this is a solution that deserves approval as it eliminates the risk of acting against the owner's will, its quality is questionable in the light of the rules of legislative technique, as the legal basis of the regulation, as defined in Article 61 APM[22] does not designate delegations enabling the addition of such limitation in the regulation. The author of this work has doubts as to whether the limits of the enabling delegation were not exceeded in this case. This does not affect the fact that the provisions of the applicable regulation are mandatory. However, in the event of introducing amendments to the Act on the protection and guardianship of monuments, it is worth to consider supplementing the delegation to issue the regulation with appropriate clauses. Currently, it only specifies the issuance of regulations as to the procedure and permit templates.

12. THE PRINCIPLE OF DIRECT CONTACT WITH THE ARTEFACT OF THE MONUMENT PROTECTION ADMINISTRATION BODY WHICH ISSUES A PERMIT FOR THE TEMPORARY EXPORT OF THE ARTEFACT ABROAD

In the procedure for issuing a permit, an mandatory inspection must be carried out. It is a procedural step indicated in Article 85 CAP. This procedure ensures direct contact of a given office employee with the artefact and the most accurate assessment of the object. The administration authority may not refrain from carrying out the inspection in a situation where the law makes it mandatory.[23] Pursuant to para. 7(1) of the regulation of the MKiDN, the provincial conservator of monuments or the Director of the National Library of Poland, prior to considering the application for the issuance of: a single permit for the permanent export of an artefact abroad, a single permit for the temporary export of an artefact abroad, or a multiple individual permit for the temporary export of an artefact abroad, *shall inspect the monument*. In these cases, it is an obligatory procedure. Pursuant to para. 8(1) and (2) of the above-mentioned regulation "in the case of an application for a single permit for the permanent export of a historical artefact abroad, after the inspection of the monument the provincial

[22] "The minister competent for culture and protection of national heritage shall determine, by way of a regulation, the procedure for submitting applications and issuing single permits for the permanent export of a historical artefact abroad, single and multiple permits for the temporary export of an artefact abroad, as well as templates of these permits, in order to standardize these documents and also ensure the protection of these artefacts."

[23] See ibid.

conservator of monuments sends the application together with the artefact inspection report to the minister competent for culture and protection of national heritage." This protocol "includes a description of the artefact and an indication of its author or manufacturer, the time of its creation and the value of the item given as amount." The obligation to perform the inspection has not been stipulated in the case of submitting the application for a multiple general permit for the temporary export of artefacts abroad. The applicant in this case is a museum or other cultural institution. However, pursuant to Article 85(1) CAP "A public administration body may, if necessary, carry out an inspection."

As an optional step, the appointment of experts in the proceedings is allowed. Pursuant to para. 7(2) of the above-mentioned regulation, the "inspection may be carried out with the participation of appropriate experts and with the use of specialized equipment." According to Article 84(1) CAP, "when specialised knowledge is required in the matter, a public administration body may request an expert or experts to issue an opinion."

"The inspection is carried out in the place where the historical artefact is located", or at the seat of the provincial conservator of monuments or the Director of the National Library, respectively (para. 7(3) of the regulation of the MKiDN; cf. para. 1(3) of the regulation of the MKiDN). In the event it is necessary to temporarily detain the artefact at the seat of this authority in order to carry out the inspection, the "applicant shall be issued a receipt." para. 7(4) of the regulation of the MKiDN; cf. para. 1(3) of the regulation of the MKiDN).

13. THE PRINCIPLE OF RECORDING THE FEATURES IDENTIFYING A HISTORICAL ARTEFACT IN THE FILES OF THE PROCEDURE

In the event of a positive review of the application for: a single permit for the temporary export of a historical artefact abroad, or a multiple individual permit for the temporary export of a historical artefact abroad, these permits are "accompanied by a colour photograph of the artefact with the seal and signature of the authority issuing the permit on the reverse and the information that it is an appendix to the permit", pursuant to para. 11 of the above-cited regulation of the MKiDN. The obligation to attach a photograph to the permit has not been stipulated in the case of submitting the application for a multiple general permit for the temporary export of artefacts abroad.

The permit to export the artefact abroad is an administrative decision. Pursuant to Article 104(1) CAP, "a public administration body shall deal with the matter by issuing a decision, unless the provisions of the code provide

otherwise." An administrative decision is a formalized administrative act that must contain elements specified by law – pursuant to Article 107(1) CAP.

The regulation of the MKiDN on the export of historical artefacts abroad includes appendices specifying the form of the permit[24], which contain additional elements: 1) a single permit for the temporary moving of a historical artefact abroad additionally includes a description of the object, the validity period of the permit and an indication of the country to which the item is exported; 2) a multiple individual permit for the temporary moving of a historical artefact abroad additionally includes a description of the object and the validity period of the permit; 3) a multiple general permit for the temporary moving of historical artefacts abroad additionally includes an indication of the person authorized to sign the list of exported artefacts and the validity period of the permit.

Taking the above into account, it should be noted that the transfer of an artefact across the border within the European Union requires the person transporting the item across the border to have legal awareness as to whether the transported object is a historical artefact. If it is a historical artefact, the person transporting it must be aware as to whether the item being transported is included in the catalogue of items for which a permit to export an artefact abroad is required. The model of operation adopted by the Polish legislator assumes high formalization of permits, their temporary nature and criminal liability specified in the cases provided for in Article 109(1) APM.

14. THE PRINCIPLE OF MAKING THE RETURN OF THE ARTEFACT TO THE TERRITORY OF POLAND PROBABLE

If the applicant obtained: 1) a single permit for the temporary export of a historical artefact abroad, or 2) a multiple individual permit for the temporary export of a historical artefact abroad, or 3) multiple general permit for the temporary export of a historical artefact abroad, it should be noted that the natural person or organizational unit that received the above-mentioned permit, is obliged to bring the exported artefact back to the country within the period of validity of this permit. Artefacts included in public collections, which are the property of the State Treasury, local government units and other organizational units included in the public finance sector, or artefacts in their possession or included in the national library resource,

[24] Appendix No. 1 – a single permit for the permanent moving of a historical artefact abroad; Appendix 2 – a single permit for the temporary moving of a historical artefact abroad; Appendix 3 – a multiple individual permit for the temporary moving of a historical artefact abroad; Annex 4 – a multiple general permit for the temporary moving of historical artefacts abroad.

temporarily exported abroad for exhibition purposes or for the purpose of arranging the interiors of diplomatic missions and consulate offices do not have to be imported into the territory of the Republic of Poland during the period of validity of the permit, in the event of applying for another permit for the temporary export of the artefact abroad. The application is submitted no later than 90 days before the expiry date of the permit. The application is accompanied by a current description of the state of preservation of the historical artefact. Applications submitted after the 90-day deadline shall not be considered, and the applicant is informed about it. The next permit specifies the conditions and method of displaying and storing the artefact as well as the manner of performing an inspection of the state of preservation and use of the artefact, within the period of validity of this permit. In the event of issuing a decision refusing to grant another permit or leaving the application without consideration, the applicant is obliged to bring the exported historical artefact to the territory of the Republic of Poland within 60 days from the date on which the decision became final or from the date the applicant receives information about leaving the application without consideration. (cf. Article 56a APM).

CONCLUSION

By studying the aforementioned principles and permits analysed in this article, one can attempt to decode the theory of legal phenomena in the sphere of state interference in the movement of historical artefacts across the border in the methodological sense of the word "theory" – "thus as a collection of scientific statements systematized in a specific manner" [Ziembiński 1977, 5]. This theory can be decoded in the dimension of administrative law through the analysis of normative statements.[25] "In general, in any stabilized society, certain habits of behaviour in certain situations arise, which over time gives the basis for the formulation of certain patterns of behaviour" [Ziembiński 1977, 70]. Such extralegal habits also occur in the area of public administration activities related to monuments. The Act on the protection and guardianship of monuments should be interpreted taking into account non-legal norms based on knowledge, e.g. expressed in Rouba's conservation theory [Rouba 2008, 102, 107]. Often, non-legal norms of knowledge are reflected in the legal model. Therefore, the analysis of legal norms in the context of norms related to extra-legal knowledge will give a full image of the state's will to protect national heritage, as well as reveal the theory of activities of public administration in this area, which can be called the theory of state interference in the export of historical artefacts abroad.

[25] On statements which can be considered as norms of conduct, see Ziembiński 1977, 23.

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THE INFORMATION SPHERE IN THE AGE OF CYBERTHREATS. DISINFORMATION AND CYBERSECURITY

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Abstract. Disinformation is currently one of the greatest threats in the modern world. This concept is related to the information sphere, which plays one of the most important roles in the state. It can also provide a substrate for the occurrence of cyberthreats and affect the cybersecurity of citizens as well as the state. The purpose of the article is to analyse the information sphere in the era of cyber threats. The article presents the concept of information and public information, the issue of e-information in the era of digital transformation, the relationship between disinformation and cybersecurity, as well as the legal liability for disinformation.

Keywords: information; disinformation; cyberthreat; cybersecurity.

INTRODUCTION

The development of new technologies, especially the Internet, including its ubiquity, also contribute to threats in the sphere of security of the state as well as citizens. The virtual world is increasingly a field for the occurrence of threats called cyberthreats. This forces the science of law to describe this phenomenon and to penalize the actions taken by criminals. One such form of attack is disinformation. Aimed at misleading citizens in order to cause negative phenomena. This concept also refers to information and public information. Information is one of the most important values. Every citizen processes a very large amount of information on a daily basis. The state should provide adequate instruments for the protection of information as well as the possibility of access to private information by unauthorized persons. Access to information has an impact on the processes taking place in the state. It can induce certain behaviors of society, including

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undesirable behaviors. In the case of the information sphere, it can also affect state security.

Communication via the Internet moves some of the social relationships and interpersonal relations into the virtual space. It provides a greater opportunity in terms of the occurrence of cyberattacks, taking control of data, installing malware, attacking data sources, disinformation. This is also influenced by the growing use of social media and online media, which has led to an increase in campaigns that spread deliberately falsified information and misleading information. The purpose of these campaigns is to sow fear and uncertainty. The purpose of the paper is to analyze the information sphere in the age of cyberthreats. The authors in the paper will present the concept of information and public information, the issue of e-information in the era of digital transformation, the relationship of disinformation and cybersecurity, as well as legal liability for disinformation. It is becoming necessary to guarantee the protection of citizens and create legal instruments that provide security guarantees for access to information as well as to counter cyberthreats in the area of its misuse. It should be noted after B. Składanek that freedom of speech is such a key value of the demoliberal state of law that it is necessary to approach cases of its regulation with extreme caution. Justifiable concern for public health cannot constitute a consent to disproportionate repressive and censorship actions that threaten freedom of expression [Składanek 2023, 292].

1. THE CONCEPT OF INFORMATION AND PUBLIC INFORMATION

When considering the concept of the information sphere as well as disinformation, it is first necessary to define the concept of information. As M. Schroender notes, terminological disputes are among the easiest to resolve, conceptual disputes, on the other hand, are among the most difficult. The former occur when it is merely a matter of establishing a convention in naming concepts whose definition, that is, the choice and use of previous defining terms, is not objectionable, and the problem arises only because a given term is sometimes used by different authors in different contexts and meanings [Schroender 2015, 11]. It is the same with the concept of information we can find many definitions of this concept depending on the field or scientific discipline that deals with this concept. In Poland, one of the first authors to give a scientific definition of information was J. Ratajewski. In it, he distinguished between the subject and object sense, resulting in two separate explanations. Information in the subject sense, i.e. understood as a message, is "a mutual relationship between at least two objects (objects, organisms), consisting of a meaning (content) and a physical carrier (form), for the transmission of signals of one object (object, organism) to another

object (object, organism)" [Ratejewski 1973, 8-9]. In subjective terms, i.e., as an activity, information is "a set of specific activities (actions) for producing, processing, storing, searching, making available and receiving messages (contents, meanings) concerning a specific object (subject)" [ibid., 9].

In legal science, the concept of information can be referred to both in Constitutional terms and in terms of the Law on Access to Public Information. However, in each of these scopes it has its own conceptual scope. J. Supernat points out that the public administration has a huge amount of information at its disposal, even holding a monopoly on information in some areas of social life. This makes it possible to use it to influence the environment and carry out public tasks [Supernat 2002, 487]. J. Janowski alludes to defining information through an intuitive approach, which consists in using the term "information" without pointing to any definition or interpretation of it; a systematic approach, according to which the term "information" is used after it has been defined in advance in a certain convention and after it has been adapted to the needs of a particular field or situation; and a descriptive approach, understood as using the term "information", giving its characteristics, properties, etc., but without defining it systematically [Janowski 2011, 218-19]. Public information is the primary source of knowledge about the activities of public administration bodies. It is thanks to the legally guaranteed access to public information that citizens obtain information about all public matters, i.e. those most important to them, public information then becomes the source of all further actions [Świtał 2019, 218-19].

I. Lipowicz distinguishes the following information resources of the administration: "a permanent stock of information concerning a citizen, real estate, infrastructure of a given area; information that is provided by parties (witnesses) in the course of administrative proceedings and that is used by the administration in the decision-making process; information that is gathered by the authority in order to issue a decision, such as expert opinions, inspections or opinions; information concerning decisions already made by the administration, as well as decisions made by other authorities, for example, courts; information concerning normative acts and administrative policy, normative information" [Lipowicz 1993, 17]. M. Jaśkowska, on the other hand, took the position that "the concept of public information cannot [...] be considered exclusively against the background of Article 1 of the Act, without taking into account the content of Article 61 of the Constitution. This is because an applied linguistic interpretation could lead to an overly narrow understanding of the term. This would result in treating as public information any news relating to a public matter, that is, a matter concerning a certain collective. Thus, information relating to individual matters resolved, for example, by an administrative decision, would not

be covered by this term, unless there were public elements in the circle of parties to the proceedings" [Jaśkowska 2002, 26-27].

Referring to the definition of the concept of information on the basis of case law, it should be noted that this concept is also not uniformly defined. The Provincial Administrative Court in Lodz stated that the concept of public information refers to any public matter, including when the information was not produced by public entities, but only refers to them.[1] The Supreme Administrative Court, on the other hand, indicates that public information is information relating to the performance of public tasks, including the management of public property, recorded in a medium in written, audio, visual or audiovisual form, exposing the links between public information and the dynamic activities of the state, as an organizer of social and economic life, while pointing out that in a democratic state of law, the broadest possible catalog of information must be subject to public scrutiny.[2] It is also worth noting that public information will not only be the documents directly edited and technically produced by such an entity, but also those that the obliged entity uses to carry out the tasks entrusted to it by law. It is also irrelevant how they came into the possession of the body and what matter they relate to. What is important, however, is that such documents serve the performance of public tasks by the entity in question and relate directly to it. In other words, such information must relate to the sphere of facts occurring on the part of the entity obliged to provide public information.[3] Thus, public information is any information about public affairs, and in particular about the matters listed in Article 6 of the access to public information concerns the sphere of facts.[4]

2. E-INFORMATION IN THE AGE OF DIGITAL TRANSFORMATION

There is no doubt that every piece of information has a certain cognitive value, at the same time it can be both true and false. Of course, much depends on how the recipient of the information interprets its content, whether he or she understands the context, indicates the main idea of the author. Nowadays, information has become a good of a special kind, and its consumption value can also be attributed to it. Besides, access to information,

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[1] Judgment of the Provincial Administrative Court in Lodz of 21 May 2021, ref. no. II SAB/Łd 66/21, Lex no. 3181265.

[2] Judgment of the Supreme Administrative Court of 16 April 2021, ref. no. III OSK 114/21, Lex no. 3190413.

[3] Judgment of the Supreme Administrative Court of 27 October 2020, ref. no. I OSK 2266/19, Lex no. 3082170.

[4] Judgment of the Provincial Administrative Court in Gliwice of 19 October 2021, ref. no. III SAB/Gl 63/21, Lex no. 3267154.

including public information, has been facilitated by the widespread use of ICT tools. Electronic communication has intensified information processing activities, from its creation to its removal from publicly available websites. Klaudia Skelnik highlights the phenomenon of so-called information overload. She states that: "more and more information is reaching us, we are experiencing it more and more intensely, and we are increasingly becoming objects of manipulation, understood as actions aimed at achieving in us a defined perception of information or a certain behaviour" [Skelnik 2018, 68]. The overproduction of information therefore necessitates certain actions in the context of selecting those that are actually necessary to the addressee (information management), secondly from the scope of establishing reliability, i.e. the source of the information. It is characteristic of the digital transformation that the mass processing and transmission of data takes place in an increasingly automated or programmed form [Janowski 2014, 19]. It is particularly dangerous if disinformation constitutes the action of cybercriminals or cyberterrorists. It should therefore be assumed that when deliberate misleading of the addressee takes place in cyberspace, an effective solution is to adopt a specific strategy of action, i.e. information cybersecurity policy. All the more so as cyberthreats can significantly affect the timeliness, availability, accuracy, completeness, reliability and credibility of information [Szafrański and Szpor 2021, 205]. In addition, they can dramatically change the meaning of a message, facilitate disinformation activities, disrupt or long-term limit the continuity of a given service or even ICT infrastructure.

The information society focuses attention on access to public information. The transmission of information between addressee and recipient takes place on a macro scale, is very dynamic, and involves both public information and personal data (including sensitive data). The primary task of administrators of websites and portals is to analyse potential cyberthreats, strictly defining the principles (standards) of cyberspace protection against cyberattacks. Piotr Gawrysiak rightly points out that "security strategies for web services [...] should be constantly reviewed and updated" [Gawrysiak 2012, 150]. The creation of conditions ensuring uninterrupted access to public information is not possible without the development and implementation of optimal legal regulations and the definition of technical (technological) requirements for the security of ICT networks and systems. It is worth remembering that the right of access to public information, which stems from the Constitution of the Republic of Poland, is a fundamental right of the individual, and that "e-access to public information itself is a fundamental factor promoting the principles of e-participation and e-democracy" [Skoczylas 2020, 5638].

Information cybersecurity policy is one of the components of state security. Given that the Internet is an excellent venue for disinformation and propaganda activities, the role of public administration bodies (primarily part of government administration) is gaining importance. In this case, the state's priority (given the scale and type of cyberthreats) is to create legal mechanisms to ensure effective protection of cyberspace. Following Boguslaw Olszewski, it should be pointed out that cybersecurity of information (protection against disinformation) should be understood through the prism of: availability, integrity and confidentiality of data (CIA triad). At the same time, the author emphasises that "classic cyberattacks focus mainly on the information content, taking as their target both the devices enabling data exchange within the Network and the resources stored on them" [Olszewski 2018, 67]. An important paradox can be observed in the case of access to public information. At the same time, due to the development of new information and communication technologies, a web user can, in principle, use online information, process data, carry out transactions remotely or deal with administrative matters without restrictions. On the other hand, the main problem of the information sphere in the 21st century is cyberthreats. An interesting view in the field of cybersecurity is formulated by Tomasz Hoffmann, who uses the concept of "an attack on the electronic security of processed information." In doing so, the author points out that such an attack should be regarded as a "crime against the confidentiality, integrity and availability of data and information systems" [Hoffmann 2018, 68]. Systems where public information is processed are potential sources of cyberattacks. Given the diversity of cybercriminals' methods, the issue of cybersecurity and cyberthreats should be approached in a legal and IT context. It is also worth addressing what actions website administrators and public entities should take to ensure the security of e-information. In other words, what should be the cybersecurity policy of an entity that handles information online (disinformation protection policy).

3. DISINFORMATION AND CYBERSECURITY

It is a legitimate observation that in the 21st century, access to information is one of the basic conditions for socio-economic development, while at the same time enabling public participation in public life. The availability of a variety of tools, including above all modern information and communication technologies, allows quick and easy access to information. Nevertheless, attention should be paid to the problem of using and processing information, including personal data. Errors may occur in the transmission of information, preventing the correct interpretation of the content. It is also possible that access to information may be temporarily or permanently

restricted, or even used for a specific illegal purpose. An interesting thesis on disinformation is formulated by Krzysztof Kaczmarek, who states that it constitutes a particular type of risk factor in so-called crisis situations. He points out that in this case, disinformation is a type of cyberthreat, and its purpose is to "induce social behaviour that may destabilise the situation in the area of crisis [...] to gain access to information channels used by services whose task is to manage the situation that has arisen" [Kaczmarek 2023, 25]. Indeed, in the context of reducing disinformation activities in cyberspace, the cybersecurity of information and data shared online must be ensured and to the maximum extent.

A key aspect of cybersecurity policy in the area of disinformation, therefore, will be to define the conditions for both the security of the information itself (timeliness, availability, reliability, credibility) and the systems, networks or other technological components or data carriers through which the information is processed. According to the definition in Article 2(4) of the Act on the National Cybersecurity System,[5] cybersecurity means the resilience of information systems to actions that violate the confidentiality, integrity, availability and authenticity of the processed data or related services offered by these systems. Following K. Chałubińska-Jentkiewicz, it is reasonable to point out that disinformation is a common act of aggression in cyberspace, an element of hybrid warfare. Furthermore, the author points out that the increase in disinformation incidents[6] provides grounds to redefine the concept of cybercrime and cybersecurity due to the existing threats in social communication [Chałubińska-Jentkiewicz 2021, 12-16]. Cybercriminals are increasingly using new methods of illegal information exploitation in their operations, such as artificial intelligence. Thus, it is not uncommon for website users to find it difficult to distinguish between true and false information.

Putting crafted information online can have various purposes: financial, propaganda, political, to defraud, or even as a protection system against cyberattack. A. Patkowski mentions so-called "silent response" systems, involving "misleading attackers by providing them with false information resources" [Patkowski 2017, 48]. But does this mean that disinformation should be considered a positive phenomenon? It would seem that such an assessment would be unacceptable, due to the very fact that disinformation negatively affects the credibility and reliability of information transmission, thereby deliberately affecting cognitive abilities and misleading people. It should also be noted that disinformation violates (may violate) the right to freedom and protection of communication both in the real

[5] Act of 5 July 2018, the National Cybersecurity System, Journal of Laws of 2023, item 913.

[6] Article 2(5) of the Act of 5 July 2018, the National Cybersecurity System states that an incident is an event that has or may have an adverse impact on cybersecurity.

world and in the visual world. This is because it constitutes a manifestation of a certain type of hacking attack and may be treated as a crime against information protection [Sakowska-Baryła 2023, 102-103]. With regard to the case at hand, it is worth noting that there are various ways of combating or countering the phenomenon of disinformation (fake news). Some of them can be described as soft actions, such as educational campaigns or defining a catalogue of good practices in terms of e.g. using trusted websites, not disseminating information from an unknown source. The second group are legislative actions in the area of information cybersecurity [Tomaszewska-Michalak 2021, 66-67]. Recently, the importance of cybersecurity policy in the context of protection against disinformation has definitely increased. This interest is mainly due to information concerning the war in Ukraine and the situation of the Ukrainian population. In cyberspace, one can find fake news favouring Russian propaganda, pointing out, among other things, the criminality of Ukrainian refugees, the lack of Russian responsibility for the war in Ukraine or Russia's rights to Ukrainian territory [Wenzel and Stasiuk-Krajewska 2022, 24]. The disinformation campaign was also strongly emphasised by the COVID-19 pandemic. The destructive impact could be seen in the context of the creation and dissemination of false information about: the origin of the virus (production in a laboratory), prevention and treatment methods (wearing masks, disinfection, proposing alternative treatments, denial of vaccination), deliberate restriction of freedoms and human rights. Information denying the existence of the virus also appeared online. Disinformation activities were global, nevertheless the greatest confusion and chaos was caused by those originating in China, Russia and the USA [Śledź 2021, 397-98].

The problem of information security, which is widely discussed, is mainly related to the definition of the sphere of cyberthreats, which nowadays can disrupt access and processing of data in ICT systems. Given the diverse nature of cyberattacks (malware, interception of connection transmissions, illegal processing) [Skoczylas 2023, 104], information cybersecurity policy should define the legal, organisational and socio-economic conditions related to ensuring security on a macro scale. Following A. Monarcha-Matlak, it should also be emphasised that "reflections on the future of access to public information involve considerations not only of an economic or political nature but, above all, of a technical nature" [Monarcha-Matlak 2008, 227]. Firstly, a cybersecurity policy should clearly define how to classify information security incidents. At the same time, it should indicate who and to what extent (e.g., the website administrator) is responsible for taking actions such as: initial assessment of the incident (type, scale and potential consequences of the cyberthreat) and handling the incident (taking follow-up actions when the incident has actually occurred). The issue of strengthening digital

competences among entities that process and use information placed online is also extremely important. The above, it goes without saying, is in line with the main objective of the Cybersecurity Strategy of the Republic of Poland for 2019-2024, namely to increase the level of resilience to cyberthreats and to increase the level of protection of information in the public, military, private sectors and to promote knowledge and good practices enabling citizens to better protect their information.[7]

Interesting solutions were proposed a few years ago in China. The Chinese case remains a tongue-in-cheek one, moreover, due to the enormous technological advancement on the one hand, and the existing information caesura and control of processed e-information on the other. In 2017, the concept of a so-called multi-level network protection system was introduced in the areas of cybersecurity, digital economy and big data. As D. Janus writes, the aim of the regulation was also to "moderate online content in a way that no other country has been willing or able to implement so far" [Janus 2020, 233-34]. Additionally, as the author states "the new legal regime was comprehensive and applied to all available online interactions: from forums to chat rooms to comments." In fact, it can be seen that the Chinese sovereignty of the virtual environment can influence disinformation activities (including propaganda) as part of the creation of a specific narrative in the information society (this was the case, for example, during the COVID-19 pandemic). At the same time, the Chinese pattern provides some guidance as to what should be taken into account when constructing information cybersecurity benchmarks and standards.

Information disruption or manipulation of information processed in ICT systems is a significant information security problem. In addition to a number of tasks related to the classification or handling of the incidents in question, an e-information cybersecurity policy requires two more basic components. The first is related to the implementation of preventive measures, risk analysis, development of standards for protection against disinformation. This aspect is mainly systemic or technological in nature (e.g. network security, ICT infrastructure, software updates, indication of content encryption and coding rules). The second refers to soft competences, i.e. the ability to correctly interpret a text, classify information as true, false or questionable. The above is related to the development of digital competences of users of cyberspace.

[7] Resolution No. 125 of the Council of Ministers of 22 October 2019 on the Cybersecurity Strategy of the Republic of Poland for 2019-2024, "Monitor Polski" of 2019, item 1037.

4. LEGAL RESPONSIBILITY FOR DISINFORMATION

The development of the Internet has, in practice, enabled unfettered access not only to the use of information, but also to its creation and dissemination, bypassing, usually regulated, traditional information providers such as the press, radio and television, whose sphere has been subject to legal regulation [Chałubińska-Jentkiewicz 2021, 14]. Questions of liability for disinformation can be considered both under civil law and criminal law. As M. Niedbała notes in the case of Poland, according to information provided by public institutions, including the Police, as well as the mass media, in some cases the authors of fake news, which additionally caused public concern, may incur criminal liability under Article 224a of the Criminal Code Act of June 6, 1997 [Niedbała 2020, 162-63]. Pursuant to this legal regulation, "whoever, knowing that a threat does not exist, reports an event that endangers the life or health of many people or property of significant size, or creates a situation that is intended to create a belief in the existence of such a threat, thereby triggering an action of a public utility institution or an authority for the protection of security, public order or health with the aim of averting the threat, shall be subject to a penalty of deprivation of liberty for a term of between 6 months and 8 years."[8] D. Brodacki points out that: despite the obvious reference to disinformation activities in this provision, its application may present difficulties. The main issue here is the complexity of this provision and the simultaneous occurrence of several important factors, such as the creation of a belief in the existence of a threat and the impact on the functioning of public institutions. Thus, it does not constitute a protection stricto sensu against disinformation itself, but is only intended to criminalize it in the case of – as can be presumed – its most drastic manifestations [Brodacki 2022].

Referring to the crime of insult, it is worth noting that the crime of insult under Article 216 of the Criminal Code involves such behavior that violates the dignity of the insulted person. The object of protection is intrinsic (subjective) honor. Whether the behavior in question was insulting is determined by the prevailing assessments and moral norms in society, not the subjective belief of the allegedly insulted person.[9] There are two manifestations of a person's personal good, which is honor: external honor (good name) and internal honor (personal dignity). External honor is, in short, the opinion that others have of a person, and internal honor is a person's sense of his own worth; his expectation of respect from others. According to this distinction, violations of honor are differentiated.

[8] Act of 6 June 6 1997, the Criminal Code, Journal of Laws of 2022, item 1138 as amended.

[9] Resolution of the Supreme Court of 29 October 2020, ref. no. II DO 96/20, Lex no. 3077121.

A distinction is made between defamation: violation of external honor, good name, and insult: violation of internal honor, personal dignity. In criminal law, this differentiation is reflected in the stipulation of the crime of defamation (Article 212 of the Criminal Code) and the crime of insult (Article 216 of the Civil Code). Defamation occurs when such conduct or such qualities are attributed to another person as to bring him or her into disrepute in public opinion or to expose him or her to the loss of confidence needed to occupy a certain position or to carry out a certain profession or activity. Due to the fact that defamation harms the opinion of others about a person, undermines their confidence in him, humiliates him in their eyes, there will be no defamation by a statement whose recipient is only that person. In order for defamation to occur, a statement containing content that violates honor must still reach at least one other person. Insult, on the other hand, is a statement that harms a person's dignity, is insulting or ridiculing and cannot be rationalized. Because insult harms a person's sense of self-worth, insult – unlike defamation – can also occur when the recipient of an honor-infringing statement is only that person.[10]

As for the personal damage caused by such actions, the affected persons may first of all take advantage of the possibilities offered to them by the provisions of the Civil Code concerning the protection of personal property (e.g., good name), set forth in Article 23 of the Civil Code.[11] The protection of personal rights is the most common way to combat publications that violate a person's personal rights: "A person's personal property, such as, in particular, health, freedom, honor, freedom of conscience, name or alias, image, secrecy of correspondence, inviolability of the dwelling, scientific, artistic, inventive and rationalization creativity, remain under the protection of civil law regardless of the protection provided by other laws." This provision merely lists examples of personal property that are subject to legal protection. As rightly ruled in the Judgment of the Court of Appeals in Krakow, the concept of personal property is connected with non-material, individual values of the world of feelings, states of mental life. In turn, the protection of personal property is related to providing security against the violation of these values and, as such, is associated with the filing of an appropriate claim. Thus, the object of protection is a human feeling assessed not only from a subjective perspective, but also taking into account the objective criterion. The legislator's stipulation that the direct object of protection is a personal good presupposes that this good corresponds to a specific right, and therefore there are as many personal rights as there are protected goods, and in the event of their infringement, protection should relate in an

[10] Judgment of the Court of Appeals in Warsaw of 6 September 2017, ref. no. VI ACa 636/16, Lex no. 2516046.

[11] Act of 23 April 1964, the Civil Code, Journal of Laws of 2022, item 1360 as amended.

adequate and proportional (appropriate) manner to the obligation to make a specific statement or other behavior of the infringer towards the injured party.[12] The prerequisites for the protection of personal property, which must be met jointly, are the existence of a personal property, the threat or violation of this property and the unlawfulness of the threat or violation. The first two prerequisites must be proven by the plaintiff seeking protection. The defendant, on the other hand, can defend itself by showing that it did not act unlawfully.[13]

It follows from Article 23 of the Civil Code that the protection of personal property can be implemented by various means and can be of both a non-property and property nature. Such protection is granted against unlawful infringement of personal property, understood as behavior contrary to the norms of law or principles of social intercourse, regardless of the guilt or even consciousness of the perpetrator.[14] Personal property under Article 23 of the Civil Code is an absolute right, associated with a specific person, and is linked to the non-material and individual values of the emotional world. The protection of personal property under Article 24 of the Civil Code is related to providing security against violation of these values. The prerequisites for the protection of personal property are their violation or the threat of violation, and the unlawfulness of the infringer's actions. The first of these prerequisites must be demonstrated by the plaintiff as the entity claiming protection (Article 6 of the Civil Code in conjunction with Article 232 of the Code of Civil Procedure), while the burden of demonstrating that a certain behavior cannot be considered unlawful rests on the defendant as the violator of another's good, as a result of the presumption of unlawfulness of the violator's action arising from Article 24 of the Civil Code.[15]

CONCLUSIONS

The new virtual reality poses a number of information security challenges for legislators and users of cyberspace. Today, the concept of disinformation (fake news) refers to data processed in ICT systems. Given the constitutional right of access to information, the diversity of information channels, including the availability of e-information, should be assessed positively.

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[12] Judgment of the Court of Appeals in Cracow of 24 February 2016, ref. no. I ACa 1630/15, Lex no. 2022475.

[13] Judgment of the Court of Appeals in Cracow of 26 October 2017, ref. no. I ACa 589/17, Lex no. 2515464.

[14] Judgment of the Court of Appeals in Bialystok of 7 May 2015, ref. no. I ACa 703/14, Lex no. 1733658.

[15] Judgment of the Court of Appeals in Katowice of 9 November 2020, ref. no. V ACa 269/18, Lex no. 3172497.

Unfortunately, disinformation activities have become a common phenomenon, while it should be emphasised that misleading the addressee of information may have various purposes: economic, propaganda, political. In addition, disinformation can be a component of cybercrime, as well as some kind of protection against cyberattack. The overproduction of information requires its potential recipient to select the information he or she actually needs, which is also up-to-date, complete and reliable. Interpretation of the content of information, while extremely important, is not, however, sufficient in the context of the fight against disinformation.

In this case, the key aspect is to put in place optimal information cybersecurity policy solutions. A well-prepared strategy will strengthen cybersecurity in the areas of timeliness, availability, accuracy, completeness, reliability and credibility of information. Protection against disinformation can only be ensured by procedures that define how to classify information security incidents and the tasks of those responsible for taking action in the initial assessment and handling of the incident. It can be said that "it is about, among other things, ensuring adequate procedures to react quickly to any cybersecurity incident, analysing risks, testing the most adequate procedures, protecting personal data or continuously monitoring and conducting security audits" [Bartczak and Bodych-Biernacka 2021, 44]. Equally important are preventive activities related to risk analysis and the development of standards for protection against disinformation. It is worth emphasising that information cybersecurity policy should be defined both from the subject (security of information and its addressees) and object (security of networks, ICT systems, software devices) point of view. Given that disinformation is always addressed to a specific sender, it is also important to strengthen the ability to interpret it correctly, i.e. to develop the digital competence of users of cyberspace. Information cybersecurity policy is creates the right conditions for protection against disinformation and is beneficial for the development of the information society.

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REGISTER OF BENEFITS – CURRENT STATE AND AUTHORS' PROPOSAL FOR CHANGES

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Abstract. In this article, the Authors assess the institution of the register of benefits kept by the State Electoral Commission (PKW) and the Speakers of the Sejm and the Senate. This assessment can be tremendously helpful in answering the question whether the institution of the register of benefits requires a change in its operating model. The answer to the question posed in this way is significant insofar as, on the one hand, a review of the law regulating the institution of the register of benefits and the practice of its application shows that the implementation of statutory obligations still largely depends on the goodwill of those subject to the statutory obligation, if only due to the lack of a sanctioning norm. On the other hand, the legislation governing the register of benefits has raised long-standing concerns, which are also shared by the authors of this publication. These concerns centre on the problems related to overcoming the challenges in developing this institution, especially in a time when the environment is changing dynamically, but above all to the challenges associated with its day-to-day application.

Keywords: register of benefits; anti-corruption; compliance; ethics; public management.

INTRODUCTION

A common feature of record-keeping, irrespective of its thematic scope, is the collection and storage of information in a specific mode, manner and form that allow for the analysis of the actual state of affairs [Skorupka, Auderska, and Łempicka 1969, 691]. In general, the purpose of the register of benefits is to collect and monitor data on the benefits received by the enumerated persons performing public functions. In Poland, the register of benefits was first introduced in Article 12 of the Act of 21 August 1997 on restrictions on conduct of business activities by persons performing public

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functions.[1] At the same time, pursuant to Article 23(2) of that law a new drafting unit was added in another law, i.e., Article 35a to the Act of 9 May 1996 on the exercise of the mandate of deputy and senator,[2] in a wording almost identical to that of Article 12 of the Anti-Corruption Act.[3]

The institution of a register of benefits has been in place for over 25 years. The authors contend that it is reasonable to assess this institution and determine whether it requires a fundamental shift in the operating model, and if so, why and to what extent. In order to answer the question thus posed, the authors reviewed the norms of national law that regulate the issue of anti-corruption, including the institution of the register of benefits, but also a number of other hard law and soft law norms that are directly or indirectly related to these issues. In turn, the answer to the question posed this way is important for a number of reasons. Firstly, a review of Article 12 of the Anti-Corruption Act and Article 35a of the MandPosłU and the practice of their application shows that the ongoing implementation of the statutory obligations, as well as the heightened need to fulfil them after subsequent parliamentary or local elections, e.g., submitting to the register of benefits information on benefits received by spouses or meeting the 30-day deadline for reporting all changes to the data covered by the register from the date of their occurrence, still largely depends on the goodwill of those subject to the statutory obligation. This is the case, for example, due to the lack of a sanctioning standard for non-compliance with the duties cited above [Galińska-Rączy 2003, 96].[4] Secondly, the concerns identified in this publication in relation to the regulations governing the institution of the register of benefits give rise to questions not only regarding overcoming the challenges of developing this institution, especially in an era of a rapidly changing environment as well as technical and technological progress, but also the challenges of their day-to-day application [Szewc 2016, 46-54]. Thirdly, in 2023 the Anti-Corruption Act received its first substantive amendment since the introduction of the register of benefits into the national legal order (Article 12(9)), which, albeit legitimate, was frag-

[1] Journal of Laws of 2023, item 1090 [hereinafter: Anti-Corruption Act].

[2] Journal of Laws of 2022, item 1339 [hereinafter: MandPosłU].

[3] A comparison of both acts shows that the only difference actually lies in the appointment of a different register keeper, i.e. in the Anti-Corruption Act, the register keeper is the National Electoral Commission, and in the case of the Act on the exercise of the mandate of a Member of Parliament and Senator, the keeper is the Speaker of the Sejm or Senate, respectively.

[4] The literature emphasizes that the provision of Article 12(6) of the Anti-Corruption Act and Article 35a of the Act on the exercise of the mandate of a Member of Parliament and Senator, which reads "all changes to the data included in the register should be reported no later than 30 days from the date of their occurrence" – indicates the legislator's will to continuously update the data contained in the register of benefits.

mentary.[5] It is difficult to surmise why the legislature refrained from making more extensive changes to the institution of the register of benefits. Consequently, this publication is of a postulative character, which boils down to highlighting the need to make the institution of the register of benefits more efficient.

1. THE ESSENTIAL IDEA BEHIND CREATING A REGISTER OF BENEFITS

While the wording of the anti-corruption law suggests that its purpose is to restrict the conduct of business activities by officials occupying leading positions as defined by the provisions on the remuneration of persons in managerial positions, it can be assumed that the overriding *ratio legis* of its enactment is to prevent corruption. In the opinion of the Constitutional Court, the law is intended to curb corruption and abuse of public positions for personal and private gain,[6] as well as to prevent public figures from engaging in situations that may not only call into question their personal impartiality or integrity, but also undermine the authority of the constitutional bodies of the state and weaken the confidence of voters and public opinion in their proper functioning.[7]

The situation is similar in the case of Article 12(1) of the Anti-Corruption Act, which formed the basis for establishing the register of benefits. It is clear from the literal wording of this provision that the purpose of setting up a register of benefits is to disclose the benefits received by the enumerated entities or their spouses. According to A. Wierzbica, the register of benefits is an indication of openness and transparency of the financial benefits received by persons performing public functions,[8] while according to A. Rzetecka-Gil, the purpose of the register is to monitor the benefits received by persons performing public functions and their material status [Rzetecka-Gil 2021]. P.J. Suwaj notes in turn that the monitoring of the material situation of politicians and officials is the norm in European countries [Suwaj 2009], whereas M. Kozłowska noted that the register of benefits can become an effective and efficient tool to counteract corruption [Kozłowska 2021, 31-43].

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[5] The provision of Article 12(9) amended by Article 3 of the Act of 26 January 2023 amending the Act – Electoral Code and certain other acts, Journal of Laws item 497.

[6] Judgment of the Constitutional Tribunal of 13 July 2004, ref. no. K 20/2003, Lex no. 367590 (OTK-A 2004, No. 7, item 63).

[7] Resolution of the Constitutional Tribunal of 13 April 1994, ref. no. W 2/94, OTK 1994, No. 1, item 21.

[8] See commentary on Article 12, thesis 1 [Wierzbica 2017].

The ideas behind the cited views are indisputable. However, the Authors believe that there is reason to clarify some points. First of all, it should be noted that the offence of active and passive corruption are so-called consensual offences, i.e., victimless crimes, the essence of which consists in concealing the fact and circumstances surrounding the commission of the criminal act by both parties. Moreover, in this type of crime, the form of the unlawful gain and ways of legalising it are also subject to a complex concealment mechanism. The data in the register of benefits is complementary to the data obtained via another anti-corruption tool, namely the financial disclosure statement. The above toolkit makes it possible to monitor changes in the material status of public office holders.

A register of benefits can facilitate the identification of potential conflict of interest, i.e., a negative impact on the impartial and selfless performance of official duties. In addition, the universal availability of data in the register of benefits enhances the transparency of activities of public authorities, allowing the public to exercise social control over the power entrusted to public officials, which includes assessing whether their decisions could have been motivated by benefits for their own, private gain, and whether the actions taken constitute the crime of corruption. This is significant because heightened public perception and raised awareness of corruption reduce tolerance for pathological conduct and forces a response from public authorities, which, in turn, may boost public confidence in these authorities and their credibility. A register of benefits can also be a valuable tool for law enforcement and the judiciary. On the one hand, it discourages corrupt behaviour and makes it possible to identify and exclude circumstances conducive to it (i.e., preventing its occurrence) and, on the other hand, it facilitates the fight against corrupt behaviour by establishing its occurrence and surrounding circumstances, subsequently leading to detection of the perpetrators and holding them accountable.

2. ASSESSMENT OF THE LEGAL STATUS OF THE REGISTER OF BENEFITS AND THE PRACTICE OF ITS APPLICATION

At the outset, it is reasonable to clarify the relationship between the provisions of Article 12 of the Anti-Corruption Act along with Article 35a

of the MandPosłU[9] and the provision of Article 228 of the Act of 6 June 1997 – the Criminal Code.[10]

The two editing units mentioned above, i.e., Article 12 of the Anti-Corruption Act and Article 35a of the MandPosłU, on the basis of which the register of benefits was created, constitute a *lex specialis* in relation to Article 228 of the CC. This is because in Article 228 of the CC in conjunction with Article 115(4) of the CC, it is forbidden for a public office holder to accept any benefit in connection with the performance of this function,[11] which also applies to their spouses, while the wording of Article 12 of the Anti-Corruption Act and Article 35a of the MandPosłU allows to infer that the register of benefits "shall disclose the benefits received" by persons holding public office and their spouses.[12] This means that the subject-matter scope of the Anti-Corruption Act and the MandPosłU excludes the punishability of persons performing public functions for accepting benefits in connection with performing a public function. A review of national law reveals that two other norms of generally applicable law present a similar circumstance,

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9 Pursuant to Article 12(2) in connection with Article 12(7) of the Anti-Corruption Act, the register of benefits discloses benefits obtained by: members of the Council of Ministers, secretaries and undersecretaries of state in ministries and the Chancellery of the Prime Minister, heads of central offices, voivodes, deputy voivodes, members of voivodeship boards, voivodeship secretaries, voivodeship treasurers, members of poviat boards, district secretaries, district treasurers, commune heads (mayors, city presidents), deputy commune mayors, commune secretaries, commune treasurers, members of the management board of the metropolitan association, secretary of the metropolitan association, treasurer of the metropolitan association – as well as their spouses. Application to the wording of Article 35a of the Act on the exercise of the mandate of a deputy and senator, the register of benefits discloses the benefits accepted by deputies and senators and their spouses.

10 Pursuant to Article 228(1) of the Criminal Code, whoever, in connection with the performance of a public function, accepts a material or personal benefit or a promise thereof, shall be subject to the penalty of imprisonment from 6 months to 8 years. Journal of Laws of 2022, item 1138 [hereinafter: CC].

11 Pursuant to Article 15(19) of the CC, a person performing a public function is a public official, a member of a local government body, a person employed in an organizational unit that has public funds at its disposal, unless the person performs only service activities, as well as another person whose rights and obligations in the field of public activity are defined or recognized. by statute or an international agreement binding on the Republic of Poland.

12 Pursuant to Article 12(7) of the Anti-Corruption Act, the obligation to report information on the acceptance of benefits to the Register covers members of the Council of Ministers, secretaries and undersecretaries of state in ministries and the Chancellery of the Prime Minister, heads of central offices, voivodes, deputy voivodes, members of voivodeship boards, voivodeship secretaries, voivodeship treasurers, members of poviat boards, district secretaries, district treasurers, commune heads (mayors, city presidents), deputy commune mayors, commune secretaries, commune treasurers, board members of the metropolitan association, secretary of the metropolitan association and treasurer of the metropolitan association. In turn, pursuant to Article 35a(2) MandPosłU, the register discloses benefits obtained by deputies, senators or their spouses.

namely Article 58(3) of the Act of 6 September 2001 – the Pharmaceutical Law[13] and para. 5 of the Regulation of the Minister of Foreign Affairs of 22 July 2002 on the publication of scientific and journalistic works and the dissemination of news in the mass media, as well as the acceptance of gifts and other benefits of a similar nature by members of the foreign service.[14]

Under Article 58(3) of the Pharmaceutical Law, benefits may be received by persons authorised to issue prescriptions and by persons trading in medicinal products advertising a medicinal product, regardless of the extent of the ownership structure of the entity employing those persons,[15] where the giving or receiving, including by persons performing public functions, concerns items with a material value not exceeding the amount of PLN 100, related to the medical or pharmaceutical practice, bearing a sign advertising a given company or medicinal product.[16] Meanwhile, on the basis of Section 5 of the Regulation of the Ministry of Foreign Affairs on the acceptance of gifts, a member of the foreign service may, in connection with the performance of official duties, accept a gift or a benefit of a similar nature with a value not higher than the equivalent of EUR 100 if: 1) for reasons of custom or diplomatic etiquette, declining a gift or other service of a similar nature would not be advisable, 2) the giving of such a gift or benefit is of a common and commemorative nature, in particular in connection with a public or religious holiday.[17]

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[13] Journal of Laws of 2022, item 2301.

[14] Journal of Laws of 2002, No. 136, item 1150 [hereinafter: Regulation of the Ministry of Foreign Affairs on the acceptance of gifts].

[15] Pursuant to Article 2(14) of the Act of 12 May 2011 on the reimbursement of medicines, foodstuffs for particular nutritional uses and medical devices, Journal of Laws of 2022, item 463, the person authorized to issue prescriptions for reimbursed medicines is a person with the right to practice a medical profession who, pursuant to the provisions relating to the practice of a given medical profession, is authorized to issue prescriptions in accordance with the Act and the Act of 6 September 2001, the Pharmaceutical law and orders for the supply of medical devices referred to in Article 38.

[16] The provision of Article 58(3) amended by Article 1(63) of the Act of 30 March 2007 amending the Pharmaceutical Law Act and amending certain other acts, Journal of Laws No. 75, item 492, amending the Pharmaceutical Law Act as of 1 May 2007. According to the original wording, Article 58(3) of the Pharmaceutical Law Act stated that the provision of Section 1 and 2 does not apply to giving or receiving items of negligible material value bearing a sign advertising a given company.

[17] Pursuant to para. 1(2) of the Regulation of the Ministry of Foreign Affairs on the acceptance of gifts, gifts and other benefits of a similar nature may only be accepted by members of the foreign service, which are: 1) members of the civil service corps employed in the ministry supporting the minister responsible for foreign affairs, 2) persons employed in the foreign service who are not members of the civil service corps, 3) plenipotentiary representatives of the Republic of Poland in another country or at an international organization, 4) persons performing tasks in the field of economic diplomacy.

The four legal regulations cited so far, defined in Article 12 of the Anti-Corruption Act, Article 35a of the MandPosłU, Article 58(3) of the Pharmaceutical Law and para. 5 of the Regulation of the Ministry of Foreign Affairs on the acceptance of gifts, all constitute a *lex specialis* with respect to Article 228 of the CC. Therefore, benefits may be accepted on their basis and, consequently, they may also determine the need to record them in the register of benefits.[18] However, the situation in the rest of the public sector is not as clear-cut as in the cases cited above. On the one hand, there is an opinion that the provisions of Article 228 of the CC rules out the possibility of accepting benefits in the case of all other public authorities, since the acceptance of small tokens of gratitude constitutes a criminal act and,[19] on the other hand, that the acceptance of small benefits by persons performing public functions under certain conditions may not be an unlawful act under Article 228 of the CC as it does not infringe the protected legal interest by way of an offence under this Article; although it meets the features of unlawfulness and punishability, it lacks culpability or that the unlawfulness of the act is nullified by the non-statutory justification by custom [Iwański 2016, 574-88; Idem 2009, 193-224; Kubiak 2015, 82-110].[20] The Authors believe that conducting a holistic argument as to which interpretation is correct goes beyond the scope of this paper. The view that accepting small tokens of gratitude constitutes a criminal offence in relation to international custom, diplomatic protocol or cooperation with other offices serving public authorities appears to be untenable, as a result of which the intervention of the legislator is necessary, as will be discussed later in this article.

Nevertheless, it should be noted that the custom of accepting and giving benefits, souvenirs and gifts at official state and diplomatic meetings is an integral part of official etiquette and diplomatic protocol, and is an inseparable part of the official duties performed by persons holding public office [Nichols 2018, 167-78; Kissinger 2014, 52]. Therefore, it should come as no surprise that internal acts, which establish a foundation for accepting benefits and documenting them in internal registers of benefits are included in the list of binding ministerial legislation.[21] For example, in accordance

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[18] In the private sector, the situation seems to be simple. Although there is no legal basis in the strict sense for creating a register of benefits, there is a statutory provision, i.e. Article 38 of the Act of 23 April 1964, the Civil Code (Journal of Laws of 2023, item 1610), according to which a legal person operates through its bodies in the manner provided for in the Act and in the statute based on it, i.e. an entity private sector may independently decide to create a register of benefits under the internal legal regime.

[19] Anti-corruption guidelines for public officials, Central Anti-Corruption Bureau, Warszawa 2015, p. 14-15.

[20] Judgment of the Supreme Court of 29 March 1938, ref. no. I K 2159/37, OSN(K) 1939, No. 2, item 31.

[21] See Order No. 8 of the Minister of Sport and Tourism of 2 August 2023 on anti-corruption

with Article 19(1) of Ordinance No. 17 of 27 June 2023 of the Minister of Digital Affairs on the anti-corruption policy and prevention of conflict of interest in the Ministry of Digital Affairs,[22] a person employed in this Ministry due to the performance of their official duties may not accept any benefit, unless this is justified by special circumstances related to international custom, diplomatic protocol or cooperation with other offices serving public authorities.

Another important issue that needs to be discussed is the definition of the concept of benefit. Namely, pursuant to Article 12(3) and (4) of the Anti-Corruption Act and Article 35a(3) and (4) of the MandPosłU, there are six categories of events that may be regarded as a benefit for public office holders or their spouses, and these benefits are subject to the obligation of being disclosed in the register. The following information must be submitted: 1) all salaried positions and occupations performed both in public administration and in private institutions as well as self-employed professional work, 2) the existence of material support for public activities carried out by the notifier, 3) a donation received from domestic or foreign entities, if its value exceeds 50% of the lowest employee remuneration for work in force in December of the preceding year, as determined by the Minister of Labour and Social Policy on the basis of the Labour Code,[23] 4) domestic or foreign trips not related to the performed public function, if their cost has not been covered by the notifier or their spouse or their employing institutions or political parties, associations or foundations of which they are members, 5) other benefits obtained, with values greater than those indicated in item 3, not related to positions held or activities performed or professional work referred to in item 1, 6) involvement in foundation entities,

policy in the Ministry of Sport and Tourism, Journal of Laws MSiT of 2023, item 11; Order No. 1 of the Minister of Development and Technology of 30 December 2022 on anti-corruption policy and counteracting financial fraud in the Ministry of Development and Technology, Journal of Laws Ministry of Energy and Technology of 2013, item 1.

[22] Official Journal of the Ministry of Digital Affairs of 2023, item 18 [hereinafter: anti-corruption policy in the Ministry of Digital Affairs].

[23] To determine the amount of a donation received from domestic or foreign entities, if its value exceeds 50% of the lowest remuneration for employees' work, Article 25 of the Act of 10 October 2002 on the minimum remuneration for work (Journal of Laws of 2020, item 2207), according to which whenever the law mentions the lowest remuneration for the work of employees by reference to separate provisions or to the Labor Code or by designating the Minister of Labor and Social Policy, the Minister of Labor and Social Policy or the minister responsible for labor as obliged to determine such remuneration on the basis of separate provisions or the Labor Code, this means the amount of PLN 760. Therefore, in accordance with Article 12(3)(3) and (5) of the Anti-Corruption Act and Article 35a(3)(3) and (5) of the Mandate of Parliament, the limit value of the benefit constituting 50% of the amount of PLN 760 is PLN 380.

commercial law companies or cooperatives, even if no monetary benefits are collected on this account.

As can be noted, we are not dealing here with a classic definition of the term "benefit", but rather a contextual definition of events that may be identified as benefits, including remuneration for work, a donation of more than PLN 380, any benefit above PLN 380 not related to the position held or activities performed or professional work, costs of domestic and foreign trips, financial and non-financial benefit from performing certain functions, and finally, any form of material support for the public activity of a person holding a public function, which may take the form of benefit in kind. Within the catalogue of the aforementioned identified benefits, we can discern property and personal benefits. What is interesting, from the wording of Article 12(3) and (4) of the Anti-Corruption Act and Article 35a(3) and (4) of the MandPosłU, only the act of accepting a benefit can be distinguished, so these provisions do not regulate the giving of benefits by persons performing public functions.

With regard to the practice of using the register of benefits established under Article 12 of the Anti-Corruption Act and Article 35a of the MandPosłU, it should be noted that after each successive parliamentary and local government elections in Poland, a number of publications appear in the press on verified cases of non-compliance with statutory obligations by new members of the government, parliamentarians, and local government officials [Nieśpiał 2008; Skory 2014; Ferfecki 2014; Krześnicki 2015; Horbaczewski 2023]. A likely reason for this is the lack of sanctions for non-compliance with statutory obligations. Importantly, in the case of another statutory obligation to counteract corruption, i.e., submitting a financial disclosure statement, a criminal sanction is provided for and this type of problem virtually does not exist. The second explanation could be the problematic hierarchical arrangement of the entities in charge of carrying out statutory duties, i.e., under Article 12 of the Anti-Corruption Act and Article 35a of the MandPosłU there are currently three entities responsible for keeping the register of benefits, namely the State Electoral Commission and the Speaker of the Sejm and Senate. The third reason are incomplete and vague provisions of law, which, due to the declaratory nature of the register of benefits, may lead to anxiety related to voluntary disclosure of data that could be detrimental to the image of the person holding a public function. Finally, the last reason may be a pragmatic reluctance to yet another bureaucratic requirement, if only with regard to the periodic filing of the financial disclosure statement.

3. REGISTER OF BENEFITS – PROBLEM AREAS AND THE AUTHORS' PROPOSALS FOR CHANGES

Following a review of Article 12 of the Anti-Corruption Act and Article 35a of the MandPosłU, this Section identifies problem areas mentioned below that require the intervention of the legislator or should be subject to a substantive assessment: 1) regulating a legal standard in the national legal order that would distinguish between a gift and an unlawful financial or personal gain, 2) introducing a definition of the concept of "material support" and regulating the minimum value of material support for public activities, 3) revoking the possibility for public office holders to accept donations towards "material support", 4) regulating the manner of handling the accepted benefits by public office holders, 5) regulating the procedure for donations, other obtained benefits and material support below the threshold of PLN 380, 6) regulating the manner of proceeding in relation to donations, other benefits, and material support obtained, in order to determine their monetary value, or if such value cannot be determined, 7) indicating the entity whose tasks would include checking the accuracy and veracity of information submitted to the register of benefits, including analysing the data contained therein, 8) regulating the precise deadline for submitting information to the register of benefits and making changes thereto, 9) regulating the obligation to submit information in electronic form, 10) prohibiting persons performing public functions – during their holding of office or their employment and for a period of 3 years thereafter – from accepting any financial benefit, whether free of charge or for a fee in an amount lower than its actual value, from an entity or its subsidiary, if, by taking part in a decision on individual matters concerning from said entity or its subsidiary, they had a direct impact on the contents of the decision in question, 11) imposing sanctions for misrepresentation or concealment of the truth in statements submitted to the register of benefits.

The authors' proposals for changes to the abovementioned problem areas are set out below. First, it is appropriate to refer to the GRECO report, which points out that accepting a gift and accepting a bribe are two different things, and that the advantages of developing gift rules consist in resolving situations that do not involve criminal intent and/or situations that have not yet turned into bribery.[24] It added that Poland clearly needs to establish a solid set of rules on gifts. In the Authors' opinion, a discussion should be held on expanding the Act of 9 June 2006 on the Central

[24] Evaluation Report accepted by GRECO on the 81st Plenary Meeting (Strasbourg, 3-7 December 2018), Preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies, Poland, Fifth Evaluation Round, 7 December 2018, p. 24.

Anti-Corruption Bureau (CBA),[25] with a legal norm, which constituted a *lex specialis* in relation to Article 228 of the CC and which would give other persons holding public functions in public authorities and state or local government organisational units the right to accept gifts or souvenirs, provided that similar prerequisites are met as in the case of the Regulation of the Ministry of Foreign Affairs on the acceptance of gifts and the anti-corruption policy of the Ministry of Digital Affairs. To be more precise, the Authors believe that the acceptance of a gift or souvenir could take place in the case of a benefit of a material value not exceeding the amount of PLN 100, especially in the form of stationery and educational materials received together with training materials, or other items commonly provided in the form of advertising and promotion, as well as in connection with the performance of official duties that involve representing the employer, while the acceptance of the benefit is related to the interest of the public service and official tradition. In addition, the provision could enumerate the gifts or souvenirs that are allowed, prohibited and conditionally allowed.

Subsequently, another proposed change is to define "material support" as aiding in the acquisition of physically existing assets ownership of which is passed to the holder of a public function, that are placed in their possession or are controlled directly or indirectly, as well as benefits derived from these assets. The definition would also include the transfer, modification or use of these benefits, as well as the carrying out of any operation involving these assets in any way that may make it possible to derive benefit from them.

In addition, the authors propose to introduce a minimum threshold corresponding to the value of the donation referred to in Article 12(3)(3) of the Anti-Corruption Act and Article 35a(3)(3) of the MandPosłU. This is supported by the fact that the concept of material support may in a sense be synonymous with the concept of donation, which means that in practice material support may take the form of a monetary donation and *vice versa*. Therefore, the repeal of the possibility of accepting donations by persons performing public functions and leaving only material support should be considered. This is justified insofar as the definition of donation must be interpreted on the basis of Article 888 of the Act of 23 April 1964, the Civil Code,[26] and there would be nothing unusual about this if it were not for the wording of Article 898(1), according to which, a donor may cancel a donation, even one that has already been made, if the recipient has been grossly ungrateful to the donor. A review of the doctrine and judicial practice shows that the donor's right to revoke the donation due to the gross

[25] Journal of Laws of 2024, item 184 [hereinafter: Act on the CBA].
[26] Journal of Laws of 2023, item 1610.

ingratitude of the recipient constitutes a sanction for violating the ethical duty of gratitude (or at the very least, the prohibition of ingratitude), which is a private penalty that falls within the purview of the donor who was the target of the reprehensible behaviour of the recipient [Sylwestrzak 2023]. The introduction of a definition of "material support", "souvenir" or "gift" would, on the one hand, rule out the potential dependence in the case of accepting a donation, as it would be impossible to identify the aforementioned concepts with a donation within the meaning of Article 888 of the Civil Code and, on the other hand, would fulfil the aforementioned GRECO's recommendation to Poland to establish a solid set of rules on gifts or souvenirs and material support to public office holders and thus set such gifts or souvenirs and material support apart from bribery and donation under Article 888 of the Civil Code.

In terms of regulating the manner of dealing with the accepted benefits by persons performing public functions, it is reasonable to answer the question: who is the owner of the accepted benefit, and, subsequently, who can dispose of it? The answer to the above question does not pose any difficulties, because the subject of considerations in this publication is a benefit that has been accepted in connection with the performance of a public function. Thus, any benefit that is accepted in connection with the performance of official duties does not belong to the recipient, but to the body in whose name and on whose behalf the recipient is acting. Several arguments support this interpretation, which are presented below using the example of a member of the foreign service. Firstly, a member of the foreign service may accept a benefit in connection with the performance of their official duties, which involve representing the Republic of Poland on the international arena, and the acceptance of the benefit is related to the interests of the foreign service and traditions in diplomacy.

Secondly, a member of the foreign service may accept a benefit only as part of their employment relationship, as the individual member's scope of duties are determined by the employer, who also consents to the acceptance and giving of benefits. In this case, the consent is referred to in para. 5(1) of the Regulation of the Ministry of Foreign Affairs on the acceptance of gifts.[27] What is interesting, in the previous version of the regulation in question, the provision of Article 5(4) and (5), according to which, an ac-

[27] Provision of para. 5(1) of the Regulation of the Ministry of Foreign Affairs on the acceptance of gifts states that a member of the foreign service in connection with the performance of official duties may accept a gift or other benefit of a similar nature with an equivalent value not exceeding EUR 100, if: 1) due to customs or diplomatic courtesy, it is not advisable to refuse to accept a gift or other benefit of a similar nature; 2) the provision of such a gift or benefit is of a general and occasional nature, in particular in connection with a public or religious holiday.

cepted gift with a value exceeding the amount of EUR 100 was the property of the office serving the minister in charge of foreign affairs, and with regard to the management of assets, it was assumed that the provisions of the Regulation of the Council of Ministers of 21 October 2019 on the detailed management of movable tangible assets of the State Treasury[28] can be applied to accepted benefits with a value exceeding the amount of EUR 100.[29] In the opinion of the Authors, the repeal of Article 5(4) and (5) of the aforementioned regulation did not affect the legal position in principle, or if it did, it was in such a way that previously, once benefits with a value of less than EUR 100 were accepted, they became the property of members of the foreign service, who were not subject to material liability under the general rules. Under the current state of the law, all accepted benefits are the property of the office of the minister competent for foreign affairs.

Another noteworthy solution is one adopted in the anti-corruption policy of the Ministry of Digital Affairs. Pursuant to Article 19(4) of the aforementioned policy, an employee of the Ministry is permitted to retain benefits in the form of stationery and educational materials received together with training materials, typically provided as a means of advertising and promotion, which constitute personal items received in connection with a participation in official business meetings with representatives of other entities, where returning them is not possible, would be tactless or would entail significant costs. Thus, through the adoption of the solution, the Minister of Digital Affairs not only agreed to the acceptance of benefits by his subordinate employees, but also clarified which benefits arising from office become their property.

Given the above, the question arises about handling benefits accepted with the consent of the employer, but without that employer's consent for the subordinate employee to take over and control that benefit? The employer has the following options: (1) consent to the acceptance of the benefit or consent to the acceptance of the benefit under certain conditions (e.g., specifying its value or form) and then entrust it to the employee with or without an obligation to settle it or account for the benefit (e.g., in the form of a prize in kind); (2) not consent to the acceptance of the benefit by the employee; (3) consent to the acceptance of the benefit or consent to the acceptance of the benefit under certain conditions (e.g. specifying its value or form) but not entrust it to the employee.

It stands to reason to consider regulating the manner of proceeding in relation to donations, other benefits received and material support, below

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[28] Journal of Laws of 2023, item 2303.

[29] Regulation of the Council of Ministers of 21 October 2019 on the detailed method of managing tangible movable assets of the State Treasury, Journal of Laws item 2004.

the threshold of PLN 380.[30] Two approaches should be taken into consideration: first, the enumerative singling out of benefits with a value of less than PLN 380, permitted to be retained by a person holding a public function; second, the introduction of a definition of a "related benefit", which is understood as a benefit equivalent value of which exceeds the amount of, e.g., PLN 10,000, where the circumstances indicate that individual cases of donations, other benefits, and material support obtained are related to each other and have been divided into parts of a smaller value with the intention of avoiding the obligation to report information to the register of benefits.

The authors also propose the introduction of a regulation that would determine the method of determining their monetary value in relation to donations, other benefits received and material support, as well as how to proceed in the event of an inability to determine such value. In the first case, the proposal is to proceed in accordance with item 2.10 of the National Accounting Standard No. 4 "Impairment of Assets",[31] according to which, if it is not possible to determine the net selling price available on an active market, the commercial value of an object of impairment assessment is determined by its estimated fair market value, within the meaning of Article 28(6) of the Act of 29 September 1994 on Accounting,[32] reduced by the cash expenses expected to be incurred and directly attributable to the disposal of the object of impairment assessment, representing the total expected costs of sale (disposal/liquidation) of this object, excluding financial costs and income tax charges. If the aforementioned principle cannot be applied, i.e., the value of the benefit cannot be determined, it stands to reason to regard it as a personal benefit.

Another amendment proposal put forward by the authors is to add to Article 2(1) of the Act on the CBA, a new editorial unit stating that the control of the accuracy and veracity of the information reported to the register of benefits referred to in Article 12 of the Anti-Corruption Act and Article 35a of the MandPosłU, as well as the introduction of implementing provisions in the Act on the CBA that would enable the implementation of the new task. It is reasonable to designate the CBA as the entity responsible for keeping the register of benefits in Poland, assuming this responsibility from the National Electoral Commission and the Speakers of the Sejm and Senate. At the same time, it is justified to grant the CBA access to the database resources held by public authorities and state or

[30] Evaluation Report…, p. 24.

[31] Announcement No. 2 of the Minister of Finance of 29 March 2012 regarding the announcement of the resolution of the Accounting Standards Committee on the adoption of the amended National Accounting Standard No. 4 "Impairment of assets", Journal of Laws Device Min. Fin. of 2012, item 15.

[32] Journal Laws of 2023, item 120.

local government organisational units that are directly or indirectly linked to the verification of the accuracy and veracity of the information submitted to the register of benefits. The manner of performing tasks within the framework of the central register of benefits should be part of the CBA activity report for the previous calendar year, submitted annually by 31 March to the Prime Minister and the Parliamentary Special Services Committee.[33]

There are reasonable grounds for introducing into the Anti-Corruption Act and the MandPosłU a precise deadline for submitting information to the register of benefits and making changes thereto provided such changes would not create any uncertainty as to whether the deadline for the initial notification should be determined either upon the appointment to the post or function or from the date of the occurrence of the event resulting in the attainment of the benefit. It is also imperative to call for a provision prohibiting persons holding public office while in office or during their employment and for three years thereafter, from accepting any material benefit, whether free of charge or for a fee in an amount lower than its actual value, from an entity or its subsidiary, if, by taking part in a decision on individual matters concerning such an entity or subsidiary, they have directly influenced content of that decision. The proposed solution could be modelled after Article 24m of the Act of 8 March 1990 on municipal self-government.[34] The final proposal is to introduce a criminal sanction as follows: stating untruth or concealing the truth in the information submitted to the register of benefits shall result in liability under Article 233(1) of the CC.

CONCLUSIONS

A benefits register can be one of the essential elements of the system for preventing and, in some cases, combating corruption. However, the presented inaccuracies and problem areas related to this institution make it clear that it requires a thorough overhaul of its operating model. Moreover, in the opinion of the Authors, the aforementioned makes it difficult to attribute to the institution of the register of benefits the features specific to a legal system, i.e., a configuration of components possessing a clear structure and forming a logically ordered whole that is characterised by hierarchical order, internal consistency, and completeness [Podgłódek, Szmulik, and Zenderowski 2022, 400-404]. The situation is similar if we regard the institution of the register of benefits as part of the subsystem of the national anti-corruption system.

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[33] See Article 12 of the Act on the Central Anticorruption Bureau.

[34] Journal of Laws of 2023, item 40.

The Authors therefore call for a legislative initiative that would ensure that the identified inaccuracies and problem areas are repealed, and that the institution of the register of benefits is attributed the features specific to a legal system and, finally, it would form a foundation for the creation of an IT system in Poland enabling electronic processing of information submitted to the register of benefits, in particular for the purposes of calling for the correction of information submitted to the register, automatic generation of alerts and notifications, smooth implementation of control activities, easy generation of reports, etc. Furthermore, a preliminary comparison of the declaration form for the register of benefits and the financial disclosure form shows that some of the information required in both templates is duplicated or complementary, which speaks in favour of their integration.

It therefore seems, prima facie, that there are no barriers to the establishment of a central register of benefits and financial disclosure statements, which would, on the one hand, facilitate public access to the information submitted to the register of benefits and financial disclosure statements and, on the other, eventually help in the fight against corruption. This would be all the more justified as the GRECO report has called the Polish state to consolidate the legal framework in the area of financial disclosure statements (which are currently regulated by roughly a dozen of separate laws), gift policy, and conflict of interest.[35] It should also be mentioned that two IT systems relevant to the anti-corruption system have recently been developed in Poland, namely the Financial Information System[36] and the Central Register of Real Beneficiaries[37]. Integrating data from IT systems that are part of the public authorities' resources would not only significantly strengthen the public authorities' capacity to combat corruption but would also enhance the state security system as a whole.

It would be also impossible to overlook the importance of data integration due to one of the key reasons behind the introduction of the obligation to provide information to the register of benefits and submit financial disclosure statements by persons performing public functions was the inability of public authorities to access database resources in which changes in the material status of persons exercising public functions could be monitored in an efficient and effective manner. This is why the collection of this type of information has so far taken place as a result of the statutory obligation imposed on persons exercising public functions.

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[35] Evaluation Report…, p. 14.

[36] See Act of 1 December 2022 on the Financial Information System, Journal of Laws of 2023, item 180.

[37] See Article 55-71a of the Act of 1 March 2018 on counteracting money laundering and terrorism financing, Journal of Laws of 2023, item 1124.

It seems that in an era of rapid progress of digitalising administration, the aim of which is not only to optimise costs and improve the quality and security of public services but also to make citizens' lives easier and to exercise social control over the power entrusted to persons performing public functions, part of the information provided to the register of benefits and submitted in financial disclosure statements is now electronically accessible to public authorities. They are, admittedly, scattered and stored in different data formats, however, the approach above makes it possible to postulate a change in the current operating model of the register of benefits and financial disclosure statements. The authors believe that it is undeniable that the CBA is an authority whose statutory task is to combat corruption in the public and economic life.

It would be justified to ultimately have the issue of gift policy regulated in each public authority and state or local government organisational unit, which would transfer information on lawfully obtained benefits to a central register of benefits and financial disclosure statements. Given the obligation to act on the basis and within the limits of the law and to avoid invoking custom, especially in public authorities and entities with a public-private ownership structure, it is reasonable to submit for consideration the introduction of a statutory legal basis that would give the possibility of accepting and giving benefits with the consent of a superior and in connection with the exercise of a representative function.

The above situation pertains not only to the public sector, but also to the public-private and private sectors as it would be ideal if all organisational units kept registers of benefits that took common elements into account. This would enable public disclosure of benefit transfers from givers to recipients as well as the verification of information about the circumstances surrounding these transfers. It would also serve as a tool for monitoring the controversial institution of lobbying [Kuczma 2012, 61-75].

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EDUCATIONAL AND CULTURAL ISSUES IN THE LEGAL PRACTICE OF THE NATIONAL PUBLIC PROSECUTOR'S OFFICE OF THE REPUBLIC OF POLAND IN 1919-1939

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Abstract. The aim of this article is to present the most important activities of the National Public Prosecutor's Office of the Republic of Poland in matters of education and culture, one of the many examples of the legal practice of the state organ of centralised legal representation of the material and public interests of the Polish state in the period of the Second Polish Republic. The legal practice of the National Public Prosecutor's Office included issuing legal opinions at the request of public authorities or other authorised entities, legal representation before private law or public law courts and in proceedings conducted by administration authorities, and cooperation in executing agreements in material matters of the state or of entities entrusted to the legal care of the Office. In cases concerning education and culture, the National Public Prosecutor's Office undertook all types of official activities. This study, based on an analysis of the annual reports of the President of the National Public Prosecutor's Office, jurisprudence and court rulings issued on the initiative of the Office, aims to show that the activity of the Office contributed to the thorough subjugation of the education system in Poland, which was reborn after the period of partitions and to the protection of cultural heritage. The study also intends to show that the Office's position in the system of the Polish state as well as the competences and reliability of the Office's attorneys contributed to the achievement of its effects (which were very much beneficial for the Polish state).

Keywords: Second Polish Republic; State Treasury; legal representation; material and public interests of the state.

INTRODUCTION

The National Public Prosecutor's Office of the Republic of Poland[1] was established in the organizational system of the reborn Polish state under the Decree of the Temporary Chief of State of 7 February 1919. As part of uniforming sources of Polish Law, the Legislative Sejm revoked

[1] Hereinafter: Office or NPPO.

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on 31 July 1919 the decree on establishing the National Prosecutor's Office and enacted an act that replaced the thus far binding normative act [Buczyński and Sosnowski 2016, 119].[2] As part of the nationwide savings scheme carried out by the government to repair the State Treasury, the Office was reorganized in 1924 pursuant to a decree of the President of the Republic of Poland [Tkaczuk 2007, 288].[3] The National Public Prosecutor's Office of the Second Polish Republic was a state body which, under statutory acts, provided on-going legal assistance to the Polish state and other entities treated equally with the state when it comes to material and public interests [Tkaczuk 2001, 151-60; Organiściak 2002, 114-54; Tkaczuk 2006, 725-37; Idem 2007, 285-302].[4] The Office's broad scope of the legal subject matter may be studied on the basis of reports issued yearly by the President of the Office,[5] reports from presidents of Branches of the Office and from delegates of the Office, department managers at the Office's branches and in case files maintained by officials of the National Public Prosecutor's Office of the Republic of Poland, which are kept in the Polish archives.[6] The legal practice of the Office in the inter-war period covered activities taken up in many cases, which were grouped adequately due to their subject matter in reports of the President of the Office [Tkaczuk 2006, 729]. One of such reporting categories was education and cultural matters. This institution mainly

[2] Decree of the Chief of State of 7 February 1919 on establishing the National Public Prosecutor's Office of the Republic of Poland, Journal of Laws No. 14, item 181; Act of 31 July 1919 on establishing the National Public Prosecutor's Office of the Republic of Poland, Journal of Laws No. 65, item 390.

[3] Decree of the President of the Republic of Poland of 9 December 1924 on changing the organizational system of the National Public Prosecutor's Office of the Republic of Poland, Journal of Laws No. 107, item 967.

[4] Archive of New Acts – Presidium of the Council of Ministers, ref. no. 56-15, Document of 13 May 1919 – Principles of the Decree establishing the National Public Prosecutor's Office presented to the Minister of the Interior by the President of National Public Prosecutor's Office; order of the First Chamber of the Supreme Court of 7 February 1921, ref. no. C.932/20 – recital 6: The National Public Prosecutor's Office of the Republic of Poland shall be treated as a statutorily established permanent general representative of the State Treasury ("Decisions of Polish Courts" C, item 185).

[5] Pre-war reports of the President of the National Public Prosecutor's Office of the Republic of Poland are dispersed. The review of acts in the archives, such as the Archive of New Acts in Warsaw or the State Archive in Poznań allowed me to collect individual reporting annals. The library of the Chair of the History of Law of the Faculty of Law of the University of Szczecin houses reports for the following years: 1919, 1920, 1921, 1922, 1926, 1928, 1929, 1930, 1931, 1933, 1934, 1935, 1936, 1937, and 1938.

[6] Reports of presidents of branches of the National Public Prosecutor's Office, delegates of the National Public Prosecutor's Office and department managers and case files of individual cases may be found, for example, in archive units of, e.g. the Archive of New Acts in Warsaw: in the unit for the National Public Prosecutor's Office of the Republic of Poland in Warsaw (1919-1939); in the State Archive in Poznań in the unit for the National Public Prosecutor's Office of the Republic of Poland – Poznań Brach (1919-1939).

engaged in opinion-giving activity, but did not stray from legal representation exercised before common courts of law in the course of litigious and non-litigious proceedings. Its education-related field of activity included cases concerning primary, vocational, secondary and tertiary education schools.

1. PRIMARY EDUCATION CASES

When it comes to primary education, the Office issued legal opinions on the legal personality of schools or associations of schools in the former Prussian Partition and in the Upper Silesia and on school funds in the territory of the former Austrian Partition. The opinions also investigated the relation of Polish schools with communes and former manorial areas (great land ownership) and private persons, and in particular the obligation to bear the costs of maintaining schools, the scope of competence of state education authorities in relation to the competences of territorial self-governments, legal attributes of school supervision and personnel matters, equipment matters and teachers' work-related matters. The vast majority of these opinions were issued in cases concerning schools' property relationships. It interpreted legal acts concerning the establishment and maintenance of primary schools (school competition), it gave opinions on rules of protection of schools' ownership rights, schools' receivables in cash and in kind, their adjustment and the procedure to enforce them. Many opinions also addressed contracts of sale, contracts of exchange, lease contracts for school real estate, construction works contracts and donation agreements or school-related foundation agreements. Most of the opinions that pertained to primary schools were issued under the particular post-partition legislation.

Among the many opinions, those that concerned ownership of school real estate and also performances in kind for the benefit of schools were most significant. In the opinions issued in 1929, the Office pointed to the ambiguity of law, especially in terms of schools' relationships with municipalities and religious associations. When analysing these relationships against legal relationships of the former Polish Kingdom, the Office pointed to the need to carry out legislative activities intended to remove contradictions around the ownership of school real estate and the obligation to maintain it. School real estate in the territory of the former Polish Kingdom was by default the property of rural communities and the education-related legislation placed the burden of building and maintaining schools on communes.[7] The

[7] Act of 17 February 1922 on building public primary schools, Journal of Laws No. 18, item 144; Act of 17 February 1922 on establishing and maintaining public primary schools, Journal of Laws No. 18, item 143.

Office postulated that in order to solve this problems authorities should use relevant regulations stipulated for the Prussian Partition in the Act of 25 November 1925 on establishing and maintaining public primary schools.[8] In 1936, on request of the Ministry of Religious Denominations and Public Enlightenment, the Office carried out an assessment of ownership relationships of school property in eastern and central voivodeships of the Republic of Poland and held that immovable property located in eastern areas in many different kinds of schools that had previously operated under the names of "town" schools, "parish-fund" schools, "initial" schools or "Eastern Orthodox-parish" schools", was property of a given commune. In turn, when it comes to ownership of school property located in the territory of the former Polish Kingdom, the NPPO Head Office in Warsaw explained that the so-called property of those former schools, both commune schools and community schools, should be considered property of the commune, or possibly of the community, if the so-called rural school outpost had not yet been taken over by the commune.[9] However, in 1937, the Head Office came to the conclusion that the property of former Eastern Orthodox-parish schools that had existed before the Great War under the Russian Act of 1 April 1902 was transferred to the ownership of the State Treasury.[10]

In 1929 the NPPO Head Office gave its opinion on the matter of the legal existence of and procedure for exercising performances in cash for primary schools (that originated in the times of partitions) that encumbered manorial land ownership. In the opinion that analysed these relationships in the area of the former Polish Kingdom, the Office held that these legal performances still existed and were enforceable through administrative execution under the Order of the Administrative Council of the Polish Kingdom of 5 November 1844 and that the commune should be considered their administrator.[11] The Supreme Court confirmed the position of the Office in 1930.[12] In its opinion on these relationships against the legal system of the Austrian Partition, it came to analogous observations as those concerning the relationships in the former Polish Kingdom, despite legal doubts associated with the 1919 abolishment in this territory of manorial areas and of the school competition system.[13] The Office based its position

[8] Act of 25 November 1925 on amending the act of 17 February 1922 on establishing and maintaining public primary schools, Journal of Laws No. 126, item 898; Report of the President of the National Public Prosecutor's Office of the Republic of Poland for 1929 [hereinafter: SPPG and the relevant year], p. 78.

[9] SPPG-1936, p. 113; SPPG-1937, p. 125.

[10] SPPG-1937, p. 125.

[11] SPPG-1929, p. 78-79.

[12] SPPG-1930, p. 92.

[13] Act of 26 July 1919 on joining manorial areas with communes, applicable in the territory of former Galicia, Journal of Laws No. 67, item 404; SPPG-1929, p. 78-79.

on the conviction that due to the private law source of this obligation and its hypothetical safeguards the change of education law norms into public-private did not cause their expiry.[14] The rulings of the Supreme Administrative Tribunal issued in 1923 and 1927 had a profound impact on the position of the National Public Prosecutor's Office towards performances in kind for schools and on the rules of their enforcement.[15] In 1934, the Supreme Administrative Tribunal confirmed the position of the Office on the legal character of performances in kind for the benefit of primary school that encumbered former manorial areas.[16]

When it comes to the legal personality of local schooling funds in the former Austrian Partition, the Office's Lviv Branch issued an opinion in 1934 for the Education Authority of the Schooling District in Lviv in which it explained that school funds were granted legal personality under a Galician national act of 24 April 1894, while pursuant to the provisions of the Ordinance of the Minister of Religious Denominations and Public Enlightenment of 30 May 1923 they were to keep their legal personality until a statute ordered and executed their abolition.[17] The matters of School Supervision in the areas of eastern and central voivodeships were subject to numerous discussions in the Office. It mostly examined the legal character and the scope of competences of these institutions. In 1935 the NPPO Head Office issued an opinion to the question of the Ministry of Agriculture and Agricultural Reforms that relied on the Office's previously expressed views that school supervision authorities should be considered bodies of territorial self-government with powers for education, not independent legal persons.[18]

The activities of legal representation carried out by the Office on behalf of primary schools were performed by all its organizational units. Additionally, the scope of competences of the Office in Kraków and in Lviv accommodated matters of local school funds. This was because these organisational units of the Office took over the competence of the former Galician Office of the Treasury of optional representation of property administered by local school funds. Formally, the optional representation of the National Public Prosecutor's Office in these cases *de facto* became obligatory given

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[14] SPPG-1933, p. 135.

[15] Judgement of the Supreme Administrative Tribunal of 31 October 1923, Register 7/22 and judgment of 27 December 1927, L. Register 532/26 (SPPG-1928, p. 111).

[16] Judgement of the Supreme Administrative tribunal of 25 May 1934, L. Register 1322/31 and judgment of 14 September 1934, L. Register 4522/31 (SPPG-1934, p. 112).

[17] Ordinance of the Minister of Religious Denominations and Public Enlightenment of 30 May 1923 on the enforcement of the Act of 17 February 1922 on establishing and maintenance of public primary schools, Journal of Laws No. 73, item 574; SPPG-1934, p. 110.

[18] SPPG-1935, p. 101.

its constant engagement by school authorities. School supervisory authorities postulated that representation of the National Public Prosecutor's Office in matters of primary education be made obligatory. This postulate was justified by having to ensure effective protection of property of local school funds in relations with communes and by other local factors.[19]

When it comes to litigious proceedings, the majority of cases were those typical also to other divisions of state administration, such as ownership protection cases; leasing school buildings; construction works; cases pertaining to the employment relationship and employment relationship of teachers and cases for repairing various kinds of damages. The group of complex cases also included those associated with establishing performances for schools' benefit from owners of immovable goods, especially in former manorial areas in the territory of the former Austrian Partition.[20] Analogous proceedings were carried out in the Poznań Voivodship. The Office's Branch in Poznań sued communes and poviat divisions for the performance of material commitments towards primary schools made in the Prussian times.[21] An example of proceedings for performances for the benefit of schools was a dispute brought to court in 1935 over recognition of the school's right to collect wood from the Komarnickie estate. The Lviv Branch of the National Public Prosecutor's Office relied in its defence on the argument that the obligation fell under private law in its source already and the Austrian legislation made it similar to a performance under public law only through granting certain privileges to this obligation (e.g. enforcement carried out under the administrative procedure). The Supreme Court in 1937 dismissed the Office's cassation appeal arguing that the performance obligation had not been made in the form of a notarial deed and the fact that the school had exercised this rights for decades did not result in its adverse possession of this right. The Supreme Court held that this disputed performance had fallen under public law until 1919 and since this character was not confirmed by Polish legislation, it became a regular obligation based on an agreement. In turn, since the period from before and after 1919 could not be summed up, this right was not adversely possessed.[22] Under legal relations in the former Prussian District, the National Public Prosecutor's Office in Poznań failed to win the lawsuit against the commune before the Supreme Court over the disputed performance for the school. The key issue in this dispute was a declaration of validity of the commune's commitment to provide the performance. The Supreme Court held that since the document confirming the obligation failed to include signatures of the mayor,

[19] SPPG-1929, p. 78.
[20] SPPG-1928, p. 111.
[21] SPPG-1928, p. 112.
[22] SPPG-1937, p. 127.

his deputy and a member of the municipal office, this meant that the legal act was invalid. However, the Office expressed a view that the validity of the commitment was determined by the municipal office's real intent, even if expression thereof featured formal shortcomings, that is absence of the required number of signatures.[23]

When it comes to disputes over compensation that arose against the operation of school administration, the case handled by the Kraków Branch of the National Public Prosecutor's Office deserves a mention. The State Treasury was sued to compensate for damage caused as a result of bodily injury that a pupil had suffered during lessons. The Office relied its line of defence on this circumstance claiming that ligation was inadmissible in these cases. It argued that the organization of education and teaching of all citizens in primary schools, in the light of the Act of 11 March 1932 on the organization of schools, was a state's obligation under public law, and teachers' supervision over pupils was a public law act.[24] This is why the State Treasury did not bear liability under civil law for damages caused as a result of lack of teachers' supervision, because they arose as a result of the state authority's neglecting a public obligation. The Court of Appeals in Kraków recognized the Office's stance when dismissing the lawsuit.[25]

In the field of non-litigious proceedings, the majority of cases pertained to land and mortgage registers, borders, adjustment, execution of particular legacies for schools and school foundations. Noteworthy is the action of the National Public Prosecutor's Office in Poznań, who collaborated in 1926 in transferring ownership of state real estate to municipalities with the intention for it to be used for the purpose of primary education.[26]

2. SECONDARY EDUCATION CASES

When it comes to secondary and vocational training, the lion's share of opinions and proceedings concerned ownership and leasing of school property, communes' obligation to provide for junior secondary schools, teachers' personnel matters, execution of gifts and particular legacies for school purposes, school fees, compensation for injuries to health or lack of adequate insurance or return of squandered state subsidies for vocational training. The state's taking over of vocational training in the former Austrian

[23] SPPG-1937, p. 127-28.
[24] Act of 11 March 1932 on the organization of schools, Journal of Laws No. 38, item 389.
[25] SPPG-1938, p. 137.
[26] SPPG-1926, p. 79.

Partition in 1921, up until then administered by the Temporary Self-Governing Division, affected the number of cases examined.[27]

One of the more interesting opinions issued in the question of real relationships existing between secondary schools and communes was the opinion of the Lviv Branch of the National Public Prosecutor's Office. In 1938 one of the communes turned to the Office for a legal assessment of the commune's claim to have real estate given to two state secondary schools for permanent use a few decades earlier returned to it due to the restructuring of the school system carried out in 1932. At a conference organized to examine the case, the National Public Prosecutor's Office deemed the commune's request unfounded. The opinion established that as long as a type of a secondary school was upheld, the question of changing the programme in these schools and reorganizing them could not be recognized as a basis for the commune's evading an obligation it had taken on.[28]

The most notable activities that legal representation involved included disputes with the Lviv municipality over subsidies for state secondary schools[29] or similar disputes with communes or poviat communal associations in the Poznań province. When it comes to performances of communes in the post-Prussian area, the Supreme Court, in its judgement of 22 March 1929, held that the right to these performances was transferred onto the Polish State Treasury under Article 256 of the 1919 Treaty of Versailles.[30]

Quite a lot of economic cases came from the Krzemieniec High School. The majority of proceedings were those for recovering receivables for administering the school's goods and undertakings and for recovery of dorm fees. There were also disputes over ownership of real estate given to the school by the state which had earlier been confiscated by the former Russian government from participants of national uprisings.[31] The NPPO's case list related to matters of the Krzemieniec High School was reduced in 1933.[32] The Council of Ministers, upon a request from the National Public Prosecutor's Office, accepted the draft regulation proposed by the Office which granted the School the possibility to independently handle matters pertaining to its

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[27] Regulation of the Minister of Religious Denominations and Public Enlightenment of 8 February 1921 on the temporary organizational system of school authorities in the area of former Galicia, Journal of Laws No. 16, item 97.

[28] SPPG-1938, p. 135.

[29] SPPG-1928, p. 112.

[30] Judgement of the Supreme Court of 22 March 1929, ref. no. III. C. 39/29 (SPPG-1929, p. 92).

[31] SPPG-1933, p. 137.

[32] Regulation of the Council of Ministers of 19 December 1933 on court representation of the Krzemieniec High School, Journal of Laws No. 102, item 787.

property.[33] The Office retained its power to represent the School in cases involving state property whose administration was entrusted in the School.

In cases associated with government subsidies for vocational training, the most pressing issue was to secure an appropriate use of the subsidies by the subsidised entity. In 1934 the Office pointed out this problem to the Ministry of Religious Denominations and Public Enlightenment. It also presented to the Ministry a catalogue of terms the meeting of which was supposed to protect the State Treasury from squandering an education subsidy. The Office recommended that the payment of the subsidy be done possibly immediately before the moment it gets used and also directly to the hands of creditors of the subsidised institution and that the receipt of subsidy be signed by a few persons. To secure the subsidy, the Office also proposed that a deposit mortgage be established to allow recovery of funds if the premises for returning the subsidy were met and where the subsidised funds were to be used to purchase real estate, that the State Treasury be entered in the land and mortgage register as an owner and the real estate be given for use in return for a payment of only a minimum rent.[34] The following year, the Office drafted a specimen of a relevant obligation and mortgage deposit for the Ministry, advising at the same time that the declaration of securing the subsidy be made in the form of a notarial deed revealed in the land and mortgage register even before the subsidy is paid out.[35]

3. HIGHER EDUCATION CASES

When it comes to higher education, the National Public Prosecutor's Office handled matters similar to cases pertaining to secondary education. Typical cases involved protection of ownership, lease, eviction from university buildings, execution of particular legacies and inheritance for academic purposes, collection of costs of treatment in university clinics or establishment and execution of grants, loans and credits given to students. The group of disputes over ownership included predominantly cases examined by the Poznań Branch, representing the University of Poznań, for returning the Żabikowo estate to the University and for the ownership of a complex of houses in Poznań.[36] The disputes closed in favour of the National Public Prosecutor's Office. It needs to be noticed, that these lawsuits, especially the one against the Building Association of Polish State Officials over the ownership of complexes in the Łazarz neighbourhood in Poznań

[33] SPPG-1933, p. 138.
[34] SPPG-1937, p. 124.
[35] SPPG-1938, p. 133.
[36] SPPG-1926, p. 80; SPPG-1928, p. 112.

purchased by the University from the defendant in 1920, were immensely complex and lengthy. Only in 1935 did the Supreme Court settle the case with a ruling in favour of the Office and the University.[37] The Supreme Court ruling the was incredibly significant for settling another disputed case between the University in Poznań and the Building Association of Polish State Officials over ownership of buildings in the Wilda Neighbourhood in Poznań. In 1936 the Office closed the case through a settlement.[38] In 1922, the Lviv Branch of the National Public Prosecutor's Office carried out numerous opinion-giving and legal representation activities concerning the Lviv Polytechnic's taking over ownership of goods that had previously belonged to the Agricultural Academy in Dublany and regulation of obligations that encumbered this property.[39] When it comes to cases associated with the execution of particular legacies for academic purposes, special mention in due to the action of the Kraków Branch of the National Public Prosecutor's Office concerning the enforcement of the particular legacy from Adam Granicki's will covering half of the Błazkowo estate. The particular legacy made first for the State Treasury was given to the Jagiellonian University by way of substitution after the State Treasury had declined it.[40] The case was finalised in 1928 by appropriate proceedings for partitioning the estate.[41] A similar situation was in the execution of a particular legacy for the Jagiellonian University pertaining to crude oil terrains in Błażowa.[42]

When it comes to cases for enforcing various kinds of material assistance to students of tertiary education institutions granted under the Act of 30 October 1930 and the Regulation of the Minister of Religious Denominations and Public Enlightenment of 4 July 1924, the actions of the Office did not go further than implementing a monitoring procedure.[43] These cases were often brought before courts, but ended with a ruling of the court of first instance. The Office encountered difficulties in these cases only in the course of enforcement proceedings.[44] In cases relating to grants, difficulties arose in the context of the entry into force of the Act of 22 February 1937 on reliefs in the payment of due amounts on account of grants

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37 Judgement of the Supreme Court of 25 October 1935, SPPG-1935, p. 97.

38 SPPG-1936, p. 110.

39 SPPG-1928, p. 112.

40 SPPG-1926, p. 80.

41 SPPG-1928, p. 113.

42 SPPG-1931, p. 118.

43 Act of 30 October 1923 on state grants and other forms of assistance to academic youth, Journal of Laws No. 118, item 942; Ordinance of the Minister of Religious Denominations and Public Enlightenment of 4 July 1924 on the execution of the Act of 30 October 1923, Journal of Laws No. 66, item 645.

44 SPPG-1935, p. 98.

and loans.[45] Pursuant to the act, stamp duty on assistance to students was reduced by 30% for persons whose taxable income did not exceed PLN 300. The Office had doubts about the rules on establishing the student's real income due to the secrecy of tax files, about the rules on granting reliefs to persons exempted from payment of income tax under special regulations, about establishing the moment of meeting the condition for being granted the relief or about the competence of courts and administration authorities to rule on granting the relief.[46] The National Public Prosecutor's Office presented these doubts in writing to the Ministry of Religious Denominations and Public Enlightenment. In the conclusion, it pointed out that a relevant executive act must be issued to regulate the disputable subject matter.[47] The executive act issued in 1938 vested the power to rule on reducing the debt in the academic authorities, but the Office believed that this executive act still did not clear the remaining doubts.[48]

There were also court cases in which the National Public Prosecutor's Office was the adversary party to the academic school. Such a situation took place in the dispute brought by the Stefan Batory University in Vilnius against the State Treasury for the ownership of real estate in Vilnius.[49] In connection with this case, the Head Office of the National Public Prosecutor's Office issued in 1930 an opinion that addressed fundamental questions of legal personality of academic schools and their relations with the State Treasury.[50]

The Office's opinions in the academic matters department focused on the competences of private academic schools,[51] settlement between the State Treasury and the University of Poznań pertaining to properties located in Poznań's neighbourhoods of Sołacz and Gołęcin,[52] the Poznań's Voivodeship Communal Association's giving to the University of Poznań of a building housing the university library in exchange for a subsidy granted by the State Treasury for the purpose of the Wielkopolskie Museum,[53] draft

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45 Act of 22 February 1937 on reliefs in the repayment of grants and loans, Journal of Laws No. 13, item 90.

46 SPPG-1937, p. 122.

47 Ibid.

48 Ordinance of the Minister of Religious Denominations and Public Enlightenment of 18 August 1938 on the enforcement of the Act of 22 February 1937 on repayment of dues on account of grants and loans, Journal of Laws No. 66, item 493; SPPG-1938, p. 132.

49 SPPG-1928, p. 79.

50 SPPG-1930, pp. 92-93.

51 Opinion of the Head Office of the National Public Prosecutor's Office of 1927 (SPPG-1928, p. 113).

52 Opinion of the Poznań Branch of the National Public Prosecutor's Office for the Ministry of Religious Denominations and Public Enlightenment of 1929 (SPPG-1929, p. 79).

53 Opinion of the Poznań Branch of the National Public Prosecutor's Office of 1933 (SPPG-1933,

provisions of the Ministry of Industry and Commerce on rules for granting grants to students of the Kraków Mining Academy,[54] matters of the National Grants Fund,[55] students' liability for damage caused during student riots,[56] and various contracts for the purchase of real property by tertiary education institutions.[57]

4. CASES PERTAINING TO CULTURE

The Office's interference in administrative relations that regulated the culture area was associated, inter alia, with the 1921 opinion on amending the Decree of the Regency Council of 31 October 1918 on the protection of historical sites and monuments[58] and with the 1923 opinion on the binding force of the Decree in the territory of the former Austrian Partition.[59]

Up until 1928, when the National Public Prosecutor's Office, pursuant to the Decree of the President of the Republic of Poland of 6 March 1928 on protection of historical monuments and buildings, was vested a statutory obligation of protecting the relevant interest of the State Treasury, the Office had handled numerous cases concerning historical monuments and buildings. One such case was the 1925 elaboration of the contract of purchase by the State Treasury from the Żółkiew Municipality of a wing of the John III Sobieski castle, conducting a procedure to take over from the Vilnius Orthodox Church Consistory of ownership of real estate in Vilnius (so-called Post-Basilian walls) associated with Adam Mickiewicz, issuing an opinion in 1924 on the statute of the Kiersnowki Artistic Collection Foundation, issuing an opinion in 1928 on legal matters pertaining to the legacy of Zygmunt Miłkowski and Jerzy Mycielski for the benefit of the National Museum in Kraków or, finally, conducting proceedings on collections left after Józef Igancy Kraszewski.[60] The Office issued many legal opinions in this period which addressed issues of expropriation of historical monuments and buildings.[61]

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p. 136).

54 Opinion of the Head Office of the National Public Prosecutor's Office of 1930 (SPPG-1930, p. 93).

55 SPPG-1934, p. 115.

56 Opinion of the Lviv Branch of the National Public Prosecutor's Office of 1934 sent to the Vice-Chancellor of the Lviv University (SPPG-1934, p. 115).

57 For example, opinions on the contract for donation of real estate done by the Lviv Municipality for the Lviv University and the Lviv Polytechnic (SPPG-1938, p. 131).

58 Decree of the Regency Council of 31 October 1918 on the protection of cultural and artistic historical sites and monuments, Journal of Laws No. 16, item 36.

59 SPPG-1928, p. 113.

60 SPPG-1928, p. 114.

61 Ibid.

After 1928, the Office gave opinions on various matters associated with the protection of historical monuments and buildings, their transport out of the country, re-evacuation of historical monuments and buildings from Russia under the Treaty of Riga, claims of successors for return of historical monuments and buildings confiscated from their ancestors, the State Treasury's acquisition of historical monuments and buildings or cases of nature reserves. In 1930, it issued an opinion on the contract of purchase of a collection of drawings made by prof. Stanisław Noakowski, legal relations concerning ruins in Bodzentyn and Sochaczew or the treasure found in the Horokhiv district.[62] In the case of prof. Noakowski's legacy, upon a request from the Presidium of the Council of Ministers that acted in cooperation with the Management Board of the National Culture Fund, the Office issued opinions on 1933 on draft agreements that were to be executed between the Fund and museums on the latter being given for use part of the collection of prof. Noakowski's drawings.[63] In 1931 the Office took an active part in the works on establishing the Leon Piniński Art Collection Foundation. The Office's attorneys took part in a conference organized in this matter by the Civil Chancellery of the President of the Republic of Poland, in which, among other things, a draft foundation act was written.[64] In 1936, upon a call from the Ministry of Religious Denominations and Public Enlightenment, the Office wrote an opinion on the planned exchange of so-called "Puławy Manuscripts", property of the State Treasury, for "Crown Archives", property of the Princes Czartoryski Museum in Kraków.[65] In 1937, the Office issued on opinion on the rights of the State Treasury to the painting "Prussian Homage" by Jan Matejko. The Office proved the ownership right of the Polish State Treasury on the basis of declaring the Treasury a legal successor of the Galician National Division.[66]

The Office also had an obligation to declare the historical character of real estate in land and mortgage resisters. In 1931, the NPPO sent to the Ministry of Religious Denominations and Public Enlightenment a memo in which it presented legal requirements, competences of administrative authorities and a procedure for issuing certificates of the historical value of real estate and on revealing this information in land and mortgage registers.[67] This was also associated with the Office's opinion in which it expressed a view that church real estate was in the state's interest to the extent stipulated

62 SPPG-1930, p. 93.
63 SPPG-1933, p. 138.
64 SPPG-1931, p. 119.
65 SPPG-1936, p. 115.
66 SPPG-1937, p. 128.
67 SPPG-1931, p. 119.

by the Decree of the President on the protection of historical monuments and buildings.[68] This view also gained recognition of the Supreme Administrative Tribunal.[69]

CONCLUSION

The presented inter-war legal practice of the National Public Prosecutor's Office of the Republic of Poland in matters of education and culture allows the following conclusions:

1) the National Public Prosecutor's Office handled matters employing all kinds of official activities that were in its competence resulting from the legislation in force. Legal opinions dominated in its practice. Legal representation in litigious and non-litigious cases complemented its activity in the sphere of legal assistance given by the Office to the State Treasury;

2) the National Public Prosecutor's Office's legal assistance in education-related cases helped order the system of primary, secondary and academic education operating in the Polish state in 1919-1939, mostly when it comes to property-related relationships of schools of all levels and their legal status;

3) culture-related cases were not as engaging as those of education, but the NPPO's official actions in this realm were significant for securing the material and public interest mostly in terms of protection of cultural heritage;

4) given the importance of the education system and of culture-related matters for the Polish state reborn after years of partitions, the activity of the National Public Prosecutor's Office who provided legal assistance to state authorities and public entities in this sphere deserves much credit as it contributed to reinforcing the regained independence.

Translated by Agnieszka Kotula-Empringham

[68] Opinion of the Head Office of the National Public Prosecutor's Office for the Ministry of Religious Denominations and Public Enlightenment of 1934 (SPPG-1934, p. 116).

[69] Judgment of the Supreme Administrative Tribunal of 1934 (SPPG-1934, p. 116).

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PRESIDENT OF A STATE AND THE RIGHT OF FREE MOVEMENT OF PERSONS WITHIN THE EUROPEAN UNION*

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Abstract. The article analyses the decision of the Court of Justice of the European Union C-364/10, Hungary against the Slovak Republic. It explains the personal and material scope of the European Union's right to free movement of persons, focusing on the right to enter the territory of another Member State of the European Union. The judgment solves the situation of the Head of State and the restriction on the right of the Head of State to enter the territory of another Member State freely on the basis of Article 21 of the Treaty on the Functioning of the European Union. The article presents the conclusions of the judgment of Court of Justice of the European Union.

Keywords: Head of the State; president; free movement of persons; EU citizenship; Article 21 TFEU; Directive 2004/38.

1. FREE MOVEMENT OF PERSONS – BASIC ECONOMIC FREEDOM OF EU LAW

The right to free movement allows European Union ("EU") citizens to travel across member states, a cornerstone of the internal market's fundamental freedoms. This freedom, more sensitive in the integration process than the free movement of goods, often intersects with security, social welfare, and cultural differences. Initially, its legal framework was closely tied to the internal market's economic freedoms. In practice, this freedom has spurred economic growth, especially utilized by skilled professionals engaged in innovative activities. Notably, this right is exclusive to EU citizens, excluding third-country nationals, except for family members whose rights are contingent upon an EU citizen exercising their right to free movement and residency within the EU [Karas and Králik 2012].

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2. FREE MOVEMENT OF PERSONS – LEGAL BASES

The freedom of persons to move and reside[1] within the European Union's member countries is governed by EU legislation at both the primary and secondary legislation [Mazák and Jánošíková 2011]. Following the establishment of EU citizenship with the Maastricht Treaty, it has been a right of EU citizens to freely move and reside anywhere within the EU's member states. This right is a cornerstone of EU citizenship, reflecting the EU's commitment to the free movement of persons. The right to move and reside has a political dimension, which has also been reflected in the case law of the Court of Justice of the EU [Bobek, Bříza, and Komárek 2011]. The treaties, however enable some restrictions to free movement of persons. Some conditions must be met for citizens of EU Member States to be able to exercise their right to free movement of persons. The first condition is that a person must be citizen of the European Union. The second condition is that the person must carry out an economic activity which is required by EU law: whether as a worker (Articles 45-48 TFEU), self-employed person, or provider or recipient of services (Articles 56-62 TFEU). The free movement of persons is also applicable to entities – companies, branches or their subsidiaries (Articles 49-55 TFEU) [Varga 2011]. The unrestricted mobility of individuals is essential for the functioning of the internal market's freedoms. Nonetheless, this freedom can be restricted by considerations of public policy, public safety, health protection, or specific restrictions related to employment in public and civil services [Craig and de Búrca 2011]. These restrictions are in place to balance the freedom of movement with the welfare and security of the public.

The prohibition of discrimination based on nationality[2] epitomizes the internal market's freedom. Essentially, this stipulates that an individual from any Member State is entitled to identical treatment in similar circumstances as a national of that State. This principle ensures equal opportunities within the Member States, fostering a more integrated and equitable market environment [Weatherill 2010].

The primary rationale for integrating these clauses into foundational legislation by Member States was to facilitate unhindered mobility for those contributing to economic progress. The goal was to harmonize labor costs across the EU, allowing individuals to relocate where their labor was needed, thereby promoting EU-wide prosperity. This objective was realized

[1] Article 21(1) TFEU: Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

[2] Article 18 TFEU establishes the general principle of non-discrimination on grounds of nationality.

incrementally, with the benefits of person-to-person mobility initially reaching a limited segment of EU residents. The reasons for this phased approach included ensuring mobility for dependents and maintaining social security benefits for EU nationals exercising their right to move freely. Nonetheless, the expansion of the EU has highlighted additional social, cultural, and linguistic barriers.

The primary objective for integrating these clauses into foundational legislation was to facilitate unhindered mobility for individuals contributing to economic progress. The goal was to harmonize labor costs across the EU, allowing migration to regions with labor demands, thereby fostering EU-wide prosperity. Initially, the realization of this goal was incremental, with a limited segment of EU populace availing the benefits of person mobility. This was due to various factors, notably the necessity to accommodate family member mobility and to uphold social security assurances for EU denizens utilizing their right to free movement. Nonetheless, post-EU expansion, other barriers have emerged, including social, cultural, and linguistic challenges [Foster 2011].

The EU has implemented measures to address restrictions on the free movement of persons. Notably, this involved enacting secondary legislation during the 1960s and 1970s. The Court of Justice's case law has greatly shaped the substance of this secondary legislation. There has been a transition in the perception of free movement from merely an economic idea to a broader political one, particularly following the Maastricht Treaty, which established the notion of EU citizenship and conferred new political rights upon EU citizens.

3. EU SECONDARY LEGISLATION ON FREE MOVEMENT OF PERSONS

EU citizenship confers upon individuals from EU Member States the right to freely move and reside within the EU Member States. This right to free movement is a cornerstone of the internal market, characterized by the absence of internal frontiers. Consequently, it is imperative for the EU to implement legislative measures that facilitate the exercise of these freedoms [Tichý, Rainer, Zemánek, et al. 2009]. Except of the Treaties is the most important instrument of secondary legislation the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC,

72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.[3]

The directive in question was enacted to overhaul and update the patchwork of laws that were previously applicable to a diverse group of individuals, including workers, the self-employed, students, and other non-working persons. It also aimed to streamline and reinforce the freedom of movement and residency for all EU citizens and their families. Directive 2004/38 posits that an EU citizen's rights increase with the duration of their stay in another Member State. For stays under three months, an EU citizen is not required to demonstrate any economic ties to the host Member State. This shift underscores the EU's evolution from a focus on economic integration within the internal market to a broader emphasis on civil rights.

3.1. Personal scope of the free movement of persons

The personal scope of the right to free movement encompasses any individual who seeks to exercise this right. To qualify, the individual must be a citizen of an EU Member State[4] other than the one of which they hold nationality. Additionally, this right extends to family members who may accompany the individual. This fundamental freedom is integral to the EU, allowing citizens to live, work, and travel freely across Member States, fostering economic integration and cultural exchange. It represents a cornerstone of EU policy, promoting unity and solidarity among its diverse member populations.[5]

3.2. Material scope of the free movement of persons

The material scope refers to the rights granted to EU citizens under EU law, particularly when they exercise their right to free movement. Directive

[3] Hereinafter: directive 2004/38. The Directive was published in the OJ L 158, 30.4.2004, p. 77-123

[4] The EU Member States set their own criteria for acquiring citizenship. In order for a person to be able to enjoy rights under EU law, it is important that he or she is a national of an EU Member State. Member States are not entitled to examine the intention, manner or other circumstances before a person acquires the citizenship of another EU Member (see the judgment of the Court of Justice C-200/02, Kunqian Zhu, Man Lavette Chen v Secretary of State for the Home Department (ECLI:EU:C:2004:639), point 37: "Nevertheless, under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality."

[5] Article 3(1) of the Directive 2004/38. Free movement of persons within the EU would not be possible if the free movement of family members of the primary beneficiary who wishes to exercise the rights associated with the functioning of the internal market were not allowed. The rights of family members are derived from the rights of an EU citizen who exercises one of the freedoms of the internal market.

2004/38 is applicable to all EU citizens who move to or reside in a Member State other than their own.[6] This directive obligates Member States to facilitate the entry and residence of EU citizens and their families. It stipulates that EU citizens should not be subjected to entry visas or any similar formalities.

3.2.1. Refusal of entry

Denying entry to a country is often viewed as one of the most severe measures a government can implement in response to migration [Barnard 2010]. It is a principle of international law that a state cannot refuse its own nationals the right of entry or residence,[7] i.e. the refusal of entry may only be applied to migrants[8] and such derogations may only be found on grounds of public policy, public security and public health. The sate which adopts a measure of refusal of entry must prove that such a measure is proportionate and necessary[9] and compatible with human rights.[10]

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6 See Article 3(1) of the Directive 2004/38.

7 See judgment of the Court of Justice of 4 December 1974, 41/74, Yvonne van Duyn proti Home Office (ECLI:EU:C:1974:133), point 22.

8 Ibid., point 23: "It follows that a Member State, for reasons of public policy, can, where it deems, necessary, refuse a national of another Member State the benefit of the principle of freedom of movement for workers in a case where such a national proposes to take up a particular offer of employment even though the Member State does not place a similar restriction upon its own nationals."

9 See judgment of the Court of Justice of 1 February 2001, C-108/96 (ECLI:EU:C:2001:67), point 31: "That being so, it is necessary to consider whether the prohibition under challenge is necessary and proportionate to secure the objective of attaining a high level of health protection."

10 See judgment of the Court of Justice of 27 April 2006, C-441/02, Commission of the European Communities against Federal Republic of Germany (ECLI:EU:C:2006:253), point 108, 109: "it is necessary to take into account the fundamental rights whose observance the Court ensures. Reasons of public interest may be invoked to justify a national measure which is likely to obstruct the exercise of the fundamental freedoms guaranteed by the Treaty only if the measure in question takes account of such rights. In that context, the importance of ensuring protection of the family life of Community nationals in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty has been recognised under Community law. It is established, in particular, that the removal of a person from the country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8 of the ECHR, which is among the fundamental rights which, according to the Court's settled case-law, are protected in Community law (see, in particular, the ruling of the European Court of Human Rights of 2 August 2001 in Orfanopoulos and Oliveri, paragraph 98). Such interference will infringe the ECHR if it does not meet the requirements of Article 8(2), that is, unless it is 'in accordance with the law', motivated by one or more of the legitimate aims under that paragraph and 'necessary in a democratic society', that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued."

This section of the article examines the legal implications under EU law concerning the incident where the Slovak Republic refused entry into Slovakia to the Hungarian President. The analysis will delve into the complexities of EU legislation, exploring the interplay between national sovereignty and EU principles of free movement. It will also consider the diplomatic nuances and the precedents set by EU case law, providing a comprehensive overview of the legal landscape in relation to such cross-border political matters.

4. CASE C-364/10 – HUNGARY V SLOVAKIA

4.1. Political background of the case

In 2009, Slovak-Hungarian relations were strained, leading to an incident involving the Hungarian President's planned visit to Slovakia. The tension was partly due to the Slovak amendment of the State Language Act, which Hungary had criticized. Despite being invited by Komárno's municipality to unveil a statue of King Stephen I, Slovak officials were not included in the invitation. On the eve of the event, Slovak leaders declared the Hungarian President an unwelcome visitor on the sensitive date of August 21st, recalling the 1968 Warsaw Pact invasion that included Hungarian forces. Ignoring requests to cancel, the Hungarian President held a press conference near the border, criticizing Slovakia's stance before returning to Hungary without entering Slovak territory. This event highlighted the complexities of international relations and the lasting impact of historical events on contemporary diplomacy.

4.2. Diplomatic hot lines on both sides of Danube river

The Hungarian Ministry of Foreign Affairs has expressed its disapproval regarding the recent border incident to the Slovak ambassador in Budapest. Slovak diplomatic officials have raised concerns that the Hungarian President's planned visit violated multiple diplomatic norms and international protocols. These include making critical statements about Slovakia, insufficient notice of the visit's agenda – provided only three days prior – and the visit's political nature, characterized by a public speech. Additionally, no Slovak representatives were included during the visit, and Hungarian authorities disregarded Slovak appeals over the date's sensitivity. In response, Hungary has declared its intention to escalate the matter to the European Union level and pursue legal action against the Slovak Republic for an alleged breach of EU law.

The Hungarian authorities argued that Directive 2004/38 could not form a valid legal basis to justify the refusal of the Slovak Republic to allow the President of Hungary to enter its territory and insufficient reasons had been given to refuse the access to Komárno. The Hungarian authorities consisted that the Slovak Republic had breached EU law. Slovak authorities replied to the Hungarian note of 24 August 2009 that the application of Directive 2004/38 had been the 'last chance' to stop the President of Hungary from entering the territory of the Slovak Republic, and that they had not acted in any way contrary to EU law.

4.2.1. Involvement of the European Commission

The Hungarian Foreign Minister addressed a communication to the Vice-President of the European Commission, inquiring about a potential violation of EU legislation by Slovakia. The Vice-President clarified the conditions under which the free movement of individuals may be limited, as stipulated by Directive 2004/38. Such limitations must adhere to the proportionality principle, be founded on the individual's conduct, and the affected person must be duly informed with a detailed justification as per Article 30. Following this, the Hungarian Foreign Minister urged the Commission to consider initiating infringement procedures against Slovakia pursuant to Article 258 TFEU [Mazák and Jánošíková 2011], citing a possible contravention of Article 21 TFEU and Directive 2004/38. In a letter of 11 December 2009, the Commission expressed the view that EU citizens are entitled to move and reside freely within the territory of the Member States, but expressed a view that under international law, the Member States reserve the right to control the access of a foreign Head of State to their territory, regardless of whether that Head of State is a EU citizen or not. The European Commission stated that the Member States arrange official visits through bilateral political channels, with the result that this is not a sphere in which EU law applies. However, the Head of State may decide to visit another Member State as a private individual. In this case, there was disagreement between Slovakia and Hungary as to the nature of the visit in Komárno. The Commission concluded that Slovakia did not violate EU law, despite having incorrectly invoked Directive 2004/38 and its national implementing legislation. Following this, Slovakia and Hungary submitted their observations during a hearing organized by the Commission. The Commission then issued a reasoned opinion stating that visits by the head of one Member State to another Member State's territory are not covered by the rules governing the free movement of persons. Disagreeing with the Commission's legal assessment, the Hungarian government initiated legal proceedings against the Slovak Republic.

4.3. The action and findings of the Court

4.3.1. Competence of the Court of Justice to hear the case

In the proceedings, the Slovak Republic argued that the Court lacks jurisdiction over the current dispute, asserting that EU law is not pertinent to the case at hand.[11] Conversely, Hungary maintained that the Court of Justice of the EU possesses exclusive jurisdiction to resolve disputes between Member States regarding EU law interpretation, especially when one Member State alleges another's non-compliance with EU law. The Court of Justice affirmed that determining the applicability of EU law to the case falls squarely within its jurisdiction.

4.3.2. Infringement of the free movement of persons

Hungary stated that Slovakia has breached its obligation arising from Article 21(1) TFEU and Directive 2004/38 when it refused the President of Hungary entry into its territory. Hungary argued that the (i) free movement of persons is applicable to all EU citizens, including the Heads of State, and to all types of visits, that is to say, both official and private, (ii) the scope of the right of free movement of persons cannot be restrictively interpreted and may be limited only for grounds specified by Directive 2004/38 (public-policy or public-security measures if they are based exclusively on the personal conduct of the individual concerned, while observing the principle of proportionality), (iii) breach of procedural regime consisting in failing the notification of the grounds for any restrictive measure and no possible remedies were available.

Slovakia argued that the visit was not a private visit of a EU citizen but the visit of a Head of State to the territory of another Member State. The crucial question was whether Article 21 TFEU and Directive 2004/38 are applicable to Heads of State of the Member States. Slovakia argues that the movement of Heads of States within the EU falls within the sphere of diplomatic relations between Member States, as governed by customary international law and by international conventions. The sovereignty of the State which he represents is vested in the Head of State, he may enter another sovereign State only with the latter's knowledge and consent.

4.3.3. Findings of the Court

The Court of Justice considered the status of Hungarian president, who is EU national and enjoys all the rights of EU national. At the same time, the Court of Justice confirmed that EU law must be interpreted in the light

[11] Ibid., point 22.

of the relevant rules of international law, since international law is part of the European Union legal order and is binding on the institutions.[12] It was crucial in this case whether the Hungarian President was carrying out, at the material time, the duties of the Hungarian Head of State. If this is so, this can constitute a limitation, on the basis of international law, on the application of the right of free movement conferred on him by Article 21 TFEU.[13] According to customary rules of general international law and multilateral agreements, the Head of State enjoys a particular status in international relations which entails, inter alia, privileges and immunities while on the territory of a foreign State. The status of Head of State has a specific character, resulting from the fact that it is governed by international law, with the consequence that the conduct of such a person internationally, such as that person's presence in another State, comes under that law, in particular the law governing diplomatic relations.[14] Such a specific character is capable of distinguishing the person who enjoys that status from all other Union citizens, with the result that that person's access to the territory of another Member State is not governed by the same conditions as those applicable to other citizens.[15] Accordingly, the fact that a Union citizen performs the duties of a Head of State is such as to justify a limitation, based on international law, on the exercise of the right of free movement conferred on that person by Article 21 TFEU.[16] The Court decided that neither Article 21 TFEU nor, a fortiori, Directive 2004/38 obliged the Slovak Republic to guarantee access to its territory to the President of Hungary.[17]

4.3.4. Character of the note verbale

Hungary claimed that the Slovak Republic breached Directive 2004/38 and that the very fact of basing the *note verbale* of 21 August 2009 on that directive comes under the concept of the abuse of rights, the grounds of public policy or public security referred to in Directive 2004/38 cannot be invoked in order to pursue political aims.

The Court of Justice stated that the Slovak Republic was wrong to refer, in its *note verbale* of 21 August 2009, to Directive 2004/38. This was however not sufficient to prove an abuse of rights by the Slovak Republic.[18] The conditions for the application of Directive 2004/38 were not formally

12 Ibid., point 44.
13 Ibid., point 45.
14 Ibid., point 49.
15 Ibid., point 50.
16 Ibid., point 51.
17 Ibid., point 52.
18 Ibid., point 57.

complied with and the reference to that directive in the *note verbale* of 21 August 2009 from the Ministry of Foreign Affairs of the Slovak Republic to the Ambassador of Hungary in the Slovak Republic cannot be considered as a decision for the purposes of Article 27 of Directive 2004/38.[19]

CONCLUSION

The freedom to move and reside within the Member States' territories is a fundamental right under EU law, encompassing both political aspects linked to EU citizenship and economic aspects integral to the internal market's freedom. This article offers an overview of the EU's legislative framework governing the free movement of individuals and outlines the rights EU citizens derive from this legislation. It also examines a significant decision by the Court of Justice of the EU, which addresses the right of entry into an EU Member State by another Member State's President. The case in question involved the denial of entry to the Slovak Republic by its President, prompted by several factors outlined by the Slovak Ministry of Foreign Affairs. Consequently, Hungary initiated legal proceedings against the Slovak Republic under Article 259 TFEU, seeking a ruling on whether the conduct of a Member State violated EU law and demanding cessation of the unlawful act to rectify the breach and its effects.

The Court of Justice's ruling reaffirms the unique status of a Head of State within international relations, which includes certain privileges and immunities as prescribed by international law. The legal standing of a President, as the leader of a Member State, is distinct due to the fact that their presence in another EU Member State's territory is regulated by international law, particularly the laws pertaining to diplomatic relations. This unique status sets the Head of State apart from other EU citizens, who are not subject to a special legal framework under international law. Consequently, the roles performed by EU citizens as Heads of State warrant certain restrictions on their right to free movement as outlined by EU law.

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[19] Ibid., point 59.

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SOCIAL ASSISTANCE FOR PEOPLE WITH DISABILITIES – A SYSTEMIC ANALYSIS

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Abstract. The article analyses the institution of social assistance in the context of its position in the Polish legal system and presents the characteristics of the right to social assistance from a subjective perspective. Two principles of social assistance are analysed – the principle of protecting human dignity and the principle of subsidiarity, as well as their impact on the scope of benefits provided. Finally, the paper presents different legal forms and institutions for people with disabilities.

Keywords: legal system; subsidiarity; human dignity; institutions of social assistance.

INTRODUCTION

The discussion in this paper is intended to present an outline of the institutions legislation envisages as the legal framework for public administration to provide social support for persons with disabilities. This does not cover all the aspects of the issue as systemic conditions and detailed regulations make it very extensive.

It should be pointed out here a range of social assistance duties are discharged by public benefit non-government organisations as they are entrusted with some tasks by the public administration and as cooperation programmes are developed under the Public Benefit Activities Act.[1] Effective aid to the disabled certainly cannot be assured with but two instruments: the state and the market. What is midway between them is absolutely necessary. Effective assistance is impossible without it. Organisations, federal or lobbying institutions that act for various interests are needed. They should become the voice of the community. This is of paramount importance to the disabled as well. The role of such organisations in supporting persons with disabilities is enormous, a subject fit for separate research and other publications, merely signalled here.

[1] Act of 24 April 2003, the Public Benefit and Voluntary Activities, Journal of Laws of 2023, item 578.

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The Social Economy Act, approved last year and published on 29 August 2022,[2] which systematises the existing social enterprise solutions, refers to some forms of support for the disabled, too.

Social economy denotes the activity of social economic entities for local communities: social and professional reintegration, job creation for those at risk of social exclusion, and social services, realised as business, public benefit, and other paid activities.

The Social Economy Act lists the forms of support for social enterprises. The possibility of financing by the Labour Fund and the State Fund for the Rehabilitation of Disabled Persons are the key options. In addition, social enterprises can take advantage of CIT reliefs for their efforts at the social and professional reintegration of their employees. Social economy has also become part of social problem solving strategies of local and county communities. The practical application of the Act will show whether the new solutions will be a positive change for the disabled. Scientific discussions in this area also require an in-depth review that he space constraints of this publication don't allow.

Pecuniary benefits as a form of social assistance, such as ongoing, periodic, designated and other benefits, are not part of this review either, since they are designed for broad ranges of beneficiaries and disability is not a distinguishing feature among them [Małecka-Łyszczek and Mędrzycki 2021, 111].

The dogmatic method is applied to this analysis of the social assistance system in Poland.

1. SOCIAL ASSISTANCE AS AN INSTITUTION OF ADMINISTRATIVE LAW – ITS POSITION IN THE LEGAL SYSTEM

The theory of social assistance distinguishes its broad and narrow scopes. In the former sense, social assistance is a set of diverse, non-equivalent forms of support undertaken by public institutions and financed with public resources, addressed to individuals or families in need. This social assistance is governed with a number of legal regulations beside the Social Assistance Act, including those covering housing allowances,[3] family benefits,[4] social pensions,[5] assistance to those eligible for family maintenance,[6] social

[2] Act of 5 August 2022, the Social Economy, Journal of Laws of 2023, items 1287, 1429.

[3] Act of 21 June 2001, the Housing Allowances, Journal of Laws of 2023, item 1335.

[4] Act of 28 November 2003, the Family Benefits, Journal of Laws of 2023, item 390 as amended.

[5] Act of 27 June 2003, the Social Pension, Journal of Laws of 2022, item 240 as amended.

[6] Act of 7 September 2007, the Assistance to Persons Eligible for Family Maintenance, Journal of Laws of 2023, item 1300 as amended.

employment[7] or the professional and social rehabilitation and employment of persons with disabilities.[8]

Strictly speaking, social assistance is an institution governed with the Social Assistance Act and the legal acts issued in connection with the duties set out in the said Act.

Social assistance as a state welfare policy institution has since 1 May 2004 been grounded in the Social Assistance Act[9] of 12 March 2004. The area of social assistance had previously been regulated with the Social Assistance Act of 29 November 1990[10] and, still earlier, with the Social Care Act of 16 August 1923.[11] The 1923 Act officially ceased to apply after the 1990 law came into effect, however, it had not been applied by the socialist state in practice. The Social Care Act was regarded as repealed by way of *desuetudo* [Sierpowska 2020, 19].

Due to its objective scope, social assistance is part of substantive administrative law. This view, entrenched in the doctrine [Idem 2008, 31], is supported by linking the institution of social assistance legislation with an administrative procedure according to which authorities conduct most of their proceedings under the Social Assistance Act. This approach to social assistance means it becomes one of the divisions of substantive administrative law that affect the development of administrative law and public administration itself [Nitecki 2020, 196].

The Social Assistance Act has an extensive legal regulation that consists of substantive legal, system and procedural provisions, part of five chapters that govern: the general principles, the subjective scope, and tasks of social assistance (Chapter I); social assistance benefits, including the principles of payments for the benefits and benefit proceedings (Chapter II); the organisation of social assistance, including its organisational structure and the status of social workers (Chapter III); the realisation of actions co-financed by the *Fund for European Aid to the Most Deprived* (Chapter IIIA); as well as amending, provisional, and final provisions (Chapter IV). The Act has been amended a number of times during more than 20 years of its operation.

The prevailing Polish Constitution[12] of 1997 fails to provide any norms that would directly institute the right to social assistance or any particular benefits of this type. The views expressed in the doctrine and the Constitutional

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7 Act of 13 June 2003, the Social Employment, Journal of Laws of 2020, item 176 as amended.

8 Act of 27 September 1997, the Professional and Social Rehabilitation and Employment of Persons with Disabilities, Journal of Laws of 2023, item 100 as amended.

9 Act of 12.03.2004, the Social Assistance, Journal of Laws of 2023, items 901, 1693.

10 Journal of Laws of 1998, item 414 as amended.

11 Journal of Laws item 726 as amended.

12 The Constitution of the Republic of Poland of 2 April 1997, Journal of Law No. 78, item 483 as amended.

Tribunal judgments imply systemic social assistance is part of the broadly-defined social security, which includes: national insurance, social provision, and social assistance. The Constitution fails to list any forms of realising this security.

Social assistance, together with national insurance and selective social security, make up the social security system under Article 67(1) of the Polish Constitution. Such a positioning of social assistance is characteristic of continental Europe. In Anglo-Saxon countries, where public social insurance is less developed, social security systems also comprise universal healthcare. Regardless of a system's constituents, though, social assistance by definition plays supplementary roles in contemporary European states [Dobkowski 2009, 168]. Moreover, Article 67 of the Polish Constitution fails to identify any forms of social security even in general terms or to specify whether it is to be implemented through insurance or social assistance. Other provisions of the Polish Constitution, e.g., Article 69, which envisages social assistance for the disabled, should be treated in the same way. These provisions refer to individual protection through social assistance only directly and in highly general terms and certainly lay no foundations for declaring the right to social assistance is expressed in the Polish Constitution [Sierpowska 2020, 22].

In line with the established terminology, social security encompasses all and any benefits awarded, out of public resources, to citizens in need. It consists of a system of facilities and performances serving to satisfy the reasonable needs of citizens who have lost or are limited in their capacity for working or suffer from excessive costs of supporting their families. Social assistance is supplementary to insurance and social security.[13]

Specialist literature regards the right to social assistance as subjective. Its extent and actual protection, as S. Nitecki rightly notes, is possible on reviewing the rights to particular benefits. "The right to social assistance means the possibility of applying for any benefits in this area, whereas the right to a benefit is approached more narrowly and related to the fulfillment of requirements for a specific, personalised benefit" [Nitecki 2008, 13].

The view of the subsidiarity of social assistance, whose objective is not to provide means of support or to satisfy all needs of its beneficiaries, is entrenched in judicial decisions. Thus, social assistance cannot involve an ongoing provision of means and is only subsidiary to the activities of the beneficiaries concerned themselves.[14]

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[13] Judgment of the Constitutional Tribunal of 20 November 2001, ref. no. SK 15/01, Journal of Laws item 1564.

[14] Judgment of the Supreme Administrative Court of 29 April 2020, ref. no. I OSK 2698/19, Legalis no. 2487233.

The nature and purpose of social assistance require that it should be firmly positioned in the catalogue of state instruments which protect the fundamental human and civil rights. It remains a principle of the rule of law that a legal system is based on respect for and protection of human dignity, which is integral.

The legislator endows human dignity with a constitutional significance and a frame of reference for the entire system of values around which the Constitution is constructed. It is therefore the foundation of the whole legal order in the State. It is by means of social policy instruments, including social assistance, that the State discharges its special duty of guaranteeing minimum living conditions for every individual.

The objectives of social assistance express the values accepted by the legislator and actions expected for persons and families in difficult circumstances. The key purpose of social assistance is to support individuals and families with their efforts at satisfying their basic needs and to provide for their living conditions that would be appropriate to their human dignity. This means social assistance operates where the basic living conditions of an individual or a family are at risk or where the quality of their life is below a universally acceptable minimum.

In this light, social assistance benefits should be appropriate to an applicant's needs and their form should not be below their dignity. They should assure living above the so-called biological minimum and be adequate to the average living standards of a given community, by their very nature variable in time and space, just like the basic needs.

Thus, social assistance support should not be limited to benefits serving to satisfy a basic need and should comprise benefits that would allow an individual or a family in future to take advantage of their rights, resources and capabilities to satisfy their basic needs. This goal is advanced by e.g., social work or specialist advice, in particular, legal and psychological.

2. THE PRINCIPLES OF PROVIDING SOCIAL ASSISTANCE TO THE DISABLED – SUBSIDIARITY AND THE PROTECTION OF HUMAN DIGNITY

The law explicitly lists disability among the reasons for providing social assistance. The concept of disability should be identified with the characteristic of those holding the status of persons with disabilities under the provisions of the Professional and Social Rehabilitation and Employment of Persons with Disabilities Act. In the context of the Social Assistance Act, the disability can be nothing else but a feature of a disabled person. The latter is an individual affected by the risk of disability as defined by Article

7(5) of the Social Assistance Act. This should be linked with the provisions of the Professional and Social Rehabilitation and Employment of Persons with Disabilities Act. Thus, a disabled person is a holder of an official confirmation of their disability. The legislation distinguishes three degrees of disability: significant, moderate, and light. Article 6(1) of the Social Assistance Act defines a total work incapacity, which includes a significant or moderate degree of disability under the Professional and Social Rehabilitation and Employment of Persons with Disabilities Act [Małecka-Łyszczek and Mędrzycki 2021, 90-91].

Any administrative activities should be guided by values. J. Zimmermann, while reviewing fundamental values in administrative law, lists human welfare at the top. "Administrative law is to serve human welfare, and this can be seen as its fundamental, indeed sole obligation and the sense of its existence. Everything else – administrative structures and links among them, the forms of action, any rationing, etc. – serves that sole purpose" [Zimmermann 2018, 558] With reference to the subject matter of this paper, it should be pointed out all and any administrative legal regulations in this respect should first of all address human welfare.

In a separate chapter of her *Prawo pomocy społecznej* devoted to the principles of social assistance, Sierpowska presents their very extensive catalogue, distinguishing between those concerning the public administration system and administrative proceedings [Sierpowska 2008, 45-64]. The space constraints of this paper do not allow such a broad approach, therefore, this discussion will be limited to the protection of human dignity and subsidiarity, highlighted in the title of this section.

The regulation of the Social Assistance Act is interesting in this connection. An objective and the chief principle of social assistance is assuring living conditions appropriate to human dignity [Michalska-Badziak 2009, 481]. An applicant's subjective assessment needs to be objectivised in the actions of social assistance authorities, a task made difficult as dignity is not defined in law. As S. Nitecki notes correctly, social workers and the staff of social assistance organisations are legally bound to consider all the aspects of human dignity in their actions. However, when the supplementary goals of social assistance are realised, the notion of human dignity is restricted, as a rule, to the aspects reported or stressed by those applying for benefits or officially selected by an administrative authority [Nitecki 2008, 67].

The concept of dignity is present several times in the Social Assistance Act in the context of the overall goal of benefits, that is, allowing individuals and families to live in conditions appropriate to human dignity. For instance, R. Michalska-Badziak believes that, although the legislator fails to specify what "basic needs" mean, they can be assumed to denote "a certain financial minimum allowing a person (family) for independent life in a community

and for satisfying a variety of social needs" [Michalska-Badziak 2009, 477], which is variable in time.

Respect for human dignity must also be considered in social work. Methods and techniques designed to improve the functioning of persons and families in their communities must take beneficiaries' dignity into account. Human dignity is part of the organisation and services of social assistance organisations and family nursing homes, too.

Respect for dignity is also a duty of social workers serving individuals and families. One more important comment needs to be added here. Reinforcing the dignity of people being served is an essential part of non-financial actions, e.g., crisis intervention or social work. Subsidiarity is crucial, it fosters dignity. This is evident, by contrast, in the often paternalistic approach to the disabled [Małecka-Łyszczek and Mędrzycki 2021, 101].

The principle of subsidiarity in the area of social assistance can be viewed from different perspectives, with reference to the place of social assistance in the social security system, the objectives of social assistance, family duties, an individual's responsibility for satisfying their own needs, the division of public administration's tasks, the organisation of social assistance, task discharge by non-public actors, and the award of social assistance benefits. This space does not allow for covering all the questions, therefore, the discussion will focus around subsidiarity as the principle of an individual's responsibility for satisfying their own needs [Michalska-Badziak 2018, 307].

The principle of subsidiarity can be interpreted out of Article 2 of the Social Assistance Act, though it's not expressed there directly. It basically consists in not doing things individuals can do on their own; social assistance should only be provided when an individual is no longer self-sufficient in a crisis situation. The provision in question envisages applying social assistance once two conditions are met jointly: difficult circumstances arise and cannot be overcome by somebody's own devices. Obviously, the legislator avoids defining 'difficult circumstances' and only lists their most common reasons, such as: poverty, homelessness, unemployment (Article 2 of the Social Assistance Act) [Sierpowska 2009, 209].

Social assistance may only be awarded once an individual has exercised, first, their rights, second, their resources and capabilities, that is, not only funds but also mental and physical properties, professional qualifications, active solving of their own and their families' problems, and readiness to work with others to this end. Public resources must not be used by those who, able to satisfy their needs out of their own resources, choose not to do it. If an individual is unable to overcome difficulties by their own devices, communities can intervene, from the lowest, family level to other civil society institutions. If an issue cannot be solved by the civil society,

public authorities may step in to tackle such public tasks [Michalska-Badziak 2018, 308].

3. THE BASIC FORMS OF PROVIDING SOCIAL ASSISTANCE TO PERSONS WITH DISABILITIES

The current model of social assistance presumes a cooperation between the formal social assistance system, healthcare system, educational support, economic support, and indirect social assistance (non-government organisations) systems. The institutions that provide care, social assistance and support to persons with disabilities include assistance centres, daytime nursing homes, nursing homes, community self-nursing homes, occupational therapy workshops, and support centres. Local community, urban social assistance centres, and county family social assistance are the direct organisers of social assistance that engage in social rehabilitation tasks, such as co-financing for rehabilitation equipment, liquidation of barriers, and for sports.

County disability decision-making centres operate with county social assistance centres. A person with disabilities who is alone, dependent, and requires but is deprived of social assistance is eligible for such assistance in the form of care services (satisfaction of everyday needs, hygienic and nursing care, as much contact with the environment as possible) or specialist care services (suited to special needs relating to a type of disability, e.g., support with the acquisition and development of skills required for independent living, social assistance with community life, official affairs, and employment, support for the process of medical treatment and rehabilitation). Care services are awarded by a social assistance centre, which determines their scope, time, and location [Matejek and Zdebska 2022, 263].

Beside the statutory social assistance tasks delivered by social assistance centres, a person with disabilities may take advantage of institutional forms of support, such as: support centres, community self-nursing homes, nursing homes, daytime nursing homes, occupational therapy workshops, sheltered accommodation, and vocational rehabilitation facilities.

A support centre is a daytime social assistance organisation where the disabled can learn to be independent, to acquire basic everyday skills, and prepare for a working career.

Decisions to refer the mentally disturbed to an assistance centre and pay for services provided at such centres are issued by competent local authorities that administer or have administered support centres for the mentally disturbed.

Community self-nursing homes are daytime facilities that support the mentally ill, persons with intellectual disabilities, autism, as well as Alzheimer

patients. Their operation relies on the Social Assistance Act, the Mental Health Protection Act[15] of 19 August 1994, the Labour and Welfare Policy Minister's Ruling[16] on Community Self-Nursing Homes and Internal Documents (Statutes, By-Laws) dated 9 December 2010. Community self-nursing homes are designed to provide social assistance to adults with disabilities by means of daytime services in respect of integration, mobilisation, therapeutic and social support, and social assistance in crisis situations.

Depending on who they are intended for, there are four types of the homes: type A – for the chronically mentally ill, type B – for the intellectually disabled, type C – for those with other chronic mental disturbances, type D – for those in the autism spectrum or with multiple disabilities. The division relates to the rehabilitation process in a given facility.

Nursing homes are a form of institutional social assistance in support of those requiring continuing care due to their age, sickness or disability who are incapable of independent everyday living. In line with the Social Assistance Act, nursing homes, depending on who they are for, are divided into the following types: homes for the elderly, for those with chronic somatic conditions, the chronically mentally ill, adults with intellectual disabilities, children and youth with intellectual disabilities, the physically disabled, and for alcohol addicts.

Family nursing home is a 24/365 form of care and support service provided by a private individual or a public benefit organisation for those who require such support due to their disabilities, among other things. Such a home is operated under a contract between an individual or a public benefit organisation and a geographically competent local community [Małecka-Łyszczek and Mędrzycki 2021, 125].

Daytime nursing homes are intended for those who require social assistance due to their age, sickness or other causes but are deprived of such assistance or their families are unable to provide it. The operation of such homes is based on the Social Assistance Act and internal regulations.

They provide care, therapeutic, catering and hygienic services, arrange for cultural and educational activities, develop individual free-time interests to remedy the sense of loneliness in the elderly. Activities to mobilise and improve general fitness, physical and psychological therapy, as well as psychological assistance are organised to develop contacts with the family and community.

Occupational therapy workshops are daytime facilities that support the disabled and their families, educate adults with intellectual disabilities

[15] Act of 19 August 1994, the Mental Health Protection, Journal of Laws of 2022, item 2123.

[16] Ordinance of 9 December 2010 of the Labour and Welfare Policy Minister on Community Self-Nursing Homes, Journal of Laws item 1586.

in actively supporting the processes of professional and social rehabilitation and skills necessary to improve the quality of their lives. The legal foundations for their operation are laid by the Professional and Social Rehabilitation and Employment of Persons with Disabilities Act as well as the Economy, Labour and Welfare Policy Minister's Ruling[17] on Occupational Therapy Workshops of 25 March 2004 and organisational by-laws approved by an organisation administering the workshops.

Persons with an officially recognised disability status whose decisions determining their disabilities or degrees of disability indicate participation in occupational therapy workshops may take part. The professional and social rehabilitation of the participants follows their customised programmes of rehabilitation and therapy which contain details of a person with disability, scheduled actions, and expected work outcomes [Matejek and Zdebska 2022, 267].

Occupational therapy is the core activity, but a variety of workshops are conducted, e.g., movement-based activities, activities improving social communication, cooking, crafts, computer, gardening, arts, woodworking or tailoring workshops. The variety of workshops depends on the capacity of a facility and the skills of therapists running the activities.

Sheltered accommodation is a form of non-pecuniary benefit envisaged by the Social Assistance Act. Guidelines on its operation are part of the Labour and Welfare Policy Minister's Ruling[18] on Sheltered Accommodation of 14 March 2012.

Both local and county authorities are obliged to run sheltered accommodation by force of law. This is a form of social assistance that prepares its residents, under specialist care, for independent living or supports those individuals in their everyday life.

Sheltered accommodation can be administered by any social assistance or public benefit organisation. Depending on the purpose of support, it's training or supported sheltered accommodation.

Supported sheltered accommodation is intended for: 1) persons with disabilities, especially with physical disabilities or mental disturbances; 2) the elderly or the chronically ill.

Supported sheltered accommodation provides household services and social assistance with everyday necessities and social contacts in order to develop or maintain independence within a person's abilities. Thus, an adult with a disability who needs support with their everyday living but doesn't

[17] Ordinance of the Economy, Labour and Welfare Policy Minister of 25 March 2004 on Occupational Therapy Workshops, Journal of Laws item 587.

[18] Ordinance of the Labour and Welfare Policy Minister of 14 March 2012 on Sheltered Accommodation, Journal of Laws item 850.

require the services of a 24/365 facility may be awarded such support in sheltered accommodation [Małecka-Łyszczek and Mędrzycki 2021, 130].

A decision to award support in sheltered accommodation is issued for a fixed period of time. Decisions of indefinite support in sheltered accommodation may be issued to the holders of decisions determining significant or moderate degrees of disability or, in special circumstances, to other individuals.

CONCLUSION

The institutions discussed and their tasks are not all the actions for the benefit of persons with disabilities, but a selected part of the support system.

Looking at the background and organisational structure of the social assistance system in Poland, one can say it is founded on social care created in the interwar period. The development of welfare policy since 1923 was obstructed at the time of real socialism. In the post-1989 period of social transformation, a protective and passive social assistance system was established. New solutions were sought after 2000 for a more active model of social assistance and integration [Zelek 2018, 187]. The present Social Assistance Act provides for a range of both pecuniary and non-pecuniary benefits in support of the excluded.

As far as social assistance for persons with disabilities is concerned, actions are increasingly important intended to raise the social awareness of those persons: their situation, capabilities, limitations, needs, and problems connected with various disabilities.

The legislator ought to create solutions aimed at an effective social assistance, and this requires a constant monitoring of needs and variable socio-economic conditions. As the conditions change, innovation and non-standard instruments need to be sought. An effective social assistance should be dynamic and responsive. The current models of public (joint) management suggest a focus is required on using the potential of social assistance beneficiaries and including them in joint decision-making processes, which means their greater empowerment that ties in with respect for dignity.

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MARKET-BASED RESPONSES OF SUBJECTS TO TAXATION. LEGAL, MANAGEMENT AND ECONOMIC CONDITIONS

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Abstract: The content of financial policy is always the choice of certain objectives to be achieved through the management of finances (including taxes), as well as the methods and means of achieving these objectives. The financial policy of households and economic agents has a microeconomic scale, as it affects the individual economic objectives of individual consumers (households) and enterprises. The state's financial policy pursues defined objectives in three areas: stabilisation of the economy, allocation of production factors and redistribution of income. The implementation of the state financial policy in these three areas gives rise to the distinction between the three functions of state's financial policy: stabilisation, allocation and redistribution. The article analyses the legal and economic determinants of the impact of taxpayers' behaviour on the management of economic agents and household responses.

Keywords: tax law; financial law; tax liability; economics of taxation; decision making; tax management.

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INTRODUCTION

Taxpayers' reactions are dictated by their subjective perception of the tax burden, which is expressed as the amount of taxes that reduce the taxpayer's income, being the difference between the income that would be available to the taxpayer if no tax had to be paid and the actual income available to the taxpayer after paying taxes. These taxpayer responses determine both economic and political incentives [Gomułowicz and Małecki 2004, 110-11]. Every form of taxation carries with it the effect of reducing the income that the individual expected to obtain from the original appropriation, production, or exchange. Since these activities require the use of scarce resources – such as time and the use of one's body – that could have been used for consumption or leisure, the opportunity cost of these activities increases. The marginal utility of appropriation, production and exchange becomes lower and the marginal utility of consumption or leisure becomes higher. Thus, by forcibly transferring valuable, not yet consumed goods from producers (production in a broader sense also includes primary appropriation and exchange) to people who have not participated in production, taxation reduces the current income of producers and their potential level of consumption. Moreover, the current incentives for future production of valuable goods also weaken, with a consequent reduction in future income and levels of future consumption [Rothbard 1970, 2].

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. The article is written according to the traditional methods used in legal research sciences, linguistic analysis (dogmatic-legal method and linguistic-logical method), and comparative (comparative) and economic method of legal analysis. The monograph takes the form of an in-depth legal analysis of the principles of property taxation in the Polish legal system and the legal systems of European Union countries. Particular attention has been given to the directions of reform of the property taxation system in Poland in the context of the legal regulations of the model based on the real estate cadastre (ad valorem). The methods used in the microeconomic analysis – the inductive influence of taxation on taxpayers' behaviour – were also used.

2. TAXATION AND THE SOCIAL AND ECONOMIC CONTENT OF GOVERNMENT FINANCIAL POLICY

From the point of view of taxation, fiscal policy is a fundamental tool for achieving the economic and social objectives imposed upon it. These objectives are reflected in the construction of the tax system, by both defining the types and amounts of taxes imposed on particular categories of taxpayers, but also by defining the detailed principles of tax construction – determining their personal scope, subject matter, tax base, methods of its calculation, tax rates and scales, and the system of tax allowances and exemptions (less frequently tax increases). "The implementation of the objectives of the state's financial policy is based both on their qualitative definition, but also through the detailed definition of their subjective and objective scope, rules of assessment depending on the various subjective characteristics of payers, exemptions, reliefs, etc. It can be concluded that the process of collecting public revenues allows the creation and application of various tools for the implementation of state financial policy objectives" [Wołowiec and Cienkowski 2014, 25-26]. The tools of the state's financial policy simultaneously perform all functions of financial policy, i.e. stabilisation, allocation and redistribution functions. "For example, if the personal income tax is based on progressive rates (increasing with an increase in the tax base), then as an instrument of state financial policy, it will automatically perform a stabilising function" [Wojciechowski, Skrzypek-Ahmed, Wołowiec, et al. 2023, 512].

3. TAXES AND THE STABILISATION AND STIMULUS FUNCTION OF FINANCIAL POLICY

Globalisation, in addition to its positive effects, has also exacerbated a number of negative phenomena, which we can include social and income inequalities, poverty, unemployment, increased social pathologies, disintegration of family and interpersonal ties, excessive consumerism, productivism, environmental degradation and terrorist threats [Wołowiec 2009, 5]. Recent years have seen dynamic changes in the fields of economics, public management and economic and social policy, with increasing consideration of a variety of social and environmental factors and attention to inclusive (sustainable) economic growth. Similarly, the concept of profit itself is no longer the primary paradigm for the role and importance of the company in the modern world. There is a growing awareness among consumers, as well as societies as a whole, of the role and importance of sustainability and equitable distribution of resources. Neo-liberal concepts of profit

maximisation at all costs and the "invisible" hand of the market have indeed devalued [Ivashko, Wojciechowski, Życzkowski, et al. 2023, 530].

What we have today is a discussion on changing the neoliberal model of capitalism, which is no panacea for contemporary economic and social challenges and problems. Capitalism is based on three principles: free market, free competition and property rights. Unfortunately, capitalism has many different faces and can take many different forms. The formula of capitalism in the Scandinavian countries differs from that in the Anglo-Saxon "version". Since the 1970's, neo-liberalism, based on market fundamentalism, i.e. the principle that the market decides everything and is infallible, has played a dominant role in shaping capitalism. Such an uncritical belief in the infallibility of the market means that, with absolute subservience to market mechanisms alone, the mechanisms of democracy are undermined. In this way, we become slaves to the market, and this contradicts the idea of freedom. Furthermore, ordoliberalism, which assumes that the idea of liberalism is linked to the principles of socio-economic order, is gaining popularity. Post-crisis experience shows that countries with capitalism in a formula closer to ordoliberalism are characterised by smaller income disparities and a fairer distribution of national income [Leoński 2015, 135-36]. Modern capitalism must be based on a more inclusive model, i.e. one that is oriented towards the widest possible inclusion of all resources, social and material, in order to improve the quality of life and avoid various forms of social exclusion. The constitutional model of the social and economic system in Poland is based on such a concept. An inclusive system is one that optimises the use of all resources and makes it possible to narrow the gap between the potential, i.e. achievable, level of GDP and its actual size. It is the financial crises and the covid-19 pandemic that have caused us to attach increasing importance to the so-called concept of sustainability and economic inclusiveness [Anisiewicz, Wołowiec, Marczuk, et al. 2023, 228]. It assumes that GDP growth is not an end in itself. More important is the distribution of the benefits of this growth and the levelling out of income and wealth inequalities [Leśna-Wierszołowicz 2016, 71].

The stabilisation function of the government's finances includes measures aimed, *inter alia*, at achieving and maintaining a relatively high rate of economic growth, while limiting negative phenomena, i.e. high unemployment and inflation rates, mitigating fluctuations in the business cycle, stabilising the money market and making the most efficient use of tangible factors of production [Wołowiec and Cienkowski 2015, 14].

There are three main functions within fiscal policy. Stabilisation function of fiscal policy - involves influencing the level of aggregate demand in order to maintain macroeconomic equilibrium, i.e. price stability, full employment and currency market equilibrium. Redistributive function of fiscal policy - aims to reduce income inequality by transferring income from richer to

poorer segments of society through the tax system and social benefits. Allocative function - involves directing economic resources to sectors of greatest importance for economic development and social welfare. It is worth noting that these three functions are closely interrelated and influence each other. Therefore, an effective fiscal policy should take into account all these functions and strive to fulfil them simultaneously.

In practice, fiscal policy varies depending on the government's approach to shaping public finances. We distinguish between restrictive, loose, balanced, responsible and active policies, among others. Each of these approaches has advantages and disadvantages, and their application depends on the economic situation and economic policy objectives. Loose fiscal policy involves increasing public spending and/or reducing taxes to stimulate the economy and increase aggregate demand. This type of policy is used in situations of recession or economic downturn. Conversely, restrictive fiscal policy involves reducing public spending and/or increasing taxes to curb inflation and excessive economic growth. Responsible fiscal policy implies attention to the sustainability of public finances and long-term economic goals, such as sustainable development or the reduction of social inequalities. Active fiscal policy, on the other hand, involves the deliberate and flexible use of fiscal policy tools to achieve economic objectives and stabilise the economy. [Wołowiec 2019, 240].

Fiscal policy asymmetries arise from differences in the economic situation, the structure of the economy and the economic policy objectives of different countries. Fiscal policy can be shaped by various factors, such as the level of economic development, the structure of economic sectors, the level of public debt or social preferences. Consequently, fiscal policy differs between countries and its effectiveness depends on proper adaptation to the specific characteristics of the country and the economic situation. In some situations, fiscal policy tools may fail, leading to the inability of fiscal policy to achieve its intended objectives. An example of such a situation could be a lack of coordination between fiscal policy and monetary policy, which can lead to inefficient use of the available tools

4. EFFECTS OF TAXATION ON DEMAND, SUPPLY, SAVINGS AND INVESTMENT

In microeconomic terms, taxes influence the formation of demand, supply, equilibrium in the market for a given good and the decisions of producers, consumers and investors. The imposition or increase of a tax on a good will induce a decrease in the proceeds from its sale as a result of a decrease in demand for the good and a decrease in its net price. The increased gross price is covered in part by the seller and in part by the buyer. The

proportions of their share in covering the increased price depend on economic factors such as the price elasticity of demand and supply, the ability of the seller (producer) to influence the level and structure of its own costs. Under conditions of rigid demand elasticity, the entire burden of imposing (increasing) the tax will be borne by the buyer. If the elasticity of supply is rigid, then the imposition or increase of taxation under these conditions will not cause a change in the gross price of the good in question, but its net price will decrease by the amount of the imposed (increased) tax. The entire tax burden will then be borne by the seller. If the demand for the good in question were infinitely elastic, the consequence of imposing or increasing the tax would be to reduce this supply with an increase in the gross price, until the equilibrium price determined by the willingness of buyers to pay the higher price is reached. Thus, the less elastic demand and supply are, the smaller the impact of an income tax on a given economic activity, since the imposition of (an increase in) taxation does not induce major changes in the allocation of resources. The greater the elasticity, the greater the impact on resource allocation [Owsiak 2000, 172].

"A tax affects the price of the taxed good, and an increase in price affects the market. An increase in tax rates can result in a situation where the taxpayer's gross taxable income remains unchanged, in which case his net after-tax income decreases, or the taxpayer manages to increase his gross income, so that his net after-tax income does not decrease. In the first case, an increase in taxation can translate into either a decrease in direct consumption or a decrease in savings. A reduction in consumption translates into a reduction in indirect tax revenue unless an increase in income tax rates is accompanied by an increase in indirect tax rates. This, however, can result in either a further decrease in consumption or a decrease in savings and capital supply" [Wołowiec 2017a, 182].

In a market economy, allocation decisions are more or less visibly linked to the monetary savings of actors. The propensity of actors to save depends both on the deposit interest rate and inflation and on the tax rate on income from capital (monetary savings). Also, the propensity of entities to invest depends on the income from invested capital. High taxation on income from capital can reduce its marginal productivity, causing investment to be allocated in preferentially taxed sectors but with lower productivity, leading at the same time to distorted investment decisions.

Undoubtedly, high income taxation reduces private investment by reducing the portion of income potentially allocated to investment, leaving taxpayers with only enough money for consumption. Some researchers take a different view, arguing that a progressive tax does not at all reduce the attractiveness of risky investments compared to risk-free investments for two main reasons. Firstly, taxation reduces the taxpayer's overall level of income,

so that his or her attitude to risk may change. This effect occurs regardless of the form and manner of income taxation, and depends only on the size of the tax, i.e. the scale of the reduction in after-tax income. Whether the tax reduces or increases risk-taking depends on the shape of the utility function. Secondly, as Young argues, high effective income taxation with a smaller range of expected after-tax income, which induces actors to take risks [Cienkowski and Wołowiec 2014, 36]. Of course, Young's assumptions may seem somewhat controversial, as high effective income tax rates, by reducing a taxpayer's income, do not necessarily induce him to increase risk. Moreover, Young makes the simplifying assumption that all taxpayers do not differ in their degree of risk aversion, so that he concludes that a non-negative tax scale is risk-neutral if and only if it offsets either absolute or proportional sacrifice. If U(x) presents the utility for income x in the absence of taxation, and t = f(x) is the tax scale, then V(x) = U(x – t) is the taxpayer's utility for income after tax. A tax scale is risk-neutral if the taxpayer makes the same choices with and without taxation [Young 1994, 112]. As the von Neumann-Morgenstern utility is defined up to a positive linear transformation, this is the same as saying that V(x) = U(x – t) = AU(x) – B for A > 0. If A = 1, then U(x) – U(x – t) = B, this means that t compensates for the absolute sacrifice. In the situation where A < 1, and b = B(1 – A), then [U(x – t) + b] / [U(x) + b] = A. By assumption, t > 0, and U is increasing, so A < 1. Thus, the tax offsets the sacrifice rate at a rate of 1 – A. Note that the above argument has some weaknesses. Firstly, the utility function cannot be estimated individually for each taxpayer, so individual taxpayer decisions should not be "averaged". Besides, the degree of risk aversion varies, and this significantly affects the division of social roles and the social division of labour, as well as the consumption and investment decisions made by taxpayers.

5. SUBSTITUTION AND INCOME EFFECTS − AFTER-TAX REAL RATE OF RETURN ON SAVINGS VS. SAVINGS SUPPLY

In the light of cluster economic theory, the amount of household savings is influenced by the rate of return on savings, representing "unconsumed" income. Savings are the result of households choosing a particular consumption structure over time by comparing the subjective value of current consumption relative to future consumption (the discount rate) with the market interest rate, which determines the extent to which future consumption increases as a result of foregoing current consumption (the interest rate). The taxation of capital income (interest on bank deposits, bonds, investment fund units, dividends on company shares) reduces the effective rate of return, thereby reducing the remuneration of savings. Consequently, one would

expect a decrease in the level of savings (substitution effect), but there is also an income effect – a decrease in the effective rate of return on savings translates into a decrease in the level of household wealth. This can result in a reduction in current consumption as well as future consumption. A reduction in current consumption can result in an increase in the level of savings.

"The effect of a decrease in the net real rate, as a result of taxing savings income, is not clearly defined due to the presence of substitution and income effects. Economic research shows that in the long run the substitution effect is stronger than the income effect and a fall in the net rate of return interacts with a fall in the supply of savings" [Tanzi and Howell 1998, 4].

If, in the long run, a reduction in taxation of labour income and savings leads to an increase in the budget deficit, households (taxpayers) expect income taxes to increase in future periods. Taxpayers will save part of the additional disposable income gained as a result of the income tax cut, seeking to equalise the distribution of consumption expenditure over time. Assuming intergenerational altruism, we obtain the same effect regardless of whether income taxes increase while the household is still alive or whether the tax increase affects its descendants. We therefore have a substitution between public and private sector savings, with studies of EU economies and the US economy failing to confirm the full substitution of public savings for private savings.

Progressive taxation may lead to a decline in savings. The life-cycle hypothesis, assumes that households, seeking to equalise their spending over their lifetimes, increase their indebtedness in initial periods to increase current consumption, expecting higher income in the future to allow them to repay past debt. Households also expect their income to fall in the final life cycle, causing them to save part of their income to be consumed only after retirement. Thus, it can be seen that the lowest propensity to save is found among economically inactive households (pensioners), a slightly higher propensity among households in the early phase of the life cycle and the highest propensity among the most affluent households in the mature life cycle [Wołowiec and Kępa 2020, 497; Wołowiec 2020, 558].

Progressive income taxation places the heaviest burden on the incomes of households with the highest marginal propensity to save. At the same time, these households transfer part of their income to households in the early and canine phase of the life cycle (supporting children and parents with transfers). This creates a conflict between egalitarian tax policies and solutions to stimulate household savings. An important role in the analysis of this process is played by the guarantee of social and pension benefits by the state (financed by quasi income taxes – contributions charged to work), as the existence of such a guarantee system removes uncertainty related to the consequences of unfavourable events for the household and reduces to some

extent the propensity (need) to save. "In a situation where social transfers come from current public sector revenues, we may have to deal with a decline in aggregate savings and a weakening of the ability to finance investment. It therefore seems important to reduce the funding of pensions from current public revenues. Research by Feldstein and Samwick indicates that a change from a social security system to a funded system could increase US national income by 5% in the long term" [Wołowiec, Skica, and Gercheva 2014, 54].

Taking into account the differences in marginal propensity to save between households with different incomes, it can be seen that low-income households have limited access to capital (credit), which means that they have to finance the purchase of durable goods to a much greater extent from their own resources. Restrictions on access to credit, combined with a high level of income taxation, limit households' consumption expenditure, while at the same time they may increase their savings for a given income distribution [Wołowiec 2017b, 41].

If households treat the retained profits of the businesses they own as their own savings, the level of income taxation of firms can significantly affect household savings. Households may save more when firms retain less profits and save less when firms retain more profits. In a situation where the marginal propensity to save of households with a significant share of corporate profits is higher than the population average, an increase in the tax burden on corporate profits (income) combined with a reduction in personal tax may reduce the size of aggregate private sector savings. In summary, it can be concluded that increasing taxation of savings income may lead to a decrease in aggregate savings stimulating investment objectives, mainly through a reduction in disposable income, lower returns on savings and income transfer between households with different propensities to save.

A factor that has a significant impact on the amount of investment is the cost of capital, which depends on the interest rate. Taxing investment or savings income increases the difference between the return on investment before income tax and the return on savings after tax. Thus, it is a kind of tax wedge between the supply of savings and the demand for capital, which generates a decrease in the net rate of return on savings and an increase in the gross rate of return on investment and, consequently, a decrease in capital expenditure. When analysing the impact of investment income taxation, it is important to focus on effective tax rates, as very often a reduction in nominal (statutory) rates need not positively stimulate investment growth if accompanying changes in tax law (e.g. elimination of allowances) lead to an increase in the real tax burden.

CONCLUSIONS

To sum up, it should be remembered that any increase in tax and para-tax burdens may translate into a decline in the economic growth rate. The obtained research results lead to the conclusion that a better solution for economic growth is to increase the fiscal burden with indirect taxes than to increase the labor burden. Research shows that the fiscal burdens that constitute the so-called labor costs. Interestingly, contrary to popular belief, research has not shown any correlation between the impact of income taxes on the economy and economic growth. The obtained research results do not allow, without detailed microeconomic analyzes (level of wealth of households, structure of expenses of these households, price elasticity of demand, etc.), to conclude that it is more beneficial from the point of view of socio-economic well-being to increase the revenues from indirect taxation in the structure of budget revenues. Reducing the burden of income taxes requires an increase in the burden of indirect taxes to maintain the neutrality of revenues. However, please remember that this may cause some negative consequences. An increase in effective tax rates on goods and services may lead to an unfavorable allocation of production towards goods with lower price elasticity of demand. Indirect taxes use consumers' utility preferences to meet the financial needs of the budget, but the structure of the economy is shifting towards goods with low demand elasticity (basic goods). This may be a factor weakening economic growth by reducing the market for higher-level goods that stimulate the competitiveness of the economy.

The increase in prices caused by the increase in indirect tax rates may lead to an increase in inflation processes. If there is an increase in the prices of consumer goods with low demand elasticity, the low elasticity will not cause a decline in demand (or a slight decline). Producers will increase prices, which will cause a multiplier reaction of changes in other prices. Households burdened by higher prices of basic goods limit the demand for higher-order goods, which lowers their price and production. Producers reduce production and the overall price level is determined by goods with low price elasticity of demand. High (rising) indirect tax rates, by increasing the price level and the inflation effect, reduce the real income of society, reduce demand, decrease production and, consequently, weaken the economic growth rate. Price increases resulting from rising indirect tax rates generate, in the long run, pressure to increase wages so as not to weaken global demand in the economy. This results in an increase in the costs of wages and the costs of other production factors (suppliers of these factors compensate for their costs by shifting the tax burden by increasing the requested price). Therefore, there is an indirect burden of indirect taxes on enterprises on the part of costs. The increase in prices, which is the result of an

increase in the burden of indirect taxes, leads to an increase in the quantity of money in accordance with Irving Fischer's exchange equation. This may cause an imbalance in the monetary system. Indirect taxes, by burdening consumption expenditure, weaken the income of poor households the most, which means a violation of the principle of equality and fairness of taxation. In a situation where the increase in indirect taxation applies to a greater extent to domestic goods than to imported goods, this worsens the situation of domestic producers. The increase in indirect taxation of basic goods causes an increase in social stratification by increasing economic inequalities in the distribution of national income, especially in conditions of a high share of household expenditure on basic goods.

Assessment of the impact of income taxes on taxpayers' behavior and, consequently, on economic growth requires taking into account the entire external environment, in which taxes are one of the important elements, but it is not an element that functions independently and determines economic growth. A feature of the environment is that it may have an inhibitory or stimulating effect on economic growth, as well as the fact that it is shaped independently of the will of taxpayers.

Pro-growth tax policy should include such actions as: reducing taxation of income from work by lowering marginal personal income tax rates and/or increasing the tax-free amount and eliminating all ineffective tax reliefs and exemptions; reducing nominal CIT rates (in a situation where taxation of business income would still be regulated in two acts, the minimum plan is to reduce the CIT rate to 18%), while simultaneously expanding the tax base and increasing the tax base. It should be emphasized that tax incentives for investing may consist not only in reducing the corporate income tax rate, but also in appropriately designed investment reliefs. In terms of the structure of income taxes, it is recommended to replace the existing personal income taxes (PIT) and corporate income taxes (CIT) with a personal income tax and a business tax, i.e. on business activity, regardless of the form of its conduct. It is also desirable to reduce social security contributions charged to employers, in particular aimed at those social groups that are most at risk of unemployment, i.e. young people, those with the lowest income and low qualifications. An increase in the role of indirect taxes (reduction of direct taxation at the expense of indirect taxes) in the structure of tax revenues should be achieved not by further increases in the basic VAT rate, but by expanding the tax base and introducing a uniform VAT rate or significantly limiting the use of reduced rates. It should be emphasized that due to the growing share of the burden of indirect taxes, it will be necessary to look for solutions that protect the poorest income groups. All the changes indicated above should also be supported by multi-directional activities to improve the functioning of tax administration in Poland. Such activities

include: streamlining tax regulations, better use of Internet technologies in tax administration, reducing administrative costs of tax collection, improving tax collection and undertaking a decisive and effective fight against the gray zone.

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THE REQUIREMENTS OF A CANDIDATE FOR BISHOP IN THE EARLY CHURCH

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Abstract. The author in this article describes what appropriate requirements a candidate for bishop in the early church should have. These requirements are defined in Holy Scripture in the catalogue of behaviour and also derived from the writings of the early church writers and the decisions of some councils. The author divided the requirements of a candidate for bishop into those derived from *ius divinum*, *ius positivum*, *ius non scriptum*, human, spiritual, intellectual, pastoral, and requirements *sentire cum Ecclesia*.

Keywords: bishop; candidate for bishop; election of bishop; requirements; early Church.

INTRODUCTION

In April 2018, in accordance with Can. 401 § 1 of the 1983 Code of Canon Law,[1] Cardinal Dominik Duka OP resigned from the office of Archbishop of Prague. The pope accepted his resignation, but still kept him as the head of this office *donec aliter provideatur*.[2] The new Archbishop of Prague was appointed by Pope Francis on 13 May 2022. He appointed the former Archbishop of Olomouc, Jan Graubner (1948),[3] who took office on 2 July 2022. Due to his age, he is sometimes pejoratively referred to as the "winter bishop" [Zeeden 2006, 152-52].[4]

However, the process of finding and appointing new bishops in the Czech Republic does not end with Jan Graubner, quite the opposite. In the near future it will be necessary to appoint a new Greek Catholic exarch in Prague, an archbishop in Olomouc, a bishop in Litoměřice and an archbishop in Prague.[5] Also the auxiliary bishops will be subject to generational change.

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

[2] Apostolic Nunciature Prague, N. 1833/18 of 7 May 2018.

[3] "L'Osservatore Romano" CLXII no. 109, 13 May 2022, p. 2.

[4] Frederick V (Elector Palatine of the Rhine) known as the "Winter King" because his reign lasted only one year (1619-1620).

[5] Apostolic Nunciature Prague, N. 785/23 of 28 August 2023.

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News emerges regularly about a non-public or even secret process of finding a suitable candidate for diocesan bishop. There have been some criticisms from both the clergy and the laity of the Vatican's alleged covert proceedings [Jadrný 2017]. Voices have also been raised calling for the faithful to be listened to more, as they once were in the early centuries of the Church, and for the pope to make appropriate decisions. The people of God have legitimate expectations and ideas about their new bishop. The most important thing for them is not whether he has a doctorate in theology (Can. 378 CIC/83), but above all whether they know him, whether he comes from their diocese and what views he represents. Finally, the faithful want to assess his past actions, successes and failures.

This article will not focus on the process of electing a new bishop, but rather on the requirements that a candidate for bishop had to possess in the early Church.

1. BISHOPS IN THE WRITINGS OF THE NEW TESTAMENT

In the New Testament, the title of bishop (*episcopus*) did not belong to one who possessed a certain charism and exercised a specific ministry, permanent or temporary, in the community of believers since originally there was no difference between a bishop and a presbyter – either in hierarchical position or in the performance of ministries and tasks in the community [Beyer 1967, 771-82; Vopřada 2018, 14-19].[6] However, the ministry of the bishop must be distinguished from the heads of Christian communities, who were also called bishops. The life and governance of the Christian community was very similar to that of the Jewish community, as many Christians came from Judaism, from the Pharisaic current. In the early days, the offices of bishops and deacons were combined. Jesus chose the apostles, whom he sent out while he was still on his earthly journey, to preach (Mk 3:14). By the command of Jesus Christ, the apostleship is directly linked to the preaching of the Gospel (Mk 16:15). In addition to the apostles, there were other groups of authoritative prophets and teachers, led by the Holy Spirit (Mk 9:38-40). After Christ's resurrection, the apostles and other preachers of the Gospel travelled from place to place, establishing communities of believers that had to be led and held accountable. This was especially the case when the apostles, prophets or other recognised preachers had already left a place. At that point, their appointees had to responsibly lead the community, provide community discipline, spiritual accompaniment, teaching and charity (Acts 6). Without such leadership, the Christian community would not have survived (1 Cor 12:28).

[6] Cf. Acts 14:23; 20:28; Phil 1:1; 1 Tim 3:1; Titus 1:5-9.

From the very beginning of the first Christian communities, an internal organisational structure had to be established. The apostles Paul and Barnabas appointed presbyters as superiors. These superiors were called bishops and deacons in Philippi (1 Thess 5:12; Rom 12:8; Gal 6:6-10; Phil 1:1).

In the Christian community originating from Judaism, the superiors were presbyters. The community deriving from paganism, from ancient Greece, referred to its superiors as bishops and deacons. These two offices were known even before the birth of Christianity. With its rise, offices, ministries, functions and those exercising them took on a new meaning. It was logical that bishops and deacons took over the leadership of the community of believers. The apostles, prophets and possibly other teachers, who founded the first communities of Christians and temporarily led them, chose their successors while they went elsewhere to evangelise.

2. *MUNUS* OF THE BISHOP IN THE EARLY CHURCH

The episcopal state (*episcopatus*) comes from a person who, as a superior, was called to care for and supervise his subordinates. The Greek verb *σκοπέω* [Tichý 2001, 156][7] is translated in *LXX* into Latin as *intendere* [Pražák, Novotný, Sedláček 1937, 682].[8] The Greek noun *ἐπίσκοποι* is translated into Latin as *speculatores* [Pražák, Novotný, and Sedláček 1937, 1144].[9] The bishop, therefore, observes, watches over and, by virtue of his office, oversees the morals and life of the people under his jurisdiction, and intervenes when necessary.[10]

The term bishop also referred to: a provincial administrator, a community superior, a senior official, a construction manager and an overseer [Weiser 2006, 481-82]. A bishop was thus a person who was entrusted with responsible tasks that benefited the whole society or a particular community.

On the basis of the surviving testimonies of Christian communities from the early centuries of the Church's life, it is known that there were two types of hierarchical episcopal office. In the eastern Antiochian tradition, we encounter the monarchical-type bishop. His task was to lead and teach the faithful the proper doctrine of the Church (*munus regendi, munus docendi*), organise and preside over liturgical assemblies (*munus sanctificandi*)

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[7] To watch, observe, be mindful of something.

[8] To measure, multiply, magnify, aim, measure, direct, take something to heart, consider, consider somebody, care about something, pay attention to, attend to something, look at, turn eyes to, care about something, intend.

[9] A scout, spy, eyewitness, researcher, watchman, guardian; those who are looking for something, investigating something.

[10] See *Isidor ze Sevilly. Etymologie VI-VII*, Oikoymenh, Praha 2004, p. 313.

(1 Cor 2:15). The Western tradition gave rise to the collegial-type bishop office, exercised by presbyters or presbyter-bishops [Dupuy 1973, 500-1]. The exact definition of the episcopal ministry in the early Church is unknown. A bishop may have been appointed as one of the presbyters who presided over the eucharistic assembly or oversaw the unity of the faith in several communities where he coordinated cooperation.[11] However, the title of bishop could also be given to one who presided over a presbyteral assembly or had apostolic succession [Cattaneo 1997, 93-103]. The Apostle Paul recognised the ministries of apostles, prophets and teachers as the most important for the growth of the Church (1 Cor 12:28). However, these are not ministries with precisely defined tasks in a hierarchical order (Acts 13:1-2). If Paul was called an 'apostle', it is clear from the Scripture that he also exercised the ministry of prophet and teacher.

The author of the ancient Christian treatise *Didache*[12] (80-130) described the liturgical practice and disciplinary customs in Christian communities at the time. He also mentioned bishops and deacons, whose spiritual rank was lower than that of prophets. Nevertheless, they could not to be overlooked in the community because they exercised the ministry of prophets and teachers in and for the benefit of that community. The itinerant apostles, who continued the work of the twelve apostles, were also preachers of Christian doctrine, proclaiming Jesus Christ crucified, who lives because he rose from the dead (1 Cor 9:2). The itinerant prophets taught and led the congregations in Eucharistic celebrations. By proclaiming the word of God, interpreting revelations, mystical experiences and incarnated knowledge, they built up the community into the Church of God (1 Cor 14:4.30), exhorting and encouraging its members (1 Cor 14:3). They also recognised God's will and then revealed the future to the community or to individuals (1 Tim 1:18; 4:14). The ministry of teachers was considered a charismatic ministry and was closely linked to the prophetic and pastoral ministry (Acts 13:1; Eph 4:11).

It is clear from the *Didache* that the elected bishops and deacons formed a permanent element of the Christian communities for which they were also responsible. However, it is not clear whether they were chosen from among the laity, presbyters or deacons [Quasten 2000, 38]. The author of the treatise

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[11] See E. Hieronymus, *Commentariorum in epistolam ad Titum*, in: *Patrologiae cursus completus, sive biblioteca universalis, integra, uniformis, commoda, oeconomica, omnium SS. Patrum, doctorum scriptorumque ecclesiasticorum*, XXVI, ed. J.P. Migne, Paris 1845, p. 597; Idem, *Epistola CXLVI, Ad Euangelum presbyterum*, in: *Corpus Scriptorum Ecclesiasticorum Latinorum, Vol. LVI, Epistularum Pars III: Epistulae CXXI-CLIV*, ed. F. Tempsky, G. Freytag (g.m.b.h.), Vindobonae–Lipsiae 1918, p. 308.

[12] See *Učení dvanácti apoštolů /Didaché*, in: *Spisy apoštolských otců*, ed. L. Varcl, D. Drápal, J. Sokol, Kalich, Praha 2004, pp. 11-28.

emphasised that bishops and deacons had to be cared for just as carefully as itinerant prophets, teachers and apostles, because they also taught and led the Christian community. They had to be respected because they led the Christian community according to the order of the Gospel, which served to preserve the unity of the Church (IV, X, XI, XIII-XV) [Cattaneo 1997, 63-92; Vopřada 2018, 43-46].

Pope Clement of Rome (d. 97/101), in his letter to the Corinthians, which is one of the most important Christian writings of the post-apostolic era, reminded his addressees that the apostles were called by Jesus Christ to teach and proclaim the coming of the Kingdom of God. The apostles appointed bishops and deacons at all their stops on the evangelistic journey. However, the later appointment of bishops was accompanied by disputes, machinations and often their unlawful removal. The task of the bishops was to lead the community and fulfil their duties, including making offerings without blemish in piety. Bishops presided over specific communities. Clement advocated the idea of a mono-episcopate in the apostolic succession[13] [Pottmeyer 2006, 482-83]. However, it is not clear from the letter whether any of the presbyters or deacons were bishops in Corinth. As Bishop of Rome, he also felt responsible for the situation in Corinth because, as he claimed, his instructions for the Corinthians came from the Holy Spirit. However, it is not clear from the letter whether any of the presbyters or deacons were bishops in Corinth[14] [Quasten 2000, 49-51].

According to St. Ignatius of Antioch (d. 107), the bishop stands at the head of the Christian community, which was an image of the heavenly hierarchy. He believed that looking upon the bishop was equivalent to looking upon the Lord himself.[15] The bishop was to supervise everyone – deacons, priests and laity. The bishop was to be the intense bond of unity, both among ministers and among the rest of the people. He was also to preside over the true Eucharist and the community of love.[16] Ignatius considered unity and unanimity under the leadership of the bishop to be the characteristic feature of the Christian community, since there is only one Eucharist, one Body of Jesus Christ, one faith in Jesus Christ and one altar. The bishop, together with the presbyters and deacons, were therefore to form one

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[13] See Klement Římský, První list Klementův, in: Spisy apoštolských..., pp. 49-51.

[14] Ibid., pp. 83-84, 92.

[15] See Ignác Antiochijský, *Ignatios Efezským*, in: *Spisy apoštolských*…, p. 119; Idem, *Ignatios Magneským*, in: *Spisy apoštolských*…, p. 124; Idem, *Ignatios Tralleským*, in: *Spisy apoštolských*…, pp. 126-27.

[16] See Ignác Antiochijský, Ignatios Efezským, pp. 118-19; Idem, Ignatios Magneským, p. 123; Idem, Ignatios Smyrenským, in: Spisy apoštolských…, p. 137.

body.[17] For Ignatius, the unity of the faithful people, deacons and presbyters with their bishop was sacramental [Pottmeyer 2006, 483].

The Apostolic Tradition of St. Hippolytus of Rome (d. 235) demonstrates clearly the mono-episcopal leadership of the Christian community in the Western tradition. All members of the community participated in the election of its own bishop. He was consecrated on the Lord's Day, with the participation of the whole community, the presbyters and the local bishops. His task was to direct the faithful that were entrusted to him, to exercise the archpriestly ministry day and night, to reconcile the people to God, to bring to God the gifts of the community and to perform other ministries necessary for the life of the Christian community. For the bishop has been gifted to perform these tasks by the same Holy Spirit who was given to Jesus Christ and who gives superiors the perfect grace to constantly learn, transmit and guard the authentic faith. The laying on of hands by other bishops on the head of the elect was considered a visible sign of the bestowal of the Spirit of Christ.[18]

3. REQUIREMENTS OF A CANDIDATE FOR BISHOP

Over the course of the development of the Church, the requirements of a candidate for bishop have changed. Initially, a pure moral profile was primarily emphasised, according to the ideals taken from Scripture (*ius divinum*) or according to local custom and current circumstances (*ius positivum*). There were no lists of requirements that a suitable candidate should possess.

Local priests, deacons and the people of God were present at the election of a new bishop. The presentation and evaluation of candidates took place in public meetings. The subsequent election of the bishop and his installation on the episcopal seat were public so that only a person who possess the appropriate requirements could become a hierarch [Cattaneo 1997, 111-12].

3.1. Requirements mentioned in the New Testament

After Judas' death, the remaining apostles decided to fill his place with a suitable candidate. It had to be a man who had travelled with them since John's baptism and had witnessed the resurrection of Christ. The choice, preceded by a common prayer, fell on Matthias (Acts 1:20-26).

The first precise enumeration of the requirements of a candidate for bishop was summarised by the author of the Epistle to Titus, St. Paul's helper,

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[17] See Ignác Antiochijský, Ignatios Efezským, p. 122; Idem, Ignatios Filadelfským, in: Spisy apoštolských…, p. 133.

[18] See Hippolyt Římský, *Apoštolská tradice*, Refugium, Velehrad 2000, pp. 17-19.

whom the latter had left in Crete to continue the apostolic work there. "The reason I left you in Crete was that you might put in order what was left unfinished and appoint elders in every town, as I directed you. An elder must be blameless, faithful to his wife, a man whose children believe and are not open to the charge of being wild and disobedient. Since an overseer manages God's household, he must be blameless – not overbearing, not quick-tempered, not given to drunkenness, not violent, not pursuing dishonest gain. Rather, he must be hospitable, one who loves what is good, who is self-controlled, upright, holy and disciplined. He must hold firmly to the trustworthy message as it has been taught, so that he can encourage others by sound doctrine and refute those who oppose it" (Titus 1:5-9).

According to the author of the epistle, the presbyters were to oversee the development of Christianity in small communities in different parts of the island. However, they did not have the charism of leadership because they were not called to the ministry by Paul himself. The author states that the steward of the house of God is the bishop. He is the superior of the entire Christian community on the island. Among other things, his task was to appoint presbyters to the ministry. In this catalogue, the author outlined the requirements that Titus should have possessed as bishop. He concluded with an exhortation to be sure in his words of teaching, to support others in sound doctrine and to convince opponents. He was not only supposed to be a teacher, but he had to actually know how to teach (1 Tim 3:1-13; 2 Tim 3:1-5) [Biancalani and Rossi 2019, 1533-543].

3.2. Requirements according to the Church Fathers

There is no official systematic catalogue of the requirements that a candidate for bishop should fulfil. The ecclesiastical writers in the first centuries of the Church had clear ideas about the requirements of a candidate for bishop. They derived their ideals from Scripture and from the life of individual Christian communities. They professed their faith both in times of peace and affluence and in periods of war, systematic persecution of Christians, plagues and other social or natural disasters. The bishop was supposed to respond appropriately to all these situations.

3.2.1. Requirements according to the author of the *Didache*

The unknown author of the *Didache* treatise adopted the requirements for a bishop from the Gospel (1 Tim 3:2-3). He emphasised that a bishop and a candidate for bishop, was supposed to be above all worthy of the Lord. He was also expected to be courteous, not money-loving, devoted and proven (XV).

3.2.2. Requirements according to St. Cyprian

St. Cyprian (d. 258) was convinced that a bishop is freely chosen by God (*iudicium Dei*). He should therefore be respected by all, and thus the consensus of the clergy and the entire community of the faithful reinforces this choice.[19] The people really know the candidate best. They also know his behaviour because they live together.[20] The bishop is expected to be courageous and fearless in defending true doctrine and demanding discipline from the clergy and laity under his authority. Cyprian wrote to Pope Stephen I (d. 257) that in times of persecution of Christians the bishop was expected to be courageous, not to deny the faith. The bishop, but also every clergyman, should be able to welcome, protect and care for all those who seek rescue in the Church. He must be able to provide care, concern and protection to all the wounded according to the model of mercy and goodness found in the Gospel. The unity of the Christian community should be at his heart.[21] Furthermore, he is expected to have the courage to accept exile in times of persecution or to undergo martyrdom for his faith in Christ.[22]

In his writings, Cyprian portrayed the bishop and every clergyman as one who is not concerned only with multiplying his wealth, but devotes himself to the service of God, is generous to the poor and has mercy for them, maintains discipline in his life, does not despise authority, does not curse using his tongue, does not use venomous speech, does not live in hatred and does not spread unrest among the people. The bishop must not leave his people and his cathedral to go to the market, engage in trade, buy land and earn money through usury.[23] The bishop is supposed to be a master of the word and be able to persuade and debate in unity with other bishops using strong speech, but he must not abuse his power and authority to achieve personal goals[24] [Myszor 2001, 109-14; Petriglieri 2009, 46-59].

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[19] Saint Cyprian, *43. Cyprian to all the people, greeting*, in: *The Fathers of the Church, Saint Cyprian, Letters (1-81).* Translated by Sister Rose Bernard Donna, C.S.J., The Catholic University of America Press, Washington D.C, p. 108; Idem, *55. Cyprian to Antonian, his brother, greeting*, in: *The Fathers of the Church*…, p. 138; Idem, *59. Cyprian to Cornelius, his brother, greeting*, in: *The Fathers of the Church*…, p. 177; Idem, *66. Cyprian, also known as Thascius, to Florentius, his brother, also known as Puppian, greeting*, in: *The Fathers of the Church*…, p. 224; Idem, *68. Cyprian to Stephen, his brother, greeting*, in: *The Fathers of the Church*…, p. 240.

[20] Idem, Cypriani Cecil, Primus, Polycarp, Nicomedes, in: The Fathers of the Church..., p. 235.

[21] Ibid., pp. 241-43.

[22] Idem, 60th Cyprian to Cornelius, his brother, greeting, in: The Fathers of the Church..., pp. 195-96.

[23] Idem, De lapsis and De Ecclesiae Catholicae unitate. Text and Translation by Maurice Bévenot, S.J., Oxford at The Clarendon Press, London 1971, pp. 8-11.

[24] Idem, 57. Cyprian, Liberalis, Caldonius, Nicomedes, Cecil, Marrutius, Felix, Successus, Faustinus, Fortunatus, Victor, Saturninus, another Saturninus, in: The Fathers of the

3.2.3. Requirements according to St. Jerome

St. Jerome (d. 420) reflected on the requirements of a candidate for bishop in a letter to the dignified and very zealous Roman aristocrat Oceanus.[25] In the letter, he compiled a catalogue of requirements known from the apostle Paul's letters to Timothy and Titus. If anyone aspires to the episcopacy, he desires a good task (1 Tim 3:1). But this involves hardship, effort and humiliation for oneself. To be a bishop does not mean to live ostentatiously, to be liked and to reach the pinnacle of one's career and social life. According to Jerome, a bishop should be characterised by a impeccable life, even before receiving the sacrament of baptism (1 Tim 3:2.6; Titus 1:6). A blameless life includes all the virtues; this is not mutually exclusive with sin. Jerome reminds us that there was only one without sin on earth.

A candidate for bishop was to possess such requirements or characteristics as were needed in that community, that is, the one which was to be entrusted to him in the future to govern, which wanted a particular candidate as its bishop.

St. Jerome also enumerated other requirements: excelling in the art of the word, having the authority of a master who edifies with words and language; being sufficiently learned (Titus 1:9); married once (1 Tim 3:2); keeping one's house in order and taking care of one's family (1 Tim 3:4); being sober, wise, noble and hospitable (1 Tim 3:2; Titus 1:7-8); being able to teach and preside over the liturgical assembly with dignity. According to St. Jerome, a bishop's thought should always be fresh, alert and clear. The candidate must not be identified with silliness, foolishness, a ridiculous manner of walking, dress, or anything that might arouse ridicule. He should be dignified both externally and internally so that he is accepted even by people who are outside the Church (1 Tim 3:7).

Jerome stressed that this list of requirements must be adhered to while electing a bishop because they derive form Christ's command. If these preliminary requirements were not observed, rivalry and hatred would arise between the candidates [Girolamo 1974, 98-101].

Church..., pp. 156-62.

[25] E. Hieronymus, Epistola LXIX, Ad Oceanum, in: Corpus Scriptorum Ecclesiasticorum Latinorum, Vol. LIV, Epistularum Pars I: Epistulae I-LXX, ed. F. Tempsky, G. Freytag (g.m.b.h.), Vindobonae–Lipsiae 1910, pp. 678-700; St. Jerome, To Oceanus, in: A Select Library of Nicene and Post-Nicene Fathers of the Christian Church, Vol. VI., Letters and Select Works, ed. P. Schaff, H. Wace, The Christian Literature Company, London–New York 1893, p. 141.

3.2.4. Requirements according to St. Hilary

St. Hilary of Poitiers (d. 367) emphasised education. In his work *De Trinitate*, at the beginning of Book Eighth, he reflected on why a bishop should not only be pious and good, but also educated. He came to the conviction that teaching and transmitting erroneous doctrine of the faith harms people similarly to a fatal disease. As a model of virtue, St. Hilary cited the Apostle Paul, who was capable of teaching and encouraging in true doctrine, convincing opponents rather than making vain speeches. It is thus not enough for a candidate to be good, but he must be capable of teaching and defending the faith. If he lives impeccably, his teaching is more authentic. The candidate's life is to be adorned with education, and education with a concrete life. He is expected to be a good example in order to be credible. In this way, his opponents would not be able to shame and criticise him (Titus 2:7-8).

Following the example of St. Paul, Hilary reminded us that a bishop should be educated because education is very important for sound preaching, an informed faith, mastering the art of encouragement and combating erroneous teachings. Education and wisdom also help not only in seeking and fulfilling one's own will, but also in acting in ways that are not pleasing to man. If he acts only according to his will, the result will be idle talk, foolishness and thoughtless preaching.[26]

3.2.5. Requirements according to John Chrysostom

In his dialogical treatise *On the Priesthood*, St. John Chrysostom (d. 407) divided the hierarchical structure of the Church into bishops, presbyters and deacons. He used the term "priesthood" to describe both the episcopal and presbyteral ministries. According to him, bishops and presbyters should possess the same requirements.

He pointed out that craftsmen, professionals and soldiers should stick to their craft because they understand it. If they do something they do not understand, they will cause considerable damage, sometimes ending in death. Eternal death threatens priestly ministers who do not know how to perform their ministry. God does not accept their excuses about their weakness, lack of understanding of the situation or deficient knowledge on the subject. Those who are to be entrusted with the care of Christ's Church, which is his body, must take care of its full health, so that it is immaculate, holy and impeccable (Eph 5:27).

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[26] Hilarius, De Trinitate, in: Patrologiae Cursus Completus, sive bibliotheca universalis ... omnium S.S. Patrum, Doctorum, Scriptorumque ecclesiasticorum qui ab aevo apostolico ad Innocentii III tempora floruerunt, X, ed. J.P. Migne, Paris 1845, pp. 234-37.

According to John, those who are to fulfil the priestly ministry, both presbyteral and episcopal, should possess the following requirements: be able to direct souls, have the virtues of the soul formed by the spiritual life; be free, good, kind, kind-hearted and live simply; live uncompromisingly; be hard-working; be able to discern appropriate situations and understand what they should do and what is expected of them. Candidates who meet these criteria can be expected to serve for the glory of God and building up of His Church[27] [Petriglieri 2009, 104-107].

4. MIRACULOUS ELECTION OF A BISHOP

According to the Church historian Eusebius (d. 339), sometimes a man was elected bishop without any ambition to become one. This was the case of Pope Fabian (d. 250). He was a peasant who moved to Rome and, as a devout Christian, took part in the election of the new bishop in the city after the death of Pope Anteros (d. 236). During the election, a dove descended on his head. This was taken as a manifestation of God's grace, as a heavenly sign, on the basis of which Fabian was elected bishop without being known in ecclesiastical or urban circles [Eusebio 2001, 51-52].

A similar thing happened to Alexander (d. 251), bishop of Cappadocia. In a night vision it was revealed to him that he was to head the bishopric together with Narcissus (d. 213), bishop of Jerusalem. Thus, Alexander went on a journey to Jerusalem to pray in the holy places. The people of the city welcomed him very warmly, but did not allow him to return home, because some of them also had visions in which it was revealed to them to go out in front of the gate and receive the bishop chosen by God. Alexander, with the consent of the surrounding bishops, was forced to remain in Jerusalem and accept the episcopal ministry [ibid., 24-26].

5. REQUIREMENTS MENTIONED IN THE NORMATIVE ACTS OF THE 4TH-8TH CENTURY

The episcopal office has always been regarded as the highest in the hierarchical structure of the ecclesiastical community. The process of electing a bishop began to take legislative form at councils and synods from the 4th century onwards. Canons were adopted then concerning the requirements that a candidate usually had to possess, but they also specified those which prevented one from assuming the office.

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[27] Jan svatý Chrysostomos, *O kněžství*, Krystal OP, Praha 2022, pp. 118-21, 139-40.

In the first centuries of the Church's life, it was not required to receive the sacrament of baptism before being elected to the office of bishop, but it was required to assume this office in a solemn and liturgical manner [Mihai 2014, 73-74]. The process of selecting candidates was diverse, non-uniform, locally and culturally determined. Various anonymous (pseudo-apostolic) disciplinary, liturgical, moral and confessional collections indicating the requirements of a candidate for episcopacy were written down during this period.

5.1. Requirements according to *Constitutiones apostolorum*

The collection of legal and liturgical books *Constitutiones apostolorum* was written in the 4th century, before the First Council of Constantinople (381). The author summarised the requirements of a candidate for bishop in the second book. The basic requirement was that the attributes mentioned in Scripture should be fulfilled – that the elders in the Church should be immaculate and once married. They should not to be angry, haughty, drunkards, adventurers, speculators and neophytes. They should be characterised by a peaceful disposition, charity and a good conscience.[28]

The author set the minimum age for a candidate for bishop at fifty, because at that age he should already be humane to others, mature and kind. These requirements mature in a person over time and evolve from previous youth and unkindness. The candidate should also be educated. If he is uneducated, he should be skilful in speech. If no one of the required age can be found in a small parish, a younger person may be ordained. Before doing so, however, his reputation among his neighbours should be examined to see whether they consider him worthy of the episcopal office. It should also be investigated whether he is respectable, faithful, decent; whether he has a respectable and faithful wife or has previously had one; whether he raises his children piously; whether he is respected by his household and whether they are subject to him (II, Can. 1-3; VIII, Can. 14-18).[29]

5.2. Requirements according to *Canones apostolorum*

The final Book Eight in the *Constitutiones apostolorum* contains a set of 85 canons called *Canones apostolorum*. This book posits that a bishop cannot be one who after his baptism has been married twice or has had

[28] Cf. Titus 1:6-7; 1 Tim 3:2-6; 2 Cor 11:26; Gal 2:4; Mt 5:5-8; 12:36-37; Lk 14:11; 18:14; Eph 6:4.

[29] See Constitutiones apostolorum, in: Konstytucje apostolskie oraz Kanony Pamfilosa z apostolskiego synodu w Antiochii, Prawo kanoniczne św. Apostołów, Kary świętych Apostołów dla upadłych, Euchologion Serapiona, ed. A. Baron, H. Pietras, Wydawnictwo WAM, Kraków 2007.

a concubine; who has married a widow, a divorced woman, a harlot, a slave or any woman of the theatre; who has married his sister-in-law or niece; who has been accused of adultery or other forbidden acts and has subsequently been condemned; who has deliberately mutilated his genitals; who is totally blind, deaf, possessed by demons, a neophyte; who is a slave and his master has not consented to it (Can. 17-19, 21-22, 61, 78-79, 80, 82).

5.3. Requirements according to the consecration prayer

In the 4th century, the liturgical regulations were still in the process of being formed, but an established local form of rites and prayers had already been achieved. Book Eight of the *Constitutiones apostolorum* contains the doctrine on the appointment of new bishops, followed by the consecration prayer. According to this doctrine, a bishop was expected to be a man of irreproachable character, elected by the people and the presbyters for his merits; a man of noble and great spiritual strength; of perfect piety and righteousness before the people; having his family and domestic affairs in order and leading an exemplary life (VIII, Can. 4,1-6).

From the text of the consecration prayer, which is literarily, theologically and biblically sublime, it is possible to deduce what requirements a candidate for bishop should possess. The human expectations included: the ability to care for the people of God entrusted to him; the performance of the archpriesthood services; the fulfilment of one's ministry diligently day and night; the presentation of requests before God; the multiplication of the number of people saved and offering the gifts of the Church to God. The spiritual requirements required included: openness to the inspiration of the Holy Spirit in the forgiveness of sins; openness to the will of God and the responsible administration of other ecclesiastical offices; the ability to properly dispose of the authority delegated to the apostles; the desire to please God; humility, purity of heart, sinlessness and peace of conscience in offering the bloodless sacrifice (VIII, 5.1-7).

5.4. Requirements according to *Statuta Ecclesiae antiqua*

The *Statuta Ecclesiae Antiqua* (476-485) is an ecclesiastical disciplinary collection consisting of 102 canons. The author of the collection is unknown. It could probably have been a Greek monk living in the monastery of St. Victor in Marseilles [Lichner 2020, 5-9].

The very first sentence of the introduction to the *Statuta* reads: "He who is to be ordained bishop is first to be examined". It had to be examined whether the candidate for bishop fulfilled the following criteria: he was prudent by nature, capable of learning, temperate in his manners, kind, humble,

charitable, led a life of chastity, dealt properly with personal affairs, did not drink alcohol and recognised marriage.

The following were considered essential: an education in the law of the Lord; the ability to understand Scripture; an orientation in the ecclesiastical truths of the faith; and, above all, a confession of pure faith and the ability to interpret it in simple words. In addition, he was to be publicly questioned on the Christian faith, i.e. whether he believed: that God is the sole author of the New and Old Testaments; in the resurrection of an earthly body; in God's judgment and atonement for deeds. If the candidate was sufficiently examined and deemed suitable by the clergy and the people, he received episcopal ordination.[30]

5.5. Requirements in civil law

From the time of the Edict of Milan (313), when Christians gained religious freedom and Christianity became the state religion, ecclesiastical and secular power influenced each other.

The Western Roman Emperor Valentinian III (d. 455) worked closely with Pope Leo I the Great (d. 431). He issued a decree bringing all the provinces of the empire under his jurisdiction. According to this decree, every candidate for bishop in the Western Roman Empire was to be approved by the Holy See before consecration (XVII).[31]

The Eastern Roman Emperor Justinian I (d. 565) linked secular authority to ecclesiastical authority in his legislation. The state religion was Orthodox Christianity, so Justinian established many duties, rights and privileges for bishops, clerics, monks and other consecrated persons.

In *Codex Iustinianus* (529), the requirements of a candidate for bishop were defined as follows: the choice of a candidate to be ordained was considered sacramental and thus he had to be unblemished; in a given city, three candidates had to be chosen who were virtuous and distinguished by justice and honesty. The one elected to the office was the most suitable of the three, one with the most sincere motivation to become a bishop, who was able to dedicate his life to Christ and His teaching and did not boast of his possessions. The candidate could not live with a woman, have children or grandchildren, as he was to be a faithful and spiritual husband and father to all people. The legally required minimum age was set at thirty-five.

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[30] See Statuta Ecclesiae antiqua, in. Anonym (= Gennadius Masilliensis?), ed. M. Lichner, Dobrá kniha, Trnava 2020, pp. 89-111.

[31] See The Novels of the Sainted Valentinian Augustus, in Theodosian Code and Novels, and the Sirmondian Constitutions. A Translation with Commentary, Glossary, and Bibliography by Clyde Phar, Princeton University Press, New Jersey 1952, pp. 515-50.

However, a monk who had lived in a monastery since childhood could also be ordained, even if he had not yet reached the age of maturity. However, his suitability had to be confirmed. A bishop could not be a civil servant, unless he had already worked as a priest, or someone known to have been negligent in the fulfilment of his duties (I. 3.9, 42 § 1, 48, 53).[32]

5.6. Requirements in the councils' resolutions

Synods and councils in the first centuries of the Church's life were locally and culturally determined. Decisions, however, usually did not bring about major changes. They usually solemnly confirmed what was already subject to customary law (*ius non scriptum*) and was known from the writings of previous Church authorities.

At the synod of Ancyra (314), it was enacted that those who, after being baptised, offered sacrifices to pagan gods and those who in some way denied the faith during the persecution of Christians and did not implement an improvement in their lives afterwards could not be ordained (Can. 3, 12).[33] At the Council of Neocaesarea in Pontus (314), it was enacted that a man under the age of 30 could not become a presbyter. In addition, he was to be sufficiently examined beforehand as to whether he was leading a worthy life. This age was chosen after the example of Jesus Christ, who was baptised at the age of thirty and only then began his teaching (Can. 11).[34] At the Council of Chalcedon (451) it was established by the council fathers that no one could be ordained without a designated church in a city or village or a monastery (Can. 6).[35]

At the synod of Laodicea (the second half of the 4th century), the synodal fathers decided that neophytes could not be ordained (Can. 3, 57).[36] At the Council of Rome (465) it was decided that illiterates could not aspire to ordination (Can. 3).[37] At the Second Council of Nicaea (787), it was determined that one who did not know the entire Book of Psalms could not become a bishop. The candidate was to be thoroughly examined by the metropolitan on the entire Psalter, on his knowledge of the sacred canons,

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[32] Codex Iustinianus, in: Corpus Iuris Civilis, Historia Chronologica Iuris Civilis Romani, Editio Novissima, Juxta Parisiensem An. M.DCCC.XXX.

[33] See Synod of Ancyre, in: Acta Synodalia ab anno 50 ad annum 381, vol. I, ed. A. Baron, H. Pietras, Wydawnictwo WAM, Kraków 2006, pp. 62-68.

[34] See Neocaesareense Concilium, in: Sacrorum conciliorum nova et amplissima collectio, II, ed. J.D. Mansi, Florentiae MDCCLIX, pp. 539-42.

[35] See Sobór Chalcedoński, in: Dokumenty Soborów Powszechnych, Tekst grecki, łaciński, polski, vol. 1, ed. A. Baron, H. Pietras, Wydawnictwo WAM, Kraków 2001, pp. 224-57.

[36] See Sinodo di Laodicea, in Concili Greci, Roma 2006, pp. 336-51.

[37] See Concilium Romanum XLVIII, in: Sacrorum conciliorum nova et amplissima collectio, VII, ed. J.D. Mansi, Florentiae MDCCLXII, pp. 959-62.

the sacred Gospels, the Epistles and all Scripture. The Metropolitan was also to check whether the candidate had observed God's commandments in his life and whether he had taught them to the faithful (Can. 2).[38]

The canonical requirements for a candidate for the episcopal ministry were summarised and adopted at councils and synods in the first centuries of the Church, with the exception of liturgical prayers. However, they were not systematised. At the beginning, the moral profile of the candidate was examined and assessed. Originally, no emphasis was put on the candidate's education or possible illiteracy, which did not correspond to the requirements mentioned in Scripture (Titus 1:5-9).

CONCLUSION

Episcopal appointments have always aroused the interest of the faithful. The curiosity of the people concerned mainly the "familiarity" of the candidate, whether it would be a person from their area or a stranger. In the case of a figure known to them, the community could more easily anticipate the nature of the episcopal ministry. On the other hand, if a priest unknown to them was nominated, they tended to approach him with a degree of suspicion, not knowing what position he would represent.

The catalogue of requirements that a candidate for bishop or an elder entrusted with the leadership of a community of believers should possess were recorded by St. Paul in his Epistle to Titus. It was this catalogue that was intended to predestine leaders in the newly established Christian communities. Early Christian church writers were also guided by this catalogue. In later studies, they commented in more detail on the requirements that a candidate for bishop should possess in relation to the particular community of believers entrusted to him. The requirements of the episcopal candidate contained in Scripture and in the writings of recognised authors also permeated the rulings of the various councils. These included above all attributes that made it possible or, on the contrary, impossible for a candidate to be a bishop.

The requirements of a candidate for bishop in the early Church can be divided into eight categories:

1) those derived from *ius divinum*: requirements set out in the New Testament;

[38] See Synodus Nicaena II, in: Sacrorum conciliorum nova et amplissima collectio, XIII, ed. J.D. Mansi, Florentiae MDCCLXVII, pp. 747-58.

2) those derived from *ius positivum*: requirements according to local custom and current circumstances as specified in council resolutions and civil legislation;
3) those derived from *ius non scriptum*: requirements from customary law, locally and culturally determined;
4) human: male; close and known to the people around him, accepted by the majority of the laity and presbyters; having orderly relations; humanly mature and wise; not necessarily celibate or married once; just, temperate, has his family and property affairs in order; knows how to manage the Church's property; enjoys a healthy respect among clergy, consecrated persons and laity;
5) spiritual: a man with a deep spiritual life whose model is the Good Shepherd; his spiritual life is based on Scripture; open to the inspirations of the Holy Spirit; capable of discerning the charisms of the community and of individuals; capable of living and making sacrifices for the community which has itself chosen him;
6) intellectual: the ability to read and write was not necessary; familiar with Scripture; an able rhetor; educated in true science; able to teach and defend the pure doctrine of the Church against error;
7) *sentire cum Ecclesia*: awareness that he is at the service of the whole Church and of a particular community; he has the ability to observe ecclesiastical discipline, to maintain collegial relations with presbyters, deacons and local bishops;
8) pastoral: he does not necessarily have to be a presbyter or deacon; must be willing, committed and able to take responsibility for the community; knows the needs of the community; able to find collaborators.

Each of these categories can be developed in more detail, and the list can be expanded to include requirements defined both as positive and negative. In conclusion, it must be added that an ideal, flawless candidate for bishop did not exist in the early Church just as he does not exist today. As St. Jerome reminded us, only Jesus Christ was sinless and perfect here on earth.

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THE CRIME OF ABSOLVING AN ACCOMPLICE IN A SIN AGAINST THE SIXTH COMMANDMENT OF THE DECALOGUE

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Abstract. The article discusses the issue of the crime of absolving an accomplice in a sin against the sixth commandment of the Decalogue, as defined by the church legislator in Can. 1384 of the Code of Canon Law. It is also included in the catalogue of torts reserved for the judgement of the Dicastery for the Doctrine of the Faith. Following the presentation of the objective and subjective elements of the crime, attention is turned to the issue of its punishability. For this to be possible, it is necessary to establish the guilt of the confessor, who must have acted consciously and deliberately. A particular difficulty in establishing the occurrence of a crime is the determination of complicity, which is crucial to the case. In the last part, the author presents some procedural aspects necessary for the conduct of the proceedings aimed at judging the possible perpetrator of the tort in question. The sacrament of penance, which belongs to the *forum internum*, enjoys special protection in church legislation, which does not allow acts that could violate the sacramental seal of confession.

Keywords: *delicta graviora*; absolution of an accomplice; sixth commandment of the Decalogue; complicity.

INTRODUCTION

Holy sacraments administered by the Catholic Church being a depository of the means leading man to salvation, which according to Can. 1752 of the 1983 Code of Canon Law[1] should always be the supreme law in the Church community, require special protection for their valid and worthy exercise.

Among the seven signs of grace established in the Catholic Church, the sacrament of penance holds a special place as it touches a person's conscience and the intimate relationship with God associated with it. The faithful who go to confession, confessing their sins to an authorized minister, repenting of them and having resolved to amend, receive from God

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

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the forgiveness of sins committed after baptism (cf. Can. 959 CIC/83). Individual and integral confession and absolution constitute the only ordinary way by which the faithful, conscious of grave sin, are reconciled with God and the Church (cf. Can. 960 CIC/83). The church legislator provided strict norms for the valid and decent celebration of the sacrament (cf. Can. 961-964 CIC/83). The requirements for the minister are also strictly defined, and their observance guarantees the validity and fairness of the celebration of the sacrament of penance (cf. Can. 965-986 CIC/83).

One of the prohibitions subject to a severe sanction is the granting of absolution to an accomplice in a sin against the sixth commandment, which is invalid except in danger of death (cf. Can. 977 CIC/83). A confessor who grants such absolution also commits a crime specified in Can. 1384 CIC/83, incurring excommunication *latae sentetiae*, reserved to the Holy See. Judging it falls within the competence of the Dicastery for the Doctrine of the Faith.

This study analyzes the code's material norms as well as those issued in this respect and included in the *De delictis reservatis*.[2] It is not only a reflection on the legislator's dispositions, but also an attempt to show their practical application and relevance to factual situations that may occur. The method of judging and punishing the active subject of the crime, which is always the confessor, depends on them.

1. ELEMENTS OF THE CRIME OF ABSOLVING AN ACCOMPLICE IN A SIN AGAINST THE SIXTH COMMANDMENT OF THE DECALOGUE

The norm applicable to the crime referred to in Can. 1384 CIC/83 is essentially consistent with the previously applicable discipline. However, it has undergone certain changes, which should be assessed as a simplification of the norm, which in the current code is a form of combination of the provisions contained in Can. 977 and Can. 1384 CIC/83 [Dhas 2019, 103].

The above-mentioned simplification, however, does not mean downplaying the gravity of the crime in question, as evidenced by its inclusion in the *delicta graviora*, the judgment of which is reserved to the Dicastery for the Doctrine of the Faith (Article 4 § 1, n. 1 of *De delictis reservatis*), but, as Velasio De Paolis points out, is an expression of the general softening of the legislator's position on the issue of punishing crimes against chastity and departure from the severity of discipline that Pope Benedict XIV

[2] Congregazione per la Dottrina della Fede, *Norme sui delitti riservati alla Congregazione per la Dottrina della Fede* (11.10.2021) [hereinafter: *De delictis reservatis*], https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20211011_norme-delittiriservati-cfaith_pl.html [accessed: 04.12.2023].

included in the constitution *Sacramentum poenitentiae*,[3] and which was also reflected in the Code of 1917 [De Paolis and Cito 2008, 342].

According to the applicable norm, a confessor who, except in danger of death, absolves an accomplice in a sin against the sixth commandment of the Decalogue, does so invalidly (Can. 977 CIC/83) and runs the risk of incurring excommunication *latae sententiae*, reserved for the Holy See (Can. 1384 CIC/83). This standard seems simple only on the surface. However, the four lines of dispositions contained in the two canons raise at least four questions: What sins are we talking about? What does complicity in these sins mean? Is it only the danger of death that authorizes absolution from these sins? When and how will granting the absolution of it definitely be punishable? To answer the above questions, it is necessary to analyze the objective and subjective elements of the crime in question.

1.1. Objective element

The legislator in Can. 977 CIC/83, sanctioned the invalidity to absolution, granted in ordinary circumstances, from sins against the sixth commandment of the Decalogue committed by the confessor together with the penitent. It should be clarified that these are mortal sins that must be both internal and external, although they may take different forms. For there to be a sin that falls under the disposition of Can. 977 CIC/83, there must be an external manifestation of internal desires. Thoughts or lustful desires, also mutually directed by two or more partners, which have not progressed from morally disordered intention to physical fulfillment, do not constitute the matter about which the legislator speaks in the above-mentioned canon [Woestman 2004, 269].

An important aspect that must be paid attention to when assessing the actions of partners in a *contra sextum* sin is its objective severity. For such a category of moral offense to occur, awareness and voluntariness of committing it are necessary. In the case of a common sin against chastity, there must be a seriousness of the offense both on the part of the confessor and the penitent, both in the material and formal sense. If the signs of a grave sin occur only on the part of one of the partners, then he or she will not be subject to the prohibition of Can. 977 CIC/83 [Syryjczyk 2003, 124].[4] This covers circumstances such as age, mental condition, and violence,

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[3] Benedictus XIV, Constitutio *Sacramentum poenitentiae* (01.06.1741), AAS (1917), pars II, pp. 505-508.

[4] It should be noted that, especially on the part of the confessor, it is difficult to assume a lack of awareness of the gravity of the sin against the sixth commandment of the Decalogue. Traditional doctrine teaches that sexual experiences – wanted and voluntarily accepted – constitute grave matter, therefore, it is difficult to recognize *parvitate materiae* in this area

which may prevent the person involved from committing a serious sin. This issue will be developed when discussing the issue of complicity in sin.

The category of grave sins against chastity includes those that the doctrine considers to be consummated, such as intercourse, masturbation, or those that are not consummated, such as watching pornography together or exchanging such materials.[5] All venial sins against the sixth commandment of the Decalogue and other grave sins committed together with a confessor are not covered by the disposition contained in Can. 977 and 1384 CIC/83 [Calabrese 2006, 299-300; Borek 2015, 47].

1.2. Subjective element

Considering the subjective aspect of the crime typified in Can. 1384 CIC/83, in conjunction with Can. 977 CIC/83, an active and passive entity in committing the tort should be distinguished. The active subject is the confessor who committed a grave sin against chastity together with the penitent and then granted him or her absolution from this sin. It does not matter whether or not at the time of committing the sin the confessor had already received the priestly or episcopal ordination.[6] The passage of time between the commitment of the sin and the granting of absolution is also irrelevant.[7] Even after the expiry of the limitation period for a criminal complaint, which in the applicable legislation is twenty years for *delicta graviora*, the confessor remains bound by the norm of Can. 977 and 1384 CIC/83 [Dhas 2019, 112]. A confessor deprived of the general *facultas* authorizing him to administer the sacrament of penance, when granting absolution to an accomplice in a sin *contra sextum*, fulfills the features of Can. 1379 § 1, n. 2, which sanctions unauthorized hearing of confessions, not the commented Can. 1384 [Syryjczyk 2003, 98; Pawluk 1990, 138].

The passive subject of the crime referred to in Can. 1384 CIC/83 is a penitent. From a criminal point of view, his or her awareness of their confessor is not important, in other words, when confessing sins in confession,

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[Dhas 2019, 111].

[5] More on sins against the sixth commandment of the Decalogue: Tuohey 1995, 592-631; De Paolis 1993, 293-316; Provost 1995, 632-62; Grabowski 1995, 527-91.

[6] The term *sacerdos* used in Can. 1384 CIC/83, undoubtedly includes priests and bishops, who are the only clergy who can administer the sacrament of penance.

[7] Procedural practice shows that sometimes two crimes may be committed during the same celebration of the sacrament of penance. The first of them is performed by the confessor, who effectively persuades the penitent to sin against the sixth commandment of the Decalogue (the crime of solicitation), which takes place in a direct temporal sequence. Another offense is committed by absolving this penitent in the same confession, and this act also includes, in accordance with the principle of integrity, absolution from a common sin against the sixth commandment of the Decalogue. More on the crime of solicitation: Kamiński 2023, 93-108.

including a sin *contra sextum* committed with the person receiving his or her confession, whether the penitent is or is not aware that the confessor is their accomplice. The person who commits the crime of absolution is the confessor, not the penitent [Dhas 2019, 112]. The question remains whether the penitent, aware of the unlawful and criminal nature of the absolution granted to them, is complicit in the crime by consenting to it. Dariusz Borek gives an affirmative answer to this question, giving as an example a penitent priest who effectively persuades his confessor – and at the same time an accomplice in a sin *contra sextum* – to grant him absolution. According to this canonist, in such a case nothing prevents from applying criminal liability to the penitent under the principles set out in canon 1329 CIC/83. It does not matter whether he is liable as an accomplice or a necessary participant, because in both cases he incurs the same penalty [Borek 2015, 50].

Complicity, which the legislator treats in Can. 977 CIC/83 concerns, however, sin against the sixth commandment of the Decalogue, not absolution. That is why this issue requires the above-mentioned development.

For complicity to occur, which results from its nature, it is necessary for at least two people to participate in a given act and have previously agreed on joint action. In the matter under analysis, it is not important whether the accomplice in a sin is of the same or the opposite sex, or whether he or she is a transsexual person. This person's marital status is not important. It does not matter whether the accomplice is a clergyman or a consecrated person. An accomplice may be either an adult or a minor, or even a child, although this requires further explanation. It is important that this person consents to committing a common grave sin against the sixth commandment of the Decalogue and actually commits it with their accomplice. Otherwise, there can be no question of complicity [Barbero 2010, 207].

At this point it is necessary to ask about the complicity in sin of people who do not have such an ability, which may result from various reasons, permanent or temporary, such as disability, mental illness, abuse during sleep, during alcohol intoxication, or rape. A person in such a situation cannot commit a grave sin against chastity and therefore will not be his accomplice [Syryjczyk 2003, 97]. Therefore, actions with people who do not consent to them and clearly oppose to them do not result in a serious sin on their part, and criminal features appear only on one side [Montini 1997, 219; Calabrese 2006, 284].

Minors, especially children, constitute a special category when discussing complicity. The doctrine emphasizes that in order to become an accomplice in a grave sin against the sixth commandment, awareness of the gravity of the guilt and consent to committing such a sin with another person or persons are required [Cito 2008b, 324].

It is true that in Can. 97 § 2 CIC/83, the legislator included the presumption of the use of reason by a child who has completed the seventh year of age, but such *praesumptiones iuris tantum* cannot be treated as equivalent to evaluative discernment as to the gravity of the sin. Varuel Dhas believes that for this reason, children who have not reached the age of consent to such an act cannot be included among passive entities participating in the sin against the sixth commandment. The problem is that the legislator does not specify what age should be considered appropriate, as state legislators do when specifying the minimum age for legal sexual intercourse.[8]

This author believes that although the church legislator, as a rule, precisely determines the age required to perform a legal act, in this case, by omitting such a definition, created a legal gap that requires filling. Dhas asks the following questions: Can the capacity to consent to a sexual act be generally presumed in every child? Does an eight-year-old child who, as a rule, already receives the sacrament of penance have such an ability? Are people whose use of reason is permanently impaired, and who are therefore treated like children, able to consent to participation in sin against chastity? [Dhas 2019, 117].

Determining such capacity is of fundamental importance for the recognition of complicity, and, therefore, it may happen that the absolution of a child who has not reached the age appropriate to recognize the gravity of sin by a confessor who has committed a sin *contra sextum* with him will be validly and equitably granted. There remains, of course, the issue of liability for the sexual abuse of a minor, which constitutes the crime referred to in Can. 1398 § 1, n. 1-2 and in *De delictis reservatis*, Article 6 § 1, if at the time of committing the abuse the confessor was already a clergyman. Absolution of such an accomplice would also be an aggravating circumstance for the confessor when imposing a sentence for the crime of sexual abuse of a minor [Borek 2019, 86]. Additionally, it should be stated that if the abuse of a minor or a person equivalent to a child also took place by other persons cooperating with the confessor, then while the child cannot be treated as an accomplice of such a sin, the other persons will be considered as such, hence their possible subsequent absolution by the confessor-accomplice will not be valid.

To establish complicity in a sin against the sixth commandment of the Decalogue, it does not matter on whose initiative the common grave sin was committed – the confessor or the penitent [Dhas 2019, 113]. However, one may ask why only these sins were considered impossible to obtain valid absolution of? The following arguments are put forward in the doctrine:

[8] For example, in Italy it is 14 years, in Poland 15 years, in the United States 16 years, and in India 18 years [Dhas 2019, 117].

these sins cause the danger of moral degradation of the confessor; they may also contribute to the deformation of the conscience of the penitent as an accomplice; these sins, because they occur in intimate circumstances, may result in a relationship between the accomplices, which will contribute to recidivism and easy concealment of it from the Church community, because as known only to the accomplices, it does not cause harm to other people; distortion of awareness of the moral nature of this sin, which makes the issue of conversion and penance difficult [Cito 2008a, 328; Syryjczyk 2003, 101-102]. It is also important that, from the point of view of natural law, an accomplice should not assess and judge an accomplice who has committed a wrong together (*nemo iudex in causa sua*) [Dhas 2019, 101].

2. PUNISHABILITY

The Church legislator, by providing for severe punishment for the crime of absolving an accomplice in a sin against the sixth commandment of the Decalogue, safeguards the sanctity of the sacrament of penance, protecting the Church against insult and scandal among its faithful, which leads away from the principles of Christian morality. Yet another reason justifying the imposition of a criminal sanction on the act in question is also general prevention, i.e. its educational importance [Pastuszko 1999, 354-63].

Answering questions about the punishability of the crime according to the principles of Can. 1384 CIC/83 and situations in which it may be possible to grant the absolution or the punishment for the crime will be milder, it should be noted that a confessor who grants absolution to an accomplice must do so intentionally. He must also be aware that he is absolving his accomplice. Such awareness may be abolished in a situation where both parties do not know each other as accomplices in the sin, or the priest does not recognize that the person making confession is the same one with whom he committed the sin [Dhas 2019, 111]. He must know that he is trying to absolve an accomplice of sin *contra sextum* and be willing to do so, even though he knows it is forbidden. The response of the Holy Office of November 16, 1934 is no longer applicable here – it stated that the crime was committed by a confessor who, before committing a common sin, tried to convince the other person/persons (in sacramental confession or outside it) that the act they would commit was not sin or a grave sin, as a result of which the deceived penitent did not then confess this sin to the confessor-accomplice, who then granted him or her absolution.[9]

[9] Congregatio Sancti Officii, Decretum *circa can*. 2367 § 2, *Codicis Iuris canonici* (16.11.1934), AAS (1934), p. 634.

Committing a crime, and consequently the possibility of punishing it, will occur only when the priest pronounces the words of sacramental absolution (*absolvo te a peccatis*), with the intention of granting it [Borras 1987, 57]. There is no reference in the current norm to simulating absolution, as was the case in the Code of 1917 (Can. 1379). However, from the point of view of the law on sacraments, the confessor's action is an act simulating a sacramental action. In this case, the priest is *ipso jure* deprived of the authorization to hear confessions, and the absolution granted is invalid and apparent. Therefore, it is a qualified form of the crime mentioned in Can. 1379 § 1, n. 2 CIC/83 [Syryjczyk 2003, 100].

The penalty for the crime in question, which the confessor is subject to by law, contains two elements. The first of them is the above-mentioned loss of the *ipso iure* right to exercise the power of absolution in relation to the sin of an accomplice in a sin against the sixth commandment of the Decalogue. The only circumstance that would authorize this will be danger of death in which the penitent-accomplice finds themselves. The second is falling into excommunication *latae sententiae*, release from which is reserved to the Holy See (Can. 1331 CIC/83, *De delictis reservatis*, Article 4 § 1, n. 1).

At this point, we should also consider the question posed in the doctrine. Is absolution given by a confessor-accomplice valid in relation to other sins confessed together with the common sin against the sixth commandment of the Decalogue in the same confession? In response to this question, two schools of thought clash. One, based on the old criterion of *ratio peccati*, believes that the lack of the right to absolution covers only the common sin *contra sextum* and does not extend to other confessed sins [Woestman 2004, 269; Cito 2008b, 324]. The second group of canonists believes that by maintaining the criterion of indivisibility of absolution, the confessor loses the right to absolution as such, covering all confessed sins [Pighin 2014, 385].

V.G. Dhas, taking into account the norm of strict interpretation from Can. 18 CIC/83 favors the first school. D. Borek, however, is of the opinion that due to the principle of the indivisible nature of absolution, B. F. Pighin's position should be deemed right [Dhas 2019, 114; Borek 2019, 213].

Considering the last issue, namely, circumstances other than the danger of death that make a priest not subject to the penal sanction provided for in Can. 1384 CIC/83, in conjunction with Can. 1324 § 3 CIC/83, those not mentioned above should be enumerated: previous absolution of an accomplice in a sin by another priest;[10] an unintentional state of mental

[10] One cannot agree with the opinion of C. Dezzuto, who believes that such absolution would also be invalid, because the fact of complicity in sin is objective, regardless of its absolution

confusion in the confessor; hearing an accomplice's confession without giving absolution.

To properly assess the severity of the violation if the accusation was tried in an external forum, it is also important to determine the canonical status of the person being absolved. Aggravating circumstances may be verified, whether due to adultery in the case of a married person, sacrilege in the case of a clergyman, or great evil in the case of a consecrated person or a seminarian [Commentz 2011, 21-22].

3. PROCEDURAL DIFFICULTIES

Judging the crime of absolving an accomplice in a sin against the sixth commandment of the Decalogue is not easy. This is related to the secret nature of the sacrament of penance. Absolution is performed in the *forum internum*. Therefore, although the crime in question is qualified among *delicta graviora*, reserved for the Dicastery for the Doctrine of the Faith (*De delictis reservatis*, Article 4 § 1, n. 1 and n. 4), in practice, it is rarely considered by it, and proving it is extremely difficult. In order to obtain relief from the penalty of excommunication latae sententiae, it will be necessary to apply to the Apostolic Penitentiary (Apostolic Constitution *Praedicate Evangelium*, Article 191).

Proceedings in matters related to the sacrament of penance are run at risk of violating the sacramental seal of confession. They are also not conducive to ensuring the accused's right to defense. It does not seem that the disposition of Article 4 § 2 of *De delictis reservatis*, having been moved from Article 24 of the earlier version of the norms, has removed procedural difficulties, even though it included the penitent among the denunciating entities, specifying that the accuser does not always have to be identical with the penitent [Visioli 2023, 10].

In the new disposition, the legislator sets procedural requirements applicable in cases involving crimes related to the sacrament of penance. There is a prohibition binding upon all persons to disclose the identity of the accuser or penitent to the accused and his defense counsel, unless the accuser or penitent expressly consents to it. Moreover, when conducting the proceedings, the credibility of the accuser should be assessed very carefully and any risk of violating the seal of confession must absolutely be avoided, ensuring the accused's right to defense (*De delictis reservatis*, Article 4 § 2).

[Dezzuto 2014, 62]. According to the current doctrine, the inability to absolve an accomplice in a sin against the sixth commandment of the Decalogue is not permanent, provided that the penitent has previously obtained absolution from another priest [Dhas 2019, 114].

In the practical instructions given by the Dicastery for the Doctrine of the Faith to delegates conducting trials, attention is drawn to the admission of witnesses who are free from hostility towards the accused; people testifying are to be warned not to reveal the penitent's data, the type of sin, or the time and place of its commission, and in the event of any disclosure, a ban is imposed on recording such information. Such indications do not facilitate the proceedings, in which, in fact, the only question in the case of an *in actu confessionis* crime is the one concerning the fact of the confession. Questions cannot be asked about the fact of granting or not granting absolution, since this would be a betrayal of the seal of confession. The fact of granting absolution or its refusal on the part of the confessor is also covered by the seal of confession [Montini 1997, 226-27; Syryjczyk 2003, 128].

CONCLUSIONS

Protecting the sanctity of the sacrament of penance is intended to guarantee its dignified and valid administration. It is also the responsibility of the church authorities to safeguard the deposit given to the Church by its Founder – Jesus Christ. Such a delicate form of exercising service towards the faithful requires restrictive norms that should prevent possible abuses on the part of ministers, but also on the part of penitents.

One of the most serious canonical crimes against the holiness of the sacrament of penance is the absolution of an accomplice in a sin against the sixth commandment of the Decalogue. A confessor who has previously committed an immoral act with a penitent, now acting intentionally and with full awareness when absolving them, tries to hide this fact from the Church community, and at the same time exposes himself and, above all, the penitent to moral harm and distortion of conscience and may thereby cause recidivism.

The key issue in determining guilt, and therefore in proving and punishing a crime, is establishing complicity in committing it. It is not an easy task, in particular with regard to determining the ability of some people to consent to participation in committing a sin. Difficulties also arise in procedural evidence as the crime of absolving an accomplice in a sin of impurity is related to the *forum internum*, which is widely protected under church law.

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CANONICAL MARRIAGE ACCORDING TO STEFAN WYSZYŃSKI BASED ON PUBLICATIONS IN "ŁAD BOŻY"

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Abstract. This article is an analysis of sixteen texts written by Stefan Wyszyński, founder and first editor-in-chief of the weekly "Ład Boży", which were published in the author's series "Ład w myślach". Wyszyński published in-depth and thoughtful studies on ecclesiastical marriage law in the weekly, under various pseudonyms. The reason for this was the promulgation of the Decree of 25 September 1945 Marriage Law, which implemented compulsory civil weddings for all Polish citizens and legally permitted divorce. Wyszyński, using the teaching of the Popes, in particular Pius XI, and the Polish Episcopate, warned the Christian faithful of the dangers of ideologies striking at the institution of marriage, defended it and showed the way forward.

Keywords: Stefan Wyszyński; Ład Boży; Ład w myślach; canonical marriage.

Stefan Wyszyński, born on 3 August 1901 in Zuzela in the Mazovian Voivodship, son of farmers: Stanisław (organist of the local church) and Julianna, née Karp, presbyter of the Diocese of Włocławek, Bishop of Lublin from 1946 to 1948, Archbishop Metropolitan of Gniezno and Warsaw and Primate of Poland from 1948 to 1981, Cardinal-Presbyter from 1953, rightly called the Primate of the Millennium, an outstanding statesman and, since 2021, blessed of the Catholic Church [Romaniuk 1994, *passim*; Idem 2011, *passim*], was still extremely active as a writer in the pre-Primate period. Marian P. Romaniuk, author of a several-volume bibliography of the life, works and ministry of Cardinal Wyszyński, in a bibliography of printed works prepared with Benedictine patience, counted over 800 publications by Wyszyński up to the time he assumed the episcopal capital in Lublin [Idem 2018, 83-137].

It should be emphasised that a number of very interesting and valuable studies were produced from the years when Wyszyński was Primate of Poland, i.e. publications from the end of 1948 onwards,[1] which were

[1] Romaniuk himself, for the years 1949-1981, lists 1,942 printed works by Wyszyński in his subject bibliography [Romaniuk 2018, 142-371]. After Wyszyński's death, Wyszyński's writing output continued to be printed, so that the aforementioned study for the years

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repeatedly printed, often in multi-volume series, and accompanied by ample critical commentaries.[2] Unfortunately, Wyszyński's publication output prior to this period has never really become the subject of full analysis. It is to be expected that this situation will be changed by the effect of the grant *Prelude to the Collected Works. Stefan Wyszyński vis-à-vis totalitarian regimes – analysis and critical edition of sources for the years 1924-1949*, which is being carried out under the supervision of Professor Mirosław Sitarz at the John Paul II Catholic University of Lublin, as it is to result in a critical edition of Wyszyński's scholarly output and social thought from 1924-1949 published in five volumes.

The aim of this article is to analyse a narrow source resource, relatively difficult to access due to the time caesura,[3] allowing to determine Wyszyński's worldview of the years 1945-1946 on the subject of canonical marriage on the basis of the author's publications placed only in the weekly "Ład Boży" (English: "God's Order"). The issues of ecclesiastical marriage law, given Wyszyński's specialist training in canon law,[4] remained in his area of interest. It can be said that the articles published in "Ład Boży" constitute, as it were, a cursory lecture on this subject matter.

1. CHARACTERISTICS OF THE "ŁAD BOŻY"

In the autumn of 1945, Jakub Berman, a member of the presidium of the secret Central Bureau of the Communists of Poland and of the Political Bureau of the Central Committee of the Polish Workers' Party, forming with Bolesław Bierut and Hilary Minc the innermost leadership of the Polish United Workers' Party from 1949 to 1956, reported to Joseph Stalin: "The Catholic clergy, especially after the arrival of Cardinal Hlond[5] with

1921-2017 contains a total of 3,331 bibliographic units, numbered continuously with the layout of the publishing chronology [ibid., *passim*].

[2] It is enough to mention the twenty-three-volume publishing series: *Stefan Kardynał Wyszyński. Prymas Polski, Dzieła zebrane* (published since 1991).

[3] Note, however, the reprint of S. Wyszyński's articles [Wyszyński 2001] and studies: Kukołowicz 1982, 27-34; Karasinski 2020, 60.

[4] Wyszyński was sent by Bishop Stanisław Zdzitowiecki in 1925 to the University of Lublin for specialist studies. He studied canon law, although at the same time he attended lectures in the social sciences. On 10 December 1927, he obtained the degree of Licence of Canon Law with an optime grade, i.e. the best grade, and on 21 June 1929 a two-hour public defence of his doctoral dissertation entitled *The Rights of the Church to the School* took place [Sitarz 2020, 18-25]. On the rights of the family, Church and State to the school as interpreted by Wyszyński, see Romanko 2018, 165-83.

[5] August Hlond – born on 5 July 1881 in Brzęczkowice, died on 22 October 1948 in Warsaw. A Polish clergyman, a Salesian. In 1925 he was appointed Bishop of Katowice, in 1926 he was appointed Archbishop of Gniezno-Poznań and Primate of Poland, in 1927 he was elevated

instructions from the Vatican, is developing a feverish organisational and propaganda activity (14 Catholic weeklies) directed against the government, with the decree on civil marriages[6] serving as a pretext."[7] These words emphatically show the dramatic context in which Stefan Wyszyński, shortly after his return to the diocese, decided to found a new Catholic weekly in Włocławek.

The decision to publish the weekly "Ład Boży" was made definitively in May 1945 as a result of the conviction that efforts to revive faith and piety in the extensively affected diocese of Włocławek, which had been affected by the Second World War,[8] would not bear the desired fruit if the work of evangelisation was not supported by the printed word [Szurgot 2021, 81]. In this context, Pope Pius X's proclamation in the first issue of the weekly becomes understandable: "If I even had to give up my episcopal cross and pawn my furniture and chasubles to ensure the existence of a Catholic newspaper, I would do so wholeheartedly." As Rev. Antoni Borowski, Prelate of the Cathedral Basilica and Vicar General of the Diocese of Włocławek, wrote, the newly founded weekly had the "aim of promoting Catholic thought in family and social life, spreading the principles of the Kingdom of Christ, not forgetting current affairs in the life of our nation and others, while introducing a section on practical matters of everyday life and a section devoted to our children and youth" [Borowski 1945, 1].

"Ład Boży" was one of three Catholic magazines, along with "Głos Katolicki" ("Catholic Voice") and "Tygodnik Powszechny" ("Universal Weekly"), which started to come out in Włocławek through the efforts of the local diocesan curia immediately after the end of the Second World War, in the years 1945-1953 as a weekly, in 1982-1997 as a biweekly and in 1998-2004 as the Włocławek edition of "Niedziela" [Warmiński 2006, 353]. Although officially the editor-in-chief of the weekly in 1945-1946 was Adrian Turczynowicz,[9] in fact the editorial board was headed by Wyszyński, who explained the name of the weekly as follows: "In the world there was already a pagan *order* and a capitalist *order*, there was a godless *order* and a Nazi *order*. They have turned the world into a rubble. The world needs a order based

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to the dignity of Cardinal. Servant of God of the Catholic Church [Kosiński 1993, 1088].

6 This refers to the Decree of 25 September 1945 Marriage Law, Journal of Law No. 48, item 270 [hereinafter: Marriage Law].

7 *Spuścizna Jakuba Bermana*, Archive of New Records in Warsaw, VI/0, ref. no. 325-33, col. 12, quote from: Stefaniak 2001, 527.

8 More than half of the clergy of Włocławek lost their lives during the Second World War, the vast majority of them in the Konzentrationslager Dachau.

9 Adrian Turczynowicz (1902-1979) – journalist, director, underground activist, editor-in-chief of "Gazeta Kujawska", associate editor of "Ład Boży" and other Catholic periodicals, honoured with numerous decorations, including: Order of Virtuti Militari and Commander's Cross with the Order of Polonia Restituta [Ziółkowski 2004, 174-77].

on peace and justice, and this will be born of God. God's love and power are needed so that Europe ceases to be a rubble and a perpetual battlefield. We desire the order of God on earth" [Wyszyński 1945d, 2]. Turczynowicz himself remembered Wyszyński from that time in the following way: "He spared no time for his *child*, what he called Ład *Boży*. He attended all meetings of the editorial committee and fed us not only with his articles, but above all with his knowledge and enlightened advice. He would drop by the Editor's Office several times a week, taking an interest in the breaking of the weekly, often standing for several hours at a time in the late evenings at the column-breaker, helping to carry out proof-reading. Always helpful, always absorbed in his work, equally quiet and polite" [Turczynowicz 2001, 109].

By the standards of the time, the weekly "Ład Boży" was small in size, as it was printed on A4 format (20.5 x 29.5 cm). The volume of each issue was 4 sheets, i.e. 8 pages, with the exception of two issues which were published once in reduced volume (after trimming by the communist censors) and once in increased volume (the Easter issue). Noteworthy, the weekly's circulation increased very quickly, as already in 1946 it amounted to 25,000 copies from the initial 8,000 (the combined Włocławek and Płock editions) [Iwańska-Cieślik 2012, 216-17].

In the weekly, Wyszyński ran an authoritative series of articles entitled "Ład w myślach" (English: "order in thoughts"). Between 1945 and 1946, i.e. until he became Bishop of Lublin, he published a total of 46 articles in it, in which he explored the triad of issues: man – family – canonical marriage.[10] He published, for many reasons, above all his own safety, under numerous pseudonyms: 'X. S. Wyszyński', 'X. St. Wyszyński', 'X. S. W.', 'X. St. W.', 'S. W.', 'St. W.', 'S.', 'R.', 'Redakcja', 'S. Oracz', 'St. Oracz', 'Br. Ozimina', 'Dr' and 'Dr Z.'.[11] It should also be noted that several of the articles included in the analysed series did not bear a pseudonym, but the rank of the topics covered there, as well as the similarity of the writing style, undoubtedly testify to its authorship.

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[10] A separate article submitted for publication in the journal "Kościół i Prawo" has been devoted to the issue of man and family.

[11] M.P. Romaniuk claims that the provenance of the pseudonyms 'S. Oracz', 'St. Oracz' and 'Br Ozimina' has not been fully clarified, but he cites that he received information about them orally from Wyszyński's fellow students at the seminary or from residents of Włocławek from the interwar years. Nevertheless, both the language and the very manner of narration of the articles signed with these pseudonyms testify to Wyszyński's authorship [Romaniuk 2018, 22-23]. Similar conclusions, but only with regard to the pseudonym 'Br. Ozimina', are raised by W. Karasiński [Karasiński 2020, 60].

2. CONFRONTATION OF MARRIAGE LAW IN POLAND WITH ECCLESIASTICAL MARRIAGE LAW

The cession of the territory of the Polish-Lithuanian Commonwealth in 1795 to the Kingdom of Prussia, the Habsburg Monarchy and the Russian Empire, which was the last of the three partitions of Poland under the reign of King Stanisław August Poniatowski, as a result of which the common state of Poland and Lithuania ceased to exist and Poland reappeared on the maps of Europe only after 123 years of slavery in 1918, undoubtedly contributed to the lack of a uniform marriage law in Poland that would be binding on all its citizens. This legal situation also failed to change in the inter-war period. This situation was scrupulously exploited after 1945 by the communists who, referring to the legal records and pointing to the lack of changes in the legislative legacy of the former partitioning states, proceeded to amend the Marriage Law [Gancarczyk 2008].

This decree provoked strong opposition from the Polish Episcopate, which on 7 December 1945 addressed a special message to the Nation[12] in which it recalled the main principles of Catholic teaching on marriage, above all that: 1) marriage is an institution of natural law based on ethical norms and called to sacred tasks in the service of humanity; 2) Catholic marriage, by the will of Jesus Christ, should be holy and morally pure; 3) Catholic marriage, which has been concluded invalidly, can be dissolved by a declaration of nullity, while Catholic marriage, validly concluded and completed, is indissoluble; 4) the State should directly concern itself with the institution of marriage, since the family is the pillar of the collective, and all matters that are defined as the civil effects of marriage are almost exclusively within the sphere of the State's tasks; 5) theories that want to subject all areas of life to State regulation, regulating them unilaterally without taking into account God's law and the religious-moral views of citizens, are unacceptable (Message, Chapter I).

Without questioning the need, or even the urgent need, to develop uniform marriage legislation in Poland,[13] the Polish Episcopate, after analyzing the Marriage Law, uncompromisingly questioned the following legal provisions (Message, Chapter II): 1) introducing compulsory civil weddings for Catholic citizens without leaving the freedom to choose the wedding

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[12] Episkopat Polski, *Orędzie w sprawie małżeńskiej* (07.12.1945), in: *Listy pasterskie Episkopatu Polski 1945-1974*, Éditions du Dialogue. Société d'Éditions Internationales, Paris 1975, p. 25-28 [hereinafter: Message].

[13] Wyszyński himself was of a similar opinion, believing that the marriage law should be uniform in two dimensions: 1) external, i.e. systemic-administrative – introducing the same law in all parts of the state; 2) internal – bringing order to the souls of citizens [Wyszyński 1946a, 3].

according to the religious form or in the form of the so-called civil wedding (Article 11);[14] 2) introduction of divorces at the request of one of the spouses (Article 24); 3) subjecting Catholic marriages previously concluded according to the religious form to the jurisprudence of state courts (Article 36).[15]

3. THE DIVINE ORIGIN OF MARRIAGE AND ITS AIMS

The above-mentioned legal and political situation, affecting the lives of faithful Christians in a very profound way, was not without a response from the Catholic press. In the pages of the author's series of articles "Ład w myślach", Wyszyński first emphasised the divine origin of marriage. This is evidenced in the biblical account of the creation of the first human beings, when God called man and woman into existence in his image and blessed them by saying: "Be fertile and multiply, fill the earth and subdue it" (Genesis 1:28a).[16] Marriage creates a unique community: "Between two people, under God's patronage, a new knot is formed, a new marital community, which is an association of equal persons, in a spirit of friendship and help, complementing each other" [Wyszyński 1945a, 3].[17]

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[14] "Marriage is contracted by the future spouses making a consensual declaration publicly before a civil registrar in the presence of two witnesses that they are entering into marriage" (Article 11). See also Decree of 25 September 1945 Law on Civil Status Acts, Journal of Law No. 48, item 272, Article 73.1.

[15] This provision took effect from 1 January 1946 after the entry into force of the Decree under review.

[16] *The African Bible. Biblical Text of the New American Bible*, Paulines Publications Africa, Nairobi 1999.

[17] On the divine origin of marriage, the Church has invariably taught. It suffices to recall encyclical *Arcanum divinae sapientiae*: "Nota omnibus et nemini dubia commemoramus; posteaquam sexto creationis die formavit Deus hominem de limo terrae, et inspiravit in faciem eius spiraculum vitae, sociam illi voluit adiungere, quam de latere viri ipsius dormientis mirabiliter eduxit. Qua in re hoc voluit providentissimus Deus, ut illud par coniugum esset cunctorum hominum naturale principium, ex quo scilicet propagari humanum, genus, et, numquam intermissis probationibus, conservari in omne tempus oporteret. Atque illa viri et mulieris coniunctio, quo sapientissimis Dei consiliis responderet aptius, vel ex eo tempore duas potissimum, easque in primis nobiles, quasi alte impressas et insculptas prae se tulit proprietates, nimirum unitatem et perpetuitatem." Leo PP. XIII, Epistola Encyclica *Arcanum divinae sapientiae* (10.02.1980), ASS 12 (1880), p. 385-402; or the encyclical *Casti connubi*: "Atque ut ab his ipsis Litteris initium faciamus, quae totae fere sunt invindicanda divina matrimonii institutione eiusque sacramentali dignitate et perpetua fumitate, primum quidem id maneat immotum et inviolabile fundamentum: Matrimonium non humanitus institutum neque instauratum esse, sed divinitus; non ab hominibus, sed ab ipso auctore naturae Deo atque eiusdem naturae restitutore Christo Domino legibus esse communitum, confirmatum, elevatum; quae proinde leges nullis hominum placitis, nulli ne ipsorum quidem coniugum contrario convento obnoxiae esse possint." Pius PP. XI, Litterae Encyclicae de matrimonio christiano spectatis praesentibus familiae et societatis condicionibus, necessitatibus, erroribus, vitiis *Casti Connubii* (31.12.1930), *AAS* 22 (1930), p. 539-92 [hereinafter: *Casti Connubii*].

Marriage, as an institution derived from divine law, was elevated by Christ to the dignity of a sacrament. From now on, a man, leaving his father and mother, is united with his wife and they are two in one flesh (cf. Mt 19:5) [Idem 1945e, 3].

For obvious reasons, Wyszyński based his studies on the Pio-Benedictine codification.[18] The 1917 code legislation presented a juridical vision of marriage, enclosing a rich spiritual and human reality in purely legal terms. The legislator essentially interpreted marriage as a form of contract through which the spouses transfer to each other and at the same time assume certain obligations and rights, among which characteristic was the so-called *ius in corpus* referring to acts directed to the generation of offspring [Góralski 2011, 28-29]. According to the disposition of Canon 1013 § 1 of the CIC/17, the primary purpose of marriage was to give birth to and bring up offspring, while the secondary purpose was to help each other and satisfy the sexual urge.[19] In the correct realisation of the marital purposes indicated by the universal legislator, Wyszyński saw a great danger in the error of individualism claiming that man possesses the highest rights in the world, and that these rights should be subject to marriage, the family and the nation in a total way. Such reasoning was detrimental to the institution of marriage because, on this basis, man was ready to reject a number of duties towards his fellow men, even those closest to him, especially those that stood in the way of his – falsely conceived – happiness [Wyszyński 1945b, 3].

4. THE ESSENTIAL PROPERTIES OF MARRIAGE AND THE FIGHT AGAINST THE DIVORCE MENTALITY

Wyszyński devoted a lot of space in his articles published in the pages of "Ład Boży" to fighting the divorce mentality.[20] Undoubtedly, the reason for this was

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[18] *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].

[19] "Matrimonii finis primarius est procreatio atque educatio prolis; secundarius mutuum; adiutorium et remedium concupiscentiae" (Canon 1013 § 1 of the CIC/17). This conception of marriage was dominated by the biological-procreative aspect. The 1983 Codex legislature already provides otherwise, which in Canon 1055 § 1 defines marriage as a covenant directed by its nature to the well-being of the spouses and to the begetting and rearing of offspring. *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1-317.

[20] He interpreted that the propagation of the divorce mentality by various circles, but also by totalitarian systems, began with the attack on wives and mothers. "And that's why all the work to detach women from the family was started. The means to do this was to liberate women from 'pots and nappies', economic independence, divorce and so on. And when all this was not enough – the press, the novel (romance), the theatre, the cinema, fashion – all these powerful means directed by secret forces, began work on the planned humiliation of woman" [Wyszyński 1946b, 3].

the aforementioned reform of matrimonial law in Poland, which allowed spouses to apply to the ordinary courts for a divorce on the basis of a wide plethora of grounds, which could be: adultery by the spouse, having designs upon the life of the spouse or his or her child, refusal to contribute to the maintenance of the family, failure of the spouses to cohabit without just cause for more than a year, commission of a dishonourable crime, leading a licentious or promiscuous life, inciting a spouse or his/her child to lead an immoral life, engaging in a disgraceful occupation or profiting from it, compulsive drunkenness or drug addiction, venereal contagious disease, mental illness lasting more than one year, sexual impotence of any duration in persons under 50 years of age (Article 24 of the Marriage Law).[21] With a view to allowing the dissolution of validly contracted marriages, and to an extent unprecedented in the legislation of other Christian nations, the Polish Episcopate, in the aforementioned Message, stated: "Since Catholic notions on this point are dogmatically strict and justified by Christ's unconditional abolition of divorce, the Episcopate and the Polish Catholic community see in the divorce provisions of the new marriage law a fundamental deviation from Catholic teaching, a disregard for the religious and moral convictions of the Nation, and at the same time an undermining of the very institution of marriage and family" (Chapter II).

Following the Code legislator (Canon 1013 § 2 of the CIC/17), Wyszyński taught that the essential properties of marriage are unity and indissolubility, which in Christian marriage gain special power because of the sacrament.[22] "Christian marriage has received from God a great power to combat all forces of decay and disintegration. It is not only the happiness and joy of two people, not only a social duty, but it is also a sacrifice and a school of self-education for the spouses. He who remembers this will not destroy the permanence of marriage" [Idem1945c, 3].

Fighting for the unity and indissolubility of families in Poland, Wyszyński argued that the child had a "sacred right to his own family," because the family exists first and foremost for the child. The defenceless child derives the right to its own defence not from man, the family, the state, but from the Creator of the law of nature, i.e. God Himself. For this reason,

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[21] Wyszyński, with paternal understanding, nevertheless harshly judged the indicated reasons for pronouncing divorce, considering them insufficient and above all dangerous. "If today this law does not immediately bear its bitter fruits, it is only because the moral level of society is still quite high, that the Church's teaching on marriage still moves consciences. But what will happen to the family, to marriage, when this level falls; further moral decline will open up the desire for abuse. And then the stone rejected by the builders – high Catholic morality – will become the head of the corner-stone. The Church saves divorced societies from the terrible consequences of supposedly progressive laws" [Idem 1946k, 3].

[22] "Essentiales matrimonii proprietates sunt unitas ac indissolubilitas, quae in matrimonio christiano peculiarem obtinent firmitatem ratione sacramenti" (Canon 1013 § 2 of the CIC/17).

the child's right to the family should be considered more sacred than the parents' right to personal happiness or comfort [Idem 1946i, 3]. Wyszyński regarded as insufficient the provisions arising from Article 31 para. 1 sect. 1 of the Marriage Law, which obliged the common law court, when pronouncing a divorce, to entrust the child and the administration of the child's property to one of the parents with the priority of the innocent or even to a third person, if the child's interests so required. He believed that the "property interests of the child" were not the most important thing and that raising their importance only showed a false concern on the part of the proponents of divorce. Children need more heart and love during their childhood than material goods. Parents can never be replaced. "For between father, mother – and child there is not only a bond of duty, but a bond of common blood, a bond of love. These create the natural conditions for the sacrifices and offerings necessary for upbringing" [ibid.]. This is why Wyszyński, using the figurative comparison that no sensible person cuts down a tree just because a few wormy apples have been found on it, encouraged spouses to overcome various difficulties and infirmities precisely in order to protect and preserve the marital community. "It is therefore necessary to remedy human deficiencies and weaknesses rather than to break up the family" [ibid.].

Divorce has a destructive effect on social virtues – in a divorced society, resilience to family difficulties weakens and the sense of marital and parental responsibility is lost [Idem 1946g, 3]. In addition, a commonly perceived phenomenon in divorce-affirming societies is a drastic decrease in fertility rates and therefore a decline in population [Idem 1946h, 4].[23]

5. EQUALITY OF SPOUSES IN SACRAMENTAL MARRIAGE

For Wyszyński, equality in sacramental marriage was very important, but interpreted in an evangelical way. In explaining this truth, he referred to misguided opinions referring to the removal of the words about obedience from the Polish version of the rote of the marriage vow,[24] which would

[23] Wyszyński referred to statistics from France, where divorce law has the strongest tradition. In 1910, a third of divorced couples were childless. In 1919, 36% of married couples who filed for divorce were childless. In Paris alone in 1919, out of 2,568 divorced marriages, 64% were childless [Idem 1946h, 4].

[24] The oath with the vow of marital obedience was introduced by the Polish bishops into the Polish version of the post-Tridentine *Rituale Romanum*, which was used until the end of 1928. It had no equivalent in the Latin edition. The groom vowed: "I N. take thee N. to be my spouse and vow to thee in love, faith and honesty in marriage that I will not leave thee till death. So help me Lord God Almighty in one Trinity and all the saints." In turn, the bride vowed: "I N. take thee N. to be my spouse and vow to thee love, faith, honesty and **obedience in marriage** [distinction – P.L.], and that I will not leave thee till death. So help me Lord God Almighty in one Trinity and all the saints." The *Rituale Romanum* of 1925, renewed and

naively prove that the Church follows the spirit of the times and progress [Idem 1945e, 3].

Referring to the teaching of St Paul the Apostle: "Wives should be subordinate to their husbands as to the Lord. For the husband is head of his wife just as Christ is head of the church, he himself the saviour of the body" (Eph 5:22-23), he explained what gospel obedience consists of and what it obliges.[25] He interpreted the husband's primacy in marriage as an obligation to serve, as placing on the husband the full responsibility for the family, as the husband's duty towards his wife. In addition, he also invoked the words of St Paul the Apostle: "Husbands, love your wives, even as Christ loved the church and handed himself over for her to sanctify her" (Eph 5:25). In order that a husband's love for his wife may be compared to Christ's love for the Church, the husband should always bear in mind that Christ gave his life for the Church. On the husband's part, this implies a serious obligation to care for his wife and to give up his own desires and inclinations in favour of her needs and those of the established family. "When a wife feels that her husband loves her, or tries to love her according to the pattern prescribed – as Christ loved the Church – then she can easily submit to her husband in all matters. For the love she has experienced will make this total submission to her husband easy and desirable for her" [ibid.].

6. PERSONAL AND SOCIAL FUNCTION OF MARRIAGE

Wyszyński saw not only the personal character of marriage, but also the social one. He believed that it serves both the good of the individual man and the good of society as a whole. In fact, the aims of marriage, and the fulfilment of the duties and rights arising from it, can only be truly and fully achieved when the personal duties and rights of man are reconciled with those of society. The marital community is therefore a natural need of man's social being and the source of its existence has its origin in man's social nature [Idem 1946j, 3]. This view of marriage was based largely on the teaching of Pope Pius XI, who, as early as the introduction to his encyclical *Casti Connubii*, emphasised that marriage is the basis of the domestic community on an individual level and of the human community as a whole: "How great is the dignity of chaste wedlock, Venerable Brethren, may be judged best from this that Christ Our Lord, Son of the Eternal

approved by Pius XI, was adapted to the traditions of the Polish dioceses and then sent to the Holy See for approval (*recognitio*). Probably on 24 September 1928, the Holy See gave its approval. The Polish version of the ritual came into force on 1 January 1929 and in fact did not contain the passus concerning the obedience of marriage [Śliwiński 2022].

[25] "If anyone wishes to be first, he shall be the last of all and the servant of all" (Mark 9:35).

Father, having assumed the nature of fallen man, not only, with His loving desire of compassing the redemption of our race, ordained it in an especial manner as the principle and foundation of domestic society and therefore of all human intercourse, but also raised it to the rank of a truly and great sacrament of the New Law, restored it to the original purity of its divine institution, and accordingly entrusted all its discipline and care to His spouse the Church." (Introduction).

For the reason that marriage is not only individual, but also social, its duration and nature must not be decided by the will of the individual – because no one is obliged to marry, but everyone has the right to marry. By the same token, a person does not have the right to give up his marriage based on his own preference. "He may or may not want marriage, but the moment he entered into it he bound his will and submitted it to the dictates of reason and the law of God" [ibid.]. For the sake of personal well-being, therefore, the marriage bond must not be nullified, since personal happiness is not the supreme right in marriage. This is because marriage fulfils a very important social task.

7. PREPARING FOR THE SACRAMENT OF MARRIAGE

A huge role in the mission to renew the institution of marriage [Idem 1946c, 3],[26] in Wyszyński's view, is played by good preparation for the reception of this sacrament. Following Pope Pius XI, he argued that the way in which young people experience their childhood and adolescent years will have an enormous impact on their future married life. In the encyclical *Casti Connubii*, in section 6 on preparation for marriage, in point A addressing the issue of further preparation for marriage, the Pope wrote: "There is danger that those who before marriage sought in all things what is theirs, who indulged even their impure desires, will be in the married state what they were before, that they will reap that which they have sown; indeed, within the home there will be sadness, lamentation, mutual contempt, strifes, estrangements, weariness of common life, and, worst of all, such parties will find themselves left alone with their own unconquered passions." It was for this reason that Wyszyński emphatically stressed that a clean and sober youth life was very important for a future marriage, a happy and fulfilled one. "A boisterous and promiscuous youth will not create faithful and lasting

[26] Among a number of measures for the renewal of the institution of marriage, Wyszyński included, above all, a thorough instruction on what marriage is in general, what dignity it possesses, what duties it gives rise to and what rights it confers, and what it means that marriage is a sacrament [Idem 1946d, 3; Idem 1946e, 3].

families. The reason for the impermanence of many marriages should be sought in how the spouses spent their youthful years" [Idem 1946f, 3].

Wyszyński objected to the commonly held view that "young people need to have their fling." He believed that there were no special moral laws for either boys or girls to enjoy life during adolescence. He was of the opinion that everything a man does, the way he behaves and the decisions he makes have an impact on his future life, in particular on what condition his future marriage will be in. Everyone is bound by one morality, lofty, responsible, binding in the same way at every period of life [ibid.].[27]

In addition to the further preparation for marriage, which includes childhood and adolescence, the direct preparation is very important and should be devoted, among other things, to the careful choice of a spouse. "It is difficult to combine a hooligan with an angel and expect good results. Surely a pure spouse, a righteous and wise husband – can have a good effect on the other party. But it is difficult for the bankrupts of life to look for sacrifices of sometimes the best people in order to save ruins at their expense. Rather, care must be taken to prevent bankruptcy, to give the clean and sober to the clean and sober" [ibid.]. It is for this reason that the choice of a future spouse must not be the result of a whim, a momentary fancy or a fleeting feeling. Wyszyński stressed that such a choice, which determines the entire life of a person, must be made with care, because it affects whether the future marriage will be happy or unhappy. He encouraged the nupturients to get to know each other thoroughly, in every respect – so that the choice of a spouse is not decided only by the heart, feelings or passion, but above all by reason enlightened by a living faith. In choosing a spouse, the law of God and the good of the Christian faith must be taken into account. One should ask whether the future husband or wife loves God, practices the faith and respects the laws of the Church. A good spouse should also be earnestly prayed for. "When one considers that one will have to live with the chosen person, always, until death, that one will have to endure calmly all his or her faults and enjoy the advantages – then the primacy of the role of reason in the choice of a person becomes obvious" [ibid.].

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[27] In the article analysed, Wyszyński also referred to the encyclical on the Christian education of the young, in which Pope Pius XI emphasised the effects of original sin also affecting children and young people, and therefore saw the need for educational work: "Disorderly inclinations then must be corrected, good tendencies encouraged and regulated from tender childhood, and above all the mind must be enlightened and the will strengthened by supernatural truth and by the means of grace, without which it is impossible to control evil impulses, impossible to attain to the full and complete perfection of education intended by the Church, which Christ has endowed so richly with divine doctrine and with the Sacraments, the efficacious means of grace." Pius PP. XI, Litterae Encyclicae de christiana iuventutis educatione *Divini illius Magistri* (31.12.1929), AAS 22 (1930), p. 55-86.

CONCLUSION

The mission that Wyszyński undertook by founding the weekly "Ład Boży", managing its editorial board and publishing articles in the author's series "Ład w myślach" was of great importance for the reconstituting diocese of Włocławek, especially in the pastoral field. How much of a threat the activities of this weekly posed, even in the later period, is evidenced by the opinion of the Provincial Press Control Office, which made the following observation in issue 4 for 1949: "In connection with the appointment of Rev. Stefan Wyszyński as Archbishop of Gniezno and Warsaw, and thus Primate of Poland, *Ład Boży* gave on the front page the Primate's likeness, and on the second page an article by Turczynowicz, entitled *New Primate of Poland*. Up to this point, *Ład Boży*, being at the service of the clergy, had been an oasis for the pernicious clerical-capitalist policy, deftly masked by platitudes of Christian ideology. After Hlond's death, *Ład Boży* hung in wait for a new political direction. Despite the interferences made for tactical reasons, one senses that the policies of the new Primate will change the face of *Ład Boży*."[28]

In a concise, logically and substantively organised series of articles, the reader of "Ład w myślach" received a rich compendium of knowledge in the field of ecclesiastical marriage law. Using simple, clear and illustrative language, which was important for a large part of uneducated readers, Wyszyński showed the dangers facing the institution of marriage at the time, also in connection with the promulgation of the Marriage Law on 25 September 1945. Alongside his analysis of the dangers, he courageously pointed the way forward, which he faithfully drew from the teaching of the Pope and the Polish Episcopate. The reading and analysis of the 16 articles from "Ład Boży" used in this study represents a commitment to extracting from Wyszyński's spiritual legacy those values that are not diminished by time. Wyszyński himself used his Włocławek experience from the editorial board of the weekly in his further pastoral ministry as Bishop of Lublin and later as Archbishop and Metropolitan of Gniezno and Warsaw and Primate of Poland.

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[28] Archive of New Records in Warsaw, Central Office of Press, Publications and Performances Control, *Oceny czasopism i dzienników w 1949 r.*, ref. no. 122/9/19 b. Ocena „Ładu Bożego" nr 16, Kierkowska Helena, Bydgoszcz (19.01.1949), quote from: Iwańska-Cieślik 2012, 223.

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THE BISHOP OF ROME AS THE SUPREME LEGISLATOR IN THE CHURCH. A THEOLOGICAL AND LEGAL ANALYSIS OF POPE FRANCIS' LEGISLATION

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Abstract. The pontificate of Pope Francis can be characterised by a series of legislative decisions. Many of his decisions relate to the specific exercise of the Church legislative power, which in the case of the Bishop of Rome is the highest legislative authority in the Church. Although well-known and characterised in the literature, the legislative power of the Bishop of Rome is worthy of a new synthetic approach in the context of Pope Francis' legislative decisions, also by citing his specific utterances on this matter. The specific and unique mission of the Bishop of Rome in relation to the whole Church is linked to making various decisions, including those of legislative nature, which are indispensable or useful for the defence and promotion of the unity of faith and communion of the Church. Pope Francis' reforms, in particular those of a universal character, should also revive the legislative activity of particular legislators, especially diocesan bishops. These reforms should also contribute to the study of the ecclesiastical law, including, but not limited to, its proper application. The nature of the ecclesiastical law, in particular the law promulgated by the Bishop of Rome, is not only purely juridical but also sanctifying and saving.

Keywords: Bishop of Rome; legislative decisions; legislative power; Pope Francis; the Vicar of Christ.

INTRODUCTION

Pontiff of Pope Francis can be characterized by a number of legislative decisions. This results in his numerous decisions being related to specific exercising of the Church legislative power which in case of the Bishop of Rome constitutes the highest legislative authority in the Church. The 1983 Code of Canon Law describes it as "supreme, full, immediate, and universal ordinary power in the Church."[1] That dynamic exercising of legislative power by Pope Francis is, without doubt, connected with a great effort that he

[1] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, pp. 1-317 [hereinafter: CCL], Can. 332 § 1.

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makes concerning the multidimensional reform of the present Church. The reform does not only relate to the functioning of the Church institutions but also wants to serve the entire ecclesial community and is supposed to contribute to not only correct but also improve functioning of that community, especially in bearing witness to the Gospel.

By example, it will be well to chronologically bring the reform on adjudicating the nullity of marriage (2015),[2] harmonisation of the Latin and Eastern Codes (2016),[3] reform of the penal law (2021),[4] reform of the Roman Curia (2022),[5] or amending functioning of the institution of the Synod of Bishops in 2018.[6] It will be well to perceive the indicated elements of the Church reform, although fragmentary, jointly with a clear will of giving the present Church a new dynamic in preaching Gospel through specific documents of the Bishop of Rome. Furthermore, without any doubts, it is connected with personal courage of Pope Francis, especially in giving a new direction for the present Church, specifically through its synodal dimension. This, one can say, has been strongly emphasized on a universal scale in recent years.

Although well-known and characterized in literature, the presented issue relating to the legislative power of the Bishop of Rome is worth a fresh synthetic approach in the context of legislative decisions of Pope Francis, also through citation of his specific utterances made in this matter. As Pope Francis indicted in his speech on the occasion of Christmas delivered during traditional Christmas wishes on December 21, 2019, at present we do not live *in the era of changes but in the change of era*. Thus, observing the pace of changes in the modern society, including the Church community, we will probably be witnesses of intensive legislative actions, including actions of the Bishop of Rome. They, without any doubt, will remain a point of reference for the Church particular legislators [Aumenta and Interlandi 2023, 11].

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[2] See https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20150815_mitis-iudex-dominus-iesus.html [accessed: 01.05.2024].

[3] See https://www.vatican.va/content/francesco/la/apost_letters/documents/papa-francesco-lettera-ap_20160531_de-concordia-inter-codices.html [accessed: 01.05.2024].

[4] See https://www.vatican.va/content/francesco/en/apost_constitutions/documents/papa-francesco_costituzione-ap_20210523_pascite-gregem-dei.html [accessed: 01.05.2024].

[5] See https://www.vatican.va/content/francesco/en/apost_constitutions/documents/20220319-costituzione-ap-praedicate-evangelium.html [accessed: 01.05.2024].

[6] See https://www.vatican.va/content/francesco/en/apost_constitutions/documents/papa-francesco_costituzione-ap_20180915_episcopalis-communio.html [accessed: 01.05.2024].

1. THEOLOGICAL FOUNDATIONS AND SPECIFICITY OF AUTHORITY OF THE BISHOP OF ROME

Observing the person and in particular the office of the Bishop of Rome one must state that we deal with a specific and extraordinary office and mission in the history of the Church and the world. This, anyway, has been and is emphasized a number of times in various utterances, not only of doctrinal nature. This unique character presented in general terms specifically results from the fact that we face institution that originates from God's law that is additionally enriched by personality of each pope. Prerogatives and functions of that office have also been established by God. Through centuries, they have been and still are defined accurately by the law of the Church, specifically by amending it, e.g. these referring to the method of election of the Bishop of Rome [Arrieta 2023, 253].

The unique character and specificity of this office is unquestionably connected with the privilege of primacy of the Bishop of Rome, namely, with clearly specified and very essential theological foundation thought specifically by the Magisterium of the First Vatican Council and gradually developed by Magisterium of the Second Vatican Council [Rozkrut 2021, 3-20].

Synthetically collecting the above indicated grand teaching of the Church the Latin and Eastern Codes, in particular Can. 331 CCL and corresponding Can. 43 from the Eastern Churches Canons Code of 1990[7]: "The bishop of the Roman Church, in whom continues the office given by the Lord uniquely to Peter, the first of the Apostles, and to be transmitted to his successors, is the head of the college of bishops, the Vicar of Christ, and the pastor of the universal Church on earth. By virtue of his office he possesses supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely."

Sort of on the margin, it is worth to mention that the structure of canons relating to the Bishop of Rome is identical in both the Latin and Eastern Code. Hence, it is also worth to invoke a remark from codification works of the Eastern Code Committee that there must be taken special care that, while maintaining only editorial modifications, in this very important subject matter there is not any dissimilarity between the two codes. It is the more that Latin canons have already been approved by the highest legislator, to this instance by John Paul II, by promulgation of the post-Councillor Code of Canon Law. Hence, it is incorrect to disbelieve that they do not also correspond to the Eastern theological tradition[8].

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[7] *Codex Canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus* (18.10.1990), AAS 82 (1990), pp. 1033-363.

[8] "Nuntia" 22 (1986), p. 39.

The above cited canon norm is to a great extent based upon Can. 218 of the pio-benedictine codification of 1917.[9] And that, in turn, was based upon Magisterium of the First Vatican Council [Del Pozzo 2020, 140]. Generally, it must also be underlined that the first part of the existing canon norm is theological. It describes the Bishop of Rome. Successively, the second part indicates consequences concerning his authority [Mosconi 2000, 6]. In comparison, Can. 218 § 1-2 of the Code of 1917 additionally pointed out that the Bishop of Rome also possesses the primacy of honour, his authority is truly episcopal and independent from any human authority. Naturally, the indicated elements of the pio-benedictine codification are still in force as they are founded in the God's establishment. It is also profitable to point out the previous Can. 218 § 1 that clearly constituted that the full and supreme authority of the Bishop of Rome relates to issues concerning faith, morality as well as discipline and management of the Church. Thus, we have also synthetically determined the subject matter of authority of the Bishop of Rome that has been developed and discussed in researches on the theological and legal doctrine of the Church through centuries. Through his office and privileges of primacy, the successor of Saint Peter is at the same time the Head of the College of Bishops and the Bishop of Rome. This means that we face a three-fold dimension of law of the same reality. In other words, in the person of Peter (and his successors) we see the head of Twelve that remains the foundation of unity and leadership of their successors. This means, it is actually connected with management of the College of Bishops. Rome that is a capital city of pope, as bishop, is at the same time the centre of communion of the Church [Arrieta 2023, 251].

When it comes to exercising the supreme power in the Church, Latin Can. 337 § 3 (as well as its Eastern counterpart – Can. 45 § 2) expresses it as follows: "It is for the Roman Pontiff, according to the needs of the Church, to select and promote the ways by which the college of bishops is to exercise its function collegially regarding the universal Church."

Furthermore, apart from this three-fold dimension that is determined theologically, legally and canonically, the Bishop of Rome, through entirely different dimension that relates to purely earthly perspective, is also the head of the Vatican City State and, within the area of his power that is of political and earthly character, possesses full legislative, executional and judicial powers related to everyday functioning of Città del Vaticano, as the one who possesses the highest authority in that state [ibid., 252].

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[9] *Codex Iuris Canonici auctoritate Pii X Pontificis Maximiiussu digestus. Benedicti Papae XV auctoritate promulgatus* (27.05.1917), AAS 9 (1917), pars II, pp. 1-593.

Immediately after he was elected on March 13, 2013, Pope Francis in his first public speech clearly indicated that the conclave elected a new Bishop of Rome and added that it is the Church existing in Rome that leads all other Churches.[10] In other words, an essential element of being pope is to exercise the office of the Bishop of Rome which is very strongly highlighted in the Tradition and Magisterium of the Church [Del Pozzo 2020, 145].

The power possessed by the Bishop of Rome is defined by the above quoted Can. 331. The indicated regular power of ruling is connected with the entrustment of the office of the Bishop of Rome and constitutes his own power in accordance with the norm of Can. 131 § 1-2 CCL.

Generally speaking, the power indicated hereinabove relates to issues concerning faith, customs, holy sacraments, discipline, and management of the Church. This means everything understood as community of the Church [Arrieta 2023, 256].

Concluding, it is worth to highlight that when it comes to its origin the authority of the Bishop of Rome comes directly from God [ibid.]. As when it comes to the Bishop of Rome we deal with an office given by the law of God. Thus, the received power comes directly from Christ [Mosconi 2000, 18]. Due to that, this fundamental truth relating to the office of the Bishop of Rome makes it impossible to compare it with another office existing in the structures of state [Cito 2000, 32].

Similarly to every other office of diocesan bishop, the office of the Bishop of Rome is connected with exercising the power assigned to each of them. This means that in accordance with Can. 375 § 1 pope, being a bishop, is a teacher of doctrine, priest of the holy cult and executor of the ruling service. In other words, according to Can. 375 § 2 his mission includes tasks relating to teaching, sanctifying and ruling [Grocholewski 1990, 581]. Therefore, in accordance with the differentiation made by Can. 135 § 1 the mentioned ruling authority includes the legislative, executive and judicial powers. Whereas, the particular mission of the Bishop of Rome, in comparison with other bishops, is not limited to a specific territory or group of people but extends over the entire Church and all faithful [ibid.].

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[10] „You know that it was the duty of the Conclave to give Rome a Bishop. […] The diocesan community of Rome now has its Bishop. […] And now, we take up this journey: Bishop and People. This journey of the Church of Rome which presides in charity over all the Churches. A journey of fraternity, of love, of trust among us", https://www.vatican.va/content/francesco/en/speeches/2013/march/documents/papa-francesco_20130313_benedizione-urbi-et-orbi.html [accessed: 01.05.2024].

2. LEGISLATIVE POWER OF THE BISHOP OF ROME

According to Can. 135 § 1 CCL, the ruling authority of the Church comprises of legislative, executive and judicial powers, wherein "Legislative power must be exercised in the manner prescribed by law; that which a legislator below the supreme authority possesses in the Church cannot be validly delegated unless the law explicitly provides otherwise. A lower legislator cannot validly issue a law contrary to higher law."

The topic concerning a possible delegation of authority of the Bishop of Rome can be clearly read in Article 18(1-2) of the Apostolic Constitution of Pope Francis "Episcopalis communio" on *passing a final document to the Bishop of Rome*: "Once the approval of the members has been obtained, the Final Document of the Assembly is presented to the Roman Pontiff, who decides on its publication. If it is expressly approved by the Roman Pontiff, the Final Document participates in the ordinary Magisterium of the Successor of Peter. If the Roman Pontiff has granted deliberative power to the Synod Assembly, according to the norm of canon 343 of the Code of Canon Law, the Final Document participates in the ordinary Magisterium of the Successor of Peter once it has been ratified and promulgated by him. In this case, the Final Document is published with the signature of the Roman Pontiff together with that of the members."[11] Unquestionably, practical application of that norm is going to be interesting.

The previously mentioned Can. 331 CCL, namely, the first canon on the Bishop of Rome present in the existing Latin Code states that "By virtue of his office he possesses supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely." Thus, legislative power of the Bishop of Rome is presented as *plenitudo potestatis* through which every pope is called to exercise it based on the given mission [Cito 2000, 35]. At the same time, essential resolutions of the law of God, especially these relating to the mission of Saint Peter and his successors in the Church have been included in this synthetic expression [Erràzuriz 2009].

Trying to practically understand the above regulation, one must bear in mind that precise adjectives indicate that the authority is:

1) *ordinary*, that means that the authority of the Bishop of Rome is by law related to office in the Church that is characterized by its primacy. Therefore, that authority does not relate to a natural person but the held office that the pope obtains "The Roman Pontiff obtains full and supreme power in the Church by his acceptance of legitimate election together

[11] See https://www.vatican.va/content/francesco/en/apost_constitutions/documents/papa-francesco_costituzione-ap_20180915_episcopalis-communio.html [accessed: 01.05.2024].

with episcopal consecration" (Can. 332 § 1 CCL). He loses that authority, e.g. as a result of resignation from the office of the Bishop of Rome which was very clearly stated by Benedict XVI in his last speech as the Bishop of Rome: "I am no longer the Supreme Pontiff of the Catholic Church, or I will be until 8:00 this evening and then no longer. I am simply a pilgrim beginning the last leg of his pilgrimage on this earth;"[12]

2) *highest*, that means that the Bishop of Rome has freedom in exercising his power. This means that he is independent from the remaining bishops who are members of the college and due to that "The First See is judged by no one" (Can. 1404 CCL) as well as there is no appeal from the sentence given by pope (Can. 1629, 1° CCL). This has been normalized in Can. 333 § 3 as follows: "No appeal or recourse is permitted against a sentence or decree of the Roman Pontiff." The term highest authority means that there is no entity on Earth before which pope as well as the College of Bishops, which head is the Bishop of Rome, is responsible. This is clearly determined in Can. 336: "The college of bishops, whose head is the Supreme Pontiff and whose members are bishops by virtue of sacramental consecration and hierarchical communion with the head and members of the college and in which the apostolic body continues, together with its head and never without this head, is also the subject of supreme and full power over the universal Church;"
3) *full*, that means that the power is not solely executive or controlling as it does not miss any essential element both in relation to the unity of faith and power in the Church. It means that it has a legislative, executive dimension, which mean an administrative and judicial dimension. From the theological point of view, the fullness of the analysed power should be understood solely as power entrusted to the Church by God. Hence, it can also be said that this power is at the same time power which is sufficient and necessary to lead the entire Church. In its para. 94 the "Ut unum sint" encyclical describes it as follows: "With the power and the authority without which such an office would be illusory, the Bishop of Rome must ensure the communion of all the Churches. For this reason, he is the first servant of unity. This primacy is exercised on various levels, including vigilance over the handing down of the Word, the celebration of the Liturgy and the Sacraments, the Church's mission, discipline and the Christian life. It is the responsibility of the Successor of Peter to recall the requirements of the common good of the Church, should anyone be tempted to overlook it in the pursuit of personal interests. He has the duty to admonish, to caution and to declare at times that this

[12] See https://www.vatican.va/content/benedict-xvi/en/speeches/2013/february/documents/hf_ben-xvi_spe_20130228_fedeli-albano.html [accessed: 01.05.2024].

or that opinion being circulated is irreconcilable with the unity of faith. When circumstances require it, he speaks in the name of all the Pastors in communion with him. He can also – under very specific conditions clearly laid down by the First Vatican Council – declare *ex cathedra* that a certain doctrine belongs to the deposit of faith. By thus bearing witness to the truth, he serves unity;"

4) *direct*, that means that the power of primacy can be exercised by pope in a direct manner over all faithful and all particular Churches, without involvement of other people or institutions, although direct character of the authority of pope in regards to the latter is understood as confirmation and guarantor of their own, ordinary and direct power of diocesan bishops;
5) *universal*, that means that the area of operation of the authority of pope extends over the entire *communio Ecclesiae et Ecclesiarum*, as he himself is the head of the College of Bishops and thus also the *caput totius Ecclesiae* [Corecco and Gerosa 1995, 230].

3. LIMITATION OF LEGISLATIVE POWER OF THE BISHOP OF ROME

Legislative power of the Bishop of Rome has also its limits that is constraints. In practice, it means that it is not absolute, though the nature of primacy causes that here – on Earth – the Bishop of Rome is not responsible before any authority for his decisions made within a mandate given to him [Cito 2000, 38]. J. Hervada states it directly: *the power of pope is unlimited*. For that reason, it is to be exercised within specified borders that can relate both to the validity and justice of the made decisions [Hervada 1989, 273]. Recognition of the above limitations does not produce any obstacle in exercising the office of the Bishop of Rome nor constitutes a limitation to the authority of pope. However, this should be perceived as paying respect to the plan of God on the one hand and responsible exercising of that office on the other hand [Del Pozzo 2020, 165].

In respect to the primacy of the Bishop of Rome, we can read in the declaration of the Congregation for the Doctrine of Faith of 1998 that the highest power of Primacy causes that there is no instance before which the Bishop of Rome would be responsible for exercising his office: "Since the power of the primacy is supreme, there is no other authority to which the Roman Pontiff must juridically answer for his exercise of the gift he has received: *prima sedes a nemine iudicatur*."[13] Naturally, it also does not apply to his

[13] See https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19981031_primato-successore-pietro_en.html [accessed: 01.05.2024].

legislative power that – similarly to the remaining aspects of the exercised power – does not present itself as supremacy of absolute nature and that could be exercised bilaterally, but the manner in which it is exercised is supposed to serve the received mission [Cito 2000, 38].

It can be clearly read in the "Ut unum sint" encyclical, para. 92: "As the heir to the mission of Peter in the Church, which has been made fruitful by the blood of the Princes of the Apostles, the Bishop of Rome exercises a ministry originating in the manifold mercy of God. This mercy converts hearts and pours forth the power of grace where the disciple experiences the bitter taste of his personal weakness and helplessness. The authority proper to this ministry is completely at the service of God's merciful plan and it must always be seen in this perspective. Its power is explained from this perspective."

The presented truth is explained in the following way by the already quoted Congregation for the Doctrine of Faith, para. 7: "The exercise of the Petrine ministry must be understood – so that it «may lose nothing of its authenticity and transparency» – on the basis of the Gospel, that is, on its essential place in the saving mystery of Christ and the building-up of the Church. The primacy differs in its essence and in its exercise from the offices of governance found in human societies: it is not an office of co-ordination or management, nor can it be reduced to a *primacy of honour*, or be conceived as a political monarchy. The Roman Pontiff – like all the faithful – is subject to the Word of God, to the Catholic faith, and is the guarantor of the Church's obedience; in this sense he is *servus servorum Dei*. He does not make arbitrary decisions, but is spokesman for the will of the Lord, who speaks to man in the Scriptures lived and interpreted by Tradition; in other words, the *episcope* of the primacy has limits set by divine law and by the Church's divine, inviolable constitution found in Revelation. The Successor of Peter is the rock which guarantees a rigorous fidelity to the Word of God against arbitrariness and conformism: hence the martyrological nature of his primacy."[14]

In the first place, from among the mentioned limitation one must list these of objective character that result from the nature of the authority of Church itself. Whereas, the remaining result from the God's foundation of the Church [Arrieta 2023, 256]. Naturally, in no event the Bishop of Rome can transgress the law of God with his decisions, both the natural and revealed law. This rule can be clearly found in canonical material law on marriage that, e.g. states that "It is only for the supreme authority of the Church to declare authentically when divine law prohibits or nullifies

[14] See https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19981031_primato-successore-pietro_en.html [accessed: 01.05.2024].

marriage" (Can. 1075 § 1 CCL), and: "A dispensation is never given from the impediment of consanguinity in the direct line or in the second degree of the collateral line" (Can. 1078 § 3 CCL).

J. Hervada very strictly indicates that borders that determine validity of decisions made by the Bishop of Rome are the natural law, positive law of God, and the nature and purpose of the Church [Hervada 1989, 273]. At the same time, he indicates that among limitations resulting from the law of God one must specifically indicate existence of episcopate and fundamental rights of the faithful [ibid.]. Hence, Can. 333 § 2 CCL states that: "In fulfilling the office of supreme pastor of the Church, the Roman Pontiff is always joined in communion with the other bishops and with the universal Church. He nevertheless has the right, according to the needs of the Church, to determine the manner, whether personal or collegial, of exercising this office."

Hence, in the introduction to reform of the law on proceedings of 2015 Pope Francis very clearly stated that: "Through the centuries, the Church, having attained a clearer awareness of the words of Christ, came to and set forth a deeper understanding of the doctrine of the indissolubility of the sacred bond of marriage, developed a system of nullities of matrimonial consent, and put together a judicial process more fitting to the matter so that ecclesiastical discipline might conform more and more to the truth of the faith she was professing. All these things were done following the supreme law of the salvation of souls insofar as the Church, as Blessed Paul VI wisely taught, is the divine plan of the Trinity, and therefore all her institutions, constantly subject to improvement, work, each according to its respective duty and mission, toward the goal of transmitting divine grace and constantly promoting the good of the Christian faithful as the Church's essential end. It is with this awareness that we decided to undertake a reform of the processes regarding the nullity of marriage, and we accordingly assembled a Committee for this purpose comprised of men renowned for their knowledge of the law, their pastoral prudence, and their practical experience. This Committee, under the guidance of the Dean of the Roman Rota, drew up a plan for reform with due regard for the need to protect the principle of the indissolubility of the marital bound. Working quickly, this Committee devised within a short period of time a framework for the new procedural law that, after careful examination with the help of other experts, is now presented in this *motu proprio*. Therefore, the zeal for the salvation of souls that, today like yesterday, always remains the supreme end of the Church's institutions, rules, and law, compels the Bishop of Rome to promulgate this reform to all bishops who share in his ecclesial duty of safeguarding the unity of the faith and teaching regarding marriage, the source and center of the Christian family. The desire for this reform is fed by the great number

of Christian faithful who, as they seek to assuage their consciences, are often kept back from the juridical structures of the Church because of physical or moral distance. Thus charity and mercy demand that the Church, like a good mother, be near her children who feel themselves estranged from her. All of this also reflects the wishes of the majority of our brother bishops gathered at the recent extraordinary synod who were asking for a more streamlined and readily accessible judicial process. Agreeing wholeheartedly with their wishes, we have decided to publish these provisions that favor not the nullity of marriages, but the speed of processes as well as the simplicity due them, lest the clouds of doubt overshadow the hearts of the faithful awaiting a decision regarding their state because of a delayed sentence," and: „We have done this following in the footsteps of our predecessors who wished cases of nullity to be handled in a judicial rather than an administrative way, not because the nature of the matter demands it, but rather due to the unparalleled need to safeguard the truth of the sacred bond: something ensured by the judicial order."[15]

Reading and analysing words of Pope Francis already from a certain perspective and perceiving them in the context of the performed synthetic analysis on the legislative power of the Bishop of Rome, it can be seen how much they are founded on the primacy and importance for proper functioning of community of the entire Church.

CONCLUSION

The legislative power of the Bishop of Rome presents itself through its attributes that are a sole characteristic of that unique power as *plenitudo potestatis* the foundation of which is the received mission by which every pope is called to execute it in accordance with the wording of Can. 331 of CCL as "the head of the college of bishops, the Vicar of Christ, and the pastor of the universal Church on earth."

The specific and unique mission of the Bishop of Rome in regards to the entire Church is related to making various decisions, also these of legislative nature that are indispensable or useful for defending and promoting unity of faith and community of the Church.

Theological and legal analysis performed in a synthetic form was also reinforced with specific statements of Pope Francis as well as his predecessors that – while respecting fundamental assumptions provided in the analysis – were enriched with his personality and dynamic character of exercising the office of the Bishop of Rome. Hence, in the Apostolic Constitution

[15] See https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20150815_mitis-iudex-dominus-iesus.html [accessed: 01.05.2024].

"Praedicate Evangelium" Pope Francis wrote: "The reform of the Roman Curia is to be viewed in the context of the Church's missionary nature. The desire for reform was urgently felt in the sixteenth century, leading to the Apostolic Constitution *Immensa Aeterni Dei* of Sixtus V (1588), and in the twentieth century, leading to the Apostolic Constitution *Sapienti Consilio* of Pius X (1908). Following the Second Vatican Council, Paul VI, with explicit reference to the desire expressed by the Council Fathers, called for and carried out a reform of the Curia with the Apostolic Constitution *Regimini Ecclesiae Universae* (1967). Subsequently, in 1988, John Paul II promulgated the Apostolic Constitution *Pastor Bonus*, with the aim of further promoting communion within the Church's overall structures. In continuity with these two recent reforms, and with appreciation for the longstanding, generous and competent service to the Roman Pontiff and the universal Church provided by so many members of the Curia, this new Apostolic Constitution seeks to attune its present-day activity more effectively to the path of evangelization that the Church, especially in our time, has taken."[16]

Pope Francis' reforms and in particular these of universal character should also revive legislative activity of particular legislators, in particular diocesan bishops. The indicated reforms should also contribute to studying the law of the Church, also in respect to its proper application but not only that. As the nature of the law of the Church, in particular the law promulgated by the Bishop of Rome has not only a purely juridical but also sanctifying and saving character [Errázuriz 2022, 68].

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[16] See https://www.vatican.va/content/francesco/en/apost_constitutions/documents/20220319-costituzione-ap-praedicate-evangelium.html [accessed: 01.05.2024].

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ESTABLISHMENT AND DISSOLUTION OF THE THIRD INSTANCE TRIBUNAL IN OLOMOUC (1951-1990)*

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Abstract. The article deals with the establishment and demise of the Tribunal of the Third Instance in Olomouc, which operated there from 1951 to 1990. It first presents the case of the nullity of the Smith-Brown marriage and then presents other circumstances of the creation and dissolution of the tribunal.

Keywords: ecclesiastical court; nullity of marriage; third instance; communism; procedural law.

INTRODUCTION

The article is part of the author's forthcoming doctoral thesis on the topic: Tribunal of the Third Instance in Olomouc between 1951 and 1990.[1] The article deals with the question of the establishment and dissolution of this tribunal. It first presents the historical context of the establishment of the tribunal, both general and specific, and then deals with the question of the establishment and dissolution of the Tribunal of the Third Instance in Olomouc.

The first part of the article briefly introduces the general historical context of the period of communist totalitarianism and then the case of the nullity of the Smith-Brown marriage and its resolution. The marriage was declared valid in the first instance and invalid in the second instance. For the sentence to be enforceable, a decision in the third instance was needed, which, given the incipient rigid totalitarianism, made it very difficult to appeal to the Roman Rota, which is the ordinary court of the third instance.

In the second part of the article we will deal with the history of the Tribunal itself. The interned Archbishop Josef Karel Matocha petitioned Rome for the establishment of the Third Instance in Olomouc and was granted.

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[1] The title of the thesis in Czech language is: Tribunál III. instance v Olomouci v letech 1951 až 1990.

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The practical establishment entailed many difficulties and pitfalls, which we explain in the article. The question of the dissolution of the tribunal seems to be obscure, as no dissolving decree has been found, the existence of which we have reasonable doubt. The article does not deal with the question of the Tribunal's activities; that subject will be dealt with in the dissertation.

It is an important topic because it shows the efforts of the Apostolic See to secure the exercise of judicial power in the Third Instance in the non-standard conditions of the totalitarian regime in the then Czechoslovakia. The article relies heavily on archival sources, which are cited in the footnotes.

1. THE SITUATION IN CZECHOSLOVAKIA AFTER WORLD WAR II

On 8 May 1945, World War II ended in Europe. On 26 May 1946, elections to the National Assembly were held in Czechoslovakia. The Communist Party of Czechoslovakia won the election with 31.05% of the vote, winning 93 of the 300 seats. In second place was the Czechoslovak National Socialist Party with 18.29 percent of the vote, which meant a gain of 55 seats.[2] Klement Gottwald, the chairman of the Communist Party of Czechoslovakia, who had been the strategist of the coup d'état in February 1948, became prime minister.[3] After February 1948, the key strategy of the communist state power was to cut the hierarchy off from Rome and create a national church over which only the state power would have influence [Balík and Hanuš 2007, 18].

On 23 March 1948, the appointment of Archbishop Joseph Karl Matocha was announced in Olomouc [Charouz 2022, 86], and he was consecrated on Sunday 2 May 1948 [ibid., 91]. Matocha was interned in the archbishop's palace from 1950 [ibid., 224] to his dead on 2 November 1961 [ibid., 249].

2. INVALIDITY OF THE SMITH-BROWN MARRIAGE

Mr. Smith born November 16, 1925 and Miss Brown born March 5, 1925 were united in marriage in the church on March 5, 1946. They had not had sexual intercourse with each other prior to their marriage. Mr. Jones, Mr. Smith's uncle, received an anonymous letter the day before the wedding stating that Miss Brown was pregnant by another man. Both men went to see Brown, where Mr. Smith, in front of his uncle and Miss Brown's parents,

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[2] See Československo Státní statistický úřad, Statistická příručka Československé republiky [na rok] 1948, Státní úřad statistický, Praha 1948, p. 105.

[3] See https://vlada.gov.cz/cz/clenove-vlady/historie-minulych-vlad/prehled-vlad-cr/1945-1960-csr/klement-gottwald-1/klement-gottwald-28424 [accessed: 20.06.2024].

said: "If you're pregnant by someone else, I can't marry you."[4] When Miss Brown heard the news she burst into tears and assured Mr. Jones under oath that it was not true. The wedding took place and the marriage was consummated. Two weeks after the wedding, Brown went to her mother in Z. She had a letter and had herself examined by a doctor at the N. M. hospital, where she was accused of having contracted a venereal disease. The doctor at the hospital told Mr. Smith that his wife was three months pregnant. Mrs. Brown remained in the hospital for three weeks Mr. Smith's brother was a religious who had studied theology in Nepomucenum at Rome. Their mother did not want divorce and scandal in the family. Therefore, Smith's mother told the hospital that Brown could return if she had an abortion and brought a doctor's note that she was healthy. Brown returned to her husband but did not have a medical certificate. They were no longer having sexual intercourse at that time. Four days later, Smith took his wife to his parents' house in R.

The problematic point is the description of Mrs Brown's return from hospital. According to the sentence, Brown returned to her husband for a few days and four days later, Mr Smith was to take her to his parents in R. If the newlyweds were living alone, it would be possible for them to go to her husband's parents after four days, which makes no sense. Mrs Brown did not meet the conditions of Mr Smith's mother Had they lived with Mr Smith's parents it is odd that the sentence would again mention that after four days he took her to her parents when Mrs Brown returned from hospital to her husband. However, it is possible that there is a typo in the Latin preposition in the sentence. The text uses the preposition "ad" (to his/her parents), but in the context of our hypothesis, the preposition "ab" (from his/her parents) would make more sense, i.e., that after four days he moved her away from her parents. The above facts are extracted from the sentence of the Second Instance and are corroborated by the examination of the parties and witnesses.[5]

On June 6, 1946, Mr. Smith filed an action in the Brno Ecclesiastical Court to review the validity of his marriage to Brown. On July 7, 1949, the Brno court rendered a sentence declaring the validity of the marriage described above. Mr. Smith's appeal from the first instance sentence was received in Olomouc on August 3, 1949. On 14 June 1950 the Olomouc Ecclesiastical Court delivered a sentence declaring nullity of the marriage.[6] The defender of the bond, Dr. Tinz, appealed to the third instance to obtain

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[4] "si esses cum alio gravida, ego te non possum uxorem ducere." See Archiv Arcibiskupství Olomouckého. Karton A 218-9 církˇ. soudní záležitosti 1950. Rozsudek II. instance v kauze Smith – Brown.

[5] Cf. ibid.

[6] Cf. ibid.

two concurring judgments in the case so that the sentence would become enforceable.[7]

Mr. Smith's urgings came to the court on October 2, 1953, and were forwarded to the vice-officials, probably to Dr. Holubníček.[8] On October 25, 1954, a panel of the Third Instance was appointed, which rendered its sentence on January 8, 1955, and thereafter the parties and the Ecclesiastical Court at Brno were notified, to which the records and sentence of the Second and Third Instances were sent by registered mail. Mr. Smith requested the Latin version of the judgment, which was apparently sent to him with a full translation on 31 January 1955, the last mention in the book.[9]

The whole case dragged on for 8½ years. The First Instance Tribunal delivered its sentence after about 13 months, the Second Instance after about 10.5 months and the Third Instance after about 2.5 months. The case was pending before the courts for a total of 26 months, the rest of the 102 months being downtime due to problems with the establishment of the Third Instance Court in Olomouc. The sentence in the second instance was delivered on 14 June 1950 and on 31 December a faculty was granted for the establishment of the third instance, which was really established until 8 April 1954.

Of the above-mentioned case, only the Latin-written sentence of the second instance has survived in Olomouc. We have not been able to find any materials on the above case in the archives of the Brno Ecclesiastical Court and therefore have little information to draw any clear conclusions. It is not entirely clear from the sentence when and how the marriage ended. We can only surmise that the newlyweds lived with Mr. Smith's parents but cannot state this with certainty. This hypothesis is supported by a note from Mr Smith's mother setting out the conditions under which Brown may return. Also, a letter from the notary Dr. Lantsch to the Archdiocesan Ordinariate regarding the establishment of a third instance mentions that Mr. Smith is dependent on his aged mother and needs a housekeeper.[10]

We know from the sentence that the marriage did not last more than three months, but we can assume that the cohabitation lasted for a shorter period. They were married on March 5, 1946. Brown went to the hospital for an examination fourteen days after the wedding and was in the hospital for three weeks. She then returned to her husband for a few days and he

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[7] Cf. Archiv Arcibiskupství Olomouckého. Karton A 218 – 9 círk. soudní záležitosti 1950. Dopis dr. Hudce č. j. 144/50 ze dne 19. srpna 1950.

[8] Cf. Archiv Interdiecézního církevního soudu Achidioecesanum Forum Judiciae Olomucense 3. inst – Protocollum ab A.D. 1950-1990, p. 1. In the next only Protocollum.

[9] Cf. ibid., p. 4.

[10] Cf. Archiv Arcibiskupství Olomouckého. Karton A 218 – 9 círk. soudní záležitosti 1950. Dopis dr. Lantsche č. j. 161/50 ze dne 19. října 1950.

then moved her out after four days. From the above information we estimate that the marital cohabitation lasted about six weeks. On 6 June – three months after his marriage to Miss Brown – Mr Smith brought an action in the ecclesiastical court, which presupposes the dissolution of the marriage (cf. CIC/17, can. 1965).

The current legislation – in order for the case to be accepted by the ecclesiastical court – requires that the defendant's marriage be irretrievably broken (cf. CIC/83, can. 1675). The original text of CIC/83, before the *Mitis Iudex Dominus Iesus* and CIC/17, is not so explicit. The current practice of ecclesiastical courts usually requires a civil divorce sentence.

We can see from the above that the court initially faced great difficulties in its establishment, the official Dr Hudec died in 1951 and Archbishop Matocha had been in internment in the Archbishop's Palace since 1950. It is questionable whether he received three requests for delegation to run the court and the subsequent urgencies. We can assume that it is more likely that he did not or was prevented from responding because the letters regarding the establishment of the court make it clear that Matocha, as a good shepherd, was very concerned about a speedy decision in the Smith-Brown case.

3. ESTABLISHMENT OF THE TRIBUNAL

The Olomouc Ecclesiastical Court of Second Instance handed down its judgment in the Smith-Brown case on 14 June 1950. The judicial vicar, Tomáš Hudec, writes to the Ordinariate that an appeal to the Third Instance in this case needs to be dealt with because it has been dragging on for four years and Smith needs a wife as a domestic helper, but for the time being he is bound by his marriage to Brown. The official mentions the faculty[11] to hear the same case in two instances in the same court, when a new tribunal is appointed, but he thinks that this does not apply to the second and third instance and asks for the Holy See's permission to decide the case in the third instance in Olomouc, or for the Holy See to designate another court to decide the case in the third instance and suggests Prague or Hradec Králové,[12] which was the court of appeal for Olomouc.[13] Archbishop Matocha replies to Dr. Hudec's letter that the request to send a telegram to Rome was not granted by the Police headquarters,[14] although he points

[11] By a faculty is meant here the permission to exercise a certain power which the Apostolic See has delegated to persons subordinate to itself, either for a definite or indefinite period [Vybíralová 2019, 43].

[12] Cf. Archiv Arcibiskupství Olomouckého. Karton A 218 – 9 církv. soudní záležitosti 1950. Dopis Tomáše Hudce arcibiskupskému ordinariátu č. j. 144/50 ze dne 19. srpna 1950.

[13] Cf. Annuario Pontificio 1950, p. 285.

[14] As mentioned above, the Communist authorities used all available means to control and

out the urgent need to establish a court of third instance.[15] In the telegram the Archbishop asks for the establishment of a third instance court in Prague, Olomouc and Nitra for urgent cases not expressly reserved.[16] The notary Dr. Lantsch replies to Matocha's letter of 5 September on 19 October and asks on behalf of the judicial vicar for another attempt to establish a court of third instance by a simple request.[17] On 26 October a letter was sent to the Vatican requesting the establishment of a Court of Third Instance only in Olomouc,[18] to which he replied in the name of Pius XII. Domenico Tardini with a letter dated 31 December 1950 with the number 9419/50[19], in which he gives the faculty the establishment of a Court of Third Instance with competence for all cases decided in Czechoslovakia in the First and Second Instances. The faculty shall be in force for the duration of such adverse circumstances. The rights of the moderator of the court were vested in Archbishop Matoch with the right of further subdelegation to any suitable cleric. According to a handwritten note on the letter, he came on 19 January 1951.[20] Archbishop by letter dated 20 January 1951 communicated this glad tidings to the Archdiocesan Ecclesial Court and delegated jurisdiction to Tomáš Hudec with the right of further subdelegation. The Archbishop stresses the necessity of beginning the Smith-Brown case as soon as possible and asks for a specific proposal for the staffing of the new court, as well as the establishment of a special book of proceedings where everything is to be extensively and carefully recorded for later reporting to the Holy

restrict the activities of the Church.

15 Cf. Archiv Arcibiskupství Olomouckého. Karton A 218 – 9 církˇ. soudní záležitosti 1950. Dopis arcibiskupa Josefa Karla Arcidiecéznímu duchovnímu soudu č. j. 334/50 ze dne 5. září 1950.

16 Cf. Archiv Arcibiskupství Olomouckého. Karton A 218 – 9 církˇ. soudní záležitosti 1950. Neodeslaný telegram papeži Piu XII.

17 Cf. Archiv Arcibiskupství Olomouckého. Karton A 218 – 9 církˇ. soudní záležitosti 1950. Dopis dr. Lantsche č. j. 161/50 ze dne 19. října 1950.

18 Cf. Archiv Arcibiskupství Olomouckého. Karton A 218 – 9 církˇ. soudní záležitosti 1950. Žádost o zřízení soudu III. instance č. j. 385/50 ze dne 26. října 1950.

19 Here it is important to underline that during the communist totalitarianism many documents were destroyed. Not much archival material from the time of Archbishop Matocha has survived. In 2001, Mr. Link sent the entire file of Archbishop Matocha's correspondence with the Holy See to the diocesan curia. This file included the above mentioned letter. We do not know how Mr. Link came into possession of these documents and, given the time lapse of more than twenty years, we may never know (Karton G9 188 – 7 of the correspondence of Arch. Matocha with the Holy See, Nunciature, dispensation 1949-1952). We have not been able to find this letter in the Vatican archives, even though the protocol numbers indicate that we were in the correct archive box.

20 Cf. Archiv Arcibiskupství Olomouckého Karton G9 188 – 7 korespondence arc. Matochy se Svatým Stolcem, nunciatura, dispens 1949-1952, Dopis Domenica Tardiniho arcibiskupovi Matochovi č. j. 9419/50 ze dne 31. prosince 1950.

See.[21] On September 5, 1951, the court asks the archbishop for a delegation for Dr. Holubníček, since the official Dr. Hudec had died. This delegation was requested again on 7 November 1951 and 17 March 1952.[22] The court began to consider the renewed request for delegation on February 26, 1954, and His Excellency left on March 4, 1954. The delegation was given to the new judicial vicar, Dr. Tinz,[23] on 8 April 1954, with the right of further sub-delegation also for all general cases, which we regard as the date on which the Tribunal of the Third Instance in Olomouc actually began its work.[24] At the end of May and in June the nominations of judges and other staff from Slovakia for the cases there were already being dealt with.[25]

The last entry in the record book is dated 1 February 1990, when the case was accepted on the grounds of defective consent. [26] We do not know how the case went, because since the death of Archbishop Matocha the case book is very brief, containing only entries about personnel changes in the court, and for cases the surnames of the parties and information about the appointment of the proposed tribunal are usually written.

František Polášek, who was appointed a judge of the Ecclesiastical Court in 1982, a vice-officiary in 1989 and an official in 1998, which he was until 2013 [Menke 2015, 138], states in his script Procedural Law that the court was established on 18 August 1951 by Decree No. 135/51 [Polášek 2003, 18]. The Book of Proceedings of the Third Instance does indeed contain a record of the establishment of the court by Decree No. 135/51 of 18 August 1951, but the court did not started its activities.[27] From 5 September 1951, is a new request to His Excellency for a delegation for Dr. Holubníček left the court because the official Dr. Hudec had died. Subsequently, according to the Book of Proceedings of the Third Instance, four appeals to the Third Instance came to Olomouc in 1952 and 1953. The minute book for two of the cases explicitly states that the files were returned because the Third Instance had not yet been established, and for the first case, which came to the court from Nitra on 10 March 1952, it does not state that the file was returned, but it can be assumed that it was attached to the report to the Nitra tribunal of 4 September 1952 that the Third Instance had not yet been established in Olomouc. The Anderson – Trinity case from Ni-

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[21] Cf. Archiv Arcibiskupství Olomouckého Karton G9 188 – 7 korespondence arc. Matochy se Svatým Stolcem, nunciatura, dispens 1949-1952, Dopis arcibiskupa Josefa Karla Arcidiecéznímu duchovnímu soudu č. j. 5/51 ze dne 20. ledna 1951.

[22] Cf. Protocollum, p. 1.

[23] Defender of the bond in case of nullity of the marriage Smith-Brown.

[24] Cf. Protocollum, p. 2.

[25] Ibid.

[26] Ibid., p. 55.

[27] Ibid., p. 1.

tra came again to the tribunal on 28 June 1954 and was received under case number III – 12/54, which was after the establishment of the Third Instance and the next entry in the Anderson – Trinity case is the applicant's urging dated 28 March 1956.[28]

4. DISSOLUTION OF THE TRIBUNAL

According to František Polášek, the tribunal was dissolved by a decree of 30 October 1990 [Polášek 2003, 18]. It is not the usual practice for the Apostolic See to issue dissolving decrees. Faculties are usually given for a certain period of time (e.g., three or five years) and when they expire the permission granted will lapse, unless the faculty is renewed. In the case of the Tribunal of the Third Instance, the time period was specified in the Tardini letter where it states: as long as the adverse circumstances last. The practice of specifying precise conditions into the future is not uncommon. On 28 June 1918, Archbishop Aleksander Kakowski of Warsaw asked the faculty to try matrimonial cases in the Third Instance and to grant dispensations *super rato*, and he asked this faculty for a period of three months after the conclusion of peace.[29] A reply has survived in the archives, for which it is not certain that it is not just a draft, as the archbishop's request is written in Latin and typewritten, whereas the reply is handwritten and in Italian. The reply states that a faculty is granted to try matrimonial cases in the third and subsequent instance for the entire ecclesiastical province of Warsaw, and the faculty expires two months after the conclusion of the peace.[30]

Eva Vybíralová, who focuses her research on the question of extraordinary faculties granted to the Church in Czechoslovakia, argues in her article that all extraordinary faculties ceased to be valid at the moment of the fall of the communist regime, when free communication with the Apostolic See was restored [Vybíralová 2024, 106], and this approach is consistent with Tardini's letter.

Monika Menke, in her monograph on the ecclesiastical courts in the Czech lands, states that she was unable to find the decree mentioned by Polášek in the archives of the Olomouc ecclesiastical court and in November 1990 the court returned the file to the first instance with a note on the necessity of a proper appeal to the Roman Rota [Menke 2015, 150].

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[28] Ibid., p. 2 and 7.

[29] Archivio Storico della Segreteria di Stato – Sezione per i Rapporti con gli Stati e le Organizzazioni Internazionali (ASRS), [fondo] Congregazione degli Affari Ecclesiastici Straordinari (AA.EE.SS.), [pontificato] Benedetto XV, [serie] Polonia, Pos. 62, fasc. 42 ff. 11r-11v.

[30] ASRS, AA.EE.SS, Benedetto XV, Polonia, Pos. 62, fasc. 42 ff. 12r.

Our search in the archives of the Apostolic Signatura, which is competent in the matter of the management and supervision of the activities of tribunals (cf. CIC/83, can. 1445 § 3), was also unsuccessful. The decree is not mentioned by Grocholewski in his article on the documents of the Apostolic Signatura concerning the tribunals in the present-day Czech and Slovak Federal Republic, in which there are references to the courts of third instance on the territory of Czechoslovakia, including the Olomouc tribunal [Grocholewski 1992, 542-45].[31]

If the decree is located in the archives of the Section for Relations with States of the State Secretariat, one can only guess when the requested fund will be made available. It is the Pope who decides on the access to the archival fund (Article 37). Our research at the Archives of the Secretariat of State in February 2024 revealed that not all the materials from the pontificate of Pope Pius XII are yet accessible. The archives from this historical period were opened on 2 March 2020, 62 years after his death [Mayaki 2020]. This date marked the 81st anniversary of Eugenio Pacelli's election to the See of Peter [Aquilino 2019].

The Ecclesiastical Court of the Third Instance in Olomouc received a total of 104 cases of nullity of marriage in 36 years of activity [Menke 2015, 150]. The record book shows that in 1955 and 1960 two questions were raised about dispens *super rato*, in which the tribunal was not competent In 1966 a complaint about a priest appears in the book of record,[32] in which the tribunal was also not competent.

CONCLUSION

It is clear from the above article that the situation in the Church in Czechoslovakia after the Second World War was not at all simple and written contact with the Apostolic See was very limited. It is interesting that the state authorities did not allow a telegram to be sent, but an ordinary letter went out just fine. The question is whether the letter escaped the attention of the state authorities or whether they did not consider it important to withhold ordinary correspondence.

Archbishop Matocha was in a difficult personal situation, he was interned in his palace and the Communist secret police controlled who could visit him. The whole course of the Smith-Brown case shows the genuine pastoral care of Archbishop Matocha, who was very concerned about the establishment of the Third Instance Tribunal and the speedy decision

[31] Z. Grocholewski was the Secretary of the Supreme Tribunal of the Apostolic Signatura at the time the article was published.

[32] Cf. Protocollum, p. 32.

in the above-mentioned case. There is also a very strong emphasis in the case on Mr Smith's mother avoiding scandal and even forcing her daughter-in-law to have an abortion, which was not easy in 1946, but the daughter-in-law resisted the pressure.

The article opens up further questions in our research, which will further explore issues related to this tribunal, not only in the history but also in the jurisprudence of this tribunal, as there are 18 cases of the Third Instance in the archives of the Olomouc Ecclesiastical Court, some of the files seem to be torn and others seem to be complete.

The question of the tribunal's jurisdiction is very crucial. The minute book shows that after the death of Archbishop Matocha only one cleric usually had it, which seems to us very risky. In 1964, the official died a month after the delegation was delivered to other clergyman.[33] If he had not been able to grant it before his death, the whole of the Third Instance would have ended, because there would have been no competent authority to administer it.

We plan to publish the whole dissertation as a monograph, because it is a very interesting topic and unfortunately unknown even among canonists in the Czech Republic.

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