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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 XVIII (2025), Issue 1.

The current issue contains 39 scientific articles. The authors of the published texts represent 32 research centres, including 5 foreign (Academy of Canon Law in Brno – Czech Republic; Grigol Robakidze University – Georgia; Menedék Hungarian Association for Migrants – Hungary; Moldova State University – Moldova; Ukrainian Helsinki Human Rights Union – Ukraine) and 27 domestic (Academy of Zamość; Association of CBRNE Security Specialists; Catholic Academy in Warsaw; European University of Law and Administration; Kozminsky University; Maria Curie-Skłodowska University in Lublin; Medical University of Lublin; Nicolaus Copernicus Superior School; Nowy Sącz School of Business – National Louis University; SGH Warsaw School of Economics; SWPS University in Warsaw; The Cardinal Stefan Wyszyński University in Warsaw; The John Paul II Catholic; University of Lomza; The Pontifical University of John Paul II in Krakow; University of Lublin; University of the National Education Commission in Kraków; University of Radom; University of Siedlce, University of Silesia in Katowice; University of Szczecin; University of Warmia and Mazury in Olsztyn; University of Wrocław; VIZJA University; Warsaw University of Technology; WSGE University of Applied Science in Józefów; WSPiA University of Rzeszow).

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

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DOUBTS AS TO THE CONSTITUTIONALITY OF ARTICLE 66(1)(5)(B) OF THE LAW ON THE BAR ACT – OUTLINE OF THE PROBLEMS

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Abstract. The purpose of this paper is to draw attention to the doubts concerning the constitutionality of Article 66(1)(5) of the Law on the Bar Act to the extent to which it requires a total of 3 years of professional experience from persons holding the academic degree of doctor of juridical sciences (social sciences in the discipline of juridical sciences) with Article 2, Article 32(1) and (2), Article 65(1) of the Constitution of the Republic of Poland, in a situation where it does not require any practical experience from persons holding the academic degree of post-doctoral degree (*doktor habilitowany*) and the title of professor. The research problem described in the article was presented in a historical perspective. The inconsistency of the Act with the legal system concerning the analysed issue was also pointed out. In conclusion, the powers of the administrative court to consider the potential unconstitutionality of the indicated provision in a specific case were indicated. It was also reminded of the possibility of filing a constitutional complaint by citizens who believe that their constitutional freedoms or rights have been violated. Attention was also drawn to the possibility of submitting a request to the Commissioner for Human Rights who can use his powers, such as a general speech to the Minister of Justice.

Keywords: the Law on Bar Act; legal professions; advocates; advocate trainee.

INTRODUCTION

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 emerges that has not yet been addressed in the literature on the subject,[1] 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

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

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training confirmed by the relevant certificate constitutes fulfillment of the statutory requirement described in Article 66(1)(5b) of the Law on the Bar Act[2]?

The purpose of this paper is to draw attention to doubts about the constitutionality of Article 66(1)(5)(b) of the Act to the extent that it requires doctors of juridical sciences (social sciences in the discipline of juridical sciences) to have a total of 3 years of professional experience, in particular to perform activities requiring legal knowledge which are directly related to the provision of legal assistance by an advocate or an attorney-at-law under an employment contract or a civil law contract in an advocate's office, an advocacy team, a general partnership, a registered partnership, a limited liability partnership, a limited partnership or a partnership limited by shares referred to in Article 4a(1) or the law firm carried on by an attorney-at-law, a general partnership, a registered partnership, a limited liability partnership, a limited partnership or a partnership limited by shares referred to in Article 8(1) of the Act of 6 July 1982 on attorneys-at-law with Article 2, Article 32(1) and (2), Article 65(1) of the Constitution of the Republic of Poland of 2 April 1997[3] and with the principle of subsidiarity expressed in the preamble to the Constitution, in a situation where no practical experience is required of persons holding the academic degrees of post-doctoral degree (*doktor habilitowany*) and professor. There is no relevant distinctive feature on the basis of which holders of the academic degree of post-doctoral degree and the title of professor may be treated differently from holders of the academic degree of doctor with regard to their possession of specific practical experience in the performance of activities requiring legal knowledge which are directly related to the provision of legal assistance (there are no grounds for differentiating the possibility of entry into the register of advocates for holders of the academic degree of post-doctoral degree and the title of professor).

The requirement of three years of professional experience only in relation to persons holding the academic degree of doctor of juridical sciences and the lack of relevant professional experience for holders of the academic degree of post-doctoral degree and the title of professor, as set out in Article 66(1)(5)(b) of the Act, violates the principle of equality in access to the profession, results in discrimination against persons holding the academic degree of doctor and contradicts the principle of a democratic state respecting the rule of law and the directive of reliable legislation contained therein. The relationship between Article 65(1) and Article 2 of the Constitution in the scope under study is that the requirements of decent legislation, which are imposed on the legislator, are here additionally supplemented by certain substantive legal

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

[3] Journal of Laws No. 78, item 483 as amended [hereinafter: Constitution].

requirements, and it is therefore not only a matter of transparency and certainty and predictability of requirements from the point of view of candidates to the profession, but also the adequacy of these requirements.

1. EVOLUTION OF THE PROVISIONS OF THE ACT OF 26 MAY 1982 – LAW ON THE BAR ACT IN A HISTORICAL PERSPECTIVE

The legislator, from the very beginning of the Act of 26 May 1982 – Law on the Bar Act and without any indication of *ratio legis*, has determined that only persons holding the academic degree of post-doctoral degree and the title of professor (and excluding persons holding the academic degree of doctor) are exempted from the obligation to undergo advocate's training and to take the advocate's examination. This assumption, however, has no rational justification, as will be shown below and, as it turns out, constitutes only historical reminiscences. When amending Article 66 of the Act by virtue of the Act of 30 June 2005 amending the Act – the Law on Bar Act and certain other acts,[4] the legislator allowed persons holding the academic degree of doctor of juridical sciences to take the advocate's examination before an examination board, without being required to complete an advocate's training. It should be noted that, in accordance with the parliamentary bill on the amendment of the Act – the Law on the Bar Act and on the amendment of certain other acts of 6 March 2003 (Sejm paper No. 1694), the proposers postulated the recognition of qualifications possessed by persons holding the academic degree of doctor of juridical sciences and employed as assistant professors as equivalent to those obtained as a result of passing the professional examination. Already at that time, it was rightly argued that in the majority of faculties conducting law studies in Poland, doctors perform similar scientific and teaching tasks as persons holding the academic degree of post-doctoral degree or the title of professor in terms of lectures and examinations. In view of this, the solution of the current Act providing for exemption from the obligation to undergo the training and take the examination only for persons holding the academic degree of post-doctoral degree and professor is inconsistent with the facts. This construction was based on an unreasonable and socially unjustified conviction that among lawyers, only those holding the academic degree of post-doctoral degree and the title of professor are qualified to be granted the right to be entered into the register of advocates. *De lege lata*, the current state of the law opens up the possibility to be entered into the register of advocates to persons holding the academic degree of post-doctoral degree

[4] Journal of Laws 2005, No. 163, item1361.

and the title of professor, which also means that the legislator does not require practical experience to properly practice the profession of advocate.

In this context, it should be noted that over the last decade – both during successive amendments of previous normative acts in the field of higher education and science, as well as during the work on the currently binding Constitution for Science – the demand to abolish the academic degree of post-doctoral degree has been put forward many times. Following the recent reform of the law on higher education, the current Act of 20 July 2018 – Law on Higher Education and Science[5] essentially equates the legal position of a doctor and a post-doctoral degree. By way of example only, it should be pointed out that the l.h.e.s. allows a person holding both a doctoral degree and a post-doctoral degree degree to hold the position of professor at a university (Article 116(2)(2) l.h.e.s.). The Act ensures that the lack of a post-doctoral degree cannot be an obstacle to the position of professor at a university, opening up this possibility to persons holding a doctoral degree (Article 116(4)(2)). Moreover, pursuant to Article 227(2) l.h.e.s., habilitation is no longer a *sine qua non* condition for the title of professor, as it may be conferred on a person holding the academic degree of a doctor. This is a further step in largely equating the position of the doctor and post-doctoral degree. A certain complement to these regulations is the regulation of the teaching load for doctors, person holding the academic degree of post-doctoral degree and professors employed in a research and teaching position, which is now equalised and amounts, under Article 127(2)(1), to 240 teaching hours.

In turn, by virtue of the Act of 20 February 2009 amending the Act - the Law on Bar Act, the Act on Attorneys-at-law and the Act – the Law on Civil-law Notaries[6] the legislator exempted from the requirement to complete the advocate's training and to take the advocate's examination those doctors of juridical sciences who have three years of experience in the performance of activities requiring legal knowledge directly related to the provision of legal assistance by an advocate or an attorney-at-law, as evidenced by Article 66(1)(5(b)). At the same time, the explanatory memorandum further emphasises that persons holding a doctor degree have a particularly high level of knowledge in legal sciences, which has been verified during the state (doctoral) examination. By the way, it should only be emphasised that the awarding of the degree of doctor of juridical sciences is preceded by the defence of the doctoral dissertation, which confirms both the candidate's theoretical legal knowledge and the ability to conduct scientific research independently.

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[5] Journal of Laws of 2018, item 1668 [hereinafter: l.h.e.s.].

[6] Journal of Laws of 2009, No. 37, item 286.

In the light of subsequent legislative changes, the allegation of unconstitutionality with respect to Article 66(1)(5) of the Act provides the Provincial Administrative Court with grounds for assessing whether the currently binding legal solution is appropriate from the point of view of the constitutional right of equal access to a profession, in the context of the principle of equality of citizens before the law and non-discrimination, stipulated directly in Article 65, paragraph 1 of the Constitution in connection with Article 32(1) and (3) of the Constitution in connection with Article 2 of the Constitution.

2. INCONSISTENCY OF THE ACT OF 26 MAY 1982 – LAW ON THE BAR ACT WITH THE LEGAL SYSTEM

The inconsistency concerning the legal system in the present case consists in the fact that the legislator in one place treats a degree as a substitute for knowledge, while in another place it treats a degree as a substitute for knowledge and three years of professional practice, which results from the normative construction of the provisions of Article 65 of the Act, Article 66(1)(5)(b) of the Act, Article 66(2)(1) of the Act and Article 66(1)(1) of the Act. Pursuant to the wording of Article 65 of the Act, in order to practise the legal profession one must possess the necessary quantum of legal knowledge in the form of graduation from legal studies in the Republic of Poland and obtaining a Master's degree or foreign legal studies recognised in the Republic of Poland and completing an advocate's training in the Republic of Poland. On the other hand, pursuant to Article 66(2)(1) of the Act, obtaining a doctoral degree in juridical sciences exempts one from the obligation to complete an advocate's training while confirming the possession of the required quantum of theoretical knowledge. This therefore means that, in the opinion of the legislator, the doctoral degree is a substitute not only for theoretical knowledge, but also for practical experience, which is acquired during the training. On the other hand, looking at the normative construction of Article 66(1)(5)(b) of the Act, the doctorate is only a substitute for having legal knowledge at a high theoretical level, but nevertheless not a substitute for practical experience. By overlaying the provisions of Article 66(1)(1) of the Act, allowing persons holding the academic degree of post-doctoral degree and professors to be admitted to the bar without the requirement of a training completed, it is clear that this time the degree is again treated not only as a substitute for a high level of legal knowledge, but also for relevant practical experience. In view of the foregoing, in the light of the constitutional provisions analysed above, to the extent that Article 66(1)(5)(b) of the Act still requires additional practical experience from holders of a doctoral degree, it violates the principle of equality before the law and non-discrimination and the freedom of choice

and practice of a profession, established in Articles 32(1) and 65(1) of the Constitution, which is incompatible with the values described in Article 2 of the Constitution.

The freedom to practice a profession is 'freedom from external interference', so if such interference takes place, such as in the form of determining the conditions on which the practice of a profession depends, it must be justified and deprived of the features of arbitrariness and serve to protect constitutional values.[7] Despite the fact that Article 17(1) of the Constitution grants to professional self-governments for the professions of public trust the privilege of limiting the freedom of pursuing a profession, nevertheless these limitations should meet the premises set out in Article 31(3) of the Basic Law, and thus remain within the limits of the public interest and serve its realisation[8] and statutory limitations on the freedom of pursuing a profession by persons exercising professions of public trust may not go beyond the prohibition of excessive interference and should be justified by constitutional values.[9] The literature sources correctly show that the Constitution, when delegating regulation of the issues of professional self-governments implies certain restrictions to prevent these self-governments from limiting the freedom of practicing a profession and undertaking a business activity [Skrzydło 2013]. In the judgment of 19 October 1999, the Constitutional Court clarified the meaning of Article 65(1) of the Basic Law for the so-called liberal professions. In the justification of this jurisprudence there was a statement that, with regard to these professions, the content of the freedom of pursuing a profession is the creation of a legal situation in which: firstly, everyone will have free access to practise a profession, conditioned only by talents and qualifications; secondly, they will then have a real opportunity to practise their profession; and thirdly, in practising their profession they will not be subjected to the rigours of subordination that characterise the provision of work.

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[7] Judgement of the Constitutional Court of 5 December 2007, ref. no. K 36/06, OTK-A 2007, item 11, p. 154.

[8] Judgement of the Constitutional Court of 18 February 2004, ref. no. P 21/02, OTK-A 2004, item 2, p.9. It should be noted that the provisions of the Constitution or other acts do not define the meaning of a public trust profession nor do they specify any list of professions, which might be considered such professions; the respective decision is left to the discretion of the legislator, which creates numerous practical problems [Smarż 2012, 148]. The Constitutional Court, when making reference to the resources of the legal science doctrine, defines the public trust professions are those, which serve personal needs of humans, are linked with the reception of information about their personal life and are organized in a way that justifies the social belief that the use of this information by service providers is appropriate for the interest of the individual (judgement of the Constitutional Court of 1 December 2009, ref. no. K 4/08, OTK-A 2009, item 11, p. 162).

[9] Judgement of the Constitutional Court of 18 October 2010, ref. no. K 1/09, OTK-A 2010, item 8, p. 76.

The constitutional principle of equality before the law consists in the fact that all subjects of the law (addressees of legal norms), characterised by a given essential (relevant) feature to an equal extent, are to be treated equally. That is, according to the same measure, without any differentiation, either discriminatory or favourable.[10] The Supreme Administrative Court also expressed similar opinions in its resolution of 22 May 2000.[11] When assessing a legal regulation from the point of view of the principle of equality, it should be considered whether it is possible to identify a common essential feature justifying equal treatment of subjects of law, considering the content and purpose of the legal regulation. At the same time, the burden of proof that the introduced differentiation of subjects of law possessing a common essential feature meets the above-mentioned requirements rests on the state authority that established the challenged legislative act.[12] This means that everyone has the right to be treated in the same way as persons in an analogous situation (in terms of the relevant elements), because all subjects of law equally characterised by a given relevant characteristic should be treated equally. The principle of equality thus implies an order to treat all citizens equally within a certain class or category.[13] The point of departure for the adjudication of the principle of equality must therefore always first be to determine whether there is commonality of the relevant characteristic between the situations being compared. In other words, whether there is similarity between the situations. The existence of such similarity is a prerequisite for the application of the constitutional principle of equality. Thus, if it is established that similar situations have been treated differently by the law, this indicates a possible breach of the principle of equality. In the current state of the law, the equality before the law in respect of the regulation of access to the profession of advocate for persons holding the academic degree of doctor, post-doctoral degree and the title of professor has been undermined.

The material (relevant) feature by which the differentiation of the position of doctor from post-doctoral degree and professor in the provisions of the Act must be assessed is the additional requirement only for doctors to have three years of professional experience, which follows from Article 66(1)(5) of the Act. On the other hand, according to Article 66(1)(1) of the Act, the requirement to complete an advocate's training and to pass the advocate's examination does not apply to professors and persons holding the

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10 Ruling of the Constitutional Court of 9 March 1988, ref. no. U 7/87, OTK 1988, item. 1, p. 1.

11 Resolution of the Supreme Administrative Court of 22 May 2000, ref. no. OPK 1/00, ONSA 2000, item 4, p. 133.

12 Judgement of the Constitutional Court of 20 October 1998, ref. no. K 7/98, OTK ZU, No. 6/1998, item 96.

13 Judgement of the Constitutional Court of 5 November 1997, ref. no. K 22/97, Journal of Laws of 1997, No. 941, item 140.

academic degree of post-doctoral degree in juridical sciences, and thus the legislature does not require these subjects of law to have any practical experience on which registration as advocates would be conditional. At this point, it should be noted, following the former Commissioner for Human Rights, Dr. hab., Prof. of the SWPS University A. Bodnar, that the habilitation, which is an academic degree, is only a confirmation of theoretical qualifications, but does not constitute a confirmation of possessed practical skills including application of the law. The habilitation is an academic degree, so it only confirms academic qualifications. Habilitation requirements have nothing to do with drafting a lawsuit, an appeal or other practical skills needed by a lawyer. In addition, many scholars who hold the degree of post-doctoral degree do not specialise in dogmatic legal sciences, but only in issues that constitute ancillary sciences, e.g. sociology of law, history of law or Roman law [Bodnar, Bojarski, and Wejma 2007, 21]. Since, on the one hand, attention is drawn to the obligation for doctors of juridical sciences to have a three-year professional experience, and at the same time persons holding the academic degree of post-doctoral degree and professors of juridical sciences are admitted to practise the profession of advocate without practising it, this indicates a significant inconsistency on the part of the legislator. Indeed, persons possessing only theoretical knowledge, holding the academic degree of post-doctoral degree or the title of professor, without having to demonstrate any practice, are recognised as persons entitled to practise the profession within the path provided for in Article 66(1)(1) of the Act. At the same time, this entitlement is denied to persons who hold a doctoral degree and therefore also have theoretical knowledge as required by law, by imposing an unjustified requirement of three years' professional experience. The provision in question discriminates against doctoral degree holders. There is no relevant distinctive feature on the basis of which doctoral degree holders should be treated differently from holders of the academic degree of post-doctoral degree and the title of professor as regards the requirement of practical experience, since they are not a substitute for experience in the field of law. There are therefore no compelling circumstances to justify the differential treatment in the provisions of the Act between persons holding the title of professor and the academic degree of post-doctoral degree and persons holding the academic degree of doctor, which confirm academic qualifications but do not verify professional experience. The requirement of three years of professional experience is only applied to holders of a doctoral degree and no professional experience (e.g. two years) is required for persons holding the degree of post-doctoral degree and (e.g. one year) for professors, respectively. This kind of discrimination against persons who confirm their extended theoretical knowledge in the form of a doctoral degree is incompatible with the constitutional standard described in Articles 2, 32(1) and (2) and 65 of the Constitution. The norm of the Act set out

in Article 66(1)(5) violates the principle of equality in access to the profession, leads to discrimination against persons holding a doctoral degree and contradicts the principle of a democratic state respecting the rule of law together with the principle of reliable legislation contained therein. The relationship between Article 65(1) and Article 2 of the Constitution in the studied scope lies in the fact that the requirements of legislative decency, which are imposed on the legislature, are here additionally supplemented by certain substantive requirements concerning the transparency and certainty and predictability of requirements from the point of view of candidates to the profession of advocate, but also the adequacy of such requirements. The adequacy of the requirements should be understood as an obligation to refer to the purpose that the legislator had in mind when the profession was subjected to statutory rationing. Derogation of the provision burdening only persons with doctorates with the additional obligation to have three years of practical experience, and thus uniform conditions for all persons with degrees and academic titles in legal sciences to enter the profession of advocate is the only way to ensure equal treatment in the light of the principle of equality before the law and the freedom of choice and pursuit of a profession, established in Articles 32(1) and 65(1) of the Constitution.

There can therefore be no doubt that the provision of point 5(1) of Article 66 of the Act is inconsistent with the remaining elements of that Article, and thus contrary to the principle of equal access to the profession of advocate arising from Article 65(1) in connection with Article 32(1) of the Constitution. The contested regulation, by introducing an additional requirement of practical experience for doctoral degree holders, constitutes an inexplicable breach of the principle of admission to the profession of advocate in respect of persons who possess a high level of theoretical legal knowledge. The present case demonstrates that he is suitably qualified, possesses the relevant knowledge and, if it were not for the lack of an unambiguous provision in the law, would not have encountered difficulties in being registered as an advocate. At this point, it should also be recalled that the function of the constitutional principle of correct legislation is not only to ensure the correctness of the law regulating the relations between public authorities and citizens, but in general of the law, which is necessary to achieve the objectives set by the given regulation. The need to guarantee legal certainty and security for citizens comes to the fore, which is why this principle prohibits the enactment of laws that give the state authorities too much discretion and allow for arbitrary decisions. A defect in legislation of this kind may constitute a premise for stating that a provision affected by it is unconstitutional [Garlicki and Zubik 2016, *passim*].

CONCLUSIONS

From the point of view of an individual, the solution to the problem outlined in this paper is possible through actions taken by an administrative court in an individual case, as, having regard to Article 8(2) of the Constitution and Article 178(1) of the Constitution, it is entitled to control the constitutionality of legal regulations. There is no doubt in jurisprudence that a judge of an administrative court may, in an individual case, deviate from the application of a statute provision that he or she considers to be contrary to the Constitution and disregard a delegated act that is contrary to the Constitution and the statute.[14] In other words, the court may independently find that a provision of law is unconstitutional and refuse to apply it in a particular case.[15]

The law also provides the possibility to lodge a constitutional complaint, pursuant to Article 79(1) of the Constitution, to anyone whose constitutional freedoms or rights have been violated. A constitutional complaint shall be lodged after the appellant has exhausted the legal path (making use of ordinary means of appeal), within the period of 3 months from the date of delivery to the appellant of a final judgment, final decision or other final ruling. The rules for lodging a constitutional complaint are set out in the Act of 30 November 2016 on the organisation and procedure before the Constitutional Court.[16]

A request to the Commissioner for Human Rights may also be considered. Pursuant to Article 16(2)(1) of the Act of 15 July 1987 on the Commissioner for Human Rights,[17] it is possible for the Commissioner for Human Rights to request the Minister of Justice, by way of a general speech, to analyse the problems raised in this paper and to consider initiating legislative action to amend the provisions on the entry of doctors of social sciences specialised in the discipline of juridical sciences into the register of advocates.

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[14] See judgement of the Supreme Administrative Court in Poznań of 14 February 2002, ref. no. I SA/Po 461/01, Lex no. 74357; judgement of the Supreme Administrative Court of 21 June 2011, ref. no. I OSK 2102/10, Lex no.1082693; judgement of the Supreme Administrative Court of 11 January 2022, ref. no. III OSK 2267/21, Lex no. 3287570.

[15] Judgement Supreme Court of 26 September 2000, ref. no. III CKN 1089/00, Lex no. 44288; decision of the Supreme Court of 26 May 1998, ref. no. III SW 1/98, OSNAPUS 1998, No. 17, item 528; judgement of the Supreme Court of 19 April 2000, ref. no. II CKN 272/2000, not published.

[16] Journal of Laws of 2016, item 2393.

[17] Journal of Laws of 2023, item 1058.

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AUXILIARY UNITS OF THE COMMUNE – FROM EVOLUTION TO THE DIRECTIONS OF CHANGE

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Abstract. Auxiliary units of the commune are a key element of the reborn system of local government. Thirty-five years of the functioning of local government is an opportunity to reflect on the legal position of auxiliary units of the commune, both in an evolutionary context and *de lege ferenda* proposals. Contemporary local government faces new challenges in organizational and functional terms, hence, the role of auxiliary units of the commune is becoming more significant and should be viewed through the prism of current needs and the possibilities for implementing tasks of local communities. The article presents the stages of evolution of auxiliary units that have influenced the current shape of the local community and the way the commune carries out its own tasks. Four models of directions for change (from the most progressive to the conservative one) have been proposed, which the legislator faces in shaping the legal position of the auxiliary unit of the commune.

Keywords: decentralization; subsidiarity; auxiliary units of the commune; evolution of the legal status of auxiliary units of the commune; and directions of change for auxiliary units of the commune.

INTRODUCTION

Auxiliary units of a commune are a key element of the local government system. Taking into consideration the fact that year 2025 marks the 35th anniversary of the reborn self-government, it is worth devoting some reflections on the legal position of commune auxiliary units both in terms of evolution and *de lege ferenda* proposals. The contemporary local government is facing new challenges in organisational and functional terms, therefore the role of commune auxiliary units is gaining greater significance and should be seen through the prism of contemporary needs and possibilities of implementing the tasks of local communities.

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Local government units are the implementation of the principle of deconcentration [Ura 2012] and subsidiarity [Dolnicki 2012, 25; Stec 2022, 31] in a local government, serving to perform the commune's own tasks. They are a form of social participation, increasingly activating local communities. They belong to the auxiliary territorial division of the state. They are optional and obligatory structures (Warsaw districts) that can be established in communes or cities with district rights.

The aim of this article is to answer the following questions. What is the legal position of commune auxiliary units in evolutionary terms and what are the directions of changes in the systemic, functional and competence scope of auxiliary units? Do the foregoing experiences concerning the functioning of commune auxiliary units make it possible to indicate the desired direction of changes to their legal status, resulting in modifications to statutory regulations or even changes at the level of the Constitution of the Republic of Poland?

The article uses the dogmatic-legal method consisting in the analysis of the legal text and the historical-legal method. It shows views presented in the doctrine and administrative literature and in the case-law in the field of the discussed issues. The whole is crowned with conclusions, which summarise the considerations presented in the text.

1. COMMUNE AUXILIARY UNITS IN THE REBORN LOCAL GOVERNMENT IN POLAND – EVOLUTION

The initial norms concerning auxiliary units were of a fragmentary nature, but as the awareness of the identity and interest of individual local communities grew, the legislator expanded the statutory normative scope of their functioning, creating the current shape of the legal position of commune auxiliary units. Thirty-five years of the existence of these structures have shown the need for changes in the provisions concerning their system and functioning, which correspond to the discussion on the changes in the legal framework of contemporary communes.

Auxiliary units of the commune are the implementation of the principle of subsidiarity. This principle makes it possible to define the relationship between the resident and the local authority and to distribute competences between the levels of local government [Dolnicki 2023]. The evolution of their legal status thus concerns systemic and functional issues. We can distinguish three stages in the evolution of commune auxiliary units.

1.1. The first stage of evolution – the formation of auxiliary units of the commune in 1990-1995

The first stage involves defining a catalogue of auxiliary units of a closed nature, the manner in which they are established and the type of bodies within them. It also includes the basic elements of the legal status of auxiliary units in the public-law sphere (judicial powers) as well as in the private-law sphere (disposal of commune property by an auxiliary unit).

In accordance with Article 5(1) of the Act of 8 March 1990 on local government,[1] the legislator introduced a closed catalogue of auxiliary units of the commune, exclusively of an optional nature. He included in this catalogue village districts and urban districts and settlements. He also indicated that in towns where administratively separate districts existed on 1 January 1990, they could be given the status of a commune. The decision to do so was taken by the Prime Minister, after prior consultation with the communities concerned. On the other hand, districts constituting communes formed *ex lege* an obligatory association of communes (see Article 5(3) of the A.l.g.).

The first stage also encompasses the manner in which commune auxiliary units are established, indicating that this is the exclusive competence of the commune council, adopted by way of a resolution after consultations with residents or on their initiative. The legislator has indicated *expressis verbis* that "establishing the scope of activities of the village district and the district (estate) and the transfer of property components to them for use" (Article 18(2)(7) A.l.g.) falls within the exclusive competence of the decision-making body in the commune.

Moreover, the legislator has entrusted the rules for the establishment of commune auxiliary units to the statutory matter of the commune. This has certainly fostered greater diversity in the regulation of their establishment.

It was also within the competence of the commune council to define the organisation and scope of activities of a village district, a district (estate) by means of a separate statute. As rightly emphasised by the Voivodship Administrative Court in Kielce in its judgement of 15 May 2024, "in certain situations it is permissible to create (the existence of) a village district on the territory of a city. Such a possibility must be considered within the limits and on the basis of the law, and therefore it is permissible to create village districts only in areas to which rural characteristics can be attributed. Although village districts are generally created in rural communes and districts and estates – in urban areas, the possibility of creating village districts in urban communes is not excluded and is sometimes used. As a result of shifting the urban boundaries, areas with a rural or formerly

[1] Act of 8 March 1990 on local government, Journal of Laws No. 16, item 95 [hereinafter: A.l.g.].

rural and now suburban character on which there are village districts are included in its area."[2] From the very beginning of functioning the reborn local government, the legislator categorically defined the catalogue of bodies of the village district and the district (housing estate) while indicating the legal nature of the individual bodies functioning therein. It introduced a certain freedom in the selection of the decision-making body in an estate, indicating that this body could also be the general meeting of inhabitants. These regulations also covered the manner of electing the village head and the members of the village council (see Article 36(1) A.l.g.).

An important regulation that accompanied the beginnings of the commune auxiliary units was Article 48 of the Act on local government, which allowed the village district, the district (estate) to manage and use communal property and to dispose of income from this source to the extent specified in the statute. The statute also defined the scope of activities to be performed independently by the bodies of auxiliary units in relation to the property to which they were entitled. The legislator introduced a certain degree of autonomy for village districts with regard to municipal property, indicating that "the commune council may not deplete the existing rights of village districts to use the property without the consent of the village assembly [...] and all village inhabitants' rights of ownership, usufruct or other property rights, hereinafter referred to as commune property, shall remain intact" (see Article 48(2) and (3) A.l.g.).

The legislator, in the local government act, has indicated *expressis verbis* that auxiliary units do not create their own budgets and the commune statutes will define their powers to carry out financial management within the commune budget. Thus, it has defined their legal position in the financial sphere in relation to the commune.

Within the scope of administrative authority, commune auxiliary units, from the very beginning of their functioning, had the possibility of issuing administrative decisions, as Article 39(3) of the A.l.g. provided that "the commune council may also authorise the executive bodies of auxiliary units to deal with individual matters of public administration." Thus, the executive bodies of the commune auxiliary units were equipped (after prior authorisation) with adjudicatory powers [Czerw 2022].

By virtue of Act of 6 November 1992 amending the Act on local government,[3] the village head and the chairman of the district (housing estate) board were granted the legal protection enjoyed by public officials.

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[2] Judgement of Voivodship Administrative Court in Kielce of 15 May 2024, ref. no. II SA/Ke 211/24, Lex no. 3722335. See also judgement of Voivodship Administrative Court in Poznań of 16 August 2013, ref. no. II SA/Po 682/13, Lex no. 1373850.

[3] Act of 6 November 1992 on amending the Act on local government, Journal of Laws No. 100, item 499 [hereinafter: 1992 amendment].

Special regulations apply to the capital city of Warsaw. Pursuant to Article 1(1) of the Act of 25 March 1994 on the system of the capital city of Warsaw (this act created new Warsaw communes (11 communes, as provided for in Article 1(2) of this act),[4] the city was a commune association within the meaning of the Act on local government. Auxiliary units and lower-level units could be created in Warsaw communes on the principles set out in the local government act, taking into account, however, the provisions of the 1994 Act.

The first stage of the evolution of commune auxiliary units involves the formation of their legal status as structures with substantial powers in the public law sphere, devoid of subjectivity in the private law sphere, equipped with competences, tasks and resources delegated to them by commune councils in their statutes on the basis of deconcentration and subsidiarity.

1.2. The second stage of evolution – system and functional strengthening of the commune auxiliary units in 1995-2000

The second stage involves extending the catalogue of auxiliary units to include unnamed and lower-level units and the scope of mandatory regulations in the commune statutes concerning the organisation and functioning of auxiliary units. The legal position of the holders of executive bodies of commune auxiliary units has been strengthened by law.

By virtue of the Act of 29 September 1995 amending the Act on local government and certain other acts,[5] the legislator introduced an open catalogue of auxiliary units, introducing a greater freedom in their appointment, also with regard to the bodies of units not named by the legislator [Augustyniak 2010, 34]. An obligatory regulation was also introduced in the statute of the commune concerning the inclusion of the principles of creation, merger, division and abolition of an auxiliary unit. Thus, the legal character of these norms was strengthened.

With the 1995 amendment, the legislator also clarified the scope of the exclusive competence of the commune council concerning the determination of the scope of activities of auxiliary units, the principles of transferring property components to them for use, adding to it the determination of the principles of transferring budget funds for the implementation of tasks by these units.

Another important amendment was the introduction of the possibility of establishing lower-level units within basic-type auxiliary units by statute, without specifying their names and bodies.

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[4] Act of 25 March 1994 on the structure of the Capital City of Warsaw, Journal of Laws No. 48, item 195 as amended.

[5] Act of 29 September 1995 amending the Act on local government and certain other acts, Journal of Laws No. 124, item 601 [hereinafter: 1995 amendment].

In addition, the legislator decided to specify that the rules and procedure for the election of the village head and village council and their dismissal were to be defined in the statutes of the village district (this regulation was repealed by virtue of Article 1(38) of the Act of 11 April 2001 amending the acts: on commune self-government, on county self-government, on voivodeship self-government, on government administration in the voivodship and amending some other acts[6]). These actions were aimed at introducing mechanisms for proper operation taking into account the specific nature of village communities.

Under the 1995 amendment, the competences of the chairperson of the executive body of an auxiliary unit were extended and he/she was given the right to participate in the work of the commune council on the principles set out in the commune statutes, but without the right to participate in voting. Additionally, a regulation was introduced that allowed the commune council to establish the rules under which the chairman of an executive body of an auxiliary unit would be entitled to a daily allowance and reimbursement of travel expenses. As Kazimierz Bandarzewski rightly points out, the following principles of determining per diems for village heads may be identified:1) optionality of the commune council to determine per diems for village heads, 2) freedom of determination of criteria allowing for the granting of per diems, 3) admissibility of variation in the amount of per diems, 4) lack of statutory determination of the minimum and maximum amount of per diems for village heads [Bandarzewski 2022]. The resolution of the commune council on the principles of granting and the amount of per diems for village heads constitutes an act of local law.[7] These regulations strengthened the legal position of the heads of executive bodies of commune auxiliary units.

Subsequently, by the Act of 31 July 1997 amending the local government act,[8] the subjective power of the commune council to establish the rules under which members of the executive body of an auxiliary unit and members of the district (housing estate) council, village council, will be entitled to an allowance or reimbursement of business travel expenses was extended.

It should be noted that the previous adjudicatory powers granted to the executive bodies of auxiliary units did not indicate the body to which an appeal could be lodged against a decision issued on their behalf. By virtue

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[6] Act of 11 April 2001 on amending the following acts: on commune self-government, on county self-government, on voivodship self-government, on government administration in the voivodship and on amending some other acts, Journal of Laws No. 45, item 497.

[7] Judgement of Voivodship Administrative Court in Poznań of 9 May 2024, ref. no. IV SA/Po 154/24, Lex no. 3714922. See also judgement of Voivodship Administrative Court in Gdańsk of 11 April 2024, ref. no. III SA/Gd 485/23, Lex no. 3708400.

[8] Act of 31 July 1997 amending the local government act, Journal of Laws No. 107, item 686.

of the 1995 amendment, a standard was introduced that "decisions issued, inter alia, by the executive bodies of the units, in matters concerning the commune's own tasks may be appealed to the local government appeals board, and in matters concerning tasks delegated to the community – to the voivode" (Article 39(5) of the A.l.g.). This made it possible to appeal against administrative decisions issued by executive bodies of auxiliary units on their own behalf. These decisions were not issued on behalf of the commune mayor or the council, which, despite being able to authorise the issuance of decisions, did not itself have adjudicatory powers

By virtue of the 1995 amendment, the statutory regulations of the commune auxiliary units were strengthened, indicating that they belonged to the constitutional regulations in the nature of local laws issued by the community, which raised the rank of these acts and the possibility of judicial review.[9]

The 1995 amendment also extended the powers of the auxiliary unit to manage and use municipal property and to dispose of income from that source to the extent set out in the statutes of the commune auxiliary unit. The statutory matter also established the scope of activities performed independently by the auxiliary unit within the scope of its property. These regulations were extended to lower-level units.

The subjective scope of the financial powers of commune auxiliary units has been widened by specifying that the municipal statutes define the powers of an auxiliary unit (named and unnamed) to carry out financial management within the commune budget.

By the Act of 2 February 1996 amending the local government act,[10] the legislator expanded the catalogue of named units to include the city, located within the territory of the commune.

The introduction of the three-tier territorial division of the state[11] made it possible to create auxiliary units in towns with county rights.

In the second stage of the evolution of commune auxiliary units, elements of strengthening their legal status by extending their property and financial rights are noticeable.

The systemic conditions of auxiliary units were also strengthened as a result of reflection on the already existing legal regulations in this area.

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[9] See judgement of Supreme Administrative Court of 17 September 2024, ref. no. III OSK 4535/21, Lex no. 3765709.

[10] Act of 2 February 1996 amending the local government act, Journal of Laws No. 58, item 261 [hereinafter: amendment of 1996].

[11] Act of 24 July 1998 on introduction of the three-tier territorial division of the state, Journal of Laws No. 96, item 603.

1.3. The third stage of evolution – from control elements to consultation. Increasing the participation of residents in the functioning of the commune auxiliary units from 2001 to 2024

By the Act of 11 April 2001, the legislator broadened the material scope of the audit committee's scrutiny to include control over the activities of commune auxiliary units (in Article 18a(1) of the Act on commune self-government as amended by Article 1(16) of the Act). The composition of the audit committee was also specified, indicating that there should be councillors, including representatives of all clubs, which was to create a guarantee of participation in the control process also of opposition councillors [Augustyniak 2024, 493]. Thus, an important subject of control was established with regard to the activities of the commune auxiliary units, thus not leaving their activities outside the control of the commune decision-making body.

The 2001 amendment introduced obligatory consultation of residents,[12] on the statutes of the auxiliary unit. These consultations also apply to the amendments to the statute of an auxiliary unit of the commune [Czerw 2017, 651-59]. As pointed out by the Supreme Administrative Court in its judgement of 2 August 2023, narrowing the circle of persons entitled to consult on changes to the statute to the residents of a given district, instead of all residents, constitutes a significant violation of the law.[13]

By virtue of the 2001 amendment, it was clarified that the matter of the charter of an auxiliary unit will determine, in particular: the name and area of the auxiliary unit, the principles and procedure for the election of its bodies, the organisation and tasks of the bodies of the auxiliary unit,[14] the scope of tasks delegated to the auxiliary unit by the commune and the manner of their implementation, as well as the scope and forms of control and supervision by the commune council over the activities of the bodies of the auxiliary unit.

The amendment also included system modifications, as it was specified that the legislative body in the district (housing estate) will be the council with the number of members determined in accordance with Article 17 of the Act on commune self-government, but not more than 21. In addition, the chairman of the commune council was obliged to notify, on the same principles as councillors, the chairman of the executive body of an auxiliary unit about a session of the commune council.

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[12] See judgement of Voivodship Administrative Court in Poznań of 5 June 2024, ref. no. IV SA/Po 291/24, Lex no. 3727575.

[13] Judgement of Supreme Administrative Court of 2 August 2023, ref. no. III OSK 1790/22, Lex no. 3595170.

[14] See judgement of Supreme Administrative Court in Warsaw of 6 November 2000, OSA 2/00, ONSA 2001, no. 2, item 48.

The 2001 amendment also introduced a regulation according to which consultations with the inhabitants in matters concerning the change of commune or town boundaries consisting in the exclusion of an area or a part of an area of an auxiliary unit of a commune and its inclusion in a neighbouring auxiliary unit of that commune or in a neighbouring commune may be limited to: 1) the inhabitants of the commune auxiliary unit covered by the change – by the respective commune councils; 2) the inhabitants of commune covered by the change violating district or voivodship boundaries – by the relevant district or voivodship councils.

An important constitutional element that influenced the evolution of the commune auxiliary units was the constitutional changes concerning the appointment of a monocratic commune executive body in place of a collegial body introduced by the Act of 20 June 2002 on the direct election of the mayor of the commune, the mayor and the president of the city.[15] This led to a change in the regulation of the subjective scope concerning control and supervision over the activities of the local government units, as the legislator indicated that the statutes of the subsidiary unit would determine the scope and forms of control and supervision of the commune authorities over the activities of the auxiliary unit bodies (see Article 35(3)(5) as amended by Article 43(33) of the Act on direct election of the mayor of the commune, the mayor and the president of the city). The previous regulation empowered only the commune council to control and supervise.

Additionally, under the Act of 20 February 2009 on the village fund[16] (see Article 5 of the Act on the village fund) the legislator introduced two significant changes in the functioning of auxiliary units. Firstly, he added to the catalogue of the commune's own tasks the tasks concerning the creation of conditions for the operation and development of auxiliary units and implementation of programmes stimulating civic activity (see Article 7(1)(17) of the Act on commune self-government[17]). Secondly, it strengthened village districts financially by enabling them to use the village fund to implement projects (submitted by the village districts), which are the commune's own tasks, serve to improve the living conditions of the inhabitants and are in line with the commune's development strategy (however, the village fund is not a special purpose fund within the meaning of the Public finance act). The village fund may also be used to cover expenses for activities aimed at removing the consequences of a natural disaster [Augustyniak 2014, 66]. It should be emphasised that the village fund has also become an important element in terms of the active participation of the local community in the implementation of the proposed tasks,

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15 Act of 20 June 2002 on the direct election of the mayor of the commune, the mayor and the president of the city, Journal of Laws No. 113, item 984.

16 Act of 20 February 2009 on the village fund, Journal of Laws No. 52, item 420.

17 Hereinafter: A.c.g.

as the legislator, by virtue of the Act, has granted 15 adult inhabitants of the village district the right of initiative to apply for the allocation of fund resources to the village district, which is adopted by the village meeting (see Article 5(2) of the Act of 21 February 2014 on the village fund[18]). As Rafał Trykozko pointed out, "The allocation of fund resources to the village districts can only mean the possibility of deciding on their allocation (this is also where the statutory regulations came in), and not the physical transfer of money or powers to them in terms of, for example, incurring liabilities" [Trykozko 2018].

By the Act of 11 January 2018 amending certain laws to increase the participation of citizens in the process of electing, functioning and controlling certain public bodies,[19] the legislator included *ex lege* the auxiliary units of the commune in the civic budgeting process, indicating that the funds spent under the civic budget may be divided into pools covering the entire commune and its parts in the form of auxiliary units or groups of auxiliary units of the commune (Article 5a (6) A.c.g.).

The Act of 15 June 2018 amending the Electoral code act and certain other acts[20] introduced a new provision prohibiting the ordering of elections to the bodies of auxiliary units of the commune and elections to the bodies of subordinate units for the day for which other elections have been ordered. This prohibition, however, does not apply to the election of a village mayor by a village assembly or the executive bodies of a settlement or district [Marchaj 2021]. The legislator excluded from the application of this regulation elections to district councils of the capital city of Warsaw. In addition, this regulation does not apply to "the ordering of elections to the bodies of auxiliary units of the commune or elections to the bodies of lower-tier units for the day on which by-elections to the Senate, early, supplementary or re-elections to the constitutive bodies of local government units or elections to a new constitutive body of a local government unit, as well as early or re-elections of the commune mayor" have been ordered (see Article 35a(3) A.c.g.). This amendment entered into force on 1 January 2019. Combining the elections to the bodies of auxiliary units with other elections, in particular elections to local government bodies, was often dictated by a desire to increase voter turnout, although it certainly constituted their marginalisation in the light of other elections.

The legislator continues to strengthen the legal position of commune auxiliary units and their bodies. One of the manifestations of this is the

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[18] Act of 21 February 2014 on the village fund, Journal of Laws item 301.

[19] Act of 11 January 2018 amending certain laws in order to increase the participation of citizens in the process of electing, functioning and controlling certain public bodies, Journal of Laws item 130 [hereinafter: amendment of 2018].

[20] Act of 15 June 2018 amending the Electoral code act and certain other acts, Journal of Laws item 1349.

provisions of the Act of 26 May 2023 on the monetary benefit for the function of the village head,[21] which lays down the conditions and procedure for granting, as well as rules for the payment and financing of, a cash benefit for performing the function of a village head. A person entitled to receive the benefit is a person who has performed the function of a village head for at least 7 years (however, continuity in performing this function is not required) and has reached the following age: 60 for women and 65 for men. The benefit is granted in the amount of PLN 336.36 per month and is subject to annual valorisation. The benefit, together with the costs of its service, is financed from the state budget. The introduction of the benefit is a form of tangible recognition and appreciation of village heads in the performance of their functions.

It should be noted that the third stage in the evolution of commune auxiliary units involves the establishment of mandatory Warsaw districts under the Act of 15 March 2002 on the system of the capital city of Warsaw.[22] However, Warsaw districts cannot be a separate subject of civil law rights and obligations from the City of Warsaw. They may act as a party to administrative proceedings or as a public administration body [Augustyniak 2008]. The creation of Warsaw districts is inextricably linked to the delegation of specific tasks and competencies belonging to the commune and the guarantee of specific financial resources for their implementation. Warsaw districts have a certain normative range of tasks assigned to them by the legislator of an obligatory nature, and *a contrario* to other auxiliary units of the commune.

The third stage in the evolution of commune auxiliary units is characterised by the introduction of control elements and increased participation of residents in the functioning of commune auxiliary units, e.g. through the introduction of obligatory consultations with regard to the adoption of the statutes of a commune auxiliary unit or the proposal initiative to the village fund. Systemic conditions have also been strengthened and regulations of a significant nature with regard to the organisation and functioning of commune auxiliary units have been given the form of a local law act. This raised the legal value of the statutes of the auxiliary unit of the commune, with all the consequences envisaged for the judicial review of the local law act.

This stage involves active involving the residents in social participation in the local community, indicating the important place of the commune auxiliary unit in this process.

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[21] Act of 26 May 2023 on the monetary benefit for the function of the village head, Journal of Laws of 2024, item 1650.

[22] Act of 15 March 2002 on the system of the capital city of Warsaw, Journal of Laws of 2018, item 1817.

2. COMMUNE AUXILIARY UNITS – DIRECTIONS OF CHANGE

The directions of change facing auxiliary units include several options. Their implementation, together with the change of legal regulations, depends on the political will and the legislator's determination to strengthen or weaken this self-government structure, possibly changing its legal character. However, bearing in mind that the development of local government is continuous and important from the point of view of satisfying the collective needs of the local community, it is worth reflecting on several system-functional models of commune auxiliary units in Polish local government**.**

The first model of functioning of the auxiliary units of the commune is based on changing the territorial division of the country and introducing auxiliary units into the basic territorial division of the state. This would create the possibility of granting auxiliary units of the commune the status of a local government unit with all the legal consequences, including legal personality, performing tasks in its own name and at its own responsibility, as well as the possibility of being a subject of civil rights and obligations and judicial protection. Thus, the auxiliary units of the commune would be independent in terms of performing tasks based on decentralization, rather than deconcentration. This would require a change to the Constitution of the Republic of Poland and relevant laws. Currently, there is no political will in this regard.

The second model of functioning of the auxiliary units of the commune is based on strengthening the legal position of the auxiliary unit by expanding the range of its public and private law competencies, without granting it the status of a local government unit. This means bringing the structure of optional units closer to the legal position of the districts of Warsaw, but with varying emphasis on the elements of their subjectivity. There would also be a legal possibility to expand the competencies of the auxiliary unit in the area of public and private law, even in relation to the current legal position of the districts of Warsaw.

This model allows for the creation of a system based on the obligatory establishment of districts in large agglomerations in Poland, similar to the districts of Warsaw, with a possible broader statutory catalogue of tasks and ensuring their financing. Under the law, auxiliary units would be equipped with specific adjudicatory competencies, thus not requiring authorization from the commune council in this regard.

This model requires the introduction of a greater categorization of auxiliary units, while simultaneously strengthening their legal status within the commune structure, expanding their scope of competencies, and allowing them to act *pro foro externo*. This creates the possibility of more efficient implementation of public tasks.

This model would also enable the establishment of other optional units with consultative and advisory competencies, based on the currently applicable principles. The aim of this model would be to ensure the full integration of auxiliary units within the commune structure.

The legislator seems to recognize the need for normative changes in this direction [Bandarzewski 2019], yet there is still a lack of will to adopt comprehensive regulations regarding the strengthening of the legal position of auxiliary units of the commune, including the mandatory introduction of, for example, districts into large urban agglomerations.

The third model of functioning of the auxiliary units of the commune is based on increasing the residents' activity in the process of social participation, while maintaining the current legal position of these units. It involves the implementation of various participatory instruments at the level of the auxiliary units of the commune, including the possibility for an auxiliary unit to submit a draft resolution of the commune council for discussion at the council's session under statutory regulations. This would serve as a kind of alternative to the institution of citizen legislative initiative, as defined in Article 41a of the Act on commune self-government.

Other participatory instruments, such as public consultations and the civic budget, should be more closely linked to the functioning of auxiliary units. Strengthening the legal position of auxiliary units is a realization of the subsidiarity principle, highlighting the essence of the issue of civil society [Dolnicki and Augustyniak 2010]. The legislator is slowly beginning to recognize the importance of implementing this model, yet there is still no normative decision in this regard.

Comprehensive regulation of issues related to "all participatory mechanisms in the auxiliary units of the commune based on the law (and not, as previously, based on the statute), which would provide participants in these forms with a tool for the protection of subjective rights before the administrative court, still seems to be a relevant postulate *de lege ferenda*" [Augustyniak 2017, 373].

The fourth model of functioning of the auxiliary units of the commune is based on maintaining this structure as a merely auxiliary, consultative, and pro-educational formula, increasing the possibility of supporting and promoting the idea of local government and stimulating civic activity, without equipping it with significant task-related competencies in the public and private spheres. A weakly competent auxiliary unit does not pose a threat to representatives of indirect democracy in local government. It does not require the sharing of power by the commune authorities. Thus, adopting this model does not require expanding the scope of tasks or competencies of the auxiliary unit in the act, but only regulating its scope of action in the statutory domain, tailored to the needs of a given commune.

The auxiliary unit of the commune then plays an advisory and petitioning role, serving as a platform for dialogue between councillors and residents. It does not have executive powers or significant competencies and operates within the legal subjectivity of the commune.

CONCLUSIONS

Optional and mandatory auxiliary units are an element of the auxiliary administrative division, a derivative of the basic territorial division. They are an important participatory instrument, facilitating the implementation of the commune's tasks [Augustyniak 2021]. *De lege lata*, the auxiliary units of the commune have been equipped with significant competencies in the area of public law, but are devoid of legal subjectivity in the field of private law. They are equipped with competencies and tasks granted to them by the commune councils in the statutes. It should be noted that the commune exercises its constitutionally granted autonomy, and the authorization to shape the content of the auxiliary unit statute is general, not casuistic. Therefore, each commune can freely regulate in its statute all matters concerning its structure, as long as it does not conflict with statutory provisions.[23]

We can distinguish three stages in the evolution of the auxiliary units of the commune, which have influenced the current shape of the local government community and the way in which the commune own tasks are carried out.

The first stage of evolution of the auxiliary units of the commune involves shaping their legal status in both public law (adjudicatory competencies) and private law (management of municipal property by the auxiliary unit), along with the establishment of the foundations of their normative subjectivity.

The second stage of evolution is the statutory strengthening of the organizational and functional structure of the auxiliary units and their bodies.

The third stage involves the expansion of the control and consultative instruments in the commune within the auxiliary units, as well as the normative increase in the participation of residents in the functioning of these structures.

The article presents four models of directions for change (from the most progressive to the conservative) that the legislator faces in shaping the legal position of the auxiliary unit of the commune.

The legitimacy of establishing auxiliary units of the commune is grounded in the initiative of the residents of the local community. The awareness of realizing the interests of the local community gradually strengthens the legal position of the auxiliary units of the commune in the reborn local

[23] Judgement of Voivodship Administrative Court in Gliwice of 9 December 2024, ref. no. III SA/Gl 789/24, Lex no. 3825786.

government in Poland, which still requires modifications and the adoption of a specific model for directions of change.

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THE LEGAL REPRESENTATIVE AND THE WITNESS IN CIVIL PROCEDURE. REMARKS ON THE DUTIES OF THE ADVOCATE/ATTORNEY-AT-LAW AND THE DIRECTION OF STATUTORY CHANGE

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Abstract. The situation of an advocate/attorney-at-law appearing in civil proceedings both as a legal representative and witness is controversial because it goes beyond the scope of providing legal assistance. This poses a threat to his or her independence and the obligation to maintain professional secrecy. Combining these procedural roles at the same time is negatively perceived by organizations of legal professions, hence the prohibition, resulting from ethical rules, on proposing a motion for the questioning of an advocate/attorney-at-law as a witness, or the inability to provide legal assistance in the case if the lawyer testified as a witness about the circumstances of the case. Such a situation is formally possible, as the Code of Civil Procedure does not prohibit testimony by a professional legal representative of a party. The protection of professional secrecy is ensured by the right to refuse to answer a question if the testimony would entail a violation of essential professional secret (Article 261(2)). The obligation to keep professional secrecy under the Law on Advocates and the Act on Attorneys-at-Law prevents an advocate/attorney-at-law from testifying about circumstances related to the legal assistance provided, also in the case of the consent or request made by the client being represented. With this respect, there have been drafts to amend the civil procedure, but each of them is flawed. Under the draft law of 2018, the advocate/attorney-at-law had the right to refuse to testify about circumstances covered by professional secrecy, but it provided for the court's right to exempt the advocate/attorney-at-law from professional secrecy, in a way similar to the provisions of criminal procedure. The second draft, which is now at the stage of the legislative process (after the petition of 2019 was filed), rules out the possibility of testifying as a witness by a legal representative. This amendment raises a lot of reservations, and in its modified version, submitted as part of public consultation by legal professional associations, boils down to petrifying the protection of advocate/attorney-at-law secrecy in civil proceedings. This is a risky solution, as it may lead to a restriction of the right to a fair trial on the level of evidence taking by rendering it impossible, in special situations, to weigh this value and protection of the client's interest against the value of the protection of professional secrecy.

Keywords: civil procedure; witness; legal representative; attorney-at-law; advocate; professional secrecy; professional deontology.

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INTRODUCTION

An advocate/attorney-at-law acting as a witness in civil proceedings, in which he/she is also a legal representative of a party, raises numerous controversies in the practice of providing legal assistance. These arise not only from the different tasks of a witness and a legal representative, but also from the need to maintain independence and gravity in the practice of the profession of advocate/attorney-at-law and the obligation to keep professional secrecy. The latter issues concern spheres that are extremely sensitive in the exercise of any profession of public trust. This issue has been discussed in the legal literature, but there is still no clear position – despite the debate within the legal professional associations – regarding the assessment of such behaviour by an advocate/attorney-at-law. Most importantly, however, there is still no satisfactory normative solution in this respect. This situation is undoubtedly influenced by the never-ending dispute over the essence of attorney-client privilege and its material scope. The basic norms on professional secrecy of advocate/attorney-at-law are included in the laws on the practice of these legal professions and in the codes of ethics that clarify them.[1] They are only an element of the system of legal norms concerning the procedural issue of professional secrecy, the protection of which (e.g. in the form of prohibitions to take certain types of evidence) is regulated differently in civil and criminal procedures [Baszuk 2015, 318].

The study concerns the classification of the conduct of an advocate/attorney-at-law (including the risk of disciplinary liability) acting in civil proceedings in a double role – a legal representative and a witness (also testifying in this capacity with the consent of the client) and the assessment of the proposed normative solutions. In this context, the thesis about a potential conflict of values concerning the obligation of professional secrecy, legal protection of client's interests and preservation of independence and gravity in practicing the profession of advocate/attorney-at-law arises. The duties of an advocate/attorney-at-law should not contradict the purpose of providing legal assistance, namely the legal protection of the client's interests. They should complement each other by protecting the value of legal assistance provided in a manner consistent with the public interest (interest

[1] Article 3(3) of the Act of 6 July 1982 on attorneys-at-law (Journal of Laws of 2024, item 499) [hereinafter: AAL]; Article 6(1) of the Act of 26 May 1982, the Law on advocates (Journal of Laws of 2024, item 1564) [hereinafter: LoA]; Article 15 of the Code of Ethics of Attorney-at-Law (consolidated text in the annex to Resolution No. 884/XI/2023 of the Board of the National Bar Council of Attorneys-at-Law of 7 February 2023 [hereinafter: CEAL]; para. 19(1) to (3) of the Principles of Ethics and Dignity of the Profession of Advocate – Code of Advocate's Ethics (consolidated text in the communication of the Board of the National Bar Council of 1 July 2021) [hereinafter: PEDPA].

of justice) without undermining confidence in the entirety of people practising as advocates/attorneys-at-law.[2]

Decoding the only correct model of behaviour of an advocate/attorney-at-law in civil proceedings in the analysed situation is not easy due to the need to balance the values protected or guaranteed statutorily and in the Constitution of the Republic of Poland. An advocate/attorney-at-law should avoid situations that give rise to such collisions, as their very occurrence leads to the blurring of the canon of values based on which the prestige of a legal profession of public trust is built. The obligation to keep professional secrecy by an advocate/attorney-at-law acting both as a legal representative and witness is closely related to the discussed issue, but this issue – due to its complexity – has been addressed only to the extent necessary to discuss the topic concerned.

1. OBLIGATION TO TESTIFY BY AN ADVOCATE/ATTORNEY-AT-LAW

In civil proceedings, the parties are obliged to present evidence to establish the circumstances from which they derive legal consequences, as they bear the burden of proof (Article 6 of the Civil Code, Article 3 and Article 232 of the Code of Civil Procedure).[3] The situation becomes complicated when only the advocate/attorney-at-law as the client's legal representative, possesses the appropriate knowledge about them, while the opposing party has already presented evidence regarding a fact that is crucial for the resolution of the case. In such a situation, the passivity of the client and his/her representative, along with the lack of appropriate evidence, will result in negative procedural consequences (result of Article 230 CCP), especially losing the case.

Anyone may be a witness in civil proceedings, unless otherwise provided by law. The Code of Civil Procedure contains no prohibition to question an advocate/attorney-at-law as a witness, so they may be questioned if they has information that is relevant to the outcome of the case (Article 227 CCP). The subjective exclusions indicated in Articles 259 and 259[1] CCP (which constitute absolute or relative evidentiary prohibitions) do not include an advocate/attorney-at-law also when he/she is a legal representative of the party. Due to the general obligation to testify as a witness (Article 261(1) CCP), an advocate/attorney-at-law summoned in this capacity cannot refuse to testify, nor can he/she invoke a collective refusal to testify as to facts of which he or she has become aware while providing legal assistance (the second sentence of Article 261(1) CCP applies only to a clergyman

[2] Judgment of the Supreme Court of 8 June 2017, ref. no. SDI 18/17, Legalis no. 1632724.

[3] Act of 17 November 1964, the Code of Civil Procedure (Journal of Laws of 2024, item 1568 as amended) [hereinafter: CCP].

as to facts entrusted during a confession). Nevertheless, a statement by an advocate/attorney-at-law that everything they know about the case is related to the legal assistance provided and is covered by professional secrecy will be virtually tantamount to a collective refusal to testify, which does not limit the power of the court and the parties to continue further questioning.

2. ADVOCATE/ATTORNEY-AT-LAW'S RIGHT TO REFUSE TO ANSWER QUESTIONS

A lawyer/attorney-at-law has the right to refuse to answer a question if the testimony would entail a breach of significant professional secret (Article 261(2) CCP).[4] This right transforms into an obligation imposed on the advocate/attorney-at-law summoned as a witness. This also applies to information obtained in connection with providing legal assistance to other clients or a principal in earlier cases, since the obligation to maintain professional secrecy cannot be limited temporally and continues even after the cessation of providing legal assistance.[5] Therefore, it does not matter that the advocate/attorney-at-law previously disclosed this information in a public hearing, acting as a representative or defence counsel before a procedural authority.

An advocate/attorney-at-law, relying on the lawyer-client privilege arising from Article 6(1) LoA or Article 3(3) AAL, does not justify the factual reasons underlying the refusal to answer the question asked. Their identification could lead to the disclosure of circumstances covered by professional secrecy, which is protected by the norm set out in Article 261(2) CCP. Such a statement made by the advocate/attorney-at-law enjoys a kind of presumption of truth, and the court is in principle unable to verify it, and therefore cannot expect or request a response to the question asked in a situation where the advocate/attorney-at-law invokes the right to refuse an answer resulting from the obligation to protect professional secrecy [Błaszczak 2019; Sowiński 2024, 694; Gawryluk 2012, 48]. What is covered by this obligation is decided by the advocate/attorney-at-law himself and, if he has doubts, he should assume that the information constitutes professional secrecy.[6] It is irrelevant

[4] A similar right to refuse to answer questions in proceedings before the authority has been regulated in Article 83(2) of the Act of 14 June 1960, the Code of Administrative Procedure (Journal of Laws 2024, item 572) [hereinafter: CAP] and Article 196(2) of the Act of 29 August 1997, the Tax Ordinance (Journal of Laws 2023, item 2383 as amended.

[5] Article 3(4) AAL; Article 6(2) LoA; Article 17 CEAL; para. 19(7) PEDPA; para. 2.3.3. of the Code of Conduct for European Lawyers adopted at the Plenary Session of the Council of Bars and Law Societies of Europe (CCBE) held on 28 October 1988.

[6] For the criteria to be followed by the advocate/attorney-at-law in establishing what is covered by secrecy, see: Marchwicki 2015, 149-51, 153-56, 158-62, 166-67, 169-70, 172-73, 176, 219; Resolution of the National Bar Council of Attorneys-at-Law no. 520/VI/2006 of

whether this concerns information that is favourable or disadvantageous to the client, so the mere refusal by the lawyer to answer questions should not result in negative procedural consequences for the client. It is unacceptable for the court to assume that the refusal to answer a question is based on the fact that it concerns information that may prove unfavourable to the customer [Matusiak-Frącczak 2023, 217].

The judicial practice in civil proceedings usually shows that such conduct of an advocate/attorney-at-law is considered understandable as long as his or her statement regarding the obligation to maintain professional secrecy does not raise serious doubts and is not clearly aimed at circumvention of the provisions on the obligation to testify.[7] The situation becomes more complicated when the client declares before the court that he or she exempts the attorney/attorney-at-law from professional secrecy, and thus further refusal to answer the question based on the right to silence may be treated as unreasonable [Górski 2023].

Article 261(2) CCP employs only the term "professional secrecy" (which does not have a legal definition) of a general nature, concerning various professions whose practice is associated with the obligation to keep secret. In the context of civil proceedings, no distinction is made between the secrecy of advocate, attorney-at-law or defence counsel, thus their protection is provided by procedural instruments on professional secrecy in general.[8] This protection applies to all information covered by professional secrecy acquired in the course of providing legal assistance, i.e. not only related to pending civil proceedings, but also when providing legal assistance in other cases, regardless of type. The obligation to maintain professional secrecy arises from the legislation on the exercise of the professions of advocate and attorney-at-law, and its violation is subject to criminal and disciplinary sanctions.

Noteworthy is also the relationship between Article 261(2) CCP and Article 6(1) LoA and Article 3(3)(3) AAL. The regulation of civil procedure empowers the advocate/attorney-at-law to refuse to answer a question

16 December 2006 containing the position on the imposing of a penalty for breach of order on an attorney-at-law who refuses to answer questions as cited in: *Opinia OBSiL KRRP w przedmiocie tajemnicy zawodowej w postępowaniu cywilnym* of 25 November 2015 (author Zenon Klatka).

[7] Different judicial practices and underlying juridical reasons and the position of the bar association of attorneys-at-law is analysed by Machnikowska 2022, 69-70, 72-74.

[8] Apart from Article 261(2) CCP, it is also Article 248(2) CCP, concerning the lawyer's evasion of the obligation to present a document constituting evidence of a fact relevant to the outcome of the case, in his possession, if the contents of the document relate to circumstances about which he could, as a witness, refuse to testify, and Article 761(2) CCP, concerning the refusal to explain at the request of the enforcement authority, if he/she can evade such a request to the extent that he/she can refuse to present a document (Article 248(2) CCP) or answer as a witness to a question asked (Article 261(2) CCP).

if the testimony would entail a violation of relevant professional secrets, and therefore refers to the content of the information forming part of the evidence and its meaning (and therefore should be 'relevant') for the confidential relationship between the client and the lawyer. On the other hand, in the regulations on the practice of legal professions, information covered by the obligation of professional secrecy was only specified by their property of being acquired by a lawyer due to the provision of legal assistance [Klatka 2004, 65; Korczak 2019, 43-44].[9] The norm concerning the subject matter of relevant professional secrecy should be decoded through the lens of the object of protection indicated in Article 6(1) LoA and Article 3(3) AAL and boils down to determining which information is a professional secret of the advocate/attorney-at-law and which does not. This also confirms the view that these provisions constitute a *lex specialis* in relation to Article 261(1) CCP [Knoppek 2016, 348].

The content of Article 261(2) CCP may lead to a wrong conclusion that the right of the advocate/attorney-at-law to silence is subject to limitations and does not apply to facts covered by professional secrecy but which are not relevant professional secret. An interpretation leading to the conclusion that some information covered by professional secrecy does not constitute relevant professional secret is unreasonable in the context of the lawyer-client privilege [Gutowski 2019a, 187-88]. There is also a view that the "relevant professional secrecy" does not pertain to the information covered by it, which is characterized by homogeneity, but rather to significance of the very professional secrecy within the system of legal protection and the socially useful function performed by representatives of public trust professions who are obliged to maintain it. This allows the inclusion of the lawyer-client privilege in the group of "relevant professional secrecies" [Machnikowska 2022, 71-72]. For the above reasons, regardless of the interpretation of the concept of relevant professional secret, the advocate/attorney-at-law advisor is obliged to maintain professional secrecy in its entirety. [Klatka 2017, 349-50; Korczak 2023, 135].

3. THE LEGAL REPRESENTATIVE – ADVOCATE/ATTORNEY-AT-LAW AS A WITNESS

The party's legal representative – advocate/attorney-at-law who also acts in the capacity of a witness is an occasional situation, highly controversial albeit formally admissible [Knoppek 2016, 367].[10] Certainly, such testimony

[9] Ruling of the Supreme Disciplinary Court of 8 June 2029, ref. no. WSD 36/19, Legalis no. 3010947.

[10] Judgment of the Appellate Court in Katowice of 14 February 2014, ref. no. I ACa 1034/13, Legalis no. 1062661.

cannot be considered as the provision of legal assistance, which is the responsibility of an advocate/attorney-at-law. Nevertheless, the Code of Civil Procedure does not prohibit combining these procedural roles, as it does in the case of the roles of legal representative and expert, or legal representative and judge.[11] For this reason, a legal representative acting as a witness cannot be summoned to give an opinion as an expert, also on facts about which he or she has testified as a witness, even though the law allows such an opinion to be sought from a witness, even if he or she has previously given an opinion on behalf of an entity other than the court (Article 505^{7}(3) CCP).

The combination of the role of advocate/attorney-at-law as a legal representative and a witness leads to various restrictions resulting from legal provisions and implies various conflict situations in the judicial proceedings. A legal representative standing as a witness cannot be present at the questioning of other witnesses until he/she has given evidence himself/herself (Article 264 CCP, second sentence).[12] Consequently, the court should hear him/her first, otherwise he/she will not be able to attend as the party's representative the hearing of witnesses questioned previously. A legal representative who testifies cannot ask questions to themselves (Article 271(1) CCP), but may refuse to answer the question (if the testimony is to entail a breach of relevant professional secrecy). After all, an advocate/attorney-at-law acting as a witness cannot be obliged by the client to testify solely in client's favour. Bearing in mind the obligation to act in the interest of the client, the lawyer may face a dilemma, as part of the obligation to testify the truth, about the scope of disclosure of circumstances covered by professional secrecy, relativising its substantive scope, refusing to answer depending on the question being asked or person asking the question (e.g. questions asked by the opposing party concerning facts unfavourable to the client). This renders such testimony unreliable, also due to doubts regarding their objective nature (it should be assumed that a witness performing the duties of a legal representative of a party perceives the realities of the case differently). Such an legal representative is also in an awkward situation during the final speech, assessing the credibility of testimonies of all the witnesses (Article 210(2) CCP) [Knoppek 1984, 74-77]. Such events do occur in practice, but given this unusual situation, the court should pay attention to the evidentiary value of such testimony for the resolution of the case.

Legal professional organizations treat such a situation in civil procedure as exceeding the limits of correct representation of client's interests and undesirable from the point of view of prestige and dignity of the profession. Moreover, the admissibility of questioning the lawyer as a witness

[11] Article 48(1)(4) CCP and Article 281(1) CCP.

[12] See also judgment of the Appellate Court in Warsaw of 25 May 2015, ref. no. I ACa 958/14, Legalis no. 1316264.

may in many cases undermine the confidence of the party in their representative or call into question their loyalty, which is the basis for the relationship between the client and the advocate/attorney-at-law providing legal assistance to the party. Hence, similar restrictive regulations (differing in the personal scope of prohibition) contained in deontological regulations. An attorney-at-law may not request that another attorney-at-law, or another person with whom the attorney-at-law may legally cooperate in practicing the profession, be heard in order to find the circumstances covered by their obligation of professional secrecy (Article 20 CEAL). An advocate may not report evidence from the testimony of a witness, who is an advocate or attorney-at-law for the purpose of disclosure of information obtained in the course of their professional activity (para. 19(8) PEDPA). Making such a request is a tort (it is formal in nature and it is not necessary for its commission to take effect in the form of a hearing of the advocate/attorney-at-law as a witness) and gives rise to disciplinary liability due to a breach of rules of ethics. *The rationale* of such a provision is the assumption that the mere request to take such evidence may, in the perception of the clients, put their legal interests at risk by disclosing information communicated by them to the advocate/attorney-at-law.[13] Since the advocate/attorney-at-law may not submit such a request, he/she should also not actively participate in the questioning of another advocate/attorney-at-law by asking questions concerning circumstances covered by professional secrecy (he/she should additionally ensure that such a position is recorded in the report of the hearing). However, that does not prevent him/her from instructing the client on how one should exercise their procedural rights when hearing such a witness.[14]

A request for the hearing of a legal representative may also be submitted by any party to the proceedings, without risking disciplinary liability (unless they are an advocate or attorney-at-law). Submitting such request does not compel the legal representative to revoke the power of attorney or to abandon further providing legal assistance to the party represented. The same applies to situations where the representative appears as a witness and refuses to answer questions due to the obligation to maintain professional secrecy (i.e. does not testify "about the circumstances of the case"). A different stance would lead to an unjustified limitation of the right to choose a legal representative by allowing the opposing party to disqualify the legal representative [Korczak 2023, 136; Błaszczak 2019, 168].

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[13] Decision of the Supreme Court of 12 December 2014, ref. no. SDI 44/14, Legalis no. 1766684; Ruling of the Supreme Disciplinary Court of 5 July 2014, ref. no. WSD 52/14, Legalis no. 1515064.

[14] Article 8, Article 11(1) and Article 20 in conjunction with article 7(3) CEAL; See https://kirp.pl/wp-content/uploads/2023/02/sk-22.03.2021-zjm.pdf [accessed: 31.05.2025] and supplement of 29 March 2021, https://kirp.pl/wp-content/uploads/2023/02/p-29.03.2021-rw.pdf [accessed: 31.05.2025].

The case law includes also a separate view suggesting that the legal representative of a party in civil proceedings may be questioned as a witness on the condition that he/she renounces the power of attorney, and even a more far-reaching position that such questioning is inadmissible.[15]

The analysis of the generally applicable provisions in the context of the qualification of the conduct of an advocate/attorney-at-law acting as a witness precludes him/her from being held disciplinarily liable for unlawful conduct. However, this does not exclude the application to him/her in a specific situation of another ground of disciplinary liability, namely the breach of the rules of ethics (Article 80 LoA; Article 64 AAL). The statutory power to establish rules of ethics by the bar associations of advocates and attorneys-at-law is intended to ensure that they are able to supervise the proper exercise of their professions. The rules of ethics are a restrictive regulation that carries a disciplinary sanction in the event of their breach. Although this character is reserved for statutory acts, it is considered permissible to specify the "non-essential" elements of the substantive legal grounds for disciplinary liability in sub-statutory acts [Mojski 2018, 30]. Rules of ethics are autonomous in relation to legal norms and, as such, do not need juridical legitimacy, especially when they refer to the values of dignity and independence in the exercise of a profession implementing an important social function [Baszuk 2015, 311].[16]

An advocate/attorney-at-law, when testifying as a witness, is involved in the case in a capacity other than that of a legal representative. Instead of providing legal assistance, he/she provides factual assistance, which is not in line with the principle of loyalty of the lawyer to the client [Korczak 2022, 82].[17] An advocate/attorney-at-law should not act in a dual role in the trial (i.e. as a legal representative and a witness) due to the obligation to avoid a conflict of interest, established to ensure proper provision of legal assistance (Article 10(1) CEAL), and the duty to maintain professional secrecy. This calls into question the correctness of actions of the lawyer, particularly lawyer's independence in assessing and describing the factual

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[15] Judgment of the Appellate Court in Warsaw of 6 May 2008, ref. no. VI ACa 1517/07, Legalis no. 420486 and judgment of the Supreme Court of 15 December 2000, ref. no. I PKN 165/00, Legalis no. 54290. For the critical analysis of these judgments, see Skibińska 2020, 69-71.

[16] See: resolution of the Constitutional Tribunal of 17 March 1993, ref. no. W. 16/92, OTK 1993, part 1, item 16, Legalis no. 10155; judgment of the Constitutional Tribunal of 27 February 2001, ref. no. K. 22/00, OTK ZU 2001, no. 3, item 48, Legalis no. 49666; judgment of the Constitutional Tribunal of 23 April 2008, ref. no. SK 16/07, OTK-A 2008, no. 3, item 45, Legalis no. 97130.

[17] Similarly should be assessed a request for evidence related to the submission of an own advocate's/attorney's study as incompatible with the purposes of civil procedure and the role of a professional legal representative – judgment of the Regional Court in Warsaw of 25 February 2020, ref. no. XXV C 195/16, Legalis no. 2334219.

state due to the differing obligations of a legal representative and a witness [Kurosz 2024, 122, 124]. This also applies to situations where the legal representative – advocate/attorney-at-law testifies as a witness at the request of their client with the use of knowledge about the subject-matter of the dispute (circumstances of the case) in the client's interest, and then continues to provide legal assistance to the client. Such conduct of the advocate/attorney-at-law cannot be justified by the duty to exercise due diligence in the professional practice of the profession to protect the client's interest.

Such conduct was sanctioned by para. 22(2) of the Principles on Legal Ethics and Dignity of the Profession of Advocate of 1998, in the light of which an advocate who has testified in a given case as a witness cannot act as a proxy or defender.[18] This provision was repealed as of 1 January 2012 and no new regulation has appeared instead.[19] Similarly, Article 22(1)(f) CEAL prohibited an attorney-at-law from conducting a case and providing any form of legal assistance if he/she gave testimony in that case as a witness.[20] After its repeal, on 1 July 2015, it was included as Article 27(2) CEAL, prohibiting an attorney-at-law from providing legal assistance if he/she had previously testified as a witness in a case involving the circumstances of the case. This regulation is autonomous, so it is irrelevant whether the testimony on the circumstances of the case concerned information covered by professional secrecy [Woroniecka 2023, 255]. Basically, an attorney-at-law, being aware that he/she will stand as a witness in the case, should refuse to provide legal assistance due to the circumstances of the case (refusal due to important reasons) and if such a request appeared at the stage when he/she was already the client's legal representative and he/she intends to testify about the circumstances of the case, he/she should abandon further provision of legal assistance (Article 30a(1) and (2) CEAL) [ibid., 268]. This means that the legal representative – advocate/attorney-at-law should terminate the power of attorney no later than after testifying as a witness (Article 27(2) in conjunction with Article 10(2) and Article 30a(2) CEAL) [Ereciński and Dziurda 2024, 197]. However, he/she is under an obligation under the first sentence of Article 94(2) CCP, to act for the party for a further two weeks, unless the principal relieves him/her of that obligation. If he/she does not do so, it may occur that the attorney-at-law, in performance of the

[18] Resolution no. 2/VIII/1998 of the National Bar Council of 10 October 1998.

[19] Para. 70 of the Principles of Ethics and Dignity of the Profession of Advocate (Code of Advocate's Ethics) (consolidated text in the communication of the Board of the National Bar Council of 14 December 2011).

[20] Resolution 5/2007 VIII of 10 November 2007 of the National Assembly of Attorneys-at-Law on the adoption of the Code of Ethics of Attorney-at-Law as amended (consolidated text in the annex to Resolution No. 8/VIII/2010 of the Board of the National Bar Council of Attorneys-at-Law of 28 December 2010 (consolidated text in annex to Resolution no. 884/XI/2023 of the Board of the National Bar Council of Attorneys-at-Law of 7 February 2023).

statutory obligation, will continue to participate in the proceedings during the aforementioned period and should not be subject to disciplinary liability for this fact [Baumgart 2019].[21] Apart from this special situation, if after testifying he/she continues to provide legal assistance to the party (client), he/she commits a disciplinary tort, violating the principles of ethics.

The introduced prohibition is rooted in the established ethical assessment of such behaviour (even if the advocate/attorney-at-law does this in the interest of the client), which may offend the dignity of the profession, undermine its prestige, and/or undermine trust in representatives of the profession of public trust.[22]

A separate issue remains how the court should treat a request to hear the legal representative – advocate/attorney-at-law as a witness in civil proceedings. It is not the court's role to supervise compliance with ethical rules or adherence to the obligation of maintaining lawyer-client privilege by the legal representative. Undoubtedly, the court should assess whether the fact for which this evidence was requested to be taken is relevant for resolving the case, therefore it should consider if such a fact requires proof, the circumstances covered by the evidence request have not been proven by other means, and the situation where acceptance of such a request may subsequently expose the advocate/attorney-at-law to disciplinary liability or loss of trust from the client.[23] Such a request, filed by the opposing party's representative, should also be evaluated by the court in terms of its contradiction with the clause of good practices (Article 3 CCP). If it violates the rules of advocate/attorney-at-law ethics, it may be considered by the court as contrary to good practices and consequently disregarded (Article 235^2(1)(1) CCP) [Błaszczak 2022, 191]. Due to the sensitivity of the matter concerning protection of professional secrecy, the court should take into account all these circumstances if it intends to admit such evidence *ex officio*.

4. PROFESSIONAL SECRECY DURING TESTIMONY BY A LEGAL REPRESENTATIVE – ADVOCATE/ATTORNEY-AT-LAW

In light of the provisions of the Code of Civil Procedure, a legal representative – advocate/attorney-at-law may testify as a witness even if the thesis of the request for evidence points to circumstances covered by the lawyer-client privilege. Such testimony, when it discloses information covered by professional secrecy, constitutes evidence in civil proceedings,

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[21] See also Article 47 CEAL.

[22] Cf. judgment of the Supreme Court of 8 June 2017, ref. no. SDI 18/17, Legalis no. 1632724.

[23] Judgment of the Regional Court in Warsaw of 25 February 2020, ref. no. XXV C 195/16, Legalis no. 2334219.

as there is no absolute or relative prohibition of taking evidence in this situation, and Article 261(2) CCP does not prohibit a witness from testifying [Knoppek 2021; Ziemianin 2019a, 135]. It also constitutes an act that meets the criteria of a disciplinary tort based on a knowing and culpable breach of the oath, the law and the rules of ethics [Naumann 2023; Bergier and Jacyna 2016, 182-83].[24]

In civil proceedings, the court does not have the powers to waive the obligation to keep the lawyer-client privilege (a waiver by the court in the mode of procedure specified in criminal procedure does not extend to civil proceedings), and in the laws regarding the practice of the professions of advocate and attorney-at-law there is a general prohibition against waiving the obligation to maintain professional secrecy (Article 6(3) LoA; Article 3(5) AAL) [Błaszczak 2019, 167, 170].

An advocate/attorney-at-law cannot exempt himself/herself from the obligation of professional secrecy and freely dispose of the acquired knowledge for the needs of the procedural authority, even as a witness. This obligation is not a right of the advocate/attorney-at-law but his professional duty.[25] The client, despite a special relationship based on trust between the client and the lawyer, cannot exempt the lawyer from the obligation of professional secrecy, because the client is not the only holder of professional secrecy [Kożuch 2015, 269; Malicki 2015, 224].[26] Professional secrecy is a substantive-legal institution of the nature of *ius cogens*, protecting the constitutional freedoms of the individual, building social trust in the professions of advocate/attorney-at-law and ensuring the proper functioning of the justice system. Its protection is therefore justified not only by the individual interests of the client but also by the public interest [Malicki 2015, 217; Naumann 2023].[27] The obligation of the advocate/attorney-at-law to act for the client

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[24] The statutory text of the oath to be taken by the advocate and attorney-at-law requires maintaining professional secrecy (Article 5 LoA and Article 27(1) AAL); Article 6(1) LoA and Article 3(3) AAL. Cf. decision of the Supreme Court of 15 November 2012, ref. no. SDI 32/12, Legalis no. 549636.

[25] Decision of the Supreme Court of 15 November 2012, ref. no. SDI 32/12, Legalis no. 549636. Cf. decisions of the Appellate Court in Krakow of 30 March 2009, ref. no. II AKz 110/09 and of 16 June 2010, ref. no. II AKz 198/10, Legalis no. 178196 and no. 287215.

[26] Ruling of the Supreme Disciplinary Court of 27 October 2018, ref. no. WSD 68/18, Legalis no. 2480021; see *Stanowisko OBSiL KRRP z dnia 12 listopada 2014 r. w sprawie odpowiedzi na pytanie: „Czy zgoda klienta na złożenie przez radcę korzystnych dla klienta i jego pracowników zeznań może uchylać obowiązek tajemnicy zawodowej?"* (author Zenon Klatka).

[27] Decision of the Supreme Court of 2 June 2011, ref. no. SDI 13/11, Legalis no. 442143; decision of the Appellate Court in Szczecin of 29 October 2013, ref. no. II AKz 330/13, Legalis no. 966087; decision of the Appellate Court in Krakow of 11 October 2016, ref. no. I ACa 659/16, Legalis no. 1532995; decision of the Appellate Court in Wrocław of 4 November 2010, ref. no. II AKz 588/10, Legalis no. 357840.

is not tantamount to an unrestricted precept.[28] The client cannot dispose of the advocate/attorney-at-law his/her procedural role as a witness, exempting him/her from professional secrecy, and the advocate/attorney-at-law cannot violate the rules of the profession in order to meet the expectations of the client, court or third parties (Article 7(3) CEAL) [Woroniecka 2023, 93; Malicki 2015, 218, 224].

This categorical position, currently prevailing in the case-law of disciplinary courts of legal professional organizations, under the influence of views of legal scholars [Łojewski 1970, 166-67; Buchała 1969, 45; Garlicki 1964, 14], the principles applicable in other countries, and realities of providing legal assistance, is gradually being softened (by moving away from the so-called public order theory) and, in my opinion, has matured for revision through changes in the laws governing the practice of the professions of advocate and attorney-at-law. In practice, a situation may arise (such as when a legal representative – advocate/attorney-at-law testifies as a witness in civil proceedings on matters covered by professional secrecy), where the paradigm of public interest in terms of professional secrecy conflicts with the individual interest of the client represented by the advocate/attorney-at-law.

Professional secrecy should be perceived as an instrument to protect the freedom of communication between the advocate/attorney-at-law and the client, and the information covered by this secrecy as the client's secret. Thus, the client as the holder of the secret should decide whether or not to disclose certain information [Bogusz 2022, 675-76]. This view is also supported by the constitutional freedom of the client to dispose of information that concerns the client himself/herself or their case. In this context, the possibility appears of disclosing information covered by professional secrecy with the client's consent or at the client's direction by way of testimony as a witness by the client's advocate/attorney-at-law. On the one hand, the permissibility of such a situation is supported by the fact that the obligation of professional secrecy was introduced in the interest of the client who uses the services of the advocate/attorney-at-law and the fact that the legal existence of professional secrecy is based on the will of the client. On the other hand, the institution of professional secrecy cannot be used freely according to client's wishes. Instrumental treatment of an advocate/attorney-at-law for private purposes as part of accepted litigation tactics is not only inappropriate, but also violates the dignity of the profession and undermines public confidence in these legal professions (Article 11(2) CEAL) [Malicki 2015, 221].

Therefore, there is more and more accepted view in the legal literature that the existence and scope of the obligation of professional secrecy is determined by the advocate/attorney-at-law in agreement with the client

[28] Judgment of the Supreme Court of 8 June 2017, ref. no. SDI 18/17, Legalis no. 1632724.

[Giezek 2014, 72; Warylewski 2015, 11; Baszuk 2019, 120]. An advocate/attorney-at-law may, if deems it necessary, with the consent or at the request of the client, testify as a witness in civil proceedings about circumstances covered by the obligation of professional secrecy. This applies to exceptional situations, so when making such a decision, the advocate/attorney-at-law should take into account both the gravity and type of goods concerned by the civil proceedings, the nature and extent of the damage that the client may suffer in the absence of his/her testimony as a witness, and the risks associated with such a procedural act in the context of the evidence-taking proceedings [Sala-Szczypiński 2025, 60, 90, 102-103]. The refusal of the advocate/attorney-at-law to do so should take place if he/she considers it detrimental to the interest (good) of the client whose protection is the purpose of the legal assistance being provided. In such a situation, he/she is obliged to refuse to answer questions about circumstances related to the provision of legal assistance (Article 2 AAL; para. 6 and 7 PEDPA; Article 8 CEAL) [Bogusz 2022, 676; Chojniak 2015, 281].

As argued by certain authors, such a view may, in a broader perspective, lead to the destruction of the entire institution of professional secrecy that forms the cornerstone of the professions of public trust and the legal and social degradation of the profession of advocate/attorney-at-law [Korczak 2019, 45; Malicki 2015, 217; Skoczek 1969, 30; Kaftal 1970, 46]. Such a position does not facilitate the debate, as it blurs the rational arguments on the essence of the issue.

5. ATTEMPTS TO SOLVE THE PROBLEM BY AMENDING THE CODE OF CIVIL PROCEDURE

Among scholars in the field, there have been proposals for different regulation ensuring the protection of professional secrecy in civil proceedings. These concerned the introduction of the right to refuse testimony by an advocate/attorney-at-law (by modifying the content of Article 261(1) CCP) modelled on solutions that successfully operate in civil procedures in other countries (e.g. Germany, Italy, France) [Błaszczak 2019, 177; Skibińska 2020, 55-56, 78-80, 82; Gil 2022, 44-45].

This issue was also addressed in the draft Act of 17 May 2018 amending the Code of Civil Procedure and certain other laws (ref. no. UD 180). It introduced for those obliged to maintain professional secrecy the right to refuse to testify as to the circumstances covered by this obligation (Article 261^1(1) CCP). Unfortunately, at the same time, this draft provided for the possibility for the court to exempt an advocate/attorney-at-law from the obligation of professional secrecy (Article 261^1(1) *in fine* and (2), first sentence CCP) in accordance with the rules set out in Article 180(1) *in fine* and (2)

of the Code of Criminal Procedure[29] the draft provisions of which were closely duplicated. The brief explanatory memorandum does not contain the rationale for these solutions that deviate from the nature of the civil-law relationship and the and judicial implementation of claims resulting therefrom, and the differences in the purposes and values protected in criminal proceedings. The prerequisite for exemption from professional secrecy by the court was to be the good of the justice system, which is not implemented in civil proceedings aimed at satisfying the interests of the parties. This dangerous draft amendment has been criticized by representatives of associations of legal professionals, not only for the sake of protection of professional secrecy, but also of the rules of adversarial civil procedure (the court which *ex officio* takes such evidence, replaces a party in the exercise of its rights, exposing itself to criticism due to unequal treatment of the parties and undermining the principle of equality of arms) [Gutowski 2019b, 103-107, 109-14].[30]

In the search for a solution to the problem, another direction of statutory amendment appeared, which did not directly concern professional secrecy and the rules of exempting an advocate/attorney-at-law from the obligation to maintain it, but boiled down to introducing an absolute prohibition for the legal representative to stand as a witness. Its purpose, like any evidentiary prohibition, was to develop a rule to prevent the achievement of goals by all available means in civil proceedings, which may lead to the violation of other values, no less important than the principle of objective truth in civil proceedings. L work has been underway for several years following the submission of a civic petition on 30 December 2019 on amending Article 259 CCP, concerning the extension of the circle of persons who may not be witnesses in civil proceedings, i.e. to include legal representatives of the parties. The draft amendment to the Code of Civil Procedure, prepared by the Committee of Human Rights, Rule of Law and Petitions of the Senate of the Republic of Poland of 10th term in 2021 (Senate papers no. 380 and 381), was the subject of analysis and consultation. The proposed extension of the list of subjective evidentiary prohibitions covering all representatives of the parties, without distinction between professional and other representatives, raised many doubts (e.g. regarding the prohibition of using this kind of evidence as the sole source of knowledge about the circumstances relevant for the case, also after the power of attorney has been terminated) and concerns about the use of this institution to circumvent the provisions of the law (e.g. appointing persons

[29] Act of 6 June 1997, the Criminal Procedure Code (Journal of Laws of 2024, item 3) [hereinafter: CPC].

[30] See https://www.adwokatura.pl/admin/wgrane_pliki/file-kpc-opinia-tajemnica-zawodowa-23485.pdf [accessed: 20.06.2025].

as representatives in order to prevent the opposing party from summoning them as witnesses).[31]

The direction of the amendment is basically in line with the postulates of associations of legal professionals and legal scholarly opinion, aimed at strengthening the protection of professional secrecy which is the cornerstone of the professions of advocate/attorney-at-law [Ziemianin 2019b; Skibińska 2020, 80, 82; Machnikowska 2022, 74-75]. It has been assumed that the protection of the interests of the represented party in civil proceedings can only be implemented without infringing upon the value of maintaining professional secrecy. At the same time, it has been noted that introducing an absolute evidentiary prohibition related to the legal representatives of the parties in proceedings may negatively affect the interests of the party and the proper administration of justice.

The amendment proposed by associations of legal professions (in Piotr Rylski's opinion) concerned the addition of point 5 in Article 259 CCP in a modified version from the original draft, by introducing the prohibition of questioning as a witness of "representatives of the parties, unless the party agrees or the court deems it necessary, and the fact cannot be established using other evidence," and by introducing a new Article 259^2 CCP in the wording: "An advocate or attorney-at-law may not be a witness as to facts of which he or she has become aware while providing legal assistance or conducting the case, unless otherwise provided by law."[32]

The construct of Article 259^2 CCP, as proposed, was partially borrowed from Article 178(1) CCP, and referred to the regulation on the protection of professional secrecy contained in the Law on advocates and the Act on attorneys-at-law (which results from the content of the opinion prepared). A difference can be seen in the substantive scope of professional secrecy under the laws on the practice of the professions of advocates and attorney-at-law: "everything that he/she learned while providing legal assistance," and the draft amendment to the Code of Civil Procedure: "facts of which he or she has become aware while providing legal assistance," but it is irrelevant, since anything that goes beyond the sphere of facts cannot be the subject of a request for evidence and the evidence itself (Articles 235^1 and 236 CCP). Thus, the new evidentiary prohibition is merged with the existing

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[31] See https://www.senat.gov.pl/download/gfx/senat/pl/senatdruki/11386/druk/381.pdf; https://www.senat.gov.pl/download/gfx/senat/pl/senatekspertyzy/6231/plik/oe-382.pdf; https://www.senat.gov.pl/download/gfx/senat/pl/senatinicjatywypliki/1409/4/381_sn.pdf; https://krs.pl/en/163-uchwaly-opinie-stanowiska/1013-opinia-krajowej-rady-sadownictwa-z-dnia-30-kwietnia-2021-r-wo-420-47-2021-druk-senacki-nr-381.html [accessed: 04.01.2025].

[32] See https://www.senat.gov.pl/download/gfx/senat/pl/senatinicjatywypliki/1409/4/381-obsil.pdf; https://www.adwokatura.pl/admin/wgrane_pliki/file-nra12-st-2442022-37139.pdf [accessed: 31.01.2025].

construct regarding the obligation of maintaining professional secrecy under the Law on advocates and the Act on attorneys-at-law. The proposed amendment means that it is not possible for an advocate/attorney-at-law to testify as a witness (regardless of being a legal representative of a party) about circumstances covered by the obligation of professional secrecy. It significantly reduces the possibility for an advocate/attorney-at-law to commit an offence or disciplinary tort concerning the disclosure of information covered by professional secrecy during his/her testimony as a witness. It introduces an absolute evidentiary prohibition binding on a court in civil proceedings, so such testimony of an advocate/attorney-at-law are inadmissible, and the evidence obtained contrary to the prohibition is illegal. In such a situation, the client's consent is irrelevant, as it would lead to the relativisation of the statutory evidentiary prohibition. At the same time, the nature of the regulation under Article 261(2) CCP, regarding the protection of the lawyer-client privilege would change, as its application would be incidental, i.e. when an advocate/attorney-at-law testifies about circumstances unrelated to the legal assistance provided, and questions related to this area (thus covered by professional secrecy) arise during the questioning. This also applies when he/she gives evidence as a legal representative of a party having met the conditions set out in the proposed point 5 of Article 259 CCP (constituting a relative evidentiary prohibition). The proposed solution more petrifies than strengthens professional secrecy (without having to redefine its broad objective limits), abolishing the possibility of taking into account the client's request for the examination of the advocate/attorney-at-law as a witness about the circumstances covered by this secrecy. Thus, an advocate/attorney-at-law who is a depositary (custodian) of information covered by professional secrecy cannot be released from the obligation to keep it by the client for whom the legal assistance is provided. This proposal, axiologically reasonable, is consistent with the statutory provisions on the obligation to keep professional secrecy by advocates/attorneys-at-law but a circumstance should be taken into account that it was submitted as part of public consultation within the limits determined by the draft amendment to the Code of Civil Procedure. The rules of the legislative process and the proposals put forward by legal professional organizations heretofore do not allow taking another position, but still one can look for another solution regarding the submission of testimony as a witness by an advocate/attorney-at-law, which differs from the model adopted based on a formal interpretation of the provisions of the Law on advocates and the Act on attorneys-at-law.

The opportunity of abandoning the construct of professional secrecy protection as set out in the Act on attorneys-at-law was not taken advantage of during the legislative work conducted in the bar association of attorneys-at-law in the period 2023-2025. The proposed normative solutions

address many important issues related to professional secrecy (sometimes resolved in the case-law and scholarly opinion, and thus applied in practice), including clarifying its objective scope and expanding its subjective scope.[33] Regarding the subject-matter of the study, the postulate to abolish the possibilities of exemption from attorney-at-law professional secrecy existing in other laws (Article 180(2) CPC) and to introduce absolute evidentiary prohibitions concerning the possibility of questioning an attorney-at-law about facts learned while providing legal assistance or running a case (the proposed new Article 259[2] CCP, Article 82(4) CAP, and Article 43(1a) of the Act on the Supreme Audit Office[34]) is significant. It is a solution that goes in the right direction, strengthening the attorney-at-law secrecy against third parties (including the bodies conducting the proceedings), but along with the petrifaction of the model of protection of attorney-at-law secrecy, the client as the disposer of information covered by professional secrecy has been forgotten. The proposed solution of an absolute prohibition of testimony is a risky and even dangerous solution, due to the need to protect the interests of the client, which is the purpose of the legal assistance being provided. According to the proposed regulations, an attorney-at-law may use information covered by professional secrecy, *inter alia*, to protect their interest as part of the exercise of their right to court (in terms of the right to evidence) or the right of defence, if the proceedings are in connection with the practice of the profession of attorney-at-law, therefore the deprivation of the client of the right to court in the area of evidence-taking, and the impossibility of weighing its value against the good of protecting professional secrecy, is incomprehensible.

CONCLUSION

A categorical approach to professional secrecy while simultaneously sacrificing the individual interest of the client raises doubts. It undermines the reciprocity-based relationship of trust between the representative and the client, the client's competence in exercising his/her fundamental rights (the right to privacy and freedom and confidentiality of communication),[35] and may hinder the pursuit of the client's interest and the achievement of the desired result concerning client's rights, which he/she cannot achieve independently

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[33] See *Projekty dotyczące uregulowania tajemnicy zawodowej, konfliktu interesów, wolności słowa, immunitetów oraz niezależności w nowej ustawie o radcach prawnych,* Ośrodek Badań, Studiów i Legislacji KRRP, 20.03.2025.

[34] Act of 23 December 1994 on the Supreme Audit Office (Journal of Laws of 2022, item 623).

[35] Article 47, Article 49 and Article 51 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 443 as amended) [hereinafter: Polish Constitution]. For more detail, see Marchwicki 2015, 62-66.

and must seek professional legal assistance – exercising the right to court and the right of defence (Article 42(2) and Article 45(1) of the Polish Constitution) [Gruszecka 2019, 80-81; Marchwicki 2015, 50-52]. These doubts become when, for establishing objective truth before the court, it is necessary to take evidence, with the consent or upon request of the client, from the testimony of an advocate/attorney-at-law concerning circumstances covered by professional secrecy as part of the legal assistance provided to the client, and which cannot be established by other evidence. The way of resolving this conflict of values (protection of professional secrecy versus the client's interest) through the lens of public interest that safeguards the protection of professional secrecy, indicating an absolute prohibition on testimony, is risky.

The obligation of professional secrecy is established in the interest of the client, so it is the client who should decide on the disclosure of the information covered by it (constituting the client's secret), instructed about the consequences of such a decision by the lawyer representing him/her. However, this should not result in the obligation of the advocate/attorney-at-law to disclose this information, including in particular to testify about circumstances covered by professional secrecy at the request or instruction of his/her client. The advocate/attorney-at-law should refuse to consent when he/she considers that it is contrary to the interest of his/her client (which may take the form of defending the client against himself/herself) or it violates the trust of other persons from whom the advocate/attorney-at-law obtained information covered by professional secrecy. This is a safer solution[36] and is not detrimental to the dignity of the advocate/attorney-at-law and the prestige of the profession of public trust (which otherwise could occur if the client's will is ignored, and therefore the autonomy of client's will is not respected [Giezek 2014, 71-72; Baszuk 2019, 121; Rusinek 2007, 40].

An effect of this proposal is the revival of the debate about the essence and scope of professional secrecy protection. Information covered by the lawyer-client privilege should be absolutely protected (in a way similar to the defence counsel secrecy) from being accessed by third parties (including public authorities conducting the proceedings), which essentially gives it a public character, correlated with the obligation of confidentiality by the advocate/attorney-at-law. Article 261(2) CCP sufficiently protects the advocate/attorney-at-law secrecy, provided that it is responsibly applied by the advocate/attorney-at-law. However, the possibility of testimony by an advocate/attorney-at-law with the client's consent in civil proceedings, concerning

[36] The proposal of amendment could be based on the appropriately reworded evidentiary prohibition contained in Article 2591 CCP with not only the client's consent taken into account but also the consent by the advocate/attorney-at-law. See Błaszczak 2019, 177 pointing out the consequences of introducing such evidentiary prohibition.

matters covered by professional secrecy, requires amendment to Article 6(4) LoA and Article 3(6) AAL, followed by relevant deontological regulations.

This does not imply acceptance for combining procedural roles in the form of giving testimony as a witness by a legal representative regarding the circumstances of the case they are running. A hindrance is the violation of the independence of the advocate/attorney-at-law during procedural acts and the conflict of interest associated with combining factual assistance, which does not fall within the scope of providing legal assistance. Such a situation should be accompanied by the termination of the power of attorney by the advocate/attorney-at-law acting as a witness in order to properly implement the rules of civil procedure. In this respect, the solutions contained in the deontological regulations seem sufficient.

Consequently, the proposed amendment concerning the introduction of item 5 in Article 259 CCP (also in the version modified by legal professional organizations, submitted during the public consultation) seems too far-reaching. It gives the court in civil proceedings the right to take evidence from the testimony of a representative if necessary, and the addition of a new Article 259^2 CCP will prevent the advocate/attorney-at-law to testify as a witness about circumstances covered by professional secrecy as part of the construct of legal excuse in the interest of the represented party, justified by the implementation of values of special importance protected in the legal system. A solution to the problem, not only for the civil procedure, should be sought in the Law on advocates and the Law on attorneys-at-law, in the provisions on the extent of the obligation to protect professional secrecy.

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REQUIREMENTS CONCERNING THE QUALITIES OF A CANDIDATE FOR THE EPISCOPACY IN MEDIEVAL AND CONTEMPORARY ECCLESIASTICAL NORMATIVE ACTS

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Abstract. The author deals with the qualities that a candidate for the episcopacy was expected to have in the Middle Ages and should have today. Such requirements are found in medieval, modern, and contemporary normative ecclesiastical acts. The current basic requirement is found in *Boni Pastoris Imago*. The other requirements are divided into eight categories: canonical, non-canonical, human, spiritual, intellectual, pastoral, *sentire cum Ecclesia*, and social requirements.

Keywords: bishop; diocese; candidate for bishop; qualities; episcopal office.

INTRODUCTION

In my previous paper I discussed the qualities expected of a candidate for bishop in the early Church [Brinda 2024, 347-64]. These qualities follow from the Bible and the experience of prominent spiritual leaders of the early Christian communities. Those attributes were later adopted in conciliar and synodal resolutions of the time. I divided them according to their origin into *ius divinum*, *ius positivum*, and *ius non scriptum*. Then, I subdivided them into human, spiritual, intellectual, *sentire cum Ecclesia* and pastoral qualities. In the early Church, when a bishop was appointed, the emphasis was laid, first and foremost, on his impeccable morality, not his education.

As religious orders developed their schools and when other educational institutions, especially universities, were established in the Middle Ages [Woods 2008, 42-56; Wolter 1973a, 120-23; Idem 1973b, 318-21], it became important for episcopal candidates to receive consistent higher education. However, the first unified catalogue of qualities expected of such a candidate is found only in the 1917 Code of Canon Law. Successive uniform catalogues of qualities appeared after the Second Vatican Council (1962-1965).

Essential attributes are the enduring qualities that the candidate lives out and which set him apart [Black 1993, 1155-156; Smékal 2009, 62].

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1. CANDIDATE'S QUALITIES FOUND IN MEDIEVAL NORMATIVE ACTS

Whenever a candidate for bishop was considered in the Middle Ages, frequent references were made to the qualities mentioned in the Bible,[1] the writings of the Church Fathers and the resolutions of earlier councils and synods [Brinda 2024, 357-62]. However, these characteristics were not unified in normative acts. They are defined positively and negatively. Clergy from poorer social strata could not become bishops because studying, accommodation and other costs of living at universities or other educational institutions did not come cheap. Members of the clergy from wealthy backgrounds were predestined for the episcopacy [Wolter 1973b, 321-22]. Since the Middle Ages, when mandatory celibacy for the clergy became common practice [Denzler 2000, 19-47; Stickler 2008, 11-30],[2] candidates for bishops whose lives embodied the ideal of the Good Shepherd of Jesus Christ known from the Bible have been much in demand.[3]

1.1. Candidate's qualities in *Decretum Gratiani*

Gratian's *Decretum*[4] (1139-1159?), in distinction 23 can. 2, stipulates the qualities that were to be examined sufficiently before episcopal consecration could be conferred, namely whether the candidate for the episcopacy:

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[1] 1 Timothy 3:1-7, New King James Version (NKJV): "This is a faithful saying: If a man desires the position of a bishop [literally 'overseer'], he desires a good work. A bishop then must be blameless, the husband of one wife, temperate, sober-minded, of good behaviour, hospitable, able to teach; not given to wine, not violent, not greedy for money, but gentle, not quarrelsome, not covetous; one who rules his own house well, having his children in submission with all reverence (for if a man does not know how to rule his own house, how will he take care of the church of God?); not a novice, lest being puffed up with pride he fall into the same condemnation as the devil. Moreover he must have a good testimony among those who are outside, lest he fall into reproach and the snare of the devil." 1:5-9, NKJV: "For this reason I left you in Crete, that you should set in order the things that are lacking, and appoint elders in every city as I commanded you – if a man is blameless, the husband of one wife, having faithful children not accused of [b]dissipation or insubordination. For a bishop must be blameless, as a steward of God, not self-willed, not quick-tempered, not given to wine, not violent, not greedy for money, but hospitable, a lover of what is good, sober-minded, just, holy, self-controlled, holding fast the faithful word as he has been taught, that he may be able, by sound doctrine, both to exhort and convict those who contradict."

[2] *Enchiridion symbolorum definitionum et declarartionum, de rebus fidei et morum, Kompendium der Glaubensbekenntnisse und kirchlichen Lehrentscheidungen*, Verlag Herder GmbH, Freiburg im Breisgau 2009, nos. 118, 119, 185, 1809.

[3] John 10:1-18.

[4] *Decretum Magistri Gratiani*, in: *Corpus Iuris Canonici, pars prior*, ed. A. Friedberg, Ex officina Bernhardi Tauchnitz, Lipsiae 1879.

is sufficiently wise and understanding; shows restraint in his observance of morals; practices sexual abstinence; uses alcohol in moderation; faithfully performs the duties entrusted to him; is humble, trustworthy and charitable; is literate and versed in God's law; shows a sound understanding of Scripture; has an expert knowledge of in the dogmatic doctrine of the Church, and can defend the truths of the faith in simple words.[5]

In distinctions 25 and 26, Gratian interprets the qualities of the candidate as prescribed by the pastoral epistles of Saint Paul to Timothy and Titus [Trevisan 1999, 58-59].[6]

Distinctions 35-49 contain qualities defined negatively – ones that prevent episcopal consecration. No man can become a bishop if he: is crippled or tends to inflict self-mutilation; has little understanding of ecclesiastical matters and God's duties; is uneducated;[7] reads pagan literature;[8] does not lead a virtuous life; is not hospitable;[9] shows no restraint;[10] frequents an inn and overeats;[11] is a quarrelsome or envious person; is a sycophant, jester, scandalmonger, usurer, or has been removed from his office before.[12]

Under specified conditions, a soldier, a servant, a subject, an ill person, a priest's son, an illegitimate descendant, or even a person not versed in ecclesiastical matters could become a bishop [Weiler 2003, 59-65; Erdö 1996, 105-27].[13]

1.2. Candidate's qualities mentioned in Pope Gregory IX's Decretals

Pope Gregory IX included in his Decretals[14] (1234) the decisions of the Third Lateran Council (1179), where the Conciliar Fathers decided that a candidate for bishop must be at least thirty years old, of good nature, sufficiently educated, born of a legitimate marriage, unmarried, not liable to any ecclesiastical penalty, must lead an exemplary life to be a role model for others.[15] A man who failed to model his life upon the image of the Good

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5 D.XXIII, c. 2.

6 Tit 1:5-9; 1 Tim 3:1-13; 2 Tim 3:1-5; D.XXV, 3.3; D.XXVI, 1.

7 D.XXXVI, c. 1-2.

8 D.XXXVII.

9 D.XL.-XLII.

10 D.XLIII.

11 D.XLIV.

12 D.XLV.-XLVI.

13 D.LI.-LIX.

14 Gregory IX, *Decretales*, in: *Corpus Iuris Canonici, pars secunda*, ed. Aemilius Frieberg, Ex officina Bernhardi Tauchnitz, Lipsiae 1881, p. 1-928.

15 X.I.6 c. 7; see Sobór Laterański III, *Canones*, in: *Dokumenty Soborów Powszechnych. Tekst grecki, łaciński polski*, vol. II (869-1312), ed. A. Baron, H. Pietras, Wydawnictwo WAM, Księża Jezuici, Kraków 2003, p. 168-207, can. 3.

Shepherd could not be ordained bishop.[16] The document also included the decision made by Pope Innocent III that a subdeacon could be appointed bishop [Trevisan 1999, 59-60; Weiler 2003, 65-68].[17]

1.3. Candidate's qualities in the documents of the Council of Trent

The Council of Trent (1545-1563) was convened in response to the burgeoning Reformation. The decrees issued by the Council concerned the Church's doctrine, bishops, presbyters and lay people at large, as well as a liturgical reform emphasising the real presence of Jesus Christ in the Eucharist. Even in the conciliar documents the requirements as to the candidate's qualities are not systematised. The Conciliar Fathers would approve what had already been written down, even if irregularly, in previous collections of laws.

They concluded that the candidate for the episcopacy must have the qualities stipulated by the Third Lateran Council (1179).[18] Moreover, a bishop should be able to mend the ways of those who have erred through human weakness, and therefore should – while always being mindful of his role as the shepherd of those who have gone astray – love people as his own sons and brothers, be able to admonish and encourage, be kind and patient, ready to punish firmly but not too harshly, be just yet merciful, severe yet kind. He must not be a murderer (*percussor*).[19] The Fathers also pointed out that all clerical persons should always bear in mind that they were called to a life as willed by God – therefore, their dress, gestures, manner of walking, speech and all other kinds of behaviour should be filled with dignity, temperance, piety – all to command respect. A man like this was to live honestly, carrying out his duties in God's service, and undergo education. Clergy were to shun debauchery, drunkenness, dances, gambling, crime and lay occupations.

The Council Fathers further mandated that men eligible for cathedral churches be born of a legal marriage, of the required age, and of good moral standing, at least six months from their last ordination, distinguished by their education; they also were to hold a master's degree, doctorate or licentiate in sacred theology[20] or canon law, or hold a certificate proving their

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[16] Luke 15:1-10; John 10:1-18; X.I.22; II.29.; III.2.-4; IV.6.; V.14.; V.24-29.

[17] X.I.14. c. 9.

[18] Lateran Council III, *Canones*, in: *Dokumenty Soborów Powszechnych. Tekst grecki, łaciński polski*, vol. 2, p. 168-207, can. 3. *Decretum de Reformatione*, Sessio VII (3.03.1547), in: Concilium Tridentinum, *Canones et decreta sacrosancti oecumenici Concilii Tridentini sub Paulo III. Iulio III. et PIO IV. Pontificibus Maximis*, Ex Ufficina Bernhardi Tauchnitz, Lipsiae 1887, p. 46-50, C. I.

[19] *Decretum de Reformatione*, Sessio XIII (11.10.1551), in: Concilium Tridentinum, *Canones et decreta sacrosancti oecumenici*…, p. 65-68, C. I.

[20] *Universita*, in: *Ottův slovní naučný*, vol. 26, 188-96, Vydavatel a nakladatel J. Otto v Praze, Praha 1907, p. 189. A student who has passed a university master exam. The holder of a *licentia*, known as *Licentiatus docendi*, was qualified to be an independent university teacher.

ability to teach others issued by another academy; they had to be capable of discharging their future obligations. In addition, members of religious orders needed a certificate from their superior.[21]

The Conciliar Fathers also resolved that qualities of a candidate for the episcopacy had to be specified by provincial synods convened by the metropolitan bishop. Conclusions formulated during a candidate examination were to be submitted to the pope, so that he could finally decide who would be a bishop.[22] This is a novelty regarding the candidate's requisite qualities.

2. CANDIDATE'S QUALITIES MENTIONED IN THE 1917 CODE OF CANON LAW

Until 1917, canon law was laid down in numerous collections of legal regulations. The 1917 Code of Canon Law[23] was first to stipulate the qualities of a candidate for the episcopacy so that they would make up a coherent body of norms. The qualities were codified by the ecclesiastical legislator in Book II, Canon 331 § 1.[24] The candidate's suitability was to be ultimately judged by the Apostolic See, and the Roman Pontiff was free to appoint him as bishop (Canons 329 § 2 and 331 § 3 CIC/17).

The following qualities and qualifications are assessed objectively: being born of a legitimate marriage, being at least 30 years of age and five years within his priestly ordination, having a doctorate or at least licentiate in sacred theology or canon law from a university or an academic institute approved by the Holy See, or being at least truly proficient in these fields. If the candidate was a member of a religious order, he was obliged to submit

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[21] *Decretum de Reformatione*, Sesso XXII (17.9.1562), in: Concilium Tridentinum, *Canones et decreta sacrosancti oecumenici…*, p. 123-29, C. I.-II; Gregorius XIV, Const. *Onus apostolicae* (15.05.1591), in: *Codicis Iuris Canonici Fontes*, vol. I, ed. P. Gasparri, Typis Polyglottis Vaticanis, Romae 1947, p. 321-27, § 1, 7-9.

[22] *Decretum de Reformatione*, Sessio XXIV (11.11.1563), in: Concilium Tridentinum, *Canones et decreta sacrosancti oecumenici…*, p. 123-28, C. I; *Decretum de Reformatione*, Sessio XIII (11.10.1551), in: Concilium Tridentinum, *Canones et decreta sacrosancti oecumenici…*, p. 65-68, C. I.

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

[24] "Ut quis idoneus habeatur, debet esse: 1. Natus ex legitimo matrimonio, non autem legitimatus etiam per subsequens matrimonium; 2. Annos natus saltem triginta; 3. A quinquennio saltem in sacro presbyteratus ordine constitutus; 4. Bonis moribus, pietate, animarum zelo, prudentia, ceterisque dotibus, praeditus, quae ipsum aptum efficiant ad gubernandam dioecesim de qua agitur; 5. Laurea doctoris vel saltem licentia in sacra theologia aut iure canonico potitus in athenaeo aliquo vel in Instituto studiorum a Sancta Sede probatis, vel saltem earundem disciplinarum vere peritus; quod si ad religionem aliquam pertineat, a suis Superioribus maioribus vel similem titulum vel saltem verae peritiae testimonium habeat."

a certificate from his superiors confirming his scholarly degree or genuine proficiency in the required disciplines.

The following qualities were assessed subjectively: good morals, piety, true concern for the souls, foresight. In addition, the candidate also had to meet other qualifications necessary to lead the designated diocese [Bączkowicz, Baron, and Stawinoga 1957, 507].

During the preparatory work on a codification for the Eastern Churches, Pope Pius XII issued an apostolic letter motu proprio *Cleri Sanctitati* (1957), where the wording of Canon 331 § 1 CIC/17 was determined, with a proviso that the candidate must not be married.[25]

3. PRINCIPLES UNDERLYING THE POSTCONCILIAR NORMATIVE ACTS

Pope John XXIII convened the Second Vatican Council (1962-1965) so that the Church could formulate an adequate response to the signs of the times. Although the Conciliar Fathers did not adopt a new ecclesiastical doctrine, the conclusions arrived at during the Council have deeply transformed the understanding of liturgy and the mission of the Church, clergy and the lay faithful. The preliminary requirements for candidates for diocesan bishops were not addressed by the Council until later.

3.1. Qualities mentioned in *Normae de promovendis ad Episcopale ministerium in Ecclesia latina*

In 1972, the Council for the Public Affairs of the Church issued *Normae de promovendis ad Episcopale ministerium in Ecclesia Latina* concerning the appointment of presbyters for the exercise of episcopal tasks. It was recalled that a candidate for bishop should be properly evaluated for qualities that should necessarily characterise a good pastor of souls. They can be divided into five categories:

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[25] Pius PP. XII, Litterae apostolicae motu proprio date *Cleri Sanctitati* (02.06.1957), AAS 49 (1957), p. 433-603, Canon 394 § 1: "Ut quis idoneus habeatur, debet esse: 1° Legitimis natalibus praeditus, non autem legitimatus etiam per subsequens matrimoniu; 2° Vinculo matrimoniali non ligatus; 3° Annos natus saltem triginta; 4° A quinquennio saltem in presbyteratus ordine constitutus; 5° Bonis moribus, pietate, animarum zelo, prudentia, ceterisque dotibus praeditus, quae ipsum aptum efficiant ad gubernandam eparchiam de qua agitur; 6° Doctor vel saltem prolyta in sacra theologia aut iure canonico renuntiatus ab Athenaeo aliquo vel Instituto studiorum a Sede Apostolica probatis, vel saltem earundem disciplinarum vere peritus; quod si ad Religionem aliquam pertineat, a suis Superioribus maioribus vel similem titulum vel saltem verae peritiae testimonium habeat. § 2. Etiam electus vel quoquo modo ab illis designatus, qui privilegio a Sede Apostolica concesso vel agnito eligendi aut designandi gaudent, debet memoratis qualitatibus pollere. § 3. Iudicare definitive num quis idoneus sit, ad Apostolicam Sedem unice pertinet."

1) personal qualities: being a good pastor of souls and teacher, of good reputation, rectitude and constancy, of a good nature, with a proper family background, of adequate health, proper age and stable family situation;
2) intellectual qualities: having a profound knowledge of dogmatic theology, moral theology and canon law; having masterful discernment, sharp intellect, and a sound knowledge of life;
3) *sentire cum Ecclesia* qualities: devout faith, respect for the Apostolic See, fidelity to ecclesiastical doctrine;
4) spiritual qualities: exemplary devotion and dedication;
5) pastoral qualities: pastoral zeal, leadership skills, social sensitivity, capacity for dialogue and cooperation, discernment of the signs of the times, ability to see view different matters from various angles [Barberena 1972, 657-82].[26]

The Norms represent the first collection of essential qualities of the candidate for the episcopacy issued by the Holy See after the Second Vatican Council, since the 1917 Code was promulgated.

3.2. Qualities mentioned in *Ecclesiae Imago*

In 1973, the Congregation for Bishops issued the Directory on the Pastoral Ministry of Bishops *Ecclesiae Imago*,[27] informed by the need to revisit the ideal kind of a bishop who would be best suited for the changing times. In those circumstances, a more detailed handbook was drafted on the Council's teaching (*ratio*) contained in the Decree on the Pastoral Office of Bishops in the Church *Christus Dominus*.[28] The theological framework for episcopal ministry was drawn basically on the Dogmatic Constitution on the Church *Lumen Gentium*. The document was legally grounded in the 1917 Code. The Congregation presented the ideal bishop as a person fully moral, ascetic and mystical in his ministry [Uggé 2010, 388-89].

The attributes mentioned in the Directory centre on the bishop's spiritual profile, who must: be a man of the Church who knows how to be a shepherd, a father and a brother; be a disciple of Christ, an authentic teacher and model of Christian faith and virtue; mystically betrothed to the Church; be authentic and aware that he participates in the common priesthood of all people of God and in complete priestly ministry and the hierarchical system of the Church; be able to teach the Word of God with authority, standing

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[26] Council for the Public Affairs of the Church, Normae de promovendis ad Episcopatum in Ecclesia latina (25.03.1972), AAS 64 (1972), p. 386-391, Article VI, 2.

[27] Congregation for Bishops, Directorium de pastorali ministerio Episcoporum *Ecclesiae imago* (22.02.1973), Typis Polyglottis Vaticanis 1973 [hereinafter: EI].

[28] Vatican Council II, Decretum de pastorali Episcoporum munere in Ecclesia *Christus Dominus* (28.10.1965), AAS 58 (1966), p. 673-96 [hereinafter: CD], no. 44.

guard to it and interpreting it authentically; be able to admonish the faithful; officiate the liturgy and administer the sacraments in an exemplary manner; be able to discern charisms under the guidance of the Holy Spirit; steadfastly pray for pastoral grace; be able to seek out collaborators to effectively direct the particular Church; make supplications to God for self-improvement in theological and moral virtues; have a mature and true faith; live a life of hope, obedience, perfect chastity, poverty, pastoral prudence, and practical wisdom; be able to spiritually guide and make decisions; show mercy as a leader, honest conduct in a community, and constant and wise concern for the clergy entrusted to him and the entire people of God (EI 14-31).[29]

3.3. Qualities (virtues) mentioned in *Apostolorum successores*

In 2004, the Congregation for Bishops issued a new Directory on the Pastoral Ministry of Bishops *Apostolorum successores*. With this Directory, the Congregation actualises and reiterates the image of the ideal bishop we know from *Ecclesiae Imago*, as well as reflecting the conclusions of the Tenth Ordinary General Assembly of the Synod of Bishops in Rome in 2001, during which the participants discussed the theme "The Bishop: Servant of the Gospel of Jesus Christ for the Hope of the World" [Uggé 2010, 391-92]. The Directory is based on the teaching of Vaticanum II, the 1983 Code of Canon Law, and Pope John Paul II's postsynodal exhortation *Pastores gregis*.[30]

In chapters 3 and 5, the Directory presents the qualities a bishop should possess. The large part of them also concern candidates for the episcopacy. The qualities fall into three categories, with the spiritual attributes given the greatest prominence.

1) Spiritual qualities. The bishop should emulate the saints, be in love with Christ, act as a moral authority and be authentic, promote and exemplify Christian perfection, have the mentality of Christ and a humble Marian spirituality, be a man of prayer, adoration, the Word of God and *lectio divina*, lead an exemplary sacramental life, be a man of theological virtues of faith, hope and charity, be a man of pastoral and brotherly love in the spirit of collegiality, be open to acceptance, counsel, encouragement and consolation, be able to discern and interpret the signs of the times and the inspiration of the Holy Spirit, constantly

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[29] Vatican Council II, Constitutio dogmatica de Ecclesia *Lumen gentium* (21.11.1964), AAS 57 (1965), p. 5-75 [hereinafter: LG], nos. 12, 18-21, 24-29; Idem, Decretum de presbyterorum ministerio et vita *Presbyterorum ordinis* (07.12.1965), AAS 58 (1966), p. 991-1024; nos. 3, 14; CD 2, 12-21, 28; Idem, *Decretum de apostolatu laicorum Apostolicam actuositatem* (18.11.1965), AAS 58 (1966), p. 837-64; EI 14-31.

[30] John Paul II, Adhortatio apostolica post-synodalis de Episcopo ministro evangelii Iesu Christi pro mundi spe *Pastores gregis* (16.10.2003), AAS 96 (2004), p. 825-924.

and diligently cultivate his theological knowledge, faith and morality, be moved by a missionary spirit, be prudent, polite, kind, friendly, level-headed, fatherly and brotherly, follow good customs, be strong, humble, polite, patient, courageous and firm in his decisions based on equitable norms, show fortitude and oppose all abuses of power and arbitrary decisions, be obedient to the Will of God and the authority of the Church, discharge his duties untiringly, practice ascetic discipline and live in chastity, be truly and visibly poor, give alms generously.

2) Human qualities. The bishop should exercise self-control, be gentle, patient and restrained; should not build walls around himself but, on the contrary, show a lot of humanity and a great, good and loyal spirit; have a strong and cordial character; be open-minded and insightful, sensitive to the joys and sufferings of brothers and sisters.
3) Pastoral qualities. The bishop should be creative, able to direct wisely and act prudently; be able to accept responsibility, facilitate dialogue, listening, and to exercise his authority; be ready to serve; be charitable, respect the rights of others; humbly seek new initiatives.[31]

4. CANDIDATE'S QUALITIES REQUIRED BY THE 1983 CODE OF CANON LAW

When a candidate for an ecclesiastical office is considered, his qualities are evaluated as stipulated by the ecclesiastical legislator in the 1983 Code of Canon Law.[32] This is a canonical assessment [Trevisan 1999, 61]. If the candidate does not meet any of the requirements, the Holy See may dispense him from it.

The first and most important requirement is the full communion with the Catholic Church. The other qualities are: being capable of holding public ecclesiastical offices (Canon 96, 149, 205 CIC/83) [Tkhorovskyy 2004, 192-95] and meeting the conditions for the validity and liceity that are requisite for the diaconate and presbyterate.

4.1. Qualities set forth by Canon 378 § 1

The canon concerning the requisite qualities is the fourth in order and is found in Book II: The People of God, Part II: The Hierarchical

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[31] LG 24-27, CD 13, 16, 28; Congregation for Bishops, Direttorio *Apostolorum successores* per il ministero pastorale dei vescovi (22.02.2004), Libreria Editrice Vaticana, Città del Vaticano 2004 [hereinafter: AS], 33-69.

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

Constitution of the Church, Section II: Particular Churches and Their Groupings, Title I: Particular Churches and the Authority Established in Them, Chapter II: Bishops, Art. 1: Bishops in General (Canon 375-380 CIC/83). The catalogue of qualities is retained from the previous codification of CIC/17, Canon 331 § 1. The only requirement removed by the legislator was that the candidate be born of a legal marriage.

The qualities necessary for episcopal consecration are exhaustively laid down in Canon 378 § 1: "In regard to the suitability of a candidate for the episcopacy, it is required that he is: 1º outstanding in solid faith, good morals, piety, zeal for souls, wisdom, prudence, and human virtues, and endowed with other qualities which make him suitable to fulfil the office in question; 2º of good reputation."

The legislator lays emphasis chiefly on moral qualities. The first points of the canon in question characterise the candidate as a person, Christian and priest, so they can be assessed subjectively.

In points 3-5, the canon stipulates the qualities that can be assessed objectively and are unambiguously verifiable. A person to be consecrated as a bishop is required to be at least thirty-five years old (3º), be a presbyter for at least five years (4º), hold a doctorate or at least a licentiate in biblical science, theology or canon law, or be a graduate of an institute of higher studies recognized by the Apostolic See, or "at least expert in the same disciplines" (5º).

In Canon 378 § 1, the ecclesiastical legislator does not require the candidate to be experienced in pastoral care, because it concerns only qualities necessary for a rightful and canonical evaluation of the candidate. A more detailed appraisal (abilities and pastoral experience) is to be carried out in a secret manner by the nuncio or suitable Roman dicasteries. The final decision belongs solely to the pope (Canon 377 § 3 and 378 § 2 CIC/83).

In the Code of Canons of the Eastern Churches,[33] Canon 180,[34] the requirements imposed by the church legislator on a candidate for the episcopacy are the same as those stipulated by CIC/83. The only difference is that the candidate for the episcopacy must be not be bound by a matrimonial bond (§ 3), that is, must live in celibacy, widowed or a priest whose marriage was declared canonically invalid by a competent ecclesiastical tribunal [Motiuk 2019, 430].

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[33] *Codex Canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus* (18.10.1990), AAS 82 (1990), p. 1033-364 [hereinafter: CCEO].

[34] "Ut quis idoneus ad episcopatum habeatur, requiritur, ut sit: 1° firma fide, bonis moribus, pietate, animarum zelo et prudentia praestans; 2° bona existimatione gaudens; 3° vinculo matrimonii non ligatus; 4° annos natus saltem triginta quinque; 5° a quinquennio saltem in ordine presbyteratus constitutus; 6° in aliqua scientia sacra doctor vel licentiatus vel saltem peritus".

4.2. Qualities resulting from the law

The episcopal candidate must himself judge whether he possesses qualities other than those specified by the legislator in the Code or other documents of the Magisterium.

The candidate should also be aware of the fact that as a bishop – in comparison with the range of functions that a parish priest is expected to fulfil (Canon 528-530 CIC/83) – he will be much more conspicuous in the community of the faithful, preaching the Word of God in public, officiating liturgy in an exemplary manner, administering sacraments and governing the whole diocese. He should also remember that by preaching he will form the laity and clergy. He should be able to proclaim the pure and unadulterated faith in conformity with the proper doctrine of the Magisterium. For that reason, he should reflect on what and how he proclaims and teaches to the lay faithful of all ages and intellectual abilities, and whether he is easily understood, knowledgeable, consistent and authentic.

In matters of liturgy, the candidate should also realise that Our Lord Jesus Christ, the Supreme High Priest, will be truly present with his mediation (LG 21). What is more, he should be fully aware that in his governance of a diocese he will have to make decisions that should be dignified and worthy of a successor of the Apostles (Canon 375 CIC/83). He will need to consider how to apply civil law and canon law, enforce them, and possibly demand canonical respect and obedience, which are due to him (Canon 212, 273 CIC/83).

The candidate should also realise that the People of God will regard him as a highly respected person, who will or will not meet their expectations – who was chosen by God himself, because he is a man of God with a strong personal spirituality, charisma and authority, and for these reasons he should be respectable and credible. The People of God and other clergy will be more interested in his human and Christian attributes than his scholarly degrees from pontifical universities.

A bishop cannot direct a diocese single-handedly, so the candidate should contemplate how and with whom, if need be, he will establish a group of collaborators to make the governance of the diocese as effective as possible (Canon 369 CIC/83). He should make choices such that properly qualified people fill appropriate managerial positions (AS 61).

The candidate for bishop is to remember that, as a bishop, he will be the first to proclaim the Gospel, both with his words and his life – he will be a missionary in his own diocese. For these reasons, he should consider to what extent he is capable of listening to the faithful, non-believers and people of different faiths. He should welcome believers and non-believers, being sensitive to the needs of his diocese, the world and the entire Church [Trevisan 1999, 66-68].

5. CONCLUSION: THE QUALITIES OF A CANDIDATE FOR THE EPISCOPACY

Just like in the past, the choice of a new bishop attracts a great deal of public interest, and of the mass media recently. Since the Middle Ages, choosing a candidate has been less and less based on qualities mentioned in the Bible and in the Epistles of Saint Paul (*ius divinum*).[35] Of course, emphasis on the moral profile and education of the candidate has been retained. Since the Council of Trent, the local and current differences in the customary law (*ius non scriptum*) have become blurred. The Conciliar Fathers prescribed that when a suitable candidate for the episcopacy is being chosen, his higher education is of relevance. It was also decided that the final choice is solely the pope's. The qualities of a candidate for bishop were harmonised in compliance with proposals submitted by councils (*ius positivum*).

In the medieval period, a new quality emerged expected of an episcopal candidate: his resemblance to the image of the Good Shepherd (*Boni Pastoris Imago*) – his resemblance to Jesus Christ the Good Shepherd, the one we know from the Gospel.

The qualities I have addressed here follow from a reflection and examination of sources of canon law and literature. They can be encapsulated in nine categories. Some are considered positive and can be assessed objectively and subjectively – ones that can be easily verified by everybody and ones that can be assessed subjectively (on a case-by-case basis).

5.1. *Boni Pastoris Imago*

The life of the candidate for the episcopacy should testify to his adherence to the image of the Good Shepherd,[36] which is to say that he should know his flock, and the sheep should know him; he should take care of them on equal terms, even those other than his own; he should be willing to make sacrifices for the sake of the sheep in his care, he should be a shepherd "with the smell of the sheep" and at the same time spread the scent of God.[37]

5.2. Canonical qualities

Canonical requirements concerning a candidate for the episcopacy are precisely laid down by the ecclesiastical legislator in CIC/83, in Canon 378

[35] Titus 1:5-9; 1 Timothy 3:1-13; 2 Timothy 3:1-5.

[36] Luke 15:1-10; John 10:1-18.

[37] Francesco, *Incontro con i Vescovi del Myanmar* (29.11.2017), https://www.vatican.va/content/francesco/it/speeches/2017/november/documents/papa–francesco_20171129_viaggioapostolico–myanmar–vescovi.html [accessed: 09.04.2024].

and other normative acts of the Church. These attributes relate only to requirements essential for a legitimate and canonical appraisal of an episcopal candidate. If the candidate does not meet any of the canonical requirements, the pope grant him a dispensation.

5.3. Non-canonical qualities

The non-canonical qualities of a candidate for bishop are not precisely defined by the ecclesiastical legislator. They are assessed in the secret examination conducted by the pontifical legate. He should consult some of the members of the college of consultors and the cathedral chapter, hear the opinions of other members of the diocesan and religious clergy, as well "laity outstanding in wisdom" (Canon 377 § 3). The legate's examination can involve the assessment of not only the pastoral activity of the candidate, but also his moral profile, academic career, social sensitivity, and many other aspects of his private life.

5.4. Qualities of the person

A candidate for bishop should be kind and polite, regard all people with equal attention, be a good listener, mentally balanced, emotionally mature, adequately educated, life-wise and sincere. He should be guided by his own opinion, able to express in clear language, be brave, courageous, unwavering, just and gentle; he should have the ability to maintain close relationships with people; his family and property affairs should be well-ordered, he should be able to manage the Church's property; he should also enjoy healthy respect among the clergy, religious and laity.

5.5. The *sentire cum Ecclesia* qualities

These are as follows: spreading the authentic teaching of the Church that is free from dogmatic errors, applying the Magisterium and availing oneself of the rich tradition of the Church, showing obedience to the pope and the Holy See, having a knowledge of the documents of the Roman Curia, being ecumenical and missionary.

5.6. Intellectual qualities

Irrespective of his education, the candidate should have practical judgement and perspicaciousness resulting from life wisdom, ability to contemplate things at depth, be sensible, have an adequate knowledge of culture, society, politics and history, have suitable academic training, be able to teach, have the desire for continuing education in matters other than ecclesiastical,

be able to hear the opinions of experts in various fields, be able to express himself coherently, and have consistent views.

5.7. Spiritual qualities

As regards the spiritual side, the candidate for bishop should be a priest following the example of the Good Shepherd and the saints, he should be genuinely a man of God and of theological virtues, an expert in Holy Scripture, a man of profound and intense prayer, sacraments, Eucharist, liturgy. He should worship Mother of God, he should be humble and modest, live in celibacy, and be willing to undergo continuing formation.

5.8. Pastoral qualities

The following are considered pastoral qualities: learning from the past and being forward-looking, co-creating and participating in pastoral initiatives, being eager and committed, able to recruit collaborators, build, manage and assume responsibility for the team, motivating and rousing people to common action; having the ability to present projects, activities and initiatives, having authority and commanding respect as a father; being discerning, inspired by the Holy Spirit, able to discern the charisms of both communities and individuals, as well as living for the people of God entrusted to him.

5.9. Social qualities

Finally, there is one non-canonical quality that is essential for the image of the Good Shepherd in the Church. Nowadays, the candidate for the episcopacy cannot escape the attention of the mass media, which can trace not only people's names but also qualities that should characterise the alleged candidate for bishop. He must accept that as a diocesan bishop he will have to give interviews and statements on various media platforms. As a representative of the diocese and the Church, he will have to comment on and judge, either positively or negatively, various social, historical, political, cultural and religious issues. For that reason, the candidate should take time to reflect whether he can bear the pressure of the media and their attention.

He is evaluated, first and foremost, as a person, Christian, and a priest. Each of these qualities can be further deliberated, elaborated on, and defined, whether positively or negatively. The final canonical decision on the suitability of a candidate for the episcopacy rests with the pope.

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THE LEGAL DEVELOPMENT OF LAND TENURE IN THE UNITED STATES: HISTORY, POLITICS, AND ECONOMIC POWER

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Abstract. Land ownership in the United States is a fundamental economic, social, and legal development issue. This study examines the development of American land ownership from the colonial period to the present day, influenced by legal precedents and state policy. Through legal analysis, the impact of the Discovery Doctrine and Johnson v. M'Intosh decisions on Aboriginal land ownership is discussed, the role of the Homestead Act in the process of land democratization and its subsequent stage in the context of the mechanism of corporate land ownership. The study also analyzes the importance of the social function of land and the state's role in managing land ownership. International comparative analysis contributes to a better understanding of the features of the American land ownership model and its contemporary problems.

Keywords: legal land reforms; historical land tenure; corporate land ownership; public land policies.

INTRODUCTION

Land ownership is one of the fundamental issues in the social, economic, and political development of the United States. Its history reflects not only the formation of land ownership models, but also problematic relations between social groups, the transformation of state policy, and changes in the legal order. The process of land legal regulation has always been at the center of the intersection of international law, domestic politics, and economic processes, where legal precedents, industrial development, and issues of social justice have intersected with each other [Robertson 2005, 56-78].

The history of American land ownership can be divided into several phases: 1) Colonial land tenure – the influence of English legal traditions

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and the distribution of land through royal charters [Allen 1991, 1-23]; 2) Expropriation of Aboriginal Lands – Based on *the Discovery Doctrine* and *Johnson v. M'Intosh* decisions, restrictions on the right to land ownership of Indigenous peoples under American law [Edwards 2008]; 3) The Homestead Act and the attempt to democratize land – state land subsidies and small farmer empowerment policies [Perdue and Green 2004]; 4) Land concentration and corporate dominance – the impact of the Industrial Revolution on the land tenure system, the growth of financial speculation, and the marginalization of small farmers [White 2011].

The social function of the land ownership system in the United States has historically been defined as an instrument of individual well-being and social development, although individual legal and economic changes have often violated this equality. Government policies that served the equal and fair distribution of land eventually gave way to the interests of capitalist expansion and industrial development [Hibbard 1924, 546-50].

This article examines the development of land tenure in the United States, the influence of legal precedents, and the role of the state in land governance. It discusses the historical, legal, and economic contexts that shaped the fairness of land rights, the expropriation of Aboriginal people, and the transition to democracy. On the way the road and capitalism Roots To stand up.

This study aims to explore how the social function of land in the United States has changed and how it has transformed from an instrument of equality and general welfare into a mechanism for the accumulation of economic power. The study is based on the method of legal analysis, which includes the study and evaluation of judicial precedents, legislative acts, and international legal norms. It also uses economic and historical methods that analyze the "dynamics" of land ownership in a socio-economic context. Through comparative legal analysis, international examples of the development of land ownership systems are considered, which makes it possible to better understand the uniqueness of the American model and its global context.

1. SOCIAL FUNCTION OF LAND

Understanding the social function of land is a central part of the legal and economic science of land [McDonald and Freyfogle 2007, 1107]. Land is not just an economic asset, but its use should serve the public good. As Hernando de Soto has noted in his studies, "land should not be perceived simply as an object of property, but as an instrument that ensures the sustainable development of society" [de Soto 2000, 125-200].

Thus, the social function of land is related to both individual property rights and its public purpose and according to this concept, property rights

cannot be absolute, as they are related to public interest. Accordingly, land management policy is based on taking into account the public interest, which implies long-term and environmentally sustainable use of land.

The social function of land is of particular importance for urban planning and the establishment of order in the agricultural sector [Fernandes 2007, 177]. For example, the legislative order often reflects the principle that "the right to own land includes not only the right to possess and dispose of it but also the obligation not to use it contrary to the public interest" [Crawford 2011, 1090].[1]

the social function of land, as already noted, its regulation depends on the historical, social, and economic context. For example, in Western European countries, land management strategies are often based on eco-social models, while in developing countries the social function of land is mostly associated with the process of legalization of property rights [Payne 2011, 415]. The process of legalization of land ownership is determined by the historical land tenure structure, legal uncertainties, etc. Many developing countries have not had a formal land registration system for a long time, as a result of which a significant part of land plots are owned *de facto*, but not de jure.

In some countries, such as Brazil, this principle is enshrined in the constitution. reflected in the German Constitution, where the property right is considered not only in the context of private use but also in the context of public purpose. The German Basic Law (*Grundgesetz*) also contains the principle that private property must serve the public good (Article 14 GG). The public function of land is also reflected in EU law in the case law of the European Convention on Human Rights (ECHR) on property rights. Thus, international legal frameworks Establish general principles of land use and distribution, which are often translated into national policies to regulate land management models.

Global experience shows that in developed countries the social function of land is strictly defined. For example, in Sweden, the state controls land use so that it does not become excessively concentrated in the private sector.[2] On the other hand, in the USA the land market is largely subject to market principles, which often leads to urban speculation and housing prices. Sharp growth [Harvey 2003, 939] in urbanization Tempo With growth Together, developing countries often neglect the social function of the land. A trend that leads to the marginalization of low-income groups. The role of the state is particularly important in this process, as it regulates land management and ensures the balancing of property rights with the public interest.

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[1] Ibid., bk. 2, ch. 1, Civ. Code of Ga.

[2] *Plan and Building Act* (2010:900) (Swed.), https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/plan--och-bygglag-2010900_sfs-2010-900 [accessed: 15.02.2025].

Faces new problems. Climate change forces states to pay more attention to environmentally sustainable land use. For example, the EU's environmental policy requires that land be used by the principles of sustainability to avoid degradation[3] of ecosystems. The growth of financial speculation creates the danger that land will be transformed into a commercial asset, reducing its accessibility to the wider population.

2. THE EVOLUTION OF LAND TENURE IN AMERICA: PROPERTY TRANSFORMATION AND LEGAL FOUNDATIONS

The legal and social construction of US land has historically been shaped by several fundamental processes, including the adoption of English legal traditions as well as the influence of colonialism and economic expansion [Allen 1992, 1774-815].

2.1. Colonial land ownership and the influence of English law

The settlement of North America by Europeans significantly transformed the legal and economic concepts of land ownership [Robertson 2005]. Land, which had originally been owned and managed collectively by Native American tribes, became the primary object of private property during the colonization process [Allen 1992, 1774-815]. These changes were particularly inspired by the English legal tradition and its concepts.

The English legal system was based on feudal principles, which held that land belonged to the "sovereign" (the British monarch), and that individuals were granted only temporary usufruct or conditional ownership [Nelson 1975, 1760-830]. It was on this legal model that land was distributed in North America through royal charters and grants.

Royal charters, issued by the British monarch, were a legal mechanism by which individuals or legal entities (such as the Virginia Company) were granted exclusive rights over certain territories [Andrews 1934]. This approach led to the concentration of land ownership in the hands of private interests, which later became one of the main causes of socio-economic inequality.

The settlement of new colonies and their control were of particular importance to the English government. This was the purpose of the "Headright System," which was introduced in the Virginia colony in 1618. This system provided that a colonist who financially secured the arrival of an immigrant to America would be given 50 acres of land in exchange for each migrant.[4]

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[3] Cong. of Local & Reg'l Auths., Right to the Environment: Proposal for a European Charter (Council of Eur. 2022).

[4] Library of Cong., Virginia Colony, 1611-1624, https://www.loc.gov/classroom-materials/

This system differed markedly from the feudal property model established in Europe, as it created favorable conditions for the privatization of land and the expansion of private property. Legal entities that financed the arrival of new immigrants received large land plots, which allowed them to establish large plantations and farms.[5]

This system led to an unequal distribution of land and a clear distinction between social classes. The wealthy, who owned land, became a landed aristocracy, while the majority of immigrants, who could not find the financial resources to come to America, were forced into Indentured servitude. This system was particularly relevant in 17th-century North America, where it played an important role in shaping land ownership and the socio-economic structure, and also made possible the system of land leasing. Get involved [Galenson 1981, 446].

Agricultural production led to a sharp increase in the demand for labor, which was initially met [Eltis and Engerman 2000, 123] by the institution of temporary slavery of immigrants from Europe. However, from the mid-17th century, as the number of free European immigrants decreased, the colonies turned to African slave labor, which led to the rise of the slave economy in the Western Hemisphere.

New forms of land ownership also influenced the toponymic development of North America. New territories were often named after English toponyms (e.g., New York, Richmond, Jamestown), reflecting increasing British legal and political influence. The "Headright System" and the British legal tradition laid the foundation for the future development of the American land tenure system [Burrows and Wallace 1898, 147-65].

The strengthening of the large landowning class – an elite layer was formed, which later played a decisive role in shaping the political and economic structure of the United States [Morgan 1975, 145-75].

Limitation of the social function of land – land has become an object of private ownership and financial exploitation, while its public benefits have been sharply limited.

Legal precedents – Under the influence of English law, the legal concepts of fee simple and absolute ownership were formed, which are still part of American land law [Banner 2005, 89-112]. Thus, the interaction of the British legal model and the "Headright System" determined the legal, social, and economic foundation of US land ownership, which is still reflected in the country's land ownership policy and social structure.

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united-states-history-primary-source-timeline/colonial-settlement-1600-1763/virginia-colony-1611-1624/ [accessed: 15.02.2025].

[5] Am. Hist. Cent., Headright System in Colonial America, https://www.americanhistorycentral.com/entries/headright-system-in-colonial-america/ [accessed: 15.02.2025].

The English legal tradition on US land ownership can be described in terms of legal pluralism. Even in a context where local and colonial legal systems interacted, often in conflict. In this process, institutional Economics and law Realism contributed to the formation of a land ownership model that considered the interests of the state and the private sector, which ultimately became the basis of capitalist land ownership.

Although the Headright System was originally designed to accelerate the economic development of the colonies, it led to the concentration of land among economic elites. This process must be viewed from the perspective of legal realism, noting that legal instruments often serve the interests of specific social groups. As a result, the strengthening of the large landowning class contributed to economic inequality, which was later exacerbated by the impact of the Industrial Revolution, when land became one of the main forms of capital, not only in the United States but throughout the world.

2.2. Expropriation of Aboriginal Lands and Legal Discourse

During the colonization of North America, the expropriation of Aboriginal lands was a central issue in legal and political discourse. The concepts and norms of property rights developed within European legal traditions were fundamentally at odds with the collective land ownership model of Native American tribes.

For example, the Marshall Trilogy is a collection of three important decisions of the U.S. Supreme Court, delivered between 1823 and 1832, that determined the legal status and land rights of Native Americans. These decisions continue to have a significant impact on the formation of U.S. Native American policy and law. In Johnson v. M'Intosh (1823), the court ruled that Native American tribes were not entitled to sell land to private individuals because their ownership rights were not absolute. The court noted that European colonizers, under the "doctrine of discovery", had acquired ownership rights to land, while Aboriginal people were left with only the right to use the land [6]. Cherokee Nation v. Georgia (1831), in which the Cherokee tribe sued to stop the laws of the state of Georgia from being applied to their territory. The court ruled that the Cherokee tribe was not a "foreign nation" under the Constitution, but rather a "dependent Nation," which meant they had no right to sue in federal court.[7] Worcester v. Georgia (1832), in which the Court ruled that the state of Georgia did not have the right to extend its laws to Cherokee lands because these territories were recognized

[6] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), https://supreme.justia.com/cases/federal/us/21/543/ [accessed: 15.02.2025].

[7] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), https://supreme.justia.com/cases/federal/us/30/1/ [accessed: 15.02.2025].

as independent by federal treaties. This decision strengthened tribal sovereignty, although its enforcement was problematic.[8] The main legal principle reflected in the Court's decision was that the "Discovery Doctrine" granted European nations property right, while the indigenous population retained only temporary possession of the land.

The British and later American legal systems were based on the concept that legitimate land ownership was determined only by written treaties and royal acts, while Aboriginal land tenure, which was based on traditional and oral order, was not recognized as subjects of international law [Banner 2005].

The "Discovery Doctrine" was laid Pope established the basis for *Inter Caetera* of 1493, granted European states the right to colonize newly discovered lands. The doctrine was developed in the United States as a principle of property rights that excluded international sovereignty over aboriginal territories [Wilkinson 1987].

This doctrine created a legal basis according to which: 1) Land ownership was transferred to the US federal government, which ultimately entailed the forced relocation of Aboriginal people; 2) Access to land for the local population has been severely restricted, leading to their economic marginalization; 3) The US government began a systematic seizure of Aboriginal lands, which was followed by the adoption of various legal acts that violated the rights of Indigenous peoples.

The Discovery Doctrine resulted in several fundamental political and legal changes: 1) "Indian Removal Act" (1830) – This act legalized mass deportations, including the "Trail of Tears," which resulted in the removal of tens of thousands of Native Americans from the new territories;[9] 2) "Dawes Act" (1887) – This act divided Aboriginal lands into individual plots, which were to be transferred to them as private property, although in reality, a large part of the lands was purchased by private owners and corporations;[10] 3) "Lone Wolf v. Hitchcock" (1903) – The U.S. Supreme Court ruled that Congress could unilaterally terminate treaties with Native Americans, which would have violated their property rights.[11]

Although the "Discovery Doctrine" defined the American land ownership system for centuries, it began to be legally revised in the 20th century: 1) Indian Reorganization Act (1934) – partially restored Aboriginal

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[8] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), https://supreme.justia.com/cases/federal/us/31/515/ [accessed: 15.02.2025].

[9] U.S. Dep't of State, Off. of the Historian, Indian Treaties and the Removal Act of 1830, https://history.state.gov/milestones/1830-1860/indian-treaties [accessed: 15.02.2025].

[10] Nat'l Archives, Dawes Act (1887), https://www.archives.gov/milestone-documents/dawes-act [accessed: 15.02.2025].

[11] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), https://supreme.justia.com/cases/federal/us/187/553/ [accessed: 15.02.2025].

land ownership and repealed the principles of *the Dawes Act* [Deloria 1985]; 2) "Native American Graves Protection and Repatriation Act" (1990) – which provides for the return of historic lands and cultural property to Aboriginal communities [Echo-Hawk 2010].

Modern litigation – Native American tribes continue to fight for lost lands, but the historical construction of the land tenure system continues to pose serious obstacles.[12] Carpenter v. Murphy (2019) – The U.S. Supreme Court ruled that much of Oklahoma is still in the hands of Native Americans. To the ground, it was considered because Congress never This status has been revoked. The case has even reached the US Supreme Court. Before the court, where the hearing took place in 2018, however, a decision was not made, presumably due to a tie vote among the judges, as Judge Neil Gorsuch Himself Removed the Case from the hearing, due to his previous work on the 10th Circuit Court of Appeals. As a result, the case was postponed and retired in 2019. Because Carpenter v. Murphy was not decided, the Supreme Court considered a similar issue in[13] McGirt v. Oklahoma (2020). In this case, the court ruled that the Creeks Reservation was never Repealed by Congress, resulting in the state of Oklahoma having no jurisdiction over the territory Crimes To be judged. This decision significantly strengthens the territorial rights of American Indians.

It is noteworthy that the legal recognition of the "Discovery Doctrine" was not consistent with the principles of modern international law, such as the right to life of persons. The right to self-determination and international protection of property rights. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) already prohibits legal practices based on such doctrines. To be continued. Nevertheless, the Marshall Trilogy precedents still apply in the US legal system, which makes the legal status of Aboriginal lands problematic to this day. In addition, decisions taken in European states, such as the Mounties case (Portugal v. Australia, ICJ, 1995),[14] have denied the legitimacy of the Discovery Doctrine in the international legal system.

Historical expropriation of land ownership continues to be felt today among Native Americans. Economic conditions on reservations. Economic analysis shows that the expropriation of Aboriginal lands has created an uneven economic development structure, where property status hinders investment and financial independence. Although the Indian Reorganization Act (1934)

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[12] Carpenter v. Murphy, 591 U.S. (2019), https://www.oyez.org/cases/2018/17-1107 [accessed: 15.02.2025].

[13] McGirt v. Oklahoma, 591 U.S. (2020), https://www.oyez.org/cases/2019/18-9526 [accessed: 15.02.2025].

[14] East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90 (June 30), https://www.icj-cij.org/case/84 [accessed: 15.02.2025].

partially restored land ownership rights,[15] restrictions on financing and property management continue to hinder economic development on reservations [Newton, Cohen, and Anderson 2012]. This process is particularly aggravated by the legislative restrictions on the market economy, which in many doesn't allow Tom to be independent Manage land and natural resources.

In the 21st century, new legal processes have emerged in the United States to reexamine the legal status of Native American lands. For example, in McGirt v. Oklahoma (2020), the U.S. Supreme Court recognized that lands in Oklahoma still fall under the jurisdiction of[16] the Muskogee tribe. This decision sets an important precedent and demonstrates that modern courts are willing to reconsider the legacy of the Discovery Doctrine and the Marshall Trilogy.

2.3. The Homestead Act and the Process of Land Democratization

The Homestead Act of 1862 was one of the most significant changes to the land tenure system in the United States.[17] It was a federal government policy aimed at democratizing land ownership and expanding the West. Settlement. This act allowed U.S. citizens, as well as those who were planning to become citizens, to receive 160 acres of federal land, completely free or at a low cost if they developed and farmed it for at least five years [Gates 1962].

The Homestead Act was based on the Republican political program, which sought to maximize the distribution of land ownership. The adoption of the Homestead Act was related to several main reasons: 1) Intensive settlement of the West – The US government wanted the western part of the country to be developed more effectively and strengthen the economy there; 2) Democratization of land ownership – Farms and middle-class families should have the opportunity to own land that was previously either owned by Aboriginal people or federally owned; 3) Reducing the influence of slaveholding in the South – Republicans wanted to make land ownership accessible to smallholders and limit the economic dominance of plantations.[18]

The Homestead Act established a completely new system of land ownership in the United States, one that differed from feudal inheritance and also opposed the traditional European model of land concentration [Edwards 2009, 179].

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[15] Indian Reorganization Act, 25 U.S.C. §§ 5101-5129 (1934), https://www.govinfo.gov/content/pkg/USCODE-2011-title25/html/USCODE-2011-title25-chap14-subchapV.htm [accessed: 15.02.2025].

[16] McGirt v. Oklahoma, 591 U.S. (2020), https://www.supremecourt.gov/opinions/19pdf/18-9526_9okb.pdf [accessed: 15.02.2025].

[17] See https://scholarsjunction.msstate.edu/cgi/viewcontent.cgi?article=1640&context=fvw-pamphlets [accessed: 15.02.2025].

[18] Nat'l Archives, The Homestead Act (1862), https://www.archives.gov/legislative/features/homestead-act [accessed: 15.02.2025].

Under this policy, land ownership was to be based not on inheritance or large investments, but on labor and production. This defined the American agrarian economy by strengthening individual property and farms [Gate 1977].

As a result of this policy, from 1862 to 1934, millions of Americans requested and received land grants: 1) Expansion of land ownership – Approximately 270 million acres of land were transferred to private individuals, representing almost 10% of the total area of the United States;[19] 2) Social empowerment – middle-class farmers were allowed to purchase land, which contributed to agrarian economic stability.[20]

Although the Homestead Act was officially considered a model of democratic land ownership, its enforcement often involved racial and gender discrimination: 1) Restrictions on the rights of African Americans – The Civil War was already underway in the United States, but blacks still did not have equal access to land: a) the advantage of white Southern farmers – Under *Jim Crow* laws, Homestead Act land was often given to white farmers, while African Americans were excluded [Schlissel 1992] from this process; b) the Exodus Movement and Black Farmers – In the 1879-1880s, African-Americans began migrating to Kansas, where they were granted land under the Homestead Act but were often subjected to legal and violent oppression [Weare 1996]; 2) Women's Land Ownership Problems – Although the Homestead Act did not explicitly contain gender restrictions, it was more difficult for women to obtain land and maintain property rights: a) married women could not own land – according to the legal system at the time, married women could not own land separately from their husbands; b) women as secondary beneficiaries – widows or single women – could receive land, although legal and economic barriers made this process difficult [Edwards 2009, 179].

The Homestead Act left a significant mark on US land ownership policy: 1) Strengthening Farming Culture – the Homestead Act contributed to the development of agrarian America and the individual model of land ownership; 2) An attempt to prevent economic inequality – although the law served to widely distribute land, it did not become a mechanism for universal justice; 3) Establishing a Land Ownership Model – the Homestead Act laid the foundation for America's free land policy, which was reflected [Gates 1968] in the New Deal, the GI Bill,[21] and other land ownership reforms in the 20th century.

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[19] Ibid.

[20] Khan Acad., The Homestead Act and the Exodusters, https://www.khanacademy.org/humanities/us-history/the-gilded-age/american-west/a/the-homestead-act-and-the-exodusters [accessed: 15.02.2025].

[21] Nat'l Archives, The Servicemen's Readjustment Act (GI Bill) of 1944, https://www.archives.gov/milestone-documents/servicemens-readjustment-act [accessed: 15.02.2025].

The Homestead Act played a major role in the democratization of the U.S. land system and the economic development of the West, but this process was accompanied by significant social and racial inequalities. Although individual land ownership expanded, it remained inaccessible to limited groups, especially women and African Americans.

Today, the Homestead Act is considered one of the most successful, albeit discriminatory, land reforms, creating the basic structure of the American agrarian economy, but at the same time failing to address gender, racial, and socioeconomic inequalities.

The Homestead Act opposed the feudal landownership of Europe and implied that land ownership should be transferred to the population only [Locke 1689] for labor and development, which was based on the Lockean Labor Theory of Property. Thus, the Homestead Act set a legal precedent according to which public lands could be transferred to private individuals in exchange for active labor to own the land. This legal approach was later reflected in the New Deal, the GI Bill, and other modernized land ownership laws. In policies.

Although the Homestead Act was officially viewed as a democratic reform that made land available to all citizens, legal and administrative barriers prevented its implementation. Strengthening land ownership for women and racial minorities. Jim Crow laws in the Southern states African-Americans were practically denied the right to own land because state administrative processes pursued discriminatory policies against them.[22] The Homestead Act can be compared to the Canadian land tenure system, which was also based on a policy of state land privatization, but had stricter regulations on land transfers.[23] In Australia, the Crown Land Grants system of land distribution also created a model of agrarian land tenure, although it was assumed from the beginning that the land distribution would not lead to the complete economic marginalization of Aboriginal people.[24] A comparison of the Homestead Act with these legal models reveals that, despite its progressive goals, its practical implementation served the interests of the white population more than the democratization of universal land ownership.

Economic analysis of the long-term effects of the Homestead Act shows that, despite the expansion of individual land ownership, land concentration continued to shift to private legal entities in the 20th century. This was

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[22] Nat'l Park Serv., Jim Crow Laws, Martin Luther King, Jr. Nat'l Hist. Park, https://www.nps.gov/malu/learn/education/jim_crow_laws.htm [accessed: 15.02.2025].

[23] Library & Archives Can., Land Grants of Western Canada, 1870-1930, https://www.bac-lac.gc.ca/eng/discover/land/land-grants-western-canada-1870-1930/Pages/land-grants-western-canada.aspx [accessed: 15.02.2025].

[24] Nat'l Park Serv., Native Americans and the Homestead Act, https://www.nps.gov/home/learn/native-americans-and-the-homestead-act.htm [accessed: 15.02.2025].

partly due to the increasing financial obligations of farmers and the strict mortgage policies of banks, which ultimately led to economic pressure on small farmers and the loss of land. In addition, the industrialization of agriculture and the intervention of large capital, for example through the creation of partial cooperative models (agribusiness model), contributed to the fact that by the 1930s much of the land acquired under the Homestead Act was again in the hands of a small elite of landowners [Gates 1973, 50].

2.4. Land ownership concentration and corporate dominance

As mentioned, 19th-century land tenure policies were initially aimed at empowering small farmers and liberalizing land ownership, but the Industrial Revolution and capitalist expansion significantly altered the structure of land ownership. As noted, state-wide land distribution programs, such as the Homestead Act (1862) discussed above, And now the aforementioned initial railroad subsidy laws ultimately created an environment where land ownership gradually became concentrated in the hands of large corporations, industrial magnates, and railroad companies [Hibbard 2024].

This process changed the social function of land – land, originally considered a primary economic resource for individual farmers, became a financial instrument used to grow capital and generate investment profits [Goodwyn 1978].

One of the most important phenomena in 19th-century U.S. land policy was the expansion of land ownership by railroad companies. The U.S. government saw the expansion of transportation networks as a key factor in the country's industrial development, and millions of acres of land were transferred to private companies.

Primary Railway Grants: a) railroad companies were given huge tracts of land by the government to finance construction; b) for example, under the Pacific Railway Act (1862), companies such as the Union Pacific and the Central Pacific were granted substantial land grants. Specifically, each company was granted 10 alternate sections (each section being 640 acres) per mile of construction, 10 miles on either side of the railroad. This meant that the companies received 6,400 acres of land per mile. In addition, they were granted federal loans per mile of construction. A significant portion of this land was ultimately not used for infrastructure but was sold to private investors, setting a precedent for land monopolization.[25]

The influence of railway companies on land prices: a) as a result of land grants, railroad companies were able to artificially inflate the price of land, making it more difficult for small farmers to purchase land; b) for example,

[25] Pacific Railway Acts, Encyclopedia Britannica, https://www.britannica.com/money/Pacific-Railway-Acts [accessed: 15.02.2025].

land prices in the northwestern regions increased by 100-200% as railroad companies sold this land to speculators and large landowners.[26]

The monopolization of land and the effects of industrial expansion led to the agrarian crisis of the late 19th century, particularly the economic decline of small farmers. Farmers who received land under the Homestead Act or other programs often found themselves in financial distress as land prices and taxes rose. By the 1880s, the average American farmer was forced to take out loans from banks to finance his land development, which ultimately led to increased debt and land loss. Financial institutions and industrial magnates bought up land masse from bankrupt farmers, which had the opposite effect of state land ownership policies. By 1890, more than 20% of all agricultural land in the United States was already in the hands of large corporations. The transformation of land tenure policy in the 19th century shows that land in the United States did not remain merely a lever of a democratic economy, but also became a mechanism for the concentration of capital [Allen 2019, 251].

Effects of land concentration and corporate dominance can be discussed in terms of institutional economics theory [North 1990] and Karl According to Polanyi's model of economic [Polanyi 1944] transformation, the transformation of land ownership was an organic process of capitalist development, transforming land from an economic asset into a financial instrument. According to Polanyi, the transformation of land into a market economy often leads to social crises, because property rights and market forces contribute to the concentration of economic power in a small elite. This process occurred in the United States as a result of the transformation of land ownership policies in the 19th century, when the interests of small farmers were Sacrificed in favor of strengthening industrial capital and railroad magnates.

The processes of land concentration that took place in the United States in the 19th century are similar to the Latin American land tenure system, where the "latifundia" model also promoted the concentration of land in a small elite. Concentration [Frank 1972, 3] in groups. However, unlike South American countries, where the unequal distribution of land is a result of feudal inheritance as a result, the monopolization of land in the United States developed based on industrial capitalism and state intervention. In contrast, in some European countries (for example, in France after the Revolution of 1789 and in Germany during the land reforms of the 19th century), there was a movement towards the democratization of land. Directed state policies sought to reduce corporate dominance and increase The role of individual property [Mendell 1980, 342]. A discussion of these

[26] Digital Hist., Pacific Railway Act, https://www.digitalhistory.uh.edu/disp_textbook.cfm?psid=4004&smtID=3 [accessed: 15.02.2025].

international examples makes it clear that the transformation of US land tenure policy served the goals of capitalist growth more than social equality.

Corporate concentration of land has been strengthened by court decisions and legislative changes, which have legally justified the accumulation of property in the corporate sector. Santa Clara County v. Southern Pacific Railroad (1886) In this case, although the Court's decision did not directly address the constitutional rights of corporations, the headnote to the decision noted that corporations are considered "persons" under the 14th Amendment, which grants them constitutional protection. This precedent was later used to expand the rights of corporations.[27] This was followed by the Sherman Antitrust Act (1890), which aimed to prevent monopolies and anticompetitive practices. However, in its early stages, legal interpretations and enforcement difficulties hindered the ability to challenge corporate land ownership. Effective measures. Only later, as a result of additional legislative acts and court decisions, was it strengthened Antitrust regulations.[28] Legal analysis reveals that the US judicial system has historically protected corporate interests more than the property rights of small farmers.

CONCLUSION

In the United States reflects the dynamic interplay of legal doctrines, economic interests, and public policy. Interaction. Legal precedents such as the Discovery Doctrine and Johnson v. M'Intosh established the legal basis for the expropriation of Aboriginal land, while laws such as the Homestead Act initially aimed to democratize land but ultimately contributed to its concentration in the hands of private corporations.

The transformation of land ownership shows how state policy can initially be seen as an instrument for ensuring equality and prosperity, but over time it can turn into a mechanism for the concentration of economic power. In the 19th century, most land resources were concentrated in the hands of railway companies and large industrial groups, which led to the marginalization of small farmers and the decline of the social function of land.

Contemporary legal and economic challenges continue to be linked to issues of land use, ownership, and distribution. Given international parallels, as the examples of Canada, Australia, and the United Kingdom demonstrate, problems related to equitable land tenure are still relevant. In Canada, for example, legal reforms are aimed at restoring Aboriginal land rights, while

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[27] Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394 (1886), https://supreme.justia.com/cases/federal/us/118/394/ [accessed: 15.02.2025].

[28] Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1890), https://www.britannica.com/event/Sherman-Antitrust-Act [accessed: 15.02.2025].

in Australia Mabo v. Queensland's (1992) decision fundamentally changed the concept of *terra nullius*, which meant recognizing Aboriginal land ownership. At the same time, land reforms in Great Britain served to reduce feudal land tenure and ensure a more balanced distribution of property.

Globalization and economic liberalization, land tenure policy faces new challenges, including financial speculation, urbanization, and the growing impact and consequences of climate change. States need new legal strategies that adapt to changing economic realities and at the same time, they will uphold the principles of social justice and ecological sustainability.

Therefore, it is necessary to regularly review land tenure legal policies to ensure not only the protection of private property, but also the consideration of the principles of social justice, ecological sustainability, and economic inclusion.

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ENTRY CONDITIONS, RIGHTS AND OBLIGATIONS OF UKRAINIAN CITIZENS, ACCORDING TO HUNGARIAN LAW*

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Abstract. The escalation of the war in Ukraine on 24 February 2022 triggered one of the fastest growing humanitarian emergencies in recent history. Hungary is both a transit country and a destination for people fleeing conflict in Ukraine. Central and local government institutions, civil society, and non-governmental organizations have taken on the task of providing essential support to refugees arriving from Ukraine. The purpose of the paper is to show how Hungary has dealt with the new migration situation and also what policy Hungary is pursuing towards Russia and Ukraine.

Keywords: Ukraine; refugees; migration policy; Hungary.

INTRODUCTION

It should be noted that for a long time, the countries of Central European were more emigration countries than destinations for immigrants. However, the war caused by Russia has led to a dynamic influx of foreigners. This situation represented a significant change and challenge requiring a new way of thinking and new policies from the governments and societies of neighboring countries such as the Czech Republic, Hungary, Poland and Slovakia. These countries, as part of the Visegrad Group, have adopted legal regulations concerning migrants. The Visegrad Group countries have determined that migration policy should be based on the principle of "flexible solidarity".

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This concept should enable Member States to make decisions regarding specific forms of contribution, taking into account their experience and potential. Moreover, all distribution mechanisms should be voluntary.[1]

The outbreak of war in Ukraine has caused Europe to face a refugee crisis. Millions of Ukrainians and third-country nationals (TCNs) have crossed into nations to the west and south of Ukraine, including Turkey, as a result of the war in Ukraine. The war began on February 24, 2022, when Russia invaded that country.[2] Hungary's general election campaign in 2022 featured a significant emphasis on the conflict in Ukraine. The main plank of the Hungarian government's communication strategy was to avoid getting involved in the Russian-Ukrainian conflict in order to present themselves to the public as defenders of the Hungarian people and families [Sadecki 2022; Maksymiuk 2022, 198]. Although the government did not strongly denounce the Russian action, it did emphasize that Hungary needed to continue having positive business connections with Putin's Russia in order to keep energy costs down [Korkut and Fazekas 2023]. Therefore, Hungary did not support most of the European Union sanctions and tried to veto the developments to constrain Russia via economic regulations [Herszenhorn, Barigazzi, and Moens 2022]. Orban sabotaged the implementation of strategic decision regarding Ukraine, attempting to force the European Union to make concessions in the dispute over Hungary's funds. Hungary questioned not only the date of the start of negotiations but also Ukraine's integration with the European Union as such, despite having supported it earlier [Sadecki 2023].

After all, the Hungarian government pledged that, for the Ukrainian persons "they would do whatever it takes for all refugees" [Korkut and Fazekas 2023]. György Bakondi, the Prime Minister's advisor on internal security in the government, stated that due to the war in Ukraine, 542,000 people have arrived in Hungary so far. "We help everyone who is fleeing from war or coming to us because of war, but we also assist those who are in great need in Transcarpathia or in other areas of Ukraine," he said, noting that Hungary has exemplary fulfilled this dual task, and the Hungarian people have shown a willingness to help. György Bakondi also stated that, apart from that, Hungary does not send or allow the flow of weapons through its territory. "It is a matter of primary national security interest for Hungary, and we represent NATO's position on this issue."[3] Statements from members

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[1] Joint Statement of the Heads of Governments of the V4 Countries, https://www.visegradgroup.eu/calendar/2016/joint -statement-of-the-160919 [accessed: 20.09.2024].

[2] As of August 31, 2024, there are over 62 thousand refugees from Ukraine registered in Hungary. More than 46 thousand refugees registered for temporary protection: https://data.unhcr.org/en/situations/ukraine/location/10783 [accessed: 20.09.2024].

[3] *Minden Menekültnek Segit Magyarország*, https://kormany.hu/hirek/minden-menekultnek-segit-magyarorszag [accessed: 20.09.2024].

of the Hungarian government and articles appearing in the press suggested that Hungary is providing refugees with all possible assistance.

1. LEGAL BASIS FOR THE ACTIONS OF THE HUNGARIAN GOVERNMENT

The United Nations and the European Union have adopted solution that oblige Member States to provide – in legally defined situations – protection for foreigners and, within this framework, an appropriate range of support [Moroń, Madej, and Csoba 2024, 45]. Hungary is obligated to provide protection to foreigners in accordance with national and international law. International law consists of international systems (European Union law and United Nations law) and national law. Obviously, states implement international rules into national law, thus creating a coherent system governing the protection of aliens in need of assistance, but the specific legal solutions in individual states differ.

Since hostilities began on 24 February 2022 in Ukraine, over 522,100 refugees have arrived in Hungary directly from Ukraine or via third countries, the majority of women and children as well as older people and those with disabilities.[4]

Residence in Hungary is possible on the basis of permits such as: asylum card, residence permit, settlement permit, which can be applied for at the National Directorate-General for Aliens Policing. A Ukrainian national can file two different kinds of process with the National Directorate-General for Aliens Policing (NDGAP).[5]

Ukrainian refugees can apply for temporary protection if they want to stay safely in Hungary until the conflict in their home country ends. If they do not seek protection in Hungary, but want to work, set up a business or study in Hungary, they can apply as part of an aliens police procedure.

Hungary grants temporary protection in accordance with the Council of the European Union (EU) 2022/382.[6] The Temporary Protection

[4] *Ukraine refugee situation operational update*, file:///C:/Users/user/Downloads/Hungary%20-%20Operational%20Update%20-%2024%20March%202022.pdf [accessed: 20.09.2024].

[5] The National Directorate-General for Aliens Policing of Hungary is an independent budgetary body with countrywide jurisdiction, under the control of the Minister of Interior of Hungary. The National Directorate-General for Aliens Policing of Hungary is the countrywide competent authority responsible for cases related to the entry, stay, residence and settlement of foreign nationals and processing asylum applications. In addition, the authority is responsible for making decisions in the cases of foreign nationals who are staying illegally in Hungary or foreign nationals committing other offences, and for organising the repatriation of foreign nationals under the obligation to leave the territory of Hungary, http://oif.gov.hu/index.php?option=com_k2&view=item&layout=item&id=564&Itemid=1847&lang=en [accessed: 20.09.2024].

[6] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting

Directive, adopted following the conflicts in former Yugoslavia, introduced a special status: temporary protection. It should be noted that the Directive sets minimum standards, so the Member States may decide on more favourable solutions. The temporary protection Directive European Union from 2001 was activated for the first time in 2022 – in response to the influx of millions of people fleeing the brutal war in Ukraine to the European Union. The Council's decision on March 4, 2022, obligated European Union Member States to provide an appropriate level of protection to Ukrainian citizens and other individuals who fled the war in Ukraine. According to the Directive, the preparation of common policy on asylum, including common European arrangements for asylum, is a constituent part of the European Union's objective of establishing progressively an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the European Union. Temporary protection is granted automatically, but one must apply for a residence permit in the European Union country where they have decided to stay.

The European Union has decided to provide temporary protection to those Ukrainian citizens, refugees recognised in Ukraine and stateless persons and their families who lived in Ukraine prior to 24 February 2022 and had to leave Ukraine because of the war.

On 24 February 2022, Government Decree 56/2022 (II.24.) came into effect. The Hungarian Government, being the first in Europe, decided to grant temporary protection to everyone who had a legal basis to stay in Ukraine and fled the country to Hungary, regardless of their nationality. The national protection provided thereby was applicable until 7 March 2022. Since 8 March 2022, Government Decree No. 86/2022 (III.7.)[7]

The Government Decree 86/2022 (III.7.)[8] establish a new protection system exclusively for Ukrainian citizens. Regarding non-Ukrainian citizens who lived in Ukraine, Hungary made the decision to exercise its discretion. Instead of offering sufficient protection, however, it offers individuals escaping the war protection "in accordance with the general rules" in Hungary, which in reality translates to no protection at all [Babická 2022]. Such persons had to apply for residence under general rules or for international

a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, www.eur.lex.eu [accessed: 20.09.2024].

[7] *Temporary protection Hungary*, https://asylumineurope.org/wp-content/uploads/2024/07/AIDA-HU_Temporary-Protection_2023.pdf [accessed: 20.09.2024].

[8] Government Decree No. 86/2022. (III. 7.) on rules applicable in state of danger and related to persons recognized as eligible for temporary protection, and on derogations from the rules of Act CVI. of 2011 on public employment and on the amendment of acts related to public employment and of other acts, https://helsinki.hu/en/wp-content/uploads/sites/2/2022/03/HUgovdecree_implementing_councildecision_tempprotEN.pdf [accessed: 20.09.2024].

protection. Under this decree, the beneficiaries of temporary protection are citizens of Ukraine, persons who have previously resided in Ukraine as refugees (who are citizens of another country but have been recognised as such by Ukraine) or stateless persons (who do not have the citizenship of any nation), members of the above-mentioned families (spouses, individuals with official status as unmarried partner of an individual in the above-mentioned categories, children of an individual in the above-mentioned categories under the age of 18), relatives who have been financially dependent on an individual in the above-mentioned categories, such as sick siblings or elderly partners, who after February 24, 2022, escaped to Hungary from the conflict. In Hungary, citizens of Ukraine, refugees recognized in Ukraine, stateless persons, and their family members who lived in Ukraine before February 24, 2022, and had to leave due to the war can apply for temporary protection. This is called temporary protection status ("menedékes" in Hungarian) in Hungary. This status is also provided to you if you did not arrive in Hungary directly from Ukraine. Note, however, that you may only request protection if you arrived in Hungary on or after 24 February 2022. The following are considered family members: a married spouse, a partner, a child under the age of 18 and other relatives who had resided in the same household in Ukraine. Family members are entitled to the same protection, even if they are not Ukrainian citizens, and even if they arrived in Hungary prior to 24 February.[9] The validity of temporary protection has been extended until March 4, 2025, across the European Union, including Hungary.[10]

Persons who are citizens of Ukraine and arrived before February 24 do not qualify for temporary protection. However, they can still apply for temporary protection, and they will likely receive a status called "tolerated status" (known as "befogadott" in Hungarian). Although it is not the same as temporary protection, it allows them to remain in Hungary and provides them with some rights. Anyone who is not a Ukrainian citizen, a recognized refugee or stateless person, or a family member of a Ukrainian citizen (or recognized refugee or stateless person) is ineligible for temporary protection. These individuals can apply for asylum, which is not so simple in Hungary. The asylum procedure is a single procedure where entitlement to refugee status and subsidiary protection is considered. Those wishing to seek asylum in Hungary must first personally submit a "statement of intent" for the purpose of lodging an asylum application at the Embassy

[9] *Information for Ukrainian citizens fleeing Ukraine, for refugees recognised in Ukraine and for stateless persons and their family members*, https://helsinki.hu/en/information-ukraine-stateless-recognized-refugees/ [accessed: 20.09.2024].

[10] *Temporary Protection status*, https://help.unhcr.org/hungary/temporary-protection/ [accessed: 20.09.2024].

of Hungary in Belgrade or in Kyiv.[11] The embassy must then forward the "statement of intent" to the NDGAP in Budapest, which shall examine it within 60 days. The NDGAP should make a proposal to the embassy whether to issue the would be asylum seeker a special, single-entry permit to entry Hungary for the purpose of lodging an asylum application. The law does not clarify the criteria to be considered by the NDGAP in deciding on such applications.[12] Restriction on accessed to territory and asylum procedures are considered incompatible with European Union law.[13]

2. TEMPORARY PROTECTION

Temporary protection is a special status offered within the European Union to individuals who are fleeing the war in Ukraine. It permits persons to remain in Hungary for a predetermined amount of time by granting certain privileges and services to those who qualify. Access to social welfare benefits, health care, children's education, and job authorization are all included in temporary protection.

The condition for being recognized as a beneficiary of temporary protection is to present evidence of this to the appropriate authorities. For this purpose, it is necessary to have the required documentation confirming nationality or citizenship, length of stay in Ukraine, family connections, and the date of entry into Hungary. Individuals who arrived in Hungary prior to February 24, 2022, and were employed there at the time, are not eligible to be recognized as recipients of temporary protection.

Using a biometric (new-type) passport, Ukrainian nationals can enter Hungary without the need for a separate visa or other formalities. When traveling to Hungary from Ukraine with a biometric passport, citizens of Ukraine may choose to remain on Hungarian or Schengen Area territory for a maximum of 90 days. Ukrainian nationals who want to work, study, or stay longer in Hungary must apply to NDGAP with a case-specific application.

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[11] Government Decree no. 233/2020 (V.26.), On the rules of the asylum procedure during the state of danger declared for the prevention of the human epidemic endangering life and property and causing massive disease outbreaks, and for the protection of the health and lives of Hungarian citizens, https://helsinki.hu/wp-content/uploads/Government-Decree-no.-233_2020-on-the-rules-of-the-asylum-procedure-during-the-state-of-danger.pdf [accessed: 20.09.2024].

[12] *Country Report: Short overview of the asylum procedure*, https://asylumineurope.org/reports/country/hungary/asylum-procedure/general/short-overview-asylum-procedure/ [accessed: 20.09.2024].

[13] *Hungary de facto removes itself from the common European asylum system (CEAS)*, https://helsinki.hu/wp-content/uploads/new-Hungarian-asylum-system-HHC-Aug-2020.pdf [accessed: 20.09.2024]; *No access to asylum on the territory since 27 May 2020*, https://helsinki.hu/en/wp-content/uploads/sites/2/2023/03/Access-to-asylum.pdf [accessed: 20.09.2024].

When requesting temporary protection, persons are entitled to support from the states. In order to receive permanent accommodation and three meals a day, it is important that you submit your asylum application within one month of your arrival in Hungary. In this case, until you receive the asylum card or the decision rejecting the asylum application, you are entitled to accommodation and meals. If you submit your asylum application more than 30 days after your arrival in the country, long-term accommodation and meals are only available if you are pregnant, a parent raising a child under the age of six, a person with a disability or the caretaker of such a person, over 65 years of age or 18 years of age below, who lives in a joint household with any of the people listed here. Persons who receive the temporary protection card are entitled to accommodation and food for 30 days. Pregnant women, children under the age of 18 and one parent living in the same household as them, people with disabilities and their caregivers, as well as people over 65 years of age, can receive accommodation and meals for an unlimited period of time beyond 30 days after obtaining the asylum card. If someone receives a temporary protection card, accommodation and meals are only available for 30 days after obtaining the card, unless this person takes up work and their employers provides a contract with an accommodation included. People who do not have a job are unfortunately not entitled to a free meal and accommodation, unless they belong to the group of beneficiaries defined in the previous paragraph.

Furthermore, there is the right to medical care, translation of personal documents, employment, schooling for children, preschools and day-care and 6 months of free meals for children and discounted travel tickets.

3. NEW IMMIGRATION LAW

On September 26, 2023, in Budapest, the UNICEF Crisis Response Office in Hungary and the Hungarian Ministry of Interior committed to further developing their cooperation to ensure access to essential services for refugees' children and families from Ukraine. The Memorandum of Understanding signed by Mátyás Hegyaljai, Deputy State Secretary of the Hungarian Ministry of Interior, and Pilar Gonzalez Rams, Emergency Coordinator for UNICEF Refugee Response Office, Hungary, commits to supporting social inclusion, providing education, health services, and specialized child protection and child welfare services, including temporary care for children and prevention of human trafficking.[14] Interestingly, on 1 January, 2024,

[14] *Hungarian Ministry of Interior and UNICEF expand partnership to continue support for refugees from Ukraine*, https://www.unicef.org/eca/press-releases/hungarian-ministry-interior-and-unicef-expand-partnership-continue-support-refugees [accessed: 20.09.2024].

the new Immigration Law entered into force, and its provisions are applied from 1 March, after a transitional period. The new law (Act XC of 2023 on the General Rules for the Entry and Residence of Third-Country Nationals (TCNs), abbreviated in Hungarian as: "Btátv") has significantly changed the rules on residence permits. The new law has fundamentally changed the way TCNs can work in Hungary. Certain residence permits have been abolished and replaced by new ones, and related conditions and rules have also changed radically. If the applicable resident's permits regulations are the same under the new law as they were under the prior law, then the procedures for renewing a residence permit stay the same . For example, the process of extending a residency permission in order to pursue education will continue to operate as it did prior to the new legislation. If a specific type of residence permission is no longer available according to the new law, it is not possible to apply for its extension either.[15] Hungary is implementing these changes as part of a broader effort to tackle labour shortages, while simultaneously intending to protect the local market, especially in certain industries due to recent high levels of migration to the country.

In June 2024 Viktor Orban, the prime minister of Hungary, issued an executive order ending public funding for shelters used by many Ukrainian refugees, most of whom are Roma. In accordance with the decree, only those Ukrainian refugees who come from combat zone in Ukraine – in other words from parts of the country that are directly impacted by the war – will in future get states support for temporary accommodation. Eligibility will be determined on the basis of each refugee's current registered address in Ukraine. From now on, state support for refugee accommodation will be limited to the end of the month after the date of the person's registration as a refugee in need of temporary protection. The Hungarian government intends to revise its list of combat zones in Ukraine every month [Verseck 2024]. Hungarian non-governmental organizations estimate that over 3 000 Ukrainian refugees will lose access to state-subsidized accommodation as a result. The majority of individuals impacted are from neighbouring western Ukrainian areas or the far-western Zakarpattia Oblast (Transcarpathia). Their official status is now "in need of temporary protection". The majority are Roma who speak Hungarian.

CONCLUSION

The European Union has introduced a temporary protection solution, applicable to large groups leaving their country of origin due to armed conflicts.

[15] *Hungary: Ukrainian refugees losing housing*, https://www.hrw.org/news/2024/09/11/hungary-ukrainian-refugees-losing-housing [accessed: 20.09.2024].

The influx of a large number of displaced persons from Ukraine due to hostilities on its territory required measures to support refugees. The Member States of the European Union were obliged to introduce legal solution regulating the possibility of temporary protection for refugees from Ukraine.

The outbreak of the war in Ukraine significantly affected the election campaign in Hungary. Orban and his government implemented a strategy to shift focus away from their political and economic connections with the Russian Federation. The Hungarian government tried not to get involved in the Russian-Ukrainian war under the pretext of protecting the Hungarian nation. Therefore, the main media message was to emphasize the need to restore peace rather than identify the aggressor and their actions. At the same time, it was emphasized that Hungary does not send or allow the transit of weapons through its territory.

The government declared that it helps everyone fleeing due to the war and has launched aid programs. Ukrainian refugees with certain rights: the right to work, the right to education, and the right to medical care. Based on European Union law, Hungary recognized the rights of Ukrainian citizens, citizens of other countries, and stateless person recognized in Ukraine as refugees. This means that the new legal regulation does not cover citizens of other countries fleeing their own country. Additionally, Ukrainian citizens who were in Hungary before the outbreak of the war cannot benefit from temporary protection.

Over time, support is reduced, and benefits are granted for a limited period of time, especially for those who can take up employment and support themselves.

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EXPLORING ANTISEMITISM THROUGH LEGAL, POLITICAL, AND LINGUISTIC PERSPECTIVES WITH INSIGHTS ON SHIFTING PERCEPTIONS THROUGH HOLOCAUST EDUCATION

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Abstract. This paper explores the enduring issue of antisemitism, framed as "the oldest hatred," through an interdisciplinary lens that integrates legal, political, and historical perspectives. By examining the persistence and evolution of antisemitism in modern society, the study underscores the importance of Holocaust education as a critical tool for understanding and combating prejudice and discrimination. Grounded in the analysis of existing legal frameworks, including those established by the International Holocaust Remembrance Alliance (IHRA) and the European Court of Human Rights, the paper investigates how state policies and linguistic manipulation have historically reinforced antisemitic ideologies. A Polish university academic staff survey reveals educators' perspectives on Holocaust education's relevance in contemporary education. The findings highlight the need for a multidimensional approach that fosters critical thinking, societal awareness, and empathy to prevent future atrocities. The study concludes that combining historical awareness, legal knowledge, and ethical engagement in Holocaust education is essential for combating rising antisemitism and fostering a more informed and inclusive society.

Keywords: antisemitism; holocaust education; legal perspectives; political dimensions; human rights education.

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INTRODUCTION

The tragic history of the Holocaust, with its profound impact on human rights and societal values, highlights the need for educational strategies that go beyond recounting historical facts to understanding the ideologies behind such atrocities. This paper examines the multifaceted nature of antisemitism, often called the "oldest hatred," through legal, political, and historical analyses to understand its persistence and evolution in modern society. George Santayana's warning that "Those who cannot remember the past are condemned to repeat it" underpins our investigation into the ongoing relevance of Holocaust education. In a world where geopolitical tensions mirror past conflicts, the importance of teaching the Holocaust extends beyond history, serving as a tool against the resurgence of antisemitism. This paper explores evolving definitions of antisemitism, as discussed by scholars like R.S. Wistrich, and examines the legal frameworks developed to combat it. By integrating law, politics, and history, the authors aim to enhance understanding and education about antisemitism.

1. ANTISEMITISM IN LEGAL, POLITICAL AND LINGUISTIC PERSPECTIVE

In scholarly discourse, antisemitism is frequently described as one of the most persistent and complex manifestations of prejudice, encompassing racial, ethnic, and religious dimensions. This characterization underscores its longstanding presence in human history, aptly earning it the designation of the "oldest hatred in the world" [Wistrich 1994, 19]. Specific dimensions of antisemitism stem from hatred towards those deemed other or foreign, frequently reflecting elements of religious extremism and racism. Although comparisons can be made between hostility towards Jews and the historical persecution of various minority groups – including heretics, witches, homosexuals, Roma, and Black individuals – the distinctive sacred and quasi-metaphysical attributes inherent to antisemitism set it apart from other forms of discrimination [Idem 2010, 80].

Historical and political factors, along with linguistic variations, have influenced the development and perpetuation of antisemitic attitudes. Jean-Paul Sartre, an eminent French existentialist, in his essay "Anti-Semite and Jew," illustrates how anti-Semites utilize frivolous discourse deliberately. He states, "They are amusing themselves, for it is their adversary who is obliged to use words responsibly since he believes in words" [Sartre 1944, 62]. This manipulation of language is not merely to obscure the absurdity of their arguments but to disorient and intimidate them. When pressed, they disengage, indicating the cessation of rational debate.

In a parallel vein, racist ideologies deeply embedded within fascism have profoundly shaped its rhetoric, mainly through the glorification of the "historical mission" of the Aryan race. This narrative, pivotal to an intensified form of antisemitism in Nazi Germany, positioned Jews as a significant threat. As Andrzej Sylwestrzak notes, this facilitated the projection of internal societal tensions onto the Jewish population, serving as a convenient scapegoat and a mechanism for releasing collective aggression [Sylwestrzak 2022]. This racial ideology, termed 'Aryanisation' (German: *die Arisierung*) or 'German Ancestral Heritag' (*Deutsches Ahnenerbe*), was rooted in historical and linguistic interpretations that evolved dramatically under Nazi influence. As Philip Gooden and Peter Lewis explain in their monograph "The Word at War," the term 'Aryan' originally had neutral linguistic and ethnographic connotations, derived from the Sanskrit *arya*, meaning 'noble, of a good family,' and was associated with the Indo-European language family. By the 19th century, this term was linked to a supposed Aryan race believed to have initially populated northern Europe. However, in Nazi ideology, this concept was distorted to distinguish white Caucasians as superior, directly opposing other racial groups, particularly Jews, with Hitler famously declaring in *Mein Kampf*, "The exact opposite of the Aryan is the Jew" [Gooden and Lewis 2015, 23-24]. This ideological transformation underscores the pernicious use of racial theories to justify antisemitism and societal violence within Nazi rhetoric.

Legal systems address anti-Semitic statements or behaviors using definitions informed by interdisciplinary studies and existing legal interpretations nationally and internationally. This method, enriched by governmental and non-governmental organizations frameworks, promotes a cohesive understanding of anti-Semitism, ensuring that legal assessments are complex, contextually informed, and consistent, thereby enhancing fairness in proceedings related to anti-Semitic incidents.

Although many organizations and institutions have devised their definitions of antisemitism, a universally accepted legal definition remains undefined. However, the International Holocaust Remembrance Alliance (IHRA) established a working definition on May 26, 2016, which is widely recognized and used globally as a reference in legal, political, and educational contexts. This definition, primarily educational and not intended as a legal or political tool, describes antisemitism as a perception that may manifest as hostility toward Jews, potentially expressed through actions or words against Jews, non-Jews, their property, and Jewish community institutions.

Since its establishment, the Council of Europe has actively engaged all member states in efforts to combat antisemitism. Key bodies within the Council, specifically the European Commission against Racism and Intolerance (ECRI) and the European Court of Human Rights (ECHR),

play pivotal roles in setting standards for addressing antisemitism. ECRI focuses on monitoring and analyzing instances of racism and antisemitism, issuing recommendations to member states on effective preventative and remedial measures. Concurrently, the ECHR adjudicates cases involving allegations of antisemitism, providing legal recourse and shaping jurisprudence that influences national policies and practices related to human rights and anti-discrimination. These institutions collectively contribute to a comprehensive approach towards eradicating antisemitism within Europe. Addressing antisemitism through legal frameworks and combating other similar forms of xenophobia might appear, at first, as endeavors unlikely to succeed. The deeply ingrained nature of irrational hostilities and prejudices might suggest that merely implementing provisions from criminal codes or human rights protection treaties would be insufficient to alter behaviors and mindsets. However, the activities of the Council of Europe, mainly through the European Court of Human Rights (ECHR) and the European Commission against Racism and Intolerance (ECRI), underscore the potential effectiveness of these legal and institutional mechanisms. As highlighted by Gliszczyńska-Grabias and Wieruszewski in their analysis, "Combating Antisemitism within the Council of Europe – A Balance of Achievements and Failures", these efforts are not only necessary but have also demonstrated tangible impacts, suggesting that such legal instruments can indeed play a crucial role in mitigating antisemitism and fostering a more inclusive society [Gliszczyńska-Grabias and Wieruszewski 2017]. Combating antisemitism and similar forms of xenophobia through legal instruments poses complex challenges, as deeply entrenched irrational hostilities and prejudices may not be easily influenced by criminal codes or human rights treaties alone. These legal approaches need careful implementation and must be supported by educational and societal interventions to address the multifaceted nature of these issues effectively.

Europe pursues initiatives to combat antisemitism, yet harmonizing legal responses, especially in criminal law, is challenging due to the diverse legal traditions of member states. Such disparities necessitate a nuanced approach to legal integration to effectively address antisemitism across diverse jurisdictions [ibid., 22]. Established in 1993, the European Commission against Racism and Intolerance (ECRI) assesses state practices. It formulates recommendations to address racism, discrimination, xenophobia, antisemitism, and intolerance in Europe, guiding member states in promoting tolerance and equality.

The Resolution of the European Parliament, adopted on 1 June 2017, titled "Combating Antisemitism" (2017/2692(RSP)), was a response to escalating concerns about the rise in antisemitic incidents across Europe. Published in the Official Journal,[1] this resolution highlights the urgency of addressing

[1] OJ C 2018, 307, p. 183.

and mitigating antisemitism as a critical social issue. It underscores the European Parliament's commitment to combatting this prejudice through comprehensive and effective measures, reflecting a concerted effort to reinforce the importance of tolerance and equality within the European community.

The resolution passed by the European Parliament on 1 June 2017 emphasized the necessity for effective measures to combat all manifestations of antisemitism. It urged member states to enhance their collaborative efforts in this area. It also called on the European Commission to appoint an EU Coordinator for Combating Antisemitism. This role is intended to oversee and coordinate activities at the EU level aimed at addressing antisemitism. Additionally, the resolution advocated for the complete adoption by member states of the International Holocaust Remembrance Alliance (IHRA) definition of antisemitism. This definition notably includes the identification of certain forms of criticism of Israel that may cross the threshold into antisemitism. By endorsing these measures, the resolution aimed to fortify cooperation and improve the efficacy of strategies to counter antisemitism throughout Europe, marking a significant advancement in the regional commitment to tackling this pressing issue.

On December 2, 2020, the EU Council adopted a Declaration on mainstreaming the fight against antisemitism across policy areas (General Secretariat of the Council, 13637/20). This declaration represents a significant advancement in addressing antisemitism and enhancing the security of Jewish communities and institutions within Europe. The Council outlined specific directives for member states, which include ensuring the protection of Jewish communities and institutions, combating hate speech and hate crimes, promoting Holocaust education and the preservation of Jewish heritage, supporting research and monitoring of antisemitism trends, and implementing the IHRA's working definition of antisemitism. Additionally, the declaration called for robust cooperation and coordination at the EU level, highlighted by the appointment of a coordinator for combating antisemitism and promoting Jewish life. The Council also endorsed the Commission's European Democracy Action Plan, which incorporates strategies to combat antisemitism and safeguard Jewish communities, emphasizing a holistic approach to fostering a secure and inclusive environment.

The legal frameworks designed to address antisemitism within both the universal and European contexts are diverse, demonstrating a commitment to upholding human rights and preventing discrimination. At the universal level, cornerstone documents such as the Charter of the United Nations, the Statute of the International Court of Justice, and the Agreement establishing the Preparatory Commission of the United Nations[2] provide the foundational

[2] Journal of Laws of 1947, No. 23, item 90 as amended.

principles of international law and justice. These documents underscore the global imperative to protect human rights and actively prevent discrimination, forming the legal basis from which efforts to combat antisemitism are further developed and implemented. These foundational principles are further reinforced by the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on December 9, 1948.[3] This convention plays a critical role in addressing acts of genocide, including those motivated by antisemitism. The Convention explicitly defines genocide and mandates that signatories undertake to prevent and punish such heinous acts. This legal instrument is integral to the international community's efforts to address and deter grave violations of human rights, particularly those that target specific groups based on ethnic, racial, or religious discrimination.

The International Convention on the Elimination of All Forms of Racial Discrimination, which was opened for signature in New York on March 7, 1966,[4] targets explicitly racial discrimination, including antisemitism. This legal framework mandates that state parties adopt various measures to eradicate discrimination in all its forms. The Convention obliges signatories to implement legislative, judicial, and administrative measures to prevent and address discriminatory behaviors, promoting global equality and human dignity. The International Covenant on Economic, Social and Cultural Rights, which was opened for signature in New York on December 19, 1966,[5] complements these legal instruments by emphasizing the principle of non-discrimination in accessing and enjoying economic, social, and cultural rights. This covenant enforces that all individuals must have equal opportunity to achieve their potential in these critical areas, free from discrimination. Additionally, the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted on November 30, 1973,[6] while primarily aimed at eliminating apartheid, also addresses broader issues of systemic racial discrimination. This convention establishes a framework for understanding and combating institutionalized forms of racism, including anti-Semitism, by setting legal obligations for state parties to suppress and punish segregation and discrimination, fostering a more inclusive and equitable society.

The International Covenant on Civil and Political Rights, opened for signature in New York on December 19, 1966,[7] offers further protection by safeguarding civil and political rights, such as freedom of speech and religion and protection from hate speech and discrimination. These protections

[3] Journal of Laws of 1952, No. 2, item 9.
[4] Journal of Laws of 1969, No. 25, item 187, annex.
[5] Journal of Laws of 1977, No. 38, item 169, annex.
[6] Journal of Laws of 1976, No. 32, item 186, annex.
[7] Journal of Laws of 1977, No. 38, item 167, annex.

explicitly extend to anti-Semitic acts, ensuring that individuals are shielded from such forms of hatred under international law.

Moreover, the First Optional Protocol to the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on December 16, 1966,[8] empowers individuals to file complaints with the Human Rights Committee regarding violations of the Covenant, including those connected to antisemitism. This mechanism provides an essential avenue for addressing individual grievances related to discrimination and hate crimes.

Additionally, the Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at abolishing the death penalty, adopted on December 15, 1989,[9] reflects broader human rights commitments that, while primarily focused on capital punishment, indirectly bolster efforts to combat anti-Semitic hate crimes. This comprehensive framework underscores the international community's dedication to protecting human dignity and combating discrimination in all its forms.

Within the European legal framework, the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on November 4, 1950, provides robust protection for human rights across Europe, including safeguards against discrimination and hate speech, encompassing acts of antisemitism. This Convention establishes the legal basis for preventing and addressing various forms of intolerance, reinforcing Europe's commitment to protecting all individuals from hatred and prejudice.

The Framework Convention for the Protection of National Minorities, drafted in Strasbourg on February 1, 1995, specifically aims to safeguard the rights of national minorities, including Jewish communities, shielding them from discrimination and hostility. This Convention promotes equality and cultural diversity, ensuring that minority groups are protected from societal and institutional biases.

Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Strasbourg on May 11, 1994, encapsulates reforms aimed at enhancing the effectiveness of these protections. This Protocol restructured the European Court of Human Rights, streamlining its procedures to improve its efficiency in handling human rights cases, including those related to antisemitism and discrimination, thus strengthening the overall enforcement of human rights across Europe.

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on November 4, 2000, further enhances the European human rights framework. This protocol broadens the non-discrimination protections enshrined in the Convention, explicitly

[8] Journal of Laws of 1994, No. 23, item 80.

[9] Journal of Laws 2014, No. 891.

prohibiting discrimination on any ground, including antisemitism. It reinforces the comprehensive protection of individuals against all forms of prejudice.

The Convention on Cybercrime, adopted in Budapest on November 23, 2001, addresses crimes perpetrated through the internet, including the dissemination of antisemitic hate speech and propaganda. The Additional Protocol further bolsters this Convention to the Convention on Cybercrime, drafted in Strasbourg on January 28, 2003, which targets explicitly online hate speech, including content that promotes antisemitism. Together, these instruments offer critical legal frameworks for combating the spread of antisemitic rhetoric in the digital age, ensuring accountability for those who use the internet to propagate hate. Additionally, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Strasbourg on May 13, 2004, introduces reforms aimed at improving the efficiency of the European Court of Human Rights. These reforms streamline the Court's operations, enabling more effective adjudication of cases involving antisemitic discrimination and hate crimes. Collectively, these protocols and conventions strengthen Europe's legal mechanisms for addressing both traditional and emerging forms of antisemitism. These universal and European legal instruments form a robust framework that prevents and punishes antisemitism, protects human rights, and promotes an inclusive global society by tackling discrimination and hate crimes through a multidimensional approach at both international and regional levels.

Antisemitism, one of human history's oldest and most intricate phenomena, demands particular focus within the legal protection framework. Contemporary research highlights a resurgence of antisemitism globally, posing significant challenges for societies in terms of safeguarding minority rights. In Europe, movements such as PEGIDA, which gained traction in Germany, have not only underscored growing tensions between ethnic groups but also revealed a marked increase in antisemitic incidents, often intertwined with other forms of discrimination [Pries and Bekassow 2015]. In the political sphere, antisemitism transcends being a mere social issue and has historically been exploited as a tool by regimes to consolidate power. A notable example is the Vichy regime's actions in Tunisia, where the imposition of racial antisemitic laws served to bolster French dominance in the region [Peterson 2014]. These examples underscore the need for robust legal mechanisms to address the complex and multifaceted nature of antisemitism in modern society.

In Europe, like elsewhere, there has been a noticeable increase in discriminatory policies that risk marginalizing minorities, including Jews. In response to these developments, the European Union has introduced various legal mechanisms aimed at combating antisemitism, such as directives that prohibit the public approval, denial, or trivialization of the Holocaust [Dudek 2023].

However, it is essential to acknowledge that these measures are often insufficient, and their effectiveness largely hinges on the commitment of member states to implement and rigorously enforce these regulations. As emphasized in the Opinion of the European Committee of the Regions on the EU Strategy for Combating Antisemitism and Supporting Jewish Life (2021-2030),[10] one of the most widespread contemporary manifestations of antisemitism is that which is linked to Israel. This form of antisemitism often manifested through disproportionate criticism or the delegitimization of Israel, highlights the evolving and complex nature of antisemitism in modern European discourse, necessitating a more targeted and robust legal response. European Jews frequently experience this form of antisemitism in online spaces, with an alarming 79% reporting that they feel blamed for the actions of the State of Israel.

Additionally, 69% of respondents state that the Arab-Israeli conflict has a considerable impact on their sense of security.[11] These findings underscore the growing prevalence of antisemitic sentiments tied to geopolitical issues, which further complicates the already challenging environment faced by Jewish communities in Europe, particularly in the digital sphere. This highlights the need for complex strategies that extend beyond legal and educational measures and also include political and social actions aimed at combating the evolving nature of antisemitism. While robust legal frameworks are essential for prosecuting hate crimes and preventing discrimination, they must be complemented by sustained educational initiatives that promote understanding and tolerance, particularly regarding the complexities of the Arab-Israeli conflict and its misuse in fostering antisemitic attitudes. Moreover, political leadership is crucial in shaping public discourse and implementing policies that protect minority communities, while social interventions – such as awareness campaigns and community engagement – play a key role in fostering a more inclusive society. Addressing antisemitism requires a holistic approach, with a strong emphasis on education, to dismantle the prejudices and misinformation that fuel hate.

It is essential to address the role of digital spaces, as the contemporary context amplifies the presence and spread of antisemitism online. In these environments, antisemitic content can disseminate rapidly, exacerbating feelings of insecurity and vulnerability within Jewish communities. Consequently, comprehensive strategies must be developed to regulate online content, enhance digital literacy, and promote accountability within social media platforms. These efforts should be reinforced by coordinated legal and political

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[10] Official Journal of the European Union, 2022, C 375, p. 21.

[11] European Union Agency for Fundamental Rights, Experiences and Perceptions of Antisemitism – Second Survey on Discrimination and Hate Crime Against Jews in the EU (2018), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-experiences-and-perceptions-of-antisemitism-survey_en.pdf [accessed: 20.08.2024].

measures to effectively combat the evolving nature of antisemitism in the digital age. In the context of legal protections against antisemitism, it is crucial to examine how the law can simultaneously serve as a mechanism of protection and marginalization for different groups. Research indicates that legal systems in Western countries are not always as neutral or objective as they appear, often reflecting and reinforcing existing social hierarchies [Riedel 2021]. For Jewish communities, history demonstrates that the law has been used as a tool of persecution, most notably during the Holocaust, while also serving as a means of protection, as seen in the post-World War II reintegration of Jews in Europe [Sacerdoti 2023]. Contemporary scholarship highlights the importance of incorporating education on religious and cultural diversity into curricula as a critical strategy for combating antisemitism and other forms of discrimination [Ben-Moshe and Halafoff 2014].

The role of media and technology in propagating antisemitism is also critical to highlight. In recent years, particularly following terrorist attacks in Europe, there has been a noticeable rise in antisemitic rhetoric within online spaces, posing new challenges for legislators [Schroeder 2023]. In response, some EU member states have started to implement regulations targeting online hate speech, representing an essential step toward protecting minorities, including Jewish communities, from violence and discrimination [ibid.].

Historically, antisemitism has frequently been employed as a political instrument, as evidenced by Italy during Mussolini's regime, where the implementation of racial laws not only marginalized Jews but also served to consolidate the regime's authority [Luconi 2004]. Contemporary research indicates that many of the enduring tropes and stereotypes associated with antisemitism continue to persist today, underscoring the need for active societal interventions to counter these harmful narratives [Hirsh and Miller 2022]. In this context, education and raising social awareness are essential in the fight against antisemitism, which is pivotal in promoting tolerance and fostering mutual understanding among diverse ethnic and religious communities [Cox 2021].

Current research on antisemitism and its legal protection underscores the necessity of an integrated approach that combines legislative, educational, and social measures. While the introduction of effective legal frameworks to protect minorities from violence and discrimination is essential, equally vital is fostering social awareness about both the historical and contemporary manifestations of antisemitism [Dudek 2023]. Collaboration between institutions, non-governmental organizations, and local communities is essential for promoting tolerance and justice, fostering a society where individuals are granted equal rights and respect. This multifaceted approach ensures sustainable efforts to combat antisemitism.

In a global context, antisemitism transcends local boundaries, manifesting as an international issue that requires cooperation among states

to combat this phenomenon effectively. Collaborative efforts to protect the rights of minorities, including Jewish communities, are crucial in addressing the growing antisemitic tendencies observed in various parts of the world [Cox 2021]. Contemporary research reveals that antisemitism is often intertwined with other forms of discrimination, highlighting the need for an integrated approach to tackle these interconnected issues [Farris 2014]. In this regard, education on diversity and tolerance and promoting intercultural dialogue play a pivotal role in fostering a more just and equitable society.

2. RESEARCH AND RESULTS

The research for this paper aimed to explore the perspectives of university educators on the importance of teaching the Holocaust and its relevance in modern education. The study was conducted at one of the most rapidly developing higher education institutions in Poland, which offers a variety of degrees, including law, economics, international relations, and psychology. While lacking a dedicated history department, students are introduced to significant historical events through courses on EU integration, human rights, political systems, and political thought.

The research design included a survey distributed to 22 academic staff members. Respondents, who varied in age, gender, and academic qualifications, voluntarily participated in the survey. This diverse group of educators ranged from master's degree candidates to full professors representing various academic specializations. The survey's primary aim was to gather insights into the educators' views on the importance of Holocaust education, the educational goals they prioritize, and the key lessons students should learn from this historical event.

Respondents, Methodology, and Key Findings

The respondents represented a variety of backgrounds, as outlined below:

Age	%	Gender	%	Education	%
30 years or under	1 (4%)	Men	12 (54%)	Master of Arts (Doctoral Dissertation in progress)	1 (4%)
31-40	3 (14%)	Women	7 (32%)	Doctoral Degree	7 (32%)
41-50	10 (45%)	Other	3 (14%)	Doctoral Degree with Habilitation	10 (45%)
Over 50	8 (37%)			Full Professorship	4 (19%)
Total	22 (100%)		22 (100%)		22 (100%)

Table 1. Demographic Breakdown of Respondents by Age, Gender, and Education Level. Source: Authors' elaboration.

The survey comprised open-ended questions designed to grasp the participants' perspectives on the importance of Holocaust education. It concentrated

on three main research areas: the importance of teaching the Holocaust, the primary educational objectives in teaching about the Holocaust, and the key lessons students should learn from studying the Holocaust.

The qualitative analysis of responses identified key themes and trends, with the diversity of the respondents enriching the findings. Several recurring themes emerged regarding the importance of Holocaust education, focusing on fostering critical thinking, societal awareness, and empathy among students.

Respondents emphasized that Holocaust education helps students reflect on its causes (propaganda, discrimination, societal indifference, etc.) and recognize similar patterns in modern society. Teaching personal stories of victims and survivors, especially those of a similar age to students, effectively fostered empathy and made historical events more relatable. Holocaust education was also viewed as essential for preventing future atrocities, with respondents stressing the importance of understanding incremental steps, such as propaganda and discriminatory policies, that lead to genocide.

Many respondents highlighted the need to contextualize the Holocaust within the broader history of antisemitism and genocide, emphasizing deeply rooted ideologies like the Aryan Race Theory. Drawing parallels with other genocides, such as those in Rwanda and Cambodia, was suggested to provide a global perspective on the dangers of unchecked hatred. Respondents also underscored the role of propaganda in facilitating the Holocaust, noting its relevance to critically evaluating media and disinformation today.

Finally, respondents highlighted the contemporary relevance of Holocaust education in combating rising antisemitism and Holocaust denial, particularly in the context of current political events like the war in Ukraine. They also emphasized its importance in conveying moral and ethical lessons on human rights, justice, and equality, inspiring students to advocate for a more compassionate society.

CONCLUSION

Antisemitism remains a complex phenomenon that demands a multi-dimensional approach to combat it effectively. While legal protections against antisemitism are indispensable, fostering social awareness and promoting tolerance within society are equally critical. The study highlights the necessity of collaboration between educational institutions, governmental and non-governmental organizations, and local communities to effectively combat antisemitism, enhance awareness, promote inclusivity, and protect minority rights. The survey results reflect a strong commitment among the teaching staff to ensure that students acquire a deep and critical understanding of the Holocaust. Educators view Holocaust education as essential

not only for preserving the memory of past atrocities but also as a crucial tool for equipping students with the knowledge and analytical skills necessary to recognize and combat modern-day manifestations of hatred, racism, and discrimination. The research presented in this paper highlights the need for an integrated approach to Holocaust education, combining historical awareness, critical thinking, and ethical engagement. From a legal perspective, incorporating knowledge of international frameworks, such as those established by the IHRA and the European Court of Human Rights, equips students to understand the legal mechanisms available to combat antisemitism and hate speech. Politically, examining the role of state policies and regimes, both historical and contemporary, sheds light on how political structures can either reinforce or dismantle antisemitic ideologies. Linguistically, understanding how language and propaganda have been used historically to spread antisemitic views and how they persist in modern discourse helps students critically assess the power of words in shaping societal attitudes. By incorporating legal, political, and linguistic dimensions into the curriculum, educators can better prepare students to address contemporary issues of discrimination and violence. In light of the growing levels of antisemitism worldwide, proactive measures must be taken to protect human rights and uphold democratic values. Expanding Holocaust education with a multidimensional framework will not only help prevent future atrocities but also foster a more informed, tolerant, and just society.

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REVIEW OF THE SUPREME ADMINISTRATIVE COURT'S JUDICIAL DECISIONS ON CORPORATE INCOME TAX IN 2019-2022

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Abstract. The article presents a review of the judicial decisions of the Supreme Administrative Court in the field of corporate income tax in 2019-2022. It emphasises the importance of the Supreme Administrative Court's judicial decisions in shaping and interpreting tax law. Tax legislation and the interpretation of tax law cannot be fully considered without taking into account the importance of the judicial decisions of administrative courts. Court judgments, although they are not sources of law, have a significant impact on the structure of corporate income tax. The review of the case law of the Supreme Administrative Court is therefore crucial in this respect for understanding its impact on the structure of tax law and shaping the tax policy of the state. The analysis of judicial decisions shows a desire to extend the protection of individual rights and tax justice, as well as limit the practices of tax authorities and restore unjustly deprived rights of taxpayers.

Keywords: judicial decisions; corporate income tax; tax legislation; interpretation of tax law.

INTRODUCTION

In Article 87 of the Constitution of the Republic of Poland, the concepts of a closed catalogue of sources of law[1] were adopted. However, this does not limit the possibility of making legal acts created by the administrative judiciary in specific judicial situations [Gomułowicz and Mączyński 2022, 222]. The closure of the catalogue of sources of law applies only to the sources of written law and does not mean that it cannot be supplemented with other sources of law [Małecki 2003, 63]. Polish administrative

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

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courts have numerous objective reasons for substituting the legislator, who, in many cases, adopts defective solutions in the field of tax law [Idem 2005, 249]. This applies primarily to situations in which there is a need to: 1) specify the content of general concepts used in the field of tax law; 2) clarify defective tax regulations; 3) adopt a resolution of the Supreme Administrative Court [Gajewski 2022, 87] performing an explanatory function in the field of the correct application of tax law.

Supervision over the judicial decisions of provincial administrative courts in matters of tax liabilities and other monetary benefits to which tax regulations apply, and on the enforcement of monetary benefits falls within the jurisdiction of the Financial Chamber of the Supreme Administrative Court.[2] For the purposes of this article, the judicial decisions of the Financial Chamber of the Supreme Administrative Court in the field of corporate income tax in 2019-2022 were analysed (Table 1). The subject of the analysis was the materials contained in the annual *Information on the activities of administrative courts*, which is a material form of fulfilling the information obligation of the President of the Supreme Administrative Court on the activities of administrative courts.

1. JUDICIAL DECISIONS OF THE SUPREME ADMINISTRATIVE COURT IN THE FIELD OF CORPORATE INCOME TAX

Tax legislation and systemic solutions regarding the interpretation of tax law cannot be considered without determining the importance of the judicial decisions of administrative courts. Although court judgments are not sources of tax law, they significantly affect the structures of corporate income tax. Considering the above, an analysis of the judicial decisions of the Supreme Administrative Court in the field of corporate income tax becomes justified and purposeful. It affects the construction of tax law and the shaping of the state's tax policy.

The data presented in Table 1 shows that cases in the field of corporate income tax in the years 2019-2022 constituted from 7% to 9% of all cases received by the Financial Chamber of the Supreme Administrative Court.

Table 1. Information on the Supreme Administrative Court's judicial decisions in the field of corporate income tax in 2019-2022

[2] Act of 25 July 2002, the Law on the system of administrative courts, Journal of Laws item 2492 as amended, Article 39.

1	2	3	4	5
Year	Number of cases received (in total) by the Financial Chamber of the Supreme Administrative Court	Number of corporate income tax cases	Percentage of corporate income tax cases	Issues in the field of corporate income tax resulting from the judicial decisions of the Financial Chamber of the Supreme Administrative Court
2019	5650 cassation appeals +16 petitions for resumption of proceedings	443	8%	1) Expenditure on catering services as tax costs (judgment of the Supreme Administrative Court of 8 January 2019, ref. no. II FSK 3524/16). 2) Special economic zones (judgments of the Supreme Administrative Court: of 5 March 2019, ref. no. II FSK 780/17; of 12 August 2019, ref. no. II FSK 2998/17). 3) Guarantee deposit (judgments of the Supreme Administrative Court: of 11 April 2019, ref. no. II FSK 79/17; of 10 September 2019, ref. no. II FSK 839/18). 4) Employees serving as members of supervisory boards (judgment of the Supreme Administrative Court of 28 May 2019, ref. no. II FSK 1585/17). 5) Revenue from the establishment of a gratuitous transmission easement (judgment of the Supreme Administrative Court of 14 August 2019, ref. no. II FSK 3396/17). 6) Uncollectible or redeemed receivables and tax-deductible costs (judgment of the Supreme Administrative Court of 24 July 2019, ref. no. II FSK 2841/17). 7) Implementation of the matching principle of expenses with revenues (judgment of the Supreme Administrative Court of 2 August 2019, ref. no. II FSK 2612/17). 8) Gratuitous performance of the function of a member of the company's management board as taxable revenue from gratuitous services (judgment of the Supreme Administrative Court of 30 October 2019, ref. no. II FSK 3717/17).

1	2	3	4	5
2020	4803 cassation appeals + 49 petitions for resumption of proceedings	421	9%	1) Admissibility of excluding from tax-deductible costs of expenses for the acquisition of intangible services incurred by the taxpayer for contractors (judgment of the Supreme Administrative Court of 23 January 2020, ref. no. II FSK 1750/19). 2) Tax-deductible costs, correction invoices, compensating adjustment (judgment of the Supreme Administrative Court of 30 January 2020, ref. no. II FSK 191/19). 3) Date of revenue arising from the contract for using security – financial service (judgment of the Supreme Administrative Court of 3 March 2020, ref. no. II FSK 783/19). 4) Monetary benefits of the founder to the foundation made based on the foundation act for the implementation of the foundation's objectives and the donation agreement (judgment of the Supreme Administrative Court of 10 March 2020, ref. no. II FSK 3179/18). 5) License fees for a personally affiliated company as tax-deductible costs (judgment of the Supreme Administrative Court of 9 May 2020, ref. no. II FSK 2900/19). 6) Expertises and opinions, eligible costs for the purposes of research and development relief (judgment of the Supreme Administrative Court of 8 July 2020, ref. no. II FSK 1264/18). 7) Legal and tax consequences of selling all rights and obligations of a general partner in a limited partnership (judgment of the Supreme Administrative Court of 14 July 2020, ref. no. II FSK 3017/19). 8) Conversion of own receivables into shares (judgment of the Supreme Administrative Court of 18 August 2020, ref. no. II FSK 2083/19). 9) Exchange rate for invoice correction (judgment of the Supreme Administrative Court of 25 August 2020, ref. no. II FSK 1153/18). 10) Resignation from remuneration by a member of the management board and revenue from gratuitous benefits (judgment of the Supreme Administrative Court of 13 October 2020, ref. no. II FSK 991/18). 11) Resignation of a partner from a partnership (judgment of the Supreme Administrative Court of 13 October 2020, ref. no. II FSK 1614/18). 12) Passenger car insurance as a cost paid by the lessee (judgment of the Supreme Administrative Court of 18 November 2020, ref. no. II FSK 2781/19). 13) Tax-deductible costs and losses in current assets (judgment of 19 November 2020, ref. no. II FSK 1841/18).

1	2	3	4	5
2021	6079 cassation appeals +55 petitions for resumption of proceedings	449	7%	1) Interest on ERDF funds (judgment of the Supreme Administrative Court of 12 January 2021, ref. no. II FSK 1220/20). 2) Exemption of the cooperative from taxation of income from the rental of garages occupied by persons who do not have the status of a member of a housing cooperative (judgment of the Supreme Administrative Court of 12 January 2021, ref. no. II FSK 1034/19). 3) Documentation obligation, loan, and interest (judgment of the Supreme Administrative Court of 15 January 2021, ref. no. II FSK 2514/18). 4) Permanent separation of a component or peripheral part of a fixed asset (judgment of the Supreme Administrative Court of 20 January 2021, ref. no. II FSK 2254/18). 5) Remuneration for adapting the room by the tenant as the owner's tax expense (judgment of the Supreme Administrative Court of 11 February 2021, ref. no. II FSK 3014/18). 6) Intermediate trade service, excluded from costs (judgment of the Supreme Administrative Court of 23 February 2021, ref. no. II FSK 2697/20). 7) R&D relief, adjustment of eligible costs (judgment of the Supreme Administrative Court of 9 March 2021, ref. no. II FSK 3178/18). 8) Revenue from the loan guarantee granted by the parent company to related companies (judgment of the Supreme Administrative Court of 9 March 2021, ref. no. II FSK 2808/18). 9) The right to reduce the revenue from buildings (judgment of the Supreme Administrative Court of 5 May 5 2021, ref. no. II FSK 1487/20). 10) The right to correction, limitation (judgment of the Supreme Administrative Court of 12 May 2021, ref. no. II FSK 3642/18). 11) Interest-free loan, gratuitous service (judgment of the Supreme Administrative Court of 26 May 2021, ref. no. II FSK 3527/18). 12) Exemption from corporate income tax on investment fund income – CFC (judgment of the Supreme Administrative Court of 27 May 2021, ref. no. II FSK 59/20). 13) Lending institution, uncollectible receivables (judgment of the Supreme Administrative Court of 11 June 2021, ref. no. II FSK 3504/18). 14) Takeover of liabilities and tax-deductible costs (judgment of the Supreme Administrative Court of 20 July 2021, ref. no. II FSK 3738/18).

1	2	3	4	5
2021	6079 cassation appeals +55 petitions for resumption of proceedings	449	7%	15) The transaction price specified in the contract (judgment of the Supreme Administrative Court of 20 July 2021, ref. no. II FSK 28/19). 16) Foreign legal entity (judgment of the Supreme Administrative Court of 3 August 2021, ref. no. II FSK 2939/18). 17) Beneficial owner (judgment of the Supreme Administrative Court of 12 August 2021, ref. no. II FSK 126/19). 18) Calculating the limit of debt financing costs, above which they are excluded from tax costs (judgment of the Supreme Administrative Court of 26 October 2021, ref. no. II FSK 976/21). 19) Exemption of income of foreign collective investment institutions (judgment of 25 November 2021, ref. no. II FSK 813/19).
2022	5,217 cassation appeals + 22 petitions for resumption of proceedings	458	78%	1) Planning services in the context of exemption from Article 15e(1) on corporate income tax (judgment of the Supreme Administrative Court of 14 January 2022, ref. no. II FSK 987/19). 2) Data storage service on the server in the context of withholding tax collection (judgment of the Supreme Administrative Court of 19 January 2022, ref. no. II FSK 1274/19); 3) Special economic zones (judgment of the Supreme Administrative Court of 15 February 2022, ref. no. II FSK 1233/19). 4) Uncollectible receivables (judgment of the Supreme Administrative Court of 5 April 2022, ref. no. II FSK 1833/19). 5) Acquisition utility certificates (judgment of the Supreme Administrative Court of 17 May 2022, ref. no. II FSK 2386/19). 6) Rules for converting applied costs in foreign currencies pursuant to Article 15(1) on corporate income tax – correction invoice (judgment of the Supreme Administrative Court of 25 May 2022, ref. no. II FSK 2530/19). 7) Recognising the expense as a tax-deductible cost (judgment of the Supreme Administrative Court of 18 October 2022, ref. no. II FSK 432/20). 8) An entity paying interest on the issue of bonds to a non-resident as an obligation to collect and pay withholding tax (judgment of the Supreme Administrative Court of 16 November 2022, ref. no. II FSK 598/20).

Source: own study.

2. ANALYSIS OF JUDICIAL DECISIONS ON CORPORATE INCOME TAX IN 2019-2022

In 2019, the jurisprudence of the Supreme Administrative Court focused mainly on the following issues: 1) tax costs; 2) special economic zones; 3) guarantee deposits; 4) revenues from the establishment of a gratuitous transmission easement; 5) tax deductible costs; 6) implementation of the matching principle of expenses with revenues; 7) revenues from gratuitous services subject to taxation.

The Supreme Administrative Court, in its judgment of 8 January 2019, considered that the purpose of representation costs is to create a certain image of the taxpayer, create a good image of their company, activities, etc., create positive relationships. with contractors. When assessing whether the costs are representative, it is necessary to look through the prism of their purpose. If the sole or dominant purpose of the costs incurred is to create such an image of the taxpayer, these costs are representative. Listing expenses for catering services and the purchase of food and beverages, including alcoholic beverages, as examples of representative costs, does not mean that these expenses must always be excluded from tax-deductible costs. They are not costs only if they are representative in nature. The qualification of each case should be separate, depending on its circumstances.[3]

Two judgments of the Supreme Administrative Court regarding special economic zones are also worth mentioning. The judgment of 5 March 2019 shows that the income obtained from the sale of zonal products, in part in which it would correspond to the value of non-zonal products and services used in their production, may, in certain circumstances, be considered as income obtained from business activities conducted in a special economic zone. In the same circumstances, expenses incurred for the purchase of these products and services should also be considered as tax-deductible costs of this activity.[4]

However, in the judgment of 12 August 2019, the Supreme Administrative Court ruled that a change in the legal status may lead to the decision losing the binding force and thus to the abolition of the resulting individual norm resulting from it or amendment of the act resulting from the individual norm, but only if the new provisions provide so. Therefore, the legislator cannot stop repealing or amending the previous act but must also refer to the decisions issued on its basis in individual cases. The changing

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[3] Judgment of the Supreme Administrative Court of 8 January 2019, ref. no. II FSK 3524/16, Lex no. 2618815.

[4] Judgment of the Supreme Administrative Court of 5 March 2019, ref. no. II FSK 780/17, Lex no. 2641889.

legislation regulating the activity of special economic zones did not contain provisions that would specify new conditions for previously issued exemptions in terms of time. It also did not make general changes to the permits issued so far. These permits took the legal form of administrative decisions; therefore, they were an administrative act that unilaterally, by the action of the competent authority, resolved an individual matter. The issue of changing the conditions, including the duration of exemptions, was left to interested entities conducting business activity in the zones. Therefore, this exemption did not become an exemption for an indefinite period only because the new legislation did not provide for the issue of such permits.[5]

The judgment of 11 April 2019 is also noteworthy (ref. no. II FSK 79/17), according to which the guarantee deposit is tax-neutral, which means that it is neither a revenue nor a cost. On the other hand, the tax consequences are related to the occurrence of circumstances entitling the creditor to be satisfied with the deposit. The amount of the guarantee deposit received cannot be considered a final receipt, unless there are circumstances entitling the deposit to be retained. Then, the amount paid as security for the concluded contract loses its security character. Consequently, it cannot be doubted that the expenses incurred for the guarantee deposit could not be deductible costs since they were not definitively incurred but were incurred temporarily. In the judicial decision of administrative courts, there is no doubt that the cost incurred is a final expense.[6] In this situation, the provision of Article 15(1j)(3) on corporate income tax, stating that the tax-deductible costs from taking up shares in exchange for a contribution in a form other than an enterprise or its organised part as at the date of taking up these shares are determined in the amount actually incurred, not included in the tax-deductible costs, expenses for their acquisition, could not be applied in the case, since the expenses for the guarantee deposit were not actually (definitively) incurred.[7]

In 2020, the judgments of the Supreme Administrative Court referred to the following issues: 1) excluding from tax-deductible costs of expenses for the acquisition of intangible services incurred by the taxpayer for the contractors; 2) tax deductible costs (compensating adjustment); 3) revenue arising from a contract for using security; 4) transfer of assets to the foundation; 5) license fees for a personally affiliated company (tax-deductible costs); 6) eligible costs for the purposes of R&D relief; 7) tax consequences

[5] Judgment of the Supreme Administrative Court of 12 August 2019, ref. no. II FSK 2998/17, Lex no. 2769497.

[6] Judgment of the Supreme Administrative Court of 20 April 2007, ref. no. II FSK 563/06, Lex no. 389357; judgment of the Supreme Administrative Court of 28 April 2005, ref. no. FSK 1818/04, Lex no. 166056.

[7] Judgment of the Supreme Administrative Court of 11 April 2019, ref. no. II FSK 79/17, Lex no. 2656077.

of selling all rights and obligations of the general partner in a limited partnership; 8) conversion of own receivables into shares; 9) exchange rate for invoice correction; 10) revenues from gratuitous benefits; 11) tax consequences of the partner's withdrawal from a partnership; 12) costs paid by the lessee; 13) costs of obtaining revenues and losses in current assets.

In particular, the judgment of 14 July 2020 should be included in the group of important judgments (ref. no. II FSK 3017/19) which explains that the transfer of all rights and obligations of a partner in a partnership to another person is related to the withdrawal of the transferring partner. All rights and obligations of a partner in a partnership may be transferred to another person only after obtaining the written consent of all other partners unless the partnership agreement provides otherwise. Article 10 of the Commercial Companies Code[8] states that only all rights and obligations may be disposed of. Therefore, the rights and obligations of the shareholders cannot be separated. It is also not possible to dispose of individual rights in partnerships, as trading in rights is not allowed due to their relationship with the partner. The rule of indissolubility of a partner's rights and obligations determines the need to transfer all the partner's rights and obligations always as an indivisible (inseparable) whole. In the event of transferring all the rights and obligations of a partner in a partnership to an acceding partner, the set of rights and obligations is transferred to the extent to which the partner appearing at the time of the transfer is entitled. However, there may be cases in which there will be no transferable rights in the company. In contrast, the rights resulting from the withdrawal from the company will be vested in the former partner after withdrawal from the company and due to the implementation of the said withdrawal, and not due to the sale of rights in the existing company, with the consent of the partners. In addition, the transfer of all rights and obligations of a partner in a partnership is regulated in Article 10 CCC, while the withdrawal from the company is regulated in Article 65 CCC. The hypotheses, premises and method of implementing the aforementioned provisions are normatively separate and not the same. It follows from the above that the normative concept of transferring to another person all the rights and obligations of a partner in a partnership cannot be reasonably identified with the normative concept of withdrawal of a partner from a partnership.[9]

In the judgment of the Supreme Administrative Court of 23 January 2020 (ref. no. FSK 1750/19), a decision was made that was important for corporate income taxpayers regarding the inclusion of expenses incurred

[8] Act of 15 September 2000, the Code of Commercial Companies Code, Journal of Laws of 2024, item 18 as amended [hereinafter: CCC].

[9] Judgment of the Supreme Administrative Court of 14 July 2020, ref. no. II FSK 3017/19, Lex no. 3052524.

for related entities as tax-deductible costs within the meaning of Article 11 on the corporate income tax. The Court emphasised that if there is no doubt that the costs incurred are necessary to produce a product or provide services, the possibility of deducting them should not be limited. It was noted that the expression "directly" used by the legislator means that expenses for the acquisition of intangible services incurred by the taxpayer for contractors are not subject to exclusion from tax-deductible costs pursuant to Article 15e(1) in connection with Article 15e(11)(1) on the corporate income tax, if these expenses have such a cause and effect relationship that they determine, in the adopted business model, the acquisition or production of a given type of goods or the provision of a specific type of service.[10]

An important and permanent element of interest in the judicial decision of the Supreme Administrative Court in 2021 was the issue of: 1) interest on the funds from the European Regional Development Fund;[11] 2) exemption of the cooperative from taxation of income from renting garages occupied by persons who do not have the status of a member of a housing cooperative; 3) obligation to prepare tax documentation regarding the loan agreement; 4) permanent separation of the component or peripheral part of the fixed asset; 5) tax expenses of the owner of the premises; 5) exclusion from the costs of services of affiliated entity; 6) adjustment of eligible costs of R&D relief; 7) revenues from the loan guarantee granted by the parent company to affiliated companies; 8) rights to reduce the revenue from buildings; 9) limitation as excluding the right to correction; 10) non-interest-bearing loan; 11) exemption from corporate income tax of the investment fund (CFC); 12) tax costs of lending institutions (bad debts); 13) costs of obtaining income (takeover of liabilities); 14) prices; 15) foreign legal entities; 16) beneficial owner (17); calculation of the limit of debt financing costs, excluded from tax costs; 18) exemption of income of foreign collective investment institutions.

In its judgment of 25 November 2021 (ref. no. II FSK 813/19) the Supreme Administrative Court decided that collective investment institutions equivalent to Polish closed-end investment funds and specialised open-end investment funds operating with restrictions may, in principle, invest in tax-transparent companies. However, the income generated from these investments is not exempt and is subject to taxation as income from business activities,[12] some of them as revenues from capital gains.[13] Exemption specified

[10] Judgment of the Supreme Administrative Court of 23 January 2020, ref. no. II FSK 1750/19, ONSAiWSA 2021, No. 1, item 5.

[11] Hereinafter: ERDF.

[12] Act of 15 February 1992, the Corporate Income Tax, Journal of Laws of 2025, item 278 as amended, Article 5(3).

[13] Ibid., Article 7b(1)(4).

in Article 17(1)(58) on corporate income tax applies only to income that is obtained from investing funds in securities, financial instruments and other (than shares in tax-transparent companies) property rights.[14]

However, in another judgment, the Supreme Administrative Court disagreed with the position presented by the body of the Director of the National Tax Information[15] and by the court of first instance, which was based on the statement that "to the income within the meaning of Article 24a on corporate tax income will not apply, as is the case with the income determined in accordance with Article 7(2) of this Act, the objective exemption pursuant to Article 17(1)(57) on corporate income tax." In other words, as the Director of the National Tax Information stated in the conclusion of his considerations, "the income of a controlled foreign company reported by the Fund does not benefit from the exemption referred to in Article 17(1)(57) on corporate income tax, because the income determined in accordance with Article 7(2) is exempt under this provision and not the income referred to in Article 24a of this Act." The Supreme Administrative Court stated that this thesis does not find any confirmation in the text of the Act, nor can it be interpreted by applying a systemic interpretation or other types of interpretation. The Supreme Administrative Court also found that Article 24a does not constitute a derogation from the principle expressed in Article 7(1) on corporate income tax because this provision also mentions income, only that it is determined according to a specific methodology. In the opinion of the Supreme Administrative Court, pursuant to the reservation contained in Article 7(2) on corporate income tax does not follow that Article 17(1)(57) of this Act used a different concept of income than in Article 24a, i.e., that the income within the meaning of Article 17(1)(57) on corporate income tax constituted a category separate from income within the meaning of Article 24a of this Act. It follows that the income referred to in Article 24a on corporate income tax may benefit from the exemption specified in Article 17(1)(57) on corporate income tax.[16]

The Supreme Administrative Court, in its judgment of 9 March 2021 (ref. no. II FSK 2808/18) indicated that pursuant to Article 11(1) and (4) and (5) in connection with Article 12(1)(2) on corporate income tax, it follows that the revenue from a loan guarantee granted by the parent company to affiliated companies can only be obtained by the beneficiary of the guarantee and not by the guarantor. In Article 5(2)(8) and Article 5(5)

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[14] Judgment of the Supreme Administrative Court of 25 November 2021, ref. no. II FSK 813/19, ONSAiWSA 2022, No. 3, item 40.

[15] Letter of 24 May 2018 issued by Director of the National Tax Information, 0114-KDIP2-2.4010.131.2018.1.AM, http://sip.mf.gov.pl [accessed: 27.11.2023].

[16] Judgment of the Supreme Administrative Court of 27 May 2021, ref. no. II FSK 59/20, Lex no. 3199342.

and Article 170(1) and (2) of the Act of 29 August 1997, the Banking Law,[17] there is a sanction prohibiting collecting remuneration (commission) for granting a guarantee by organisational units other than banks.[18]

The judgment of the Supreme Administrative Court of 9 March 2021 also remains noteworthy (ref. no. II FSK 3178/18). The aforementioned decision stated that the adjustment of tax-deductible costs should be made on an ongoing basis. The fact that the legislator has not regulated this matter cannot be a reason to adopt a solution unfavourable to the taxpayer. In the opinion of the Supreme Administrative Court, the obligation to separate the costs of research and development activities also includes the accounting reflection of the adjustments made to the eligible costs, both in minus and in plus. Therefore, the reduction of the relief for research and development activities occurs not through global summaries of amounts but through a precise illustration of the method of spending eligible costs appropriately reduced or increased due to, for example, correction invoices received. According to the Supreme Administrative Court, clearly in Article 18d(5) on corporate income tax, it was emphasised that the eligible costs to be deducted cannot be reimbursed in any form. This, therefore, applies to all kinds of situations in which the taxpayer receives a subsidy (reimbursement of funds) that is used to cover eligible costs and not about a subsequent correction of these costs, as claimed by the interpretative authority. The Court also stated that the purpose of the provision of Article 18d(5) on corporate income tax is to exclude covered expenses from the basis for calculating the tax relief in the economic sense from funds other than the taxpayer's own funds.[19]

In the case resolved by the judgment of 15 January 2021 (ref. no. II FSK 2514/18) the Supreme Administrative Court stated that in the value of the transaction in the light of Article 9a(1)(1) and Article 9a(1d) on corporate income tax, both the value of the money transferred to the borrower (capital) and the sum of interest due constituting remuneration for granting the loan should have been recognised in the case of the loan agreement.[20]

However, in the judgment of 5 May 2021 (ref. no. II FSK 1487/20) the Supreme Administrative Court indicated that the regulation contained in Article 24b(10) on corporate tax income does not apply to situations in which the taxpayer of income tax on buildings does not directly or indirectly hold in other companies shares in the capital or voting rights

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[17] Act of 29 August 1997, the Banking Law, Journal of Laws of 2018, item. 2488 as amended.

[18] Judgment of the Supreme Administrative Court of 9 March 2021, ref. no. II FSK 2808/18, ONSAiWSA 2021, No. 5, item 77.

[19] Judgment of the Supreme Administrative Court of 9 March 2021, ref. no. II FSK 3178/18, Lex no. 3157771.

[20] Judgment of the Supreme Administrative Court of 15 January 2021, ref. no. II FSK 2514/18, Lex no. 3117883.

in controlling, decision-making or managing bodies, or shares or rights to participate in profits or assets or their prospects, including participation units and investment certificates.[21]

An important issue was also raised in the judgment of 20 July 2021 (ref. no. II FSK 28/19). The main dispute in the case focused on the correct interpretation of the provisions of substantive law, in particular Article 14(1) on corporate income tax. Pursuant to this provision, the revenue from the disposal of goods, property rights or the provision of services is their value expressed in the price specified in the contract. However, if the price, without justified economic reasons, differs significantly from the market value of these goods, rights or services, the tax authority determines this revenue in the amount of the market value. The position of the applicant is based on the adoption of such an interpretation of this provision, according to which the binding factor for determining the amount of revenue is only the price expressed in the contract agreed by the parties to a given transaction, regardless of the provisions of the sales contract, as well as other agreements of an obligatory nature accompanying it, which directly modify the mutual obligations of its parties. Meanwhile, the literal provision of the analysed provision shows that the revenue is the value of goods, property rights or services expressed in the price specified in the contract. Therefore, when interpreting this provision, an appeal cannot be omitted when determining the revenue from the sale of goods and property rights to their value, which is to be reflected in the price specified in the contract. In addition, as follows from the second sentence of Article 14(1) on corporate income tax and Article 14(2) on corporate income tax, in accordance with the will of the legislator, the amount of income from this title is to correspond to the market value of the goods, rights or services sold.[22]

In 2022, the last year of the analysed cases, the judicial decision of the Supreme Administrative Court focused on the following issues: 1) exemptions from Article 15e(1) on corporate income tax; 2) withholding tax collection in the case of data storage services on the server; 3) special economic zones; 4) uncollectible receivables; 5) acquisition of utility certificates; 6) rules for converting costs incurred in foreign currencies pursuant to Article 15(1) on corporate income tax; 7) recognition of the expense as a tax-deductible cost; 8) obligation to collect withholding tax by the entity paying interest on the issue of bonds to a non-resident.

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[21] Judgment of the Supreme Administrative Court of 6 May 2021, ref. no. II FSK 1487/20, Lex no. 3284632.

[22] Judgment of the Supreme Administrative Court of 20 July 2021, ref. no. II FSK 28/19, Lex no. 3217781.

The judgment of the Supreme Administrative Court of 16 November 2022 seems particularly important (ref. no. II FSK 598/20), which shows that the provisions of agreements (conventions) on the avoidance of double taxation in the field of interest apply only if the entity receiving interest has the status of a beneficial owner, i.e. an entity whose right to dispose of the payment received is not only formal in nature. This means that the agreement's provisions can only be applied to the final recipient of the interest, who, as the actual recipient, is the "beneficial owner of the interest". A feature of the "beneficial owner of the interest" is the ultimate benefit of the right to interest. Therefore, the point is not that the "interest recipient" should be a direct recipient, but that as a beneficial owner (and not an intermediary), it should be a "person entitled" to interest, i.e. it should be possible to independently decide on the allocation of the received receivable.[23] It should be emphasised here that the Corporate Income Tax Act does not contain an equal definition of income, and in Article 12 on corporate income tax, only a partial definition was formulated, which is limited to mentioning exemplary categories of events that are designators of the defined concept and at the same time limiting this concept by indicating what is not considered as revenue. At the same time, in Article 21(1) on corporate income tax, it was assumed that the tax on obtaining income in the territory of the Republic of Poland is 20% of income from interest paid to taxpayers referred to in Article 3(2) on corporate income tax. Therefore, the literal wording of this provision does not indicate that it is necessary to determine whether the taxpayer to whom the interest is paid was the beneficial owner. We cannot lose sight of the fact that in the light of Article 3(2) on corporate income tax, income (revenues) generated in the territory of the Republic of Poland by entities not having their registered office or management board in the Republic of Poland are subject to taxation. However, this does not mean that if the entity to which the interest is paid is not the beneficial owner, no revenue is generated on their side, and consequently, there are no grounds for applying Article 21(1)(1) on corporate income tax. This means only that in relation to an entity that meets the conditions set out in Article 21(3)(1-3) on corporate income tax, the provided tax exemption cannot be applied because it does not meet the last of the conditions, i.e. it is not the beneficial owner of interest.[24] In the context of the aforementioned international agreements, this only means that since it is not possible to identify

[23] Judgments of the Supreme Administrative Court of: 17 August 2022, ref. no. II FSK 3101/19, Lex no. 3424927; of 26 July 2022, ref. no. II FSK 1230/21, Lex no. 3417791; of 14 April 2021, ref. no. II FSK 508/19, Lex no. 3176496; of 13 December 2017, ref. no. II FSK 3188/15, Lex no. 2442921; of 16 September 2016, ref. no. II FSK 2299/14, Lex no. 2120031; of 2 March 2016, ref. no. II FSK 3666/13, Lex no. 2036649.

[24] Act of 15 February 1992, the Corporate Income Tax, Article 21(3)(4).

the beneficial owners of interest, the preferential tax rates or exclusions provided for in the double taxation agreements applicable to these entities cannot be applied to these interests.[25]

In the judgment of 25 May 2022 (ref. no. II FSK 2530/19) the Supreme Administrative Court stated, however, that the principle of converting costs incurred in foreign currencies from Article 15(1) on corporate income tax applies to the current conversion related to the date of incurring the cost. Therefore, there is no justification not to use such a current conversion for corrections. Therefore, applying the provision of Article 15(1) on corporate income tax, it should be considered that the amounts expressed in foreign currency in correction invoices (or other correction accounting documents) received by the taxpayer should be converted at the average exchange rate of the National Bank of Poland from the last business day preceding the date of issuing the correction invoice (or other correction accounting document).[26]

Attention should also be paid to the judgment of the Supreme Administrative Court of 19 January 2022 (ref. no. II FSK 1274/19) which emphasised that the fees for the data storage service on the server are not fees for the use or the right to use an industrial device within the meaning of Article 21(1)(1) on corporate income tax, but the fees for the provision of the service. Therefore, they do not result in an obligation to collect withholding tax pursuant to Article 26(1) on corporate income tax in connection with Article 21(1)(1) on corporate income tax. Polish law considers the hosting agreement an innominate contract. As indicated in the literature, it is necessary to exclude the appropriate application of the provisions on the lease, tenancy or use agreement to this type of agreement because the objects of these named agreements are defined in terms of identity. In contrast, in the hosting agreement, the service provider provides only generically defined space on the server. The economic purpose of the aforementioned named agreements is also different. It involves the use of equipment, while with a hosting agreement, the purpose is not only to make the server space available but also to secure the data on it [Gołaczyński 2018, 571-81]. It is indicated that the hosting agreement is very similar to the service provision agreement[27] by providing access to data on the server and to the storage agreement [Rączka 2009, 36], as its subject is to keep the data sent by the service recipient in a non-deteriorated state (in the case of a storage agreement, this obligation applies to movable goods, and in the case of hosting – digital files). A reminder of the features of the hosting agree-

[25] Judgment of the Supreme Administrative Court of 16 November 2022, ref. no. II FSK 598/20, Lex no. 3486340.

[26] Judgment of the Supreme Administrative Court of 25 May 2022, ref. no. II FSK 2530/19, Lex no. 3401329.

[27] Act of 23 April 1964, the Civil Code, Journal of Laws of 2024, item 1061, Article 751.

ment is necessary to determine whether the fee under this agreement, made for the benefit of the service provider, meets the conditions for its inclusion in the revenues for the use or the right to use an industrial device, including a means of transport, commercial or scientific equipment referred to in Article 21(1)(1) on corporate income tax.[28]

CONCLUSION

The relationship between the legislative and judicial powers may be shaped differently in individual legal systems. However, it should be clearly stated that the legislative and judicial powers are closely correlated, which becomes particularly visible in the field of legal norms relating to the issue of corporate taxation. Polish administrative courts have numerous objective reasons for substituting the legislator, which often takes defective solutions. This is mainly due to the lack of due diligence in the law-making process. Considering the above, Polish tax law standards are very often ambiguous, inconsistent and highly complex. This is where the interpretative role of Polish administrative courts begins. It should be clearly emphasised that the role of the judicial decision of administrative courts in the process of establishing tax law in the field of corporate taxation is not limited only to clarifying undefined issues or fulfilling the content of the general clause. Particularly important in this respect are the resolutions of the Supreme Administrative Court, which unify case law and organise opinions on issues that raised discrepancies and indicate the directions of decisions in the most complex cases.

The analysis of information on the judicial activities of administrative courts in the field of corporate income tax in 2019-2022 clearly indicates the use of judicial activities aimed at expanding the sphere of protection of individual rights. This was reflected both in the judgments and resolutions of the Supreme Administrative Court regarding tax equity, consisting, among others, in limiting the practice of tax authorities based on the *in dubio pro fisco* principle, rejecting the thesis on the autonomy of tax law and restoring unjustly deprived rights of taxpayers.

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LEGAL CULTURES AND STRATEGIES FOR IMPLEMENTING ARTIFICIAL INTELLIGENCE REGULATIONS. CASE STUDIES OF THE UNITED STATES, PEOPLE'S REPUBLIC OF CHINA AND EUROPEAN UNION

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Abstract. The dynamic development of new technologies, primarily manifested in the rapid and uncontrolled improvement of artificial intelligence models, needs a discussion on the advisability of framing it within regulatory boundaries. Despite widespread interest and clear signalling of the need to control the development of artificial intelligence, a unified approach to the direction of legislative development in this area has not yet been established. Legislative bodies of countries worldwide, particularly those at the forefront of innovation, international organizations, and the creators and providers of modern technological solutions themselves present different attitudes and legislative strategies. The authors express the conviction that the current course of legislative work is dependent not only on objectively occurring factors, including the difficult-to-normatively-capture explosive technological progress, but in fact stems from the cultural characteristics shaping a given legal culture. The aim of this paper is to review and analyze law-making activities in countries/areas dominating the technological market, conditioned by different legal cultures, and to indicate the influence of legal culture on the shape of regulations governing artificial intelligence.

Keywords: artificial intelligence; legal cultures; law; common law; European Union; Confucianism.

INTRODUCTION

Artificial intelligence has proven to be a revolutionary IT model that now affects almost all areas of human life. It is no wonder that it is considered a flywheel driving the global phenomenon dubbed "Industrial Revolution

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4.0" [Siuta-Tokarska 2021]. Leaving aside the difficulty with defining the very concept of artificial intelligence unambiguously and precisely, it is regarded as a useful technological phenomenon having universal potential. The fast-paced development of new technologies, expressed primarily in the rapid and uncontrolled improvement of artificial intelligence models, stirs a discussion on whether it is advisable to cover it by the regulatory framework. Despite widespread interest and a clear indication of the need to control the development of artificial intelligence, no uniform approach has yet been determined as to the development of legislation in this area. The legislative bodies of countries in the world, especially those leading in innovation, international organisations, or the very producers and suppliers of modern technological solutions, represent different attitudes and legislative strategies.[1]

Law, as Pierre Legrand describes it, "[...] remains part of the tradition: in short, it inherently participates in culture, it necessarily manifests itself culturally" [Legrand 1996a, 54]. Law as a tool for organising and regulating social relations is a product of civilisation, which naturally entails the strong marking of its content by traditions, values, forms of social coexistence, beliefs, material, spiritual and intellectual achievements [Wołpiuk 2014, 180; Tokarczyk 2000a, 187]. Therefore, law is unquestionably one of the most important elements of culture that influences its shape and determines its development at the same time [Wołpiuk 2014, 180, 188; Tokarczyk 2000a, 62]. Leaving aside considerations on the interference between law and culture, it should be emphasized that finding and identification of specific features and cultural mechanisms inherent in a given community, which together form a particular legal culture, is a condition for effective studies on regional comparison of law and the distillation of models suitable for its improvement or the improvement of international cooperation.

Legrand's concepts on legal cultures and *mentalité juridique*[2] [Legrand 1996b, 279-318] constitute a starting point to analyse the interdependencies

[1] See https://lordslibrary.parliament.uk/artificial-intelligence-development-risks-and-regulation/ [accessed: 28.05.2024].

[2] *Mentalité juridique* is a concept proposed by Henri Lévy-Bruhl, a French sociologist and historian of law. It derives from the research on "primitive mentality" carried out by his father Lucien Lévy-Bruhl. The concept refers to the way in which society perceives, interprets and applies law. It covers formal aspects of law and informal practices and beliefs related to law. Henri Lévy-Bruhl studied the evolution of law from primitive to codified forms. He analysed the impact of this transformation on the concept of legal personality. According to him, in situations of uncertainty, people refer to imagined beings extending beyond modern risk calculation. The idea suggests that *mentalité juridique* contains cultural and psychological dimensions affecting uncertainty management by legal structures. See Keck 2020. Pierre Legrand, on the other hand, develops this idea and sees *mentalité juridique* as a key element of legal culture. In his view, every legal tradition has

between legal cultures and regulatory implementation strategies, particularly evident for work on AI regulations [Idem 2006, 346-460; Gordley 2017, 133-80; Szacki 2009; Pomian 2006; Kołakowski 1972]. Legrand stresses that law is deeply embedded in culture and cannot be fully understood without taking into account the broader context, therefore various legal cultures approach differently issues such as privacy, responsibility and AI ethics, which will affect the way regulations are created and implemented.

Mentalité juridique refers to the mindset about law that is characteristic of a particular legal culture. In the AI context, this may include differences in the perception of the role of technology in society, acceptance of the autonomy of AI systems, or approach to liability for decisions made by AI systems. It should be noted that law is not only just a sum of graphic characters written in the form of normative acts, but it is revealed in the way in which it is interpreted and applied by people. The effectiveness of regulation will depend not only on its content, but also on how it is understood and implemented by AI developers, users and regulators.

The adoption of appropriate regulations requires a combination of knowledge in the fields of law, technology, ethics and social sciences, which should also be integrated into local cultural contexts. The mere transposition of legal solutions between cultures is problematic. The use of regulatory strategies that work in one legal culture may not yield the expected result in another. The global approach to AI regulation proposed by the EU in the AI Act[3] may therefore encounter difficulties in its implementation into different cultural circles.

The AI regulation implementation policy is therefore inextricably linked to and conditioned by the system of assumptions and concepts forming a particular legal culture, which means that seemingly universal regulatory solutions will in practice be interpreted, adapted and applied in a way that is consistent with the unique values, traditions and thinking that are characteristic of a particular legal system. This is so because strategies refer to the planning

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a unique mentality, deeply rooted in the culture of society. It is a set of often subconscious assumptions and ways of thinking about the law, characteristic of a given tradition. Legrand points out that *mentalité juridique* goes beyond the formal legal system. This is closely linked to the language, history and culture of a particular society, emphasising the importance of a broader cultural context for its full understanding. Includes informal practices, beliefs and interpretations of the law. In his studies, he often juxtaposes the legal mentality of the Roman tradition with common law, highlighting fundamental differences between them. For Legrand, understanding *mentalité juridique* is essential to compare legal systems reliably. Otherwise, comparative studies remain a superficial discipline. Cf. Legrand 1996b, 279-318.

[3] The full title is: *Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts (Artificial Intelligence Act).*

and implementation of activities aimed at specific legal objectives. This can include both the actions taken by state authorities and arrangements used by companies or organisations to comply with legislation and protect their interests. However, effective regulatory strategies will require a deep understanding of the local cultural landscape, an interdisciplinary approach and the flexibility to adapt to the peculiarities of the *mentalité* of the legal culture concerned. Humans are characterised by a remarkable capacity to adapt while seeking to order the reality around them [Graeber and Wengrow 2022; Mumford 1986]. To this end, they create rules, a kind of guide posts, which take the form of various laws, including those formulated by authorised decision-making bodies (positive law), customary laws, ideas, religions or traditions. As a result, societies operate under specific social contracts typical of the historical era concerned [Bostrom 2024; Idem 2016].

A crucial issue in the development of artificial intelligence is the problem of alignment of AI to operate safely and in accordance with human standards, in particular in a way compatible with the human value system and the goals assumed by humans. This issue can be perceived as an attempt to redefine the concept of "social contract" currently under construction between humanity and the non-human world in the form of AI. Like "traditional" social contracts, the new contract will continue as long as the factors that make it reasonable exist or operate [Du Sautoy 2019; Tegmark 2019]. However, with rapidly developing AI technology, circumstances can change much faster than in the case of "traditional" social contracts [Suleyman and Bhaskar 2023]. When the existing rules and norms become inadequate for the opportunities and challenges posed by AI, the existing contract will cease to apply which will force the formation of a new relationship that would be better adapted to the changing reality.

In this context, legal cultures play a crucial role in the process of developing legislative strategies concerning artificial intelligence. Different legal traditions, be it the common law, continental law or hybrid systems (e.g. Chinese), show different approaches to creating and enforcing the law. These differences may affect the way in which particular societies attempt to solve the AI alignment problem. For example, common law systems that are largely based on precedents may be more flexible in adapting to fast-changing AI challenges. On the other hand, systems of continental law that are strongly focused on the normativisation of reality may seek to create a comprehensive legal framework to govern the development and implementation of AI.

AI regulation strategies must therefore take into account not only the technical aspects of the alignment problem, but also the legal-cultural contexts within which these regulations will be located. This will lead to polarisation of approaches towards AI regulation in various regions of the world, reflecting local values, legal traditions and social expectations.

The study seeks to review and analyse lawmaking activities in countries/regions that dominate the technological market,[4] subject to different legal cultures. The authors express the belief that the current course of legislative work depends not only on objectively occurring factors, including e.g. soaring technological progress that is difficult to normatively capture, but in fact on cultural properties that shape a given legal culture. This paper does not exhaust this issue, but may be an impulse to deepen studies and analyses on this subject.

To prepare the article, the authors reviewed the literature on artificial intelligence theory and reference material in the form of normative acts, analyses and reports by public administrations of selected countries and their legal systems.

1. STRATEGIES FOR THE DEVELOPMENT OF ARTIFICIAL INTELLIGENCE REGULATION

1.1. United States of America

The system of law of the United States as a federal state is based on the binary division of regulations into federal law and state law applicable on the territory of the whole country and territories of particular states. Normative acts are arranged in a hierarchical collection determined by the wording of the provision of Article IV of the Constitution of the United States of America, providing for the superiority of constitutional provisions over international agreements, federal laws, state constitutions, state laws and legal norms of local administrative units [Tokarczyk 1996, 111-14]. The central concept in American legislation and jurisprudence is liberty [Siedlecki 2021, 134], and the most important rights include the right to personal security, the right to personal freedom or the right to private property [Tokarczyk 1996, 117]. Historical and cultural background contributed to the creation of the paradigm of "American uniqueness", also expressed today in the pursuit of demonstrating the nation's superiority in the field of artificial intelligence [Hine and Flordi 2024, 268]. Wishing to maintain its position as the world leader in artificial intelligence, the US has decided to create an extremely flexible and adaptive "open innovation ecosystem."[5]

The narrative about the need to build a "technology superpower" based on liberalised regulatory policies is directly reflected in the content of Presidential Executive Order No. 13859 of 11 February 2019.[6] This direction

[4] See https://www.wipo.int/edocs/pubdocs/en/wipo-pub-2000-2023-en-main-report-global-innovation-index-2023-16th-edition.pdf [accessed: 02.06.2024].

[5] See https://time.com/6848922/ai-regulation/ [accessed: 29.05.2024].

[6] *Maintaining American Leadership in Artificial Intelligence*, https://www.federalregister.

was maintained and developed in further legislation, including the National Artificial Intelligence Initiative Act of 12 March 2020[7] or Executive Order No. 13960 of December 3, 2020. The clear intention of the lawmakers was to support research centres, the progress in artificial intelligence or drafting the best standards for the development and use of trustworthy artificial intelligence systems (Sec. 101(b)(1) and (2) NAIIA). None of these acts explicitly stated the adoption of a single, coherent and centrally applicable legal framework for AI. This assumption was also not included in the draft AI Bill of Rights (*Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People*) published on 4 October 2022. The document contains five principles (guidelines) to be followed by entities which design, use and implementation of AI models in using new technology.[8] Artificial Intelligence has thus been regulated fragmentarily, and relevant regulations have been contained in numerous federal laws[9] or soft-law industry guidelines[10] drafted by the executive authorities, not by the legislative bodies authorised to do so. Along with the rapid development of generative artificial intelligence, initiated by providing the ChatGPT to the public, more and more concerns have been expressed about the passivity and sluggishness of the US legislature, which was explained by the lack of understanding of this technology[11] or by the excessive dynamics of changes that supposed to be an obstacle to the smooth conduct of the legislative process.[12]

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gov/documents/2019/02/14/2019-02544/maintaining-american-leadership-in-artificial-intelligence [accessed: 29.05.2024].

[7] House of Representatives 6216, *National Artificial Intelligence Initiative Act of 2020* [hereinafter: NAIIA], https://www.congress.gov/bill/116th-congress/house-bill/6216/text [accessed: 29.05.2024].

[8] See https://www.whitehouse.gov/ostp/ai-bill-of-rights/ [accessed: 09.08.2024].

[9] See https://www.europarl.europa.eu/RegData/etudes/ATAG/2024/757605/EPRS_ATA(2024)757605_EN.pdf [accessed: 29.05.2024].

[10] *Practical Guidance for the use of generative artificial Intelligence in the practice of law*, The State Bar of California Standing Committee on Professional Responsibility and Conduct, https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf [accessed: 29.05.2024]; *Generative Artificial Intelligence. Guidelines for Use in the Practice of Law*, The Law Society of Manitoba, https://educationcentre.lawsociety.mb.ca/wp-content/uploads/sites/2/2024/04/Generative-Artificial-Intelligence-Guidelines-for-Use-in-the-Practice-of-Law.pdf [accessed: 29.05.2024]; *Ethical Principles for Artificial Intelligence* (24.02.2020), https://www.ai.mil/docs/Ethical_Principles_for_Artificial_Intelligence.pdf [accessed: 29.05.2024]; *National Intelligence's Principles of Artificial Intelligence Ethics for the Intelligence Community* (23.07.2020), https://www.intelligence.gov/artificial-intelligence-ethics-framework-for-the-intelligence-community [accessed: 29.05.2024]; https://www.dataguidance.com/opinion/usa-multiple-state-bars-set-guidelines-generative-ai [accessed: 29.05.2024].

[11] See https://www.nytimes.com/2023/03/03/business/dealbook/lawmakers-ai-regulations.html [accessed: 29.05.2024].

[12] See https://www.brookings.edu/articles/the-us-government-should-regulate-ai/ [accessed: 29.05.2024].

In May 2024, the Bipartisan Senate AI Working Group, recognising the threats from uncontrolled development and use of artificial intelligence,[13] and listing sensitive areas,[14] called for consideration to be given to undertaking concrete legislative action, particularly with regard to the creation of mechanisms for holding artificial intelligence developers and implementers accountable to consumers, standards of the protection of personal data stored in databases and subsequently processed by artificial intelligence systems.[15] The Senate Working Group supported the creation of a federal law to protect citizens, based on the principle of the minimisation and security of data, security, consent and data brokers.[16]

Moreover, attention has been drawn to the current problems related to the use of artificial intelligence, such as e.g. the generation of child pornography or deepfakes, strongly advocating the development of rules to protect children from online harm caused by AI and the clear prohibition of social scoring practices.[17] The Senate Working Group also promotes legislation to support the implementation of artificial intelligence in the healthcare sector (including the protection and safeguarding of patients' interests), legislation to ensure transparency for suppliers and patients in the use of artificial intelligence models in medicinal products and clinical support measures, rules on databases used for the training of artificial intelligence models,[18] and norms for public education in the use and identification of artificial intelligence products.[19]

The Senate's position, however, was not welcomed by representatives of the Republican Party, who clearly opposed to taking regulatory action on artificial intelligence. This opposition is explained by a desire to maintain the technological edge that the US would lose as a result of potential burdens and restrictions on developers or the establishment of new AI controlling bodies. The Republicans see the process of regulation of AI as

[13] See https://www.politico.com/live-updates/2024/05/15/congress/schumers-roadmap-on-ai-bills-00157828 [accessed: 02.06.2024].

[14] *Driving U.S. Innovation in Artificial Intelligence. A roadmap for artificial intelligence policy in the United States*, The Bipartisan Senate AI Working Group, https://young.senate.gov/wp-content/uploads/Roadmap_Electronic1.32pm.pdf [accessed: 30.05.2024]. The above-mentioned areas appear to overlap the rules expressed in Section 2 of the Executive Order No. 14110 of 30 October 2023 on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence. See Section 2, Executive Order 14110 (30.10.2023), *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence [accessed: 30.05.2024].

[15] The Bipartisan Senate…, p. 14.

[16] Ibid.

[17] Ibid. p. 12.

[18] Ibid., p. 13.

[19] Ibid., p. 16.

acts of suppressing innovation and generating litigation between developers,[20] which also certainly influenced the content of the Republican Party Platform 2024. In the official communiqué issued on 8 July 2024 titled "2024 GOP Platform: Make America Great Again" the party directly stated its intention to repeal the previous Presidential Executive Orders believed by the Republicans to hinder AI innovation, proposing instead the development of artificial intelligence in the spirit of free speech and flourishing of humans.[21]

1.2. People's Republic of China

The management of artificial intelligence in the People's Republic of China is based on a monolithic model, pre-planned and imposed by the central authorities,[22] which is in line with Confucian political philosophy founded in the primacy of obedience to authority, the supremacy of state interests and social cohesion [Huang 2024, 76]. Apart from the centrally applicable rules on artificial intelligence, there are also rules in the Chinese legal system that are issued by provinces, especially those which are economic leaders or interested in attracting investment [Hine and Flordi, 266-67].

Undoubtedly, Confucian culture is multifaceted, but even a cursory review of Chinese legislative thought allows the observer to notice little cultural influence affecting both the wording of regulations and the course of legislative work [Nisbett 2015; Nakamura 2005]. The content of certain regulations concerning the use of artificial intelligence clearly refers to the Confucian charisma, including the ideas of harmony, focus on values or the promotion of restraint in society.[23]

In early July 2017, The State Council of the People's Republic of China has announced the Next Generation Artificial Intelligence Development Plan[24] presenting a strategy for the development of artificial intelligence intended to guarantee China the status as a global technological power. The document was an important complement and development of the policies of the 13th Five-Year Plan for Economic and Social Development of the People's Republic of China (2016-2020)[25] and the White

[20] See https://ny1.com/nyc/all-boroughs/politics/2024/06/14/house-republicans-unlikely-to-support-ai-regulation [accessed: 09.08.2024].

[21] See https://www.presidency.ucsb.edu/documents/2024-republican-party-platform [accessed: 10.08.2024].

[22] See https://www.globalpolicyjournal.com/blog/01/06/2023/contextualizing-chinas-ai-governance [accessed: 30.05.2024].

[23] See https://www.gov.cn/zhengce/zhengceku/2022-01/04/content_5666429.htm [accessed: 30.05.2024], Articles 6 and 8.

[24] See https://www.gov.cn/zhengce/content/2017-07/20/content_5211996.htm [accessed: 30.05.2024].

[25] *The 13th Five-Year Plan for economic and social development of the People's Republic of China*

Paper on Big Data (2019) drafted by the Chinese Academy of Information and Communication Technology.[26]

The Next Generation Artificial Intelligence Development Plan included a stage-determined perspective of technological improvement by 2030. According to the plan, a legal, regulatory and ethical system was to be built by 2025. The experience gained by then was supposed to enable the assessment of security and control of artificial intelligence and to be used to build a legal system.[27] The plan did not contain binding recommendations and guidelines, so the artificial intelligence industry developed spontaneously, on a self-regulation basis.

In fact, the interest in the legal regulation of artificial intelligence did not begin until 2020, with the formulation of the Artificial Intelligence Industry Self-Discipline Convention,[28] which defines the eight most important pillars for the development of artificial intelligence, including: focusing the technology on human needs, promoting fairness and justice, ensuring security and control of content, promoting sharing or transparency in decision-making based on artificial intelligence algorithms.[29] The system was supplemented on an ongoing basis with national standards and guidelines.[30]

Data protection legislation, including that of personal data, has been adopted in the following years,[31] and binding guidelines and standards have been established for AI algorithm technologies, mainly to control the flow of content on the Internet.[32] The previously determined model of the Chinese central administration of artificial intelligence prioritizes three problems related to the operation of artificial intelligence: content moderation, data protection and control of algorithms including

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(2016-2020), https://en.ndrc.gov.cn/policies/202105/P020210527785800103339.pdf [accessed: 30.05.2024].

[26] *Big Data White Paper (2019)*, China Academy of Information and Communications Technology, http://www.caict.ac.cn/english/research/whitepapers/202003/P020200327550643303469.pdf [accessed: 30.05.2024].

[27] See 5.(3) Strategic goals. Ibid.

[28] See https://www.gov.cn/zhengce/zhengceku/2020-08/09/5533454/files/bf4f158874434ad096636ba297e3fab3.pdf [accessed: 30.05.2024].

[29] See https://www.saiia.org.cn/index.php/2019/08/18/1212/ [accessed: 30.05.2024].

[30] Guidelines on machine learning, https://www.tc260.org.cn/file/2021-08-04/6b530404-858b-4c9d-8d89-a83239ec5712.pdf [accessed: 30.05.2024], Guidelines on algorhythm ethics, https://www.tc260.org.cn/file/zn10.pdf [accessed: 30.05.2024].

[31] See https://www.chinalawtranslate.com/en/datasecuritylaw/ [accessed: 30.05.2024], Article 62(2). *Personal Information Protection Law of the People's Republic of China*, https://digichina.stanford.edu/work/translation-personal-information-protection-law-of-the-peoples-republic-of-china-effective-nov-1-2021/ [accessed: 30.05.2024].

[32] See https://www.gov.cn/zhengce/zhengceku/2022-01/04/content_5666429.htm; https://www.gov.cn/zhengce/zhengceku/2022-12/12/content_5731431.htm; https://www.cac.gov.cn/2023-07/13/c_1690898327029107.htm [accessed: 30.05.2024].

recommendation and algorithmic profiling[33] [Strittmer 2020; Czubkowska 2022], which is currently expressed in extensive audit activities carried out by the Chinese cyberspace supervisory and administration authority (CAC/ The Cyberspace Administration of China, 国家互联网信息办公室) in enterprises providing and creating artificial intelligence systems. According to media reports, the audit of Chinese artificial intelligence models provides for advanced censorship based on meticulous filtering and eliminating the content that "violates fundamental socialist values" or "incites overthrowing state authorities." In response to numerous "dangerous" artificial intelligence systems, the authorities decided to devise a state model based on the political philosophy of the Chinese President, called Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era.[34]

The emergence of new artificial intelligence capabilities and related negative phenomena have forced a critical look at liberalised policy of the government. The legislative plan for 2023 has announced the formulation of a law to comprehensively regulate the issue,[35] which, in the light of recent divergences between industry and academia, is not yet definitive.[36]

Efforts undertaken to regulate artificial intelligence locally did not prevent the adoption, in early July 2024, of the Shanghai Declaration on Global AI Governance, the ideological foundations of which, although strongly linked to universal values, are characteristic of the Confucian philosophy, in particular the assumption of collective (global) responsibility for the harmonious and balanced development of artificial intelligence worldwide.[37]

2. EUROPEAN CONCEPT OF ARTIFICIAL INTELLIGENCE REGULATION

European Union law, currently the most important component of European legal culture, makes up a supranational system referring to the cultural sources of the Member States. For the Old Continent, legal culture is one of the central elements of identity, since law is one of the key elements of European heritage [Pomian 2024, 25-27; Tokarczyk 2000a, 208]. Respecting cultural and legislative traditions, the EU lawmakers actively

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[33] See https://www.twobirds.com/en/insights/2024/china/ai-governance-in-china-strategies-initiatives-and-key-considerations [accessed: 30.05.2024].

[34] See https://www.ft.com/content/10975044-f194-4513-857b-e17491d2a9e9?countryCode=POL [accessed: 07.08.2024].

[35] See https://www.gov.cn/zhengce/content/202306/content_6884925.htm [accessed: 31.05.2024].

[36] See https://www.scmp.com/news/china/politics/article/3270544/china-likely-ditch-unified-ai-legislation-due-considerable-disagreement-timing [accessed: 07.08.2024].

[37] See http://www.chinaview.cn/20240704/b1ca8d45f8f54ba9b954fcd969a2304f/c.html [accessed: 07.08.2024].

respond to the challenges being faced, especially those posed by the dynamically changing reality [Tokarczyk 2000b, 16]. Dynamism, closely linked to integralism, is an emanation of the European legal system based on the idea of creating a coherent system of norms that prospectively regulate the phenomena that are of importance to EU citizens [Tokarczyk 2000b, 19]. It should therefore come as no surprise that three years after Thierry Breton, Commissioner for the Internal Market, had presented the idea of developing a regulation governing the principles for operation of artificial intelligence.[38] The Council of the European Union adopted on 21 May 2024 the world's first comprehensive regulation on artificial intelligence – the Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act, the so-called *AI Act*).[39]

The first mention of the EU legislature's interest in artificial intelligence emerged as early as in 2018, with the gradual formation of specialised expert units being established at the European Commission.[40] A landmark moment was 19 February 2020, when the "White Paper on Artificial Intelligence: a European approach to excellence and trust"[41] was presented, including the axiology of artificial intelligence and the directions of development of norms governing the innovative technology. The aim of the development of a common European law on artificial intelligence was to counter disintegration and regulatory fragmentation within the European Union, which would undoubtedly arise if the initiative in this matter was left to the Member States' authorities.[42]

The intention of the EU legislature was to base the revolutionary technology on common values and fundamental rights shared by all the European Union member states, in particular human dignity and the protection of privacy,[43] which is also reflected in recitals 6 and 8 of the Regulation. The main subject of the legislative work was to develop an "ecosystem of trust"[44] underpinned by human leading and supervisory role, technological soundness and security, privacy protection and data management, transparency,

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[38] See *Proposal for a Regulation of the European Parliament and of the Council, Laying Down Harmonised Rules On Artificial Intelligence (Artificial Intelligence Act) and Amending certain Union Legislative Acts*, https://data.consilium.europa.eu/doc/document/ST-8115-2021-INIT/en/pdf [accessed: 31.05.2024].

[39] Ibid.

[40] See https://ec.europa.eu/commission/presscorner/detail/en/IP_18_1381 [accessed: 31.05.2024].

[41] See https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A52020DC0065 [accessed: 31.05.2024].

[42] *White Paper on Artificial Intelligence: a European approach to excellence and trust*, Brussels, 19.02.2020, COM (2020) 65 final, p. 3, https://commission.europa.eu/publications/white-paper-artificial-intelligence-european-approach-excellence-and-trust_en [accessed: 31.05.2024].

[43] Ibid., p. 2.

[44] Ibid., p. 10.

diversity, non-discrimination and fairness, societal and environmental wellbeing and accountability.[45] The regulatory framework was intended to be the foundation for the creation of trustworthy models and to provide genuine protection for EU citizens.[46]

According to the official communication from the Council, the provisions contained in the Regulation are intended to support the development and deployment of secure artificial intelligence systems in the single market of the European Union, which will work in compliance with fundamental rights of EU citizens while not acting as a brake on the development of new technologies.[47]

According to the draft, the types of artificial intelligence were classified based on the criterion of the risk they posed. Thus, a distinction was made between safe systems, artificial intelligence systems posing limited risk, high-risk artificial intelligence systems, and artificial intelligence systems based on social scoring and cognitive-behavioural manipulation, which are prohibited.[48] Classifying an artificial intelligence model as one of these groups will affect the scope of requirements, restrictions and even prohibitions applicable to these systems. The provisions of the Regulation also introduce the rules for introducing systems in the market, the formulas of market supervision and ways to support undertakings.

The management of artificial intelligence in the European Union is based on a complex system that has been regulated in a multilayer way [Cantero and Mardsen 2024], and its landscape is complemented by the provisions of the GDPR[49] and the Digital Services Act.[50]

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[45] See *White paper…*, 11; *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Building Trust in Human-Centric Artificial Intelligence*, Brussels, 8.04.2019, COM (2019) 168 final, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2019:0168:FIN:EN:PDF [accessed: 01.06.2024].

[46] Ibid., p. 12.

[47] See https://www.consilium.europa.eu/en/press/press-releases/2024/05/21/artificial-intelligence-ai-act-council-gives-final-green-light-to-the-first-worldwide-rules-on-ai/ [accessed: 01.06.2024].

[48] Ibid.

[49] *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)* (Text with EEA relevance), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0679 [accessed: 02.06.2024].

[50] *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act)* (Text with EEA relevance), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2065&qid=1717344407343 [accessed: 02.06.2024].

3. ARTIFICIAL INTELLIGENCE – A CHALLENGE FOR THE CONTEMPORARY LEGISLATION

Before 2020, most countries limited their activities to observing this outstanding technological phenomenon. The unexpected emergence of generative models of artificial intelligence, the predisposition of which went beyond all possible predictions of the legislators, caused a heated discussion about possible legislative developments. It has become clear that artificial intelligence and its evolution affect the shape of the global economy, national security and human relations [Parinandi, Crosson, Peterson, et al. 2004, 240].

The issue of artificial intelligence requires resolute legislative action, which is now not questioned by the legislative bodies of technologically leading countries. The original question "Should artificial intelligence be regulated?" has now been replaced by the dilemma "How should it be done?" M. Rojszczak argued in 2019 that too little attention had been paid to seeking regulatory direction to support the development of artificial intelligence [Rojszczak 2019, 2].

It appears that the adoption by the United States, China and the European Union of initially different legislative strategies with regard to artificial intelligence was not conditional on reformulated strategies such as economic development, but was indeed determined by the pre-existing conflicting value systems rooted in the tradition of a particular legal culture.

The US system, promoting freedom and openness has been based, unlike that of the European Union, on non-binding guidelines, the enforceability of which is debatable,[51] although the governance model, like that of the European Union, is based "on the principle of risk" and seeks to create technological constructs that are trustworthy.[52] The Chinese model, on the other hand, is designed for pursuing collective interest, patriarchal authority and to support the hierarchisation of social relations [Huang 2024, 73; Englehart 2000, 548-68]. All countries/organisations, regardless of their legal culture, must now face the same challenge: to formulate an adequate response to the unexpected emergence of far-reaching negative consequences of the widespread and uncontrolled improvement of artificial intelligence models.

However, the existing regulations do not set out the operating principles of the technology itself, but are limited to indicating the scope of their possible application and possibly minimising the damage they may cause. The issue of clash of artificial intelligence with industrial property rights

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[51] See https://www.brookings.edu/articles/the-eu-and-us-diverge-on-ai-regulation-a-transatlantic-comparison-and-steps-to-alignment/#anchor3 [accessed: 01.06.2024].

[52] See https://www.nist.gov/system/files/documents/2023/01/26/crosswalk_AI_RMF_1_0_OECD_EO_AIA_BoR.pdf [accessed: 01.06.2024].

and copyright, which seem anachronistic and incompatible with the new digital reality, is also marginalised [G'sell 2024].

CONCLUSION

The analysis of strategies for implementing AI regulation in the United States, China, and the European Union confirms the main thesis of the article: legal cultures play a major role in shaping the approach to AI regulation. Pierre Legrand's concept of *mentalité juridique* is fully reflected here, showing how deeply rooted values and legal traditions affect the formulation of regulatory strategies.

Guided by the ideals of freedom and individualism, the United States has adopted an "open innovation ecosystem" model with minimal regulatory interference. China, in accordance with the Confucian tradition of obedience to the authorities and the primacy of collective interest, has implemented a centralized, top-down control system. The European Union, striving for integration and protection of fundamental rights, has created a comprehensive, harmonized legal framework in the form of the AI Act. The various approaches illustrate how seemingly universal regulatory solutions are in practice interpreted and adapted through the prism of local values and ways of thinking. However, despite these cultural differences, all of the actors studied face similar challenges as a result of the unexpected consequences of AI development. The dynamics of technological progress force constant adaptation of regulations, posing the difficult task of balancing between supporting innovation and ensuring the security and ethical functioning of models for society. The need for a new "social contract" that takes into account the relationship between humanity and AI is indispensable, taking into account both local cultural contexts and global challenges. Effective regulatory strategies require not only an understanding of the specificity of a given legal culture, but also flexibility in adapting to rapidly changing technological realities.

Guided by the ideals of freedom and individualism, the United States has adopted a model of "open innovation ecosystem" with minimal regulatory interference. China, in accordance with the Confucian tradition of obedience to authority and the primacy of collective interest, has implemented a centralised, top-down control system. The European Union, striving for integration and protection of fundamental rights, has created a comprehensive, harmonised legal framework in the form of the AI Act. These various approaches illustrate how seemingly universal regulatory solutions are in practice interpreted and adapted in the light of local values and mindsets. However, despite these cultural differences, all these actors face similar challenges as a result of the unexpected consequences of AI development.

The pace of technological progress forces constant adaptation of regulations, which makes the legislators to face a demanding task of balancing between supporting innovation and ensuring the security and ethical functioning of AI models for society.

It is indispensable to address the need for a new "social contract" covering the relationship between humanity and AI[53] that would take into account both local cultural contexts and global challenges. Effective regulatory strategies require that characteristics of a given legal culture be understood, but they also must be flexible to adapt to rapidly changing technological realities.

In conclusion, the analysis of the cases of the US, China and EU confirms the view that legal cultures have a fundamental impact on the development of AI regulatory strategies. At the same time, it points to the need to develop more universal solutions which, according to Clifford Geertz, would allow "[…] the formulation of assumptions, interests and frameworks of action typical of one type of legal sensitivity in terms specific to another" [Geertz 2005, 179]. This ambitious task seems necessary in the face of unprecedented global challenges posed by the development of "thinking machines" as they were referred to as by Alan Turing [Turing 1950, 433-60; Idem 1937, 230-65; Jefferson 1949, 1105-121].

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[53] An example of attempts of this type is the initiative of *Future of Life Institute* under leadership of Max Tegmark. See online: https://futureoflife.org/ [accessed: 20.06.2024].

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PRINCIPLE OF CONTINUITY OF ADMINISTRATIVE PROCEEDINGS

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Abstract. The article discusses the essence, sources, content and meaning of the principle of continuity of administrative proceedings. The objective of administrative proceedings is to settle an individual case consisting in determining the legal situation of an individual in terms of rights and obligations in the public law sphere. This objective is achieved by the public administration authority by carrying out a series of orderly procedural actions consisting in the recognition and consideration of the case which is the subject of the proceedings. Continuity of proceedings is considered to be a universal principle inherent in any modern legal procedure. The principle of continuity is a directive that the proceedings should constitute a compact, uninterrupted course of procedural actions. The continuity of the proceedings is expressed by two features organising its course: uninterruptible character and integrity. The relevance of the continuity of administrative proceedings can also be determined through procedural facts and situations that interrupt the course of proceedings. Continuity of proceedings, expressed in the form of a procedural principle, can also be recognised as a procedural value.

Keywords: administrative proceedings; continuity of proceedings; process dynamics; suspension of proceedings.

INTRODUCTION

Administrative proceedings, like any legal process, are a structured sequence of activities aimed at achieving an objective defined by law [Adamiak 2003, 100]. The objective of administrative proceedings is to settle an individual case consisting in determining the legal situation of an individual in terms of rights and obligations in the public law sphere. This objective is achieved by the public administration authority by carrying out a series of orderly procedural activities consisting in the recognition and consideration of the case which is the subject of the proceedings. The result of these actions is an act of applying a norm of administrative law undertaken in the factual circumstances established by the authority. As a rule, this act takes the formalised form of an administrative decision, although the Code

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of Administrative Proceedings[1] also provides for the settlement of a case through the silence of the authority or the conclusion of an administrative settlement by the parties. The procedure results in the concretisation and individualisation of an abstract and general norm of substantive administrative law [Zimmermann 2017, 38].

Provisions of procedural law regulating the formal aspect of procedural activities and their legal effects are a factor organizing these activities into an orderly and uniform sequence. The form of procedural activities imposed by the law turns their sequence into a whole subordinated to a common objective. The function of organising procedures is also performed by procedural principles [Łaszczyca 2018, 543-44] On the one hand, they construct, in a static sense, a model of procedure and indicate the values to which the legislator refers when creating a certain type of procedure. On the other hand, procedural principles are realised in the course of proceedings through the actions performed by the subjects of these proceedings. By referring to the legal directives arising from procedural principles, the full content, meaning and legal effects of the actions taken in the course of the proceedings can be established. From the procedural principles it is also possible to derive criteria for assessing the correctness of the course of the procedure.

Continuity of proceedings is considered to be a universal principle, inherent in all modern judicial proceedings, and its universal character is reflected in the fact that it covers not only judicial proceedings, but all procedures of a jurisdictional nature conducted by the authorities appointed for that purpose, and thus also administrative proceedings. The principle of continuity, also known as the principle of concentration, is a directive according to which proceedings should constitute a compact course of action, free of interruptions and obstructions [Czarnik 2007, 38-39]. The continuity of administrative proceedings as a procedural principle has not, however, been articulated expressly in the provisions of the Code. In view of the significance of the legal consequences attributed to a violation of this directive, it is worth searching for its essence and sources, situating it in the systematics of procedural principles, as well as determining its content and meaning for the subjects of administrative proceedings.

1. THE DYNAMIC STRUCTURE OF ADMINISTRATIVE PROCEEDINGS

The principle of continuity of administrative proceedings is derived from the objective of those proceedings. “Due to the purposeful character

[1] Act of 14 June 1960, the Code of Administrative Proceedings, Journal of Laws of 2024, item 572 [hereinafter: the Code].

of administrative proceedings – their course should be based on certain rational assumptions, and, inter alia, they should be continuous, i.e. they should proceed without interruption from the moment of initiation until the moment of issuing a decision by the authority conducting the proceedings" [Dawidowicz 1983, 126]. The expediency and rationality of the legal process are therefore considered fundamental values underlying the continuity of proceedings.

It seems that in order to establish the essence of the continuity of the proceedings, it is first necessary to refer to the meta-concepts of "statics" and "dynamics", which serve as tools for describing the structure of the process. The statics of the process are formed by the institutions determining its 'architecture', i.e. its organisational (institutional) legal framework. Thus, the static elements of the administrative process are, in particular, the competence of the authority, the prerequisites for admissibility of the administrative proceedings, the legitimacy and procedural capacity of the parties to the proceedings. Whereas the broadly understood dynamics of proceedings should be understood as the legal mechanisms determining the course of those proceedings. "The dynamic structure of a process is determined by the temporal succession of its individual stages and sub-stages. Their distinction is based on the fact that they are characterised by their specificity and sub-objectives in relation to the fundamental objective of the process" [Wiśniewski 2013, 21].

Like any dynamic structure, the legal process can also be described in terms of certain parameters, which include movement, change, relationships and time.

A movement, which is identified with a course of proceedings, is a procedural mechanism resulting from a causal sequence of occurrences and legal actions, determined by the fundamental objective of the process, which is the settlement of the case [Gregorczyk 2021, 25-26]. The provisions of administrative procedural law determine precisely the initial and final moment of the course of proceedings, binding significant legal consequences to the occurrence and closure of the process. In the light of Article 61(3-3a) of the Code, proceedings are commenced on the date on which a party delivers the authority a request for initiation of proceedings, and in the case of a request filed electronically – on the date on which proof of its reception is issued, as referred to in the Act of 18 November 2020 on electronic deliveries.[2] The date of commencement of *ex officio* proceedings, unless otherwise specified in special provisions, shall be the date on which the notice of commencement of the proceedings is delivered to the party, pursuant to Article 61(4) of the Code. The moment of the ending of the proceedings

[2] Journal of Laws of 2024, item 1045 as amended.

is connected with the fact of externalisation towards the party of the act by which the authority settles the case being the subject of the proceedings, i.e. with delivery or announcement of the administrative decision in the manner specified in Article 109 of the Code, provided that the case may be, pursuant to Article 122a of the Code, settled in a silent manner – on the date specified in Article 122c of the Code. Precise determination of the date on which the proceedings are concluded is also important for the assessment of the authority's observance of the time limit for settling the case and is significant from the point of view of the time of admissibility of verification of the act ending the proceedings.

In considering the course of a process, it is necessary to have in mind procedural occurrences and activities as facts constructing the various stages of the process. Procedural activities are all deliberate, intentional actions taken by the participants in the proceedings with the intention of achieving procedural effects. The course of the process, i.e. the operation of the process mechanism itself, is based on procedural activities [Wiśniewski 2013, 22-23]. The functions and content of procedural activities are determined in particular by the stage of the process, the subject matter of the proceedings, i.e. the scope of the rights and obligations to be determined by the authority, as well as the level of recognition of the case and the involvement of the party in the course of the proceedings. Change as a parameter of the dynamics of the process appears both in its progression through the subsequent procedural stages and in the transformation of the findings made on the factual and legal state of the case into a decision concluding the proceedings.

The dynamics of the process are also determined by the relationships between its subjects and participants. These relations occur first of all between the authority conducting the proceedings and its party or parties, but also between the public administration authorities in the given configuration of the proceedings. In particular, public administration authorities, pursuant to Article 7b of the Code, have been obliged to cooperate with each other in the course of the proceedings to the extent necessary to clarify the factual and legal state of the case accurately, taking into account the public interest and the legitimate interest of citizens and the efficiency of the proceedings, by means of measures adequate to the nature, circumstances and complexity of the case. Interaction between authorities may consist, inter alia, in co-participation in the handling of a case in the opinion procedure (Article 106 of the Code), provision of legal aid (Article 52 of the Code), delegation of jurisdiction (Article 26(2) of the Code) or transmission of an application (Article 65 of the Code).

The process is conducted within a specific legal framework and in a manner dictated by the logic of the procedural activities. Thanks to this dimension of dynamics, the process acquires the feature of structural-functional

stability, which is extremely important for its participant. The subject (participant) of the process can take the actions prescribed by law and exercise procedural rights adequate to the state of the proceedings. Also the authority conducting the proceedings orders its course according to the logic imposed by normative criteria. In particular, when initiating administrative proceedings at the request of a party, the public administration authority to which the application has been submitted assesses in turn: its capacity to conduct the proceedings, as determined by the provisions on jurisdiction and exclusion from the case, the completeness and formal correctness of the application submitted, as well as the admissibility of the proceedings, after which, in the event of a positive result of the assessment made, it determines the subjective scope of the proceedings and notifies all parties of the commencement of the proceedings as a result of the request made. A negative outcome of the assessment in any of the above aspects implies the necessity for the authority to take appropriate actions, such as: to transmit the application to the competent authority and at the same time to notify the applicant of this action and its consequences (Article 65 of the Code), to return the application to the applicant (Article 66(3) of the Code), to leave the application unprocessed, after a possible earlier request to remove the defects (Article 64 of the Code), or to refuse to commence proceedings (Article 61a of the Code). At the same time, the applicant is provided by the procedural law with an adequate legal remedy (complaint, reminder, claim to the administrative court) enabling a reaction to an action taken by the authority or lack of appropriate action.

When describing the dynamics of a process, the parameter of time should also be taken into account. The objective "time of the process" is contained in the timeframe defined by the beginning and end of the proceedings, i.e. the date of its commencement and conclusion. Nevertheless, there is also "time in the process", captured according to the principles of procedural formalism in the form of procedural time limits, which integrate and concentrate procedural activities and, moreover, discipline the subjects and participants of the proceedings. It should be noted that in a specific legal context, determined by the norms and principles shaping the procedural model, time of proceedings is no longer merely a parameter of the dynamics of the process, but becomes a procedural value, protected and guaranteed by law. Such a value is above all the speed of action of the authority in the case, raised in Article 12 of the Code to the rank of a directive determining the content of the general principle of proceedings, in addition to the directives of acting thoroughly and taking into account the economic dimension of the process. Deconcentration of procedural activities leading to inaction of the authority or lengthiness of the proceedings entitles a party to these proceedings to use legal instruments counteracting procedural stagnation. On the other hand, the disintegration of the proceedings through the behaviour of the parties

and other participants violating the procedural time limits triggers the possibility of using legal sanctions by the authority, e.g. in the form of a fine, as well as leads to the loss of certain procedural rights and benefits by these subjects, causing, e.g. the inability to use a legal remedy after the time limit or leaving the application, the deficiencies of which were not completed within the time limit set by the authority, unprocessed [Wasilewski 1966, 61].

The source and essence of the principle of continuity of proceedings must be located in the dynamic dimension of the structure of administrative proceedings, decoding then its content by analysing the various procedural institutions through which the principle works.

2. CONTINUITY OF PROCEEDINGS AS A PROCEDURAL PRINCIPLE

The essence of the continuity of proceedings is reflected in two features that organise its course: non-interruption and integrity (indivisibility, concentration) [Łaszczyca 2018, 544]. The non-interruption of proceedings means that they run continuously from the moment they are commenced until they are concluded. The course of this procedure is closed within the timeframe set by the time limit for handling the case. Integrity of the proceedings is a qualitative feature of the course of the proceedings, which implies that procedural steps should be arranged in a logical, planned and orderly sequence, focused on achieving the objective of the proceedings. This excludes taking activities that are unnecessary for the outcome of the proceedings, such as proving facts that have already been proved or that are irrelevant to the case, repeating procedural activities or pretending to be exploratory. The procedural tools securing the integrity of the proceedings are provided to the authority in particular by the provisions of the Code regulating the course of evidence proceedings.

The doctrine of the administrative process, regarding continuity of proceedings as a principle, places it among the technical-procedural principles and puts it on a par with the principles of speed and simplicity of proceedings and procedural economy [Idem 2005, 17-18]. On the other hand, the guarantee and instrumental dimension of continuity of proceedings in relation to the directives of efficient action, mentioned expressly in the content of Article 12(1) of the Code, is indicated. In particular, continuity of proceedings is considered to be a guarantee of the implementation of the principle of speed of proceedings [Knysiak-Molczyk 2013, 279]. This is because any interruption of the proceedings postpones the achievement of their objective and may even lead to its prevention. Thanks to the principle of continuity, the proceedings become a compact, consistent series of procedural activities carried out without interruption [Łaszczyca 2005, 18].

Judicature also generally places the continuity of administrative proceedings in the context of the principle of speed. This is because only the continuous manner in which the proceedings are conducted allows for an efficient and quick recognition of the case.[3] Continuity of proceedings is treated as a factor on which the possibility of settling an administrative case within the required time limits depends. The special value of continuity of proceedings is precisely due to the fact that it is a procedural guarantee of the principle of speed.[4] As a result, any delay in settling the case must also be treated as a violation of the principle of continuity.

However, the reducing of the principle of continuity of proceedings to a guarantee of prompt action by the authority seems to be a simplification which does not take into account the essence of the continuity of the process and, at the same time, deprives continuity of the character of an independent procedural principle. Reflections of the principle of continuity can, after all, also be found in other Code provisions not directly related to the implementation of the directive of prompt action in a case. An example of this is the institution of reinstatement of a procedural time limit. It is intended to mitigate the legal consequences related to the expiry of a strict time limit, the violation of which renders a procedural activity ineffective [Wegner 2019, 365]. Pursuant to Article 58(2) of the Code, when applying for the restoration of such a time limit, the activity for which it was set must be performed at the same time. This requirement is related to the legal effect of restoring the time limit. This is because the public administration authority in this situation only recognises the application for restoration of the time limit, and if it is justified – restores the time limit. As a result of the reinstated time limit, the procedural activity for which the time limit was set is treated as if it had been performed within the time limit. The adoption of such a solution is justified by the logic of the course of proceedings, which justifies the expediency of simultaneous performance of two mutually dependent procedural activities. Failure to perform simultaneously the activity for which the time limit is to be restored constitutes a formal shortcoming of the application, which may be removed by way of a summons under pain of leaving the application for restoration of the time limit unexamined.[5] It is also accurate to state that if a party becomes aware of the failure to comply with the time-limit for submitting an appeal as a result of the authority's notification of an order in that case, the party is not obliged to submit a further appeal

[3] See judgment of the Voivodship Administrative Court in Cracow of 30 November 2022, ref. no. I SA/Kr 84/21, in: Central Database of Administrative Court Decisions [hereinafter: CDACD].

[4] See judgment of the Supreme Administrative Court of 11 December 2018, ref. no. II OSK 1311/17, in: CDACD.

[5] See resolution of the Supreme Administrative Court of 21 April 2009, ref. no. II FPS 9/08, in: CDACD.

together with an application for the reinstatement of the time-limit [Golęba 2019, 431]. The rationality, integrity and indivisibility of the process, in this case taking into account its inter-instance dimension founded in the principle of two-instance proceedings, oppose the duplication of procedural activities with identical content and objective. It is also worth noting that in the case of restoration of the time limit for submitting an appeal, the scope of the effect of this activity is even broader, as it causes the opening of the review procedure as a result of a kind of "restitution" of the non-finality of the decision which was not contested within the time limit. This is also an argument in favour of the continuation of a process that has not yet reached the optimal objective, which is a judgment accepted by its addressee.

The principle of continuity of administrative proceedings is also revealed in the institution of procedural succession. Pursuant to Article 30(4) of the Code, in cases involving transferable or heritable rights, in the event of the transfer of a right or death of a party during the course of proceedings, its legal successors enter in place of the previous party. The entry of a legal successor in place of an existing party into the pending proceedings is effected by operation of law as soon as the prerequisites for succession are met. It is therefore not permissible for the authority conducting the proceedings to rule on the matter. Instead, the task of the authority is to examine the existence of the prerequisites of procedural succession and to take steps to enable the legal successors of a party to participate in the pending proceedings, in accordance with the directives arising from the general principles laid down in Articles 9 and 10 of the Code.[6] The categorical formula of the norm of Article 30(4) of the Code determines the obligatory character of the entry of legal successors into the course of proceedings. In this way, a provision of procedural law, reflecting the continuity of proceedings in an identical case, directly concretises the procedural situation of a specific entity, without the need for this concretisation by a public administration authority [Matan 2005, 405].

A legal instrument provided for preventing the obstruction of the course of proceedings is the construction of a legal fiction of delivery of a procedural letter [Borkowski 2012, 256]. Pursuant to Article 44 of the Code, if a letter cannot be delivered to the addressee, it is deemed to have been delivered with legal effect and left in the case file upon expiry of the period for which it was deposited at a postal operator or at the office of the competent municipality (city). Similarly, pursuant to Article 47 of the Code, in a situation when the addressee refuses to accept a letter delivered by a postal operator or through another subject, the letter is deemed delivered on the day of its refusal by the addressee. The above solutions implement the directive of continuity of the

[6] See judgment of the Supreme Administrative Court of 11 July 2013, ref. no. II OSK 623/12, in: CDACD.

process, preventing the party from thwarting or delaying the activities undertaken by the authority in order to achieve the objective of the proceedings.

A reflex of the principle of continuity of the process can also be found in the provisions concerning the adjudication of the costs of administrative proceedings. Pursuant to Article 264(1) of the Code, at the same time as issuing a decision, the public administration authority is obliged to determine, by way of a decision, the amount of the costs of the proceedings, persons obliged to pay them and the date and manner of their payment. An order on the costs of proceedings is an administrative act separate from the decision concluding the proceedings in an individual case, nevertheless the moment of its issuance links it strictly with the course of these proceedings. It is permissible to issue an order for procedural costs prior to the issuance of a decision in a case when both of these administrative acts have been delivered to a party jointly and thus entered into legal force on the same day.[7] The order on the costs of the proceedings does not affect the existence, legality or enforceability of the administrative decision. Its existence is independent, as it relates to an incidental issue, related to the activities carried out in the course of the proceedings and not to the substance of the case settled by the decision. Nevertheless, the Code concentrates the decision on the merits and the order on the costs of the proceedings. "The time limits of this order are determined by objective considerations. The moment of its issuance is immediately after the decision is issued, never before, sometimes a few days later when they are public holidays" [Jaśkowska 2020, 1146]. However, jurisprudence allows for a loosening of the temporal correlation of the decision and the order on the costs of the proceedings.[8]

3. INTERRUPTION OF THE CONTINUITY OF ADMINISTRATIVE PROCEEDINGS

The essence of the continuity of administrative proceedings can also be expressed in terms of procedural facts and situations that interrupt the course of proceedings. Also, the characterisation of the continuity of the process as a principle is generally based on the identification of exceptions to it [Czarnik 2007, 37-38]. Interruptions in the course of proceedings may have different causes, nature and permanence. They may affect the continuity of the proceedings both in terms of their non-interruption and their integrity. It is the task of the legislator to determine the balance between the

[7] See judgment of the Supreme Administrative Court of 14 November 1995, ref. no. SA/Gd 2749/94, in: CDACD.

[8] See for example judgment of the Supreme Administrative Court of 25 September 2007, ref. no. II GSK 137/07, in: CDACD.

continuity of the proceedings and the procedural values in front of which it must give way [Łaszczyca 2018, 546].

The opposite of the continuity of proceedings is the resting of the process, included in the formal framework of the institution of suspension of proceedings. However, it is a simplification to interpret the essence of suspension of administrative proceedings as an exception to the principle of continuity of proceedings. Indeed, this institution has been constructed as a compromise between the continuity of the proceedings and the necessity of temporarily stopping the proceedings. "The continuity of administrative proceedings is an important factor ensuring that an administrative case can be resolved within the limitations of the applicable time limits. On the other hand, however, it cannot be disregarded that in certain circumstances the interruption of the course of administrative proceedings will prove unavoidable for factual or legal reasons. A compromise between these opposing reasons is achieved by the introduction of the institution of suspension of proceedings, which determines the principles and procedure of suspension of the course of administrative proceedings by the authority conducting the proceedings" [Dawidowicz 1983, 126]. This compromise is realised by the provisions of the procedural law on several levels.

Suspension of proceedings is admissible only if in the course of these proceedings there occur facts or circumstances which make the course of the proceedings impossible and, as a consequence, lead to the necessity to suspend procedural actions aimed at consideration and settlement of an individual case. A public administration authority, pursuant to Article 97(1) of the Code, is obliged to suspend proceedings *ex officio* for two reasons. Firstly, proceedings are suspended when their conduct is prevented by subjective deficiencies. The authority may not undertake procedural activities aimed at consideration and settlement of the case in a situation where there is either no party to the proceedings or the party is not properly represented. Secondly, an interruption of the proceedings is necessary if the examination of the case and the decision in the ongoing proceedings is subject to the prior settlement of a preliminary issue (prejudicial question) by another authority or court. Suspension of the proceedings *ex officio* on the basis of other causes by the authority is a gross violation of procedural law. It is also impermissible to suspend proceedings where the reason for suspension did not in fact exist because the authority misinterpreted the content of the premise for suspension in the circumstances. "If, therefore, the proceedings are to constitute, as assumed by the legislator, a compact and consistent sequence of procedural activities carried out without unnecessary interruptions, any action of the authority which excludes the directional character of the activities undertaken by taking into account in the handling of the case issues which are not related to it, or which show such

a connection, nevertheless having only an indirect character, not corresponding to the content of Article 97(1)(4) of the Code, is defective."[9]

The procedural law also allows the authority to suspend the proceedings at the request of the party at whose request the proceedings were commenced, if this is not opposed by other parties and the public interest is not threatened. In this case, the course of the proceedings becomes temporarily inexpedient from the point of view of the party's interest, nevertheless the principle of continuity of the proceedings speaks in favour of limiting the state of suspension in time. Therefore, pursuant to Article 98(2) of the Code, if within three years from the date of the suspension of the proceedings, none of the parties requests the resumption of the proceedings, the request for the commencement of the proceedings shall be deemed to be withdrawn. The provision here sets a time limit for the suspension of proceedings at the unanimous request of the parties, after which the possibility of obtaining a substantive decision as to the rights or obligations in these proceedings ceases to exist and thus the basis for continuing the proceedings expires. The purpose of this provision is to prevent the proceedings from being stayed beyond a reasonable time.[10]

The interruption of proceedings should be precisely delimited in time. The timelines of the state of suspension of proceedings are determined by the authority's orders on the suspension and resumption of the suspended proceedings. The date of the beginning of the suspension of proceedings, which is particularly important for the calculation of the time limit referred to in Article 98(2) of the Code, should be determined by issuing an order on the suspension of proceedings. Only the date determined in such a way is uniform, certain and indisputable for all parties to the proceedings. There are no justified grounds for assuming that the limit of three years from the date of the suspension of proceedings provided for in this provision may be shaped by the effectiveness of notifications to the parties to the proceedings or the institution of reinstatement of the time limit. The effect of the fiction of the withdrawal of the request for commence proceedings cannot be linked to a different date for each party to the proceedings.[11]

The suspension of proceedings does not relieve the authority and the party to the proceedings from the obligation to undertake actions aimed at removing this state as being contrary to the assumptions of the non-interruption of the process. The division and content of the obligations in this

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[9] See judgment of the Supreme Administrative Court of 21 March 2024, ref. no. II OSK 1654/21, in: CDACD.

[10] See judgment of the Supreme Administrative Court of 29 March 2022, ref. no. II GSK 1872/18, in: CDACD.

[11] See judgment of the Supreme Administrative Court of 25 May 2016, ref. no. II OSK 2024/14, in: CDACD.

scope are specified by the provisions of Articles 99 and 100 of the Code, taking into account, in particular, the fact that the continuation of the suspension of proceedings is unacceptable in view of the public interest present in the case, which argues for its settlement.

In the jurisprudence, the issue of contestability of decisions by virtue of which the authority formalises the state of suspension of proceedings has become the subject of dispute, to which the careless editing of the provision of Article 101(3) of the Code has undoubtedly contributed. According to the Supreme Administrative Court, the content of Article 101(3) of the Code should be read in such a way that a complaint may be lodged only against the order suspending proceedings and against the order refusing to resume suspended proceedings. The necessity of such an interpretation of this provision is also supported by its objective and systemic interpretation. An appeal should only be admissible against orders stopping administrative proceedings and, at the same time, should exclude the possibility of challenging orders which do not stop the course of the administrative proceedings, i.e. orders refusing to suspend the proceedings and orders resuming the suspended administrative proceedings. Justification for such an assumption should be sought first of all in the principle of speed of proceedings.[12]

It is also worth noting that as a result of the most recent amendment to the Code, made by a deregulatory act,[13] a temporary limitation of the state of suspension of proceedings was introduced also in a situation where it took place *ex officio* in circumstances of subjective deficiencies in the proceedings. Pursuant to Article 97(4) of the Code, if, within three years from the date of suspension of the proceedings, commenced at the request of a party, the subjective reasons justifying the suspension do not cease to exist, the public administration authority may issue a decision on discontinuation of the proceedings, provided that the other parties do not oppose it and it does not endanger the public interest. The adopted solution, implementing the directive of continuity of proceedings, is to prevent the situation of many years' suspension of administrative proceedings in the case, e.g. when the parties to the proceedings are no longer interested in issuing a given decision and do not undertake their own actions or do not cooperate with the public administration authority in order to remove the obstacle to further proceedings. "At the same time, it will not be possible to discontinue the proceedings for the above-mentioned reason in cases where the administrative proceedings have been commenced *ex officio*. It should be noted that in such a case the proceedings are usually commenced in connection with the imposition

[12] See judgment of the Supreme Administrative Court of 30 January 2014, ref. no. II OSK 1993/12, in: CDACD.

[13] Act of 21 May 2015 on amending certain acts in order to deregulate economic and administrative law and to improve the principles of economic law drafting, Journal of Laws of 2025, item 769.

of an administrative obligation on a party. Thus, the public administration authority should then seek to remove the obstacle to further conduct of the proceedings in order to enforce the obligations owed by the party."[14]

CONCLUSIONS

Every legal process contains dynamic elements, both in potential and in the real dimension. As such, the process is dynamic and diachronic by its very nature, it is a "becoming", in the sense that – as an assumption – it leads to a specific result, just like an administrative proceeding whose objective is the formation (creation, abolition, change) of a right or obligation in the sphere of administrative-legal regulation. The process cannot therefore be equated with its object and purpose, and continuity is its immanent feature, expressing the nature of the process. Hence, the continuity of the proceedings is, in a sense, the meta-principle on which the procedural mechanism is based. By framing the course of proceedings in terms of its non-interruption and integrity, it is at the same time possible to see a procedural value in the continuity of the process and to recognise it in the form of a procedural principle. As it is a principle that is not expressly named in the Code, it is all the more impossible to ascribe to it the rank and effect of a general procedural principle. Instead, the meaning of this principle should be derived from the objective of the administrative proceedings, and its manifestations can be decoded in the procedural institutions related to the dynamics of the course of the procedure, the rational organisation of its course by the authority, the activities aimed directly at settling the case. The content of the continuity of proceedings can be particularly clearly captured in those procedural states and situations in which there are interruptions and delays in the course of proceedings. At the same time, the inclusion of the continuity of proceedings as a procedural principle imposes a narrow interpretation of the normative prerequisites allowing the interruption of the course of procedural activities.

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[14] See Explanatory statement for the draft Act on amending certain acts in order to deregulate economic and administrative law and to improve the principles of economic law drafting, Sejm of the Republic of Poland, 10th Term, Sejm Paper No. 1108 of 14 March 2005, p. 7-8.

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NEW CHALLENGES FOR CROSSING THE SCHENGEN BORDER – RIGHT TO ASYLUM DURING POLISH-BELARUS BORDER CRISIS

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Abstract. Artificially created wave of irregular migrants at the Polish-Belarus is considered as one of the greatest challenges for EU member states, in this case Poland, in terms of border management (as part of Integrated Border Management), national and EU security and finally fundamental human rights and safety of migrants that are attempting to cross the border in a illegal manner. The article analyzes the legal issues that have appeared during the practice of returning irregular migrants, who declare the intent to apply for international protection in Poland (practice of so-called pushbacks).

Keywords: pushbacks; irregular migrants; Polish-Belarus border; asylum; international protection.

INTRODUCTION

The process of gradual abolishment of border checks on common borders of Schengen Area states was the main aim of the so-called Schengen Agreement.[1] According to Article 17 of the Schengen Agreement border check are to be transfer to the external borders of the Schengen states. This provision confirms that external borders of the Schengen Area are the only, where full border control and border checks are to be carried out. Therefore those Schengen states who directly respond for the border management and border traffic of the Schengen external border are, to some extent, in charge of the security of all Schengen states, especially in terms organized crime activities and irregular migration.

[1] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000, p. 13-18.

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The Schengen *acquis* includes the Decision of the Executive Committee of 27 October 1998 on the adoption of measures to fight irregular immigration. Its preamble establishes the "necessity to respect human rights and underlining each Contracting State's obligations arising from the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, the Geneva Convention on the Legal Status of Refugees and the New York Protocol, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of all forms of Discrimination against Women and the Convention on the Rights of the Child."[2] As a result, any actions within the border checks or any activities within the integrated border management should take into account the abovementioned international agreements and rights there enshrined, especially the Geneva Convention on the Legal Status of Refugees. The right to apply for asylum[3] is also guaranteed by the Article 18 of the Charter of Fundamental Rights of the European Union, providing that "the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union."[4] Thus, once the Border Guard official receives a declaration from a third-country nationals about the intent to submit the application on international protection, the particular administrative proceedings have to started.

The crisis on the Poland-Belarus border has started in the summer of 2021 when the number of third-country nationals attempting to cross the Schengen external border in the illegal manner, therefore not through the official border crossing points (so-called BCPs) in order to avoid the border checks, has significantly increased. Rapidly the border crisis turned into the humanitarian one, where at least 37 people have died in the period from September 2021 until February 2023, however this is a number of identified cases of death, but the real number maybe even higher.[5] Perhaps the num-

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[2] Decision of the Executive Committee of 27 October 1998 on the adoption of measures to fight illegal immigration, OJ L 239, 22.09.2000, p. 203-204.

[3] The term "asylum" used in EU's documents should be understand as right to apply for "international protection" as provided in Article 2(a) of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20.12.2011, p. 9-26. Therefore the right to asylum means the right to apply for international protection, which has two forms: refugee status and subsidiary protection.

[4] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391-407.

[5] See Grupa Granica, *Cykliczny raport Grupy Granica z sytuacji na pograniczu polsko-białoruskim*, Warsaw 2023, s. 3-4.

ber may not seem high in comparison to statistics on irregular migration at Mediterranean Sea, yet it has to be taken into account that Poland-Belarus border is a land border. This situation happened to be the greatest border crisis caused by migration flow in recent years on Schengen land external border. It is important to mention that based on considerable evidence this migration flow was artificially provoked by the Lukashenko's regime, who arranged a lot of diplomatic effort of its diplomatic missions in particular host states in Middle East, Africa or Asia. Belarus diplomatic personal in those countries introduced a propaganda campaign and encouraged people to come to Belarus in order to easily enter European Union. Some experts claim that it is a hybrid warfare, which Lukashenko applies in order to achieve particular political goals [Łubiński 2022, 43-44]. Nonetheless, regardless of its origins, the wave of irregular migration on Polish-Belarus border within time turned into a humanitarian crisis and involved practices that raised particular legal ussies and from legal perspective should be identified as a violation of Schengen and EU regulations.

The aim of this chapter is to analyze how effective the right to asylum is in terms of large flow of irregular migration at the Schengen external borders and discuss the most significant legal issues that were identified in the case of Belarus-Polish border crisis. In order to accomplish the aforementioned aim the analysis of legal provisions will be applied, including dogmatic legal method and comparative legal method.

1. CRITERIA TO ENTER SCHENGEN AREA BY THIRD-COUNTRY NATIONALS

As it has been already mentioned in Schengen Are there is no border control on its internal borders. Obviously, temporary reintroduction of border control is legally permissible in particular cases and by 2021 three overlapping regimes of temporarily reintroduction of border controls in the Area may be identified: those reintroduced to counter so-called secondary movements (the movement of people seeking international protection within the Schengen Area), those reintroduced to counter terrorism and those introduced to counter the spread of Covid-19 [Guild 2021, 388-89]. As a result, the main responsibility for border controls is transferred on the external borders of the Schengen Area.

The main regulation that establishes entry conditions for third-country nationals into the Schengen Area is the so-called Schengen Borders Code.[6]

[6] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, p. 1-52.

In its Article 6 Schengen Borders Code provides for the following criteria that are to be met by a third-country national, who is to enter the Schengen Area state: "is in possession of a valid travel document entitling the holder to cross the border satisfying the following criteria; is in possession of a valid visa, if required; can justify the purpose and conditions of the intended stay and has sufficient means of subsistence; is not a person for whom an alert has been issued in the SIS for the purposes of refusing entry; is not considered to be a threat to public policy, internal security, public health […]."

The abovementioned criteria do not apply, if "a third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorized by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations. Where the third-country national concerned is the subject of an alert as referred to in paragraph 1(d), the Member State authorizing him or her to enter its territory shall inform the other Member States accordingly" (Article 6(5)(c) of the Schengen Borders Code). This exact provision enables to derogate the previous conditions and still allow third-country national to enter Schengen Area state, if it is required on humanitarian grounds, on grounds of national interest or because of international obligations. The right to asylum should be identified as a reason that lies within the "international obligations", including for instance obligations enshrined in the Geneva Convention relating to the status of refugees.[7] If this provision did not exist, there could be a high risk of refoulement of the possible asylum seeker [Pijnenburg and Rijken 2021, 289] who would be deprived of their right submit the application for international protection. Therefore, Schengen Borders Code itself provides for a possibility for entering the Schengen state by a third-country national without fulfilling all necessary conditions (usually without possessing a valid visa or valid travel document) based on personal declaration about the intent to apply for international protection.[8]

Accordingly to the conditions for entry of third-country nationals established in Article 6 of Schengen Borders Code all Schengen states had the obligation to introduce regulations that were to establish the same criteria by the national laws. In case of Poland the regulation that provides for these conditions is called "Act on Foreigners" and in its Article 28 the Act provides for more elaborated list of conditions for refusing of entry for the third-country nationals, which however do not apply, if a third-country national declares about the intent to apply for international protection in Poland.[9] Thus, Polish

[7] Convention relating to the status of refugees, 189 UNTS 137.

[8] In the EU the application for asylum is called "application for international protection" and a third-country national may be granted the following forms of international protection: refugee status or subsidiary protection.

[9] Act of 12 December 2013 on Foreigners, Journal of Laws of 2023, item 519.

national law provides for the same exception in case a third-country national who declares the intent to apply for international protection.

2. APPLYING FOR INTERNATIONAL PROTECTION DURING POLISH-BELARUS BORDER CRISIS – LEGAL ISSUES

Unfortunately more experts claim that the Polish-Belarus crisis was the first time, however probably not last, in the recent history when humans were used by regime as a tool of the hybrid warfare against EU [Filipec 2022, 2-3]. The European Commission and EU leaders accused Lukashenko of intentionally assisting the trafficking of migrants from the Middle East to the Poland-Belarus border (to enable them the entry into EU and Schengen Area via Poland), forcing the EU, especially Polish authorities, to abandon its humanitarian responsibility [Editorial 2021, 1]. At the most culminative moment, on 8 November 2021 between 3 000 to 4 000 thousands of third-country nationals gathered at the border on the Belarus side [Bornio 2021, 2]. The fact that at some point third-country nationals gathered at the border means that a vast majority of them later attempted to cross the border not through the official border crossing points. When they did and where detected by the Polish Border Guard officials crossing the Schengen external border in a illegal manner, at the spot they communicated the Border Guard officials the intent to apply for international protection. In such situation, no matter if the third-country national had crossed the border in an illegal manner,[10] Polish Border Guard official has to initiate administrative proceedings that are to enable a third-country national to submit the application for international protection on the territory of Poland. Nevertheless, such situations where in minority.

According to the Schengen Borders Code and Polish Act on Foreigners in case of third-country national, who illegally crossed the Polish-Belarus border, Border Guard authorities have to proceed on the procedure of receipt of the application for international protection as soon as they hear that this is the will of that person. However, the opposite has become increasingly noticeable as the number of attempts to illegally cross the border or to actually cross it in violation of the law (not through the official border crossing points) has increased. The number of third-country nationals attempting to cross the Polish and Schengen external border caused that Border Guard officers have started to increasingly "ignore" declarations of third-country

[10] Article 31 of the Convention relating to the status of refugees, 189 UNTS 137. However, the obligation of State Parties not to penalize the illegal entry or stay of refugee concerns those third-country nationals, who entered the territory of particular country illegally directly from a territory where their life or freedom was threatened.

nationals based on Article 28(2)(2a) of the Act on Foreigners about their intention to apply for international protection in Poland. Denying entry to Poland to a third-country national who has declared his intention to apply for international protection on the territory of Poland is a direct violation not only of Article 28(2)(2a), but also of the right to asylum guaranteed by the Charter of Fundamental Rights of the European Union, not to mention the obligations of Poland as a State Party to the Geneva Convention relating to the status of refugees.

Ignoring the declarations of third-country nationals, who have been detected during their attempt to illegally cross the Polish border or right after, Border Guards initiated the infamous practice of so called "pushbacks", which Border Guards decides to justify it with provisions of Polish domestic law. The practice of pushbacks means that Border Guard officials forced a third-country national back over the border, without their individual situation being assessed [Baranowska 2021, 195]. In 2022 a Polish regional court in Hajnówek issued a judgment concerning pushback practice carried out on the basis of the executive order of the Commander of the Border Guards Facility, in which the court declared that pushbacks are illegal, unjustified, unlawful and irregular.[11] What is more, the UN Special Rapporteur on the human rights of migrants has defined the term "pushback" as: "various measures taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border."[12] Moreover, the European Court on Human Rights in case *D.A. and Others v. Poland ruled that* he Polish authorities were found to have violated the prohibition on torture and inhuman or degrading treatment, the prohibition on collective expulsions, the right to an effective remedy and the right of individuals to make an application to the court.[13] Some pushbacks of third country nationals were carried out after the one had already spent couple of days in Poland, usually due to important injuries, as a result of which a person had to undergo a medical treatment. The Regional Administrative Court in Białystok found the return of the Ethiopian citizen to the state border line to be ineffective. The court had no doubts as to the factual circumstances, i.e. taking the third country national with a broken leg in a trunk behind the border fence, despite the fact that he

[11] Judgment of the Regional Court in Bielsko Podlaskie, VII Penal Branch Division in Hajnówka, 2022, ref. no. VII Kp 203/21.

[12] Special Rapporteur on the Human Rights of Migrants, *Report on means to address the human rights impact of pushbacks of migrants on land and at sea*, 12 May 2021, A/HRC/47/30.

[13] *D.A. and others v. Poland*, European Court of Human Rights, Application no. 51246/17.

had been discharged from the hospital with a stabilizing splint and referred for surgery. In justifying the ruling, the court referred to established case law in cases concerning return to the border line. The court also emphasized that "in accordance with the guidelines of the Border Guard Headquarters, the foreigner should be recognized as an applicant in refugee (international protection) proceedings even if he did not declare his intention to seek international protection directly, but only expressed a fear of returning to his country of origin in a covert or implied manner. Therefore, the body was obliged to recognize the complainant as an applicant for protection and to enable him to submit an application on the form [...]. [...] the declaration of submitting such an application should be accepted by the Border Guard officer who first comes into contact with the foreigner."[14] What is important, is that this judgment, despite of referring to the pushback practice, underlines also that it is not necessary for a third country nationals to clearly express the intent to apply for international protection.

The inevitable doubt that appears at this point is how, in such situation, the Polish Border Guards justified the practice of pushback, if both courts – Polish and European Court on Human Rights – ruled that they are illegal?

Polish Border Guards raised couple of legal issues as to justify the refusal of entering Poland. First of all, Border Guards official claimed that there was no legal basis for allowing a third-country national to enter Poland, and therefore Schengen Area, who without meeting the conditions established by Schengen Borders Code and Polish law were trying to cross the border in an illegal manner. The fact that these third-country nationals were requesting asylum at the border seemed to be ignored. Second of all, Border Guards officials raised the issue that the principle of *non-refoulement* has not been violated by their actions. According to that principle no State shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violation of human rights.[15] The principle should be understand as "forbidding to send back" [Molnar 2016, 51]. Evidently, for Polish Border Guards it is clear that there is no risk of any inhumane or degrading treatment by returning a third-country national to Belarus. However, according to the European Court of Human Rights "if a State removes an asylum applicant to a third country without examining the merits of the application itself, it must review whether the applicants

[14] Judgement of the Regional Court in Białystok of 5 March 2024, ref. no. II SA/Bk 71/24.

[15] Article 3 of the Convention against torture and other cruel, inhumane or degrading treatment, 1465 UNTS 85.

would have access to adequate asylum procedures in said third country […] *inter alia*, that the State's claim that the applicants did not present documents requesting international protection was not credible, and that there was evidence to support the claim that their asylum applications would not be treated seriously by Belarusian authorities in the event of their return. […] The Court concluded that the Polish authorities had failed to review the applicants' requests for international protection, in compliance with their procedural obligations, contrary to Article 3 ECHR."[16] The Court in the same case noted that "by failing to allow the applicants to remain on Polish territory pending the examination of their applications, the Polish authorities knowingly exposed the applicants to a serious risk of *chain-refoulement* and treatment prohibited by Article 3 ECHR in Belarus."

What is more, Border Guards claimed that Belarus is not a country of origin of these third-country nationals – it is a country, to which those third-country nationals, who attempt to illegally cross the Polish-Belarus border, arrived upon their own will. It is hard not to agree with that fact, nevertheless in the light of existing evidence it is beyond any doubt that Lukashenko's police and border guards officials are using force and abuse towards migrants at the border, persuading them not to return back to Belarus.[17] From this perspective, their situation should be considered on individual basis before returning them back, especially to the territory of the country, whose authorities apply mass human rights violations in order to oppress their own citizens.

Another legal issue raised by the Polish Border Guards in order to justify their action at the Polish-Belarus border is that the border itself does not constitute Polish territory and therefore Polish authorities has no obligation in accepting declarations about the intent to submit the application for international protection. Nonetheless, there were issued a couple of judgments that seem to clarify this issue. According to the Regional Court in Bielsk Podlaski Local Criminal Division in Siemiatycze "the wall on the border does not exactly stand in the line of the border, since it was built on the Polish side, about 1-2 meters from the border. […] the strip of land behind the wall is Polish territory […] court's findings in this regard are also important for assessing the situation of people who are right next to the border wall and apply for international protection."[18] In another case concerning 32 Afghan nationals, who have been confined for approx-

[16] *M.K. and Others v. Poland*, European Court of Human Rights, Application nos. 40503/17, 42902/17, 43643/17. The case concerned the repeated refusal of Polish Border Guards to examine applications for international protection.

[17] Council of the EU, Press release no. 925/21, 2 December 2021.

[18] Judgement of the Regional Court in Bielsk Podlaski Local, Criminal Division in Siemiatycze, (2023), ref. no. VIII W 292/23.

imately seven weeks in a makeshift camp on the border between Belarus and Poland, the Court in its *interim measure* notice decided "to indicate to the Polish Government that the applicants should not be sent to Belarus, provided that the information submitted by the applicants' representative is accurate, and the applicants are on Polish territory."[19]

From the procedural point of view it is important to underline the fact, that a pushback makes it impossible for a third country national to legally challenge violation of his right to asylum before the Polish courts. Apparently, the Ombudsman is an authority that can act on behalf of third country national in such cases. Supreme Administrative Court confirmed the legitimacy of the Commissioner for Human Rights to file a complaint regarding the so-called pushback stating that "The Commissioner for Human Rights has the right to independently assess whether the protection of human and civil rights justifies his participation in the ongoing administrative court proceedings, as well as to file the provided legal remedies. The Commissioner's participation in the proceedings before administrative courts may consist in a request to initiate proceedings, the external form of which is a complaint filed with the administrative court, or in the Commissioner reporting his participation in the proceedings already underway. Not only the correctness of the decision to participate in these proceedings is not subject to the court's assessment, but also the choice made by the Commissioner in what capacity he will appear in the proceedings."[20] The most problematic is the issue of possible "return" of the third country national to Poland in case Polish court finds that he was subjected to the practice of pushback in violation of the law.

The abovementioned migration challenges caused EU members states, especially those located along the external border of EU, to increases funds for border management. However, the ratio indicates that states are far more concerned about their own safety and policy, than about the rights of irregular migrants willing to apply for international protection. According to the report *Beyond walls and fences: EU funding used for a complex and digitalized border surveillance system* "35.66% of national programmes funds is dedicated to strengthening infrastructure and equipment. While the European Commission has ruled out the possibility of using BMVI funding for walls and fences, Member States can use it to finance the renovation and establishment of buildings and permanent surveillance infrastructures, including in countries with track records of pushbacks or unlawful detention at borders. The funding is also being used to increase border controls with new technologies and the deployment of artificial intelligence

[19] *R.A. and Others v. Poland*, European Court of Human Rights, Application no. 42120/21.

[20] Judgement of the Supreme Administrative Court of 9 January 2024, ref. no. II OSK 2751/22.

measures."[21] While in the meantime "only 0.04% of the funding in Member States' programmes is allocated to initiatives designed to increase support and assistance to people with vulnerabilities and people wishing to apply for international protection."[22] Explanation for such an approach should be presented into two spheres. First of all, EU member states introduce measures and instruments in order to guarantee that third country nationals, who enter their territory to it in a legal manner, where their personal data can be verified. Second of all, EU member states desire to show a clear sign to Belarus and obviously Russian regimes that by provoking and, as a result, using irregular migration as a tool to destabilize EU they will not achieve their goal. Unfortunately, whatever is the reason for any action on the Belarus-Polish border, there will always be people trapped in the middle.

Situation at the Polish-Belarus border brought a couple of legal solutions that were to deal with the migration and safety challenges, however recent governmental initiative seems to cause most doubts about whether this solution does not violated not only Poland's international obligations, but Polish Constitution as well. One of the elements of the Migration Strategy for Poland for the years 2025-2030 are new legal changes regarding asylum law. The authors of the strategy propose introducing an instrument of "temporary and territorial suspension of the right to submit asylum applications." Apparently, proposed changes do not cover only asylum, but also international protection. Both the right to asylum and the right to international protection have constitutional status. According to Article 56(1) of the Polish Constitution, foreigners may exercise the right to asylum under the terms specified in the Act. This Act is the Act on granting protection to foreigners on the territory of Poland.[23] According to that Act a foreigner may, at his/her request, be granted asylum in the Republic of Poland, when it is necessary to provide him/her with protection and when it is in the important interest of the Republic of Poland. Granting asylum is discretionary and is left to the discretion of state authorities. It is possible to limit the constitutional right to asylum, but only with respect for the requirements specified in Article 31(3) of the Constitution. It follows from the above that such a limitation would have to meet, above all, the requirement of proportionality. Furthermore, a limitation of the right to asylum could not violate the principle of equality before the law, which requires identical treatment of persons in the same or similar legal situation. In such a case, the principles

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[21] PICUM, ECRE, *Beyond walls and fences: EU funding used for a complex and digitalized border surveillance system*, June 2024, s. 6.

[22] Ibid.

[23] Act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland, Journal of Laws No. 189, item 1472 [hereinafter: act on granting international protection].

arising from Article 2 of the Constitution of the Republic of Poland would also be of significant importance, such as the protection of acquired rights, the principle of proper legislation, the principle of non-retroactivity of law or the requirement to maintain an appropriate *vacatio legis*. In contrast to the right to asylum, the Constitution of the Republic of Poland, when introducing the right to international protection (refugee status and subsidiary protection), refers to international agreements binding on Poland. It follows from the above that it is international agreements that set the limits of Poland's obligation to provide foreigners with protection from persecution. At the same time, it would be impermissible to limit the right to asylum and international protection in a way that does not result from agreements binding on Poland. Geneva Convention on status of refugees and supplementary New York Protocol[24] are considered the most fundamental international agreement concerning that matter. Due to the content of Article 56(2) of the Constitution of the Republic of Poland indicates that the fundamental law gives them the "nature of a constitutional right." The Geneva Convention not only introduces the definition of a refugee, but also applies one of the most important principles of international refugee law, i.e. the principle of non-refoulement, according to which no contracting state shall expel or return in any way a refugee to the border of territories where his life or freedom would be threatened because of his race, religion, nationality, membership in a specific social group or political beliefs. It is generally believed that recognizing a given person as a refugee is of a declarative nature. This means that if he meets the conditions of the definition of the Geneva Convention, he becomes a refugee, even if this status has not yet been officially granted to him by the relevant state authorities. If, according to the Polish Constitution, right to asylum and refugee are of constitutional nature, then they can not be "temporary and territorially suspended."

FINAL REMARKS

Migration crisis at the Poland-Belarus border apparently is not the first border crisis of the Schengen Area states involving irregular migration, however it is the first time when third-country nationals were used as an instrument of hybrid warfare against an EU member state, a Schengen Area state and consequently the whole EU itself.

The current migration crisis at the Poland-Belarus raised important legal issues in terms of crossing the Schengen border and applying for international protection at the border. Firstly, a large number of irregular migrants (third-country nationals) trying to cross the border in an illegal manner

[24] Convention relating to the status of refugees, U.N.T.S. vol. 189, p. 137.

caused the practice of "ignoring" by the Border Guards their declarations about the intent to apply for international protection and proceed with actions on return them to the territory of Belarus. Secondly, by "ignoring" declarations on international protection Border Guards had a justification for so-called pushbacks of third-country nationals to the territory of Belarus, therefore returning them without any due consideration of their individual situation. The lack of appropriate proceedings on consideration of the individual situation of third-country nationals before returning them to Belarus raised the claim of violation of the *non-refoulement* principle in those cases. Border Guards officially justified their actions with the fact that Belarus is not the country of origin of third-country nationals that were attempting to cross the border in illegal manner, therefore there is no risk of inhumane or degrading treatment in Belarus. Nevertheless, as evidence has shown, there is a number of identified cases of abuse and violence against migrants on the territory of Belarus. What is more, asylum applications of these third-country nationals submitted to the Belarus authorities will not be treated seriously and with due procedural safeguards. Thirdly, Poland-Belarus migration crisis raised the territorial issue, therefore if the border can be considered as Polish territory? As the case law of European Court of Human Rights and Polish national courts has shown it is the territory of Poland and should be treated as such in terms of Polish obligations under international agreements, which Poland is a State Party to.

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CUSTOMS AND FISCAL CONTROL AND TAX CONTROL

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Abstract. In Polish tax law, in addition to tax control and inspection activities, there is also customs and fiscal control, which covers not only tax law like the first two procedures, but also, among others, customs law, organizing and conducting gambling games or counteracting money laundering. The competences in the scope of customs and fiscal control are much broader than tax control and it could successfully remain the only typical control procedure in the Polish tax system. At the same time, instead of tax control, the head of the tax office should have broader competences within the inspection activities procedure.

Keywords: taxes; National Revenue Administration; fiscal control; customs control.

INTRODUCTION

Polish tax law provides for several legal possibilities of verifying the correctness of declaring and paying taxes in Poland. One of the oldest institutions is the tax control currently regulated by the Tax Ordinance Act of 29 August 1997,[1] the purpose of which is to verify whether the controlled persons fulfill their obligations resulting from the provisions of tax law. The concept of tax law provisions has been defined in Article 3(2) T.O., which means, among others, the provisions of tax acts, as well as the provisions of executory regulations issued on the basis of these acts. This means a very broad understanding of the obligations that the controlled persons are obliged to comply with. In addition, the administrative court indicated that undertaking a tax control is aimed at preventing the initiation of unnecessary tax proceedings, in a situation where the obliged persons properly fulfil their obligations, and also serves to collect evidence that can be used in jurisdictional proceedings, in the event that such obligations are not respected.[2] Tax controls are conducted by first-instance tax authorities, which

[1] Act of 29 August 1997, the Tax Ordinance, Journal of Laws of 2023, item 2383 [hereinafter: T.O.].
[2] Judgment of the Supreme Administrative Court of 1 September 2023, ref. no. I FSK 1023/22, CBOSA.

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means that, for example, local government authorities to the extent that they are first-instance tax authorities (or have the powers of tax authorities) are authorized to conduct tax controls within the scope of taxes and fees within their jurisdiction. For example, when it is necessary to verify the fulfillment of tax obligations, tax controls may be conducted not only in the scope of property tax, but also in the scope of the fee for municipal waste management [Firkowski 2018]. The National Revenue Administration Act of 16 November 2016 specifies that the performance of tax controls and inspection activities is the responsibility of the head of the tax office.[3]

Another control procedure with a wealth of powers is the customs and fiscal control regulated by the KAS Act, where pursuant to Article 33(1)(1), this procedure is one of the basic tasks of the head of the customs and fiscal office. In practice, however, it is largely a compilation of solutions typical for fiscal control and customs control. The name of this procedure refers to this. The concept of customs and fiscal control has not been legally defined, one of the main objectives of the control will be to verify the degree of compliance with tax law provisions by analyzing the reliability of the tax bases declared by the controlled entities and the correctness of their calculation and payment of taxes constituting state budget revenue [Bielecki 2018, 142]. Customs and fiscal control is aimed at detecting and combating irregularities on a large scale.[4]

The first problem related to the fact that in the Polish tax law system we have as many as three verification procedures in the scope of correctness of paying taxes is the potential competition of activities between the locally competent head of the tax office and the head of the customs and tax office. In the scope of taxes, before the KAS Act came into force, i.e. before 01.03.2017,[5] we had in Poland as many as three bodies that could control the taxpayer, i.e. the head of the customs office[6] (e.g. in the scope of excise tax) and the head of the tax office (including income taxes or goods and services tax), both in the tax control procedure. In addition, tax control in the scope of local taxes and fees may also be conducted by the borough leader, the city mayor or the city president. The director of the tax office[7]

[3] See Article 28 of the National Revenue Administration Act of 16 November 2016 (Journal of Laws of 2023, item 615) [hereinafter: KAS Act].

[4] See p. 25 of the justification for the draft act on the National Revenue Administration; https://www.bing.com/ck/a?!&&p=62f582973db910fd8a1b766ea3f249d2ef48e4c3da699500c20a56f827e44000JmltdHM9MTczNjY0MDAwMA&ptn=3&ver=2&hsh=4&fclid=0deafeb9-5ab5-698f-1862-eac15b9d6887&psq=uzasadnienie+do+ustawy+o+KAS&u=a1aHR0cHM6Ly93d3cuc2x1emJhY3l3aWxuYS5pbmZvLnBsL2ltYWdlcy9zdG9yaWVzL2RvX3BvYnJhbmlhL3V6YXNhZEtBUzE3MDIucGRm&ntb=1 [accessed: 18.03.2025].

[5] Act of 16 November 2016, the Provisions introducing the Act on the National Revenue Administration, Journal of Laws item 1948.

[6] Act of 19 March 2004, the Customs Law, Journal of Laws No. 68, item 622 as amended.

[7] Act of 28 September 1991 on fiscal control, Journal of Laws No. 100, item 442 as amended.

had much broader competences, because the basic objective of tax controls was to protect the interests and property rights of the State Treasury and to ensure the effectiveness of the performance of tax liabilities and other receivables constituting the income of the state budget. The doctrine rightly noted that the main objective, i.e. protection of the interests and property rights of the State Treasury, is a largely unspecified objective, and in practice, the tax control performs the vast majority of its tasks by conducting control proceedings in the scope of controlling the reliability of the declared tax bases and the correctness of calculating and paying taxes constituting the income of the state budget [Melezini and Zalewski 2015, 35]. In conclusion, it should be stated that before 1 March 2017, a taxpayer could be subject to control by as many as four different, independent control bodies.

In the light of the currently applicable regulations, at least in the area of state taxes, there are only two bodies of the National Revenue Administration authorized to carry out control activities, i.e. the head of the tax office and the head of the customs and tax office. Firstly, it is very good that these are only the KAS bodies that may report directly to the director of the tax administration chamber in a given province, and indirectly to the Head of the KAS. However, even this fact does not eliminate competitive activities in the field of tax law in the scope in which the head of the tax office may undertake tax control. To illustrate the situation, it should be pointed out that in Poland there are 400 tax offices, where the task of tax control must be performed in each of them.[8] Such competition may appear already at the stage of analysis of materials necessary for undertaking control activities, because such preparation is necessary for their proper conduct. An appropriate tax analysis may be prepared simultaneously by both the head of the tax office competent for the taxpayer and the head of the customs and tax office, who engage employees and their time in these activities. Since both bodies are located in the structure of the National Revenue Administration, any duplication of control activities by them is secured by IT mechanisms.

2. CHARACTERISTICS OF TAX CONTROL

A tax control is always undertaken ex officio, and the head of the tax office undertakes it only in relation to taxpayers who have their registered office or place of residence within their territorial jurisdiction. This means that only the tax authority (fiscal control) makes decisions on undertaking

[8] Regulation of the Minister of Development and Finance of 17 December 2021 on the territorial scope of activity and seats of directors of tax administration chambers, heads of tax offices and heads of customs and tax offices and the seat of the director of the national tax information, Journal of Laws of 2022, item 361.

control.[9] The second limitation, apart from the territorial jurisdiction of the tax authority, is the aforementioned purpose of the control, i.e. checking only and exclusively whether the controlled party fulfils the obligations resulting from the provisions of tax law. The tax authority is obliged to notify the controlled party of the tax control, but the legislator has provided exceptions to this rule contained in the regulation of Article 282c T.O., which contains a closed list of cases when the controllers may immediately commence the control, surprising the taxpayer, without prior delivery of a notice [Mariański 2023]. The basic rights of the controller, pursuant to Article 286 T.O., include, among others: entry onto property and buildings, requiring the presentation of property subject to control and carrying out its inspection, requesting access to files, books and all types of documents related to the subject of the control, examining witnesses or consulting experts. As emphasized in court decisions, the scope of powers of the inspector listed in this provision, indicated for example in the regulation of Article 286 T.O. is not exhaustive.[10]

In addition, attention should be paid to the limitation of the duration of the tax control, which should be completed without undue delay, but the statutory limitations on the duration of the control are included in the Act of 6 March 2018 on entrepreneurs.[11] According to Article 55 of this Act, the duration of all controls at the entrepreneur in one calendar year cannot exceed in relation to: 1) micro-entrepreneurs – 12 business days (the time limit for controlling a micro-entrepreneur may not exceed 12 consecutive working days);[12] 2) small entrepreneurs – 18 working days; 3) medium-sized entrepreneurs – 24 working days; 4) other entrepreneurs – 48 working days.

It should also be noted that the above-mentioned time limitation applies not only to the tax control as such, but also to any other possible controls conducted by other bodies, inspections, etc. However, the case law to date has held that exceeding the control time cannot be *ex lege* identified with a breach of the control regulations that had a significant impact on the outcome of the case, and therefore in the administrative court proceedings the party must derive the effects of the breach in the form of a significant impact on the outcome of the case.[13] Time limitations are not applied if, among other things, conducting the control is necessary to prevent a fiscal

[9] Judgment of the Regional Administrative Court in Kraków of 5 November 2014, ref. no. I SA/Kr 1157/14, CBOSA.

[10] Judgment of the Supreme Administrative Court of 10 March 2015, ref. no. I FSK 41/14, CBOSA.

[11] Act of 6 March 2018 on entrepreneurs, Journal of Laws of 2024, item 236 [hereinafter: Entrepreneurs Act].

[12] Judgment of the Supreme Administrative Court of 19 February 2020, ref. no. I FSK 2243/19, CBOSA.

[13] Judgment of the Supreme Administrative Court of 21 July 2016, ref. no. II FSK 1953/14, CBOSA.

crime or fiscal misdemeanour and the control concerns the justification for making a refund of the goods and services tax before making this refund.

According to Article 47 of the aforementioned Entrepreneurs Act, controls are planned and conducted after prior analysis of the probability of violating the law in the course of conducting business activity. The analysis includes identification of the subjective and objective areas in which the risk of violating the regulations is the highest.

Another verification procedure, namely inspection activities, has much more limited possibilities. As uniformly emphasized by administrative case law, verification of invoices as part of inspection activities has a different nature compared to tax proceedings or controls. Inspection activities are, in principle, limited in nature. It should be noted that as part of inspection activities, the body does not have the right to conduct much evidence, e.g. to examine witnesses.[14] The literature clearly indicates that the nature of inspection activities does not allow for conducting evidence proceedings in a broader scope - going beyond the indicated purposes [Mariański 2012, 12].

2. CHARACTERISTICS OF CUSTOMS AND TAX CONTROL

The legislator has provided much broader possibilities for verifying the correctness of settlements in the scope of public law levies for customs and tax control. Undoubtedly, one of the most important features of this procedure is the performance of control throughout the territory of the Republic of Poland (Article 61 of the KAS Act). Although there is a customs and tax office in each province, it has the possibility to initiate a customs and tax control in relation to a taxpayer with its registered office or place of residence also outside that province. The above regulation is consistent with the concept of functioning of such offices, as units specialized in combating the largest tax frauds in our country. In the scope of production, movement and consumption of excise goods or organization and conduct of gambling games, customs and tax control may be performed as a permanent control consisting in performing control activities in a continuous manner.[15]

A very important feature of customs and tax control is the mandatory consideration of the risk of irregularities and the determination and assessment of the measures necessary to limit it. According to the legislator, risk is the determination of the probability and effects of a violation of the law, e.g. in the area of taxes or customs law. The higher the probability

[14] Judgment of the Provincial Administrative Court in Białystok of February 15, 2023, ref. no. I SA/Bk 37/23, CBOSA.

[15] See regulation of the Minister of Finance, Funds and Regional Policy of 12 August 2021 on customs and tax control of certain excise goods, Journal of Laws item 1636.

of irregularities in the controlled entity, the higher the level of risk, which can still be corrected by the amount of the potential obligation to pay. After all, we can be certain of irregularities in a given case, but the amount that can be determined or specified will not justify the initiation of customs and tax control, because it will be at odds with its primary objective and the basic principles of economics of conducting proceedings [Bielecki 2018, 331]. In such a case, it may turn out that the application of the inspection activities procedure by the head of the tax office will be sufficient.

The powers that the legislator has endowed customs and tax control with are much broader than those resulting from the Tax Ordinance, for example, within the framework of customs and tax control, the body is authorized to: 1) impose official seals on devices, premises, means of transport; 2) conduct an experiment or recreate the possibility of playing a slot machine or other device. Customs and tax officers have the independent power to conduct an experiment, where the legislator does not introduce any additional formal requirements in the scope of their competences to check the operation of gaming devices and conduct appropriate experiments on them;[16] 3) search premises, rooms and items using technical devices and customs dogs.

In addition, functionaries carrying out customs and tax control pursuant to Article 64(2) of the KAS Act are authorized to: search goods, search persons, inspect postal items, stop and inspect ships, and check the type of fuel used by taking samples.

An undoubted advantage from the point of view of a state authority is the fact that, pursuant to Article 65 of the Entrepreneurs Act, all regulations concerning limitations of control activities, such as the duration of a control at an entrepreneur's premises, do not apply to customs and tax controls.

A very important tool that the head of the customs and tax office has at his disposal, primarily in the scope of obtaining information necessary in the customs and tax control procedure, are the powers contained in Chapter 5 of the KAS Act, i.e. special powers of the bodies of the National Revenue Administration and functionaries of the customs and tax service. The activities regulated in Articles 114-120 and 128 of the KAS Act are defined by the legislator as operational and reconnaissance activities, which are to serve the secret obtaining of information and the secret recording of traces and evidence. Secrecy obviously concerns the lack of possibility of informing the persons against whom they are performed. The principle of openness of proceedings does not apply here, and within the framework of these activities the competent body of the National Revenue Administration may, among others, conduct operational control, record the image of events in public

[16] Judgment of the Provincial Administrative Court in Olsztyn of 20 August 2020, ref. no. II SA/Ol 62/20, CBOS.

places or secretly acquire or dispose of or take over objects. The powers to conduct operational and reconnaissance activities granted by law to the head of the customs and tax office are among the most characteristic tools for the implementation of the statutory tasks of this body.

At present, this legal form of action is justified to the extent that the activities of these law enforcement bodies are contained in two planes of action. The first is related to their information activities on threats to security and detection, as a sphere of disclosing and prosecuting crime, and the second is related to the statutory task of collecting information about it in a secret manner [Dana 2021, 49-67]. At the same time, on the basis of Article 122(1), if the data and materials collected as part of operational and reconnaissance activities contain, among others, information of significance for customs and fiscal control or tax proceedings, they are transferred to the locally competent KAS body. Therefore, information obtained as part of operational and reconnaissance activities may be legally used also for the purposes of customs and fiscal control.

Another undoubted advantage of customs and tax control is the transformation of a completed customs and tax control into tax proceedings, resulting from Article 83(1) of the KAS Act, which the legislator did not provide for a completed tax control. As rightly emphasized in court decisions, the transformation of customs and tax control into tax proceedings does not mean that tax proceedings are reduced to issuing a decision only, because the authority is obliged to apply the procedural rules resulting from them, including those related to collecting evidence. Evidence collected during a customs and tax control may constitute the basis for factual findings.[17]

In addition to control considerations, it should be noted that the most serious cases within the scope of the Fiscal Penal Code[18] have also been transferred by the legislator to be conducted by the head of the customs and tax office. The list of cases remaining within the competence of this body is included in Article 133 of the Fiscal Penal Code, which specifies the material competence of this financial body of preparatory proceedings [Wilk 2020]. Moreover, in accordance with the provisions of Article 33a of the KAS Act, the head of the customs and tax office performing a customs and tax control is, among others, authorized to conduct preparatory proceedings in cases of fiscal crimes and fiscal misdemeanours disclosed in connection with this control. The examined powers of the head of the customs and tax office also extend to mandate proceedings or explanatory activities in cases of misdemeanours [Maruchin 2019].

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[17] Judgment of the Supreme Administrative Court of 28 February 2020, ref. no. I FSK 19/20, CBOSA.

[18] Act of 10 September 1999, the Fiscal Penal Code, Journal of Laws of 2024, item 628.

From the comparison of the two control procedures, the customs and tax control definitely has broader powers and seems to be a complete tool for verifying the correctness of the application of, among others, tax law. It has a very wide range of interests, the body can use operational and reconnaissance activities, supporting itself with advanced analytics. In addition, the lack of territorial restrictions and the solution for transforming a completed customs and tax control into a tax procedure significantly optimize the activities of this KAS body.

Period	01.01.2023 to 30.11.2023	01.01.2024 to 30.11.2024
Number of completed tax controls	11687	8712
Number of completed customs and tax controls	6581	6368

Table 1. Number of tax and customs and fiscal controls in 2023 and 2024 [Stawicki 2024].

From the above summary, the following conclusions can be drawn that while the level of customs and tax controls remains stable, the number of tax controls is falling drastically and one can argue with the author of the commentary on this situation, who presented the above data on the reasons for such a decline, as this control procedure is undoubtedly in a deep downward trend.

Moreover, in the face of the development of analytics not only at the central level but also in individual customs and tax offices and tools tightening the tax system such as KSeF[19] or JPK,[20] the thesis can be put forward that one control procedure is sufficient for verification activities, i.e. a customs and tax control may be sufficient. For the proper performance of tax settlements verification by the head of the tax office, the control procedure could be sufficient, however, after supplementing it with additional powers, i.e. the possibility of conducting inspections, according to the regulations contained in the tax control regulations.

All cases that require strictly control activities should remain within the jurisdiction of the customs and tax office in order to initiate the customs and tax control procedure. Of course, a very important issue in such

[19] The National e-Invoice System (KSeF) enables the issuance and sharing of structured invoices. In the initial period, structured invoices will function in economic transactions as one of the permitted forms of documenting transactions, alongside paper invoices and electronic invoices currently used in economic transactions. Unfortunately, the planned introduction of this system has been postponed until 2026.

[20] JPK was introduced by the Act of 10 September 2015 amending the Tax Ordinance Act (Journal of Laws item 1649). Initially, there was no obligation to regularly submit VAT registers; this obligation was introduced by the Act of 13 May 2016 (Journal of Laws item 846) and was gradually introduced from 1 July 2016. Preparing JPK is not possible manually and requires equipping taxpayers' accounting systems with functions that allow for the creation of such a file. In some cases, it is also necessary to modify the principles of bookkeeping and the method of documenting commercial transactions.

decisions will be the issue of personnel resources necessary to perform additional work by customs and tax offices. The solution to this problem will be the proper allocation of competent staff from tax offices to customs and tax offices in proportion to the amount of work that the latter body would take over. It must be remembered that after the statutory strengthening of control activities, the appropriate, competent staff resources must remain in the tax offices in order to maintain the tightness of the tax system.

As a *de lege ferenda* proposal, statutory changes may be considered, in order to delete from the KAS Act the task of tax control by the head of the tax office, then the only control activities that the KAS would conduct would be customs and tax control, which is within the competence of the head of the customs and tax office. At the same time, the legislator should extend the powers of the head of the tax office contained in Section V T.O. to conduct inspections on the same principles as those applicable to tax control.

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THE SITUATION OF UKRAINIANS IN THE TIME OF RUSSIAN FULL-SCALE MILITARY AGGRESSION*

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Abstract. The objective of this article is to analyse the legal situation of Ukrainian nationals following 24 February 2022 from the perspective of migration processes. The analysis focuses on legal measures adopted at the level of the European Union, by Member States neighbouring Ukraine – exemplified by Poland – and by Ukraine itself. Ukrainians were given temporary protection, based on the provisions of Council Directive 2001/55/EC and Council Implementing Decisions (EU) 2022/382, both the acts having led to the adoption of uniform standards of their protection, which are to be observed across EU Member States. At the same time, each Member State has enacted separate legal instruments specifying the manner in which the refugees' rights granted under EU law are to be exercised within its territory, thereby establishing the legal framework for a safe stay, along with the possibility of full participation in the host country's economic and social life. With regard to the measures adopted by the Ukrainian authorities, it should be noted that they focus on reconciling the right to freedom of movement with the need to maintain the state's defensive potential. Particularly, this is sensitive area, as it concerns, on the one hand, the exercise of one of the constitutional freedoms of Ukrainian citizens and, on the other hand, the necessity of ensuring state security, including its defence capabilities. The measures discussed indicate a gradual tightening of legal provisions aimed at preserving military capacity and preventing abuses intended to evade mandatory service in defence of the country. Furthermore, the legal situation of internally displaced persons, who have been granted social assistance by the Ukrainian authorities, is also addressed. The considerations taken in this article support the thesis that only coherent measures – at the level of the European Union, its Member States, and the Ukrainian authorities – can serve to stabilise the situation of Ukrainian nationals in the context of the ongoing Russian aggression.

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INTRODUCTION

The ongoing war on the territory of Ukraine is a phenomenon that is difficult to comprehend and accept in the 21st century. Following the end of the Second World War, a range of instruments was established with the aim – and continuing purpose – of ensuring peace and international security. Paradoxically, the Russian Federation is among the states that constitute the foundation of this very system. It is therefore striking that Russia is the state responsible for the tragedy currently afflicting Ukraine.

It should be emphasised that Russian aggression unfolded in two distinct phases. The initial actions were undertaken as early as 2014 and involved the annexation of Crimea and the commencement of hostilities in two eastern regions of Ukraine–Donetsk and Luhansk. On 24 February 2022, Russia launched the second phase of its aggression, initiating active bombardment (by means of air strikes and missile attacks) across virtually the entire territory of Ukraine. Russian armed forces also entered other regions, including the Kharkiv, Kherson, Kyiv, Zaporizhzhia, Sumy, and Chernihiv oblasts.

As a result of these military actions, the Ukrainian population has suffered severe losses – moral, economic, existential, and health-related – including psychological trauma and financial hardship.

The outbreak of hostilities and the ensuing chaos during the initial hours of the Russian invasion led to the mass displacement of Ukrainian nationals, who sought protection primarily in neighbouring states that opened their borders to persons fleeing the armed conflict. This period exposed not only the tragic consequences of war and the atrocities committed by the Russian Federation, but also the altruism, solidarity, and humanitarian engagement of individuals and organisations providing assistance to those forcibly displaced.

It must be acknowledged, however, that not all Ukrainian citizens were in a position—or expressed the intention – to leave the country. The movement across Ukraine's borders with neighbouring states remains ongoing and is characterised by a bidirectional dynamic. While a substantial number of individuals continue to seek refuge abroad, there is also a significant return migration of persons resettling in their places of habitual residence.

In addition to cross-border migration, internal displacement has become a significant phenomenon, affecting two distinct categories of persons. The first includes individuals who, as a result of the Russian Federation's military operations, have lost their homes or have voluntarily relocated to other regions within the country. The second comprises Ukrainian nationals who

have fled areas under Russian occupation. Many of these individuals have lost all personal property and lack close relatives or other support networks with whom they could reside in the western regions of Ukraine.

The migration challenges outlined above concerning Ukrainian nationals represent a serious and multidimensional issue, posing significant difficulties not only for the authorities of host states and the European Union, but also for Ukraine itself. In the case of the former, there has arisen a need to develop legal frameworks governing the legal status of Ukrainian citizens residing within the territories of host countries. In the case of the latter, the challenge lies in ensuring adequate social protection for the population, while simultaneously introducing new legal instruments tailored to the exigencies of the current situation – particularly with regard to regulating the emigration of citizens in a manner that does not undermine the state's defensive capabilities.

The aim of this article is to examine the legal situation of Ukrainian nationals following 24 February 2022 from the perspective of migration processes. Accordingly, the analysis encompasses several key issues. First, the position of Ukrainian nationals who left Ukraine at the onset of the full-scale aggression and found refuge in neighbouring countries will be discussed. Second, the ability of Ukrainian citizens to leave the country after the imposition of martial law will be addressed.

1. MIGRATION OF UKRAINIAN NATIONALS FOLLOWING 24 FEBRUARY 2022

The full-scale Russian aggression against Ukraine commenced on 24 February 2022. In his address, President Vladimir Putin justified the actions undertaken as a purported necessity to protect the population of the Donbas region from "genocide" and to achieve the "demilitarisation and denazification of Ukraine." According to the content of his speech, the immediate basis for initiating the military operation was the request for assistance from the so-called separatist "republics" and the alleged obligation to defend a population that, for "eight years, has been the victim of genocide perpetrated by the Kyiv regime." At the same time, Putin declared the intention to bring to justice those responsible for "bloody crimes," including those allegedly committed against Russian citizens [Wilk and Domańska 2024, 1]. As a result of this so-called "humanitarian mission," mass departures of Ukrainian nationals across international borders were recorded. Consequently, by the end of 2024, the population of Ukraine within the territory recognised by the international community was estimated to have declined to approximately 34 million, according to the Institute for Demography and Life Quality Studies of the National Academy of Sciences of Ukraine (NASU). Of this number, an estimated 28 to 29 million individuals resided in areas under the effective

control of the Ukrainian government.[1] In the very first days of the aggression, Ukrainian nationals began crossing the borders of neighbouring countries *en masse*, particularly into Poland, Slovakia, and Romania. Focusing on the example of Poland, it should be emphasised that the sheer number of individuals fleeing the conflict, combined with the dramatic circumstances at the border, led to the adoption – as noted by Iryna Kozak-Balaniuk – of "extraordinary and unprecedented legal measures." These measures allowed Ukrainian nationals arriving after 24 February 2022 to cross the border without holding a valid visa and, in many cases, without a valid travel document, upon presentation of a biometric Ukrainian identity card or even a non-biometric internal Ukrainian passport [Kozak-Balaniuk 2022, 242-43]. Similar measures were adopted in other neighbouring states; however, it should be noted that the degree of openness towards Ukrainian nationals varied across countries.[2] The situation at the external border of the European Union, combined with the growing number of war refugees arriving in the Member States, also influenced the EU's legislative activity. On the basis of a proposal submitted by the European Commission on 4 March 2022, the Council acknowledged the existence of a mass influx of Ukrainian nationals and consequently triggered special measures pursuant to Article 5 of Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof[3] and adopted Council Implementing Decision (EU) 2022/382, establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.[4] At present, the temporary protection granted to Ukrainian nationals has been extended until 4 March 2026. The adoption of the above-mentioned mechanism introduced uniform standards of protection for Ukrainian nationals, which are to be observed across all EU Member States. Moreover, the status granted to persons benefiting from temporary protection in host countries effectively aligns the legal position of war refugees from Ukraine with that of EU citizens in terms of the rights associated with the free movement of persons

[1] See: https://ies.lublin.pl/komentarze/kryzys-demograficzny-na-ukrainie/ [accessed: 10.06.2025].

[2] To compare with Romanian law see Krzysztofik 2022, 189.

[3] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Official Journal L 212 , 07/08/2001 P. 0012-0023.

[4] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, Official Journal L 71, 4/3/2022 P 1.

[Duszyński and Kaczmarczyk 2022, 7]. Pursuant to the provisions of the Implementing Decision, the personal scope of temporary protection encompasses: Ukrainian nationals residing in Ukraine prior to 24 February 2022; stateless persons or third-country nationals other than Ukrainians who, before 24 February 2022, benefited from international protection or equivalent national protection in Ukraine; and family members of the aforementioned persons,[5] namely: spouses, minor unmarried children, and other close relatives who lived together as part of the same household at the time of the circumstances leading to the mass influx of displaced persons and who were wholly or partially dependent on the persons concerned at that time.[6]

Individuals falling within these categories are thereby entitled to a range of rights, including the right to residence and accommodation, access to employment, education, social benefits, healthcare, and legal assistance.[7] The adoption of the directive establishing the temporary protection mechanism gave rise to an obligation on the part of the Member States to adopt domestic legislation implementing its provisions into their national legal systems. In the case of Poland, the relevant implementing act is the Act on Granting Protection to Foreigners within the Territory of the Republic of Poland.[8] Following the adoption of Implementing Decision 2022/382, Poland enacted the Act on Assistance to Citizens of Ukraine in Connection with the Armed Conflict on the Territory of that State.[9] This act constitutes an ad hoc legal measure, specifically directed at a single category of beneficiaries of temporary protection – namely, Ukrainian nationals – and is not of a general or systemic nature.[10]

A direct consequence of extending the temporary protection mechanism to Ukrainian nationals is the establishment of a common set of rights applicable across the territories of all EU Member States. However, the modalities of exercising those rights may differ to some extent depending on the host country. An analysis of the legal and administrative measures adopted by individual Member States indicates that, for example, in the area of access to employment – immediately following the activation of the Implementing Decision – countries such as Poland, Belgium, Bulgaria, the Czech Republic, Spain, Portugal, and Romania introduced simplified employment procedures for Ukrainian nationals and reduced existing barriers to labour market entry.

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5 Article 2(1) of Council Implementing Decision (EU) 2022/382.

6 Article 2(4) of Council Implementing Decision (EU) 2022/382.

7 Chapter III of Council Directive 2001/55/EC of 20 July 2001.

8 Act of 13 June 2003 on Granting Protection to Foreigners within the Territory of the Republic of Poland, Journal of Laws No. 128, item 1176 as amended.

9 Act of 12 March 2022 on Assistance to Citizens of Ukraine in Connection with the Armed Conflict on the Territory of that State, Journal of Laws of 2024, item 1222.

10 For a more detailed discussion of the Polish legal framework, see: Markiewicz-Stanny 2024, Maksymiuk 2024, 273-80].

With regard to access to education, a number of facilitating measures were implemented. These included, *inter alia*, the recruitment of teachers speaking Ukrainian fluently, the appointment of classroom assistants supporting Ukrainian children in the learning process, and the establishment of specialised language courses designed to ease the integration of children and adolescents into national education systems. In the area of housing, many Member States introduced special financial allowances either for individuals who provided accommodation to Ukrainian nationals in their private homes or directly for the beneficiaries of temporary protection. For instance, in Poland, a daily allowance of PLN 40 was granted to cover the costs of accommodation and food; in Romania, the amount was set at RON 50 for accommodation and RON 20 for meals; while in Germany, a system of regionally differentiated social benefits was introduced, with the amount of support varying depending on the federal state [Szymańska 2024, 117-18].

An additional element strengthening the protection of Ukrainian nationals in host countries was the mobilisation of financial instruments by the European Commission, aimed at facilitating Member States' implementation of obligations arising under the directive. In this context, two major funding packages should be noted: CARE (Cohesion's Action for Refugees in Europe) and FAST-CARE (Flexible Assistance for Territories), with a combined value of €13.6 billion. These instruments were designed to provide targeted support for Member States facing the most significant migratory pressures and to ensure effective and rapid access to cohesion policy resources in response to the crisis [ibid., 117].

The relative harmonisation of the legal status of Ukrainian nationals across EU Member States has contributed to their gradual secondary movements within the Union. At present, the highest numbers of individuals benefiting from temporary protection under Directive 2001/55/EC reside in Poland, the Czech Republic, and Germany.[11]

2. THE IMPACT OF THE RUSSIAN AGGRESSION ON THE LEGAL STATUS OF CITIZENS WITHIN UKRAINE

It is evident that the onset of full-scale Russian aggression has fundamentally altered the situation within Ukraine itself. As noted by Volodymyr Pylypenko, "the aggressive war that Russia has been waging against Ukraine since 2014 has already claimed the lives of not only thousands of heroic defenders of our homeland but also civilians; it has forced several million people to leave their homes, caused damage to residential buildings

[11] See https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20250210-1 [accessed: 10.06.2025].

and infrastructure destroyed as a result of hostilities, and devastated the national economy – most severely affecting the most vulnerable segments of the population" [Pylypenko 2024, 322]. According to the report of the Office of the High Commissioner for Human Rights on the human rights situation in Ukraine for the period from 1 December 2023 to 29 February 2024, at least 10,675 civilians have been killed since the beginning of the full-scale Russian aggression (including 5,079 men, 3,124 women, 311 boys, 250 girls, as well as 28 children and 1,883 adults whose sex could not be determined). In addition, 20,880 civilians have been reported injured (including 6,634 men, 4,631 women, 595 boys, 425 girls, as well as 291 children and 7,504 adults of undetermined sex).

Furthermore, as a result of hostilities, 1,055 educational institutions and 444 healthcare facilities have been either damaged or completely destroyed.[12] According to a study conducted by the Kharkiv Institute for Social Research NGO in cooperation with the United States Agency for International Development (USAID) under the Human Rights in Action Program implemented by the Ukrainian Helsinki Human Rights Union (UHHRU), 78% of Ukrainian citizens who participated in the survey stated that they or their families had been affected or likely affected by the Russian-Ukrainian war.

Respondents most frequently reported experiencing psychological trauma as a result of the war (39%), followed by a deterioration of chronic illnesses or the development of new health conditions (19%). In the area of employment, 18% indicated that they had lost their job or business. Additionally, 16% reported having been forced to leave their home, and 15% stated that they had to leave their residential district or region [Kobzin, Chernousov, and Shcherban 2024, 4].[13] The sources cited above illustrate the dramatic situation currently unfolding in Ukraine.

The difficult – at times even dire – situation posed a significant challenge to the Ukrainian authorities. It is therefore not surprising that one of the very first measures adopted was the issuance, on 24 February 2022 at 5:30 a.m., of a Presidential Decree introducing martial law, in accordance with Article 106(20) of the Constitution of Ukraine.[14] The detailed procedures for the introduction of martial law and its legal consequences are set

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[12] *Report of Human Rights, Situation in Ukraine 1 December 2023 – 29 February 2024*, https://ukraine.un.org/sites/default/files/2024-03/2024-03-26%20OHCHR%2038th%20Periodic%20Report.pdf [accessed: 10.06.2025], p. 10.

[13] A detailed analysis of the aforementioned report was presented by M. Tarasova in the paper entitled "Needs Assessment of War Victims in Ukraine: Requests, Expectations and Challenges," delivered during the international conference 'The Legal Status of Ukrainians in the Time of Russian Full-Scale Military Aggression', held in Lublin on 23-24 May 2024.

[14] The Constitution of Ukraine, https://biblioteka.sejm.gov.pl/wp-content/uploads/2023/02/Ukraina2023.pdf [accessed: 10.06.2025].

out in the Law of Ukraine "On the Legal Regime of Martial Law". Article 4 of the Act provides that "Martial law is a special legal regime introduced on the territory of Ukraine or in specific localities thereof in the event of armed aggression or the threat of attack, a threat to the statehood of Ukraine or its territorial integrity. It entails the granting of powers to the competent state authorities, military command, military administrations, and local self-government bodies necessary to eliminate the threat, repel armed aggression, ensure national security, and eliminate danger to the state independence and territorial integrity of Ukraine. It also provides for the temporary restriction of constitutional rights and freedoms of individuals and citizens, as well as the rights and legitimate interests of legal entities, caused by the said threat, with an indication of the period during which such restrictions are to apply."[15] The initial Presidential Decree introduced martial law on the territory of Ukraine for a period of 30 days. Subsequently, the state of martial law was extended multiple times [Strutynska 2024, 107]. The introduction of martial law resulted in a series of restrictions that affected the exercise of constitutional rights and freedoms of Ukrainian citizens, including the right to migration. As noted by Ivan Pankevych, in the initial period "one can speak of a rather chaotic operation of a number of state bodies involved in mobilisation processes and the control of border crossings" [Pankevych 2024, 1]. As indicated above, the subject of this article concerns legal measures adopted in the area of freedom of movement and migration of Ukrainian nationals. Accordingly, the following analysis will focus on the implementation of Article 33 of the Constitution of Ukraine during the period of Russian aggression. Pursuant to that provision: "Everyone who is lawfully present in the territory of Ukraine shall have the right to freedom of movement, free choice of place of residence, and the right to freely leave the territory of Ukraine, except for restrictions established by law."

At the same time, Article 64 of the Constitution of Ukraine provides that, during a state of war or a state of emergency, further restrictions may be imposed on certain constitutional rights and freedoms, subject to the indication of the duration of such restrictions.

The measures adopted in Ukraine following the declaration of martial law in this area have resulted in a series of limitations, in particular with respect to men of conscription age, whose freedom of movement – especially the right to leave the country – has been significantly curtailed.[16] However, a number of exemptions from the restrictions were introduced. Already

[15] Law of Ukraine on the Legal Regime of Martial Law, "Bulletin of the Verkhovna Rada of Ukraine" 28 (2015), p. 250.

[16] Decree of the President of Ukraine of 24 February 2022 on the Introduction of Martial Law in Ukraine, "Official Bulletin of Ukraine," 14 June 2022, No. 46, p. 16, Article 2497, document ID: 111724/2022.

in the initial phase, these exemptions applied to: men aged 18 to 60 who resided permanently abroad and had an appropriate entry in their passport; persons exempt from military registration on health grounds; persons with disabilities classified in groups I, II or III, provided they held valid supporting documents; single parents raising minor children under the age of 18, as well as individuals acting as guardians of a disabled child under the age of 18; parents providing care of an adult child with a disability of group I or II; relatives accompanying a disabled child during travel abroad, provided they are not subject to military service during mobilisation; individuals who accompany a disabled spouse during travel abroad; individuals who accompany either their own parent or the parent of their spouse with a group I or II disability abroad; persons providing continuous care for a person with a group I or II disability and accompanying them abroad; individuals temporarily unfit for military service for up to six months based on an opinion issued by a Military Qualification Commission; military personnel on official leave or undergoing military training abroad; diplomatic service employees on official or long-term foreign assignments, accompanied by their families; individuals applying for admission to higher education or vocational programmes, as well as research assistants, postgraduate and doctoral students studying abroad in full-time or hybrid formats; members of ship crews, railway employees, aviation personnel, freight truck drivers, volunteers, and representatives of the cultural and sports sectors [ibid., 12-13].

The ongoing military operations conducted by the Russian Federation in Ukraine, combined with the growing needs of the Ukrainian armed forces, have led to a tightening of migration regulations, which particularly affected individuals of conscription age enrolled in academic programmes.

With respect to students pursuing studies abroad, they were permitted to leave the country provided that they submitted the following documentation: a valid student ID card or visa; translated and notarised documents confirming admission to a foreign university; official military deferral certificates issued by the competent military authorities; and a certificate issued by the Territorial Centre for Recruitment and Social Support confirming the departure of vocational students, research assistants, postgraduate and doctoral students enrolled in full-time or hybrid study programmes [ibid., 14].

The aforementioned restrictions were partially lifted in 2024, with the adoption of new guidelines concerning the right of students to cross the state border. However, authorisation to leave the country remains conditional upon the fulfilment of several cumulative criteria, including: age between 18 and 22 years; exemption from compulsory military service during mobilisation; completion of at least one academic semester; enrolment in a full-time programme at a public institution of higher education abroad; pursuit

of a degree in one of the following fields: bachelor's degree, medicine, pharmacy, or veterinary medicine.[17]

Similar restrictions have also been introduced with regard to men working abroad. As noted above, in the initial period they were allowed to move freely across the border, provided that they met the applicable conditions. However, according to the announcement of the State Border Guard Service of Ukraine dated 5 June 2024, men of conscription age who are permanently residing abroad and possess the relevant entry in their passport are no longer exempt from the general rules and no longer enjoy the freedom to cross the border [Pankevych 2024, 16].

The academic literature emphasises that a relative stabilisation in the regulation of the right to freedom of movement for Ukrainian citizens was introduced by the new Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning Specific Issues Related to Military Service, Mobilisation, and Military Registration", adopted on 11 April 2024.

One of the most significant changes introduced by this law was the obligation for all men aged 18 to 60 to update their personal data within 60 days. This may be done either in person at military recruitment centres or electronically. Failure to comply with this obligation may result in judicial restrictions on the use of private vehicles, and in the case of citizens residing abroad, the denial of consular services, including the issuance of new passports.

The law also lowered the mobilisation age from 27 to 25 years. In addition, it abolished the system of compulsory military service and introduced a new institution of basic military training for men aged 18 to 25, which is scheduled to commence in September 2025 and, under wartime conditions, shall not exceed a period of three months [Ber 2024, 1]. Another important amendment introduced by the new legislation was the elimination of the category of persons with "limited fitness" for military service. Individuals previously classified in this category are now required to undergo a second medical examination within nine months from the date of entry into force of the law.

In addition, a revised list of medical conditions was adopted, establishing the grounds on which the Military Qualification Commission may issue a decision declaring a person unfit for military service or exempt from such service.

The legislation also clarified the provisions regarding deferral from military service for students enrolled in higher education. Accordingly, the right to deferral now applies only to individuals pursuing a level of education higher than the one they currently hold, with a view to obtaining a new degree from an accredited institution of higher learning [Pankevych 2024, 18]. It should be noted that, under the applicable Law of Ukraine "On Military

[17] Resolution of the Cabinet of Ministers of Ukraine No. 366 of 2 April 2024 on Amendments to the Rules on Crossing the State Border by Citizens of Ukraine.

Duty and Military Service", women may also be subject to mobilisation if they are deemed fit for military service based on health and age criteria. Furthermore, women who have graduated from vocational or technical institutions of higher education, or who hold medical or pharmaceutical specialisations, are subject to mandatory military registration.

Women possessing qualifications related to national defence may also be registered for military service on a voluntary basis upon submission of a personal request.

Importantly, however, it must be emphasised that even during the period of martial law, women subject to military service obligations are not restricted in their freedom of movement, and thus retain the right to cross the state border [ibid., 19].

To summarise the above considerations, it should be noted that the restriction of freedom of movement of Ukrainian citizens is driven primarily by national defence interests and the need to strengthen the personnel capacity of the Ukrainian armed forces.

3. INTERNALLY DISPLACED PERSONS (IDPS)

A separate issue concerns the situation of forcibly displaced persons. As previously noted, this phenomenon refers to internal migration involving individuals who have lost their homes as a result of Russian military actions or who previously resided in territories currently under Russian occupation and are now seeking refuge in other parts of Ukraine. As indicated above, this group represents approximately 16% of the population residing in Ukraine prior to the outbreak of the full-scale invasion. According to estimates by the International Organization for Migration (IOM), the number of internally displaced persons (IDPs) between 2022 and April 2024 stood at approximately 3.5 million, although during the initial phase of the aggression the figure reached as high as 8 million. The highest number of IDPs resided in the Dnipropetrovsk region (479,000 persons, or 14% of the total number of de facto displaced persons), followed by the Kharkiv region (414,000 persons, or 12%), both located in the eastern part of the country. The capital city, Kyiv, hosted approximately 343,000 IDPs (10%), and the adjacent Kyiv region was home to 268,000 displaced persons (8%).[18] It should be emphasised, however, that this is a highly dynamic group, influenced by a range of factors such as frequent secondary movements, returns to places of habitual residence (where such return is still feasible), and the evolving

[18] International Organization for Migration, *Ukraine Internal Displacement Report General Population Surverey*, https://dtm.iom.int/sites/g/files/tmzbdl1461/files/reports/GPS_R16_IDP_April_2024.pdf [accessed: 10.06.2025], p. 2.

nature of the conflict – particularly the concentration of Russian military activity in the eastern regions of the country. In this context, the actions undertaken by the Ukrainian authorities have focused primarily on providing social support to persons who have been forcibly displaced.

The studied phenomenom had already emerged in Ukraine after 2014, when the Russian Federation occupied part of Ukraine's territory. At that time, approximately 1.8 million people were internally displaced as a result of the armed conflict in the Donbas region [Perelli-Haris, Head, Torrisi, et al. 2023, 3]. These individuals were entitled to social assistance provided by the state, which, however, was conditional upon official registration and recognition of the status of an internally displaced person (IDP). Due to the high number of displaced persons, the President of Ukraine issued a decision in November 2014, according to which individuals who had lived in the Donbas region prior to the conflict and had not registered as IDPs by 1 November 2014 would lose their pension entitlement and other forms of social benefits. The verification of applications significantly reduced the number of individuals officially recognised as IDPs to approximately 1.3 million. Social assistance consisted of monthly financial support disbursed by the Ministry of Social Policy, the amount of which was determined based on the financial situation of the household, including ownership of real estate, bank deposits, and employment status. The maximum monthly amount of assistance was 442 hryvnias, and up to 1,000 hryvnias for children and pensioners. Nevertheless, the total monthly allowance per family could not exceed 3,000 hryvnias, or 3,400 hryvnias in the case of a household including a person with a disability. Large families were eligible to receive up to 5,000 hryvnias [Szabaciuk 2023, 1].

As noted above, the scale of internal displacement increased significantly following the onset of the full-scale Russian aggression. This shift was accompanied by a change in state policy. Pursuant to the Law of 20 March 2022, a standardised housing allowance was introduced, amounting to 2,000 hryvnias per adult and 3,000 hryvnias per child, payable from 1 March 2022. The benefit was granted upon submission of a relevant application. Subsequently, under the Law of 20 May 2022, eligibility for this allowance was extended to persons whose homes had been destroyed or rendered uninhabitable as a result of Russian attacks, as well as to displaced persons from Crimea and other occupied territories. Moreover, eligibility for the benefit was conditional upon reporting the destruction of one's home via the Diia mobile application no later than 20 May 2022, or – where applicable – presenting a written document confirming the damage and specifying its nature. With regard to individuals whose property was not destroyed but who chose to leave areas affected by hostilities, the assessment of eligibility was based on a list of high-risk localities established by decision of the Ministry for Reintegration of the Temporarily Occupied Territories of Ukraine [ibid., 2].

Further restrictions were introduced by the Law of 11 July 2023. Under its provisions, social assistance payments may be withdrawn from individuals who: purchased a vehicle less than five years old; acquired land, an apartment, or a house with a value exceeding 100,000 hryvnias; hold more than 100,000 hryvnias in a bank account; purchased foreign currency or precious metals with a total value exceeding 100,000 hryvnias (with the exception of funds received from charitable organisations or used for medical, social, or educational expenses); own real estate located in areas not affected by hostilities or not under occupation, where the living space exceeds 13.65 square metres per family member; left the territory of Ukraine for a period longer than 30 days without a justified reason (excluding business travel, internships, medical treatment or rehabilitation, or the need to care for a sick child); or are serving a prison sentence or have been convicted of collaboration [ibid., 3].

CONCLUSION

The foregoing considerations illustrate the magnitude of the phenomenon currently confronting much of Europe. It is essential to underline that the Russian aggression against Ukraine does not constitute an internal conflict that could be resolved solely through engagement by the parties directly involved. In this context, the role of the European Union has proven to be of particular importance. The EU has not only provided support to Member States hosting war refugees, but has also extended direct assistance to Ukraine through the activation of successive financial instruments aimed at strengthening the country's capacity to respond to the crisis.

It should be noted that the legal situation of Ukrainian nationals in host countries has been regulated on two levels. First, at the European Union level, the Council recognised the existence of a mass influx of Ukrainian nationals within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001 on minimum standards on giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. Consequently, the Council adopted Implementing Decision (EU) 2022/382, which introduced temporary protection for Ukrainian nationals, a status that has been progressively extended and is currently in force until 4 March 2026. The adoption of this mechanism established uniform standards of protection for Ukrainian nationals that are binding across all EU Member States. At the same time, each Member State adopted its own national legislation specifying the manner in which the rights arising from temporary protection are to be exercised within its territory. For example, Poland enacted the Act on Assistance to Citizens of Ukraine, which created the legal foundations for a secure stay

and enabled the full participation of Ukrainian nationals in the economic and social life of the host country.

With regard to the measures adopted by the Ukrainian authorities, it should be observed that these are focused on reconciling the right to freedom of movement with the imperative of maintaining the state's defensive capacity. This is an exceptionally sensitive area, as it involves, on the one hand, the exercise of one of the constitutional freedoms of Ukrainian citizens, and on the other, the necessity of safeguarding national security, including combat readiness. The measures discussed demonstrate a gradual tightening of regulations, aimed at preserving military capabilities and preventing abuses intended to circumvent the obligation of compulsory service in the defence of the country.

It must be emphasised that only coherent and coordinated solutions – at the level of the European Union, its Member States, and the Ukrainian authorities – can contribute to stabilising the legal and humanitarian situation of Ukrainian nationals in the context of the ongoing Russian aggression.

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IMPLEMENTATION BY THE CATHOLIC CHURCH OF THE CONSTITUTIONAL PRINCIPLE OF COOPERATION WITH THE POLISH STATE IN FAVOUR OF THE INSTITUTION OF RELIGIOUS MARRIAGE WITH CIVIL EFFECTS

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Abstract. The competence to co-operate between the state authorities and the Catholic Church results both from the Constitution of the Republic of Poland of 2 April 1997, as well as from the Concordat and ordinary laws. The Polish state in many areas of social life (e.g. in the field of education, protection of monuments or charitable activity) is supported in achieving its goals by churches and other religious organisations. The cooperation may be spontaneous and rely on the convergence of activities of both entities, but it may also be contractual, i.e. agreed upon by their competent representatives. The aim of this paper is not only to present the legal regulations relevant to the cooperation between the state and the Catholic Church, but above all to show the practical side of the principle of cooperation in the area of actions taken by the Catholic Church for the benefit of marriage, especially that the Polish legislation, allowing for the possibility of concluding religious marriages on the territory of the Republic of Poland with civil effects, has extended the possibility of cooperation with religious organisations.

Keywords: principle of cooperation; Church; State; Concordat; Constitution.

INTRODUCTION

The principle of co-operation between the state and religious associations, legally permissible in Poland, constitutes an obligation to undertake and carry out actions aimed at the realisation of the human good and the common good. This principle expressed in Article 25(3) *in fine* of the Constitution of the Republic of Poland[1] provides the possibility for institutional religious

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

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entities to co-operate with the state in achieving the above objectives, which are of a broad nature. It represents one of the constitutional principles defining the relationship between the state and churches and other religious associations.[2] As is well known, religious communities play an important role in the field of education, humanitarian activities or health care, among others, their participation in the performance of social assistance tasks was expressed *expressis verbis* in Article 2(2) of the Act of 12 March 2004 on social assistance.[3]

In doctrine, cooperation means the pursuit of a common goal through the fulfilment of one's own tasks [Krukowski 2013, 159], the obligation of both the state and religious communities to develop a coordinated policy for the implementation of activities that are of interest to these entities [Dudek 2004, 208], as well as the obligation to seek consensual solutions, which requires compromise, dialogue and agreement on both sides [Sobczyk 2013, 158]. It is indisputable that there are many converging non-religious areas of cooperation between public authorities and churches and other religious associations. The legislator has not explicitly indicated the scope of cooperation between state and church authorities, as it has been specified in acts of lower order [Garlicki 2016].

The aim of this article is to present legal regulations relevant to the cooperation between the State and the Catholic Church in the area of the religious form of marriage with civil effects, as well as to outline the scope and tools allowing for joint initiatives for the benefit of existing marriages. In the light of the axiology adopted in the current Constitution, marriage is a value occupying a particularly high rank in the hierarchy of constitutional values.[4]

1. LEGAL BASIS AND ESSENCE OF THE PRINCIPLE OF COOPERATION BETWEEN STATE AND CHURCH

Adopting the principle of the state and the church working together for the benefit of humanity and the common good implies a subservient role of these entities towards man [Sobczyk 2015, 172]. In this way, churches and other religious associations have been integrated into the concept of subsidiarity and civil society [Orzeszyna 2007, 19-27]. The principle of cooperation

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[2] The other principles on which this relationship is based are: 1) equal rights of churches and other religious associations; 2) impartiality of public authorities in matters of religious, philosophical and philosophical beliefs; 3) freedom of expression of religious, philosophical and philosophical beliefs in public life; 4) respect for the autonomy and mutual independence of each within its own scope in the relations between the state and churches and other religious associations; 5) consensual regulation of the relations between the state and churches and other religious associations: on the basis of agreements, and in the case of the Catholic Church – an international agreement with the Holy See (Article 25 of the Constitution of the Republic of Poland).

[3] Act of 12 March 2004 on social assistance, Journal of Laws of 2023, item 901.

[4] Judgment of the Constitutional Court of 18 May 2005, ref. no. K 16/04, OTK-A 2005, No. 5, item 51.

complements the principle of autonomy and independence of church and state. Furthermore, it is noted in the doctrine that the formulation of two principles defining the relations between the state and religious associations in one paragraph of Article 25 of the Constitution of the Republic of Poland has given a positive meaning to such concepts as autonomy and independence [Borecki 2022, 89-90]. The Constitution in force, when defining the model of relations between the State and churches and other religious associations, adopted, in essence, the same formulation as in Article 1 of the Concordat of 1993,[5] which reads: "The Republic of Poland and the Holy See reaffirm that the State and the Catholic Church are, each in its own domain, independent and autonomous, and that they are fully committed to respecting this principle in all their mutual relations and in co-operating for the promotion of the benefit of humanity and the good of the community." Thus, both entities, independent of each other, should take action to build an order and a social order in which every human being will be assured the realisation of his or her rights and freedoms [Krukowski 2004, 98; Steczkowski 2008, 157-60], which is a consequence of adopting a personalistic vision of social life, where the aim of cooperation is human development. The essence of cooperation should be seen in activities undertaken on the basis of partnership and good will, as there are grounds for directing mutual expectations. The concept of cooperation used by the legislator presupposes the activity of both state and church bodies. It is not clear from the constitutional provision what legal forms this cooperation may take, hence it is permissible, inter alia, in the form of financial assistance.[6]

The scope of cooperation between the state and religious associations is contained not only in the Act of 17 May 1989 on Guarantees of Freedom of Conscience and Religion,[7] but also in individual acts on the relationship between the state and the religious association concerned. In addition, with regard to the Catholic Church, this scope is contained in the Concordat, which is an instrument for the normalisation of relations between the State and the Catholic Church.

Of particular importance in Polish religious legislation is the Law of 17 May 1989 on Guarantees of Freedom of Conscience and Religion, the so-called General Act. According to Article 18(2) of this Act: "Provisions of Article 2 defining the rights of churches and other religious unions can however be applied to churches and other religious unions whose situation is regulated by the laws when separate laws defined in Item 1 do not stipulate

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[5] Concordat between the Holy See and the Republic of Poland, signed in Warsaw on 28 July 1993, Journal of Laws of 1998, No. 51, item 318.

[6] Judgment of the Constitutional Court of 14 December 2009, ref. no. K 55/07, OTK-A 2009, No. 11, item 167.

[7] Act of 17 May 1989 on guarantees of freedom of conscience and religion, Journal of Laws of 2023, item 265.

such rights." The legal and property situation of the Roman Catholic Church is defined in the Law of 17 May 1989 on the relationship between the State and the Catholic Church in the Republic of Poland.[8]

The General Law on the Principle of State Co-operation with Churches and Other Associations states that an area of co-operation, in addition to preserving peace and shaping the conditions for national development, is the fight against social pathologies (Article 16(1)). Undoubtedly, current social pathologies include divorce. The tool for the implementation of the principle of cooperation "may be the conclusion of agreements between the materially competent central government administration bodies and the authorities of individual churches and other religious unions" (Article 16a(1)). Organisational units of religious unions are equal in rights to non-governmental organisations and may carry out activities related to the performance of public tasks, which may be subject to control by the Supreme Audit Office.[9] Pursuant to Article 4 of the Act on the Relationship between the State and the Catholic Church in the Republic of Poland, the competent body to deal with problems related to the development of relations between the State and the Catholic Church is the Joint Commission of Representatives of the Government of the Republic of Poland and the Polish Bishops' Conference. A particular example of cooperation for the benefit of marriage regulated in the individual law is Article 15a concerning the religious form of concluding a marriage producing civil law effects.

The cooperation for the defence of the family and the respect of marriage as the foundation of society is clearly expressed in Article 11 of the concordat. The concordat regulation of marriage includes, on the one hand, issues of marriage and, on the other hand, issues of adjudication in matrimonial matters (Article 10).

It does not follow from the above-mentioned legal provisions that the state is the only active actor on which cooperation is dependent. The correlated actions of the two coexisting actors – the state and the church – should be the foundation for healthy cooperation and collaboration in the various areas of human assistance.

2. FORM OF MARRIAGE

The Catholic Church obliges her faithful to conclude marriages according to the provisions of her own law (Canons 1059, 1117 of the Code of Canon

[8] Act of 17 May 1989 on the relationship between the State and the Catholic Church in the Republic of Poland, Journal of Laws of 2023, item 1966.

[9] Act of 23 December 1994 on the Supreme Chamber of Control, Journal of Laws of 2022, item 623, Article 2(3).

Law[10]). If at least one of the parties is a Catholic, then the marriage, in order to be valid, must be celebrated in either the ordinary or the extraordinary form. The ordinary form of concluding a marriage is understood as contracting a marriage in the presence of the Ordinary of the place or the parish priest, or a priest or deacon delegated by one of them,[11] and in the presence of two witnesses (Canons 1108-1111, 1113 CIC/83) [Kamiński 2020, 49-89]. Among Catholics in Poland this is the most common form of entering into marriage.[12]

The ecclesiastical legislator, bearing in mind the natural right of persons to marry, has recognised that there are situations where Catholics can also validly enter into marriage without the presence of a clergyman competent to assist in its conclusion. In Canon 1116 § 1 CIC/83, he has written: "If a person competent to assist according to the norm of law cannot be present or approached without grave inconvenience, those who intend to enter into a true marriage can contract it validly and licitly before witnesses only: 1° in danger of death; 2° outside the danger of death provided that it is prudently foreseen that the situation will continue for a month."[13] The method of marriage described in Canon 1116 is referred to as an extraordinary form of marriage.

The Bishop of Rome, taking into account the serious difficulties[14] that the future spouses may encounter, has also recognised the possibility for the Ordinary of the place and the Holy See (usually) to grant a dispensation from the norm prescribing the observance of the ordinary canonical form (Canons 1127 § 2, 1079 § 1-2 CIC/83). A Catholic, having obtained the dispensation in question, may validly contract a marriage, e.g. in the USC or another religious union. The lack of a dispensation does not result in the invalidity of the marriage when the Catholic party marries a non-Catholic party of the Eastern rite (e.g. Orthodox). In such a case, the canonical form of marriage is only required for its licitness.[15] For validity, the participation of a priest

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

[11] When the marriage is assisted by a clergyman who does not have the authority to do so by virtue of his office or delegation, in the cases described in Canon 144 CIC/83, this deficiency is remedied. The marriage is then validly concluded.

[12] According to Canon 1112 § 1 CIC/83, "Where there is a lack of priests and deacons, the diocesan bishop can delegate lay persons to assist at marriages, with the previous favorable vote of the conference of bishops and after he has obtained the permission of the Holy See." In Poland, such a way of concluding marriages is not possible.

[13] The circumstances set out in Canon 1116 § 1, 2° CIC/83 do not occur in Poland.

[14] Polish Bishops' Conference, *General Decree on Conducting Canonical and Pastoral Conversations with Fiancées before Conducting a Canonical Marriage*, "Akta Konferencji Episkopatu Polski" 3 (2019), p. 28-93 [hereinafter: *Decree*]. Article 90 of *the Decree* mentions as an example of such difficulties: preserving family harmony, obtaining parental consent to the marriage, recognising the particular religious commitment of the non-Catholic party or his/her bond of kinship with a minister of another Church or ecclesial community.

[15] The term 'illicit' in ecclesiastical law describes an act validly but unlawfully performed.

and the observance of other requirements of the law governing its validity are required (Canon 1127 § 1 CIC/83) [Jakubiak 2019, 137-52; Idem 2013, 119-42]. The Catholic Church does not usurp the right to determine the purely civil effects of marriages. In Canon 1059 CIC/83, the Bishop of Rome confirms the competence of the secular authorities on this subject. Furthermore, in Canon 1071 § 1 CIC/83, he indicates that, except in the case of necessity, Catholics wishing to enter into a marriage governed by ecclesiastical law, which cannot be recognised or concluded according to state law, must obtain the permission of the Ordinary of the place. Taking into account the canon law in force in the whole Church and the provisions of the Family and Guardianship Code,[16] the Polish Bishops' Conference recalled the necessity to take care that each canonical marriage is at the same time recognised in the state legal order, so that the spouses can fully exercise their rights. The bishops obliged the faithful of the Catholic Church in Poland entering into a canonical marriage to obtain civil effects for it (*Decree*, Article 95).

The Polish Bishops' Conference in Article 96 of *the Decree* has recognised the conclusion of the so-called concordat marriage,[17] meeting the requirements set out in Article 10 of the Concordat[18] as the ordinary way of ensuring civil effects of a canonical marriage. The separate conclusion of civil and canonical marriages should be an exception and occur only in those cases where the nuptuptupants have already been civilly bound for a long time and wish to regulate their marital situation in the Church (quoted *Decree*, Article 97). The bishops stated that Catholics "only in occasional cases and for exceptionally grave reasons" may enter into so-called civil marriages exclusively. However, in the sense of Church law, they will not then be married (*Decree*, Article 96).

Due to the possibility of concluding religious marriages with civil law effects in the legal order, priests have been presented with new duties. In the *Decree* (Article 99) and the Concordat (Article 10(2)) they are obliged to inform the betrothed of, inter alia, the content of the provisions of the Polish law on the effects of marriage, which is done by familiarising the nupturients with the content of Article 1, 8, 23 of the Polish Civil Code. The norm recorded in the Concordat differs from that recorded in the Polish Family Code, Article 2(3), according to which the head of the Registry Office explains to persons intending to get married the significance of the marriage,

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[16] Act of 25 February 1964, the Family and Guardianship Code, Journal of Laws of 2023, item 2809, Article 4.

[17] According to *the Decree*, Article 98, the procedure and formalities connected with the contracting of a concordat marriage are regulated by a separate instruction of the Polish Bishops' Conference, *Instruction for pastors concerning concordat marriage* (15.11.1998), "Dokumenty Konferencji Episkopatu Polski" 1998, p. 231-37. It does not take into account subsequent changes in the state regulations of civil status acts.

[18] Concordat, Article 10; Civil Code, Article 1, para. § 2-3, 4^1, 8.

the provisions regulating the rights and obligations of the spouses and the provisions on the name of the spouses and the name of their children. It should be noted that *the Decree* contains a provision that expands the content to be explained to the nupturients (Article 99 and Form 16b) in relation to the norm enshrined in the Concordat.

It is worth noting at this point that pursuant to the rule provided in Article 9(2) of the Polish Family Code, it is possible to enter into a religious marriage with civil effects before a clergyman without presenting a certificate drawn up by the Head of the Registry Office stating that there are no circumstances excluding marriage. Such a situation occurs in the case of a danger directly threatening the life of one of the parties. The state legislator has imposed further obligations on the clergy in the aforementioned circumstances.

In the analysis of the cooperation between the Church and the State for the benefit of marriages, it should also not be overlooked that the Catholic Church in Canons 1104 and 1105 of Code of Canon Law – like the Polish State in Article 6 of the Family and Guardianship Code – allows for the possibility to conclude a marriage by proxy. Then, the power of attorney referred to in Article 6(2) of the Family and Guardianship Code may also be effective under ecclesiastical law, provided that it meets the other requirements set out in Canon 1105 CIC/83.

Since ecclesiastical law prefers that Catholics concurrently conclude marriages recognised under state law, the bishops have pointed out in Article 100 of *the Decree* that nupturients wishing to enter into marriage without civil effects must obtain the consent of the local Ordinary. The consent of the Ordinary of the place is also necessary if they promise to obtain the civil effects of the union only after it has been concluded in ecclesiastical form. Exceptionally, the Ordinary will grant this consent if, in spite of being instructed by the priest about the consequences of such a decision, the nupturnants persist in their opposition and present serious reasons for living in a marriage that is valid only in the ecclesiastical forum.

Polish legislation, by allowing religious marriages with civil effects on the territory of the Republic of Poland, extended the possibility of cooperation between the state and the church. In the registry offices in 2022, 76 405 civil marriages and 79 412 religious marriages were registered (98.8% of them were concluded in accordance with the law of the Catholic Church).[19] In 2021, 78,012 marriages were performed before a Registry Office clerk, while 90,312[20] were performed in religious union (98.99% of them in the Catholic Church).[21] A year earlier (2020), 67 265 unions were concluded in the civil form, while

[19] Central Statistical Office, *Rocznik demograficzny 2023*, Warsaw 2023, p. 181.
[20] The 2022-2020 data only includes marriages registered at the Registry Office.
[21] Central Statistical Office, *Rocznik demograficzny 2022*, Warsaw 2022, p. 181.

77 780 were concluded in the religious form (99.02% in the Catholic Church).[22] It is impossible not to notice that more than half of the marriages registered in the Registry Office were concluded in the ordinary canonical form, as so-called concordat marriages. For the state administration this represented a significant time and economic relief [Wojewoda 2017, 82-83]. A higher number of marriages performed in the Registry Office would have required additional infrastructure and would have been more demanding for the already involved. In addition, other full-time positions would have to be created for the Registry Office staff directly handling civil marriage ceremonies. It is worth noting that currently some of the Registry Offices in Warsaw make marriage ceremonies shorter, and yet one has to wait several months to get married in them.

The entitlement to concordat marriage under Article 9(2) of the Civil Code significantly increases the possibility for citizens to realise their rights to marry in a situation of direct threat to the life of one of the parties. In 2022, there were 10,357 parishes in Poland in which there are from one to several clergymen who can provide pastoral services at any time. On the other hand, data made public by the Ministry of the Interior and Administration show that there are currently 2256 Registry Offices in Poland which are open at specific times.[23]

Concluding the analysis of the legal status concerning the canonical form of marriage, it should be noted that the clergy, by assisting in concordat marriages – cooperate with the Polish State in fulfilling its functions concerning: social security, family support, administrative service, civil matters. By their service they significantly relieve the Polish State in economic and administrative terms. Their availability also increases the chances of concluding a marriage with civil effects on the territory of the Republic of Poland in urgent situations when one of the fiancées is in immediate danger of death.

3. MEASURES IN FAVOUR OF CONCLUDED MARRIAGES

According to the Central Statistical Office, in 2022 there were about 8.6 million marriages in Poland.[24] The actions of the Church have also been and are directed to them, the need for which is indicated by numerous documents of the Holy See and the Polish Bishops' Conference, reminding of the need for communities of the faithful to provide assistance to married couples. This obligation has been enshrined in Canon 1063 CIC/83.

Care for marriages is not limited to those recognised by canon law. It also covers those who are legally and factually separated, those who are newly

[22] Idem, *Rocznik demograficzny 2021*, Warsaw 2021, p. 181, 199.
[23] See https://www.gov.pl/web/mswia/urzedy-stanu-cywilnego [accessed: 08.08.2024].
[24] Central Statistical Office, *Rocznik demograficzny 2023*, Warsaw 2023, p. 181.

married, those who hold different world views or come from different cultures, as well as widowers. The assistance of Church institutions is not only addressed to Catholics.[25] Since there are many levels in which the Catholic Church accompanies spouses, and since this publication is limited in size, the authors will only indicate some of the forms of service that the community of faithful provides to married couples [Skreczko 2009, 129-48].

Data published by the Institute for the Catholic Church Statistics shows that in 2021 there were 2360 family life counselling centres in Poland (mainly maintained by the Church), in which 3903 family life counsellors provided assistance. Their activities are used not only by future spouses, but also by spouses affected by various types of difficulties. In 2021, more than 92,000 people were beneficiaries of the service of family life counselling centres. When those presenting themselves to a family life assistant require more expert knowledge, they are referred to specialist counselling centres – including those run by the Catholic Church. In 2021, there were 121[26] of the latter on the territory of the Polish Episcopal Conference, with 875 specialists working in them. 34,076 people benefited from their assistance. There are currently nine specialist counselling centres in the Warsaw Archdiocese alone[27] [Jakubiak, Kołodziej, and Lorkowski 2024, 116].

The Catholic Church's support for the institution of marriage is carried out not only in providing assistance to people in crisis, but also through activities of a preventive nature. The latter include, among others, ongoing human, marital and family formation provided at parish and diocesan level. This is carried out through individual consultation with a clergyman,[28] participation in various groups and communities,[29] and through ongoing

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[25] Franciscus PP., Adhortatio apostolica post-synodalis *Amoris laetitia* (19.03.2016), AAS 108 (2016), p. 311-446, no. 217-58.

[26] Institute for Catholic Church Statistics SAC, *Annuarium Statisticum Ecclesiae in Polonia. Data for 2021*, Warsaw 2021, p. 22, 29.

[27] One of them is the Catholic Psychological and Pastoral Care Centre 'Poradnia Dewajtis'. In 2022, it provided 297 hours of free counselling. Considering the average market amount of PLN 250 per 1 hour of service, the cost of counselling could have been around PLN 74 250. The centre provided counselling at prices well below the market value. Thus, there were 3981 individual visits (reduced amount of PLN 477,720), 203 marital therapies (reduced amount of PLN 20,000), 317 visits from parenting counselling (reduced amount of PLN 24,000). There were also 13 visits to the Family Counselling Centre and the therapeutic and formative Programme 'Finally to live – 12 steps towards the fullness of life', attended by 55 people, for a total of 94 meetings. Through its activities, the Catholic Psychological and Pastoral Care Centre significantly relieved the burden on the Bielany health care system.

[28] The seminar curriculum takes into account pedagogical and psychological preparation. It also includes subjects dealing directly with marriage and the family.

[29] Some of the communities are aimed at men – e.g. Men of St Joseph, women – e.g. Miriam Community of Women, families – e.g. Domowy Kościół, Neocatechumenal Way, Covenant of Families. The number of members in various types of parish organisations was around

homiletic and retreat formation.[30] A special role in promoting the value of marriage is played by grandly celebrated anniversaries in parishes on the 25th, 50th and 60th anniversaries of the sacrament of marriage.

When talking about the support of marriage, it is impossible to omit educational activities. Catholic universities and institutes conduct numerous scientific studies on issues concerning the family and marriage. They organise workshops, training courses and conferences on these issues. They prepare and publish numerous publications (e.g. the journals "Ius Matrimoniale" and "Family Studies"). They educate spousal supporters.[31]

Summing up the part of the study devoted to the undertakings within the Catholic Church for the benefit of already existing marriages, it should be noted that the planes of cooperation between the Church and the Republic of Poland in these fields are the most numerous. They are located in the following functions of the state: educational, upbringing and caring activities; culture and protection of national heritage; Polish science; social security and family support; civic affairs.

CONCLUSIONS

The State and the Church, although independent and autonomous from each other in their respective fields, are obliged to serve man and society as a whole. This need was pointed out by the Catholic Church in the 1965 conciliar document *Gaudium et spes*, which reads: "Therefore, to encourage and stimulate cooperation among men, the Church must be clearly present in the midst of the community of nations both through her official channels and through the full and sincere collaboration of all Christiana – a collaboration motivated solely by the desire to be of service to all. This will come about more effectively if the faithful themselves, conscious of their responsibility as men and as Christians will exert their influence in their own milieu to arouse a ready willingness to cooperate with the international community" (no. 89).

The principle of cooperation between the state and religious associations is still valid and needed, especially as its implementation to date has proven itself against various social phenomena. However, respect for such principals as the principle of respect for a pluralistic society, the principle

2.5 million in 2019.

[30] The retreats often include teachings promoting the value of family and marriage and introducing ways to overcome crises and difficulties.

[31] The Catholic Academy in Warsaw, for example, runs a two-year 'Marriage and Family Study'. The Archbishop Kazimierz Majdański Institute of Family Studies in Łomianki organises a 'Study of practical preparation for accompanying married couples', which includes 120 hours of exercises and lectures.

of independence and autonomy of the state and the church or the principle of respect for religious freedom in private and public life should form the basis for the implementation of the principle of healthy cooperation between the two entities [Krzywkowska 2018, 47-49]. In order to eliminate conflict situations, the scope of cooperation should be agreed upon through concrete arrangements.

The cited legal provisions have made the state and religious associations partners and allies who, possessing good will, can realise the common good, i.e. the good of the state, the good of citizens and, finally, the good of all people. Comparing Article 25(3) of the Constitution with Article 1 of the Concordat, it should be stated that in essential content they are identical. The state authorities and the ecclesiastical authorities are entitled and obliged to co-operate, first of all, in the scope of helping a person to protect his/her due rights and freedoms resulting from the dignity of a human person, especially in the situation of their violation. The statutory catalogue of forms of cooperation is not of a closed nature. As can be seen from the analysis of the implementation of the principle of cooperation for the benefit of marriage presented above, ecclesiastical institutions may not only be executors of tasks, but also their initiators.

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HYPERPOSITIVISM AS A SAFETY VALVE IN A POST-COMMUNIST LEGAL SYSTEM: THE CASE OF POLAND

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Abstract. The present paper suggests that hyperpositivism, considered a metanormative legal survival of the Communist rule in the Polish legal system, might serve as a safety valve preventing activities by public authorities that could destabilise the system. Hyperpositivism may entail a mental (even if only imaginary) barrier that stops those applying law from departing too far from the lexical meaning of a legal text. While the dangers of extreme formalism (or "ultra-formalism") in the application of law, characteristic of hyperpositivism, are well-known, it might be the case that in a post-Communist system that has not matured yet after the transition to democracy, this feature of the system is a necessary element that keeps a precarious homeostasis in it. Its hasty removal – without other checks being established – may lead to chaos. The present paper indicates that recent months have seen some more abrupt cracks in the barrier of hyperpositivism, which are motivated rather instrumentally by the willingness to remove the legal changes made by the previous government and, allegedly, to restore the rule of law in Poland. In this process, non-formalist readings of legal texts have led some public authorities to ignore the decisions or even the existence of others. This seems to be destabilising the state in a geopolitical situation where stabilisation and consolidation should be sought instead. Without engaging in the ongoing political dispute, the paper, using the case study and dogmatic methods and drawing on a review of selected legal theoretical and comparative law literature, analyses two examples of such activities, including the outright questioning of the so-called "neo-judges" and the removal and appointments of the National Prosecutor's office holders in 2024. In both situations, a more formalist reading of positive law would prevent dangerous consequences these situations are likely to produce for the legal system, the state and its citizens.

Keywords: hyperpositivism; ultra-formalism; legal survivals; neo-judges; National Prosecutor.

INTRODUCTION

Excessive formalism in the application of law brings to mind the injustice that may be done by a public authority sticking too closely to the literal meaning of a legal text. In the title of his thought-provoking monograph, Matczak even refers to the "error of formalism", claiming that formalism

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is incompatible with the rule of law [Matczak 2007]. After all, warnings against overstrictness in applying law – such as "summum ius summa iniuria" [Cicero 1928, 34] and "ius summum saépe summast málitia" [Afer 1891, 45] – have been voiced since antiquity. Indeed, it is undeniable that blind adherence to a legal text may lead to injustice, which is the case especially when disputes between private parties or between a private party and the state are being resolved. This notwithstanding, the present paper argues that the picture of extreme formalism is not black and white, at least insofar as it may act as a check on activities destabilising a legal system. This potential seems to apply to relations between the public authorities of a post-Communist state, where "ultra-formalism" or "hyperpositivism" became a dominant legal ideology under the former system [see Mańko 2013a, 8-10] and whose current system has not yet matured in the process of transition to democracy.

Arguments for such a take on formalism will be drawn from the developments in Poland in recent months, during which – apparently under the guise of the non-formalist application of law – certain public authorities have begun to ignore the decisions or even the existence of other public authorities. A special focus will be placed on the problem of the so-called "neo-judges" and the appointment of a new National Prosecutor. Based on these examples, it will be shown that, despite arguments pointing to the fallacy of a purely literal interpretation, characteristic of formalism, the awareness of constraints imposed by a legal text (even if these constraints are merely imaginary, mental barriers) may act as a safety valve preventing activities that could destabilise the system. In other words, the author, having both legal and linguistic background, does not argue that a purely literal interpretation is possible but submits that the belief in constraints imposed by a legal text can lead to positive practical results in an immature political and legal system.[1] Removing this safety valve (at least too early) may, in turn, lead to chaos. Using another metaphor, it could be said that hyperpositivism is perhaps not a "weed in the gardens of justice" that needs to be eradicated in the name of discontinuity with the former system [see Mańko 2013b, 210] but an (as yet) essential element of the current system's environment that keeps a precarious homeostasis in it.

In order to support the above thesis, first of all, the notion of "hyperpositivism" is analysed in Section 1. Focus is placed on its origins and nature as a legal survival [see Mańko 2015]. Then, Section 2 discusses some of the key arguments against formalism in the application of law. In Section 3, the examples mentioned above are discussed and examined to show how a more formalist approach could prevent destabilisation. Based on these findings, Section 4 elaborates on the potentially positive role of hyperpositivism,

[1] Obviously, the author has no competence to elaborate on this observation in psychological terms, but it might be an interesting subject for "law and psychology" research.

demonstrating that, at least in relations between public authorities, it can be considered an essential element of the Polish legal system.

Apart from the case study method, the present research employs the dogmatic method, which has been used to analyse the regulations concerning the examples discussed, and also draws on a review of selected legal theoretical and comparative law literature. A major limitation of the research is its inductive nature, which, however, seems sufficient to demonstrate just the potentially positive impact of hyperpositivism. This observation may be a starting point for further, more comprehensive studies. What is more, as the examples discussed are politically sensitive, it needs to be stressed that the author does not wish to side with any political grouping or platform. Yet, an underlying axiological assumption accepted by the author – which needs to be made clear from the outset – is that the stability of a legal system, translating into the stability of the state, is a vitally important value for both the state and its citizens.

1. HYPERPOSITIVISM AS A LEGAL SURVIVAL

Mańko defines "legal survivals" as "elements of legal culture originating within an earlier socio-economic formation which were functional towards that formation but which, following the transition to a historically subsequent formation, have remained in place" Mańko [2013b, 215-16]. In addition to organisational and normative legal survivals, he distinguishes a category of metanormative survivals, which are instances of continuity in the form of metarules governing legal discourse, including rules defining what is considered "law", rules on legal interpretation and views on the judge's role in resolving a case. It is the metanormative survivals of the Socialist Legal Tradition that the umbrella term "hyperpositivism" covers [ibid., 217-18]. An alternative term used by Mańko is "ultra-formalism" [Idem 2013a, 1, 8-10]. In this connection, it should be mentioned, as a side note, that although contemporary formalism is historically related to positivism [Niesiłowski 2017, 85], the mere concept of positivism does not predetermine the use of particular methods of resolving legal problems. However, positivists may have a greater proclivity for formalism in legal interpretation [Gizbert-Studnicki 2013, 54]. The latter observation is definitely the case with hyperpositivism. It should also be clarified that the concept of formalism referred to in the present paper concerns the level of applying law rather than the level of law-making or of law as a certain product of the lawmaker [Niesiłowski 2017, 85-86].

Hyperpositivism is characterised by adherence to the view of law as abstract and general written legal instruments adopted by competent state authorities. As such, it rejects precedents, customary law, scholarly writings and general principles of law as law sources. Furthermore, its concept

of interpretation boils down to decoding the inherent meaning of a text, with functional primacy being given to strictly literal interpretation. The role of the judge is thus reduced to a machine applying legal rules in the course of syllogistic subsumption. Hyperpositivism insists on the form of law rather than on its substance [Mańko 2013b, 218-20].

Poland and other Central European countries received hyperpositivism, born in the 1930s in the Soviet Union, under the latter's influence. The success and entrenchment of this approach in the period of state socialism in Poland was also due to the influence of German positivism (the Pandectist conceptual jurisprudence) in the pre-socialist period. As a result, the Soviet species of legal positivism was not seen as unfamiliar. Also the weak social position of judges corresponded to the view of a judge as an element of the state machine. From the ruling party's perspective, hyperpositivism was a way to prevent judges from disobeying and questioning any rules of positive law. As regards the legal community, hyperpositivism helped them avoid difficult political questions by letting academics and judges claim their activity was technical and neutral. Judges' work was also made easier, as writing a decision presenting solely linguistic arguments (irrespective of the true reasons behind it) is simpler. In addition, Polish lawyers, who were generally cut off from the developing legal thought and had an outdated view of Western legal culture, could actually believe that they followed Western ideas. Consequently, in 1989, hyperpositivism was the working legal thought among Polish legal scholars and practitioners. Despite a growing critique, it was perpetuated in subsequent years [ibid., 220-25]. However, gradual changes in Polish judges' reasoning – with even "a new dynamic" – have been observed recently [Klimaszewska, Machnikowska, and Koch 2023, 304].

An interesting question asked by Mańko is whether the mainstream of Polish lawyers, who officially consider socialist legal survivals as something undesirable ("weeds" that need to be removed), are really committed to eliminating the survivals – or perhaps their actual mindset is different, and the metaphor of legal survivals as "weeds" is just an "ideological lie" [Mańko 2013b, 226]. This notwithstanding, it seems recent years have seen some change, with a truly more activist approach that openly departs from formalism emerging in the legal community. This change, however, appears to be – at least to some extent – instrumental, marking an attempt to oppose the legal reforms made by the Law and Justice government (in power between 2015 and 2023). While in 2013, Mańko was wondering whether one could "imagine the Polish judiciary *en masse* actually abandoning the *jouis-sense* of hyperpositivist formalism and textualism" [ibid., 232], in 2024, it seems that a significant group of prominent lawyers and judges (perhaps not *en masse*, though) has turned towards an openly and radically non-formalist approach. One scholar even claims that recent years have shown

a universal value and feature of the Polish legal system: a judge interpreting law is becoming a central figure of legal culture, relying on his or her beliefs and their justness and coherence [Wyjadłowski 2024, 123-25]. Supposing this statement were correct, relying on beliefs rather than positive law would mean a paradigm shift. A symptom of changing attitudes was also a meeting in which the Prime Minister ventured to openly declare, in front of a group of renowned legal experts – who did not seem to protest – that his decisions might not fully correspond to the rule of law in purists' eyes.[2]

Proposing a view of legal survivals as symptoms within the meaning of Lacanian psychoanalysis, Mańko makes the following claim [quoting: Žižek 2008, 85]: "The survivals of the Socialist Legal Tradition are a key structural element of Polish legal culture. They are symptomatic, in that they 'cause […] a great deal of trouble, but [their] absence would mean even greater trouble: total catastrophe'" [Mańko 2013b, 229]. With this in mind, it needs to be enquired whether the rather instrumental and abrupt breakaway from hyperpositivism (even if following earlier, slower changes) is not, in fact, a step towards such a disaster.

2. THE FORMALIST MYTH, OR IS IT?

A crucial element of hyperpositivism (notably also referred to as "ultra-formalism") is its formalist component. Matczak provides a general definition of formalism as a concept of applying law whereby law is applied strictly according to the provisions of a legal text, even if the result is unjust or contrary to common sense [Matczak 2007, 9]. In his work, he questions the commonly held view that such application of law is compatible with the premises of legal positivism. The present paper will generally accept this definition but will not explore the relationship between positivism and formalism or the various more detailed concepts and definitions of formalism presented in Matczak's monograph.[3] Yet, it is worth summarising the catalogue of common features of formalist conceptions provided by Matczak. It includes, in short, belief in the syllogistic nature of the application of law, the desire to reduce the number of interpretative premises and the belief that the formalist process of the application of law constrains lawyers, ensuring foreseeability of the interpretative decision and limiting their discretion [ibid., 15, 70].

Each of the above features of formalism has been criticised in the literature. Adherence to syllogism may be challenged as creating a pretence

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[2] See *Premier: nie wszystkie moje decyzje będą spełniały kryteria praworządności z punktu widzenia purystów*, https://www.pap.pl/aktualnosci/premier-nie-wszystkie-moje-decyzje-beda-spelnialy-kryteria-praworzadnosci-z-punktu [accessed: 28.10.2024].

[3] See also the criticism of Matczak's understanding of formalism by Tomza [Tomza 2011, 100-101].

of objectivity, seemingly making the interpretative decision independent of the interpreter's preferences. An argument against reductionism is that understanding a legal text is impossible without considering the interpretative premises derived from the context in which the text was created or is interpreted. Another argument is that taking account of a broader range of interpretative premises yields a better result of the process of the application of law. Furthermore, it can be argued that due to the semantic properties of language, a textual approach to the interpretation of law is impossible, as one cannot speak of clarity of legal language. It can also be claimed that the interpretation of a text is only one of the multiple components of the broadly conceived process of applying law [Matczak 2007, 70-79].

Matczak identifies three errors of formalism that consist in the failure to realise that communication through law takes place over multiple channels, that it is diachronic and that legal communications are hierarchical [ibid., 181]. In his arguments, he invokes the Kripke-Putnam semantics, claiming that formalism cannot be defended in its light [ibid., 136]. What is more, formalism can also be perceived as a game. Its participants are generally aware that it is merely a game, and only some actually believe in the formalist myth. This would suggest that practising lawyers may objectively adhere to formalism, while subjectively (cynically) they are legal pragmatists or realists, which they are prepared to admit in private [Mańko 2013b, 230-31].

Much seems to have been said about the advantages and disadvantages of formalism. No matter whether one sees formalism as an error or a myth or is a true believer in it – and regardless of which of these positions is deemed to be right – there remains the question of the real impact of adherence to formalism, in particular in its extreme version ("ultra-formalism"). Can the actual or pretended belief in the syllogistic nature of the interpretation of legal texts, which is supposed to ensure legal certainty and security, really contribute to achieving this result? This will be demonstrated based on two examples discussed in the following section.

3. SELECTED RECENT EXAMPLES OF NON-FORMALIST APPROACHES IN THE POLISH LEGAL SYSTEM

Before looking at the two examples mentioned in the introduction, it is worth noting the criticism of non-formalist attitudes among the judiciary expressed by Muszyński [Muszyński 2023, 21-22]. Muszyński argues that the rule of law[4] is absent at the level of the application of law by certain national

[4] This seems to be the formal conception of the rule of law, which focuses on the requirement of acting on the basis of obligatory law rather than concentrating on the content of legal enactments [Nowacki 1969, 85].

and international courts. Referring to a number of examples, including that of the alleged illegality of the National Council of the Judiciary, he justifies his standpoint by stating that those courts' activities are not based on the law *written down* in the Constitution,[5] statutes or international agreements. Thus, as he puts it, their rulings reflect some mysterious, not universally known legal system (hence the reference to "alternative rule of law" in his paper's title). Obviously, such arguments may be easily challenged by those for whom the world beyond a legal text is an integral part of their notions of the legal system and of the rule of law. For instance, Wyjadłowski submits that the judge's conscience includes judicial disobedience which, as it were, goes beyond the framework of the constitutional legal order and that such disobedience may become a source of law [Wyjadłowski 2024, 130-31]. With regard to the same problem of the National Council of the Judiciary, he concludes that the new method of the appointment of its judicial members can only be considered legal if the constitutional provisions are read at random and with uncritical adherence to legal rules [ibid., 134]. It seems impossible to reconcile these perspectives. Hence, the examples presented below do not serve to prove the superiority of either formalist or non-formalist approaches to the application of law. Nor does the author seek to engage in the ongoing political dispute in Poland, which, sadly, has also crept into scholarship. Rather, these examples are intended to show that, in practical terms, in the situations discussed, faithfulness to the hyperpositivist legacy of the Polish legal system could have prevented (and might prevent further) destabilisation of the state.

3.1. The so-called "neo-judges"

The neologism "neosędzia" ("neo-judge") is defined as referring to a judge appointed with the involvement of the National Council of the Judiciary following its reform in 2017.[6] As is well-known, the status of the reformed Council has been challenged on multiple occasions by the European courts[7] as well as part of Polish politicians and part of the legal community. Notably, since the new government, formed by previous opposition parties, was appointed on 13 December 2023, the outright questioning of selected rulings issued by the so-called "neo-judges" seems to have been on the rise. For instance, on 10 January 2024, in a case concerning a Law and Justice politician who had been controversially pardoned by the President [Kusik 2024], a ju-

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

[6] See https://pl.wiktionary.org/wiki/neos%C4%99dzia [accessed: 29.10.2024].

[7] Judgment of the ECtHR of 22 July 2021, Reczkowicz v. Poland, Application no. 43447/19; judgment of the Court (Grand Chamber) of 19 November 2019, Joined Cases C585/18, C624/18 and C625/18.

dicial panel of one of the Supreme Court's chambers declared an earlier decision by judges of another chamber of the same court,[8] allegedly improperly appointed, not to be a ruling of the Supreme Court. As a result, it examined the same case on its own,[9] thus openly disregarding the other judicial panel.

Another example is the Minister of Justice's announcement of 27 September 2024, released on X (formerly Twitter), according to which the "position" of the three neo-judges who had found the appointment of a new National Prosecutor (see Subsection 3.2.) invalid was not a resolution of the Supreme Court and was non-binding. The National Prosecutor's Office issued a similar statement, claiming that the "position" had been expressed by unauthorised persons. It is worth noting that all the judges considered as "neo-judges" in that case have had decades of careers in the judiciary.[10] One might also find it surprising that a public authority uses social media to undermine the status of another public authority. Furthermore, there have already been cases of judges of ordinary courts ignoring rulings issued by the so-called "neo-judges" and citing, among others, the European courts' case law [Jałoszewski 2024].[11]

The root cause of the "neo-judges" problem is Article 9a of the Act of 12 May 2011 on the National Council of the Judiciary,[12] added under an amendment coming into force on 17 January 2018.[13] The new provision gave the Sejm the power to elect the judicial members of the Council. A formalist reading of the Constitution, like the one presented by Muszyński, indeed gives no grounds for challenging this method of appointment [Muszyński 2023, 26-30]. Articles 186 and 187 of the Constitution of the Republic of Poland do not specify who should appoint the Council's judicial members, leaving this procedure to be established in an ordinary statute. Even more importantly, the Constitutional catalogue of law sources excludes the possibility of the CJEU authoritatively reviewing the compatibility of the Polish Constitution with EU law, including in terms of the relations between the National Council of the Judiciary and the legislative and executive powers. Nor is it possible to treat the judgments of either the CJEU or the ECtHR as overriding the provisions of the Polish Constitution. Furthermore,

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[8] Order of the Supreme Court of 5 January 2024, ref. no. I NSW 1267/23, Lex no. 3649912.

[9] Order of the Supreme Court of 10 January 2024, ref. no. II PUO 2/24, OSNP 2024/5/55.

[10] See *Bodnar dąży do anarchii: Stanowisko neosędziów ws. Dariusza Barskiego nie jest uchwałą SN i nie jest wiążące. Komentarze*, https://wpolityce.pl/polityka/707775-anarchia-bodnar-stanowisko-neosedziow-nie-jest-uchwala-sn [accessed: 29.10.2024]. Resolution of the Supreme Court of 27 September 2024, ref. no. I KZP 3/24, Lex no. 3760705.

[11] Judgment of the Court of Appeals in Warsaw of 8 March 2024, ref. no. II AKa 142/22, Lex no. 3729595 (one judge dissenting).

[12] Journal of Laws No. 126, item 714, as amended.

[13] Article 1(1) of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and Certain Other Acts, Journal of Laws of 2018, item 3.

the Constitution provides no grounds for courts or other public authorities to challenge the appointments of judges, which are, to wit, made by the President and not by the Council (Article 179 of the Constitution).

3.2. Appointment of a new National Prosecutor

Another noteworthy case is that concerning the appointment of, first, Jacek Bilewicz as an "acting National Prosecutor"[14] and then Dariusz Korneluk as the National Prosecutor.[15] This happened even though the previous holder of the National Prosecutor's office, Dariusz Barski, had not been dismissed in the procedure provided for in Article 14(1) of the Act of 28 January 2016 on the Public Prosecution Service.[16] Barski's "dismissal" took the form of a letter in which the Minister of Justice declared that his reinstatement in active service back in 2022, under Article 47 of the Act of 28 January 2016 – Provisions Introducing the Act on the Public Prosecution Service,[17] had not had a valid legal basis and was thus ineffective. Again, note should be taken of the current Minister of Justice using instruments ungrounded in positive law. What is more, with the President's refusal to recognise Barski's removal, the appointments of Bilewicz (to a non-statutory position of an "acting National Prosecutor") and Korneluk did not follow the procedure under Article 14(1) of the Act on the Public Prosecution Service either, as this provision requires the President's opinion. In effect, not only Barski's removal but also the appointments of the new office holders were conducted in a non-statutory procedure. According to the Supreme Court's reading of Article 47(1) and (2) of the Provisions Introducing the Act on the Public Prosecution Service presented in case no. I KZP 3/24 (cited also in Subsection 3.1.) – which can be considered as formalist – the above provisions are not transitional, and their applicability is indefinite unless they are repealed. This means that Barski had been validly appointed and remains the National Prosecutor. The Supreme Court's judgment is clearly consistent with the wording of the above provision, which does not contain any indications of its time-limited applicability. Its alleged temporary nature was read into it in an evidently non-formalist manner. The practical consequences of the doubts about who holds the National Prosecutor's office are exemplified by an earlier ruling in which a judge of the Warsaw Regional Court refused to authorise surveillance requested by a public prosecutor appointed by Bilewicz [Pilarek 2024].

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[14] See *Prokurator Prokuratury Krajowej Jacek Bilewicz pełniącym obowiązki Prokuratora Krajowego*, https://www.gov.pl/web/sprawiedliwosc/prokurator-prokuratury-krajowej-jacek-bilewicz-pelniacym-obowiazki-prokuratora-krajowego [accessed: 29.10.2024].

[15] See *Dariusz Korneluk nowym Prokuratorem Krajowym*, https://www.gov.pl/web/sprawiedliwosc/dariusz-korneluk-nowym-prokuratorem-krajowym [accessed: 29.10.2024].

[16] Journal of Laws, item 177, as amended.

[17] Journal of Laws, item 178, as amended.

3.3. A looming chaos

Both examples presage the chaos these situations – and the proliferation of similar cases – may lead to. Regardless of what one thinks of the legal changes made by the Law and Justice government – some of which may be considered as driven by a non-formalist approach, too[18] – the open and escalating refusal to recognise certain public authorities by other public authorities seems to mark a line that had not been crossed before. In fact, there are other examples, which, due to space constraints, cannot be discussed here at a greater length. These include the manner in which the management of the public media has been taken over in disregard of the National Media Council's competence [see Nowicki 2023] or the Speaker of the Sejm boycotting the Constitutional Tribunal [Przybył 2024]. Such steps are more than just "bending the law" and are likely to trigger dramatic consequences for the whole legal system and, thus, the state and its citizens. This is particularly worrying in the context of the current geopolitical situation, which necessitates consolidation of the state, including its legal framework, rather than destabilisation.

4. WOULD HYPERPOSITIVISM PREVENT CHAOS?

At first, it might be worth noting that in his monograph, Matczak demonstrates Polish courts' adherence to formalism by referring to the example of administrative courts' case law [Matczak 2007, 33-50]. While the following observation can only be considered anecdotal, it is interesting that the internal confusion – well-known from the Supreme Court – has not been replicated in the Supreme Administrative Court. Even recently, the Board [*Kolegium*] of this Court made it clear that defective composition of the National Council of the Judiciary, recommending a particular judge for appointment by the President, is not sufficient to find a violation of the right to a fair trial or to disqualify that judge. The resolution, which focused on the appointments of administrative courts' assistant judges, emphasised the duty of administrative courts to hear cases without undue delay and stated that such appointments should not be conditioned by political developments [Rojek-Socha 2024]. This standpoint clearly manifests prudence and responsibility. Moreover, it shows that even if one considers the Council's composition wrong, which already entails a non-formalist reading of the Constitution, going a step further and undermining the status of such judges for this reason would be taking the non-formalist approach too far.

[18] See Article 6 of the Act amending the Act on the National Council of the Judiciary and Certain Other Acts, which allowed the premature discontinuation of the term of the judicial members of the Council, even though the term is defined in the Constitution (Article 187(3) of the Constitution).

The present paper is not intended to take a stance in the debate on the meaning of legal texts and will not enquire, in particular, into whether there is anything like plain meaning or into the controversies over the "clara non sunt interpretanda" and "omnia sunt interpretanda" maxims [see Tobor 2013, 20-36]. One should agree, however, that "legal norms and institutions work only through language as normative creatures", and legal language is "a form of discourse in which legally meaningful linguistic operations take place" [Husa 2023, 65]. Unsurprisingly, understanding legal texts, including legislation and case law, is one of lawyers' most important skills [Tobor 2020, 297]. Legal texts are, therefore, the starting point in the application of law, no matter what one makes of these texts in the process.

Furthermore, it should be noted that while linguistic expressions have certain lexical, grammatical and semantic properties, only utterances in which these expressions are used have pragmatic meanings. In this way, the utterer's meaning is what is meant by the speaker when he or she uses a particular expression. Without the context of the utterance, it has lexical meaning only [Lanius 2019, 7]. It seems the reader of a legal text is usually aware of such lexical, acontextual meanings in ordinary language (an expert will also often realise specialised meanings in legal language) or at least has certain intuitions about them. This may even be true if one accepts, for instance, the Kripke-Putnam semantics [Matczak 2007, 133-57]. In that case, the more "ordinary" meaning would be the one that comes to mind without a detailed analysis of all the multiple groundings of a particular expression. These groundings, in fact, seem to open the meaning of a legal text very broadly to various sources under the pretence of still working on the text.

Consequently, even if a given reader (interpreter) does not consider lexical meanings useful, there still seems to be some potential for such meanings to have, mentally, a constraining effect. They may arouse fear or discomfort that departing too far from the lexical meaning is not the right thing to do or might be frowned upon by other legal community members. Returning to the above examples – with this constraint in mind, one may conclude that the National Council of the Judiciary is wrongly composed but will not challenge, in an extraconstitutional manner, the position of the judges appointed upon its recommendation. Similarly, it will, perhaps, feel like going too far to remove the holder of a key public office, such as the National Prosecutor, by resorting to a very far-fetched interpretation of a statutory provision (at least in the light of its literal reading). Such a mental barrier – or, perhaps, an inhibition, as this term is understood in psychology[19] – seems to be part of the legal mentality – "the collective mental programme" [Legrand 1996,

[19] Defined, among others, as "the process of restraining one's impulses or behavior, either consciously or unconsciously, due to factors such as lack of confidence, fear of consequences, or moral qualms" [VandenBos 2015, 540].

60] – of the members of a hyperpositivist legal system. If that barrier is cracked, the reader of a legal text will feel freer to interpret its meaning by taking into account multiple other factors, e.g. creatively reconstructing the intention of the lawmaker or looking for a wide range of interpretative premises (under the heading of "holistic interpretation"). From a realist perspective, of course, interpreting a legal text by prioritising either the lexical meaning or other factors can be just a veil behind which the interpreter seeks to impose the meaning he or she prefers. Yet, it seems that in the case of a formalist approach, the text can still act as a check, giving less leeway to the interpreter. In non-formalist approaches, if there are no other checks – such as a mature sense of responsibility for the interpreter's actions – there is much more leeway, which could be hazardous.

Notably, it seems that hyperpositivist formalism (ultra-formalism), inherited from the Communist system, has, until recently, kept a relative balance in the Polish legal system. As already mentioned, this does not mean there were no earlier attempts at manipulating the law. However, a situation where certain public authorities openly and increasingly refuse to recognise other public authorities is definitely novel. Unfortunately, even if there has been a gradual change in attitudes among the legal community, these recent developments seem to be rather instrumental and politically motivated. As is well-known, a significant part of the legal community has shown outright antipathy towards the former ruling party and its reforms [see Markiewicz 2018], trying to restore what they believe to be "the rule of law" at any cost. It should not be forgotten, however, that there are lawyers who think differently or just refuse to take sides in the dispute. Moreover, given that those previously in power had been democratically elected – and then re-elected – this state of affairs seems to testify to the immaturity of the Polish legal system. Similar conclusions can actually be reached about the Polish political class and its members holding the highest public offices (other than the judicial ones).

As a result, at least with reference to the examples discussed in this paper, it seems that the peculiar adherence to legal texts might have, for a long time, constrained lawyers and politicians in their handling of law. In a legal and political system with a relatively short history – which succeeded the Communist rule and has not matured yet – the hyperpositivist approach, however critical one may be of it, appears to have served a stabilising function. As it has been weakened, at least in some circles, destabilisation is creeping in.

CONCLUSION

The thesis put forward in this paper may sound controversial in that it finds virtues in hyperpositivism – seen as a post-Communist "weed" in the Polish legal system. One should agree, though, that "it goes without saying that there is a fundamental difference between mechanically applying

the end-product of a democratic decision […] and mechanically applying the decisions of a narrow circle of Party bureaucrats" [Mańko 2013b, 223]. Thus, the legal survival of hyperpositivism may fulfil different or additional functions in the current legal system compared to those it served under the Communist rule. It is no longer a tool of an undemocratic government imposed on Poland by the Soviet Union. Change of function is, indeed, a frequent characteristic of legal survivals [Idem 2016, 22; 2023, 9-11].

Having changed its role, hyperpositivism, at least in a certain sphere, may well be considered a necessary element of the contemporary Polish legal system. To come back to a quote used before – hyperpositivism might be "an element which causes a great deal of trouble, but its absence would mean even greater trouble: total catastrophe" [Žižek 2008, 85, quoted in Mańko 2013b, 228]. Hence, the present paper is not intended as a general defence of formalism or ultra-formalism, as the author acknowledges the injustice it may lead to, especially in the individual cases of ordinary citizens. Yet, it is submitted that the picture of hyperpositivism is not black and white. The examples provided in this paper may suggest that in a post-Communist legal system, hyperpositivism may serve a balancing function – or act as a safety valve – in relations between public authorities. Removing the mental barrier against departing too far from a legal text – at least too early and too abruptly – may be a step towards chaos in a system that is not fully mature yet. The emerging chaos is likely to impact the average citizen, too, and threaten the stability of the state as a whole. To paraphrase computer programmers (and end on a lighter note), hyperpositivism is, perhaps, not a "bug" of the Polish legal system but its "feature".

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MIGRATION SYSTEMS AT THE REGIONAL, INTERNATIONAL LEVEL AND IN THE REPUBLIC OF MOLDOVA*

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Abstract. Human migration is a major social phenomenon, which shows in the most effective way the changes occurring in the contemporary world. The difference in the level of development in different regions, the increase in international economic interdependence, progress in the field of mass media and transport, respect for the right of immigrants to family reunification, the increase in armed conflicts that lead to the appearance of an ever-increasing number of refugees and displaced people, are among the factors that generate population mobility. The phenomenon of international migration has always existed through transhumance, invasions, colonizations and crusades. There is no example in the history of any country that did not benefit from a dynamic demography that reflected to some extent on the economic or political situation of the country or that was constituted by an absolutely homogeneous population.

Keywords: human migration; legal; illegal; human movements; emigration; population immigration.

1. CURRENT STATUS OF THE INVESTIGATION

The phenomenon of migration has always existed, materialized through transhumance, invasions, colonizations and crusades, or caused, in general, by the attraction exerted by richer regions on poorer populations. Moreover, there was no example in history of any country whose political and economic influence did not benefit from a dynamic demography or from the action of a large and homogeneous population.

The demographic transition, the phenomenon of contemporary migration, in order to understand its specifics, content and future evolution, it is necessary to analyze both from the point of view of historical evolution, of objective

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and subjective determinations and of the possibility of introducing a possible control, aspects that will be the subject of the following explanations.

The directions of migration flows were internal and limited to the territory of one state – the Soviet Union. Migration processes were strictly organized and controlled by state bodies. Although voluntary migration existed, it did not have a significant influence on the entire system.

The situation changed after the Republic of Moldova gained independence. As in the rest of the countries of the former Soviet Union, in the Republic of Moldova, migration to the great rivers was a popular phenomenon due to the immediate lack of trade before and after the declaration of independence in 1992 and the economic crisis that followed. For the population of the Republic of Moldova, such migration was especially attractive due to the favorable geographical location of the country.

To begin with, it is necessary to present the content of three notions: migration, emigrating and immigrating.[1] Migration represents the movement of a population from one region to another, in order to settle there. It therefore represents movement and settlement. Emigrating signifies the action of leaving one's own country in order to settle in another country. Immigrating represents the activity by which one enters a country other than one's own, in order to settle there. In this sense, the term "foreigner" should not be confused with "immigrant", as is sometimes done by administrations that count residence permit holders as immigrants. A student studying in another country, diplomats or tourists are not immigrants.

Globalization and recession have determined the need to rethink the role of issues in the dimension of migration and asylum. If migrant flows are initially generated by wage differences, they are also influenced by social and political pressures in destination countries, which become increasingly restrictive towards new arrivals.

Migration, whether legal or illegal, is one of the main challenges to security, stability and economic development for the European space. Factors such as unresolved ethnic and territorial conflicts, border insecurity, weak democratic institutions and poverty create the conditions for uncontrolled migration from or to the region in Western Europe. Although the latest round of EU enlargement has catalysed the process of institutionalising regional cooperation in migration policy, the CIS countries and the EU continue to address migration issues in separate ways.

In our opinion, illegal migration should be defined as the entry into the country, exit beyond its borders, presence on its territory or transit of individuals in violation of the requirements of the legislation in force regulating these processes [Bessonov 2005].

[1] Law on Migration of the Republic of Moldova No. 1518-XV of 06.12.2002.

The dimension of migration and asylum at the EU level, in this sense the work will provide theoretical and practical support for both students and practitioners, who in their work come into contact with issues related to the migration process of individuals, the legal status of foreigners and refugees, and the conclusions and recommendations obtained can be used to improve the migration policy of the Republic of Moldova and to improve the legal framework in the field.

Within the European Union, there are very different positions when it comes to free circulation, which makes the migration problem of great importance when the subject of enlargement is addressed.

In the last decade, migration processes have been significantly stimulated and accelerated by the transformations produced in the post-communist country. In this context, the Republic of Moldova is an example of a country with intense emigration of the population, determined by the current economic situation.

Materials used and methods applied. The methodology used in the work indicates the interdisciplinary nature of the research, which corresponds to modern trends in the development of legal science. The conclusions and recommendations obtained can be used to improve the migration policy of the Republic of Moldova and to improve the legal framework in the field.

It also presents the specifics of the EU policy on migration and asylum, as well as the possibilities of integrating the labor market system of the Republic of Moldova into the European Union within the framework of a comprehensive investigation consisting in studying the nature and content of the strategies of the EU for regulating migration processes in the context of globalization, in order to achieve this goal.

Results and Discussion: The history of America began with the arrival of the first immigrants from Asia across the Bering Strait, approximately 14,000 years ago, towards the end of the Paleolithic, following herds of animals for hunting, to America. These American Indians left traces of their existence through petroglyphs and other archaeological materials. It is estimated that 2.9 million people lived in the territory that today belongs to the United States, before their numerical decline as a result of epidemics caused by infectious diseases, which arrived in the Americas by European travelers (although there are doubts about their exact number). There were also advanced societies, for example the Anasazi of the southwest, or the Woodland Indians, who built the center of Cahokia, located near St. Louis, which had a population of 40 in 1200 BC. The eastern coasts were visited around the year 1000 by Vikings from Iceland, under the leadership of Leif Eriksson, who had to cede the colony to the Netherlands in 1655.

The formation of the nation. The socio-political and religious crisis in Great Britain favored mass emigration to the eastern lands of America:

from 4,600 inhabitants in 1630, the population grew to almost 3 million inhabitants in 1780, of which a quarter were black slaves.

In the spring of 1775, open military actions began between the colonies and the metropolis.

The course of events definitively divided the population into patriots and loyalists, who sided with the colonists. Thus, with the beginning of the War of Independence, the civil war broke out in the colonies. As the supreme commander of the American army, Congress appointed George Washington. In a short time he organized the American army, which was able to ensure the independence of the colonies. After the end of the war, G. Washington was the first president of the U.S. He is rightly called the "founding father" of the U.S. After the armistice signed by Great Britain with the U.S. at the end of 1781, the Treaty of Versailles was concluded in 1783, which recorded the independence of the U.S., with a territory between the Allegheny Mountains, the Mississippi River, the Canadian and Florida borders.

In September 1862, Lincoln's Emancipation Proclamation transformed the abolition of slavery in the South into a war goal and determined the British not to intervene.

The war, which is the conflagration with the most victims in the history of the United States, resulted in the deaths of over 620,000 soldiers, over 325,000 combatants reported missing, and an undetermined number of civilians, ended slavery in the United States, restored the Union, and strengthened the role of the federal government in within it. The social, political, economic, and racial aspects of the war marked the period of reconstruction that lasted until 1877 and continued to manifest itself throughout the 20th century.

As a result of this process, the US occupied the territories of the American Indians. These actions continue to have political implications today as some tribes demand these lands back. In some places, indigenous populations were destroyed or severely reduced by infectious diseases brought by Europeans, and so colonizers from the US easily seized these empty territories. In other instances, American Indians were forcibly removed from their traditional territories

A development that is worth noting is that since 2005, the number of unemployed people among those born in the US has been and is higher than the number of unemployed people from other countries on legal immigration criteria, this being a national development.

The most recent data, from May 2009, shows that immigrants represent 8.4% of the population of the Pacific region of the USA, namely California, Oregon, Washington, Alaska and Hawaii.

In the eastern part of the USA, in Ohio, Michigan, Indiana, Illinois and Wisconsin, immigrants represent 2.8% of the population.

2. RESULTS OBTAINED AND DISCUSSIONS

Friedrich Ratzel is the legal founder of geopolitics. He operated with the term political geography, thus titling his basic work: "Politische Geographie", published in 1897. By profession, a zoologist, he approached the study of geography, on the occasion of his trip to North America and Mexico where he studied the life of the inhabitants of German origin.

Simion Mehedinți appreciated this theme as being "intended to overturn and transform geographical literature," the state being no longer a cartographic fiction, it "is born, grows, decays and perishes in connection with certain physical circumstances." Simion Mehedinti even formulates a demographic axiom: "the power of nations increases and decreases, as their population increases and decreases" [Trebici 1975].

In this sense, we can ask ourselves whether Russia will resume its status as a great world power, given that its population is registering negative growth rates, and in 2050 it is estimated that it will occupy 14th place in the world from this point of view (being surpassed by countries such as: India, China, Pakistan, USA, Indonesia, Nigeria, Brazil, Bangladesh, Ethiopia, Congo, Mexico, Philippines, etc.) [ibid.].

Starting from a historical approach to international relations, Aristide Zolberg describes how the state's capacity to control, regulate, or even stimulate migratory flows changes over time. Thus, if, in the era of technical and scientific revolutions, migrations were susceptible to regulation by the state, then in the contemporary era, they are increasingly susceptible to control, which becomes a priority in the conditions of the difficulties of adapting to the new, more complex data of population movements.

James Hollifield looks at migratory flows from the perspective of the political economy paradigm. The migrant is seen as a good that can be managed according to market rules, like any other commercial good, and the legislation of states can have a decisive influence on migratory flows. His behavior depends more on collective than individual reasons, on political than economic reasons [Bertrand and Wenden 1993, 14].

Friedrich Ratzel also uses the term geo-space, referring to the extension of the civilizing force of a country to the level of an entire continent (he speaks of the American geo-space). In fact, this is the objective of pan-Germanism, to gather the population of Germanic origin within the same border. In 1841, Friedrich Liszt spoke of Germany's mission to reach the Black Sea along the Danube, "the course of the Danube shows the direction in which this emigration must go." There was in fact a German obsession with building an empire that would stretch from the North Sea to the Adriatic Sea, and Liszt had in mind a grand project, the realization of the Hamburg-Baghdad axis.

In fact, it was about the desire to impose the German nation as a civilizing force in front of other nations, to create a German geo-space [Ratzel 1998].

Thus, when the Roman Empire was strong, the Mediterranean Sea was the most important; when England became an empire, the Atlantic Ocean played a major role; currently, when the great powers are the USA, Japan, China, the Pacific Ocean has become the ocean of the future, the place where (according to Ratzel) the main confrontation between maritime and continental states will take place. F. Ratzel in his analyses goes beyond the boundaries of political geography and makes political analysis [ibid.].

Another key notion, launched by Ratzel, is that regarding the political-geographical position of a state. Position is what gives value to space. For these reasons, a state will have a good position that will own significant land areas but also sufficient openness to the sea. This explains Germany's desire for expansion and not only hers, Russia having been looking for "water and not land" since the time of Peter the Great. Access to the sea is what gives power to a state because from here you can reach the Planetary Ocean, and as the representatives of the Anglo-American geopolitical school stated, whoever controls the shore will control Eurasia. There is also talk of an intermediate position, regarding the status of buffer states. These had the role of separating two great powers. Thus Norway, Denmark, Sweden, Belgium, Luxembourg and Switzerland separated England from the continent, just as Finland, Poland, Romania, Yugoslavia, Bulgaria, Albania and Greece had the role of separating Russia from Europe. These buffer states are not artificial as Lord Curzon of Kedleston claimed, because even if they appeared at a favorable historical moment, their constitution took place on the principle of nationality. Friedrich Ratzel refers to the border as a peripheral organ of the state. At the border, states meet with their strength, in this consisting the ability to expand the space they hold at a given time. The border is a true compromise between two states.

On this occasion, Ratzel once again states that "treaties that guarantee borders are based on the illusion that it would be possible to put a stop to the living growth of a nation."

We note that the phenomenon of migration is therefore an international phenomenon and has as its starting point the country of origin of the emigrant and as its arrival point the country in which the emigrant will settle [Lee 1969].

3. THE CONCEPTUAL BASIS OF THE RESEARCH

In *neoliberal approaches*, migration is seen as an important mechanism for the spread of human potential, with increasingly effective development methods (TH. Sowell), an approach that is limited only to estimating the abilities of migrant resources, only the situation of the highly qualified labor

force. In Marxist research, however, migration is analyzed as a component of the mechanism for attracting capital. The emphasis is placed on eliminating the negative consequences of migration, as well as on the link between migration and the development of shadow economies, which gives rise to dichotomies in national labor markets [Takudis 2000, 224].

To get a broader picture of the volume of mobile flows of the world's population, we will highlight several forms and types of migration.

Taking into account the direction of the flows, we distinguish internal migration, which takes place between the regions of a country, and external migration (international or interstate) – which takes place between states.

The Sociology Dictionary [Boudon and Benard 1996, 168] designates by migration the movement of the population of a region to another region, especially from rural areas to urbanized ones, but also from one society to another. In both cases, those who move are not the poorest, but individuals capable of noticing the gap between their aspirations and the possibilities of achieving them, which has the effect of changing the roles of those who migrate, in the case of international migrations.

An argument in favor of sociology as a science capable of undertaking a complex analysis of the migration process is also the fact that this process has developed as a result of the large-scale modernization of society, the globalization of sociocultural, political, socio-economic and demographic processes, which characterize the dynamics of contemporary processes within society. In this sense, the theory of migration sociology [Yudina 2002, 104] was developed, which approaches migration as a "special" social process that has the following particularities: mass character (the migration process manifests itself through mass actions to change the place of residence); sustainability (the interdependence between the causes and consequences of migration processes); social content of the sources and results of migration processes (they are generated by the social problems of society and aim to solve them); individualism of participants in migration processes (migration refers to spontaneous social processes, generated by various factors and which develop as a social initiative). The migration process includes three phases: the formation of mobility factors; the very process of changing the place of residence of migrants; their adaptation to their new place of residence. On this occasion, Ratzel once again states that "treaties that guarantee borders are based on the illusion that it would be possible to put a stop to the lively growth of a nation."

In an economic sense [Ghencea and Gudumac 2005, 15], population migration represents the actual movement of the labor force to other countries, as a result of the disproportion between the economic and demographic development of the country. Population growth at a rate higher than the country's economic development leads to the emergence of a surplus of labor force and, consequently, part of the population is forced to emigrate to find

a job. When migration reaches mass dimensions – this indicates not only the lack of correspondence between the level of development and numerical growth of the population, but also represents a reflection of the internal contradictions of society, the deepening and persistence of crisis situations in the country. Thus, the movement of human capital takes place that has been formed and trained through significant investments made by the country of origin. The destination countries – those to which the labor force moves – benefit from this cheap labor force, in which others have invested. From an economic perspective, a "product" with special properties is moving abroad – labor, which is distinguished from other products by the fact that it is itself a factor of production of other products. The country that exports labor, i.e. the country of origin of migrants, is "rewarded" for the export given by transferring back to the country of origin a part of the migrants' income, which contributes to reducing unemployment and the entry into the country of a significant flow of foreign exchange from abroad.

According to the forms of organization of migration processes, we can distinguish organized migrations (directed by state bodies or with their help) and unorganized – individual migrations [Filchagova 1999, 74].

The International Labor Organization uses the notion of labor migration, according to which "migrant workers are persons who are allowed to engage in economic activity in a country other than their country of origin, and who do not hold the citizenship of the state in which they will be employed."

According to the classification developed by the International Labor Organization, there are several types of migrants [Cozma 1999, 11; Filchagova 1999, 74].

Another typology developed within the International Labor Organization (W.L. Böhling) focuses on the economic content of various movements rather than on the images of sending states or on the individual intentions of migrants [Manolo 2005, 149].

From the point of view of international economic relations, international labor migration is the flow of the world economic circuit not subject to the contractual regulations of trade and cooperation acts, fluctuating and unorganized, comprising the active labor force in search of jobs.[2]

However, starting from the ideas of the sociology of transnational relations, revealed by James Rosenau, Bertrand Badie, we will observe how migratory flows will shake the classical categories that lie at the foundation of the state order. The principles of territoriality and sovereignty are threatened by new economic and cultural flows, which, taking on immeasurable proportions, can no longer be managed by the state. Thus, migratory flows increase uncertainties, limit sovereignty, and diminish the state's ability

[2] *Dicționar de Relații Economice Internaționale*, Editura Enciclopedica, București 1993, p. 354.

to regulate them, which leads to a mismatch between state and migratory logic and fuels the undesirable phenomenon of illegal migration. A consequence of the development of events is also the increase in conflict in the countries of immigration.

The French researcher Catherine de Wihtol de Wenden [Wihtol de Wenden 1999; Idem 2004, 108-28], research director at the Center for International Studies and Research in Paris, consultant on migration at high international forums such as the OECD, the Council of Europe, UNHCR, etc., as well as a political scientist and lawyer, has addressed the topic of international migration from the perspective of the most diverse aspects: the factors driving the development of migration trends, especially towards Western European countries, national – state and community migration policies, etc.

Among the American researchers who have addressed various theories of migration are Stalker Peter [Stalker 2000], Manoli Abella [Manoli 1997], etc. Useful sources for studying the personality characteristics of the student period, a component part of the early adulthood age, were the works of Romanian researchers Neculau Adrian and Șchiopu Ursula, Russian researchers Rean N., Larionova-Krecetova A.A., etc. And an important source for researching the motivational foundation of the decision to migrate of young people were articles from the psychology magazine of Frieze Irene [Frieze 2004, 15-23].

Other extremely useful sources of information were the publications of the International Organization for Migration [Chauzy 2004, 7-17],[3] with reference to development factors and the impact of migration on the socio-economic situation of states; of the International Labor Organization, regarding the protection of migrant workers and forms of prevention and reduction of the phenomenon of illegal migration; and of some NGOs that work in the field of preventing negative phenomena related to migration such as illegal migration and human trafficking – Winrock International in Moldova, the International Center for the Protection and Promotion of Women's Rights "La Strada".

As for the local literature, a considerable contribution to the research of this topic was made by the extensive studies of the Moldovan researcher Moșneaga Valeriu [Moșneaga 2004, 24-35; Idem 1999; Idem 2003; Idem 2005], who, in the publications edited under his editorship, or even of which he is the author, analyzes the migratory trends of the Republic of Moldova, their causes and consequences on the internal socio-economic order. Another local researcher, Victoria Gonța, addressed the issue of the consequences of the emigration process in our country on children left without parental control, etc.

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[3] *The Migration-Development Nexus: Evidence and Policy options*. IOM migration Research series, No. 8, Geneve 2002.

Migration is: territorial permutation of persons, accompanied by a change of place of residence[4] change of place of residence of persons or groups of persons, regardless of the reason and cause of the change of place of residence (from an international point of view) an integral part of the contemporary world economy.

An emigrant is considered a citizen of the Republic of Moldova who leaves abroad to settle permanently or temporarily on the territory of another state.

Labor migration is the voluntary departure of citizens of the Republic of Moldova abroad, as well as the voluntary entry of foreign citizens or stateless persons into the territory of the Republic of Moldova, in order to carry out work.

Illegal migration creates multiple problems related to legal employment, violation of the rights of citizens illegally abroad, illegal transit of other countries, illegal trafficking in human beings, aggravation of the criminogenic situation, both in the receiving and sending countries of migrants. Illegal migration is considered entry into the Republic of Moldova, stay and exit from its territory, in violation of the legislation in force of the Republic of Moldova.

Migration is, therefore, explicitly defined as a form of social mobility. Of course, operationally, for "cutting out" the migration phenomenon from reality, the temporary change or leaving of the permanent residence is a sufficient identifying characteristic; the essence of the phenomenon is not the geographical movement between localities, but the change of position in the social space. The definition that we give to migration implicitly assumes the following statements: any change of permanent residence between localities implies a phenomenon of social mobility; Any temporary and repeated leaving of the place of residence for work implies a phenomenon of social mobility; the change of social position is essential, in most cases, in the sense that it is more important for the human agent who endures it than the change of geographical position; in other words, the movement in geographical space affects the quality of life of those who migrate through their movement in social space.

To summarize, it can be said that the theory of migration flows involves four types of factors (variables): a) factors that determine the nature and degree of differences in development and interaction between different socio-economic areas, as well as the nature and magnitude of communication costs between the respective areas; b) for the case of our contemporary society, the main factors included in this category are: industrialization, scientific and technical revolution, urbanization, cooperatization and modernization of agriculture; c) variables that characterize the differences in the

[4] Law of the Republic of Moldova No. 1518-XV of 06.12.2002.

nature and degree of development and interaction of socially territorialized groups, as well as the differences in the cost of migration between these groups; d) latent, interpretative variables that make the differences in development, interaction and economic and psychosocial costs significant for migration, determine the variability of the characteristics of migration flows; e) variables defining the migration flow (volume, direction, rhythm, etc.) [Drăguţan 1978, 137-40].

At the level of the explanatory context of the fundamental formulations, specific features of migration appear, variable from one socioeconomic context to another. Thus, the fact that in the conditions of our society, industrialization, urbanization, and modernization of agriculture are planned processes, controlled at the macrosocial level, gives the migration process a similar feature of possible controllability. Like other forms of migration, commuting implies a change in social position and geographical movement; however, it only implies a temporary and repeated departure from the place of residence, in order to find another occupation in another place. Commuting is therefore a form of migration for work, achievable by temporarily and repeatedly leaving the place of residence. Demographers define the migration flow as the total 'number' of movements made during a period from a common area of origin to a common area of destination [ibid.].

Analyses undertaken, in particular by Theodor Anderson and Torsten Hägerstrand, on gravity models of migration have highlighted the fact that the importance of distance in predicting and explaining migration varies depending on a number of factors. The authors mentioned were particularly concerned with the technical aspect of the problem: how to weight the distance factor in order to obtain the best possible prediction of migration between two localities or areas. The theoretical significance of their main technical conclusions could be summarised as follows: the distance between origin and destination is all the more important for the volume of the migration flow the more: a) the area of origin is more isolated and smaller in demographic terms (or is rural); b) the migration flow has been triggered for a shorter period of time. As the duration of contact through migration between origin and destination increases, the influence of distance on the volume of the migration flow tends to decrease [Hillery, Brown, and Dejong 1965].

According to Paul Kennedy, today we are faced with the same problems that Malthus dealt with at a time when the population doubled every twenty-five years, when technological innovation was paving the way for industrialization, and the demographic transition was just beginning. Today, emigration remains possible, even if it is difficult, and technology produces effects even where there is no longer demographic growth. These problems were at the heart of the discussions of the Cairo Conference on Population and Development (it had as its theme: "United Nations Population Funds,"

6-13 September 1994). As we have observed, the world population has grown considerably in the last fifty years. Its evolution and distribution have evolved under the influence, on the one hand, of the dynamics of the populations of the Third World, and, on the other hand, of the progressive aging of the population of the richest areas [Malthus 1998].

In this regard, the mission of the International Organization for Migration in Moldova, starting with 2003, in addition to activities related to migration management, the fight against illegal migration, border management, family reunification and the fight against trafficking, providing assistance to asylum seekers, also carries out activities to encourage the return of migrants in crisis situations and skilled workers to the country.

Reducing illegal migration [Ghencea and Gudumac 2005, 31; Malthus 1998] is an aspect of the activities to prevent negative phenomena related to emigration that requires attention, especially for those who have already made the decision to migrate, which is a potential source of multiple risks. There are several reasons why it is important to reduce or prevent illegal migration, including: to support the policies of states to manage inevitable migratory flows; to ensure decent wages and normal working conditions for labor migrants; to avoid the emergence of employment sectors or businesses that are totally dependent on illegal labor, which have no interest in modernizing and improving working conditions, given the advantage obtained from cheap labor; to prevent the exploitation of illegal migrants by employers, intermediary agents or traffickers, by offering wages much lower than those of locals, or by being deprived of social protection. Measures focused on reducing illegal migration are associated with efforts aimed at reducing the degree of risk exposure of citizens – migrants.

Legalization of illegal migrants are devices to reduce the number of illegal migrants. Thus, once every 2-3 years, and sometimes at even greater intervals, the countries receiving migrants undertake actions to legalize clandestine migrants. Moldovan migrants illegally residing in Spain, Portugal and Italy also periodically benefit from such regularization actions.

Migrants' rights are regulated at the interstate level, based on bilateral agreements, which we talked about above, and at the international level through a series of international instruments. The International Labour Organization, the United Nations and the Council of Europe have adopted international instruments relevant to migrant workers, including: the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN, 1990), the Universal Declaration of Human Rights (UN, 1948), the Resolution on the Protection of the Rights of Migrants (UN, 2000), the Protocol on the Smuggling of Migrants (2000), the International Labour Organization Declaration on Fundamental Principles and Rights at Work (1998), the Conventions

on Migration for Employment (1949), on Migrant Workers (1975), the European Convention on the Status of Migrant Workers (Council of Europe),[5] the signing with some reservations of the Social Charter (1977), etc. [Moshnyaga, Rusnak, and Tsurkan 2004, 110].

From the point of view of immigration, Moldova is not an attractive country for citizens of other states. Policies on asylum seekers and refugees are gradually aligned with EU requirements, however, we have arrears in terms of respecting the rights of refugees and asylum seekers, providing decent living conditions and opportunities for social inclusion. Neighborhood with the EU offers us some advantages of collaboration and considerable financial support. The European Union contributes funds to strengthen cross-border cooperation. The Republic of Moldova was the first country to sign the EU-Moldova Mobility Partnership in June 2008, which opens up new perspectives for the Republic of Moldova in order to jointly manage migration flows. However, we do not capitalize on some advantages, such as the agreement on small border traffic with Romania, which we have not signed yet.[6]

CONCLUSION

Next, we will list the conclusions reached, following the attempt to achieve the previously proposed objectives and tasks:

The development of the emigration phenomenon was stimulated both by external factors such as globalization, which facilitated the freedom of movement of people, goods and capital, the collapse of the Soviet bloc, which opened the gates of the West for citizens of the newly independent states, the worsening of economic crises in countries with economies in transition that set in motion a flow of migrants in search of well-paid jobs and more favorable social conditions, as well as by some internal factors such as social representations of a Western way of life, whose victims also become young people to whom rich countries promise much greater opportunities for growth and development than their countries of origin, and the high motivations of young people to seek more and better opportunities to pursue quality studies or obtain a better-paid job in the receiving countries.

However, illegal migration is one of the main reasons that currently worries European experts in the fields of international relations and security studies precisely because of the risks that this phenomenon poses. Most

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[5] *International Instruments Concerning Migrant Workers*, International Labour Organization, Chisinau 2006, p. 34.

[6] *Migration trends and policies in the Black Sea region: the cases of Moldova*, Romania, Ukraine–Chisinau 2008.

often having socio-political causes, starting from the precarious standard of living to the repercussions of dictatorial regimes, illegal migration also represents a significant geopolitical aspect for 21st century Europe, being one of the main pillars that lie at the origins of the proliferation of organized crime. The specific effects are most often represented by the development of the underground economy, illegal work also determining an imbalance between the qualified local workforce and the market supply, prostitution and the intensification of drug and organ trafficking, etc. Moreover, social marginalization and socio-cultural differences can represent the foundations of sources of conflict between natives and immigrants, among whom extremist-terrorist sentiments can develop.

The social costs of human trafficking and the associated negative aspects of irregular migration are unacceptable to society. However, reducing migration could slow economic development, even if it would help reunite families and address some of the difficulties in the labor market, which is unlikely to happen as long as Moldova is facing internal social and economic problems and the demand for migrant labor is high. The likely scenario is one in which migration levels remain high, but are better controlled and flows are more regular. Some negative aspects may persist, but some policy interventions can be designed. The Moldovan government's efforts to improve the business climate have been ongoing for some time, with substantial support from external donors. Improvements require major changes in the public sector, cultural norms, and economic incentives faced by large groups of people. Such changes take time and are achieved gradually, at best. At the same time, the success of these reforms will ultimately be important for the future of the Republic of Moldova. There are other measures that can be used to expand the benefits of migration and remittances on growth, employment and poverty reduction. The first action concerns policies regarding the volume, characteristics and use of remittances.

One can also observe the development of an increasingly extremist European discourse and an increase in the popularity of the far right, corroborated with the statements of the German Chancellor and other political leaders who drew attention to the "death of multiculturalism". Bringing into discussion the actions against Muslims by Marine LePen in France, and the increasing sympathy she enjoys, only reinforces the above.

It is true that the Republic of Moldova does not enjoy a very good image at the present time either. The phenomenon of illegal migration is by no means a simple process to solve, and it cannot be limited to the securitization of the external borders of the European Union, which must thus become interested in the stabilization of the Balkans and the Caucasus. Europe will not withstand the pressure created at its borders, thus being forced

to get involved in the socio-political consolidation of these states, their creation as a buffer zone, and then their integration into the Union.

The analysis of the migration situation shows that the existing system of its regulation in the Republic of Moldova does not correspond to the real needs. The current legal framework does not ensure full respect for the rights of migrants, and the activity of state structures in the field of migration is insufficient, since they do not have a well-defined mechanism for recording and controlling migration flows, as well as the necessary levers for their management.

The new socio-economic and political realities require the state to take a special attitude towards the problems of population migration, which implies the adoption of an adequate strategy in this area and the development of the necessary legislative framework for promoting the migration policy of the Republic of Moldova.

Nowadays, demographic concern reappears due to the risks it gives rise to in the occurrence of crises, at local, regional, continental or planetary levels that could negatively influence the social order, or in the triggering of disturbances in ethnic or religious balances. The definition we give to migration has as its implicit premise the following statements: any change of permanent residence between localities implies a phenomenon of social mobility; any temporary and repeated leaving, for work, of the locality of residence implies a phenomenon of social mobility; the change of social position is essential, in most cases, in the sense that it is more important for the human agent who endures it, than the change of geographical position; in other words, the movement in geographical space affects the quality of life of those who migrate through their movement in social space. At the beginning of the century, developed societies faced with economic and social difficulties, as well as developing societies whose difficulties are much greater, are no longer able, if they do not adopt urgent and effective measures, to properly manage the demographic policy that can at any time become a real human bomb. The most difficult social, political and economic problem facing the Republic of Moldova is the migration of the labor force. At first glance, this should not surprise anyone, because this phenomenon is characteristic of all countries in the world in the transition to a market economy. However, we cannot ignore the fact that the share and scale of migration from our country is extraordinary. There is no other country in the world than Moldova, where a third of the population is abroad with the intention of never returning. The migrant labor force contributes to increasing the currency mass in the country and reducing monetary inflation, which leads to the socio-economic stabilization of the country, contributes to reducing social conflicts, strengthening the banking system, improving the material condition of the population, reducing poverty, and forming the

middle social class. One of the greatest challenges of the transition is adjusting vocational education to the new economy and new occupations that are in demand. Moldova is no different from other republics of the former Soviet Union and is facing the problem of reorganizing the vocational education and training system in terms of facilities, curricula, and subjects taught.

A simple recommendation, which could be addressed as part of a much more comprehensive bilateral agreement between Moldova and the relevant countries, is to offer some kind of "grace period" (the duration of which would be open to negotiation), during which migrants would be able to work and at the same time be free to clarify their status. Such an agreement could also include provisions related to providing assistance in accessing, understanding and completing documentation. The initiation of the implementation of this recommendation, quite simple and straightforward, seems to be a positive step in the right direction. In all eras, migration has generated ethnic and religious syntheses, economic changes and realignments of power relations at regional and global levels, all of which mean changes in culture, values or even political models. In addition to the political, cultural, economic or demographic changes that are brought about by the departure of people abroad under various forms of migration regardless of the position and direction they choose, whether the society they leave from or the destination society, these changes are based on the birth of a way of life with an aspiration for prosperity, individual freedom and democracy, beyond differences of ethnicity, religion or culture.

Finally, the quality of life in Moldova and, as a result, the incentive for people to live and work in the country rather than abroad will crucially depend on access to public services of an acceptable quality – from population safety to education and healthcare – as well as on an economic environment that adequately rewards people for the effort they put in and the investments they make. Since life abroad will probably become much more attractive over time, and more and more migrants will gradually legalize their status in most destination countries, the Government of the Republic of Moldova will soon find itself competing for internationally mobile people. However, the Moldovans who constitute the third wave of potential migrants could possess essential skills and entrepreneurial ambitions, generating major economic growth, for the benefit of all Moldovans.

The problem that the author set himself before researching the topic was to answer the question: what are the conditions in which the emigration phenomenon, in general, and illegal emigration from the Republic of Moldova, in particular, has gained momentum, what are the forms of diminishing this phenomenon, and in order to avoid such negative phenomena related to emigration, as clandestine migration, human trafficking.

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THE CONSTITUTIONAL PROTECTION OF FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION: AN ANALYSIS OF RELATED CRIMES IN POLAND

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Abstract. Freedom of thought, conscience, and religion is a universally recognized right, enshrined in human rights catalogues and the constitutions of democratic states governed by the rule of law. This freedom is also protected in the 1997 Constitution of the Republic of Poland, specifically in its second chapter. This paper aims to examine Article 53 of the Polish Constitution and analyse the level of crimes that violate this provision in Poland.

Keywords: Constitution of the Republic of Poland; crime level; freedom of religion; freedom of belief.

INTRODUCTION

Freedom of thought, conscience, and religion is a universally recognized right, enshrined in human rights charters worldwide. The Universal Declaration of Human Rights of 1948, adopted in the aftermath of World War II, established the protection for inherent dignity and inalienable rights of man, including freedom of thought, conscience, and religion, as a fundamental goal of humanity. This Declaration laid the foundation for subsequent conventions and international treaties designed to protect universal human rights. In democratic societies, the importance of safeguarding religious freedom is widely acknowledged, and this freedom is enshrined

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in the constitutions of democratic nations, including Poland. This constitutional recognition underscores the significance of religious freedom and enables the establishment of systems to protect it. However, despite these comprehensive safeguards, the freedom of thought, conscience, and religion is not always fully respected. In this context, the principle of proportionality – considered a meta-principle of constitutional law – plays a crucial role. It imposes certain limitations on governmental decisions that impact individual rights and freedoms.

Cultural and religious diversity is increasingly common in the modern world and is visible also within individual European countries. Globalization, the war in Ukraine, migration, and the crisis facing the Catholic Church in Europe reflect a clash of civilizations and religions, as described by S. Huntington, underscoring the critical need to protect religious freedom. Nation-states play a crucial role in this context, as they are responsible for safeguarding religious freedom through their legal frameworks and institutions [Mikołajczuk and Maksymiuk 2023, 7-8]. Actions that infringe upon the freedom of religion and conscience may constitute criminal offences. This article aims to examine the Polish legal framework concerning the constitutional protection of freedom of conscience and religion. Furthermore, it analyses the level of related crimes and the relevant legislation designed to safeguard religious freedom.

1. FREEDOM OF CONSCIENCE AND RELIGION IN THE 1997 CONSTITUTION OF THE REPUBLIC OF POLAND

Article 53 (Chapter II) of the 1997 Constitution of the Republic of Poland[1] constitutes the basic guarantee of religious freedom. It reads as follows:

1) Freedom of conscience and religion shall be ensured to everyone;
2) Freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching. Freedom of religion shall also include possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services;
3) Parents shall have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions. The provisions of Article 48(1) shall apply as appropriate;

[1] The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 443 as amended.

4) The religion of a church or other legally recognized religious organization may be taught in schools, but other peoples' freedom of religion and conscience shall not be infringed thereby;
5) The freedom to publicly express religion may be limited only by means of statute and only where this is necessary for the defence of State security, public order, health, morals or the freedoms and rights of others;
6) No one shall be compelled to participate or not participate in religious practices;
7) No one may be compelled by organs of public authority to disclose his philosophy of life, religious convictions or belief.

The above provision guarantees freedom of conscience and religion to everyone, not just citizens of the Republic of Poland. This is not merely a vague declaration; six subsequent paragraphs explicitly outline what freedom of religion involves. These are: manifestations of one's religion, issues related to the moral and religious upbringing and education of children, and religious education in schools. The provision also includes a limitation clause on the freedom to publicly express one's religion, a prohibition on forcing religious practices on others, and the right to remain silent [Olszówka 2016, 1248-249]. The doctrine indicates that safeguarding freedom of religion in the constitution was essential for protecting other freedoms. Thus, freedom of religion is considered the fundamental freedom that "sustains the raison d'être of other freedoms deeply rooted in each person" and "is the first and indispensable right of a human being" [Sobczyk 2001, 212-13]. It should also be emphasized here that the constitutional provisions regarding religious issues were influenced by the Concordat signed in 1993,[2] as well as the doctrine of the Catholic Church [Krukowski 1993, 259-60; Maksymiuk and Szmulik 2023, 217].

The Constitutional Tribunal has also examined freedom of conscience and religion, recognizing it as a fundamental and essential human right. The Tribunal ruled that "the way in which freedom of conscience and religion is treated in the 1997 Constitution reflects respect for European democratic standards, while also acknowledging Polish traditions, social conditions, and the political changes that occurred before the Constitution was adopted" (ruling of the Constitutional Tribunal 2009). As Potrzeszcz notes: "[…] The Tribunal carried out a systematic analysis of constitutional provisions regarding freedom of conscience and religion. Conscience is referenced in the Preamble to the Constitution […], as well as in Articles 48(1) […], 85(3) […], and 233(1) […]; however, it is Article 53 that is undeniably central to defining freedom of conscience and religion […]." The prominent position of this freedom in the catalogue of human rights is justified primarily

[2] Concordat between the Holy See and the Republic of Poland, signed in Warsaw on 28 July 1993, Journal of Laws of 1998, No. 51, item 318.

by its substantive significance and chronological priority, as noted by Sobczyk (Ruling of the Constitutional Tribunal 2015) [Potrzeszcz 2023, 12-13].

Freedom of conscience and religion is a personal right closely tied to an individual's identity. It allows each person to profess and practice their religion according to their own beliefs, whether publicly or privately. The protection of religious freedom is fundamentally linked to human dignity, as recognized in Article 30 of the Polish Constitution. In other words, it results directly from the constitutional principle of human dignity [Grądzka 2023, 297ff].

2. OFFENCES AGAINST FREEDOM OF CONSCIENCE AND RELIGION IN POLAND

2.1. Offences under Article 194 of the Penal Code

Given its significance, freedom of conscience and religion receives special legal protection, as it may be exposed to different forms of violations or crimes. These offences are addressed in Chapter XXIV of the Polish Penal Code.[3] The first prohibited act is religious discrimination. Pursuant to Article 194 of the Penal Code, anyone who restricts another person from exercising their rights due to that person's affiliation to a certain faith, or due to their religious indifference, is liable to a fine, the restriction of liberty or imprisonment for up to 2 years. This provision directly relates to the constitutional principle of equality and its corollary – the prohibition of discrimination [Gądzik 2021, 6]. It states clearly that discrimination cannot be perpetrated for any reason, thus eliminating any circumstances that might justify it. This is a strict prohibition. The Penal Code prescribes punitive measures to prevent religious discrimination. The protection provided under this provision extends only to affiliations with religious groups or communities recognized by the state and whose activities do not violate public order and morality [Grądzka 2023, 323].

Table 1. Police statistics on offences under Article 194 of the Penal Code

Year	Number of initiated proceedings	Number of confirmed offences
2020	2	0
2019	2	2
2018	1	0
2017	3	0
2016	6	0
2015	2	0
2014	4	0
2013	4	0

[3] Act of 6 June 1997, the Penal Code, Journal of Laws of 2024, item 17 as amended [hereinafter: the Penal Code].

Year	Number of initiated proceedings	Number of confirmed offences
2012	1	3
2011	4	1
2010	1	2
2009	2	0
2008	5	0
2007	7	0
2006	4	1
2005	1	0
2004	3	2
2003	6	1
2002	0	1
2001	1	1
2000	1	0
1999	3	1

Source: https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-5/63489, Dyskryminacja-wyznaniowa-art-194.html [accessed: 25.06.2024].

The data show that both the number of initiated proceedings and the number of confirmed offences under Article 194, are minimal. Therefore, the level of crime under this provision is low in Poland. Offences under Article 194 are material in nature. Since the legislator does not specify or prioritize the rights of the injured party, any limitation of a right arising from Article 194 constitutes a violation of that Article. However, a certain set of such rights can be inferred from civil law, particularly in matters of culture and charity, or labour and business law, all of which stem from the principle of equality [Gądzik 2021, 5-6]. These include, for example, restrictions on establishing or running schools, limitations on the right to perform public service, the right to fair remuneration for work performed, and the right to professional advancement on equal terms [Makarska 2005, 87].

Importantly, not every type of behaviour constitutes discrimination, and not every limitation of a person's rights implies discrimination. In some cases, differentiation (when carried out in accordance with the principle of equality) can provide equal opportunities, and does not constitute discrimination. In this context, it is crucial to prove that the perpetrator's actions were motivated by the religious affiliation (or lack thereof) of the injured party [Gądzik 2021, 5; Paprzycki 2015, 103].

2.2. Offences under Article 195 of the Penal Code

Another offence defined in Chapter XXIV of the Penal Code is disturbance of a religious ceremony or mourning rites. Article 195 states: "§ 1. Anyone who maliciously disturbs the public performance of a religious

ceremony of a church or other religious association with regulated legal status, is liable to a fine, the restriction of liberty or imprisonment for up to 2 years. § 2. Anyone who maliciously interferes with a funeral, mourning ceremonies or rites is liable to the same penalty."

Disturbance refers to an activity that interferes with or hinders the performance of a religious ceremony (it can be both an act or omission). It may include, for example, closing the doors to a church, attempting to demonstrate or shout over the leader of a religious rite, or blocking the road during a religious procession. A religious act can be defined as "any act of a religious nature, such as a worship service, prayer, blessing, meditation, consecration, baptism, wedding, procession, or pilgrimage," provided it is performed in a place and in a manner specified by the ceremonial practices of a given faith [Kozłowska-Kalisz 2024].

Table 2. Police statistics on offences under Article 195 of the Penal Code

Year	Number of initiated proceedings	Number of confirmed offences
2020	27	14
2019	30	25
2018	29	13
2017	37	16
2016	13	0
2015	14	0
2014	16	8
2013	11	12
2012	13	15
2011	12	11
2010	14	13
2009	6	12
2008	19	26
2007	13	17
2006	15	22
2005	27	16
2004	20	25
2003	21	44
2002	17	15
2001	16	12
2000	14	15
1999	14	23

Source: https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-5/63491,Przeszkadzanie-publicznemu-wykonywaniu-aktu-religijnego-lub-obrzedom-zalobnym-ar.html [accessed: 25.06.2024].

The level of crime under Article 195 of the Penal Code is visibly higher than that under Article 194; however, it is still relatively low. The number of initiated proceedings ranged from 6 in 2009 to 37 in 2017, while the number of confirmed offences ranged from 0 in 2015 and 2016 to 44 in 2003. There is no discernible trend indicating an increase or decrease in the number of offences involving disturbance of religious ceremonies or mourning rites.

Under Article 195 of the Penal Code, for a perpetrator's actions to be penalized, the religious ceremony must be conducted publicly. This provision applies to Churches and other religious associations with regulated legal status, aiming to eliminate any doubts concerning the behaviour of community members. Moreover, the disturbance must be malicious, i.e.; driven by a desire to offend, insult, or ridicule the feelings of those participating in a religious ceremony [Góral 2010, 311]. The duration and persistence of the disturbance are not relevant in this case, although they may indicate that the disturbance was malicious [Stefański 2005, 60-63].

2.3. Offences under Article 196 of the Penal Code

Finally, the third offence against freedom of conscience and religion is the offence of insulting religious feelings. Pursuant to Article 196 of the Penal Code: "Anyone who offends the religious feelings of others by publicly blaspheming an object of religious worship or a place dedicated to the public celebration of religious rites, is liable to a fine, the restriction of liberty or imprisonment for up to 2 years."

Religious feelings should be understood here as an element of religion that encompasses specific behaviour, way of speaking, or a set of beliefs. Thus, they express a personal attitude towards one's religion or faith [Kruczoń 2011, 40-41].

Table 3. Police statistics on offences under Article 196 of the Penal Code

Year	Number of initiated proceedings	Number of confirmed offences
2020	130	97
2019	80	53
2018	58	45
2017	70	60
2016	54	46
2015	59	32
2014	55	38
2013	51	54
2012	47	51
2011	42	33
2010	48	52

Year	Number of initiated proceedings	Number of confirmed offences
2009	33	39
2008	45	49
2007	55	57
2006	49	38
2005	44	88
2004	51	44
2003	30	32
2002	47	44
2001	54	56
2000	68	145
1999	61	59

Source: https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-5/63492, Obraza-uczuc-religijnych-art-196.html [accessed: 25.06.2024].

Based on the above data, it can be concluded that insulting religious feelings is the most frequently committed offence against the constitutional freedom of conscience and religion. In the analysed years, the number of initiated proceedings varied between 30 in 2003 and as many as 130 in 2020. A slight (although irregular) upward trend can be observed here. The number of offences confirmed ranged from 32 in 2003 and 2015 to 145 in 2000.

Article 196 of the Penal Code provides protection against offending religious feelings. Such protection can be also derived from the constitutional freedom of speech (Ruling of the Constitutional Tribunal 1994). An insult should be understood as an expression of contempt, disregard, or offence that violates socio-cultural norms and customs. The perpetrator's behaviour must be directed at the religious feelings of an individual or a group. Additionally, the legislator confines the scope of the perpetrator's actions to places designated for public worship (e.g., churches) or places temporarily adapted for such purposes (e.g., field masses during pilgrimages) (Decision of the Supreme Court 2015). An insult can take various forms beyond just verbal expression. It may include offensive gestures, written texts, audiovisual materials, installations, or organized events that convey offensive content. Destroying an object of religious worship is also considered an insult. An insult may also be committed with the use of mass media (e.g. social media, television).

CONCLUSIONS

Freedom of conscience, belief, and religion is constitutionally recognized in Poland and is intrinsically linked to fundamental principles such as dignity and equality. Doctrine and case law have consistently defined this freedom as a foundational principle from which other rights and freedoms

derive. Consequently, it receives special protection under various laws, including the Penal Code. Among the offences enumerated in Articles 194-196 of the Penal Code (religious discrimination, disturbing the public performance of a religious ceremony or funeral rites, and offending religious feelings), offences that insult religious feelings constitute the highest percentage of reported and committed crimes in Poland between 1999 and 2020 (data provided by the police website). However, it is important to note that these statistics may not fully reflect the actual number of violations of religious rights, as many such violations may go unreported.

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THE USE OF ARTIFICIAL INTELLIGENCE TOOLS BY TAX ADMINISTRATION ON THE EXAMPLE OF POLAND AND SPAIN

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Abstract. The article concerns the use of artificial intelligence tools by tax administration on the example of Poland and Spain. Based on a concise description of the technology used by both the Polish and Spanish tax administration, special attention was paid to the threats to the protection of taxpayers' rights related to its use. The research goal of this work is to determine whether the use of this type of solutions is within the limits of the law and to formulate proposals for solutions aimed at protecting the rights of the taxpayer as the weaker party in the tax legal relationship. The publication uses a dogmatic and legal method.

Keywords: artificial intelligence; tax information processing; protection of taxpayer's rights; right to privacy.

INTRODUCTION

The development of artificial intelligence is increasingly used in the relationship between tax administration and taxpayers. In fact, traditional tax models are slowly being replaced by new systems based on the analysis of huge amounts of data, which are obtained using modern technological tools and increasingly advanced intelligence techniques. This analysis is aimed at both profiling taxpayers and collecting information in order to carry out control activities, which are intended to lead to an increase in the degree of voluntary compliance with tax regulations by entities liable for tax. For this purpose, tax authorities can use modern tools that can be integrated with data management systems collected by the tax administration. On the one hand, artificial intelligence can improve the operation of tax authorities by facilitating the performance of repetitive tasks

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and efficient analysis of available information, which in turn may lead to increased compliance with tax law. On the other hand, this technology raises doubts as to the due respect for fundamental rights, in particular the right to effective judicial protection and, above all, the right to privacy, which may pose a real threat to the taxpayer as the weaker party in the tax relationship.

The aim of this article is to analyse the use of exemplary artificial intelligence tools on the example of Poland and Spain, which will result in presenting both the advantages of these modern technological solutions and, above all, drawing attention to the threats resulting from their use for the taxpayer. The formulation of conclusions will be possible thanks to the study and assessment of the positions of both Polish and foreign representatives of legal science, expressed in scientific publications. It should be emphasized that the use of artificial intelligence-based solutions by tax authorities undoubtedly requires appropriate legal regulations that should protect human rights, in accordance with the European Union guidelines. The need to provide special protection for taxpayers' rights results primarily from the nature of the tax-law relationship, which is characterized by inequality of the positions of its parties. However, equipping the tax administration with tools based on artificial intelligence may only intensify this imbalance.

1. DEFINITION OF AN ARTIFICIAL INTELLIGENCE SYSTEM

Artificial intelligence was first defined by John MacCarthy in 1956 as "the science and engineering of producing intelligent machines" [Suberbiola Garbizu 2022, 458]. On July 12, 2024, the world's first Artificial Intelligence Regulation (AI Act) was published in the official journal of the European Commission.[1] Pursuant to Article 3(1) of the AI Act, an artificial intelligence system means a machine-based system, designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.

Data analysis performed by artificial intelligence allows its results to be used to predict possible future events and influence them.[2] The difference between

[1] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), text with EEA relevance, PE/24/2024/REV/1, https://eur-lex.europa.eu/eli/reg/2024/1689/oj [accessed: 24.09.2024].

[2] Government Office for Science, *Artificial intelligence: opportunities and im- plications for the future of decision making*, https://assets.publishing.service.gov.uk/media/5a7f96e9ed915d74e622b62c/gs-16-19-artificial-intelligence-ai-report.pdf [accessed: 12.08.2024], 5.

standard data analysis performed by traditional algorithms and an artificial intelligence system is that the latter learn themselves based on the processed data, and the learning results are then used for further analysis [Więckowska 2022, 245]. For this reason, in the literature, AI is defined as "a machine that can think like humans and imitate human behaviour, including perception, reasoning, learning, planning, prediction, and so on" [Yongjun, et al. 2021, 1].

2. AI TOOLS USED BY THE POLISH TAX ADMINISTRATION

In Poland, since 2016, a gradual digitization process has been taking place in relation to reporting tax information. The Polish tax administration collects huge amounts of data about taxpayers, which can be used by artificial intelligence tools. The following will briefly describe the artificial intelligence tools used by the tax administration, such as the Communication System of Clearing House and the analysis engine. A noteworthy project will also be presented, involving the implementation of an intelligent robot to fight cybercrime.

2.1. The Communication System of Clearing House

The Communication System of Clearing House (Polish abbrev. STIR) is part of new regulations aimed at tightening the tax system by preventing the financial sector from being used for tax fraud. The justification for the introduced legislative changes was to be the early detection of possible tax frauds, as well as the possibility of blocking the possibility of transferring funds that should be used to pay tax or customs arrears, together with possible late payment interest, outside the Polish system banking.[3]

Pursuant to Article 119zv(1) of the Act of August 29, 1997, the Tax Ordinance, the Head of the National Tax Administration may request the blocking of the account of a qualified entity for a period not longer than 72 hours, if the information held, in particular the results of the risk analysis referred to in Article 119zn(1), indicate that a qualified entity may use the activities of banks or cooperative savings and credit unions for purposes related to fiscal fraud or for activities aimed at fiscal fraud, and blocking the account of a qualified entity turns out to be necessary to counteract this. Moreover, pursuant to Article 119zw(1) of the Tax Ordinance, the head of the National Tax Administration may, by way of a resolution, extend the deadline for blocking the account of a qualified entity for a specified period, not longer, however, than three months, if there is a justified fear that the

[3] Report on counteracting the use of the activities of banks and cooperative savings and credit unions for purposes related to fiscal fraud for 2020, see https://www.gov.pl/web/kas/struktury-stir [accessed: 18.08.2024].

qualified entity will not fulfil an existing or future tax liability or liability arising from tax liability of third parties, exceeding the equivalent of EUR 10,000 converted into Polish zloty at the average euro exchange rate announced by the National Bank of Poland on the last working day of the year preceding the year in which the decision was issued.

The above-mentioned regulations are related to the Communication System of Clearing House (STIR), which, in accordance with Article 119zha of the Tax Ordinance is used in particular to receive and process data in order to determine the risk indicator, transfer data and information about the risk indicator to the Central Register of Tax Data and to the IT systems of banks and cooperative savings and credit unions, or mediate in the transfer of data, information and demands between the Head of the National Tax Administration and banks and cooperative savings and credit unions. The STIR institution operates based on a secret algorithm that selects a qualified entity based on data collected in bank accounts [Mikuła 2018, 375]. The grounds for blocking a bank account are also the selection results made by STIR. Therefore, analytical activities resulting from the applied algorithms constitute the basis for the tax authorities to take specific actions towards the taxpayer [Majka 2018, 372].

STIR provides three levels of data analysis [Asquith 2024]: a) risk assessment – based on daily examination of the history of taxpayers' cash flows. This ensures that the Head of the National Tax Administration may decide to block the bank account and initiate control proceedings; b) network analysis – consisting in the analysis of connections between entities liable for tax, which aims to identify unusual and suspicious transactions; c) assault communication – aimed at sending the so-called behavioural messages (letters, e-mails or text messages) that are related to the actions taken by taxpayers and are intended to encourage them to voluntarily comply with the provisions of tax law. As rightly pointed out in the Polish tax law doctrine, sending behavioural letters by the tax administration should be classified as an action that has no legal basis and is contrary to the principle of the rule of law [Brzeziński and Nowak 2024, 29-55]. Concerns are also raised about the secrecy of the algorithm on which STIR operates. After all, the use of this technology may lead to the blocking of the bank account of an entrepreneur who has not committed any offenses.

2.2. The analysis engine

The analysis engine is a modern analytical tool implemented by the National Tax Administration in 2019. It is based on innovative methods, such as machine learning in particular, which use extensive data sets for learning. Thanks to the created algorithms, numerous discrepancies in the settlement of tax on

goods and services, which have been transferred to tax offices and customs and tax offices, are identified with increasing precision.[4] The so-called VAT carousel fraud. Information about suspicions of such fraud is forwarded on an ongoing basis to tax offices with a request to carry out activities verifying the correctness of the settlement of the tax on goods and services. Actions are also taken to remove a given taxpayer from the register of active VAT taxpayers in connection with the detection of tax fraud. Thanks to the operation of the Network Analyzer of the Analysis Engine, it is possible to create an interactive and automatic analysis of the network of connections between entities, which is presented in a graphical form and also includes transactions concluded between entrepreneurs [Sarnowski and Selera 2020, 36].

2.3. Intelligent robot to fight cybercrime

In 2019, the Chamber of Tax Administration in Opole announced a competition to create an intelligent robot to fight crime. The demand for this type of software results from the need for officers of the National Revenue Administration (KAS) to monitor many online auctions and announcements related to gambling or smuggling of illegal goods.[5] This is a very time-consuming task, and what is more, a significant part of such websites cannot be found through available search engines. The purpose of using an intelligent robot was to make it easier to find places on the Internet where law is broken. The solution would undoubtedly facilitate the work of the tax administration. Unfortunately, according to the letter from the Director of the Chamber of Tax Administration in Opole, obtained under the Act on Access to Public Information, "the intelligent robot to fight cybercrime referred to in the regulations for the competition of September 4, 2019 has not been implemented." for use in the Tax Administration Chamber in Opole.[6] However, this is undoubtedly an idea worth considering in the future.

3. AI TOOLS USED BY THE SPANISH TAX ADMINISTRATION (LA AGENCIA ESTATAL DE ADMINISTRACIÓN TRIBUTARIA AEAT)

In May 2024, a strategy was developed in Spain regarding the use of artificial intelligence by the tax administration, which was defined as an essential transformation technology for the evolution and improvement of efficiency

[4] See https://www.gov.pl/web/kas/analizy-rozliczen-vat-z-wykorzystaniem-jpkvat-stir-i-silnika-analiz [accessed: 20.08.2024].

[5] See https://konkursy.govtech.gov.pl/start/postepowanie/42 [accessed: 23.08.2024].

[6] Letter from the Director of the Tax Administration Chamber in Opole of September 3, 2024, No. 1601-IWK.0150.74.2024, obtained under the Act on Access to Public Information, Journal of Laws of 2022, item 902, as amended.

in the provision of information services to the taxpayer and in the area of prevention, but also in fight against tax and customs fraud.[7] The Spanish National Agency for Tax Administration (AEAT) has a whole catalogue of artificial intelligence tools that allow it to carry out control tasks. Importantly, in accordance with the strategic plan for 2024-2027 regarding the use of artificial intelligence, it is emphasized that automated administrative activities will in no case be based solely on the results obtained from the AI system. In such situations, human intervention is always guaranteed to supervise, approve or even reject options that may have been proposed by the system, which is undoubtedly an acceptable solution. The plan indicated that ultimately all decisions would be made by people.[8] Selected instruments used by the Spanish tax administration will be briefly described below.

First of all, it is worth mentioning the ZÚJAR tool, an initiative of AEAT, which, after testing the first version in 1993, enables the processing of information contained in databases for the purpose of selecting taxpayers [Ribes Ribes 2020, 133]. As indicated in the doctrine, "it is a multi-dimensional tool for analytical processing and online data storage (Data Ware-house), which facilitates the analysis and comparison of all information existing in the system with the content downloaded from the operational database. It also allows you to browse, list, filter, group, order, cross, calculate statistics, expressions between fields, segment, draw charts, export data" [Suberbiola Garbizu 2022, 461].

In turn, the PROMETEO solution is defined as "a type of ZÚJAR specializing in the analysis of information provided during the verification of a specific taxpayer. It enables reconciliation of accounting information with bank statements by comparing them with any information from the State Treasury's own databases" [ibid., 462].

TESEO is a technology developed by AEAT, which uses information repositories to analyse, visualize and graphically edit relationships between taxpayers in real time [Gonzalez Garcia 2018, 41]. Thanks to this tool, you can search, filter, group information, as well as, in particular, store and export queries. Moreover, the tool allows you to create presentations in hierarchical, orthogonal and cyclical systems [Suberbiola Garbizu 2022, 462]. GENIO, in turn, is "a reporting tool also created by AEAT itself, which issues standard online reports, also enabling autonomous design and visualization of reports based on queries entered in the multi-dimensional analysis tools ZÚJAR and PROMETEO" [ibid.].

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[7] *Estrategia de inteligencia artificial. Agencia Tributaria* (27.05.2024), https://sede.agenciatributaria.gob.es/static_files/AEAT_Intranet/Gabinete/Estrategia_IA.pdf [accessed: 24.08.2024].

[8] *Plan estratégico de la Agencia Tributaria 2024-2027*, https://sede.agenciatributaria.gob.es/static_files/Sede/Agencia_Tributaria/Planificacion/Plan_estrategico_2024_2027/PlanEstrategico2024.pdf [accessed: 24.08.2024], 59.

When it comes to a risk management tool that is based on information stored in Zújar, it is also worth paying attention to a solution called HERMES [Ribes Ribes 2020, 134]. Based on the predictive data analysis method, HERMES analyses the differences between the taxpayer's behaviour in his declaration and the way he should do it according to the data held by the administration, which allows for the development and use of tax risk profiles when the results differ from expected standards [Suberbiola Garbizu 2022, 462]. The main use of this tool is the selection of taxpayers for whom a tax audit will be carried out.

Irune Suberbiola Garbizu also mentions commercial tools such as Business Intelligence, which were not developed by AEAT and are defined as predictive models that focus on data analysis [ibid.]. Like other tools, they are used to detect unusual behaviour and fraud patterns. The results obtained by these tools are transferred to the analytical platform, and specific risks are sent to the HERMES global risk system.

The presented analysis shows that in Spain artificial intelligence systems are used by the tax administration in a much broader way than in Poland. At the same time, unlike in Poland, a strategy was also developed regarding the use of artificial intelligence by the tax administration, as well as a strategic plan for the years 2024-2027 regarding the use of this technology.

4. THREATS TO TAXPAYERS' RIGHTS RELATED TO THE USE OF AI

The use of artificial intelligence by tax administrations may pose a risk to taxpayers' rights. First of all, it should be noted that the algorithm on which artificial intelligence is based can itself generate new information about added value, which will go beyond the information possessed by the tax administration. This applies to algorithms equipped with self-learning artificial intelligence (AI), which have the ability to self-improve, which in turn may lead to independent reprogramming, allowing for a high degree of independence, both from the data originally stored, as well as from initial programming. As indicated in the doctrine, an artificial intelligence algorithm, by definition, strives for maximum accuracy approximations that do not constitute mathematical certainty [Lai 2022, 83]. It does not operate on the basis of true-false logic, but on the basis of the "more likely than not" criterion.

The possibility of generating biases that threaten the principle of tax equality should also not be ignored. After all, artificial intelligence learns from the cases that feed it. The principle of equality, also known as the principle of non-discrimination, assumes that entities in the same factual situation will be treated in the same way [Brzeziński 2017, 294]. The 2020 White Paper on Artificial Intelligence already indicated that the use of artificial intelligence

may affect the values founding the European Union and lead to violations of fundamental rights, including the right to non-discrimination.[9] The way to avoid this threat should be to introduce supervision procedures to analyse the operation of the system. Moreover, you may consider involving people from different backgrounds in the supervision to ensure a diversity of opinions.[10] On the other hand, as indicated in the strategy on the use of artificial intelligence by the Spanish tax administration, a properly designed artificial intelligence system is able to carry out identical actions in the same situations, thus helping to mitigate possible errors that may occur in human actions.[11] Therefore, through the use of artificial intelligence, it is also possible to identify patterns of bias and discrimination that may be taking place, which may not be detected and corrected without the use of these technologies.

There should undoubtedly be transparency in the process of generating information using artificial intelligence tools. The secrecy of the operation of the algorithms used makes it impossible to understand the reasons underlying a given decision, which may result in the taxpayer's helplessness and threatens his right to court protection. In the literature, algorithms are compared to legal codes by pointing out that, like legal regulations, they are used to assess the circumstances of a specific case, based on logical conclusions, intended to lead to predictable legal consequences [Suberbiola Garbizu 2022, 468]. After all, as follows from the case law of the CJEU, the law should be characterized by certainty, and its application must be predictable by legal entities.[12]

An issue that deserves special attention is the protection of taxpayers' privacy. The use of artificial intelligence solutions by tax administrations involves the collection of more and more data about taxpayers, which can then be used by AI tools. Tax authorities have more and more powers in this respect. For example, we are talking about obtaining information on the basis of EU regulations on reporting tax schemes. In Poland, pursuant to Article 45(1) of the Act on the National Tax Administration, tax authorities, in order to carry out statutory tasks, may request access to documents containing information, including personal data. Moreover, on July 1, 2024, the Polish amendment to the Act on the exchange of tax information with other countries[13] entered into force, implementing the EU Council Directive (EU) 2021/514 of March

[9] *White Paper On Artificial Intelligence – A European approach to excellence and trust*, Brussels, 2020, 12, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0065 [accessed: 24.08.2024].

[10] *Ethics Guidelines For Trustworthy AI High-Level Expert Group on Artificial Intelligence*, 12, https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai [accessed: 24.08.2024].

[11] *Estrategia de inteligencia artificial...*, p. 6.

[12] The judgment of the Court of Justice of 9 July 2015, ref. no. C 144/14, Cabinet Medical Veterinar Dr. Tomoiagă Andrei, EU:C:2015:452, point 33 and the case-law cited therein.

[13] The DAC-7 directive was implemented in Poland under the Act of May 23, 2024 amending the Act on the exchange of tax information with other countries and certain other acts.

22, 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, the so-called DAC7 directive[14] regarding the obligation to report trade via the Internet. The Act imposes an obligation to collect and transmit to tax administration authorities information about sellers making transactions via Internet platforms. This obligation is addressed to owners of digital platforms and covers all Member States of the European Union. After all, in order to function properly, artificial intelligence must process data, without which its functioning would be meaningless. Therefore, there is a risk that the increasing powers of tax authorities to access taxpayers' data and the use of this data by AI solutions will violate taxpayers' privacy.

Undoubtedly, data processing by tax authorities using AI tools must be carried out in accordance with the provisions protecting personal data. The Court of Justice of the European Union has already commented on this matter in its judgment of 27 September 2017 in the Puskár case,[15] in which it noted that the management of taxpayers' data by tax administrations, as well as the preparation of files for tax audit purposes, must be prepared in accordance with fully respecting data protection regulations, with particular emphasis on the rights of the persons concerned in this area. As Agnieszka Franczak rightly points out, the limits of interference with the taxpayer's right to privacy are determined by the principle of proportionality [Franczak 2023, 355]. Any restrictions in this respect must be expressly indicated in the act, and what is more, they must be justified and necessary due to the general interest arising from the protection of the rights and freedoms of other persons [ibid.].

An issue that also requires particular attention is the fact that, according to recital 59 of the AI Act, artificial intelligence systems intended specifically for use in administrative proceedings conducted by tax and customs authorities should not be classified as high-risk AI systems used by law enforcement authorities for the purposes of preventing, detecting, investigating and prosecuting crimes. The above may increase the risks related to the protection of taxpayers' fundamental rights in connection with the use of artificial intelligence by tax authorities.

CONCLUSION

Human intervention, and therefore the ability to deduct, are still factors that cannot be ignored in the application of tax law. For this reason, artificial

[14] Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32021L0514 [accessed: 24.08.2024].

[15] The judgment of the Court of Justice of September 27, 2017, C 76/16, *Peter Puskár*, ECLI:EU:C:2017:725.

intelligence should not replace humans, but can support them in their work, enabling automation and simplification of bureaucratic procedures. Undoubtedly, the implementation and use of new technologies based on artificial intelligence requires ensuring such guarantees as, above all, protection of the privacy of processed data, transparency of the principles of operation of algorithms and the definition of clear rules of responsibility for decisions resulting from the use of these new solutions. The development of a strategic plan regarding the use of artificial intelligence by the tax administration in Spain is undoubtedly commendable, which indicates that administrative activities will in no case be based solely on the results obtained from the AI system. In such situations, human intervention should always be provided to supervise, approve or even reject options that may have been proposed by the system. However, it would be worth introducing regulations at the statutory level, guaranteeing that all decisions in tax matters will ultimately be made by people.

To sum up, the use of artificial intelligence by tax administrations should undoubtedly be seen as part of a natural evolution, of which the digitalization of the entire world is a part. It represents a huge progress in process automation, which will certainly affect the speed and effectiveness of tax authorities. Focusing on development will allow us to adapt to the requirements of the 21st century, and thus improve operational efficiency and improve tax collection. On the other hand, these solutions also have certain weaknesses that may affect taxpayers' rights. For this reason, the analysis carried out aims to indicate these threats in order to eliminate them through the prism of the proposed legal regulations.

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ELECTRONIC PERSON AS A PUBLIC PROCUREMENT ENTITY

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Abstract. It is now already possible to distinguish the phenomenon of electronicisation of the public procurement system, which must at the same time have its own, separately defined, existence in legal reality. The legal reality of the electronicisation of public procurement now focuses, in terms of subjective construct, on the categories of the natural person, juridical person and organisational unit without legal personality, whereas the legal reality of electronicised public procurement focuses in a very similar way on the natural person, the group of natural persons and the organisational entity. In the future, however, the electronicisation of the public procurement system should lead to the extension of the categories of procurement entity towards including an electronic person. The electronic person has recently been granted a legal status in the EU soft law system, but it is only at an early stage of development and therefore needs to be further refined. From a legal point of view, it should also be added that the category of electronic person must always be identified with an agent (electronic agent, smart agent, computer agent), as it turns out to be the most important substrate of the related artificial intelligence.

Keywords: electronicisation; electronic person; artificial intelligence; public procurement.

INTRODUCTION

The evolution of the public procurement system is linked to technological progress, which implies that it reaches increasingly sophisticated levels. Certainly, we are now witnessing the impact of digital technology on the public procurement system, which aims at the final conversion of the processes taking place in it to digital format. Undoubtedly, digital technology should then be understood as a technology based on both digital technology and information systems. It should also be assumed in this context that digital technology involves the use of digital systems. At the same time, an IT system can be considered to be a set of interrelated elements the function of which is the processing of data by means of computer technology. Digital technology is based on breaking down messages, signals or forms of communication between the creating device and the receiving device by means of a binary code string [De Sutter 2007, 37-38].

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Virtually all modern electronics today is built as digital technology, while analog electronics is coming out of use. As a result, we have a variety of digital technology products, such as: electronic document, electronic signature, electronic mailbox, electronic services, electronic announcement, electronic transactions. In view of the above, the phenomenon of electronicisation of the public procurement system may be distinguished, which must naturally also have its own distinctly defined existence in the legal sphere [Gola and Bobkowski 2017, 261-70; Moras, Nuzzo, and Szostak 2019, 39-60].

1. CURRENT NATURE OF ELECTRONICISATION OF THE PUBLIC PROCUREMENT SYSTEM

This is why the electronicisation of the public procurement system was granted a clear legal basis, which belongs both to the EU legal order and the national legal order. From the point of view of the Union legal order, particular attention should be drawn to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as it permits the use of electronic means in public procurement procedures in particular as regards communication obligations, dynamic purchasing system, electronic auction, electronic catalogues, electronic notices, electronic documents, European Single Procurement Document.[1] However, the national legal order essentially requires reference to the Act of 11 September 2019, the Public Procurement Law,[2] since it also refers to: electronic statements, the obligation to communicate electronically, electronic auction, the tool of the European Single Procurement Document also in electronic version, dynamic purchasing system as a fully electronic process, electronic reporting, electronic notices, electronic invoicing, e-procurement platforms, electronic documentation and archiving.

The electronicisation of the public procurement system in this meaning is purely objective and functional in nature. From an electronic perspective, it always focuses on the subject matter of the public contract and the procedure for awarding a public contract. Consequently, it should also be noted that the electronicisation of the public procurement system is not yet aimed at achieving a subjective character. This is true mainly having in mind that a public procurement entity cannot be currently granted an electronic character. Under the legislation currently in force, we are dealing only with the traditional understanding of the public procurement entity, which was formally reflected in the structurally similar definitions of economic operator and contracting entity. This is so because, according to the dictionary of the Act of Public

[1] OJ L 94 of 28.03.2014 , p. 65 as amended.

[2] Journal of Laws of 2024, item 1320 as amended.

Procurement Law, whenever the term "economic operator" is mentioned in the national legal system, it means a natural person, a juridical person or an organisational unit without legal personality, which offers the execution of works or a structure, the supply of products or the provision of services on the market, or applies for the award of a contract, has submitted a tender or entered into a contract for public procurement; and whenever the term "contracting entity" is used – it means a natural person, a juridical person or an organisational unit without legal personality, obliged under the Act to apply it.

This traditional understanding of public procurement entity is also widely accepted in the literature on the subject. At most, the emphasis is then placed differently, but still within a fundamentally institutional sphere. For example, it is emphasized that an economic operator, as a public procurement entity, is a specific natural person, a group of natural persons or an organisational unit which is formally qualified as an economic operator by the provisions of public procurement law and for which specific powers or obligations are or may be implemented – either directly by the provisions of public procurement law or by the acts of concretisation of the provisions of public procurement law – in the contract preparation phase in the contract award phase and in the contract implementation phase [Szydło 2014, 93-94]. At the same time it is assumed that the contracting entity, as a public procurement entity, is considered to be a specific natural person, a group of natural persons or an organisational unit which is formally qualified as a contracting authority by the provisions of public procurement law and in respect of which specific powers or obligations are or may be implemented, either directly on the basis of the provisions of public procurement law or on the basis of acts giving concrete expression to the provisions of public procurement law, during the phase of award of a public contract and during the implementation phase of a public contract [ibid., 49-50].

In any case, the construct of the public procurement entity, which applies equally to the economic operator and the contracting entity, covers categories that are actually identical from the formal point of view. The legal reality of the phenomenon of electronicisation of public procurement is focused on the categories of natural person, juridical person and organisational unit without legal personality, while the reality of legal practice related to the phenomenon of electronicisation of public procurement very similarly focuses on a natural person, a group of natural persons and an organisational unit. Hence, a public procurement entity must ultimately be categorised as a natural person or an organisational unit. A public procurement entity is often perceived in terms of attributes of a person, i.e. a legal being capable of acting, to which the entirety of rights and obligations can still be attributed. However, a public procurement entity may not be identified synonymously with a person [Kosik 1963, 24]. This is so because a person is always a public

contract entity, but it happens just as often that a public procurement entity does not mean a person at all. The most telling example of this is organisational units without legal personality [Frąckowiak 2005, 899-900].

Certainly, "natural person" is a technical classification of a human who becomes a separate entity for the purposes of legal transactions. Thus, a human becomes a natural person not because of his/her natural characteristics, but because of the consequences of the legal regulation attributed to them [Niczyporuk 2016, 161]. Therefore, the determination of the existence of a natural person always requires consideration to be given to the meaning of the legal norm and to other determinants allowed by it [ibid.]. This must undoubtedly be referred to a group of natural persons, such as e.g. civil-law partnership. Moreover, it is generally beyond doubt that "organisational unit" is the qualification of a certain organisation i.e. a separate entity which has a certain form [Frąckowiak 2005, 901]. The separate existence of an organisational unit must therefore take place where the legislature wants to link the effects of certain legal norms, usually certain rights and obligations, with the legal structure given to it [ibid., 902]. The existence of the organisational unit is also construed from the meaning of the legal norm and other determinants allowed by it, including declarations of will, administrative decisions and judicial decisions that may usually be found therein [ibid., 900]. In principle, when the criterion of the existence of legal personality is concerned, organisational units are divided into juridical persons and organisational units without legal personality.

2. FUTURE NATURE OF THE ELECTRONICISATION OF THE PUBLIC PROCUREMENT SYSTEM

In the future, the electronicisation of the public procurement system should lead to a formal extension of the categories covered by the construct of public procurement entity to include the electronic person. Moreover, it seems acceptable to assume that not only an economic operator may be an electronic person, but it is also possible to consider a contracting authority as such. Admittedly, a certain thing must be added in order to state that an electronic person becomes a contracting entity. First of all, the electronic person must also become a public entity, as this status has uniformly been given to the contracting entity, and it is therefore necessary to grant it all the public characteristics that are typical of it. Although this will of course not be an easy matter, it now seems acceptable, but will require the use of new constructs. In view of the above, in the legal reality, the categories of public procurement entity will include the following: natural person, juridical person, organisational unit without legal personality and electronic person. On the other hand, the categories of public procurement entity may

in the legal reality include at least the following: natural person, a group of natural persons, organisational unit and electronic unit.

First of all, it must now be stated that the category of electronic person already has a legal status, since a corresponding legal term has been introduced into the EU soft law system, first in the resolution of the European Parliament of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL) (2018/C 252/25).[3] It has not yet been legally defined, however, which seems understandable, as the convention typical of legal persons has been replicated. Of course, it is rightly assumed then that the electronic person is at the initial stage of development, and it therefore needs to be further specified. Concurrently to the concept of electronic person, the related criterion of electronic personality has been distinguished. This is so because the legal term of electronic personality was developed within the system of EU soft law, although for similar reasons it was not granted the character of a legal definition, first under the abovementioned resolution of the European Parliament of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL) (2018/C 252/25). Nonetheless, the meaning of the electronic personality remains unclear, apart from imposing a specific link between it and the electronic person. It is therefore not yet known whether electronic personality will be a criterion of classification of electronic persons.

Thus, there was in fact a "legal discovery" of the electronic person, which is very reminiscent of the "legal discovery" of the juridical person by the German Pandectics of the 19th century [Dölle 1959, 1-22]. On the other hand, the concept of an electronic person is rejected in legal terms, as it is not yet possible to refer to an independent legal personality of artificial intelligence, even though it would constitute a practical and even necessary solution [Chłopecki 2018, 14; Biczysko-Pudełko and Szostek 2019, 12-14]. It is then fair to say that the electronic person is not referred to in Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act),[4] Although this was to be expected, given the fundamental importance of artificial intelligence for distinguishing the electronic person. The Polish national legal system does not refer to the electronic person either, but there already is a regulation on artificial intelligence in Act of 17 January 2019 on The Industry of the Future Platform Foundation.[5]

[3] See OJ C 252/239 of 18.07.2018, p. 11.

[4] OJ L. 2024/1689 of 12.07.2024.

[5] Journal of Laws of 2019, item 229.

From the juridical point of view, it is worth adding that the category of electronic person should be inextricably identified with the agent (electronic agent, intelligent agent, computer agent), as it turns out to be the most important substrate of artificial intelligence [Jankowska 2015, 177]. The use of the term "agent" refers to Anglosphere literature (*Agent*),which does not fit well with Polish realities, because the meaning of this word in Polish is closer to attorney or plenipotentiary than it meets the criteria of an agent under the agency agreement as set out in the Civil Code [Chłopecki 2018, 20]. We are already dealing with a legal definition of artificial intelligence, because according to the glossary of Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), from the perspective of an AI system, the term "AI" refers to a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.[6]

In general, we can then establish that the agent is an existing entity whose actions are still subject to appropriate classification. It is sometimes equated with an automated message system, which is usually a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person, as defined by the UN Convention on the Use of Electronic Communications in International Contracts (2005).[7] A similar definition is also found in US law, most notably in the Uniform Electronic Transactions Act (UETA) proposed by the National Conference of Commissioners on Uniform State Laws, where it has been assigned to the Electronic Agent) [Chłopecki 2018, 20]. At the same time, as part of the model of a rational agent exhibiting intelligent behaviour, the intelligent agent is distinguished [Turing 1950, 433-60]. Finally, there is also the software agent, i.e. a computer program equipped with some kind of decision-making autonomy, operating without supervision or intervention from anyone outside, most often goal-driven (i.e. having some freedom to choose the means adequate to achieve the goal) [Russell and Norvig 2010, 34].

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[6] OJ L. 2024/1689 of 12.07.2024.

[7] United Nations Convention on the Use of Electronic Communications in International Contracts, https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications [accessed: 01.12.2024].

CONCLUSION

The agent was thus shaped by the world of digital technology, and it is usually embodied as: a robot (in the sense of a carrier) which is often equipped with physical sensors and actuators (starters, servomechanisms); an expert system supplied by a human with information to carry out the task; software when operating in a purely computational environment (so-called *softbot*) [Jankowska 2015, 177-78]. Regarding robots, these are devices that automatically perform certain tasks, most often in the form of drones, exoskeletons, androids, autonomous vehicles, while expert systems are categorised as computer programmes that support the use of knowledge and decision-making at expert level, which originally included: Dendral, Mycin, Prospector. Finally, there is also the so-called software bot in software project management and software engineering, which today includes, for example: blockchain, smart contracts, distributed ledger technology (DLT), decentralised autonomous organisation (DAO). Therefore, the legal system must keep up with such a manner of understanding the agent so that it can ultimately be recognised as a subject of law, i.e. formally allow a new category of subjects of law in the form of electronic person. This way of understanding the agent also leads to the legal distinction of the electronic entity on its basis. This proposal is most likely to be implemented in the most electronicised components of the legal system, which currently include especially public procurement.

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LEGAL REGULATIONS GOVERNING THE PAYMENT OF COMPENSATION IN CONNECTION WITH VACCINATIONS AGAINST COVID-19

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Abstract. From a medical point of view, vaccinations are the only effective method of protection against the spread of infectious diseases. The aim of the study is to present legal regulations governing the payment of compensation in connection with vaccinations against Covid-19. The experience of other countries shows that compensation payments fulfill their intended function to a greater or lesser extent. While civil court proceedings remain an alternative, due to their lengthy nature, many people choose to submit an application to the Patient Ombudsman. However, it should be remembered that court proceedings – unlike the Patient Ombudsman procedure – provide the opportunity to obtain much larger amounts as compensation, or compensation and pension.

Keywords: compensation; infectious diseases; vaccinations.

INTRODUCTION

From a medical point of view, vaccinations are the only effective method of protection against the spread of infectious diseases. They are rightfully considered one of the greatest achievements of medicine and the most effective known method of preventing infectious diseases [Radlak 2018, 27-28]. Protective vaccinations against Covid-19 during the pandemic offered the much-awaited solution for preventing and combating the infectious disease caused by the SARS CoV-2 virus. After their wide adoption, the next

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challenge was to reach citizens with vaccinations as widely as possible. The widespread use of vaccinations has contributed to reducing the incidence of Covid-19. The aim of these vaccinations was to expand the public's belief that the only effective way to protect against Covid-19 was to achieve the highest possible level of vaccination. On the other hand, compensation payments for the adverse effects of vaccinations, i.e. the so-called vaccine adverse events, are legally considered to be compensation paid from the Vaccination Compensation Fund. The aim of the study is to discuss legal regulations governing the payment of compensation in connection with vaccinations against Covid-19. In connection with this aim, the study explored the problem of the legal regulations governing the payment of compensation. In addition, other specific questions were investigated: What are the conditions for the payment of compensation? What authority administers the Vaccination Compensation Fund? What is the obligatory condition for the payment of the compensation? What are the revenues of the Vaccination Compensation Fund? What actions are taken by the Patient Ombudsman to consider an application for compensation? Is the patient's consent to vaccination a prerequisite for the legality of a medical intervention?

1. CONDITIONS FOR THE PAYMENT OF COMPENSATION

Pursuant to Article 17a of the Prevention Act,[1] if, as a result of protective vaccination against Covid-19, the person who received the vaccination suffered from the side effects listed in the Summary of Product Characteristics (SmPC) referred to in the Act of September 6, 2001 – Pharmaceutical Law within five years from the date of administration of the vaccine or vaccines, such person is entitled to compensation paid from the Vaccination Compensation Fund. For such a benefit to be paid, at least one of the following two conditions must be met: the person concerned either required hospitalization for a period of not less than 14 days or suffered from anaphylactic shock and required observation in a hospital emergency department or an acute admissions ward, or hospitalization for a period of less than 14 days.

To start with, it should be noted that it is characteristic that the causal relationship between the vaccination of a person and the side effects listed in the SmPC may be both direct and indirect. This means that in accordance with Article 17a(1) of the Act on preventing and combating infections and infectious diseases in humans (for convenience, the Act will further be referred to as the "Prevention Act"). Side effects may appear both shortly after receiving the vaccination and later as a consequence of other

[1] Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans, Journal of Laws of 2023, item 1284 as amended.

disturbances in the functioning of the body resulting from the administration of the vaccine. This interpretation of the provision in question is primarily determined by the five-year period adopted by the legislators as the time required for the occurrence of side effects listed in the Summary of Product Characteristics. This means that compensation is not due only in a situation that does not raise any doubts, i.e. where any relationship (direct or indirect) between the vaccination and an adverse event can be excluded.[2] This solution should be considered the aptest due to the justification for seeking compensation. *De lege ferenda*, the five-year period could be extended, if this is justified by an increase in the number of medical cases related to vaccination.

Although the five-year period is long enough to assume an indirect causal relationship between vaccination and the side effect [Serwach 2022, 115], the argument in favor of such an interpretation of Article 17a(1) of the Prevention Act. is provided by the justification for the draft act amending the Prevention Act. The Prevention Act clearly stipulates that compensation will be awarded both when the vaccine's side effects were the direct cause of hospitalization and when the side effects resulted in a deterioration of health requiring hospitalization for a period of not less than 14 days.[3]

Before this discussion continues, a brief description of the amount of compensation [Sałbut 2021, 67-77] is needed. The amount of compensation generally depends [Piecha 2021, 45-56] on the duration of hospitalization: in the case of observation in a hospital emergency department or an acute admissions ward due to anaphylactic shock, it is PLN 3,000, and in the event of hospitalization due anaphylactic shock for less than 14 days, it is PLN 10,000. Moreover, if the hospitalization period lasted 14 to 30 days, the compensation will range from PLN 10,000 to PLN 20,000, in proportion to the hospitalization period, and if the hospitalization lasted 31 to 50 days, it will range from PLN 21,000 to PLN 35,000, in proportion to the hospitalization period. In the case of hospitalization lasting 51 to 70 days, the compensation will range from PLN 36,000 to PLN 50,000, in proportion to the hospitalization period, and in the case of hospitalization lasting from 71 to 90 days – from PLN 51,000 to PLN 65,000, in proportion to the hospitalization period. For hospitalization lasting from 91 to 120 days – the compensation will amount from PLN 66,000 to PLN 89,000, in proportion to the hospitalization period. If hospitalization lasted more than 120 days, the compensation is PLN 100,000. As R. Budzisz rightly notes, "such an interpretation would lead to the conclusion that if the applicant received the amount of PLN 100,000 (for hospitalization lasting longer than 120 days), they would no longer be eligible for

[2] Judgment of the Provincial Administrative Court in Warsaw of 9 February 2024, ref. no. V SA/Wa 808/23, Lex no. 3709486.

[3] Amendment to the Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans, Journal of Laws of 2021, item 2069.

any additional compensation. However, it seems that the legislators' intention was to grant the applicant an additional amount in connection with treatment or rehabilitation" [Budzisz 2023, 23]. Therefore, *de lege ferenda*, this regulation needs to be changed so as to ensure the quickest possible recovery by granting funds to the aggrieved party, and if this is not possible, at least reduce the nuisance caused by the vaccine adverse event.

2. PATIENT OMBUDSMAN AS THE ADMINISTRATOR OF THE VACCINATION COMPENSATION FUND

Compensation is granted by the Patient Ombudsman [Karkowska and Kmieciak 2021, Article 3]. It should also be emphasized that the proceedings for granting compensation are extrajudicial and are conducted under administrative procedures [Matan 2005, 572-80].

The Vaccination Compensation Fund was established on the basis of the amendment to the Prevention Act [Serowaniec 2022, 24-37], introduced by the Act of December 17, 2021 amending the Act on preventing and combating infections and infectious diseases in humans and certain other acts, which entered into force on January 27, 2022.[4]

The first of the above-mentioned Acts clearly stipulates that compensation is granted by the Monetary Policy Council (MPC) (Article 17a(6)) following an explanatory procedure (Article 17d(1) of the Prevention Act). This procedure results in an opinion being issued by the Panel for Benefits from the Vaccination Compensation Fund. The opinion concerns the occurrence of an adverse event listed in the Summary of Product Characteristics (Article 17d(2)). Moreover, the Monetary Policy Council and the members of the Panel authorized by it have, pursuant to Article 17f of the Prevention Act, access to medical documentation necessary to consider the application for compensation. It is worth emphasizing that a member of the Panel may be excluded on the terms and in the manner specified in Article 24 of the Code of Administrative Proceedings [Przybysz 2021, 25]. Such a situation may occur, for example, when the applicant is a party to the proceedings or is in such a legal relationship with the applicant that the outcome of the case may affect his or her rights and obligations.

However, in Article 17d(13) of the Prevention Act, the legislators provided a very broad definition of the group of persons subject to exclusion. This is a commendable approach given the possible conflicts of interest. A Panel member is also excluded if the case concerns their spouse, relatives or in-laws up to the second degree, or persons related to them by virtue of adoption,

[4] Act of 17 December 2021 amending the Act on preventing and combating infections and infectious diseases in humans and certain other acts, Journal of Laws of 2022, item 64.

care, or guardianship. Moreover, a Panel member is also excluded if the above conditions apply to an entrepreneur conducting business activity in the field of vaccine production or sales, provided that the side effects of these vaccines are the subject of the procedure for awarding compensation. *De lege ferenda*, it would be advisable to extend the exemptions also when the side effects of vaccines manufactured by this entrepreneur concern not only this specific procedure for awarding compensation, but in general, due to the biased nature of such affiliations. Therefore, following *a minori ad maius* reasoning, this postulate should be defined through the prism of impartial behavior that could negatively influence the outcome of the proceedings.

Next, after obtaining the opinion of the above-described Panel (Article 17g(1) of the Prevention Act), the Patient Ombudsman issues a decision on the application for compensation (grants the compensation and determines its amount, or refuses to grant the compensation) within two months of receipt of the complete application, and this decision may be appealed against to the administrative court (Article 17g(3) of the Prevention Act). This decision is final (Article 17g(1) of the Prevention Act). Taking into account the local jurisdiction, a complaint should be filed with the Provincial Administrative Court in Warsaw, and a cessatory complaint against the judgment of this court may be filed with the Supreme Administrative Court.

In addition, the MPC has the right to request that the applicant or medical provider submit medical documentation within a specified period of time (Article 17g(4) of the Prevention Act).[5] Here, it should be emphasized that compensation is additionally increased depending on the duration of hospitalization, or the need for surgery. In the case of: 1) surgery under general anesthesia – by PLN 15,000; 2) a surgical procedure other than specified in point 1, or a method of treatment or diagnosis posing an increased risk – by PLN 5,000; 3) hospitalization in an intensive care unit or intensive medical care department lasting at least 7 days – by PLN 10,000; 4) hospitalization in an intensive care unit or intensive medical care department lasting longer than 30 days – by PLN 20,000. It should also be noted that compensation also includes reimbursement of the costs of further treatment or rehabilitation after observation or hospitalization, in an amount not exceeding PLN 10,000. The total amount of compensation may not exceed PLN 100,000.

For the present discussion, it is important to note that the judgments from 2017-2022 regarding health disturbances or bodily injuries to the patient (data from an online resource of common-court rulings in Poland[6]) show that the average amount awarded to the aggrieved party was PLN

[5] Judgment of the Provincial Administrative Court in Warsaw of 28 April 2023, ref. no. V SA/Wa 1748/22, Lex no. 3570961.

[6] See https://orzeczenia.ms.gov.pl/search/advanced [accessed: 15.02.2025].

116,000. Although the proposed amounts regarding compensation fully correspond to the amounts of compensation that the patient could receive in a lawsuit, due to the costs associated with the recovery, they are still insufficient. Therefore, *de lege ferenda*, it is necessary to postulate an increase in the amounts paid from the Vaccination Compensation Fund, so that they would compensate the aggrieved party's for the suffered adverse health consequences more fairly.

3. VACCINE ADVERSE EVENTS AS A PRE-REQUIREMENT FOR THE PAYMENT OF COMPENSATION

Prima facie, the types and criteria of vaccine adverse events are included in Annex No. 1 to the Regulation of the Minister of Health of December 21, 2010 on vaccine adverse events and the criteria for their recognition.[7]

A vaccine adverse event is classified as a serious adverse reaction if it is life-threatening and may: require hospitalization to save health, lead to permanent loss of physical or mental fitness, or result in death. However, a vaccine adverse event is classified as a serious adverse reaction if it is characterized by severe symptoms such as significant swelling of the limb, severe redness, high fever, but: does not usually require hospitalization to save health; does not lead to permanent damage to health; does not pose a threat to life. A mild vaccine adverse event is an undesirable post-vaccination reaction that is not particularly severe and is characterized by local swelling of the limb and strong local redness or fever.

This brings us to the changes introduced by the Regulation of December 21, 2010, which was amended by the Regulation of the Minister of Health of December 31, 2020,[8] including the form in which the notification regarding vaccine adverse events should be submitted. Pursuant to para. 1 of the Regulation of December 31, 2020, the wording of para. 4(1)(1-2) of the Regulation of December 21, 2010 is as follows: "Reporting a vaccine adverse event by a doctor or medic: 1) prepares and sends in electronic form, with the direct use of the information exchange system as part of the information exchange systems within the remit of the State Sanitary Inspectorate referred to in the regulations issued pursuant to Article 8a(2) of the Act of March 14, 1985 on the State Sanitary Inspection [...], or with the use of an IT tool cooperating with this system, made available by a unit subordinate to the minister

[7] Annex No. 1 to the Regulation of the Minister of Health of 21 December 2010 on vaccine adverse events and the criteria for their recognition, Journal of Laws No. 254, item 1711.

[8] Regulation of the Minister of Health of 31 December 2020, including the form in which the notification regarding vaccine adverse events should be submitted, Journal of Laws of 2021, item 13.

responsible for health matters, responsible for health care information systems as part of the IT system referred to in Article 7(1) of the Act of April 28, 2011 on the health care information system [...], taking into account the scope of data resulting from the vaccine adverse event reporting card, or 2) prepares an electronic document – a vaccine adverse event reporting card – and sends it via electronic means of communication in an encrypted form if the technical capabilities of the sender and recipient allow it."

Vaccine adverse event reports sent in the manner specified above must be signed with a trusted signature, a qualified electronic signature, or a personal signature. It is also worth noting that corrections to vaccine adverse event reports can be made electronically – in the form of an electronic document, by telephone, fax, or using another data transmission device. Correction of a vaccine adverse event report made by telephone should be immediately confirmed in writing in the form of an electronic document [Król-Całkowska 2021, 45].

Against this backdrop, according to Article 21(1) of the Prevention Act, a doctor or medic who suspects or identifies the occurrence of a vaccine adverse event is obliged, within 24 hours from first suspecting such occurrence, to report the case to the state district sanitary inspector responsible for the area in which the event is suspected or identified. Moreover, the competent state sanitary inspector is obliged to: first, supplement the report of a vaccine adverse event with information collected at the place of vaccination, or immediately forward the report to the competent state district sanitary inspector, and secondly, keep a register of vaccine adverse event reports.

The register of vaccine adverse event reports may be kept in paper form, or in an electronic system. This means that the data collected in the register of vaccine adverse event reports are made available by the Chief Sanitary Inspector [Kowalska-Mańkowska 2018, Article 97] to the Patient Ombudsman to the extent necessary to conduct proceedings for the award of compensation.

According to legal commentators and jurisprudence, it is assumed that fault occurs when the perpetrator can be accused of objective and subjective misconduct.[9] Therefore, only after these conditions have been met will the payment of compensation be justified. However, there is no need to prove the culpable party's fault, and compensation is granted as a lump sum. Liability for adverse effects caused by the administration of the vaccine may be borne by the doctor, medical provider, or manufacturer. A vaccine defect results in strict liability under Article 449(1) et seq. of the Civil

[9] Judgment of the Court of Appeal in Warsaw of 5 September 2019, ref. no. V ACa 450/19, Lex no. 2978510.

Code.[10] And the actions of the doctor and medical staff violating the requirements of diligence under Article 355(2) of the Civil Code entail ex delicto liability (Articles 415, 430 of the Civil Code). In practice, the application of Article 417 of the Civil Code requires the patient to demonstrate, in addition to the damage sustained and the causal relationship, the circumstances that the action of the medical provider was objectively unlawful in terms of the administrative actions taken. As stated above, in certain cases, these culpable parties may be doctors and medical staff. In this context, the judgment of the Supreme Court in Gdańsk of May 31, 2016 is distinctive. According to it, "unlawful conduct of doctors and medical staff is one that violates the legal order, principles of professional ethics, standards of medical knowledge, or principles of social coexistence. In order to find them liable, it is therefore necessary to conclude that in a given situation, their conduct was evidently inappropriate. This may take the form of ignorance, carelessness, inattention, or negligence, consisting in failure to exercise a certain measure of diligence. The conduct of doctors and other medical staff must be objectively unlawful and subjectively culpable. It is the responsibility of all medical staff of the healthcare provider to exercise due diligence in the treatment of every patient."[11] Therefore, doctors and other medical professionals [Michałowska 2021, 54] will also be liable if they do not comply with the principles of due diligence, provided that their actions or omissions are objectively unlawful and subjectively culpable.

A problematic situation occurs when none of the above-mentioned providers is at fault, and the adverse event is a consequence of the body's reaction. In that event, the culpable party is the state, and culpability is assessed on the basis of risk or equity [Nesterowicz 2017, 57].

4. REVENUES OF THE VACCINATION COMPENSATION FUND

Expressis verbis, Article 17b of the Prevention Act stipulates that due to the criteria contained in Article 29 of the Public Finance Act, the Fund is a public special purpose fund created for the purpose of paying compensation. However, there are some doubts as to whether the concept of "another body" under the provision of Article 29(4) of the Public Finance Act should be interpreted to include only public administration bodies [Zimmermann 2008, 176-177] (in its subjective meaning). Although this is a broader category of administrative bodies, i.e. bodies with a much more diverse legal status that perform administrative functions in the objective sense, the Patient

[10] Act of 23 April 1964, the Civil Code, Journal of Laws of 2023, item 1610 as amended.

[11] Judgment of the Court of Appeal in Gdańsk of 31 May 2016, ref. no. V ACa 877/15, Lex no. 2144729.

Ombudsman, who is the administrator of the Vaccination Compensation Fund, is a central government administration body [Jagielski 2022, 27-34].

Before moving on to further discussion, it should be noted that the Fund's revenues come from many independent sources. First, these are obtained from payments by entities that have concluded an agreement with the State Treasury for the supply of protective vaccines and which are obliged, within 21 days from the date of this agreement, to make a payment to the Fund's bank account in the amount of 1.5% of the gross value of this agreement. Another source of revenue is the interest earned on the Fund's bank account. Third, the Fund's revenues include interest on late payments from entities that have concluded an agreement with the State Treasury. The fourth source are fees for compensation applications. These amount to PLN 200. The fifth source are payments from the state budget transferred in a given financial year, if it is necessary to supplement the Fund for the payment of awarded compensation. The Fund also obtains its financial resources from inheritances, bequests, and donations, among others.

It is characteristic that the Fund's revenues come from entities supplying vaccines for the purposes of mandatory protective vaccinations against diseases listed in the regulation issued under the authorization arising from Article 17(10) of the Prevention Act – currently in the Regulation of the Minister of Health of August 18, 2011 on mandatory vaccinations.[12]

Therefore, the obligation to make payments applies to suppliers of vaccines [Bosek 2021, 105-18] delivered for the prevention of selected diseases, in the event of a risk of their spread, and for ad hoc vaccination campaigns. They are indicated in the implementing regulations issued pursuant to Article 46(4)(7) of the Prevention Act This authorization exhausted the scope of the regulation of the Minister of Health of March 20, 2020 on the declaration of an epidemic on the territory of the Republic of Poland, which introduced the obligation to undergo protective vaccinations against Covid-19,[13] applicable to groups of people listed in this regulation (e.g. people practicing a medical profession). Vaccine suppliers are, therefore, obliged to make a payment to the Fund to provide preventive vaccinations to these professionals.

The diseases are listed in the implementing rules issued under the delegation contained in Article 3(4)(2) of the Prevention Act. Currently, such calculation is included in the following regulations of the Minister of Health: 1) of April 6, 2009 on methods of preventing meningococcal infections;[14] 2)

[12] Regulation of the Minister of Health of 18 August 2011 on mandatory vaccinations, Journal of Laws of 2018, item 753 as amended.

[13] Regulation of the Minister of Health of 20 March 2020 on the declaration of an epidemic on the territory of the Republic of Poland, Journal of Laws item 491, act repealed.

[14] Regulation of the Minister of Health of 6 April 2009 on methods of preventing

of September 6, 2016 on the methods of preventing measles;[15] 3) of December 31, 2020 on the methods of preventing Covid-19;[16] 4) of March 25, 2022 on the methods of preventing infections or infectious diseases constituting a particular threat to public health in connection with the armed conflict on the territory of Ukraine.[17]

It is worth noting that the first system for compensating adverse events caused by compulsory vaccinations was established in France in 1964, followed by Germany in 1971, Japan in 1976, the UK in 1979, and the USA in 1988. In Europe, the Fund's revenues also come from various sources. In Finland, for example, the vaccination compensation fund is financed from health insurance contributions. However, there are models in which compensation is paid directly by hospital facilities financed from the state budget, as well as ones in which the fund is operated by insurance companies. As an example, the system in Denmark was established in 1992 and initially covered only hospitals owned by the state or local governments. Primary health care was included in the compensation system only in 2004, and as of 2021, it expanded covers cases from other European countries. In Belgium, which had an ambitiously designed system covering all health care, the compensation system became inefficient from the very beginning. A vaccination compensation fund has also been in place in the Czech Republic since 2020 [Budzisz 2023].

5. ACTIONS TAKEN BY THE PATIENT OMBUDSMAN TO EXAMINE COMPENSATION APPLICATIONS

Pursuant to Article 17(f) of the Prevention Act, the Ombudsman has access to medical documentation necessary to consider a compensation application, including documentation regarding vaccination entitling to submit compensation application and the applicant's treatment [Haberko 2021, 298-99] collected in the electronic medical records system, as well as data and information contained in medical registers. Panel members are authorized to access the documentation by the Ombudsman. This means that the Panel processes the documentation collected in connection with the procedure for granting compensation to the extent necessary to prepare an opinion on the occurrence

meningococcal infections, Journal of Laws No. 56, item 465.

[15] Regulation of the Minister of Health of 6 September 2016 on the methods of preventing measles, Journal of Laws item 1418.

[16] Regulation of the Minister of Health of 31 December 2020 on the methods of preventing COVID-19, Journal of Laws of 2021, item 10.

[17] Regulation of the Minister of Health 25 of March 2022 on the methods of preventing infections or infectious diseases constituting a particular threat to public health in connection with the armed conflict on the territory of Ukraine, Journal of Laws item 681.

of an adverse event listed in the Summary of Product Characteristics after the administration of a vaccine or vaccines, and the effects of such an event.

Moreover, the data provided include: name and surname, date of birth, national identification number, and if the person has not been assigned this number – the series and number of the passport, or the identification number of another document with personal details – address of residence, health data, and other information necessary to supervise the occurrence of vaccine adverse events, according to the up-to-date medical knowledge. Documentation collected or prepared for the purposes of, or in connection with, the procedure for granting compensation is kept by the Patient Ombudsman for a period of ten years, starting from the end of the calendar year in which the compensation application was submitted. Moreover, it should be emphasized that the Patient Ombudsman is the controller of the data contained in the documentation collected and prepared for the purposes of, or in connection with, the procedure for granting compensation.

A solution where the Patient Ombudsman decides on the substantive issues regarding compensation is clearly preferable, and for a number of reasons. First, the institution is undoubtedly a specialized body and has, ab initio, comprehensive empirical knowledge due to the exercise of its powers. Second, it also makes decisions within the framework of the Code of Administrative Procedure, which provides appropriate guarantees of the procedural rights of the interested party. Third, it guarantees expediency and limits mistakes. Therefore, the powers of the Patient Ombudsman in substantive issues regarding compensation are absolutely justified and necessary. It is difficult to imagine another authority having equivalent powers. Such a solution would certainly not be beneficial or desirable for applicants.

6. THE REQUIREMENT FOR THE PATIENT'S CONSENT TO UNDERGO VACCINATION AGAINST COVID-19 AS A PREREQUISITE FOR THE LEGALITY OF A MEDICAL INTERVENTION

The patient's consent [Świderska 2007, 56] to vaccination is a prerequisite for the legality of such a medical intervention. In the absence of consent, medical practitioners may face criminal liability under Article 192 of the Penal Code. In this context, however, we may recall the view that "The issue of consent to vaccination is debatable." The courts indicate that in this case, the patient cannot exercise the right to refuse health care services under Article 16 of the Act[18] because this right is excluded in cases

[18] Act of 6 November 2008 on Patients' Rights and Patients' Ombudsman, Journal of Laws of 2024, item 581.

where separate provisions provide otherwise (Article 15 of the Prevention Act). This is the case, among others, in relation to mandatory vaccinations under the Prevention Act.[19] Although according to the literature, the Prevention Act is silent on this subject, one could hardly say that it stipulates otherwise in relation to the Act on patients' rights and the Patient Ombudsman [Augustynowicz and Wrześniewska-Wal 2013, 122-23].

Nevertheless, this is a specific regulation whose purposive interpretation allows for the conclusion that it excludes the patient's right [Bagińska 2013, 3] to refuse consent to vaccination. Legal commentators even present the view – in my opinion, too far-reaching, such as the one offered by N. Karczewska-Kamińska [Karczewska-Kamińska 2018, 5] – that "in the case of compulsory vaccinations of minors, the consent of the legal representative is not required, as it is about fulfilling an obligation" [Boratyńska 2013, 74]. However, it is difficult to agree with this view, since vaccinations [Safjan 2004, 27] are, according to the Family and Guardianship Code, important matters for the child and therefore the consent of statutory representatives is required.

Moreover, this thesis is justified by the existing legal regulations, according to which, as provided for in the Regulation of the Minister of Health on mandatory preventive vaccinations, a medical qualification examination and mandatory protective vaccinations for a person who is under six years of age are performed in the presence of a person who has legal custody of that person or an actual guardian within the meaning of Article 3(1)(1) of the Regulation. In the case of minors over six years of age, the presence of the above-mentioned persons is not necessary, provided that their written consent and information on health conditions that may constitute a contraindication to vaccination have been obtained (para. 7(1) and (2) of the Regulation). *A contrario*, accepting such a view as valid would constitute a denial of the applicable legal regulations referred to above.

The group of people without full legal capacity includes both minors (as a rule, up to 18 years of age) and people who have already reached the age of majority [Bączyk-Rozwadowska 2013, 182] but have been incapacitated. Those responsible for fulfilling the discussed obligation to undergo vaccinations [Paszkowska 2006, 15-21] will usually be the parents of the minor (if they have the so-called parental authority), a legal guardian appointed by the court, or the actual guardian. The subjective scope of the concept of actual guardianship was defined in the Act of November 6, 2008 on patient rights and the Patient Ombudsman. An actual guardian is a person who, without being statutorily obliged to do so, provides permanent care to a patient who requires such care due to their age, health, or mental

[19] See judgments and see judgment of the Provincial Administrative Court in Krakow of 16 April 2013, ref. no. III SA/Kr 1104/12, Lex no. 1326297.

condition. For example, it may be a family member [Jaworska 2017, 60-72] (grandmother, aunt) who takes care of the minor when their parents cannot be the caregivers. It is important, however, that this care should be permanent and not incidental or short-term. What is more, pursuant to Article 109 of the Family and Guardianship Code, if the child's well-being is at risk, the guardianship court will issue appropriate orders and, in particular, may oblige the parents and the minor to take specific actions.

However, it is difficult to agree with M. Boratyńska's opinion that "The provision has a very broad structure and is independent of the procedure for suspending or removing parental authority. It provides the guardianship court with the power to act quickly, avoiding lengthy proceedings. The court may initiate a case *ex officio* (Article 570 of the Code of Civil Procedure) based on a notification from any person. Therefore, there are no obstacles to appointing a guardian just to take the child for compulsory vaccinations" [Boratyńska 2013, 74]. This argument is supported by the fact that although Article 109 of the Family and Guardianship Code does not refer directly to the concept of "violation of the child's best interests", there is no doubt that in this respect, the guardianship court is obliged to take actions aimed primarily at protecting the interests of the youngest person. The court's action will consist not only in preventing further negative effects of a given situation, but also in limiting the irregularities that have already occurred [Długoszewska 2012, 30]. Therefore, it is unclear whether appointing a guardian is justified only for the purpose of taking the child for compulsory vaccinations, or whether the purpose of appointing the guardian should be of primary concern.

If a responsible person who is a legal representative [Fiutak 2017, 155-69], a legal guardian, or an actual guardian evades the fulfillment of a statutory obligation [Staniszewska 2018, 197-201], they may be subject to indirect coercion [Augustynowicz and Czerw 2013, 35-51]. The position presented by E. Zielińska, that "the concept of *compulsory treatment* should be understood as the obligation to undergo treatment, and failure to comply with it is sanctioned by the use of a measure of direct coercion and should be distinguished from the ordinary obligation to undergo medical activities, e.g. compulsory vaccination, which does not involve the use of direct coercion, but only the imposition of financial sanctions" [Zielińska 2001, 371], seems to be appropriate. And although direct coercion consisting in immobilization, holding or forced administration of a drug does not directly apply to vaccinations, it can only be used in two cases. The first case applies when the person evading the obligation [Danecka 2018, 91] is a suspected person or has been diagnosed with a particularly dangerous or highly infectious disease that poses a threat to the health or life of other people. This solution should be assessed as appropriate due to the obligatory nature of direct coercion in the context of combating infectious diseases, including Covid-19.

However, indirect coercion may be applied by a family doctor and involves submitting quarterly reports on vaccinations to the state district sanitary inspector. The second section of this form contains information on the list of people who evade the obligation to vaccinate their children. From a legal point of view, there may be doubts as to whether such a solution does not constitute a violation of medical confidentiality, and whether it is sufficient to regulate this issue by law. By analogy, these legal solutions can also be applied to vaccinations against Covid-19, and it should be clearly stated that only the lack of health contraindications to their implementation should justify the refusal to vaccinate.

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THE EU4HEALTH PROGRAMME WITH REGARD TO THE CURRENT NEEDS FOR MEDICAL EQUIPMENT IN THE POLISH HEALTH CARE SYSTEM

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Abstract. The European Union Health Programme is a response to the crisis caused by the COVID-19 pandemic. The impact of the pandemic was felt by all the health systems of individual European countries, affecting both patients and medical and administrative staff. The fundamental premise of the programme is to strengthen the resilience of the health systems of the EU member states by undertaking activities strongly focused on long-term health problems. In this respect, one key activity is the European Commission's recommendation on using only safe medical equipment, which is to be achieved by 2028. This article presents the objectives of the aforementioned programme and, more specifically, the guidelines concerning medical infrastructure and apparatus in the context of the current needs of the Polish health care system.

Keywords: medical law; health care financing; quality of health care; patient safety; health care system; participants in the health care system.

INTRODUCTION

One of the key advantages of the European Union Health Programme is its acceleration of the process in which the efficiency of the health systems of EU countries is improved, in particular in the post-pandemic period, which cannot be achieved through activities undertaken at national level alone.[1] In addition, the programme supports and complements national policies to promote and improve human health and safety in Europe, and ensures that health is protected across all EU activities, in line with the 'One Health' approach, according to which human health is closely connected with animal health and the environment (Article 2(5)). This approach also promotes the elimination of bad practices found in national health systems of the EU

[1] Regulation (EU) 2021/522 of the European Parliament and of the Council of 24 March 2021 establishing a Programme for the Union's action in the field of health ('EU4Health Programme') for the period 2021-2027, and repealing Regulation (EU) No 282/2014. O.J. L 107/1, vol. 64, 26 March 2021, https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:32021R0522 [accessed: 24.03.2025].

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countries by standardising and strengthening the protection and improvement of human health and life in the European Union [Marcinkowski 2024, 218].

In the described context, it is necessary to point out the basic legal regulations and documents concerning health care in Poland, in which the creators of the system outlined its course of development and strategic goals, as well as the tools used to attain them. From the point of view of this article, special attention should be paid to the document entitled "Healthy Future: Strategic Framework for the Development of the Health Care System for 2021-2027, with an Outlook to 2030."[2] Being part of the government's policy,[3] this document is a follow-up to the document entitled "Policy Paper for Health Care 2014-2020: National Strategic Framework,"[4] which, importantly enough, covers the whole system and not only European Union funds. Therefore, it should also be noted that the entry into force of the Medical Fund Act of 7 October 2020[5] played a key role in the improvement of the quality of health care and patient safety in Poland. Within the framework of the implemented financial mechanism, investments in Polish health care may be made in the following areas: "1) prevention, early detection, diagnosis and treatment of civilisation diseases, including cancer, infectious diseases and rare diseases; 2) health care infrastructure influencing the quality and availability, as well as safety, of the health care services provided; 3) access to high-quality health care services; 4) development of the health care system by focusing on patients' needs, with particular emphasis on improving the quality of life of patients and their families; 5) provision of health care services to persons up to the age of 18; 6) provision of health care services to beneficiaries outside the country" (Article 3 of the resolution).

In the light of the above, it is legitimate to ask whether the implementation of the EU4Health Programme for 2021-2027 and national solutions, including public policy and an additional financial mechanism in Poland, after more than halfway through its operation, has proved effective in terms of medical facilities' provision of medical equipment that guarantees high quality of health care services and patient safety. In order to answer this question, in addition to identifying the objectives of the EU Programme for Health and selected aspects of the Polish health care system, available data

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[2] The document was adopted by Resolution No. 196/2021 of the Polish Council of Ministers of 27 December 2021 on the Establishment of a Relevant Public Policy. See *Zdrowa Przyszłość. Ramy strategiczne rozwoju systemu ochrony zdrowia na lata 2021-2027, z perspektywą do 2030 r.*, https://www.gov.pl/web/zdrowie/zdrowa-przyszlosc-ramy-strategiczne-rozwoju-systemu-ochrony-zdrowia-na-lata-2021-2027-z-perspektywa-do-2030 [accessed: 24.03.2025].

[3] See Article 4(1) and Article 4(7b) of the Resolution of 6 December 2006 on the Principles of Development Policy, Journal of Laws of 2021, item 1057.

[4] See https://www.zdrowie.gov.pl/uploads/pub/pages/page_846/text_images/Krajowe%20ramy%20strategiczne%20www.pdf [accessed: 24.03.2025].

[5] Journal of Laws of 2020, item 1875.

from analyses carried out by public law entities, including recent inspections carried out by the Supreme Chamber of Control (NIK), will be examined.[6]

1. THE OBJECTIVES OF THE EU HEALTH PROGRAMME

The EU4Health Programme was established by Regulation 2021/522 of the European Parliament and of the Council (Article 3),[7] which defines the general (Article 3) and specific (Article 4) objectives as well as the rules and regulations of EU funding for the period 2021-2027.

Among the general objectives, the EU legislators list four main activities: (1) improving and promoting health in the EU; (2) protecting EU citizens from serious cross-border health threats; (3) improving medical products and devices, including crisis-relevant ones; (4) strengthening health systems by improving their resilience and resource efficiency. The programme aims to achieve these general objectives through specific objectives.

The first specific objective is to improve and promote health in the EU. In this respect, the programme supports disease prevention and health promotion activities as well as international health initiatives and cooperation.

The second specific objective is to work towards strengthening the capacity of the EU member states and the European Union itself to respond to cross-border health threats. Through this objective, the programme shall support the prevention of, preparedness for and rapid response to cross-border health threats, along with complementation of national stockpiling of essential crisis-relevant commodities and creation of reserves of medical staff, health professionals, and auxiliary personnel.

The third specific objective is to contribute to activities undertaken in response to increasing demand for health care and to support more equitable protection of public health by promoting greater availability, supply and affordability of medical products and devices, including crisis-relevant ones.

The final objective set out in EU law is to improve the resilience and resource efficiency of the health systems of the member states. To this end, the EU Health Programme supports actions contributing to the strengthening of health databases and digital tools and services, also fostering the digital transformation of the health systems. In addition, it envisages increased access to health care, the development and implementation of EU health legislation, along with effective health policies pursued at a trans-European level.

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[6] The Supreme Chamber of Control (NIK) is the most important and independent instrument of state control, whose activities are regulated by the Act of 23 December 1994 on the Supreme Chamber of Control, Journal of Laws of 2022, item 623.

[7] O.J. L 107/1.

Consequently, the adoption and implementation of the EU Health Programme should be considered an important and welcome step towards the standardisation of the health systems of the European Community countries.

2. SELECTED ASPECTS OF FINANCING THE HEALTH CARE SYSTEM IN POLAND

Due to the different level and scope of the health care services provided in the EU countries, which mainly results from different financing of the health care systems in individual member states, it is necessary to implement community programmes in order to eliminate significant disproportions in this sector.

In Poland, as in other countries of the European Community, there is a system of public health insurance.[8] According to official data, in 2021, total expenditure on health care in Poland amounted to 6.4% of GDP, which is one of the lowest rates in Europe and much lower than the EU average of 11.0%.[9] In these statistics, Poland is only ahead of Bulgaria and Romania.[10]

The low financing of health care in Poland is reflected in the per capita expenditure on health care. In 2021, this indicator stood at EUR 1,733 (adjusted for the difference in purchasing power) – one of the smallest amounts in the EU.[11] In comparison, in 2021, health care expenditure in Germany was the highest in the EU and significantly higher than the EU average, at EUR 5,159 per capita.[12]

According to the amendment to the Act on Publicly Funded Health Care Services, in 2027 health care expenditure in Poland will be no less than 7% of GDP.[13] However, given the steady growth of health care spending in European countries, this will not bring Poland's funding levels closer to the European average.

Discussing the financing of the health care system in Poland in comparison with other European countries, it should be emphasised that this system is essentially oriented towards hospital care, as evidenced by the high number of hospital beds. In 2019, there were 6.2 beds per 1,000 inhabitants, with the

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[8] Such a system is also to be found, for example, in Norway, Portugal, Slovenia, and Hungary.

[9] For example, in Germany it is 12.9%. See *Germany: Country Health Profile 2023*, State of Health in the EU, OECD Publishing, Paris, p. 9, https://doi.org/10.1787/21dd4679-en [accessed: 24.03.2025].

[10] See *Polska: Profil systemu ochrony zdrowia 2023*, OECD Publishing, Paris, p. 9, https://doi.org/10.1787/b12d3d03-pl [accessed: 24.03.2025].

[11] Ibid.

[12] See *Germany: Country Health Profile 2023*, p. 3.

[13] See Article 131c of the Act of 27 August 2004 on Health Care Services Financed from Public Funds, Journal of Laws of 2024, item 146.

EU average being 4.9 beds.[14] In this context, special attention should be paid to the medical equipment used in Poland's health care facilities, which, in the case of hospital treatment, is an essential tool in the diagnosis and treatment of patients, corresponding to the quality of the health care services provided and patient safety. Undoubtedly, the low level of financing of Polish health care results not only in the limited possibilities of medical institutions to purchase modern medical equipment, but also, among others, the performance of diagnostic tests on worn-out equipment in need of replacement, which, in turn, may be the cause of medical mistreatment [Kunert 2019, 168-69]. Therefore, it is vital to implement the EU Health Programme in order to support the domestic activities in the health sector.

It should be noted that the significant difference between the financing of health care in Poland and other EU countries has a negative impact on the process of integrating the member states' health care systems. In order to attempt to develop common health measures in the EU, it would be necessary to equalise the financing of health care systems in all the countries of the European community. An effective solution, for example, would be for the European Commission to set a percentage of GDP expenditure on health care, which would oblige the countries of the European community to maintain a minimum level of health care provision.

In conclusion, health care should be a priority within the European community, especially bearing in mind the freedom of movement and residence of EU citizens within the territory of the member states.

3. MEDICAL EQUIPMENT

The public strategy entitled "Healthy Future: Strategic Framework for the Development of the Health Care System for 2021-2027, with an Outlook to 2030" identified, among other things, the problem of aging equipment, resulting from health care institutions' underinvestment and the high cost of specialised medical apparatus, as well as the frequent inability to install it due to the limitations of the existing building infrastructure.[15] In addition, it was pointed out that the amount, as well as the quality, of medical equipment in use was unsatisfactory,[16] because "the age and technical condition

[14] See *Polska: Profil systemu ochrony zdrowia 2023*, p. 16.

[15] Ibid., p. 104.

[16] As stated by the authors of the document while referring to the study "Map of Health Needs for 2022-2026": Announcement of the Minister of Health of 27 August 2021 on the Map of Health Needs. Journal of Ministry of Health 2021, item 69, "In 2019, The Republic of Poland was below the average for selected European countries in terms of the density of CT scanners, MRIs and angiographs. It can be observed that for CT scanners and angiographs, the Republic of Poland is ranked 14th among the countries listed. The situation is much worse for MRI and PET scanners – in these cases the Republic of Poland is ranked 18th and 19th respectively. Ibid.

of the equipment owned by hospitals is likely to generate substantial additional costs, both in terms of repair service and operational downtime. Using worn-out equipment negatively affects the quality, effectiveness, and efficiency of the health care services provided, as well as the financial efficiency of medical facilities."[17] The authors of the report also pointed to the need for investment in new equipment, which is related, among other things, to the continuous development of medical technology, the implementation of new procedures and therapies, and legal requirements. They were also right to note the correspondence between the use of worn-out and old medical equipment and the risk of making diagnostic errors and using inappropriate and expensive therapies.[18] Additionally, taking into account the forecast contained in the document "Map of Health Needs for 2022-2026," the percentage of equipment to be replaced in 2025 due to being classified as "old" ranges from 65% for linear accelerators to 90% for sonographs.[19]

The data cited above, which include a forecast of the state of medical equipment, make it possible to analyse the extent to which the objectives set in the strategy have been achieved, taking into account the inspections of safe medical equipment carried out by the NIK.

In 2024, the NIK examined the functioning of voivodship hospitals in Poland.[20] Narrowing down the results of the inspection to the subject of the hospitals' observance of the rules of safe use of medical equipment in their provision of health services, it should be noted that, despite the existence of legal regulations of statutory character on this subject,[21] several irregularities were found. Having scrutinised a sample of 160 pieces of equipment of the highest value that constituted the apparatus of hospital wards with the highest number of beds in a given hospital, with the aim to inspect the two largest wards (five pieces of equipment from each ward), the NIK discovered that the inspections of nine pieces of equipment in four hospitals had been performed with a delay of up to eight months.[22] In the subsequent report, the following delays were specified: a mobile defibrillator with a cardiometer (14 days), a chest compression system (14 days), an immunochemical analyser (22 days), a neuronavigation system (8 months), an X-ray machine (3 months), a neurosurgical navigation system (11 days), a surgical microscope (3 days), an echocardiogram (7 days), and an operating table

[17] Ibid.

[18] Ibid.

[19] See *Mapa potrzeb zdrowotnych na lata 2022-2026*, p. 503.

[20] See the report on the results of the inspection entitled "The Functioning of Voivodship Hospitals", P/24/044, 20.02.2025, https://www.nik.gov.pl/kontrole/wyniki-kontroli-nik/kontrole,25052.html [accessed: 11.03.2025].

[21] See Article 63 of the Act of 7 April 2022 on Medical Products, Journal of Laws of 2022, item 974.

[22] See information on the inspection in "The Functioning of Voivodship Hospitals", p. 22.

(38 days). The hospitals accounted for those shortcomings, among other things, by changes in the administrative and technical staff responsible for the medical apparatus, as well as the implementation of new systems for keeping records of such apparatus.[23] What was the most important, however, was the fact that, despite those shortcomings, the abovementioned equipment was used in the provision of health services, jeopardising the patients' health and life.[24] Undoubtedly, the irregularities identified in the operation of medical equipment alone constituted a risk of medical (diagnostic) error, or, more precisely, organisational error [Zoll 1988, 72-73].

Indeed, the obligation to secure the efficiency of all the equipment used in the examination of the patients rests with managers of health care facilities, who also bear responsibility for failing to do so [Marek 2007, 98]. However, in practice, it is difficult to assess the performance of the workers of the Polish health care sector with regard to their observance of organisational procedures due to the lack of management standards [Dudek and Dudek 2012, 21]. Moreover, from the patient's perspective, it is difficult to imagine a situation in which they are diagnosed by means of apparatus that is not technically checked and approved for use. Any gaps in the technical passports of medical devices, including the date from which they may be used or the date of their next technical inspection, are unacceptable and should be identified and filled by managers of health facilities. Accordingly, a health facility that conducts specialised examinations should have adequate technical and human resources [Guzik-Makaruk, Truskolaska, and Wojewoda 2021, 174]. In modern medicine, the starting point for the doctor to make a diagnosis of the patient, to be followed by a suggested course of suitable medical treatment, which depends on the patient's consent, is most often preceded by an examination with the use of appropriate and technically advanced medical equipment. Allowing situations in which doctors diagnose their patients using uncertified medical apparatus not only endangers the patients' health and life but also violates the basic principle of providing health services in accordance with the current standards and requirements of medical practice.[25] Such a violation may result in civil liability for damages caused to patients as a consequence of using faulty medical equipment [Wąsik 2020, 67].[26]

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[23] Ibid., p. 10.

[24] "In 2024, the technical inspection of the device with inventory number 802/003542 was found to have been delayed by 13 days, resulting in 78 patient examinations being performed with this device without a valid technical inspection," ibid., p. 22.

[25] See the Decision of the Supreme Court of 11 May 1983, ref. no. No. IV CR 118/83, OSNCPiUS 1983, No. 12, item 201.

[26] For more on this subject see Nesterowicz 2012 and the Lex System of Legal Information at https://sip.lex.pl/komentarze-i-publikacje/glosy/glosa-do-wyroku-sn-z-dnia-11-maja-1983-r-iv-cr-118-83-386107484 [accessed: 12.03.2025].

In another report, entitled "Oncological Treatment,"[27] the NIK identified, among other things, an unreliable inventory of medical apparatus,[28] including equipment which had been withdrawn from use and written off the fixed asset register,[29] in the attachment to a contract for the provision of health services with a branch of the National Health Fund (the resources section), as well as erratic technical documentation for the laminar chamber in a cytostatic laboratory.[30] The report also states that inspections carried out in the medical facilities offering radiological treatment protection revealed that basic quality control tests for X-ray apparatus or auxiliary equipment had not been carried out to the full extent.[31]

In addition, according to a survey of the Polish health care system within the framework of the 2nd edition of the Safe Hospital is Safe Patient certification,[32] almost half of the hospitals admit that safe equipment constitutes less than 50% of the total equipment they have, and only 13% of the hospitals admit that they have more than 90% of safe equipment.[33] Moreover, 11% of the hospitals do not use safety equipment at all in the drug preparation procedure. At the same time, it should be emphasised that determining the actual status of safe medical equipment is difficult, as 29% of Polish medical facilities do not keep relevant inventories.[34]

In the light of the above, it can be concluded that, despite the implementation of long-term financial programmes that enable health care facilities to retrofit and replace worn-out medical equipment, a level of complete safety similar to that of the developed countries of the European Community has still not been achieved.

4. GENERAL TERMS AND CONDITIONS OF HEALTH CARE CONTRACTS WITH REGARD TO SAFE MEDICAL EQUIPMENT

In the context of the subject under analysis, it should be noted that according to Article 7(1) of the Regulation of the Minister of Health

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[27] See *Informacja o wynikach kontroli „Leczenie onkologiczne"*, KZD.430.005.2023, No. 111/2023/P/23/044/KZD, Warszawa 2024, https://www.nik.gov.pl/plik/id,30368,vp,33408.pdf [accessed: 11.03.2025].

[28] Ibid., p. 77 and 80.

[29] Ibid., p. 78.

[30] Ibid.

[31] Ibid., p. 66.

[32] See *Bezpieczny Szpital To Bezpieczny Pacjent. Podsumowanie II Edycji Programu Certyfikacyjnego Koalicji Na Rzecz Bezpieczeństwa Szpitali*, Koalicja na rzecz Bezpieczeństwa Szpitali, Warszawa 2023, https://deklaracja-bezpiecznyszpital.pl/wp-content/uploads/2023/11/Koalicja-na-rzecz-Bezpieczenstwa-Szpitali_Raport_2023_HR.pdf [accessed: 11.03.2025].

[33] Ibid., p. 17.

[34] Ibid., p. 18.

of 8 September 2015 on General Terms and Conditions of Contracts for the Provision of Health Care Services (GTCs),[35] the providers are obliged to offer their services in premises that meet the requirements set out in the regulations issued on the basis of the Act of 27 August 2004 on Health Care Services Financed from Public Funds,[36] regulations on medical practice, and the detailed terms and conditions of contracts defined by the President of the Fund pursuant to Article 146(1) and (2) and Article 159(2) of the aforementioned act. These premises should be equipped with certified medical apparatus inspected by authorised entities on a regular basis. Referring to the regulation in question, it should be emphasised that health care services must be provided with due diligence (Article 3(2) CTE), ensuring their high quality (Article 3(4) CTE), as illustrated by the mandatory use of a quality questionnaire defined by the President of the National Health Fund (NFZ) pursuant to Article 146(1) and (2) and Article 159(2) of the Health Services Act, as well as perioperative documentation referred to in regulations issued pursuant to Article 30(1) of the Act of 6 November 2008 on Patient Rights and Patient Ombudsman.[37]

In conclusion, it should be emphasised that in a situation in which a health care facility does not have at its disposal safe medical equipment, it not only jeopardises the patient's health and life but also exposes itself to the risk of legal liability for failing to comply with the general terms and conditions of contracts on the provision of health care services. It is more than obvious that all the people and institutions responsible for provision of health care services in Poland and the medical entities providing health care services in Poland should first of all be guided by the fundamental constitutional principle of the citizens' right to health care.

CONCLUSION

The analysis carried out in this paper has led the author to the following conclusions:

1. The general level of health care financing in Poland is below the European average, which has a direct impact on the level of financing the replacement of worn-out equipment and the purchase of new medical equipment in health care facilities.
2. The legal regulations concerning the provision of health services financed from public funds with respect to the obligation of health care

[35] Journal of Laws of 2023, item 1194.
[36] Journal of Laws of 2024, item 146.
[37] Journal of Laws of 2024, item 581.

facilities to be equipped with safe medical equipment are appropriate. Nevertheless, these regulations are not always observed.

3. The results of the most recent inspections of health care facilities carried out by the NIK clearly show that current state of medical equipment in Poland is far from satisfactory, as evidenced by the fact that the medical apparatus used in those facilities is often outdated or uncertified, endangering patients' health and life.
4. The irregularities identified by the NIK confirm that the inspected health care facilities breached legal regulations, including the general terms and conditions of contracts for the provision of health care services (GTCs). The violations in question included the use medical equipment that did not have all the necessary certificates or/and was not inspected by authorised entities on a regular basis, which made it unfit for use. The health care facilities at which such irregularities were found not only acted unlawfully but also negligently, failing to ensure the suitable quality of the services provided and patient safety.

In the light of the conclusions drawn above, it is reasonable to ask the question about the actual retrofitting and replacement of medical equipment in Polish health care facilities entities as specified in the European Commission's guidelines, according to which the medical apparatus of the member states is to be entirely safe by 2028. Answering this question, one should advocate taking full advantage of the opportunities offered by the EU Health Programme for 2021-2027, for example by securing to the greatest extent possible investment in this area. Furthermore, the level of public funding of health care in Poland should be raised to at least the European Union average as soon as possible.

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EFFICIENCY: A PARADIGM OF PUBLIC LAW AND PRIVATE LAW*

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Abstract. The present study examines the paradigm of state efficiency, and by extension, the efficiency of law, as a foundational assumption. This assumption posits that the law (and the state) should fulfil its functions and achieve its goals in a manner that genuinely safeguards fundamental rights, operates swiftly and cost-effectively, and upholds quality standards (respecting core values). Efficiency is therefore an inherent element that defines the phenomenon of the state and law. The author argues that the law constitutes one of the fundamental pillars of a democratic state, and as such, it also defines the efficiency and causality of the state.

Keywords: effectiveness of law; law paradigm; public law; private law.

1. THE DIVISION OF LAW INTO PUBLIC AND PRIVATE LAW – ARCHAISM OR NECESSITY?

In contemporary discourse, the concepts of efficiency, effectiveness, causality, and other related ideas frequently emerge in discussions about the state, the law, and the actions of the individual. These issues serve as an ever-precise benchmark for the actions of public bodies and other entities. The concept of efficiency, particularly when considered from an economic perspective, gives rise to a number of questions. Should the law, by definition, be *efficient*? How is the concept of efficiency understood when confronted with emerging social and cultural trends, advancements in technology (such as artificial intelligence [AI]), or crises? Does efficiency take precedence over quality and underlying values? Can law, in its traditional view, still achieve effectiveness? Does achieving legal effectiveness necessitate a shift from *ossified* rules toward post-classical frameworks of *dialogue* and the art of argumentation? Does the distinction between public

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and private law remain relevant in an era characterized by the redefinition of reality and the relationships between subjects, which are based on models different from those of previous years? Answering these questions is crucial in an era of rapidly evolving social and technological realities that challenge established economic foundations and long-standing legal institutions.

The traditional view of Roman jurists, such as Ulpian, is that public law secures and promotes the supra-individual public interest, potentially involving the state and society. This perspective emphasises that public law achieves its goals and functions through commands and prohibitions enacted for the common good, emanating from statutes and public bodies vested with the power to enforce compliance through legal and physical coercion. As Ulpian states, "*Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quedam privatum*. Public law is that which pertains to the system of the Roman state, while private law is that which (pertains to) the benefits of individuals: for there are some (norms) generally useful, others again private" [Pogonowski 2024, 214ff]. The goal of this activity is the common good – based on accepted values creation and looking at the individual through the prism of the group (family, society). In light of the potential for interference in the situation of subordinated subjects, it is imperative that both the authorities (public entities) and the subordinated are aware of the extent of their authority, duties and associated sovereign powers of the public administration. Consequently, public-legal relations are founded upon the principle of legalism. Sovereign bodies are entitled to exercise authority only in matters where the law expressly provides for it. This authority is to be exercised in accordance with the tools and institutions expressly permitted by the law [Barker 2018, 9ff]. The principle of legalism has for some time before our eyes acquired completely new designations and dramatic actuality. It is complemented by the principle of helping the weak – the welfare state, state subsidiarity, or proportionality [Jouannaud 2023, 35ff]. The state is not an enemy of the individual and their freedom; rather, it is tasked with securing it. This includes protecting the weakest subjects, creating a level playing field in the market and establishing conditions that facilitate the development and expansion of positive outcomes for all.

Private law focuses on defining, regulating, and safeguarding the realization of private interests, the existence, nature, and potential violations of which do not directly impact the performance of state functions, the circumstances of an indeterminate number of subjects, or the pursuit of the public interest in a broad sense. The protection of these rights (claims, interests, subjective rights) depends on the initiative of the free and interested individual, who autonomously chooses to safeguard their own interests in interactions with another equal subject. Private-law relations are based on

the principle of equality, autonomy and are governed by the maxim: what is not expressly forbidden – is allowed (e.g., the idea of freedom of contract). However, the autonomous individual is not a lonely island, the subjects of law function, realize their freedoms (interests) in the environment of others – equal to them. Thus, to balance and secure the possibility of action (sphere of freedom) amid sometimes conflicting interests or inherent inequalities (e.g., economic, intellectual, informational), public authority must intervene, moderate, guide, regulate, and, when necessary, impose penalties, even within the realm of *purely* private activities. This approach is also a reflection of the social (welfare) state – implementing the principles of social justice in its operation, which dominates in the European Union.

The division of law into public and private is necessary especially in times of methodological confusion, blurring of the foundations of the system of law (the values on which it is based) and its paradigms [van Kędzierski 2018, 5ff; Kustra 2008, 105ff]. J.S. Langrod stresses that the division between public and private law occurs everywhere, in particular, it is derived from the idea of separation of powers. Wherever the state appears, there appear also the instruments of its sovereign action. This division arises not only from abstract considerations and theoretical constructs but also from a practical assessment essential for delineating the necessary differences between the regimes governing subjects of power and private individuals [Langrod 2003, 55ff].

Thus, the aforementioned concept remains relevant today, meriting attention not only due to its inclusion in the works of Roman jurists – who, despite their reluctance to define it, articulated legal principles that provided intelligible and practical meaning for the protection of the individual, economic development, and governmental efficiency – but also because the criterion of *utility* and the concept of *interest*, emphasized during the in-depth debates on law in the 19th century, play an incresingly vital role in defining legal phenomena [Ihering 1877; Szpunar 1947, 18ff]. Debates over law, its purposes and functions, after all, never really die out.

The concept of *subjective right* – its understanding and the consequences of adopting a certain definition, are also attractive in public law (public subjective rights) [Jakimowicz 2002; Błachut 2002, 35ff; Wróbel 2015, 329ff; Kania-Chramęga 2021, 117ff]. Therefore, in order to resolve the complex issues of rights protection, including the fundamental concept of *abuse of right* and the core principle of proportionality, it is essential to consider the indicated division [Błaszczak 2018, 7ff]. It is also the foundation for newer methods of studying the law related, for example, to its economic analysis [Fabbi 2013].

A certain reflection of the division of law and also a paradox is that we observe the following side by side: the contractualization of public law (e.g., judicial, administrative proceedings) and the proceduralization (publicization) of private law [ibid.].

The *publicization* of law, recognized for years, is typically defined as the regulation of an increasing number of individual life areas and economic activities through public (administrative) law, thereby interfering with the right to property [Safjan 2012, 49ff]. An element of this trend is the *proceduralization* of law [Jakubecki 2023, 68ff; Helios and Jedlecka 2013, 11ff]. There is a perceived tendency to disrupt the balance among participants in legal transactions by disproportionately granting rights to certain groups (e.g., consumers, tenants) while imposing burdens on others (e.g., entrepreneurs, property owners). This dynamic distorts legal subjectivity and undermines the principle of equality before the law. However, it stems from certain basic assumptions – which must always underlie the law (state).

Mauro Cappelletti emphasizes, using the example of civil judicial law (classified as public law), that the result of an approach based on the idea of real, effective access to justice (law in action), is a *contextual* conception of law [Cappelletti 1993, 282ff]. Thus, instead of a one-dimensional conception in which law and the science of law are limited to the establishment of norms, a three-dimensional conception is noted. The first dimension reflects a social problem, need, or necessity that prompts legal intervention or the creation of a legal institution; the second dimension reflects a legal response or solution, or even a response that, in addition to norms, includes institutions and processes to satisfy that social need, problem or demand; and finally, the third dimension concerns the results or impact of such a legal response to a social need, problem, or demand. In this *environment*, alternative dispute resolutions (ADRs) are gaining prominence, aimed at *alleviating* the state's responsibilities in the realm of justice, as part of the broader phenomenon of the *privatization of public tasks* [Wrona 2023, 47ff].

2. THE PARADIGM OF EFFECTIVENESS OF LAW

As noted, the paradigm is a set of basic theories on the basis of which detailed theories are built, which are then subjected to processes of testing and verification. The role of the paradigm in the development of science is twofold. On the one hand, treated as *sacred* and inviolable, it can contribute to a regression in a particular field of science, and on the other hand, it is a determinant of scientific *craftsmanship* [Brycz and Dudycz 2010, 53ff; Niżnik 1979, 179ff; Biernat 2019, 21ff]. In this context, the term *paradigm* refers to the "accepted model" or "pattern" as described by Thomas C. Kuhn [Kuhn 1962]. The paradigm of state efficiency (from the Greek: παράδειγμα/ parádeigma, meaning an *example*, a *model* – a pattern, a desirable model) serves as a foundational assumption that the law (and the state) must fulfil its functions and achieve its goals in a manner that effectively secures fundamental rights – swiftly, cost-effectively, and while maintaining quality

in its actions (respecting core values). This paradigm is a crucial element that defines the essence of both the state and the law. Law as one of the pillars of a democratic state under the rule of law, therefore, also defines the efficiency, causality of the state [Spasowska-Czarny 2017, 179ff].

Effectiveness should therefore be understood broadly – as the achievement of the objectives of the law and the realization of its functions in the shortest possible time, using proportionate means (including costs), to the greatest extent possible (including economic) up-to-date and in accordance with the systemic assumptions [Kern 2007, 41; Chiarloni 2002, 153ff; Machelski 2018, 61ff; Doliwa 2022, 49ff]. Effective law leads to an effective state that realizes its duties.

It is also important to consider what the goals of the law and the state are in the 21st century, especially in an era of social and technological change and recurring economic crises. Without elaborating further on this key issue, it is necessary, following the preamble to the Polish Constitution, to point to the universal values that the state and the legal system secure: truth, justice, goodness, and beauty. Both the essence of the actions of all entities, the relationship between the authority and the citizen, as well as relations between individuals, should realize these ideas *in concreto* [Pogonowski 2021, 355ff]. This is because they are not mere meta-principles, but ideas defined, secured, and realized in each case or factual situation of the subject.

From this perspective, the paradigm of efficiency appears to be an indispensable component of the very essence of the law. It is difficult to envisage the creation of norms of conduct without the assumption of their rational implementation, that is, the achievement of goals and the performance of functions. After all, efficiency is a feature of any orderly human action aimed at a specific goal. It is not so much an entitlement as an obligation of public authority action. Given the above, it is also obvious that the paradigm of efficiency must be taken into account in the creation of the application (implementation) of the law by all entities (including: public bodies, courts).

One of the perceived dimensions of the emphasis on the efficiency of the law is the method of its study usually referred to as "economic analysis of the law – law and economics" [Schäfer, Ott, and Bełdowski 2024; Cooter and Ulen 2011; Araszkiewicz 2015, 176ff]. This trend gives rise to fundamental questions for those responsible for creating and applying the law in relation to economic efficiency. It is important to note that there are instances where economic justification does not align with the law. The efficiency of the law, in economic terms, is a fundamental aspect of distributive justice. This entails the achievement of the law's objectives and the fulfilment of its functions in a timely and cost-effective manner. Justice, too, must be efficient, and this efficiency must be fair (just *ad casum*) [Pogonowski 2021, 355ff]. The law's guarantee function, which secures and realizes

fundamental rights (including those enshrined in the Constitution), typically leads to complexity. Upholding equality, individual rights, and fair substantive and procedural laws – such as rights of subjects, duties of bodies, evidentiary standards, adjudication, and appeals – requires time and increase both individual and social costs. The proceduralization of law raises the question of whether the principles and values are as important as the cost and time required to protect them [Kern 2007, 41ff].

The effectiveness of law in shaping subjective rights (legally protected interests, including property) cannot be considered without addressing the fundamental effectiveness of formal rules governing the enforcement of rights by state bodies (such as the judiciary). This effectiveness is ultimately shaped by procedural justice, as well as by the competence and integrity of judges, officials, and citizens. They, along with good laws, determine the quality of the functioning of the individual and the implementation of the principle of an effective (and just) state.

An effective law, as noted by Jerzy Stelmach, has the following characteristics: it is effective; it should anticipate changes that may occur in socio-economic reality; it should be created and applied in such a way as to maximize social and individual wealth; it should take into account the assumption that its addressees are economically rational subjects (*homo oeconomicus*); it should enable the proper allocation of wealth to be carried out; it should strive for self-restraint (simplicity, conciseness); it should take into account tradition, already developed habits, accepted principles and commonly accepted standards; legal science should focus its attention on the study of *effective law* [Stelmach 2010, 960ff; Stelmach, Brożek, and Załuski 2007].

3. AN EFFECTIVE STATE

The effectiveness of the law is a pillar of state efficiency. Law, as a tool for securing individual freedom and development while advancing the public interest, forms the foundation of a democratic state governed by the rule of law.

The principle of subsidiarity asserts that the state should intervene only when necessary and only by means that are essential, particularly when individuals are unable to cope or when there is a need to secure and realize the public interest.

Proportionality in the means employed to create a space for freedom and uphold values (principles) entails not only the appropriate allocation of resources but also the avoidance of unnecessary consumption of public resources or expenditure beyond legitimate needs. These two principles co-define the need and scope of the authorities.

The principle of legalism is to provide guidance to the individual and a limit to the authority's power of wielding influence.

Equality, freedom, the limits of which are set by the freedom of another, solidarity, fairness, set the basis for relations between individuals [Chojnacka 2018, 26ff].

The dignity of the human being underlies and binds all these activities and domains, highlighting the purpose and responsibilities of the state and the law. The human person, as the pinnacle of creation, simultaneously defines the principles of equality, freedom, and the pathway to individual self-realization [Plich 2021, 205ff]. A personalistic approach to people and communities ensures that both the multiple needs of the individual and the state are seen.

The effective state implements all these assumptions, protecting the sphere of individual freedom and setting limits to intervene in the individual's essence – for the good of the whole [Stefaniuk 2011, 55ff].

4. EFFECTIVENESS OF THE LAW – SUMMARY

Law (*ius* and *lex*), as the cornerstone of the state and the guarantor of individual freedom and the realization of the common good, must be effective. This characteristic is inherently derived from its essence. Clarity, certainty, and accountability (quality) of the law are crucial components of efficiency, as they underpin the achievement of its goals and functions. The division of law into public and private categories serves an organizing function, enhancing the transparency and comprehensibility of the law for its recipients. This division is not merely a doctrinal construct; rather, it is *forced* by the provisions of the Constitution of the Republic of Poland, which establishes the relationship between the state (public interest) and the citizen (subject, private interest) based on principles distinct from those governing autonomous legal relations among equal subjects, where private interests are primarily realized. The state's task and the law's function are to adequately and proportionately balance these spheres, recognizing that the public interest also aims to create a safe *environment* for individual self-realization and the protection of personal interests.

In the context of ongoing redefinition of values, definitional and methodological ambiguity, and accelerated technological advancement, there is a pressing need to revert to foundational principles – those that, at first glance, appear straightforward yet serve to establish and guarantee a minimum standard of quality within the legal system. It is not a matter of empty reverence for tradition, but of taking proven patterns and building on them a new quality. The laws of the market alone are insufficient in this context,

as evidenced by successive crises, business failures, unemployment, and the human tragedies that accompany these definitions. Simultaneously, it is important to recognize that efficiency devoid of values (the axiology of purposes) resembles mercy without truth – it can ultimately be deemed harmful.

An effective, good law, created and applied by a good legislature and good judges and public authorities, guarantees the preservation of a state of real balance and the possibility of safe individual and social development. Thus, it is a guarantor of individual self-realization, harmonious social development, and an economy based on sound principles.

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TRANSFORMATION OF THE SECURITY SYSTEM OF CIVIL AIRPORTS IN TERMS OF THE AMENDMENT OF THE AVIATION LAW

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Abstract. Civil airports are an important piece of critical infrastructure but are constantly vulnerable to acts of unlawful interference. Therefore, since the beginning of the development of aviation, they have been the subject of increased concern throughout the international aviation community. This is reflected in the regulations on civil aviation activities and their protection developed by the International Civil Aviation Organization (ICAO) and the European Union (EU). Poland has adopted all the regulations on civil aviation, including airport security, enacted by these two organizations. This was reflected in the amendment of the Polish Aviation Law. The purpose of this article is to present the changes in the responsibility for conducting security checks under the Aviation Law. The introduced changes in the civil aviation security system in the Republic of Poland, including the system of civil airport security, have not reduced the state of security. Nevertheless, it should be noted that each security service in the face of the same threat, differently assesses the need for security, which may result in different actions. This makes it all the more important to constantly monitor the relevant aviation authority and services overseeing the work of private security companies.

Keywords: security; airport security; ICAO; European Union; Aviation Law.

INTRODUCTION

Security is one of the basic needs of man, and its provision is one of the most important functions of the state by guaranteeing protection from existing threats [Nowak 2007, 9]. Threats have accompanied man since time immemorial, but they change their character and scope as society develops [Bąk and Ciekanowski 2012, 26]. Protection of civil aviation, including civil airports from various types of threats, has been the subject of increased concern throughout the international aviation community since the beginning

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of the development of aviation. On September 11, 2001, the terrorist attacks carried out in New York forced the introduction of international civil aviation, and appropriate, tightened security procedures [Piasecka, Maniszewska, and Borkowski 2022, 9]. Civil airports are an important component of critical infrastructure[1] but are constantly exposed to acts of unlawful interference [Polkowska 2024, 135-36]. The term acts of unlawful interference is used to describe acts that threaten the security of civil aviation in the terminology of the International Civil Aviation Organization (ICAO) [Żylicz 2002, 57], used in Annex 17 to the Convention on International Civil Aviation [Polkowska 2019, 162-65]. Ensuring security at civil airports is derived from the real-time picture and the anticipated modus operandi of a potential adversary who may commit an unlawful and intentional act of interference. Ensuring security at civil airports is derived from the real-time picture and the anticipated modus operandi of a potential adversary who may commit an unlawful and intentional act of interference. Nevertheless, recent advances in artificial intelligence technology have led to a surge in applications based on facial recognition, which has greatly facilitated the fight against terrorists [Polkowska 2024, 164-65]. As a result of the analysis of the literature on the subject and based on the authors' experience, an attempt was made to find an answer to the research problem, which was formulated as follows: How did the amendment of the law affect the security system of civil airports?

1. CIVIL AIRPORT SECURITY

A civil airport is a public-use airport used for commercial flights. These airports are part of the critical infrastructure of the state. Civil airports have a system character [Sienkiewicz 1994, 268]. The system, in a general sense, is a system of interconnected elements that have a certain structure and constitute an orderly whole. Taking into account that civil airports, provide specific and rapid movement of people, goods, and services, it is necessary to provide them with an appropriate system of protection against terrorist threats [Żurawski and Oskierko 2024, 71].

Civil airport security should be considered as a component of air security, which is a component of national security. Some experts pointed out that the unambiguous identification of individual types of security, including national security is difficult to define, the reason for which is, among other things: (1) the formulation of definitions that are too narrow or too broad; (2) the definition of individual types of security based on general security, without linking it to the entity, which is the state; (3) tying a given type of security

[1] Act of 26 April 2007 on crisis management, Journal of Laws No. 89, item 590 as amended.

to the same type of threat; (4) the subordination of all types of security exclusively to one entity, i.e. the state and its objectives [Kitler 2011, 45].

There are two designations of security in air communications, the first being operational security relating to flight operations, and the second being protection from acts of unlawful interference or terrorist threats. The generality and multiplicity of categories that relate to the concept of security require subject and object clarification. Both terms serve to ensure the safety of passengers and non-passengers. However, a comparison of Polish and English-language terms used to describe "safety" allows one to see the differences, which are that the two English-language terms (safety and security) correspond to a single Polish term "safety" [Siadkowski 2013, 58]. The term safety refers to the rules of operation of aircraft, while – "security", is the organization of the system of civil aviation security, including the security of civil airports.

The area of security is characterized by proactive action by the security system to counter threats. Threats to civil aviation arise from deliberate action against the security of civil aviation, which is one of the forms of threats of the modern world, and civil aviation has become the target of various terrorist or criminal activities. The terminology used to describe acts that threaten the security of civil aviation is constantly evolving [Urban 2021, 134]. This organization of the civil airport security system includes security services that form a single entity. Each of these entities has strictly defined tasks that it is obliged to carry out. Thus forming an organization, the entities combined into a whole, provide comprehensive implementation of civil airport security policy.[2]

The airport authorities – represented by the airport manager – are responsible for the overall functioning of a civil airport, the performance of its security tasks, and respect for international and EU legal standards and regulations, which the Polish authorities, including the aviation authority, have undertaken to observe and apply. It is he who, according to Article 7 of the Law on the Protection of Persons and Property, is the head of the entity he directly manages. He is responsible for organizing and supervising activities aimed at protecting the civil airport from acts of unlawful interference.[3]

The security of civil airports in Poland should be considered based on several legal acts that impose several obligations on managers. The basic legal

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[2] Security services – Border Guard, Police, Internal Security Agency, and airport security service, perform tasks at the airport (Announcement of the Minister of Infrastructure of 17 March 2023 on the announcement of the consolidated text of the Regulation of the Minister of Infrastructure on the National Civil Aviation Security Programme, Journal of Laws item 774).

[3] Announcement of the Speaker of the Sejm of the Republic of Poland of 26 July 2005 on publication of the consolidated text of the Act on the Protection of Persons and Property, Journal of Laws No. 145, item 1221 as amended.

act regulating the rules of performing security tasks is the Law of August 22, 1997, on the Protection of Persons and Property.[4] In its fifth article, the aforementioned law defines the areas, objects, equipment, and transports important for defense, the economic interests of the state, public security, and other important obligations of the state, which are subject to mandatory protection by specialized armed security formations or appropriate technical protection. According to the Aviation Law, an airport is a public-use airport used for commercial purposes. It consists of many elements interconnected by numerous internal relations, in which the role of the human factor is strongly marked. Another amendment to the Act dates back to July 3, 2002,[5] based on which an executive act in the rank of a regulation (KPOLC) was enacted. According to this act, the airport manager is responsible for the security of critical infrastructure, which is a civil airport; he has at his disposal the appropriate subordinate services.

2. MODELS OF RESPONSIBILITY FOR SECURITY CONTROL AT CIVIL AIRPORTS

At civil airports, there are three models of responsibility for the realization of tasks in the area of security control. The first is the centralized model, in which responsibility for carrying out security control rests with the state and state bodies or centralized bodies. In the centralized model, civil aviation security activities are mainly left to the state and their implementation is handled by administrative bodies, e.g. CAA – Civil Aviation Authority (US), ULC – Civil Aviation Authority (Poland), and ministries of transport. This model has also been adopted in other countries, including Austria, Finland, Germany, Italy, Portugal, Sweden, and Switzerland [Marzec 2024, 172]. In the second model, a mixed model, this responsibility is divided between airport managers and the state, where often representatives of state bodies are directly involved in the implementation or oversight of tasks. The third model is a decentralized model, in which responsibility for security control is primarily placed on the managers of individual airports. In this model, security-related activities remain the responsibility of airport managers. The implementation of these tasks remains under the supervision of the respective administrative authority. Security control tasks can be carried out by security services directly subordinate to the airport manager or by external entities with the appropriate authority to conduct security control.

[4] Act of 22 August 1997 on the protection of persons and property, Journal of Laws of 2021, No. 114, item 740.

[5] Article 187 of the Aviation Law Act, Journal of Laws of 2002, No. 130, item 1112 as amended.

In the European Union, sometimes the conduct of security checks is based on private security companies that report to managers. Strictly, physical security control carried out by private companies is supervised by a state entity, such as the Border Guard [Lickiewicz, Marach, and Urban 2020, 110-26]. The current system of civil airport security in Poland is based on security control carried out by services subordinate to the airport manager, which is supervised by the President of the Civil Aviation Authority (CAA) in cooperation with the Border Guard. In Poland, the range of tasks aimed at ensuring security at a civil airport is wide – from providing physical security and surveillance to responding to acts of unlawful interference. The main entities involved in ensuring security at a civil airport are: a) state authority (governmental, ministerial level) – the Civil Aviation Authority – (ULC) or the relevant ministry; b) security services – Police, Border Guard, Internal Security Agency; c) the airport manager; d) private security companies hired by the airport manager [Urban 2021, 143].

3. TRANSFORMATION OF THE SYSTEM OF CIVIL AVIATION SECURITY IN POLAND IN THE LIGHT OF ANOTHER AMENDMENT TO THE AVIATION LAW

Under EU legislation, each Member State draws up, stands, and maintains a national civil aviation security program. As mentioned above in Poland under the Aviation Law a regulation on the National Civil Aviation Security Program was enacted, which is one of many normative acts in the field of civil aviation security. The supreme legal act in this regard is the Aviation Law, enacted as a consolidated text in 2002. In the field of civil aviation security, this law was not amended until June 30, 2011. Comparing the provisions of the law before the amendment and after the amendment in 2011, it is not difficult to see that in the aforementioned scope, the amendment has been expanded and made more specific. The amendment also introduced several changes to the civil airport security system, bringing it in line with the legal framework and requirements arising from Poland's participation in the European Union.

The European Parliament, bypassing Regulation 300/2008 of March 11, 2008, on common rules in the field of civil aviation security in 2008, gave a clear signal for changes in the civil aviation security system, arguing that it was necessary to improve the content of the previous Regulation 2320/2002 in the light of the experience gained, aiming to simplify, harmonize and ensure transparency of the existing rules and improve the level of security. Under Regulation 300/2008, further EU regulations were enacted, supplementing the rules of civil aviation security and establishing detailed measures for the implementation of common basic standards for civil aviation security. In light of the new provisions of EU law, it became necessary to adapt

national law. Currently, the organization of the system of civil airport security in Poland, is based on the application of the provisions of international conventions and the provisions of European Union law, in particular, Commission Regulation (EU) No. 2015/1998 of November 5, 2015. The indicated regulation establishes detailed measures for the effective implementation of the common basic standards for civil aviation security, introducing harmonized and uniform standards for civil aviation security. Commission Regulation (EU) No. 2015/1998 is a direct legal act, which means that its provisions are also directly applicable in Poland.[6] Implementing acts of Polish law must be adapted and consistent with this regulation. It is worth noting that this regulation is the result of the direct implementation of an international agreement, which is the Treaty of the European Union. In case of inconsistency with Polish law, this regulation becomes a priority, since it has its source in the international agreement.[7]

At the time of the entry into force of the fundamental legal act regulating all issues related to air communications, which is the Aviation Law, the Republic of Poland was not a member of the European Union. Nevertheless, Poland was actively performing tasks related to ensuring aviation safety based on international obligations, Annex 17 to the Chicago Convention.[8] After Poland acceded to the European Union, it became necessary to adapt national legislation to Community standards and regulations. As a result, the law of April 20, 2004, on amending and repealing certain acts in connection with Poland's membership in the European Union introduced significant modifications to the Aviation Law.[9]

As part of these modifications, aviation safety regulations, particularly about civil aviation security, were harmonized with existing Community regulations, i.e. legal regulations of the European Union. The purpose of these measures was to achieve consistency and compliance with EU standards and regulations in the field of aviation security. In practice, the alignment of regulations with EU standards resulted in Poland's obligation to apply aviation safety regulations and procedures that were established by the European Union.

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[6] Commission Implementing Regulation (EU) 2015/1998 of November 5, 2015, laying down detailed measures for the implementation of the Common Basic Standards on civil aviation security OJ of the EU L of 2015, No. 299.

[7] Regulation (EC) 300/2008 of the European Parliament and of the Council of March 11, 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No. 2320/2002 O.J of the EU L of 2008, No. 97, item 72, as amended [hereinafter: 300/2008].

[8] Annex 17 – International Standards and Recommended Practices. Annex 17 to the Convention on International Civil Aviation. Protection of international civil aviation against acts of unlawful interference, ninth edition, ICAO, p. 1-1.

[9] Act of 20 Act April 2004 on the amendment and repeal of acts in connection with the gaining by the Republic of Poland of membership in the European Union on 1 May 2004, Journal of Laws No. 96, item 959.

As a result, national regulations have become compatible with EU regulations, enabling the integration of the Polish aviation system with the European system and ensuring consistent safety standards for all EU member states.

On August 18, 2011, the Law of June 30, 2011, was published – on amendments to the Aviation Law and certain other laws,[10] which was in response to the ongoing changes in the area of civil aviation security in the European Union and was therefore adapted to EU regulations. As a result, services carrying out tasks in the field of security control began to be subject to regulations and procedures, which are aimed at ensuring the effective protection of civil aviation. Amendments to the Aviation Law imposed additional obligations on the manager of a civil airport in the field of protection of civil aviation against acts of unlawful interference. Before the amendment of the law, in the security system of civil airports, the main service responsible for security in terms of security was the Border Guard, which carried out security control of passengers and baggage.

Under Article 186 b(1)(1) of the Aviation Law, the manager is responsible for screening tasks under Regulation 300/2008/EC concerning: a) persons other than passengers and the objects they carry; b) passengers and cabin baggage; c) checked baggage; d) air cargo and mail, air carrier mail and materials, in-flight supplies, and airport supplies before being permitted access to the restricted area, unless the airport operator, air carrier, known consignor of airport supplies, or registered supplier of in-flight supplies has applied the required security controls following Regulation 300/2008/EC.

Under Article 186b(4) of the Aviation Law, the manager performs the tasks imposed on him through the Airport Security Service, or specialized armed security forces operating based on the Act of August 22, 1997, on the protection of persons and property, which, following Article 186b(5) of the Aviation Law, performs the manager's tasks in: a) conducting security checks of passengers, baggage, cargo, mail, in-flight supplies and aviation supplies; b) controlling access to restricted areas of the airport; c) control of passes issued by the airport manager; d) apprehending and handing over to the Police or Border Guard: a person violating security conditions at the airport and a passenger violating the conditions of carriage; a person who without authorization has obtained or attempted to obtain access to the restricted area; a person who has committed or attempted to commit an act of unlawful interference; a person who otherwise violates public order; e) security of the security restricted area and other areas within the meaning of Regulation No. 300/2008/EC; f) activities referred to in Article 3(2) of the Law on the Protection of Persons and Property, i.e. technical security

[10] Act of 30 June 2011 amending the Act – Aviation Law and certain other acts, Journal of Laws No. 170, item 1015.

activities consisting of: installation of electronic devices and alarm systems, signaling the threat of protected persons and property, and their operation, maintenance, and repair in places of their installation; installation of mechanical security devices and means, as well as their operation, maintenance, repair, and emergency opening at their places of installation.

Tasks related to security control are carried out under the supervision of the President of the Civil Aviation Authority, which in the performance of tasks, cooperates with the Border Guard.

The Aviation Law stipulates that the Airport Security Service, in carrying out the tasks referred to in Article 186(5), shall cooperate with competent services or authorities. It introduced a definition of the Airport Security Service, which is an internal security service or specialized armed security formation, operating based on the Law on the Protection of Persons and Property,[11] performing tasks for the protection of civil aviation and reporting to the airport manager. If it is necessary to carry out tasks beyond the competence of the airport security service referred to in paragraph 5, the airport manager shall notify the Border Guard or the Police.

The Border Guard, by the provisions of the amendment to the Aviation Law, has transferred to the airport manager tasks related to the conduct of security checks in air communications. As a result, the Border Guard officers have been given the duty to supervise the airport operator's services in this respect. The purpose of the supervision is to monitor the quality of security control, as well as to ensure compliance with the implementation of tasks by the airport manager by the provisions of the current legal acts in the field of civil aviation security. In the current legal order, the airport manager is responsible for the implementation of tasks related to the conduct of security controls in civil aviation. These tasks are carried out under the supervision of the President of the Civil Aviation Authority, who cooperates with the Border Guard in the limited scope contained in the Aviation Law.

By the provisions of the Law on Amendments to the Aviation Law, Article 186b(3). the Border Guard, in terms of cooperation in the supervision with the President over security control activities, has been given the authority to independently undertake activities consisting of: 1) observing and recording the operation of the security checkpoint; 2) controlling the number of airport security personnel at the security checkpoint and immediately signaling to the airport manager any concerns about the mental and physical condition of airport security personnel; 3) immediate response to violations of aviation security regulations by employees of airport security service; 4) promptly addressing requests to the airport manager for the rectification

[11] Act of 22 August 1997 on protection of persons and property, Journal of Laws No. 114, item 740 as amended.

of identified serious deficiencies and informing the President of the Authority about these deficiencies; 5) inspecting the possession of certificates referred to in paragraph 10, related to the related to the qualifications of airport security service employees performing security checks; 6) promptly respond to signals of public disorder at the security checkpoint and the adjacent area.

4. COOPERATION OF THE CIVIL AVIATION AUTHORITY WITH THE BORDER GUARD IN THE SUPERVISION OF THE IMPLEMENTATION OF TASKS RELATED TO SECURITY CONTROL

The amendment to the Aviation Law, changed the main entity responsible for the security of civil airports in terms of security, until now it was the Border Guard, which performed tasks in the field of control of passengers and their luggage at civil airports. Under an amendment to the Aviation Law, security tasks were transferred to services subordinate to airport managers on March 18, 2013. For the implementation of this reform, the Border Guard Headquarters developed the Concept for the Border Guard's supervision of the implementation of security control tasks in air transportation performed by the airport manager in the context of the provisions of the Law on Amendments to the Aviation Law.[12]

The concept of supervision includes the experience of state services of selected countries of the European Union, where the system of civil aviation security was based on the supervision of state services over security control in air communication performed by private entities [Żukowski 2012, 89]. It was assumed that the Border Guard officers would carry out activities related to the supervision of security control in the system: 1) stationary – in the form of direct supervision in the case of combined lines of security control stations. The number of teams and the manner of performing tasks in stationary supervision will depend on the current flow of controlled persons and the number of open security control stations; 2) patrolling – performed at a distance that allows the Border Guard officers to be immediately at the security checkpoint. The number of patrols should depend on the infrastructure of the airport in question and the number of security checkpoints; 3) in the monitoring center (CCTV camera system) – which allows the Border Guard to supervise all security checkpoints manned by Airport Security staff, by observing the image transmitted by the CCTV camera system. In addition, in the event of detection of any threat/non-compliance, the Border Guard officer on duty at the monitoring center takes immediate

[12] The concept of supervision of the Border Guard over the implementation of air traffic security control tasks performed by the airport manager in the context of the provisions of the Law on Amendments to the Aviation Law.

intervention action in the form of dispatching a Border Guard patrol to a specific location of the airport; 4) working contacts – designated representatives of the Border Guard with representatives of airport managers, in which they will be informed of identified deficiencies in the process of security control, which will require immediate correction; 5) ad hoc inspections – carried out by officers authorized as national quality control auditors in accordance with the procedure and principles set forth in the Ordinance on the National Quality Control Program in the field of civil aviation security.

Because of the substantive supervision of the airport manager's implementation of security controls in air communications, Border Guard officers continue to receive specialized training in civil aviation security, aimed at maintaining up-to-date knowledge in the area in question, allowing them to take effective and efficient action in situations of potential danger. This is commensurate with the disposition contained in Article 186b(17) – the surveillance activities referred to in paragraph 3 may be performed by persons holding a security control operator certificate listed.

Moreover, it should be mentioned that following the changes introduced to the Aviation Law, Article 186b(15), in justified cases related to the need to ensure public order and public security, the Commander-in-Chief of the Border Guard may, at the request of the President of the Civil Aviation Office, direct Border Guard officers to perform security checks in civil aviation – which also requires having by Border Guard officers performing specialized tasks, authorizations to carry out the tasks in question – security control operator certificates. On June 11, 2013, Agreement No. 32 was concluded between the President of the Civil Aviation Office and the Commander-in-Chief of the Border Guard on detailed rules of cooperation in supervising the implementation of tasks related to security control in civil aviation performed by airport managers.[13] Further agreements were concluded in the following years in connection with changes in EU regulations.[14]

CONCLUSION

The amendment to the Aviation Law changed certain elements of the civil airport security system in Poland. Based on the analysis of the origins and current legal status of the civil airport security system in the context

[13] Memorandum No. 32 between the President of the Civil Aviation Authority and the Commander-in-Chief of the Border Guard on the detailed principles of cooperation in the exercise of supervision over the performance of tasks related to safety control in civil aviation performed by airport managers of 11 June 2013.

[14] Agreement between the Commander-in-Chief of the Border Guard, and the President of the Civil Aviation Authority on cooperation in the field of civil aviation security of 21 November 2023.

of the amendment to the Aviation Law, as well as direct observation, it can be concluded that the current civil airport security system in Poland based on security services subordinated to airport managers is identical to a model used by all European Union countries. In an organizational context, existing structures and procedures related to the security of civil air transport require further improvement. Personnel problems, such as staff shortages and low salaries, negatively affect the efficiency and motivation of employees of services responsible for security.

That is why private security companies are introduced at airports, supervised by state entities, including the Border Guard. The changes introduced in the civil aviation security system in the Republic of Poland, including the civil airport security system, have not reduced the state of security. However, it should be noted that each security service, when faced with the same threat, assesses the security need differently, which may result in taking different actions. Due to the subjective perception of ensuring safety, a tangle of conflicting interests is created, where discrepancies in the perception of safety appear. The constant control of the relevant aviation authority and services supervising the work of private security companies is even more important.

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LEGAL ASPECTS OF PERFORMING AESTHETIC MEDICINE PROCEDURES – A CASE STUDY

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Abstract. This paper deals with the issue of regulation of aesthetic medicine at the level of the Polish legal system. The starting point is the analysis of the institution of the patient's consent to a non-therapeutic intervention the primary aim of which is improving appearance. The article pays particular attention to the conditions of the legality of the patient's consent, taking into account the views of the doctrine of medical law and current case law of the Supreme Court of Poland. Theoretical considerations were based on a case study related to health complications in patients who underwent breast augmentation procedures with a preparation containing polyacrylamide. Drafts of future legislative changes regarding patient consent for aesthetic medicine procedures are proposed.

Keywords: aesthetic medicine; polyacrylamide; patient consent; physician liability; dangerous product.

INTRODUCTION

The authors were prompted to analyze the issue of the legal aspects of performing procedures in the field of aesthetic medicine by media reports about health complications in patients who underwent breast augmentation procedures with the use of a preparation containing polyacrylamide (PAAG). The discussion took place not only in the medical community,[1]

[1] See Treatment of complications after breast augmentation with Aquafilling gel: https://www.cmkp.edu.pl/ksztalcenie/szkola-nauk-medycznych/klinika-chirurgii-plastycznej [accessed: 13.10.2024].

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the Ombudsman for Patients' Rights also spoke on the subject,[2] and the authorities authorized to prosecute crimes conducted preparatory proceedings concerning the market introduction of the preparation called Aquafilling Bodyline.[3] It is worth mentioning that as of November 2019 the Ombudsman for Patients' Rights has initiated 11 investigations in connection with breast augmentation/modeling procedures using Aquafilling Bodyline.[4]

The subject of this article will be the limits of a doctor's legal liability related to the performance of non-therapeutic interventions that are primarily aimed at improving appearance. The primary purpose of the paper will be to try to answer the question: whether a medical error could have been committed during aesthetic procedures performed with the Aquafilling Bodyline substance.

Analysis of this question requires addressing several issues. These are: 1) the patient's legally compliant consent to the procedure, 2) performance of the procedure by a person with the appropriate qualifications, 3) the conduct of the procedure in accordance with the principles of medicine, including, among other things, conducting tests before and after the procedure, as recommended by the manufacturer of the medical device, 4) the use of an appropriate substance and possible liability introducing a dangerous product to the market.

The article will also address the doctor's liability related to with the failure to achieve the desired effect or the planned end result, and the possibility of complications after the procedure. Given the broad scope of the subject matter in question, this paper will primarily discuss the issue of the patient's consent to a non-therapeutic procedure. Other issues will be covered only in brief. In addition, proposals for *de lege ferenda* changes regarding the patient's consent to an aesthetic medicine procedure will be formulated.

1. PATIENT CONSENT FOR A MEDICAL PROCEDURE

At the outset of the discussion, it is indispensable to clarify the meaning of the concept of patient consent to a medical procedure. In the literature, patient consent is defined as: "freely taken and expressed according to the rules of meaning available to other participants in the medical

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[2] See The Ombudsman for Patients' Rights supports patients injured as a result of Aquafilling gel treatments: https://www.gov.pl/web/rpp/rzecznik-praw-pacjenta-wspiera-pacjentki-poszkodowane-w-wyniku-zabiegow-zelem-aquafilling [accessed 13.10.2024].

[3] See Regional Prosecutor's Office in Warsaw, Notification on the suspension of the investigation with the reference no. PO I Ds 38.2020, https://www.gov.pl/web/po-warszawa/zwiadomienie-o-zawieszeniu-sledztwa-o-sygnaturze-po-i-ds-382020 [accessed: 13.10.2024].

[4] See The Ombudsman for Patients' Right sums up the activities related to breast augmentation procedures with Aquafilling Bodyline gel: https://www.gov.pl/web/rpp/rzecznik-praw-pacjenta-podsumowuje-dzialania-zwiazane-z-zabiegami-powiekszania-piersi-zelem-aquafilling-bodyline [accessed: 02.11.2024].

process, an act of the patient's or his legal representative's will, taken on the basis of accessible, reliable information as to all stages of the medical procedure" [Świderska 2007, 19]. For a patient's consent to a medical intervention to be legally effective, several prerequisites must be met. First, the person who gives consent must be an authorized person, and the decision regarding medical interference should be free and informed. The consent should be in the form provided by the provisions of the applicable law, and finally, the statement of intent must be given before the undertaking of the intervention, it cannot be a retroactive consent.[5] Informed consent means that the person giving consent has the information necessary to give it, i.e. they are aware of the possible consequences, defined as awareness of danger [Michałowska 2014, 68]. Failure to meet this condition makes the patient's consent unlawful [ibid.]. The doctrine also stresses that consent to a medical procedure must be specific and concrete, not merely general and abstract [Świderska 2007, 20]. In addition, it can cover only such a subject matter that is at the disposition of the consenting person otherwise it is an illegal consent [ibid., 21]. It is worth noting at this point that there is no established position defining the scope of personal rights in relation to which their disposer may express the will to violate them or expose them to harm [Kubiak 2019, 787]. Therefore, it is not possible to determine unequivocally how far the patient's consent legalizes the doctor's actions [ibid.].

De lege lata, a patient's consent to a medical procedure is regulated by two legal acts: the Act of December 5, 1996 on the professions of physician and dentist[6] and the Act of November 6, 2008 on patient' rights and the Ombudsman for Patients' Rights.[7] According to Article 32(1) of the Act on the professions of physician and dentist, a physician may conduct an examination or provide other health service, subject to the exceptions provided for in the Act, after the patient has expressed consent. Moreover, according to Article 32(7) of the Act on the professions of physician and dentist, unless the Act provides otherwise, consent may be expressed orally or even through such conduct that clearly indicates the will to submit to the medical procedures proposed by physician. According to Article 34(1) of the Act on the professions of physician and dentist, a physician may perform a surgical procedure or apply a method of treatment or diagnosis that poses an increased risk to the patient, after obtaining the patient's written consent. Article 34(2) of the Act on the profession of physician and dentist requires

[5] See Giving informed consent, Supreme Medical Chamber: https://nil.org.pl/dla-lekarzy/prawo/dokumentacja-medyczna/4262-udzielenie-swiadomej-zgody#:~:text=Brak%20odebrania%20świadomej%20zgody%20pacjenta%20skutkuje%20odpowiedzialnością%20cywilną,wówczas%2C%20gdy%20wykonany%20jest%20zgodnie%20z%20zasadami%20wiedzy [accessed: 20.10.2024].

[6] Journal of Laws of 2024, item 1287.

[7] Journal of Laws of 2022, item 1876 as amended.

the physician to provide information to the patient before the patient gives consent. It should be noted that in Article 34(1) of the Act on the profession of physician and dentist, the legislator uses the phrase: "in the case of a surgical procedure or the use of a method of treatment or diagnosis that poses an increased risk to the patient". A linguistic interpretation of the cited provision indicates that the regulation applies only to a therapeutic or diagnostic procedure or surgery. It is worth emphasizing here, referring to the subject of this article, that an aesthetic procedure involving the administration of an injection of a preparation, although it is an invasive procedure, since it involves the interruption of tissue continuity, is certainly not a surgical procedure, nor does it constitute a therapeutic or diagnostic method. This also applies to the method used for breast correction with Aquafilling Bodyline. This leads to the conclusion that in the current legal system the aesthetic medicine procedures require only oral consent. However, it should be noted that poses an increased risk to the patient.

Based solely on a linguistic interpretation of the provisions on the form of consent, i.e., the aforementioned Article 34(1) of the Act on the profession of physician and dentist and Article 18(1) of the Act on patients' rights and the Ombudsman for Patients' Rights, it can be seen that aesthetic medicine interventions involving only the injection of a preparation would not require written consent. Nevertheless, in this case, in addition to linguistic rules, systemic-axiological reasoning should be used. According to this interpretation, in validation determinations, establishing the sources of the normative basis of the decision, in the absence of a basis in the legislation, an adequate basis should be created in the so-called system of preferences in the basic legislation, assuming axiological consistency of the legislator. In such a situation, it should be assumed that the legislator would have regulated the given state of affairs similarly if he had foreseen it [Leszczyński 2004, 129]. In the doctrine we notice a loophole in the laws regarding the regulation of aesthetic treatments and it indicates that the provisions should be applied accordingly by inference *per analogiam legis* [Gądzik 2022, 181]. The notion that in the case of an invasive aesthetic medicine procedure, which is not a surgical procedure, the regulations on consent to surgery, i.e. Article 34 of the Act on the profession of physician and dentist, should be applied accordingly seems correct. Thus, the patient's consent to such an intervention should be in writing.

At this point, it is worth noting that the written form of the patient's consent is quite simple to demonstrate during the collection of evidence. In the situation of a possible lawsuit, it increases the legal security of the doctor. The Supreme Court, in its judgment of December 17, 2004,[8] held that it is the doctor who bears the burden of proof of fulfilling the obligation to provide

[8] Judgement of the Supreme Court of 17 December 2004, ref. no. II CK 303/04, Legalis no. 66293.

the patient or the patient's statutory representative with the information that, according to the will of the legislator, should precede obtaining the consent. In the rationale of the above judgment, the Supreme Court further emphasized that only consent that is "explained" or "informed" causes the patient to assume the risk of the procedure. If the doctor does not provide the patient with accessible information, he acts under conditions of illegality.[9] If the consent is, "unexplained", then the doctor acts without consent, which may give rise to civil liability for the damage caused, as pointed out by the District Court in Sieradz – I Civil Division in its judgment of November 25, 2021.[10]

The case law further indicates that the information provided by the doctor should be comprehensive and understandable, while the degree of detail must be high. The patient should be informed of the possibility of typical complications, all of which should be included in the written consent to the procedure.11

Turning to the question of the scope of consent, it is necessary to note the view presented both in the judicature and in the doctrine, according to which the scope of the duty to inform depends on the type and nature of the medical intervention.[12] The Supreme Court, in its judgment of August 28, 1973,[13] stressed that, "at the same time, the doctor cannot be required to warn the patient about all possible complications, especially those that occur extremely rarely.

Such forewarning could lead to unnecessary worsening of the patient's well-being and to an unfounded refusal to consent to the procedure.[14] However, this view appears to apply to procedures that are curative in nature.

According to the normative view of guilt in civil law, three conditions must be met for verdict of liability: 1) unlawfulness of the behavior, 2) intentionality or unintentionality (negligence), 3) the culpability of the perpetrator [Lewaszkiewicz-Petrykowska 1999, 122].

Relating this to the responsibility of the doctor for the actions taken, in order to charge, the court must attribute fault to the doctor [ibid.]. In view of the above, it is possible to defend the view that the mere occurrence of negative health effects after the performance of the procedure does not determine the fault of the doctor.

Transferring the above considerations to the issue of the administration of Aquafilling Bodyline, it should be considered that if the doctor used

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9 Ibid.

10 Judgement of the District Court in Sieradz of 25 November 2021, ref. no. I C 351/19, Legalis no. 2650907.

11 Ibid.

12 Judgement of the Supreme Court of 28 August 1973, ref. no. ICR 441/73, Legalis no. 17300.

13 Ibid.

14 Ibid.

a medical device that was legally marketed and during this procedure there was no medical malpractice, and the patient's consent to the procedure was legally effective, it is difficult to attribute an element of guilt to the doctor, and therefore it is impossible to conclude that the doctor's action was unlawful.

2. LEGAL REGULATION OF AESTHETIC MEDICINE

Even at the beginning of the 20th century aesthetic medicine procedures, not being of a curative nature, were forbidden, but as their positive effects on improving mental health were noted, they became part of aesthetic medicine and plastic surgery [Michałowska 2014, 182-83]. In recent years, medicine aimed at improving appearance has been growing rapidly.

According to survey data from the International Society for Plastic and Aesthetic Surgery, more than 17,295,000 aesthetic procedures (surgical and non-surgical) were already performed by 2009 [Kubiak 2019, 780]. However, with the growing scale of aesthetic medicine procedures, there are insufficient regulations in the Polish legal order. Despite the fact that the Supreme Medical Council issues recommendations aimed at clearing up questionable issues, such as by publishing Position No. 1/21/VIII of January 29, 2021 on the adoption of a definition of aesthetic medicine,[15] it must be emphasized that this is an act of internal regulations and not a source of universally binding law.

In view of this state of affairs, it should be considered necessary to adjust the legal regulation of patient consent for aesthetic medicine procedures. Legally effective patient consent is an essential element of a doctor's legal compliance. It is impossible not to agree with the view that such procedures may pose risks to the health of the person undergoing the procedure. Determining the long-term consequences of such procedures is sometimes difficult. It would be worthwhile *de lege ferenda* to introduce a qualified form of written consent. It could include a requirement to specify specific, foreseeable post-complications at a given time. In addition, it would be worth including a clause informing the patient that at the time of giving consent it is not possible to foresee all possible adverse consequences that may occur in the future. The proposed modification would make it possible to more effectively guarantee the realization of the patient's right to information, and would also increase the legal security of doctors performing aesthetic procedures. In legal proceedings, the doctor would be able to demonstrate that the consent was duly explained and that the patient knowingly accepted the risks of the procedure.

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[15] Position No. 1/21/VIII of the Supreme Medical Council of 29 January 2021 on the adoption of the definition of aesthetic medicine, https://nil.org.pl/uploaded_files/documents/doc_1612526221_rs001-21-viii.pdf [accessed: 15.10.2024].

3. POSSESSION OF APPROPRIATE QUALIFICATIONS – THE POSITION OF DOCTRINE AND THE LINE OF JURISPRUDENCE

The lack of unambiguous regulations in the area of performing interventions referred to as non-therapeutic aesthetic medicine procedures was pointed out by the Supreme Court in the Order of May 26, 2021.[16] The case in question concerned the filing of a cassation appeal against a ruling of the Supreme Medical Court concerning a dentist accused of a professional tort, namely, performing a breast augmentation procedure with Aquafillig without the required qualifications. The Supreme Court, referring to the charges raised in the cassation filed by the dentist's defense counsel, expressed the view that the Aquafilling breast augmentation procedure is a medical action, which, due to its invasive nature and the conditions for its performance, falls within the legal definition of "health care service". The Supreme Court held that given the place of injection of the preparation (the patient's breast area), it cannot be performed by a dentist.

In the justification of the judgment, the Supreme Court shared the view of the Supreme Medical Court, according to which the, "liquid prosthesis" of the breast using Aquafilling should be applied only by doctors. It further stated, relying on the instructions for using Aquafilling, that it should be administered, only by specialists who are certified and properly qualified in accordance with local regulations. The Supreme Court stressed that according to the Aquafilling manufacturer's guidelines, the doctor performing the procedure when qualifying the patient must rule out contraindications to the procedure and carry out the recommended appropriate medical procedures, both before and after the procedure. It follows that in the case at hand, the performance of a breast augmentation procedure using Aquafilling was not considered unacceptable. The Supreme Court said that, having fulfilled certain conditions, it could only be performed by doctors who are qualified in accordance with local regulations. After the ruling in question, the Supreme Court did not question the possibility of using the preparation while it was authorized as a medical device.

It should be mentioned that according to the position of the Director of the Department of Supervision and Clinical Trials of Medical Devices of the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products, in response to the letter of the President of the Polish Society of Plastic, Reconstructive and Aesthetic Surgery, Aquafilling Bodyline was a preparation that was qualified for Class III medical devices, had CE certificate No. 41015/101/1/2012/CE issued on March 22, 2012 valid until

[16] Order of the Supreme Court of 26 May 2021, ref. no. I KK 23/21, Legalis no. 2612411.

March 21, 2017.[17] In the letter, the President of the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products said that as of December 2016, it had not received any reports of medical incidents involving the preparations Aquafilling Bodyline and Aquafilling faceline. The first report of a complication in a patient was received in December 2016. Aquafilling Bodyline was not withdrawn from the market until January 27, 2020, by decision of the President of the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products.[18]

In order to proceed to the determination of who was authorized to perform the procedure discussed in the article, it is first necessary to make a determination of what category of procedures the Aquafilling gel breast correction should be included in. Does it fall into the category of aesthetic medicine procedures, or is it rather a plastic surgery procedure. In considering procedures aimed at a cosmetic, beautifying effect, it is impossible not to refer to the meaning of the term aesthetic medicine itself. The legislator has not formulated a legal definition of this concept, in the literature of medical law it is assumed that procedures in the field of aesthetic medicine are, unlike plastic surgery procedures, less invasive, and do not involve the violation of the continuity of tissues with a scalpel [Budyn-Kulik 2018, 279].

The Supreme Medical Council has noted the need to regulate the matter of performing aesthetic medicine procedures, related to the encroachment of the continuity of the body.[19] In the absence of a statutory definition and to meet the need to clarify the meaning of the concept of aesthetic medicine, the Supreme Medical Council adopted its own definition of the concept. According to the Position of the Supreme Medical Council No. 1/21/VIII of January 29, 2021: "aesthetic medicine consists of health services, involving interference with human tissues, provided by physicians and dentists for the purpose of restoring or improving the physical and mental self-perception and social functioning of the patient, by changing his or her appearance."[20]

In an attempt to find the "relevant regulations" regarding the appropriate qualifications of persons authorized to perform the injection of a medical device for aesthetic purposes in the current legal system, one cannot find a provision that directly regulates the issue in question. The lack of relevant legal regulations was probably the reason for the issuance of another position

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[17] See Letter of the Director of the Department of Supervision and Clinical Trials of Medical Devices of the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products of 29.10.2018, https:////www.ptchprie.pl/img/custom/pdf/20181029_pismo_URPL.pdf [accessed: 3.11.2024].

[18] See The Ombudsman for Patients' Right sums up the activities related to breast augmentation procedures with Aquafilling Bodyline gel.

[19] See Position No. 1/21/VIII of the Supreme Medical Council of 29 January 2021.

[20] Ibid.

by the Supreme Medical Council on the eligibility to perform procedures included in scope of aesthetic medicine.[21] It is worth noting that the Supreme Medical Council has firmly stated that when injecting a specific substance or mixtures of products, the risk of side effects should be taken into account in each case, albeit with varying probability. Referring to the injection of the most commonly used preparation, which is hyaluronic acid, the Supreme Medical Council found that it cannot be administered by non-doctors.[22] However, this document is not a source of universally applicable law.

In the cosmetic surgery procedures listed in the Plastic Surgery Specialty Program of November 13, 2018, there is a point on surgical procedures for breast augmentation (point 8, 3, a), but there is no procedure for non-surgical administration of breast fillers listed there explicitly. It should be noted that non-surgical procedures for facial rejuvenation, such as chemical peeling, fillers, botulinum toxin are listed explicitly in the document.[23]

In conclusion, it can be considered that in the current legal system there are no clearly defined regulations that clearly regulate the competence of physicians who can apply treatments related to the administration of injectables within the framework of so-called aesthetic medicine.

4. TIMING OF DISCLOSURE OF THE EFFECTS OF A MEDICAL PROCEDURE AND THE CONDITIONS FOR ITS LEGALITY

In the doctrine of medical law, it is argued that the risk of a given medical action or method used should be evaluated *ex ante*, i.e. from the point of view of the moment when the action was performed, and not *ex post*, i.e. from the moment when its effects were revealed [Michałowska 2014, 71]. Therefore, the legal qualification of medical actions in the context of consent to a medical procedure should be made in relation to the performance of the action, not its result [ibid.]. To address the correctness of a medical procedure, what is relevant is the state of medical knowledge that existed when the action

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[21] See Authorization to perform procedures included in aesthetic medicine treatments, Position No. 48/21/P-VIII of the Presidium of the Supreme Medical Council of 15 April 20121 on authorization to perform procedures included in aesthetic medicine treatment, http://nil.org.pl/dla-lekarzy/prawo/medycyna-estetyczna/5418-uprawnienia-do-procedur-wchodzacych-w-sklad-zabiegow-medycyny-estetycznej [accessed: 03.11.2024].

[22] Ibid.

[23] See Specialization program in the field of plastic surgery of 13 November 2018 for physicians with a first-degree specialization in the field of pediatric surgery or general surgery, Warsaw 2014, updated on 13.11.1018, http://www.cmkp.edu.pl/wp-content/uploads/akredytacja2018/0738-program-2.pdf#:~:text=Celem%20szkolenia%20specjalizacyjnego%20w%20dziedzinie%20chirurgii%20plastycznej%20jest,choroby%20przewlekłej%2C%20procesów%20degeneracyjnych%20i%20starzenia%20się%20pacjentów [accessed: 30.11.2024].

was taken, not from the time of adjudication [Boratyńska and Konieczniak 2019, 277]. As stated in the literature, it is necessary to reckon with "temporal changes" in medicine, since many of its fields can be included in the so-called "hot science" category, where transformations occur very quickly [ibid.]. Summarizing the considerations made above, it can be concluded that the use itself of the medical device Aquafilling Bodyline itself, prior to the withdrawal of the preparation from the market, was not an unlawful act.

Turning to a discussion of the conditions for the legality of a medical procedure, it should be noted that consent is only one element of a doctor's lawful action. This is because there may be situations with properly given consent, the procedure was performed contrary to the art of medicine or was performed by a person without formal qualifications [Michałowska 2014, 72].

It is worthwhile at this point to present a rather radical view that can be encountered in doctrine and jurisprudence. Some authors believe that a doctor performing aesthetic procedures devoid of a therapeutic purpose may perform them only in cases where they involve only a small risk of negative consequences [Kubiak 2019, 786]. According to this position, the doctor can be attributed fault, and therefore can be held liable in a situation where the risks of the procedure significantly outweigh the expected aesthetic results. In such cases, he should refuse to perform the intervention [ibid., 786-87]. Similar positions are presented in the judicature. The Supreme Court, in its judgment of September 5, 1980,[24] held that an operation aimed solely at an aesthetic purpose is permissible only in those cases where it does not create a risk, "higher than average", while exceeding this limit may be considered a medical error.

CONCLUSION

To sum up, a doctor is always obliged to obtain the patient's consent to the interventions undertaken against him. Only in some cases e.g. surgical procedures is written consent expressly required. The scope of this requirement should be widened on aesthetic medicine procedures, because they pose an increased risk to the patient. In the Polish legal system the aesthetic medicine procedures require only oral consent. Therefore it seems advisable to amend Article 34(1) of the Act on the professions of physician and dentist and Article 18(1) of the Act on patients' rights and the Ombudsman for Patients' Rights, by including high-risk aesthetic medicine procedures in these provisions. Since these procedures are performed at the patient's request, and are intended for cosmetic rather than therapeutic effect, it would

[24] Judgement of the Supreme Court of 5 September 1980, ref. no. II CR 280/80, Legalis no. 22216.

be worthwhile *de lege ferenda* to introduce a qualified form of written consent. Consent for a procedure could include a requirement to detail specific, foreseeable complications at the time. In addition, it would be worthwhile to include a clause informing the patient that, at the time of giving consent, it is impossible to foresee all possible adverse consequences that may occur in the future. In the event of potential lawsuits, this would be important evidence that the patient was informed of the risks correctly and that he or she knowingly accepted those risks.

A definite pronouncement as to the possibility of medical error on the part of the doctor performing Aquafilling breast augmentation procedures remains solely within the jurisdiction of the court. After gathering all the evidence, the court should evaluate it in accordance with the principles of knowledge, logic and life experience, and on its basis make accurate factual findings. In a particular case, the parties, witnesses and plastic surgery experts should be interviewed, and medical records should be analyzed.

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FORENSIC HANDWRITING EXAMINATION OF PAINTER SIGNATURES FOR FAMILY SIMILARITIES BETWEEN GRAPHISMS IN CASE OF DIRECT LINE RELATIVES (BASED ON THE EXAMPLE OF SIGNATURES OF JACEK AND RAFAŁ MALCZEWSKI)*

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Abstract. This study is a part of a publication cycle on the similarity of graphisms in painter signatures. In the examination of handwriting, one of the identification problems, raised in expert opinion practice and in literature of the subject, are family similarities of graphisms. Even a well-qualified expert encounters serious identification problems, especially when analysing similarities between graphisms in isolated conditions. The same problem arises also in the context of painter signatures. Situations are known when works are signed by the artist's family members. As a result, an attempt is made to compile a catalogue of features identical for family members and to confirm the legitimacy of research on family similarities between painters. The study focuses on family similarities in signatures of painters related in the direct line (father and son), following the example of graphisms by Jacek and Rafał Malczewski.

Keywords: handwriting analysis; painters' signatures; familial similarities of graphisms; expert's opinion.

INTRODUCTION

An artistic signature is a sign personalising the artist and a source of primary information about the artist. Therefore, it is an objective criterion enabling the object's attribution. It is often approached as an integral part of the work of art on which it is put, which is incorrect. There are also situations of false signatures added to authentic works of art. One of such examples was provided by Franz Lenbach's wife, who would steal her husband's sketches from his studio, sign them in lieu of the author and sell as finished works. Also a reverse situation is possible – placement of an authentic

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signature on a forged painting. Salvador Dali and Marc Chagall would sign in blank lots of empty sheets of paper on which reproductions were then printed of different works. In such situation, market and collector's value attaches only to the artist's signature. On the other hand, Jacek Malczewski, who was not the author of the painting submitted to the artist for signature, agreed to sign it driven by compassion to the work's poor owner who hoped to improve her financial standing after selling the painting. Also situations of so called benevolent signatures cannot be forgotten – put by artists whose name had a higher market value on works of their less known but equally apt colleagues (such practice was engaged in, e.g., by Camille Corot). All those examples prove that any findings as to the authenticity of the signature cannot be decisive when it comes to the authenticity of the signature's carrier, namely the painting. As a consequence, a signature should be approached as an added element that can easily have an independent existence.

This study is the first publication in a cycle on the similarity of graphisms in painter signatures. Its purpose is to make an attempt at compiling a catalogue of identical features for family members and to confirm the legitimacy of conducting research on family similarities among painters. In a broader perspective, the results of the research may contribute to increasing the reliability of an expert's work and eliminating errors consisting in the attribution of the questioned signature to a wrong person. In the study, the focus has been placed on family similarities when it comes to signatures of painters being lineal blood relatives. Further research, as a part of the planned project, will be expanded to other family relations, i.e. collateral blood relationship (e.g., brother – brother) and affinity by marriage (e.g., husband – wife), and to environmental similarities.

Signatures have been examined of Jacek and Rafał Malczewski, father and son, both painters. They were chosen for a couple of reasons. In the inventories of Polish museums, there are a lot of their works whose attribution does not raise any doubts. Both of them signed their paintings using full signature, which is important in the context of analysis of the signature's characteristics (the greater the lettered content of an analysed graphism, the more features can be assessed). Moreover, at different stages of their life, their relationship was getting closer (e.g., when Jacek wanted to raise his son's interest in painting), or looser (due to frequent travels of the father abroad), which may be a valuable contribution to the discussion about the level of imitation by children of their parents' handwriting. The choice of the Malczewski family was also affected by the continuous popularity of Jacek's paintings and much interest in the collector market, which is demonstrated by very high (often also record) prices of auctioned works [Łozińska 2022]. Moreover, his works are discovered which have been considered forgotten, lost, but also completely unknown [Markowski 2002, 7]. In the light of the above, it is no surprise that he is also one of the most frequently forged Polish artists.

1. MATERIAL AND METHODS

1.1. Jacek and Rafał Malczewski – the artistic context

At the beginning, life of both artists should be discussed in the context of mutual interplay of their artistic output. Jacek Malczewski (1854-1929), painter and draftsman in the Young Poland period, is considered by art historians one of the most prominent Polish artists and the father of symbolism, a movement in Polish painting in the late nineteenth end early twentieth century [Maurin-Białostocka, et al. 1971, 275-84]. In his work, the ideas were manifest of patriotism, martyrdom, national messianism, sensitivity to the beauty of native landscapes and the native folklore, which where articulated in thematic series appropriately developed and transformed by the artist. Malczewski's paintings contain profound philosophical and psychological contents, reflect the Polish reality, which, intermingled with the realm of tales and myths, assumes a new meaning. This creative work touches upon the most essential human topics, such as: death, patriotism, religion or freedom**.**

Rafał Malczewski (1892-1965) is referred to as poet-painter. At an early stage of his work, the influence of his father is apparent. At a later stage – cubism and futurism, one can trace the influence of landscapes by Egon Schiele and Ferdinanda Hodler [ibid., 284-87]. At that time, the son's expressionist works characterised by sharp contrasts between clean colours begin to affect the output of the father, who tries to understand modernist painting and creates modernist landscapes. The works of Malczewski the son are characterised by literary contexts, poetic imagery and metaphor. "For interwar critics, he was a prime example of an artist who did not follow the footsteps of his famous father but chose his own, completely different path" [Policht 2023].

Jacek Malczewski portrayed Rafał at every stage of his life. He also tried to instil in his son a penchant for observing nature and capturing it on paper. Around 1900, a painting dialogue started between the father and the son [Folga-Januszewska 2006, 10], however, the bond became stronger only fifteen years later when Jacek, after the war broke out, was forced to move to Vienna, where Rafał had already studied for some time. Although at the initial stage of Rafał's creative work, subtle interplay is apparent with Jacek's artistic output, the younger Malczewski was anything but direct continuator of his father's art [Policht 2023]. Although both painted the same motifs, they approached the subject matter differently – Rafał would depict the motifs in a slightly humorous way, as external observation, and showing relativism as opposed to the father's seriousness and symbolism. An important element of their artistic work were their mutual portraits. "The bond between the father and the son became stronger especially in the last twenty

years of Jacek's life" [Szymalak-Bugajska and Nowoska 2022, 288]. Their relationship was an intergenerational creative dialogue [Paprotna 2019, 123].

1.2. Forensic handwriting examination of painters signatures

As a field subsidiary of criminal law and the basis of identification methods, forensic science aims to gather identification material. It is used for crime detection and perpetrator identification, which is the main aim of criminal procedure. Although criminal procedure is a primary interest of forensic sciences, its methods are used in the rest of the fields of law. It is used where it is necessary to identify a person or an object based on a trace left by any of them [Widacki 2018, 3]. It is why forensic science is also used in archaeology, museology, and history. An artwork's authentication and attribution process is where forensic scientists are present for a long time. They can offer laboratory equipment and scientific knowledge on, for example, forensic handwriting examinations carried out by graphic-comparative method. They give an expert opinion in courts or for public institutions like museums; they are members of teams carrying out scientific research on artworks.

As mentioned, one of the elements of an artwork analyzed by forensic scientists is the painter's signature. Examination of an artistic signature's authenticity is performed by the comparative graphical method used in handwriting research, appropriately adapted taking into account the specificity of the analysed objects. In the context of signatures placed on works of art., appropriate modifications are introduced to the method following from the specificity of the examined objects. This relates to external factors that can affect graphisms, i.e. non-standard writing tools, e.g., brush (as opposed to standard instruments, i.e. a pen or pencil); covering agents (paints), non-specific background surface (canvas or desk) or writing position.

In the analysis of handwriting, one of identification problems raised in expert opinion practice and in literature of the subject are family similarities of graphisms. It happens that persons duplicate, in their handwriting, certain characteristic features of handwriting of other family members. This, in particular, refers to children, who follow the handwriting style of their relatives, most often parents, with whose handwriting they have to do most frequently [Koppenhaver 2007, 13]. Even a well-qualified expert comes across serious identification problems, especially when analysing similarities between graphisms in isolated conditions. This problem can also arise in the context of giving opinions on the authenticity of painter signatures. Examples are known of signing works by the artist's family members. For example, Andrzej Wróblewski's mother, after her son's death, would sign his unsigned works using the son's given name and surname. Also, certain works by her brother, Józef, were signed by Wanda Chełmońska.

1.3. The problems of similarities between graphisms

Handwriting habit is a product of many factors, such as autonomous, environmental or psychophysical conditions. And identification of handwriting is based on the assumptions, confirmed by scientific research and practical experiences, about the individual nature and relative stability of the writing habit. In literature in the area of handwriting studies, authors point to different types of similarities between graphisms. These are environmental similarities, which include family, professional, school (friendly) similarities, or similarities based on sex; random similarities (lookalike graphisms), and similarities relating to a prohibited act, resulting from imitation and repetition [Skubisz-Śluszarczyk 2022, 103].

The qualification of family similarities as environmental similarities is a consequence of their recognition as similarities of the same type as between people spending much time with each other and imitating one another. Children imitate their parents when taking on different activities, which includes learning to write. Sometimes this is unconscious. However, children often observe their parents' graphisms and try to copy or imitate them. As the handwriting habit develops, a person moves away from model calligraphy and individualizes his or her handwriting. At the same time, however, the features of graphisms observed in the handwriting of other people with whom the person spends most time can also persist in the handwriting style.

In the examination of handwriting, family similarities of graphisms are one of the most difficult problems encountered by experts. Even a well-qualified expert may commit an error of attributing authorship to a wrong person, especially when analysing similarities between graphisms in isolated conditions. As a result of the above, when analysing comparative material deriving from several related persons whose graphisms display mutual similarity and similarity with the material put into question, an expert should disregard the analogy and focus on differences that allow to eliminate certain persons from the group of potential authors, and then reverse the order of comparison and, rather than search for analogy in the comparative material with the features considered symptomatic for the material put into question, search in the questioned graphisms for analogies with the comparative material [Widła 2002, 114].

1.4. Examination of the signatures of Jacek and Rafał Malczewski

The research methodology was based on analysis of the comparative material (photographs of painter signatures). For that purpose, during the visits in museums, photographs were made of the signatures of Jacek and Rafał, put on works of unquestioned attribution found in the collections of the following institutions: the National Museum in Poznań, the National

Museum in Szczecin, the National Museum in Kielce, the National Museum in Lublin, the National Museum in Cracow, the National Museum in Warsaw and the Tatra Museum in Zakopane. Examples of these signature are below (Fig. 1, 2, 3 and 4). When examining signatures, attention must be drawn to the fact that throughout their career, artists changed their signing habits. With the above in mind, before starting the analysis, it is necessary to gather reliable comparative material enabling to learn about the handwriting style, but also about the types of signatures used by the artist throughout his creative career. In the discussed case, both painters most frequently used full signatures, whereby Jacek most often would put an initial of his given name, Rafał would put his full given name, and both of them used their full surname. In the light of the above, minuscule signatures were chosen, written in Latin alphabet, of the same lettered content. Out of the entire material gathered, twenty minuscule signatures were chosen for each of the artists. In the author's opinion, a meaningful amount of the research material has been gathered, which allows to draw conclusions.

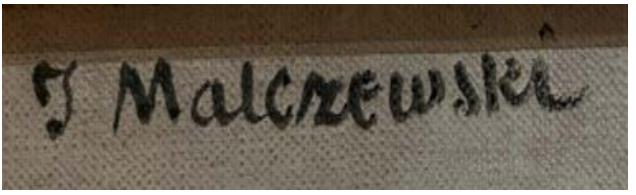
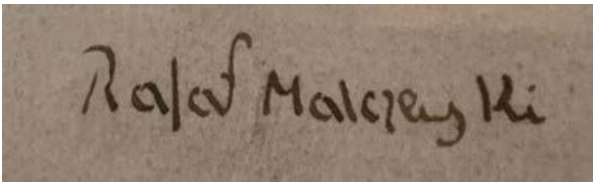


Fig. 1. Signature of Jacek Malczewski

Fig. 2. Shortened signature of Jacek Malczewski



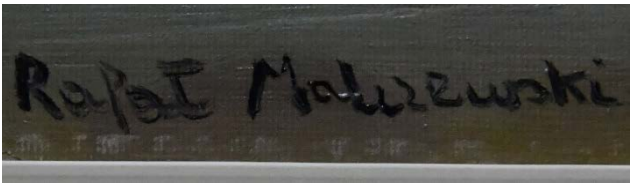


Fig. 3. Example of Rafał Malczewski's signature

Fig. 4. Another variant of Rafał Malczewski's signature

For the purposes of analysis, the comparative graphical method was applied, as used in the examination of handwriting, taking into account external factors that could affect, *ad hoc*, the variability of handwriting, as mentioned above [Widła 2016, 204]. Such external factors include the writing position of the artist, positioning of the painting on the easel and its inclination angle, brushes as tools different from standard writing instruments (brushes of different stiffness and shape), the writing agent – paints of different density, which can translate into handwriting dynamics; and texture of the background surface. The possibility to apply this method to the examination of painter signatures was confirmed on many occasions in scientific research[1] and in expert opinion practice, also of the author. In the comparative graphical method, final conclusions (identification or elimination) are formulated on the basis of all sets of features of the creator's individual handwriting. The examination was carried out using measurement instruments and optical magnification (magnifying glasses and video spectral comparator set "VSC 5000").

Each signature was analysed according to formal features selected out of each group of features examined by the comparative graphical method. These were the following characteristics: a) in the synthetic features set: type and kind of handwriting, degree of handwriting integration; b) in the topographical features set: shape of the base line of a signature, spacing size between letters; c) in the motor features set: impulse and shading; d) in the structural features set: inclined stress vis-à-vis the base, size proportions of selected letters, height of selected letters, i.e.: A) the proportion of height of the second stroke in "M" majuscule to the height of "l" minuscule, B) the proportion of height of the first stroke in "w" minuscule to the second stroke, C) the proportion of height of "c" minuscule to the height of "z" minuscule, D) the proportion of height of "k" minuscule to the height of "I" minuscule. Regarding the measurement of angles, the following features were taken into account: E) the angle between the first descending element and the first ascending element in the "M" majuscule, F) the angle between the first ascending element and the second descending element of "M" majuscule, G. the inclination angle of "i" minuscules vis-à-vis the base line, H) the angle between the stem and the upper side element of "k" minuscule, I) the inclination angle of "c" minuscule vis-à-vis the base line; e) in the modelling features set: the structure of letters, and the structure of selected inter-letter connections.

In principle, linguistic features are taken into account in case of notes longer than signatures, and their purpose is to determine the level of proficiency in a language of the person making the note, and to search for possible linguistic errors. Then, comparative analysis was carried out. The

[1] Above all Widła 2016 and other publications by the same author.

purpose of the research is not to confirm or negate the thesis about inheriting formal features of handwriting but, rather than that, to analyse similarities that may appear in painter signatures as a consequence of environmental influences and to point to these as yet another factor an expert must take into consideration in the expert opinion process.

2. RESULTS

The comparative material gathered is diversified, i.e. it comes from different periods of both artists' creative work. This allowed to learn about the natural changes of the handwriting habits of both artists. Moreover, the material was subject to preliminary critical qualification analysis and, as a result, analogies were identified when it comes to graphisms originating from the same person. As a part of the analysis, it was determined that in all groups of features, similarities are apparent between the graphisms of both painters. In the synthetic features set, similarities are manifest in the general class and picture of writing and the degree of handwriting integration. In the topographical features set, both in case of Jacek and Rafał, the shape of the signature's base line is either wavy or straight, there are similarities in the positioning of letters at different height: lower positioning of "a" minuscule vis-à-vis "M" majuscule (fig. 5 and 6); lower positioning of "s" minuscule vis-à-vis "w" minuscule; the spacing size between letters is also similar for Jacek and Rafał.

Fig. 5. Lower positioning of "a" minuscule vis-à-vis "M" majuscule in Jacek's signature.
Fig. 6. Lower positioning of "a" minuscule vis-à-vis "M" majuscule in Rafał's signature.

In the motor features set, impulse was examined, meaning the number of characters usually drawn without raising the writing instrument [Widła 1986, 43]. Graphisms of both men are characterised by a single-stroke impulse, which means that a signature was made out of letter fragments drawn in separate touches of the background surface with the writing instrument (for letters composed of more than one stroke) [ibid.].

In the structural features set, the selected size proportions of selected letters and angles, as listed above, were examined [Rybak-Karkosz 2022, 127-41]. Then, size relations were calculated, and the results were

presented in tables. The first and the second table contain an abridged version of measurements of all analysed signatures. In the tables, only the highest and the lowest value was placed for the proportions (Table 1.) and angles (Table 2.) from among the total of analysed samples.

	E		F		G		H		I	
	J	R	J	R	J	R	J	R	J	R
Lowest measurement [°]	18,4	16,9	17,4	26,3	62,9	82	15,2	28,8	43,7	79,8
Highest measurement [°]	74,2	67,6	77,1	93	112,5	127,1	109,3	92,3	121,5	140,1

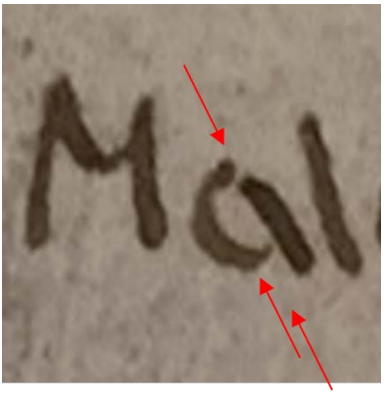
Table 1. The variability range in proportion measurements.

	A		B		C		D	
	J	R	J	R	J	R	J	R
Lowest measurement	0,7	0,76	0,62	0,5	0,68	0,65	1,16	0,66
Highest measurement	2,03	1,49	1,32	1,21	1,38	1,31	2,69	2,01

Table 2. The variability range in angle measurements.

Similarities (marked in green in the tables) are visible for most of the analysed size proportion measurements. In case of angles there are much less similarities, however, the differences are also not big.

On the other hand, in the modelling features set, similarities are apparent in the structure and way of writing of particular letters, i.e. initiation and structuring of the first stroke of "a" minuscule (fig. 7 and 8), two forms of drawing the stem of "l" minuscule, either curved or straight, whereby this method is most often used by Rafał, and much rarer in Jacek's signatures; in case of "w" minuscule, we can usually see a rounded lower part of the letter in Jacek's signatures, and the second stroke is slightly lowered vis-a-vis the first one, whereas in case of Rafał this habit is also identifiable but rare. Other similarities refer to the way of writing the "e" minuscule, i.e. one can see a triangular eye and an extended lower element (in Jacek's case, it is one of a few methods of writing this letter); the way of writing "s" and "z" minuscules (fig. 9 and 10). Similarities are also manifest in the way of connecting the letters "c-z" (fig. 11 and 12) or "w-s" and drawing the character sequence "k-i" in which letter "k" is written as majuscule (fig. 13 and 14).



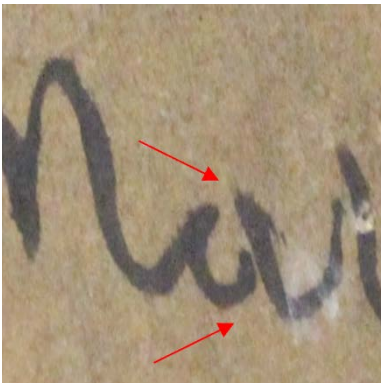


Fig. 7. Initiation and structuring of the first stroke of "a" minuscule of Jacek's signature.
Fig 8. Initiation and structuring of the first stroke of "a" minuscule of Rafał's signature.

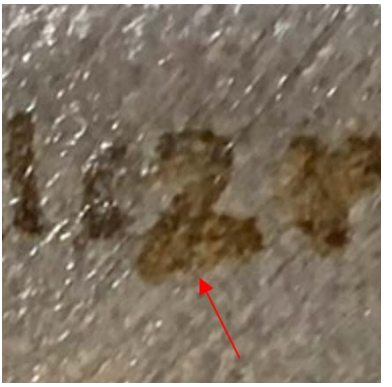
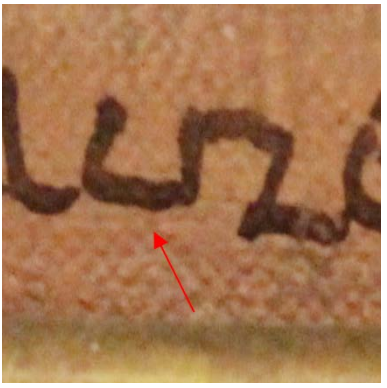


Fig 9. The way of writing "z" minuscule by Jacek.
Fig. 10. The way of writing "z" minuscule by Rafał.



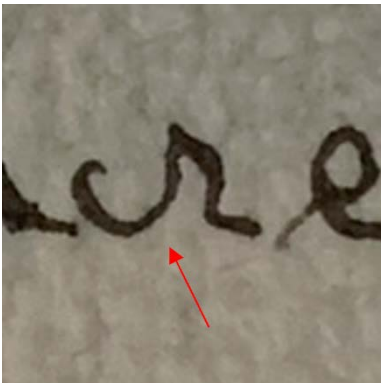


Fig. 11. the way of connecting the letters "c-z" by Jacek.
Fig. 12. the way of connecting the letters "c-z" by Rafał.

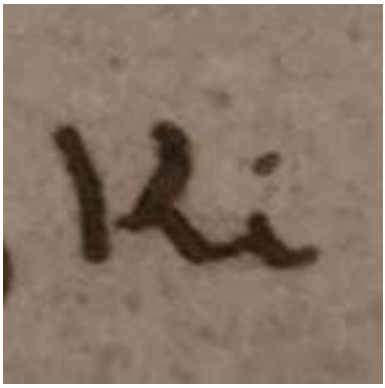


Fig. 13. Drawing the character sequence "k-i" by Jacek.
Fig. 14. Drawing the character sequence "k-i" by Rafał.

3. DISCUSSION

The presented results of the research carried out demonstrate similarities between the graphisms of Jacek and Rafał Malczewski in all the groups of features. However, it must be noted that although most similarities should be considered repeatable features in both artists' ways of signing, some of the analogies are only incidental. Moreover, the similarity of graphisms follows from the fact both men were left-handed, which, in any case, is apparent in their signatures (in both cases signatures are inclined to the left side). Left hand dominance in the father and in the son constitutes a strong element of inheriting motor features.

The presented results confirm the legitimacy of examining signatures according to environmental and family similarities, and the need to take into account such possibility especially when it is known that the artists cooperated with one another or that the artist's family members took an active part in the attribution process of the artist's works.

At the end, a limitation should be emphasized of the research capacities relating to the submitted material, that is the missing possibility to directly distinguish the features of a graphism. This follows from the impossibility to collect samples of the input material taken down, for example in the presence of an expert. The analysis described above was carried out on the basis of signatures put on paintings located in museums. As long as their attribution has been unquestioned (in fact, an error cannot be ruled out) and supported by the work's provenance and the authority of the institution, we can only assume that the signatures are authentic.

CONCLUSION

Analysis of the comparative material as a part of preliminary research will allow to improve the research of artistic signatures by compiling a catalogue of identical features of the graphisms of both painters. In the expert opinion process, their reduction from the set of consistent features present in the comparative material and in the material put into question, along with a holistic grasp of the other consistencies, will allow to make an appropriate identification decision. In case of an information that works of a given artist were signed by one of the artist's family members, the examination of family similarities should constitute one of the stages of the conducted identification research intended to establish the authenticity of the signature submitted for analysis and ensure appropriate attribution of the work on which the signature has been placed. In the expert opinion process, one should establish the features present in graphisms of unquestioned attribution, and then treat them as auxiliary features with lower persuasive value [Widła 1999, 219] The decision about authorship should be dictated by features that are not common for graphisms of the examined authors, as identified in the comparative material [ibid.]. In effect, when pointing to the probable author of the signature put into question, one should not categorically rule out the others.

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ROMAN LAW AND NEW TECHNOLOGIES – TIMELESS PRINCIPLES IN THE DIGITAL ERA

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Abstract. This article examines how technological innovations in ancient Rome – particularly in road construction – contributed to the empire's durability and efficiency. By analyzing legal sources, archaeological findings, and historical texts, the author demonstrates that modern digital technologies (AI, 3D modeling, laser scanning) facilitate the reconstruction of ancient infrastructure and highlight the continued relevance of Roman engineering and legal principles. The author argues that Roman engineering solutions, along with legal regulations pertaining to public infrastructure, contributed to the creation of a durable and efficient communication network throughout the Roman Empire. The study is based on the analysis of literary sources, legal texts, and archaeological findings. It demonstrates that Roman law focused primarily on safeguarding public access and ensuring the maintenance of infrastructure, rather than on prescribing detailed technical norms governing construction. Contemporary digital technologies enable in-depth investigations into ancient Roman construction techniques and facilitate the reconstruction of historical structures. The author emphasizes that the engineering and organizational accomplishments of ancient Rome remain relevant and continue to serve as an inspiration for modern interdisciplinary research concerning civilizational heritage. The article concludes by asserting that both ancient and modern technological innovations constitute vital drivers of civilizational development and progress.

Keywords: Roman law; infrastructure; road construction; digital technologies; heritage preservation.

INTRODUCTION

Contemporary scientific research across nearly all disciplines is predominantly focused on emerging technologies, while emerging social theories occupy a more peripheral position. In the former case, it may be observed that new technologies, particularly artificial intelligence, have garnered significant attention across a wide array of scientific fields, ranging from medicine, computer science, electronics, earth sciences, and engineering disciplines, to the humanities and social sciences. In the latter case, namely that of new ideologies, scholarly inquiry is most frequently undertaken within the domains of the social sciences and the humanities.

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Against this background, the question arises whether it is appropriate to speak or write about new technologies in the context of ancient Rome or Roman law. In my view, it is indeed possible to speak of the presence and function of "new technologies" in ancient Rome, albeit with the caveat that the very concept of "new technology" was unknown at the time. Within the historical context, what may be termed "new technologies" referred to innovative engineering, architectural, military, and administrative solutions that exerted a profound influence on the development of Roman civilization and its imperial strength.

However, the aforementioned question may also be reversed, namely, can representatives of broadly understood new technologies be interested in research concerning innovations that took place in ancient Rome? From the perspective of Roman law scholars, legal historians, or architectural historians, the answer to this question is, undoubtedly, affirmative. In contemporary scholarship, it is precisely Roman law specialists and historians of antiquity who identify potential areas of exploration for emerging technologies. Thus, professionals engaged in technological innovation are increasingly involved in spatial modelling of Roman cities and structures – such as the *Forum Romanum* or the *Colosseum* – through the use of 3D and virtual reality (VR) technologies. Furthermore, technologies such as laser scanning (LiDAR), drones, and photogrammetry are employed to map ruins and ancient road networks. Artificial intelligence (AI) and big data-based systems, in turn, support the analysis of primary texts and historical legal systems [Frischer 2008, 1-5; Guidi, et al. 2014, 663-70].

Proceeding from the premise that ancient Rome experienced technological development and innovation – phenomena which remain the subject of scholarly inquiry across various disciplines, not limited to historians or Roman law experts – one may identify numerous areas of such advancement. These include, inter alia, the construction of roads, aqueducts, military weaponry, as well as reforms in the organization of public administration [Oleson and Rihll 2008, 93-132]. The authors of this book have compiled an extensive compendium of knowledge on the engineering achievements of antiquity, including the construction of roads, aqueducts, war machines, and the administrative systems of Rome. However, due to the editorial word limit imposed by the publisher, this analysis will be confined to innovations in road construction and the development of infrastructure law pertaining to their protection.

1. ANALYSIS OF SOURCES

Sources concerning engineering techniques related to road construction and associated infrastructure are relatively scarce. This observation applies both to legal literature and to literary studies.

1.1. Literary sources

Marcus Vitruvius, arguably the most renowned Roman architect, who lived during the reign of Octavian Augustus, did not devote a separate chapter to road construction in his seminal work *De architectura*. Nevertheless, he makes reference in several passages to the methods by which Roman roads were constructed during his time.

Thus, in Book VIII (*De aquis*), Chapter 6, there are provisions concerning the gradient of terrain and the drainage of water. Such measures were necessary not only in the construction of aqueducts but also in the erection of roads. Vitruvius even delineates the recommended angle of inclination for water runoff as well as the design of drainage channels. The techniques employed in the construction of urban areas, aqueducts, and sewage systems were similarly applied in road building. The objective was to prevent the accumulation of water on the surface and to ensure its unobstructed flow.

Conversely, in Book X (*De machinis*), Chapters 1-2, Vitruvius addresses matters related to the transportation of various materials, including heavy loads. He emphasizes the importance of appropriate infrastructure, particularly the adaptation of road widths to correspond with the axle spacing of contemporary vehicles used for transport. Furthermore, in Book I, Chapter 3, Vitruvius discusses the proper planning of a city. According to him, builders ought to pay special attention to the arrangement of public utility spaces, such as public squares, promenades, and consequently, urban roads. In construction, durability, functionality, and aesthetic considerations must be taken into account. Durability constitutes the paramount attribute in building, achieved not only through skilled workmanship but also by the careful selection of building materials, without succumbing to excessive frugality, Vitruvius states.[1]

Other sources containing references to road construction include the work of Frontinus entitled *De aquaeductu urbis Romae*. The author provides valuable information regarding construction techniques, logistics, boundary delineation, as well as the design and maintenance of aqueduct infrastructure, which in many respects were analogous to issues pertaining to the construction and upkeep of roads. It is also worth noting the *Itinerarium Antonini Augusti*, a topographical and logistical compendium listing roads and stopping stations within the Roman Empire [Raepsaet and Löhberg 2013, 459-60].[2] Although this work does not contain typical engineering

[1] *Firmitas autem tunc erit, cum fuerit e fundamentis solidus, utilitas autem, cum sine incommodo erit usus et distributio locorum commodis apta, venustas autem, cum fuerit aspectus iucundus et elegans membrorum commensus.*

[2] *Itinerarium Antonini Augusti* is a Roman topographical document dating from the late 3rd century CE, serving as a register of roads (*itinerarium*) traversing the Roman Empire. It does not constitute a typical literary or narrative work but rather functions as a practical inventory of communication routes.

knowledge, it constitutes an important source of information on the extent and organization of the Roman road network.

1.2. Legal sources

Legal regulations concerning roads in ancient Rome have been preserved primarily in Book 43 of the *Digest*. The Justinianic compilers included several titles therein specifically dedicated to the issues of road maintenance and management.

The first title, *De locis et itineribus publicis* (D. 43.7), contains legal regulations concerning the status of public roads, which was conferred by the competent public authorities. At the same time, any person (*cuilibet*) was entitled to submit a petition to the appropriate public body requesting a decision recognizing a particular route as a public road. On public roads, the placement of any monuments or other objects that could impede the normal use of these communication routes was prohibited (D. 43.7.1 (Pomp. l. 30 ad Sab.)).

The second title, *Ne quid in loco publico vel itinere fiat* (D. 43.8), addresses various instances of violations of the prohibition against constructing or installing anything on public squares and roads, including those within urban areas, which could impede the normal use of these spaces (D. 43.8.1, Paul. 64 ad ed.). The prohibition extended not only to the erection of monuments but also, inter alia, to the construction of causeways across public roads for the drainage of water from private land to the sea or the grazing of animals on the road. Consequently, the unlawful occupation of a public road in a manner that restricted free use by all users was impermissible. In such cases, it was possible to petition the praetor to apply a legal-administrative protective measure in the form of the interdict *ne quid in loco publico fiat* [Procchi 2016, 527-74; Kamińska 2017, 197-98; Sitek 1999, 39-43].

The third title, *De via publica et si quid in ea factum esse dicatur* (D. 43.10), contains excerpts from the writings of Roman jurists, from which it is evident which public officials were responsible for the condition of roads within a given area and the scope of their duties. This obligation primarily consisted in supervision and oversight, since the principal responsibility for the maintenance and repair of public roads rested with the owners of the land adjoining those roads. In the event of failure to fulfill this duty, the official was authorized to commission the necessary work from a private contractor and charge the costs to the property owner (D. 43.10.1, *Ex Papiniani de cura urbium libro*).

Finally, it is necessary to mention the last title devoted to public roads, namely *De via publica et si quid in ea factum esse dicatur* (D. 43.11). Under this title, there are excerpts containing a prohibition against obstructing a person who is maintaining or repairing a public road running adjacent to their property. In the event of violation of this prohibition, the aggrieved party

could petition the praetor for the issuance of an interdict forbidding such conduct (D. 43.11.1, Ulp. l. 68 ad ed.). Furthermore, it was prohibited to alter the course of a public road onto neighboring land or to plough it over. Should such actions be undertaken, the perpetrator was obliged to restore the road to its prior condition at their own expense (43.11.3, Paul. L. 1 *senten*.).

As evidenced by this relatively brief analysis of Roman sources concerning the construction and maintenance of roads, few of them provide direct engineering knowledge. It may be assumed that such knowledge was transmitted primarily through practical experience within the profession. Perhaps it constituted a form of esoteric knowledge, closely guarded by specialists. This expertise was conveyed within the framework of professional practice and operated within specialized groups or enterprises engaged in the execution of such projects. Consequently, contemporary understanding of the methods employed in the construction of Roman roads, that is, typical engineering knowledge, derives predominantly from archaeological discoveries dating from the nineteenth century onwards [Matteazzi 2023, 167-94]. This publication examines the technical aspects of Roman road construction, drawing upon archaeological data from northern Italy

The foregoing analysis indicates that legal regulations concerning roads in ancient Rome primarily pertained to the protection of the public right of use and the obligation to maintain them in proper technical condition. However, there were no provisions specifically regulating the detailed constructional aspects of roads – thus, employing contemporary terminology, no legal-technical standards existed [Kamińska 2010b, 55ff; Sitek 2008, 180-82].

2. CHARACTERISTICS OF THE ROAD CONSTRUCTION POLICY IN ANCIENT ROME

The saying that all roads lead to Rome is widely known. Indeed, the Romans constructed a network of paved roads totaling over 80,000 kilometers in length. This presents a substantial subject for scholarly inquiry and constitutes an excellent source material for research across various academic disciplines.

Rome was the central point to which these roads led. This phenomenon initially manifested within the territory of Italy and subsequently throughout the entire empire. These roads connected various regions with the political, commercial, and cultural center that was the imperial capital – Rome [Laurence 2002, 38-79; Gallo 2006, 193ff]. However, their primary purpose was to facilitate the movement of Roman legions from one end of the empire to the other. From almost the very beginning – during the time of the tribune Gaius Gracchus, among others – these roads were most frequently constructed in a straight line, with only minor deviations, as noted by Plutarch (Plut. *The Life of Caius Gracchus* 7) [Wójtowicz 2021, 773-79].

The construction of roads in ancient Rome was not limited solely to the creation of a surface enabling transit but encompassed comprehensive engineering works related to the entire accompanying infrastructure. Roman engineers, primarily military, were required to possess expertise in the construction of bridges (*pontes*), stopping points (*mansiones*), intersections (*bivium*, *trivium*), viaducts, as well as drainage systems (*cloacae*) and rainwater channels. Equally important was the proper substructure of the road and attention to the terrain's gradient, designed to prevent erosion and the accumulation of water. Thanks to this approach, Rome's road infrastructure was distinguished by its durability and formed the foundation for the functioning of administration, commerce, and communication within the empire, especially for the Roman legions [O'Connor 1993, 20ff; Lugli 1991, 45; Morillo 2006].

3. ROMAN INNOVATIONS IN ROAD CONSTRUCTION

Roman roads were constructed in layers, employing several levels of materials differing in granulometry and function. The lowest layer (*statumen*) typically consisted of large, flat stones, which provided a solid foundation for the entire structure and enabled effective drainage. Upon this layer was placed the *rudus* – a layer of crushed stone or brick, often mixed with mortar – which imparted stability and a degree of flexibility to the surface. The subsequent layer, the *nucleus*, comprised finer crushed stone or sand mixed with lime, formed into a slightly convex surface to facilitate the efficient runoff of rainwater. The final, uppermost layer (*summum dorsum*) was composed of carefully fitted large stone slabs, most often durable basalt – that constituted the functional surface of the road [Chevallier 1976, chapter 2].

The use of concrete (*opus caementicium*) as a building material, particularly in the substructure of roads, bridges, and aqueducts, constituted a groundbreaking innovation that contributed to the acceleration of construction processes and significantly enhanced the durability of infrastructure [DeLaine 1997, 248].

The roads featured a convex cross-section, which facilitated the runoff of rainwater into ditches or channels situated alongside them. In urban areas, drainage systems – including small conduits and sewer manholes were also employed. The width of the roads was adapted to accommodate wheeled traffic: principal thoroughfares measured approximately 4.2 to 4.8 meters in width, allowing for the passage of two vehicles simultaneously (Fulford and Adam, chapter 2).

Road construction also required precise land surveying, which involved the use of geodetic instruments such as the *groma*. Sections traversing difficult terrain (e.g., mountainous areas) were often supported by retaining

walls, bridges, and cut tunnels, attesting to the advanced technical proficiency of Roman engineers.

The technique of Roman road construction was not only the result of practical knowledge but also an application of engineering and logistics principles on a vast scale. Today, it is recognized as one of the key civilizational achievements of Rome.

Regarded as one of the greatest achievements of ancient civil engineering, Roman roads stood out for their exceptional technical sophistication, particularly in the context of the era in which they were constructed [Kosiński 1966, 187-97]. Their durability and functionality were not matters of chance – the Romans designed them with great precision, attending both to practical usability and their strategic significance for communication within the empire. As a result, many of these thoroughfares have survived to the present day in remarkably good condition [Oleson and Rihll 2008, 93-132].

4. ADMINISTRATION OF CONSTRUCTION AND MAINTENANCE OF ROAD INFRASTRUCTURE

Beginning with the reign of Augustus, the construction and maintenance of roads were entrusted to public officials. At that time, the institution of the *curator viarum publicarum* was established – an imperial official responsible for overseeing public roads in Italy, and eventually also beyond its borders. The *curatores viarum* operated at both the central and local levels [Sitek and Krajewski 2005, 185-94; Kamińska 2015, 185-94]. In Rome itself, oversight of the roads was originally exercised by the *aediles curules* (curule aediles) and *censores* (censors) [Kamińska 2010a, 95; Robinson 1992, 96].

It is also worth noting that engineering knowledge in this domain was transmitted primarily through practical means within specialized building corps (*collegia fabrorum*) and through experience gained in the Roman army, which frequently organized and executed roadworks in conquered territories (Plin. HN, 36,24.).

The final element completing the picture of the scope of technologies employed in the construction of public roads is the emphasis that the principal investor in such undertakings was essentially the Roman state. This means that road construction was financed from public funds – during the Republic from the *aerarium populi Romani*, and from the Principate onward from the *fiscus*.

The contractors for these projects, however, were private enterprises (*redemptores*), selected through procedures analogous to modern public procurement processes. These enterprises employed laborers and engineers who executed the projects in accordance with established construction practices [Sitek 2016, 697-709; Idem 2011, 97-101; Trisciuoglio 1991, 22-27].

CONCLUSIONS

The Romans established a strong and well-organized state capable of adapting its political system to evolving social, political, and economic needs. Within these efforts, particular emphasis was placed on the development of infrastructure, especially roads. The construction materials, engineering techniques, and technologies employed in road building were subject to exceptionally high standards, evidenced, among other things, by the fact that many of these roads have survived for over two thousand years.

Interestingly, the primary sources of knowledge concerning the technologies employed at that time are not chiefly legal or literary texts – apart from a few exceptions, such as Vitruvius (*De architectura*) – but rather contemporary archaeological excavations. Artificial intelligence now plays a significant role in reconstructing Roman technological knowledge, enabling not only the identification of materials used but also the reconstruction of the technologies and engineering solutions applied during that period.

This knowledge was not widespread among the Romans themselves; it was specialized and primarily reserved for practitioners, especially construction enterprises (*redemptores*). It was transmitted from generation to generation through professional practice, without formal educational systems.

However, Roman legislators primarily focused on regulating the maintenance and repair of roads, their orderly management, and the legal-administrative protection of all citizens' right to use public roads and squares – both within cities and beyond.

In conclusion, technological development in various fields was already a major driver of civilizational progress in ancient Rome. Today, the advancement of new technologies – particularly in the field of artificial intelligence – enables us to fully appreciate and understand the engineering achievements of the ancient Romans.

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ACTIVE REPENTANCE AS AN INSTRUMENT MEANT TO OVERTURN THE RULE OF LAW IN POLAND?

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Abstract. According to the Polish Language Dictionary, active repentance is the result of an internal change which occurs in the perpetrator's consciousness, who has committed an act prohibited by law or perceived negatively by society, due to the arising feeling of guilt and remorse. This definition is not normative in nature, although it contains important components of the act that is active repentance. The direct impulse for writing this text, however, is the proposal by the Minister of Justice – Adam Bodnar to restore the rule of law in Poland by applying the discredited institution of active repentance, which originated in the communist era. This proposal was publicly announced and repeated many times by the media at the end of 2024. According to the Minister, active repentance should be submitted by judges promoted to higher positions after the year 2017. This solution caused quite a lot of surprise and sparked a discussion in Poland about this proposal. The institution of active repentance undoubtedly originates from the theological concept of remorse for sins, not only on a psychological or sociological level but also on a normative one, as it is regulated in the Code of Canon Law. It was later incorporated into secular legal systems, including criminal law. It was also a tool of political struggle, among other things, in the communist system in Poland. The aim of this study is to analyze the application of the institution of active repentance from a normative, doctrinal, and political perspective. Therefore, the study will discuss the institution of active repentance in Christian theology, in criminal law, and in the practice of implementing communist ideology in the People's Republic of Poland. Such an analytical approach to the institution of active repentance will allow for a proper assessment of the Minister of Justice's proposal to apply it in the process of restoring the rule of law in Poland. Such a holistic approach to the application of the institution of active repentance is undoubtedly a novelty in the existing discussions on the justification for its use. Therefore, in the structure of the paper, I will first discuss active repentance in Christian theology, then in criminal law, and during the communist era in Poland. Only in the final section will I assess the proposal of the Minister of Justice.

Keywords: Minister of Justice; active repentance; rule of law; Poland.

INTRODUCTION

According to the Polish Language Dictionary, active repentance is the result of an internal change which occurs in the perpetrator's consciousness, who has committed an act prohibited by law or perceived negatively

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by society, due to the arising feeling of guilt and remorse [Szymczak 1983, 1084]. This definition is not normative in nature, although it contains important components of the act that is active repentance.

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The institution of active repentance undoubtedly originates from the theological concept of remorse for sins, not only on a psychological or sociological level but also on a normative one, as it is regulated in the Code of Canon Law.[1] It was later incorporated into secular legal systems, including criminal law. It was also a tool of political struggle, among other things, in the communist system in Poland.

The aim of this study is to analyze the application of the institution of active repentance from a normative, doctrinal, and political perspective. Therefore, the study will discuss the institution of active repentance in Christian theology, in criminal law, and in the practice of implementing communist ideology in the People's Republic of Poland. Such an analytical approach to the institution of active repentance will allow for a proper assessment of the Minister of Justice's proposal to apply it in the process of restoring the rule of law in Poland.[2]

Such a holistic approach to the application of the institution of active repentance is undoubtedly a novelty in the existing discussions on the justification for its use. Therefore, in the structure of the paper, I will first discuss active repentance in Christian theology, then in criminal law, and during the communist era in Poland. Only in the final section will I assess the proposal of the Minister of Justice.

The main research hypothesis of the paper is the statement that an attempt to apply the institution of active repentance within the framework of implementing a specific ideology or state policy is a mistake and becomes an instrument of political struggle. Historically, such solutions, even if they are only in the form of a position, are always negatively assessed.

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[1] Hereinafter: CCL.

[2] It should also be added that the institution of active repentance is present in fiscal criminal law as well, but due to the limitations of the scope of this work, this research thread will not be explored. More on active repentance in fiscal criminal law see: Legutko-Kasica 2021; Kurzyński 2016.

The reference to active repentance as an instrument for restoring the rule of law in a democratic state governed by the rule of law primarily undermines the constitutional principle of citizen trust in the state and its organs.

1. REPENTANCE FOR SINS IN CHRISTIAN THEOLOGY

Functionally and structurally, active repentance is an emanation of the ancient institution which still exists today, namely, the remorse for sins. According to Christian theology, remorse for sins is a conscious act of a person's conscience related to the evaluation of their past, current, and former actions which harm themselves, others, nature (which is a gift from God), or God Himself. By performing the act of remorse, a person acknowledges that their behaviour, actions, thoughts, or intentions are incompatible with the system of evangelical values – it means Christian values. Such behaviour in theology is referred to by the collective term 'sin.' Remorse for sins is therefore an act of self-accusation in front of God. This behaviour is the result of a person's reflection on their life and an expression of their will to return to the path of Christian life. The goal of this internal transformation is reconciliation with oneself, with others, and most importantly, with God [Pierzchała 2024, 149-60; Śmiałek 2023, 309-320].

According to Canon 959 CCL, remorse for sins, along with the resolution to amend is one of the fundamental elements required to obtain forgiveness, which involves the remission of the wrong committed and the forgiveness of temporal and eternal punishments, including eternal damnation. The Catechism of the Catholic Church states that remorse arises from love for God, who is loved above all (no. 1452). It is simultaneously the pain of the soul and the resolution not to sin in the future (no. 1451). The last condition for a good confession is the confession of sins before an authorized minister, meaning the sinner must perform self-accusation (no. 1456) [Pastuszko 1996, 23].

In exchange for performing remorse for sins, making a firm resolution to amend, and confessing sins, the sinner not only obtains forgiveness from God but also from the people they have harmed or injured. As a result, they are once again accepted into the community of believers and into the group of the saved [Przybyłowski 2022, 282].

Some thinkers assess Christian forgiveness negatively, as from the perspective of such an action, it is contrary to the concept of social justice, or at least the kind we encounter in criminal law theory [Fiala 2010, 494-506; Zalewski 2016, 565-76]. Moreover, Christian forgiveness is difficult to explain from a psychological or psychotherapeutic point of view [Drożdż 2007, 69].

Konrad Glombik, citing the concept of L. Boros, identifies three stages of remorse for sins. The first is sorrow, which is a psychological experience

of one's near or distant past in the context of good and evil. In this context, a person is both the accused and the judge, applying moral norms as measures of good and evil to him or herself [Glombik 2015, 25-36]. The second stage of remorse is the realization that we exist together with other people. In fact, one of the principles of Roman law, passed down by the lawyer Ulpian, was the assertion that one should not harm anyone – *neminem laedere*.[3] Shame is the path to the third stage, which is love, through which a person, despite committing wrongful acts, can still function within the community. This is possible thanks to forgiving love – not only from other people and God but also from the person forgiving him or herself.

Remorse for sins, and consequently forgiveness, is an essential condition for the functioning of an individual in relation to another person, but forgiveness is also important for the functioning of social groups, states, and all of humanity. Therefore, it should be stated that forgiveness is not only a religious value but also a necessity for every human being. Hence, in my publications and speeches at conferences, I have often advocated for the inclusion of the right to forgiveness in the canon of human rights.

To summarize the issue of remorse for sins in Christian theology, it should be stated that it contains certain structural elements similar to active repentance in positive law, especially in criminal and fiscal criminal law. However, this will be discussed further in the concluding remarks after the discussion of active repentance in positive law.

2. ACTIVE REPENTANCE AS AN INSTRUMENT IN THE FIGHT AGAINST THE OPPOSITION DURING THE PRL (PEOPLE'S REPUBLIC OF POLAND) ERA

Active repentance was one of the instruments of ideological struggle used by the communist system in the People's Republic of Poland (PRL) against both external and internal opposition. It was not so much a legal instrument but primarily a tool of political repression and social control. The post-war communist authorities used this tool to intimidate opponents, obtain information about the opposition's activities, and above all, to legitimize the communist system. This tool was used not only against political opponents but also against members of the communist party who exhibited revisionist views which disrupted unity within the party. These individuals were most often forced to make public self-criticism.[4]

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[3] D. 1,1,10,1 (Ulp.,1 *reg.*). See: Borysiak 2023, 13-45; Idem 2022, 66.

[4] Active repentance and self-criticism in the times of the People's Republic of Poland (PRL) were two separate institutions, very similar to each other, but also having their own specific characteristics. Active remorse had a legal and repressive nature, while self-criticism was

The use of active repentance gave the accused of alleged crimes hope of avoiding the penalties prescribed in laws created for the needs of the party and forced political opponents to make public self-criticism and admit their mistakes. This attitude, essentially a form of public self-humiliation, did give the individual a chance, but it did not guarantee the avoidance of severe punishments, including the death penalty, imprisonment, loss of employment, expulsion from the country, or public defamation in the media of the time, which were tools in the hands of party leaders. These individuals were often coerced into denouncing other members of the opposition and enemies of the then political system.[5]

Active repentance, often combined with self-criticism in the late 1940s and 1950s, was an instrument of manipulation and blackmail. Representatives of law enforcement, especially prosecutors, often suggested to those interrogated that they cooperate and make public self-criticism in exchange for ceasing further hardships. However, in practice, these promises were often illusory and were not kept.

Another function of both active repentance and self-criticism was the re-education of citizens, especially those who had cooperated with such organizations as: the Home Army (AK), the Freedom and Independence (WiN), or the National Armed Forces (NSZ), as well as clergy, lawyers, and representatives of science and art. After the March events of 1968, students, writers, and scientists were forced, among other things, to publicly condemn Zionist or anti-socialist views. Such appearances were meant to guarantee further careers, but these promises made by the authorities were not always kept [Szurczak 2009, 94-95].

3. ACTIVE REPENTANCE IN CRIMINAL LAW

The concept of active repentance does not have a normative character. It has not been defined in any positive legal act. It is therefore a product of doctrine and case law, applied in practice, but based on criminal law provisions [Kielak 2020, 24-25]. According to J. Kośla [Kośla 2023, 8],[6] the issue of active repentance was first developed in Polish criminal law doctrine

more of an ideological and propaganda tool. Often, both of these institutions were applied together. The most despised repressive body was the Ministry of Public Security, which existed from 1944 to 1954. See: Kamiński 2010, 241-62.

[5] More about the methods and tools used by the communists in the People's Republic of Poland, especially in the 1940s and 1950s see: Trembicka 2015, 165-78; Majer 2000, 477.

[6] This is a doctoral dissertation defended at Łazarski University. On pages 11 to 31, the author of the thesis also describes the evolution of criminal law regulations in Poland, focusing on the implementation of provisions that serve as the foundation for legal doctrine and the practice of applying *czynny żal* (active repentance).

by E. Krzymuski in 1902. However, he was not the creator of this concept, as it was used in the text of the criminal law for crimes, misdemeanours, and offenses of 27th May 1852,[7] also known as the Austrian Penal Code. The term "active repentance" did not appear in later legal acts valid in the territory of Poland, neither during the interwar period of the 20th century[8] nor in post-World War II criminal laws.[9]

Currently, Articles 15, 17(1), and 23(1) of the Penal Code of 6th June 1997[10] are the normative basis for applying the concept of active repentance in judicial practice. Based on these provisions of criminal law, a perpetrator of a crime, by performing active repentance, may avoid criminal liability or hope for a mitigation of the main penalty. Therefore, the doctrine rightly states that active repentance can lead to the cancellation or reduction of the penalty. As stated in the Article 15(1), the legislator decided that "there is no penalty for an attempt if the person voluntarily refrained from committing the crime or prevented the result constituting the elements of the criminal offense". In the case of an attempt, which can take the form of voluntarily refraining from committing a crime or preventing the consequences constituting the elements of the offense, the legislator allows law enforcement authorities or courts to refrain from penalizing the perpetrator. Meanwhile, in the Article 15(2), the legislator provides a second option, which is the application of extraordinary mitigation of the penalty if the perpetrator voluntarily tried to prevent the result of their act. In the first case, we are dealing with the passive behaviour of the perpetrator, who does not take any action which would lead to the realization of an intention contrary to the law. In contrast, active repentance occurs when the criminal act has already been committed, and the perpetrator takes steps to eliminate the negative effects or neutralize them. Non-punishability, therefore, serves as a reward for the perpetrator who, at a certain moment, reflects on their actions and corrects them in accordance with the moral norms embedded in the Penal Code and the ethical norms respected within the community, which translates into their conduct [Stefański 2025, commentary on Article 15].

An extension of Article 15 PC is the Article 17(1), where the legislator decided that an important condition for refraining from punishing the perpetrator may also be that the perpetrator has destroyed the prepared means

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[7] Journal of Laws No. 117. See: Kośla 2023, 15.

[8] In the interwar period of the 20th century, the criminal law provisions initially in force were those previously applied in the former partitioned territories. Polish legal regulation in this area of law was introduced only on the basis of the decree of the President of the Republic of Poland of 11th July 1932 – the Penal Code, which came into force on 1st September 1932. See: Klepner 2001, 538.

[9] During the times of the People's Republic of Poland (PRL), a code from 19th April 1969 was in force, Journal of Laws No. 13, item 94 as amended. See: Stefańska 2017, 158.

[10] Journal of Laws of 2023, item 17 [hereinafter: PC].

intended for committing the crime or prevented their use in the future. Furthermore, in cases where a potential perpetrator intended to commit a criminal act together with another person, they will not be punished if they also prevented the commission of the act by the potential accomplice [Gadecki 2023, commentary on Article 15].

Consequently, an accomplice, based on the Article 23(1) PC, will not be subject to punishment if they prevent the commission of the prohibited act. The legislator, in the Article 23(2), has adopted a solution analogous to the Article 15(2) PC, stating that an accomplice will not be punished if they do not carry out the intended criminal act, or if they prevent the negative consequences of that act or eliminate them. An accomplice may also expect an extraordinary reduction of the penalty if they destroy tools intended for committing the crime, or if they prevent their future use [Stefański 2025, commentary on Article 23].[11]

It is also worth mentioning the issue of the effectiveness of active remorse in criminal law, which conditions the decision to refrain from punishment or creates the possibility of applying an extraordinary reduction of the penalty. The effectiveness of active remorse in criminal law can be discussed when it is voluntary in nature, meaning it is not the result of any coercion [Grześkowiaka and Wiak 2024, commentary on Article 23]. Therefore, active remorse must be genuine, not merely apparent. According to the ruling of the Supreme Court from 24th November 2005 (III Ko 52/04), active remorse does not have to result in the actual mitigation of the negative consequences of the action, but it must reflect a positive attitude, meaning a sincere will of the perpetrator to abandon their actions or reverse the negative effects. Whether active remorse has occurred is determined by the court in the appropriate panel.[12] Other circumstances also matter for the effectiveness of active remorse, such as calling an ambulance for a person injured by the perpetrator. In this context, the reason for the injury does not matter, such as a perpetrator stabbing the victim with a knife.[13]

To summarize the issue of active remorse in criminal law, it should be stated that it is a decision by the court to refrain from punishing the perpetrator of a criminal act or to apply an extraordinary reduction of the penalty if the perpetrator takes actions aimed at abandoning the realization of the intent or mitigating the consequences of the already committed act. The action taken does not need to be effective; it is sufficient for the perpetrator or co-perpetrator to have a positive and sincere attitude.

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[11] The discussion of the provisions regarding active repentance in criminal law is not exhaustive. There are other cases, especially in the Criminal Law Act of 1969, see: Radecki 1976, 17-40.

[12] Judgment of the Court of Appeal in Rzeszów of 16 October 2023, ref. no. II AKa 91/23.

[13] Judgement of the Court of Appeal in Gdańsk of 8 December 2022, ref. no. II AKa 303/22.

Active remorse, therefore, is a specific action taken by the perpetrator of a crime, offense, or delict, aimed at preventing or mitigating the consequences of their actions. Moreover, the perpetrator wishing to express active remorse must cooperate with law enforcement authorities, such as the police or prosecutor's office before these authorities take such actions themselves.

4. ACTIVE REPENTANCE ACCORDING TO THE MINISTER OF JUSTICE

As mentioned earlier, in 2024, the Minister of Justice proposed the restoration of the rule of law in Poland by addressing the issue of judges appointed after the year 2017.[14] This group of judges, referred to in the media and public discourse as "neo-judges", represents a significant issue of politically motivated accusations related to violations of the rule of law in Poland. The origins of this situation lie in the amendment to the Act of 20th August 1997,[15] which was made based on the Act of 29th April 2016.[16] This law revoked the Article 11, which regulated the selection of 15 members of the National Judicial Council (KRS) by legal corporations, which were: the Supreme Court, administrative courts, appellate courts, military courts, and district courts. Therefore, the selection of 15 members of the National Judicial Council (KRS) was a prerogative of the judicial environment. In place of the Article 11, the Article 9a was introduced, which granted the right to elect judges to the KRS to the Seym (Polish parliament). The judicial environment only had the right to propose candidates for the KRS. This solution was perceived by the then-opposition as a politicization of the process. However, it is worth noting the significantly higher degree of politicization of judicial appointments in countries like France, Germany, Italy, and Spain, which does not constitute, and which is not recognized a violation of the rule of law.[17]

Accusations began to be directed at the then government for violating the rule of law, with these claims also being spread outside of Poland. In lawsuits filed by Polish judges and opposition politicians to the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU), these institutions issued several rulings in which they stated that the

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[14] The dispute between Poland and the European Commission began earlier. It started with the issue from 2015 concerning the method of appointing judges to the Constitutional Tribunal. At that time, the Commission (EU) issued Recommendation 2016/1374 of 27 July 2016 regarding the rule of law in Poland (Official Journal of the EU L 217/53). See: Grzeszczak 2024, 31-47.

[15] Journal of Laws No. 121, item 769.

[16] Journal of Laws item 687.

[17] More on the methods of judicial appointments in other European countries see: Sitek and Michalski 2020.

panels adjudicating in Polish courts, including the Supreme Court, which includes so-called neo-judges, do not meet the conditions of impartiality and independence.[18] The Venice Commission expressed a similar view.[19]

After the change of government in Poland on 13th December 2023, and its takeover by the previous opposition, steps were taken to restore the rule of law, primarily through the reform of the judiciary. It is assumed that judges appointed after 2017 are not legitimate judges, or that their appointments to higher courts are invalid. Therefore, the Minister of Justice proposes to divide these judges into three groups. The first group consists of judges who, during this period, completed the School of Judiciary and Prosecution in Kraków. These individuals had no other option but to undergo verification by the politicized National Judicial Council (KRS). For this reason, they are to remain judges, and their positions are inviolable. The third group consists of those who were appointed as judges after previously practicing other legal professions. According to the Minister of Justice's proposal, they are not considered judges and, therefore, should lose their judicial status and return to their previous professions. They may participate in new competitions organized by the new, depoliticized KRS.

At the center of our interest is the second group, consisting of judges, including Supreme Court judges, who were appointed before 2018 and were subsequently promoted to higher positions, particularly those who advanced

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[18] There have been several judgments issued by the CJEU and the ECtHR, and for the purpose of illustrating the issue, I will refer to one judgment from each Court. In the judgment of the ECtHR from November 23, 2023, in the case 50849/21 Wałęsa v. Poland, it was stated that Poland has a flawed procedure for appointing judges with the participation of the National Judicial Council (KRS), which leads to a lack of independence of the Supreme Court's IKNiSP and excludes the competence to adjudicate such matters by the IKNiSP of the Supreme Court. However, it was not stated that the individuals deciding the case of Mr. L. Wałęsa in Poland failed to guarantee the independence of this Chamber. On the other hand, in the ruling of the CJEU of July 14, 2021, in the case C-204/21, it was ordered to suspend the application of provisions related to the adjudication by the Disciplinary Chamber of the Supreme Court, including those concerning the authorization to prosecute judges and judicial assessors for criminal responsibility or their temporary detention, in cases concerning the status of Supreme Court judges and their positions, and rights allowing for disciplinary accountability of judges for examining the fulfilment of the requirements of independence and impartiality. See: Stanek 2023

[19] The Venice Commission, during its 140th plenary session (11-12 October 2024), adopted a position on the status of judges in Poland. This was in response to a query from Minister of Justice Adam Bodnar. An important issue was the statement that it is not possible to consider all resolutions of the National Judicial Council (KRS) after 2018 as non-existent based on a single law. Therefore, it is not possible to reinstate all judges to their previous positions. This is not within the competence of Parliament and would violate the principle of the separation of powers. See more: *'Przywracanie praworządności musi pozostawać w zgodzie z zasadą praworządności' – Komisja Wenecka wydała opinię w sprawie statusu neo-sędziów*, https://hfhr.pl/aktualnosci/opinia-komisji-weneckiej-status-sedziow [accessed: 15.02.2025].

to higher courts during the discussed period. This group of judges is to return to their original positions, but under the condition of expressing active remorse and submitting a statement in which they will acknowledge that their promotion was a life mistake and, thus, that they contributed to the creation of an undemocratic order. Such a statement must be made regardless of whether the judge was aware that the National Judicial Council (KRS) was politicized and whether they were aware that they were contributing to the establishment of an undemocratic order. Undoubtedly, such a statement must be regarded as a form of public self-criticism [Kuchta 2024].

Taking into consideration the main goal of this work, it is now time to assess the proposal of the Minister of Justice from the perspective of legal principles and historical circumstances.

The fundamental accusation which can be made against the concept of restoring the rule of law in Poland is that it is based on the principle of presumption of guilt. This proposal assumes, a priori, that judges appointed after 2017 are guilty. It does not even offer the possibility of judicial proof that they are innocent. Candidates for judges, as well as judges seeking promotion, could not, and still are not authorized, to assess the legal provisions created by the legitimate authority. There is no political motive in this case, unlike the one which guided the legislator at the time. If every citizen, including a judge, had to assess the motivation behind the legislator's actions when enacting a given law, they would never have certainty about the legality of their actions. Shifting the burden of assessing the legality of the legal provisions applied to the citizens, including judges, leads to the violation of another principle: legal certainty [Patora 2020, 75-93].

Another principle proposed by the Minister of Justice is the presumption of innocence. A judge, by expressing active remorse and making self-criticism, which is, self-accusation for contributing to the establishment of an undemocratic order, is admitting to committing a criminal act which, at the time it was committed, was not and still is not punishable. Furthermore, according to the principle of the presumption of innocence, it is the duty of the state authorities to prove that the person committed the criminal act in question. The perpetrator is not obliged to accuse themselves or confess [Jezusek 2016, 175-87; Waltoś 2009, 7-22]. It should also be emphasized that, as of now, no legal provision has defined the criminal act that judges promoted after 2017 could possibly be accused of.

Finally, the proposal by the Minister of Justice to repair the rule of law in Poland contradicts the constitutional principle of trust between citizens and the state. This is a fundamental principle of a democratic rule of law, as stated in the article 2 of the Constitution of the Republic of Poland. The state should act in a predictable, consistent, and reasonable manner. Citizens, including judges, must make their life decisions consciously,

without fear of sudden, unjustified changes in the law [Chybalski 2023, 65-81]. According to the Article 7 of the Constitution of the Republic of Poland, state organs should act on the basis of and within the limits of the law. This means that the law must be predictable and protect acquired rights. The so-called neo-judges sought entry into the judiciary or professional promotion in the belief that they were acting in accordance with the applicable law. After all, trust in the state by its citizens is a key element of the rule of law.

Finally, the proposal by the Minister of Justice regarding the necessity for a specific group of judges to express active remorse and self-criticism should also be viewed from a historical perspective. This is especially important given that this proposal clearly has a political aspect, being a result of the ongoing political struggle of the current ruling coalition with the Law and Justice party (PiS). From this perspective, it is necessary to evaluate this proposal through the lens of the application of active remorse and self-criticism during the communist era in Poland, particularly in the 1940s and 1950s, as mentioned above. The use of both of these institutions to combat the political opposition has historically been negatively assessed. Poland, and the current ruling coalition which claims to belong to democratic states, should not demand that citizens, including judges, confess to actions they did not commit, especially actions which contributed to the establishment of an undemocratic order. Moreover, in my opinion, such an accusation is equivalent to a charge of a coup against the democratic order, which, of course, in the context discussed, is an absurd accusation.

COCLUSIONS

The proposal given by Adam Bodnar – the Minister of Justice, which involves legally compelling judges promoted after 2017 to submit active repentance and self-criticism by admitting their participation in building an undemocratic order, cannot be considered a solution consistent with a democratic state governed by the rule of law. This proposal is inconsistent with the fundamental principles of a democratic state governed by the rule of law, such as: citizen trust in the state, the prohibition of retroactive laws, and the presumption of innocence.

Without denying the value of actions aimed at restoring the rule of law, we must seek an answer to the question of whether there has truly been a violation of the rule of law in Poland due to the change in the method of selecting 15 judges to the National Judicial Council (KRS)? This question is justified by the already mentioned issue, namely, in other EU countries, the selection of judges is mainly political in nature, and this fact is not denied within the European Union. Is the different treatment of similar solutions by the ECtHR and the CJEU justified? Of course, in my opinion,

reversing the solution for selecting judges to the KRS from before 2016 guarantees greater independence of the judiciary from the other branches of power. In striving to change the current legal state, the KRS should not resort to radical accusations such as breaking the rule of law or judges participating in building an undemocratic order. It is enough to build a consensus on changing the current legal state between the parliamentary majority, the opposition, and the President. The rule of law cannot be restored by violating the rule of law and resorting to historically discredited institutions of active repentance and self-criticism.

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EXECUTION OF CUSTODIAL SENTENCE IN THE LIGHT OF INTERNATIONAL LAW STANDARDS BASED ON POLISH LEGAL SOLUTIONS AND SELECTED JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract. Custodial sentence is a means of state response to a criminal act. From this perspective, it seems important to reflect on the essence of freedom, since it is freedom, next to life, that constitutes the highest value for every human being. International instruments introduce an extensive catalogue of rights and recommendations that can be applied directly or indirectly to a person deprived of his or her liberty. They constitute the implementation of the principle of the convicted person's dignity. The relevance of these instruments in practice, however, depends on their implementation into national law, and on the existence of control mechanisms that would allow, in a manner accessible to everyone, to enforce the effectiveness of international instruments on individuals. In the modern world, we can speak of universal and regional systems for the protection of human rights, which include the United Nations System and the Council of Europe and European Union Systems. This article will present selected inter-state regulations that relate to the execution of custodial sentences and examples of solutions introduced into the Polish legal system on the basis of these regulations. The article will also point out selected judgements of the European Court of Human Rights, issued mainly in cases against Poland, and of the Polish Supreme Court and the Constitutional Tribunal, and introduce the issue of the National Preventive Mechanism.

Keywords: custodial sentence; prison; convict; prisoner; international standards; rights and obligations of prisoners.

INTRODUCTION

Custodial sentence has accompanied mankind since the dawn of time. From ancient times to the present, it has evolved as a result of civilisational, social, political, economic, cultural and demographic changes, repeatedly changing its shape, functions and purposes. Today, as a result of the development of multiple theories and concepts of custodial sentences over the course of the development of civilisation, custodial sentences bear

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no resemblance to those of a few hundred years ago. It is important to note at this point that the analysis of isolation punishment cannot be made without reference to the fundamental assumptions underlying the origins of punishment itself, the law of punishment and international standards [Ultrat-Milecki 2006, 46].

A person deprived of his or her liberty, by virtue of incarceration in a penitentiary unit, is particularly vulnerable to violations of his or her rights. This is because the person finds himself or herself in a place that isolates him or her from the outside world and significantly limits contact with his or her loved ones. The international community, therefore, has developed a series of documents that define the status of a detainee, his or her rights and the obligations imposed on him or her, and has developed mechanisms for the continuous monitoring of prisons to ensure the correct implementation of the custodial sentence. The focus of international instruments is the protection of human rights, particularly those relating to respect for the dignity of prisoners, the principles of humane treatment and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

A key aspect of the analysis is the observance of human rights in Polish penitentiary institutions, particularly in light of systemic challenges such as prison overcrowding. The study also considers the role of the National Preventive Mechanism in monitoring detention conditions and ensuring compliance with established standards. Furthermore, the research explores different models of custodial sentence execution, emphasizing the rehabilitative and integrative approaches. It seeks to evaluate the effectiveness of international standards in the Polish prison system while identifying areas that require improvement. The primary goal of this analysis is to assess Poland's compliance with international penitentiary standards and pinpoint challenges hindering their full implementation. It aims to highlight systemic issues in Polish prisons, including limited access to education and employment for inmates, as well as potential human rights violations. In addition, the study presents key control mechanisms, such as the activities of the European Committee for the Prevention of Torture and the National Preventive Mechanism, to ensure humane treatment of prisoners. The research also examines selected rulings from the European Court of Human Rights regarding the protection of prisoners' rights in Poland. Education and employment are crucial factors in the resocialization process, and the analysis explores their impact on reintegrating inmates into society after serving their sentences. Lastly, the study underscores the importance of humanitarian principles in the execution of custodial sentences, ensuring compliance with modern European and international legal frameworks.

1. INTERNATIONAL INSTRUMENTS – HISTORICAL BACKGROUND

At the axiological basis of a custodial sentence is the conviction of the corrective possibilities that can be achieved for the convicted person under conditions of confinement and thus make it possible to repair his or her personality and restore him or her to a life in conformity with generally accepted social norms [Świętochowska 1992, 76]. Inspired by the humanitarian trends, people began to move away from treating human beings merely as objects who, due to their frailty, cease to be useful and thus become superfluous to society. With socio-economic progress, it has been noted that society has, on the one hand, the right to defend itself against criminal individuals and to demand justice for the wrong done, but, on the other hand, also has a duty to find a way for their social readaptation. In cases where these are individuals who have repeatedly demonstrated social maladjustment, society must find humane ways for their isolation [ibid.]. With the emergence of the utilitarian element, deliberations on the punishment issues began to move away from the use of the death penalty, recognising its social uselessness, in favour of humane and rational methods of restoring justice and safeguarding society from crime [Beccaria 1959, 147]. Based on such assumptions, imprisonment has become part of the canon of penalties imposed for violations of a harmonious social reality.

It should first be noted that international law does not define the concept of human dignity. This is a term used in the field of ethics and morality. Dignity is a dynamic value, it is inherent and universal and its qualities are inalienability and permanence [Antonowicz 1990, 7]. In literature, it occurs in two meanings – as personal dignity and personality dignity. Personal dignity is granted to every human being, without exception, and is absolute and inalienable [Krukowski 1997, 40-42]. Personality dignity, on the other hand, is an individual characteristic of a specific person. It can be acquired, developed through work or even lost [Hołda, Hołda, Ostrowska, et al. 2014, 12]. Instruments of international law refer to dignity in the personal sense. Within the international protection of human rights, inherent human dignity exists, as it were, on two levels. Firstly, it can take the form of an axiological postulate and provide a goal and direction for the development of the realisation of the idea of inherent human dignity. From the second perspective, the meaning of dignity as a value protected by a particular norm will depend on its compatibility or contradiction with the normative presupposition [Zajadło 1989, 114-15].

With the end of the Second World War on the European continent, the countries of the anti-Hitler coalition began to work on the preparation of international standards for the protection of human rights at the regional

level.[1] In particular, work in this area was initiated by the Council of Europe, established in 1949, which set itself the objective of working to protect the observance and development of human rights. In addition to the Council of Europe, later the European Union (which was established on November 1, 1993, under the Maastricht Treaty signed on February 7, 1992, as the result of a long-term process of political, economic, and social integration) has also begun to develop its system. The protective prison model, which had been in place until then, began to be replaced by a pro-social (readaptive[2]) prison model. It is a clear inverse of the first model as it provides the prisoner with full personal and legal subjectivity. He or she becomes a fully informed participant and co-responsible for his or her own social readaptation. The prison impact is subject to the individual characteristics and qualities of the detainees and their broadly defined needs. It is implemented through the normalisation of living conditions in prison [Szczygieł 2002, 41]. This means that all tasks, duties, activities and conditions of punishment are to be similar to those prevailing in free society. The prisoner is confronted with challenges as similar as possible to typical situations encountered outside the prison walls. In addition, they are intended to teach him or her personal responsibility for his or her own conduct.

The criterion for the classification of legal acts used in the later part of the chapter was based on thematic assumptions – grouping acts according to their scope of regulation, such as fundamental human rights, standards for the treatment of prisoners, and control mechanisms.

The first and fundamental international document on human rights in the modern world is the 1948 Universal Declaration of Human Rights,[3] which explicitly advocated humane and lawful punishment of human beings [Szymanowski and Migdał 2014, 47]. The Declaration is a non-legally binding international agreement, the acts issued thereunder are *soft law*, however, it plays a huge political, moral and ethical role due to the fact that it has been proclaimed by almost the entire international community.

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[1] In May 1948, the European Congress was convened in The Hague with the aim of manifesting the tendencies of pro-European movements seeking European unification. The congress concluded with the adoption of the "Proclamation to Europeans" that declared a desire for European unification and the development of a Charter of Human Rights. In January 1949, the Council of Europe was established [Astramowicz-Leyk 2009, 39].

[2] Readaptation (social readaptation) refers to the readaptation of an individual to an active and independent life, expressed in the performance of social roles related to the basic spheres and planes of human existence [Ambrozik 2008, 182].

[3] Universal Declaration of Human Rights [hereinafter: UDHR or Declaration]. UN General Assembly Resolution 217 A (III), proclaimed and adopted in Paris on 10 December 1948, in: *Wybór dokumentów międzynarodowych dotyczących praw człowieka. Księga Jubileuszowa Rzecznika Praw Obywatelskich*, vol. II, ed. M. Zubik, Warszawa 2008, p. 11-16.

The Declaration undoubtedly offered a good foundation for international cooperation in dealing with offenders and contributed to the development of increasingly institutionalised forms of crime prevention. Subsequent years saw the adoption of further international acts advocating respect for human rights and acting for the good of humanity, including with regard to criminals [ibid.].

In 1966, the International Covenant on Civil and Political Rights (ICCPR)[4] was adopted under the auspices of the UN and ratified by Poland in 1977. The aforementioned act, together with its protocols, creates certain rights and obligations for the States Parties. The Covenant created an institutionalised entity to oversee compliance therewith, namely the Human Rights Committee.

The two aforementioned acts, together with the UN[5] Charter adopted in 1945[6] and constituting the UN Constitution, make up the universal system of human rights protection. The Declaration undoubtedly offered a good foundation for international cooperation in dealing with offenders and contributed to the development of increasingly institutionalised forms of crime prevention. Subsequent years saw the adoption of further international acts advocating respect for human rights and acting for the good of humanity, including with regard to criminals [Hołda, Hołda, Ostrowska, et al. 2014, 56].

Of fundamental importance in the Council of Europe's system of acts is the peremptory European Convention for the Protection of Human Rights and Fundamental Freedoms, known as the European Convention on Human Rights, adopted on 4 November 1950 at the meeting of the Committee of Ministers of the Council of Europe in Rome.[7] This Convention was adopted by the Council of Europe in response to the UN's creation of the Universal Declaration of Human Rights. From the outset, the idea was to create an international treaty that, unlike the Universal Declaration of Human Rights, would have effective mechanisms for upholding the rights contained therein. To this end, it established the European Court of Human Rights as an independent international court to adjudicate disputes arising from violations of the Convention [Szymanowski and Migdał 2014, 53].

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[4] The 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 169) [hereinafter: the ICCPR or the Covenant].

[5] The United Nations was established as a result of the signing of the Charter of the United Nations on 26 June 1947 at the United Nations Conference in San Francisco, that was ratified by Poland on 19 January 1993 (Journal of Laws of 1947, No. 23, item 90) [hereinafter: UN].

[6] Charter of the United Nations, signed in San Francisco on 26 June 1945 (Journal of Laws of 1947, No. 23, item 90) [hereinafter: CUN].

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

Among the international instruments addressing the issue of custodial sentences, of great importance has also been the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[8] adopted by the UN General Assembly on 10 December 1984, which established a control mechanism in the form of the Committee against torture. The equivalent of the aforementioned Convention on the European continent is the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment signed in 1987.[9] The above-mentioned document is a supplement to the ECHR, more specifically its Article 3 which establishes the prohibition of torture, inhuman or degrading treatment or punishment, hence it does not create specific human rights. The creation of the European Convention for the Prevention of Torture was motivated by the idea that the mechanism of judicial protection provided by the ECHR should be supplemented by non-judicial measures of a preventive nature [Dawidziuk 2013, 37].

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was established under Article 1 of the European Convention for the Prevention of Torture.[10] The principal means that the Committee uses in its activities include periodic visits during which it examines the treatment of persons deprived of their liberty with a view to strengthening their protection against torture and other unacceptable forms of treatment or punishment. An additional measure prescribed by the Conventions are *ad hoc* visits carried out when the Committee considers it necessary to carry out such a visit as a result of information obtained, inter alia, from the victims themselves or from human rights organisations, or based on its own knowledge [Hołda, Hołda, Ostrowska, et al. 2014, 71].

In accordance with Article 2 of the Convention, the Committee has the power to inspect any place where persons are deprived of their liberty in the territory under the jurisdiction of a State Party.

Under Article 7 of the Convention, when conducting visits, Committee members have the right to request from the State Party any information about places where persons deprived of their liberty are held and have unrestricted

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[8] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 10 December 1984 (Journal of Laws of 1989, No. 63, item 378).

[9] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, drawn up in Strasbourg on 26 November 1987 (Journal of Laws No. 46, item 238 as amended) [hereinafter: the Convention or the ECPT].

[10] The Committee is composed of members equal in number to the number of States Parties to the Convention, elected for a period of 4 years by the Committee of Ministers of the Council of Europe from among candidates proposed by the national delegations of each State [hereinafter: the Committee or CPT].

access to such places, including the right to move freely inside such places. They can conduct interviews in private with inmates in the penitentiary units as well as with other persons who can provide relevant information.

As in the case of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a weakness of the monitoring mechanism created by the Convention is the need to inform the State Party in advance of the intention to conduct a visit. Pursuant to Article 10(2) of the Convention, following a visit, the Committee shall draw up a report on the state of treatment of persons deprived of their liberty ascertained during the visit.

European documents have placed human dignity at the forefront by defining it as a fundamental principle of the execution of a custodial sentence and have imposed high standards for its implementation [Hołda, Hołda, Ostrowska, et al. 2014, 71]. While not questioning the necessity of custodial sentences as an important measure against crime, they were strongly against their application.

The last group of documents that should be explicitly mentioned is the regional version of the Minimum Rules adopted by the Council of Europe in 1973 in the form of the European Prison Rules, which were revised in 1987 and remained in force until 2006, the year in which the new European Prison Rules,[11] which are the new recommendations of the Committee of Ministers of the Council of Europe to Member States on standards of imprisonment, came into force. The uniqueness of the European Prison Rules derives first and foremost from the fact that they take a comprehensive approach to the issue of custodial sentence [Migdał 2008, 268].

The 2006 European Prison Rules are a comprehensive document consisting of 108 rules that regulate in detail various spheres of dealing with convicted prisoners as well as persons on remand. Essentially, a comprehensive review of this document leads to the conclusion that its most basic demands are to ensure humane treatment of prisoners while respecting their dignity, to guarantee conditions of imprisonment in prisons that aim to prepare prisoners for their return to society, so that they respect the rule of law and, in particular, refrain from committing crimes upon release, and to ensure the protection of society against crime and security in penitentiary units.

The 2006 European Prison Rules present a different axiological content regarding the execution of a custodial sentence than previous versions. The main differences are due to the fact that, over the years, attention has been

[11] Recommendation of the Committee of Ministers of the Council of Europe to Member States Rec (2006) 2 of 11 January 2006 on the European Prison Rules (adopted at the 952nd meeting of the Vice-Prime Ministers), in: "Przegląd Więziennictwa Polskiego" no. 72-73 (2011), p. 33-69 [hereinafter: 2006 European Prison Rules].

drawn to the ineffectiveness of rehabilitation efforts and, therefore, there has been a re-evaluation of the objectives of custodial sentences, moving away from the uno.ealistic assumption that every person in prison will be rehabilitated. The 2006 European Prison Rules explicitly recognise that custodial sentences are not helpful but, on the contrary, are detrimental, hence their implementation requires that these detriments be minimised as far as possible and that measures be taken from the outset of the sentence to promote the social reintegration of the convicted person [Migdał and Skrobotowicz 2014, 112]. The regulation in question requires the creation of prison conditions as similar as possible to those of a free society, in which the convicted person will learn to take responsibility for his or her fate.

The European Prison Rules place particular emphasis not only on allowing convicts to decide their own fate, but also on teaching them responsibility for their lives and choices and self-reliance so that they can function properly in society once they are released [ibid.]. In this respect, a special role is played by the work and education of convicts. The European Prison Rules attempt to create a kind of synergy between these two measures of penitentiary influence. The level of education provided in prisons should therefore correspond to the public system of general education, and should aim to develop the skills and aspirations of the convicted person, so that the education obtained in prison can find tangible results in finding a job after serving the sentence.

The 2006 European Prison Rules rejected the concept of forced rehabilitation of convicted persons and it was replaced by the principle of normalisation. According to this principle, responsibility for the results of a custodial sentence is shared between the prison staff and the convict. Therefore, positive effects of rehabilitation depend on the will and desire of the convicted person to improve. This is because the prison administration is not supposed to bail out the convict and coercively influence him or her in order to fix or reintegrate him or her into society.

2. DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS AND POLISH NORMATIVE REGULATIONS

In the area of European legal culture, centred around the Council of Europe's human rights protection system, the isolation punishment is the most severe criminal law response to a crime [Hołda and Żurawska 2012, 19]. In Poland, custodial sentence has two variations: term imprisonment (ranging from 1 month to 30 years), and life imprisonment.[12]

[12] Article 32 of the Act of 6 June 1997, the Penal Code (Journal of Laws of 2022, item 1138 as amended) [hereinafter: the Penal Code].

In addition to these three predominant custodial sentence variations, there is also a military detention of between 1 month and 2 years (Article 322(2) of the Penal Code), as well as a substitute custodial sentence that can be imposed for an unpaid fine and an unexecuted sentence of restriction of liberty.

Polish penitentiary solutions, especially on normative grounds, meet most of the standards developed by the 2006 European Prison Rules and the European Committee for the Prevention of Torture (CPT). However, it can be observed that there is a significant discrepancy between the implemented legal solutions and penitentiary practice. These discrepancies show how difficult it is to fully implement international standards in the Polish penitentiary reality.

There are currently approximately 61,200 persons serving custodial sentences in Polish prisons and approximately 8,000 pretrial detainees in remand facilities.[13] These numbers are bound to increase as a large number of convicts are still waiting to serve their sentence. Another factor that may exacerbate the degree of prison overcrowding is the obligation to admit Polish nationals serving their sentences in other EU countries to Polish prisons. With such a large prison population, it becomes exceptionally difficult to provide decent living conditions for inmates, find employment for them and guarantee their educational opportunities. In such overcrowded prisons, individual work with prisoners is very difficult, and achieving effectiveness is challenging.

Analyses of the visit reports of the European Committee for the Prevention of Torture in Poland and reports of the Ombudsman, with regard to the implementation of the functions of the National Preventive Mechanism, largely confirm that the main reason for the lack of proper implementation of the objectives of custodial sentences is the widespread overcrowding of prisons and remand facilities. This situation is due, among other things, to the lack of sufficient funds allocated to the functioning of the Polish prison system. The difficulties presented are systemic problems that imply not only the failure to align Polish penitentiary practice with international standards, but also, above all, result in the growing dissatisfaction of persons deprived of liberty, limiting the penitentiary interventions carried out towards them and thwarting the realisation of the objectives of imprisonment. In order to implement its provisions, the ECHR has introduced mechanisms to protect the rights of the individual in the form of the possibility to lodge a complaint with the European Court of Human Rights and the European Commission of Human Rights.

The issue of overcrowding in Polish prisons is of interest both in Poland and abroad. The Polish Supreme Court has commented on this issue on a number of occasions. In its judgment of 28 February 2007,[14] the Court upheld

[13] See https://www.sw.gov.pl/strona/statystyka [accessed: 05.10.2024].

[14] Judgment of the Supreme Court of 28 February 2007, ref. no. V CSK 431/06, Lex no. 255592.

the cassation of the incarcerated plaintiff, stating that serving a custodial sentence in overcrowded cells with an unseparated toilet and sanitary facility, insufficient number of beds and inadequate ventilation may constitute a manifestation of degrading treatment. Such conditions may further justify a claim for damages in the context of a violation of personal rights. Subsequently, the Polish Constitutional Tribunal also commented on the matter in the already cited landmark judgment of 26 May 2008.[15] This judgment led to the repeal of Article 248(1) of the Penal Enforcement Code,[16] which allowed the director of a prison or remand facility to place inmates, for a limited period of time, in conditions where the cell space per person was less than 3 m^2.

The lack of respect for space requirements in Polish penitentiary units has also been considered by the European Court of Human Rights. The ECtHR expressed its position on this problem in the *Orchowski v. Poland*[17] and *Sikorski v. Poland*[18] judgments. In the former, the Court found that an inadequate system of penitentiary management had led to overcrowding in prisons and remand facilities. This state of affairs has persisted for many years and, in the Court's assessment, has grown into a systemic problem [Wróbel 2022]. The ECtHR found a violation of Article 3 of the ECHR due to the reduction of the required space. It further pointed out that measures used to deprive an individual of his or her liberty can often involve undue suffering and humiliation. The humiliation and suffering must not exceed the necessary level associated with the specific type of lawful treatment or punishment. At the time the aforementioned cases were pending at the ECtHR, 160 more were filed alongside them concerning Poland's violation of Article 3 of the ECHR [Płatek 2011, 496].

Since then, the number of complaints against Poland concerning detention conditions, in particular the overcrowding issue, has decreased. This is related to the process of reverting complaints to the domestic system, initiated by the ECtHR's decisions of 12 October 2010 in the cases of Łatak *v. Poland*[19] and Łomiński *v. Poland*.[20] In these decisions, the Court declared inadmissible complaints concerning conditions of deprivation of liberty. According to the ECtHR, this is related to the virtual elimination of overcrowding in the Polish national system. Moreover, it stated that if an alleged violation of Article 3 ECHR ceases to exist, it cannot be eliminated with retroactive effect. The Court explicitly stated that persons incarcerated

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15 Judgment of the Constitutional Tribunal of 26 May 2008, ref. no. SK 25/07, Lex no. 380071.

16 Act of 6 June 1997, the Penal Enforcement Code (Journal of Laws No. 90, item 557 as amended) [hereinafter: the Penal Enforcement Code].

17 ECtHR judgment of 22 October 2009 on *Orchowski v. Poland* (no. 17885/04).

18 ECtHR judgment of 22 October 2009 on *Sikorski v. Poland* (no. 17599/05).

19 ECtHR decision of 12 October 2010 on Łatak *v. Poland* (no. 52070/08).

20 ECtHR decision of 12 October 2010 on Łomiński *v. Poland* (no. 33502/09).

in overcrowded Polish penitentiary units (i.e. in conditions that violate their personal rights – dignity, right to intimacy) should, in accordance with the principle set out in Article 35 of the ECHR, bring an action for protection of the violated personal rights before the competent national court prior to filing a complaint to the Court [Janczarek 2011, 36-37]. However, lawsuits on prison overcrowding brought by detainees are largely dismissed. In the reasons for the judgments of Polish common courts, it is indicated that the claim for compensation is not taken into account when the plaintiff's personal rights are not infringed by actions constituting individually directed repression against the plaintiff. The conditions in which the plaintiffs were detained also concerned the living conditions of other inmates.[21] In contrast, judgments upholding the actions state that the following conditions should be considered cumulatively as degrading and violating human dignity: the fact of overcrowding in the cells and the failure to ensure a minimum level of intimacy and the possibility to take care of physiological needs in separation from other prisoners (e.g. those eating a meal) in every cell, as well as the mouldy walls and other surfaces.[22]

In addition to the range of personal and political rights and freedoms expressed in the ECHR, of particular relevance to the issue at hand is Article 3 of the ECHR, which is an absolute standard stating that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." The article in question cannot be repealed. The ECHR omits the adjective "cruel" when referring to other unacceptable forms of treatment or punishment. However, a wealth of ECtHR jurisprudence has attempted to define the concepts and interrelationships of "torture", "inhuman", "degrading" treatment or punishment, which have so far remained unclarified. In 1978 judgment in a case brought by the Republic of Ireland against the United Kingdom,[23] the ECtHR stated that the difference between the concepts of torture and inhuman and degrading treatment or punishment comes down mainly to the intensity and scale of the suffering inflicted. Torture is a particular form of deliberate, inhumane treatment that causes extremely intense suffering. This is an aggravated form of inhuman and degrading treatment, which in itself is the weakest form of violation of Article 3 of the ECHR [Hołda 2009, 111]. The difference between these concepts is therefore quantitative and not qualitative. Unlike in the acts of the UN system, there is no

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[21] Judgment of the Court of Appeal in Warsaw, ref. no. VI ACa 1128/11; similar judgments: judgment of the Court of Appeal in Warsaw, ref. no. VI ACa 1043/10; judgment of the Court of Appeal in Poznań, ref. no. I ACa 812/13.

[22] Judgment of the Court of Appeal in Warsaw, ref. no. VI ACa 585/12; similar judgments: judgment of the Court of Appeal in Warsaw, ref. no. VI ACa 1582/12; judgment of the Court of Appeal in Poznań, ref. no. I ACa 386/13.

[23] ECtHR judgment of 18 January 1978 on *Ireland v. United Kingdom*, Series A, No. 25.

explicit reference to the dignity of a human being. The prohibition of torture in Article 3 of the ECHR is the only provision for which no exceptions are provided, and therefore the prohibition, as already mentioned, is absolute. The Court stated in *Ilascu* and Others v *Moldova* and *Russia*[24] that the Convention strictly prohibits torture and inhuman or degrading treatment or punishment even in the most difficult circumstances, such as counter-terrorism and organised crime.

The deprivation of liberty must be carried out with respect to the general principle of legal certainty, which is, as it were, the core of the whole Convention as well as of the legal orders of individual states. It is therefore important, as stressed by the Court, to set out any and all grounds for deprivation of liberty in clearly worded provisions of national law in order to ensure their predictable application.[25] National law should therefore meet the basic requirements of accessibility and precision to the extent that it avoids the risk of arbitrary interference with human freedom. Any deprivation of liberty must correspond to the objective set out in Article 5 of the ECHR, namely the protection of the individual from arbitrariness.[26] Para. 2 to 5 of Article 5 of the Convention provide certain rights to which persons deprived of their liberty are entitled, among which are the right to be informed promptly of the reasons for the deprivation of liberty and of the charges against them, the right to appeal to a court for a judicial determination of the lawfulness of the deprivation of liberty, and the right to compensation in the case of deprivation of liberty in violation of the Convention [Hofmański 1993, 15].

The other major safeguard under Article 7 of the ECHR is the prohibition of punishment without a legal basis. The Convention expressly prescribes that the catalogue of offences and the penalties to be imposed for offences should be clearly defined in the law. It is therefore impermissible to impose penalties, including custodial sentences of course, where the grounds for their application have not been defined by law. Furthermore, the Convention prohibits the imposition of more severe penalties than those provided for by law at the time of the offence. This provision, in the Court's view, has to be interpreted and applied in such a way that it creates effective safeguards for individuals against arbitrary prosecution, adjudication of guilt and punishment. That follows from the object and purpose of this provision.[27]

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[24] ECtHR judgment of 8 July 2004 on *Ilascu and Others v. Moldova and Russia*, Grand Chamber, application no. 48787/99, para. 424.

[25] ECtHR judgment of 27 November 2003 on *Shamsa v. Poland*, Chamber (Section III), application no. 45355/99 and 45357/99, para. 58.

[26] ECtHR judgment of 2 September 1998 on *Erkalo v. Netherlands*, RJD 1998-VI, para. 56, http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-58233&filename=001-58233.pdf [accessed: 18.12.2024].

[27] ECtHR judgment of 24 July 2008 on *Kononov v. Latvia*, Chamber (Section III), application no. 34854/02, para. 113.

In conclusion, when assessing the effectiveness of the implementation of international standards and mechanisms, it should be noted first and foremost that the implementation of international standards is a process for which international standards that comprehensively define the situations of prisoners are not sufficient on their own. The scope of their application is primarily influenced by the mechanisms for implementing these standards into the internal legal order. Currently, the most effective solutions in this regard are provided by the European Court of Human Rights, through the case law it creates. The work of the European Committee for the Prevention of Torture and the reports and recommendations of its inspection visits also have a strong influence on the implementation of standards guaranteeing respect for human rights. However, while a judicial mechanism such as the ECtHR derives its effectiveness from a *hard law* instrument, the effectiveness of the solutions proposed by the CPT comes solely from the international recognition of the observations it makes following its visits to places of detention. We must also acknowledge the activities of CPT members and experts , who actively and openly assist European countries in implementing the recommendations both those found in the 2006 European Prison Rules and those developed in the Committee's work. These mechanisms complement each other, as the ECtHR reacts to violations that have already occurred and the CPT safeguards against the occurrence of possible violations in the visited States in the future.

The current Penal Enforcement Code has adopted an inclusive model of executing a custodial sentence. The basic premise of this model is to ensure that convicts serving a custodial sentence are provided with conditions that approximate as closely as possible the life in community. The inclusive model seeks to maximise the socialisation of the execution of a custodial sentence, which is achieved by enabling convicts to maintain contact with the outside world, especially with family and relatives, but also with clergy, associations and organisations whose tasks include providing assistance and support to persons deprived of their liberty and their families [Kuć 2007, 87]. Convicts have access to the press, television, the internet (subject, of course, to limitations based on the specifics of the particular prison and its nature). An important role is also played by the system of rewards and concessions, in particular the possibility for the convict to be allowed to leave prison temporarily, which enables him or her to interact more closely with society and the possibility of closer and less constrained contact with family and relatives, which is extremely important in terms of satisfying the convict's basic emotional needs. Convicted persons are given the opportunity to acquire relevant vocational qualifications and education while in prison and these can help them in finding employment after serving their sentence. An important element in an inclusive model of executing a custodial sentence is the possibility for the convicted person to undertake paid

work while in prison, so that he or she can participate, at least to a small extent, in meeting the economic needs of their family. This is important insofar as such opportunities make the convict feel useful to his or her family and determined to act in a positive way, so that his or her rehabilitation activity increases more and more. Cultural and educational activities as well as various workshops and athletic activities conducted as part thereof are also of great importance. By participating in these types of activities, the convict can acquire many interesting and useful skills that he or she can use upon returning to society.

Undoubtedly, the inclusive model of executing a custodial sentence provides the convict with a wide spectrum for developing his or her own activities, important and needed upon release from prison, and creates an atmosphere of a normal social environment in prison [Pawela 2007, 171].

According to Article 67 of the Penal Enforcement Code, the purpose of a custodial sentence is to instil socially desirable attitudes in the convicted person, thereby deterring him or her from repeating offences after release from prison. The entire period of deprivation of liberty can be considered as a kind of preparation of the convicted person for release [Niewiadomska-Krawczyk 2023, 113-26]. This is similarly governed by Rule 6 of the 2006 European Prison Rules, which states that all detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty. Prior to the expected end of the sentence, prison staff, with the participation of the public, should take specific measures as indicated by, inter alia, the 2006 European Prison Rules.[28]

The current Penal Enforcement Code contains references to the proposals outlined in the 2006 European Prison Rules as it introduces a number of institutions designed to help the convicted person with social readaptation as early as during the execution of the sentence [Iwanowska 2013, 22]. Furthermore, in Articles 164-168 of the Penal Enforcement Code, the legislator envisaged the possibility of intensifying measures to prepare the convict for life in free society in the final stage of his or her sentence and the need to provide independent assistance to persons released from prison [ibid.]. The rationale for the draft Penal Enforcement Code indicates that proper preparation of convicts for release from prison can have a significant impact on the positive aspects of custodial sentence.[29]

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[28] In Rules 33 and 107, the 2006 European Prison Rules outline the principles of providing assistance and support to convicts prior to release, the need for the prison administration to cooperate with social institutions in this regard and the need for additional intensified programmes of activities aimed at preparing convicts for release.

[29] See *Projekt kodeksu karnego wykonawczego wraz z uzasadnieniem*, "Państwo i Prawo" 7-8 (1994), p. 95.

3. NATIONAL PREVENTIVE MECHANISM

The National Preventive Mechanism[30] is an independent, national visiting body established under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[31] The Protocol implies that the protection of persons deprived of their liberty against torture and other inhuman or degrading treatment or punishment may be enhanced by non-judicial preventive measures. These consist of regular visits to places of detention. These visits are conducted on two levels, as it were. Of these, the first ones are carried out by independent international expert groups (the UN Subcommittee on Prevention) and the subsequent ones are carried out by the national bodies designated for this purpose. Chapter IV of the Protocol contains provisions on the establishment and functioning of the National Preventive Mechanism. Under Article 17 of the OPCAT, the Polish authorities were obliged to establish one or more independent prevention mechanisms no later than one year after the entry into force of the Protocol. The Protocol has been binding on the Republic of Poland since 22 June 2006, but it was not until 18 January 2008 that the Ombudsman was assigned the function of the National Preventive Mechanism.[32] As indicated earlier, the Article 210 of the Constitution guarantees the Ombudsman's independence and impartiality of activities and accountability only to the Sejm. The functions of the Ombudsman in terms of the NPM were also introduced in the Law on the Ombudsman.[33] With this provision, the Ombudsman was fully equipped with the mechanism required by Article 18 of OPCAT to guarantee the functional independence of his office and subordinate staff.

Article 19 of the OPCAT sets out the tasks to be performed by the National Preventive Mechanism. The role of the NPM is to make regular visits to examine places of detention of persons deprived of their liberty.[34] The visits are

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30 Hereinafter: NPM.

31 Optional Protocol to the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly Resolution of 18 December 2002, No. 57/199 [hereinafter: OPCAT].

32 See *Informacja o działalności Rzecznika Praw Obywatelskich za rok 2008 oraz o stanie przestrzegania wolności i praw człowieka i obywatela*, "Biuletyn RPO. Źródła" 1 (2009), p. 22.

33 Act of 18 August 2011 amending the Law on the Ombudsman (Journal of Laws No. 222, item 1320).

34 This refers to places of detention within the meaning of Article 4 of OPCAT, which are understood to mean "any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence." These include, in particular: prisons, remand facilities, police children's homes, sobering stations, youth education centres, correctional facilities, psychiatric hospitals.

designed to examine the treatment of these persons. These visits are followed by reports and appropriate recommendations and proposals made to the relevant authorities. All these activities are carried out with the aim of improving the treatment and conditions of persons deprived of their liberty and preventing torture and other cruel, inhuman or degrading treatment or punishment. In this respect, the NPM also analyses existing legislation and draft normative acts with regard to which it can make its own comments and proposals.

In order to enable national preventive mechanisms to carry out their tasks, its members have a number of powers, guaranteed by the State Party (Article 20 of the OPCAT). They have access to all information on the number of persons deprived of their liberty in places of isolation, the number of these places and their location. They are free to choose where they want to carry out visits. Moreover, when carrying out their visits, experts have access to all places of detention, their installations and facilities, and can make use of all information concerning the treatment of persons deprived of their liberty, as well as the conditions of their detention. In order to obtain a more comprehensive and, above all, realistic picture of the situation of prisoners, they have the opportunity to conduct private interviews with prisoners, without witnesses, either in person or through an interpreter, if necessary. Such interviews may also be held with any other person whom they feel can provide relevant information.

Annual reports are drawn up on the activities of the National Preventive Mechanism, which are then published in the "Biuletyn RPO". Poland is obliged to develop and disseminate them on the basis of Article 23 of the OPCAT. Reports contain the conclusions of the conducted visits with a detailed breakdown of places of detention. They also include a description of the actions taken by the Ombudsman following the identified violations and irregularities.[35]

Visits within the NPM are unannounced. They have been shaped in such a way as to give as true an image as possible of the audited unit. Had they been announced, the administration would have had time to prepare adequately, which would have distorted the assessment of real problems and possible violations in the units.[36] Prior to the commencement of the visit, the group of experts who, in accordance with Article 18(2) of the OPCAT, should have the relevant skills and professional knowledge,

[35] See *Raport Rzecznika Praw Obywatelskich z działalności w Polsce Krajowego Mechanizmu Prewencji w 2022 roku*, https://bip.brpo.gov.pl/sites/default/files/2023-11/Raport_roczny_KMPT_2022_dostepny.pdf [accessed: 20.09.2024].

[36] See *Raport Rzecznika Praw Obywatelskich z działalności w Polsce Krajowego Mechanizmu Prewencji w roku 2012*, "Biuletyn RPO. Źródła" 5 (2013), p. 22.

is first selected.[37] The duration varies from 1-3 days. Their length depends on the size of the unit and the issues observed on site. In the course of their activities, experts may exercise all of their rights under the OPCAT provisions discussed above. Each visit follows specific stages, which consist of: conversations with management; inspection of all rooms; individual and group interviews with persons detained in the facility; interviews with staff; analysis of documentation; formulation of post-visit recommendations during the debriefing with the receipt of explanations from the management.[38]

The information obtained by experts during individual interviews with detainees can be used in two ways. First of all, persons deprived of their liberty who find that violations of the law are taking place in the unit where they are detained may lodge a formal complaint. When convicts do not wish to make formal complaints, the confidential information obtained from them can provide experts with the basis for further investigation.

The visit is followed by the preparation of a report which includes the conclusions and observations made by the experts. They address the living conditions and observance of the rights of persons deprived of their liberty on an issue-by-issue basis.[39] The report also sets out recommendations for the facility's governing body. However, when management disagrees with those recommendations, the report is forwarded to the superior unit so that the latter can express its position on the matter and take appropriate action.[40]

Based on its visits, the NPM has identified a number of issues that it encounters during such visits. Of these, the most serious concern of the Polish prison system – noted by both Polish and international visiting bodies – is that of overcrowding in penitentiary units. As pointed out in the NPM's 2019 activity report, inappropriate practices are used to simulate attempts to deal with the problem.[41] Although inadequate, they are nevertheless permitted under current legislation.

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[37] It is usually a group of several people with a group coordinator selected therefrom. Most often them are people with expertise in law, general medicine, psychiatry and psychology.

[38] See *Raport Rzecznika Praw Obywatelskich z działalności w Polsce Krajowego Mechanizmu Prewencji w 2022 roku*.

[39] These include, in particular, issues such as food, medical care, treatment, cultural and educational activities, correspondence and visits, religious services.

[40] In cases where torture or inhuman or degrading treatment or punishment has been found to take place, a notice of suspected offence is drawn up by the experts after the conclusion of the visit. Where the disclosure of this condition was brought about by the victim, its submission requires the consent of the victim, see *Raport Rzecznika Praw Obywatelskich z działalności w Polsce Krajowego Mechanizmu Prewencji w 2022 roku*.

[41] For example, day-care facilities are being converted into cells, infirmaries are being included in the number of prison cells and adapted to such needs, and the length of detention of some people in temporary cells is being extended beyond the norm.

Furthermore, as shown in the report, comments and recommendations were formulated in relation to cases of: the occurrence of beatings by prison officers of new prisoners admitted to prison; the continuation of coercive measures despite the cessation of their rationale; the downplaying of ailments reported to medical staff; the use of monitoring in unsupervised visiting rooms or the lack of cells adapted to the needs of the disabled and sick.

In addition to the numerous problems of the Polish prison system, positive activities taking place in individual prisons in Poland were also recognised. These include, in particular: training in the development of appropriate interpersonal relations with inmates, organised for Prison Service officers; taking care of the intimacy of inmates while bathing in the prison bathhouse; or creating appropriate infrastructure for sports and cultural and educational activities.

CONCLUSIONS

The process of humanizing criminal law, which has been systematically progressing since the 18th century, has led to the gradual abolition of the death penalty, replaced by imprisonment as the most severe measure of response to crime. Previously, other forms of punishment were also used, such as flogging, mutilation, or exile, yet the deprivation of human life remained the most severe penal sanction. Prison isolation is not only a form of punishment but also a significant challenge for convicts, their families, and the penitentiary system, which must balance between repression and rehabilitation.

Contemporary international standards for the execution of custodial sentences set clear and precise norms designed to ensure respect for human rights. In the context of the Polish penitentiary system, it can be observed that the adopted legal regulations largely align with these standards. However, the actual implementation of these norms faces numerous challenges, primarily stemming from number of prisoners and limited financial resources.

An analysis of the jurisprudence of the European Court of Human Rights, reports from the Committee for the Prevention of Torture, and the activities of the National Preventive Mechanism indicate significant discrepancies between the obligations arising from legal acts and their practical implementation. The issue of number of convicts, along with associated limitations on access to education, employment, medical care, and living space, remains a key challenge for the Polish penitentiary system.

The introduction of a model for the execution of custodial sentences, which seeks to approximate conditions of life in freedom as closely as possible, represents an important step toward the rehabilitation of convicts. This

system is based on maintaining contact with family and society, ensuring educational and vocational opportunities, and fostering a sense of responsibility for one's own life. Many of these elements have been incorporated into the Polish Penal Executive Code, yet their practical implementation requires further development.

Supervisory actions undertaken by the National Preventive Mechanism allow for the identification of existing problems and the formulation of recommendations that can contribute to improving conditions in Polish penitentiary institutions. Regular inspections and expert reports serve as essential instruments in shaping a more humane approach to the execution of custodial sentences.

The complete realization of international standards depends not only on appropriate legal regulations but also on effective mechanisms for their implementation and adequate resources supporting their enforcement. Only a comprehensive approach, taking into account both normative and practical aspects, will enable the Polish penitentiary system to achieve compliance with the requirements of modern European and international human rights standards.

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PECULIAR NORMATIVE CHARACTER OF A COMMUNE COUNCIL RESOLUTION ON THE SALE OF REAL ESTATE WITH THE "PREMISES FOR LAND" SETTLEMENT

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Abstract. The analysis carried out in this publication aims to answer the question about the legal nature of a commune council resolution (analogously, a poviat council resolution) on the sale of real estate with the "premises for land" settlement. The purpose and function of the resolution defining the terms for the sale of real estate with the "premises for land" settlement is to clarify the most important conditions for such a transaction. It is therefore not only a formal requirement of the "premises for land" settlement sale procedure, but also has effects under civil law, especially in determining the maximum extent for offsetting cash benefits by the transfer of ownership of real estate. In this light, the status of this resolution as an act of universal law or an intra-organisational act or qualified as expressing a will by a collegial body as an indispensable element of shaping the future legal relationship with the buyer of real estate is not clear. This analysis proves that contrary to the intentions of the drafters, expressed in the explanatory memorandum to the draft act on the sale of real estate with the "premises for land" settlement ("the resolution specified in this draft will not contain abstract norms, thus it will not be an act of local law and will not require promulgation in the voivodeship official journal"), this resolution goes beyond the structure dedicated to internally binding acts and beyond the understanding of specific and individual norms. The scholarly debate herein relies on the method of investigation of the law in force.

Keywords: premises for land; legal nature of a resolution on the sale of real estate; a resolution defining the terms for the sale of real estate with the "premises for land" settlement.

INTRODUCTION

The legal provisions governing the competence of the commune council to adopt a resolution in a particular case are so diverse in terms of the legal nature of such an act that this issue inspires much debate. Uncertainty related to the classification of a particular resolution as an act of local law or an act that is internally binding has been and will be an inspiration for

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conducting many research studies on this issue [Maroń 2016, 112; Węgrzyn 2014; Gruszecki and Lorych 2019, 22; Sondej 2019; Szafrańska and Szyszka 2009, 56; Marchaj 2017, 12-13; Nogieć-Karwot 2018, 95; Mrożek 2022, 87] and is the reason for the inconsistent positions of the judiciary.[1] Rarely in legal regulations does the legislator determine precisely the normative nature of a resolution in a way that does not raise doubts. The very content of Article 40 of the Act of 8 March 1990, the Commune Self-Government Law[2] and the indicated categories of resolutions that constitute acts of local law also do not allow for a precise determination of the normative character of these acts. Therefore, the legislator's clear approach is so crucial in this matter. Without a doubt, the following types of legislative acts have been expressly recognised as acts of local law: a resolution on the rules for the acquisition, disposal and encumbering of real estate and leasing it (under a regular lease or a lease with the right to collect fruits) for a fixed period longer than 3 years or for an indefinite period (Article 18(9)(a) CSGL), a resolution on proceeding to draft a zoning plan and the general plan of the commune,[3] rules for maintaining communes clean and in order,[4] a resolution on granting subsidies to water companies and their settlement.[5] There are also known cases in which the legislator allows the commune council itself to prejudge the legal nature of the adopted resolution. This was done in the case of a resolution on the granting of discounts on the real estate sale price. In the light of Article 68(1b) of the Act of 21 August 1997 on real estate management,[6] this resolution may constitute an act of local law or may concern individual real estate. One can also name a category for which it is necessary to conduct extensive legal analyses in order to determine the normative nature of such resolutions, such as in the case of a resolution granting consent to waive the obligation to tender when executing contracts of use or lease for a fixed period longer than 3 years or for an indefinite period (Article 37(4) REMA).[7] However, there are also examples among legal regulations in which the legislator emphasises a specific circumstance that may indicate the importance of this legal act, but without explicitly prejudging it. In the case

[1] Judgment of the Supreme Administrative Court of 13 January 2022, ref. no. I OSK 690/19, Lex no. 3335968; judgment of the Supreme Administrative Court of 31 August 2022, ref. no. I OSK 949/19, Lex no. 3443033; Parchomiuk 2013, 52-72.

[2] Journal of Laws of 2023, item 40 as amended [hereinafter: CSGL].

[3] Article 13a and 14(8) of the Act of 27 March 2003 on spatial planning and development, Journal of Laws of 2023, item 977 as amended.

[4] Article 4(1) of the Act of 13 September 1996 on maintaining communes clean and in order, Journal of Laws of 2023, item 1469 as amended.

[5] Act of 20 July 2017, the Water Law, Journal of Laws of 2023, item 1478 as amended.

[6] Journal of Laws of 2023, item 344 as amended [hereinafter: REMA].

[7] Judgment of the Voivodship Administrative Court in Kielce of 26 August 2020, ref. no. II SA/Ke 353/20, Lex no. 3053879; judgment of the Voivodship Administrative Court in Gliwice of 29 July 2019, ref. no. II SA/Gl 730/19, Lex no. 2704408.

of a resolution on determining the location of a residential housing investment, Article 8(2) of the Act of 5 July 2018 on facilitating the preparation and implementation of housing investments and accompanying investments[8] requires promulgation in the voivodship official journal, although another resolution regulated by the same act, adopted on the establishment of local urban standards, was explicitly considered to be an act of local law (Article 19(4)). The same applies to the resolution (discussed here) regulated in the Act of 16 December 2020 on the sale of real estate with the "premises for land" settlement.[9] Article 4(1)(1) of the Settlement Act indicates that in the case of real estate from commune's real estate assets , the sale of real estate with the "premises for land" settlement is decided by the commune council in accordance with the jurisdiction referred to in Article 18(2)(9)(a) CSGL or, in the case of poviat real estate assets, the poviat council in accordance with the jurisdiction referred to in Article 12(8)(A) PSGL,[10] which could suggest that these legal acts should be considered local law acts. In addition, another important circumstance was highlighted in this act. In the light of Article 6(1) of the Settlement Act, the tender for the sale of real estate from commune real estate assets with the "premises for land" settlement is announced no earlier than after the expiry of a period not longer than 30 days from the date of delivery of the resolution to the supervisory authority (Article 91(1) CSGL or the second sentence of Article 79(1), respectively). This structure corresponds to Article 93(1) CSGL (Article 82 PSGL), pursuant to which after the expiry of the period indicated in Article 91(1) CSGL (Article 79(1) PSGL), the supervisory authority cannot independently declare the resolution invalid, which only underlines the importance of the sale resolution for the correctness of tender operations and the validity of the contract concluded as a result of a positively settled tender.

Lack of clarity in the approach of the Settlement Act provisions to the legal nature of resolutions of local government bodies, in particular those relevant for civil law transactions, as well as inability to clearly resolve this status solely on the basis of the content of legal provisions and the need to search for purpose-related and systemic grounds and arguments, justifies the calling of resolutions on the sale of real estate with the settlement of "premises for land" as peculiar.

Given the importance of the resolution in question for investment processes and the legislator's unobvious approach to its legal status, a question should be asked whether it constitutes an act of local law. If the answer to this question is negative, it will be necessary to consider its other possible

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[8] Journal of Laws of 2024, item 195.

[9] Journal of Laws of 2023, item 1525 [hereinafter: Settlement Act].

[10] Act of 5 June 1998 Poviat Self-Government Law, Journal of Laws of 2024, item 107 [hereinafter: PSGL].

legal nature. There is no doubt that a resolution is part of the legislative activity of an LGU's decision-making body, but in this case it may constitute only an internal act. However, given the unusual approach of the silent legislator in terms of its legal nature, but emphasising its importance for the correct choice of the contractor and the distribution of obligations between the parties to the future contract for the sale of real estate (commune – investor) one cannot rule out that the analysed resolution may be an example of an act that fits into the new legal form of public administration activity diagnosed by Dolnicki, i.e. individual normative acts, but at the level of local government [Dolnicki 2017, 56].

1. RESOLUTION'S FEATURES ENABLING IT TO BE CONSIDERED AN ACT OF LOCAL LAW

The need to use the form of the resolution in the activities of the commune's decision-making body does not raise doubt.[11] First of all, because it is a collegial body in the structure of a legal person accumulating in itself the roles of a participant in civil law transactions (*dominium)* and an entity exercising public authority (*empire*). This is therefore a basic form of a multi-member body expressing its position. In the case of acts of local law, a resolution is also the only possible form of settling matters used by the decision-making authority that follows directly from Article 41(1) CSGL. The obligation to adopt resolutions as acts of local law raises interpretative problems that directly affect the legal classification of the resolution itself. On the one hand, pursuant to Article 40(2) CSGL the catalogue of acts of local law established by the commune council_in the form of a resolution is internally highly diverse. The literature lists the following categories [Dąbek 2020, 126; Kaczocha 2022, 35; Przybysz 2020, 101]: 1) executive acts of local law; 2) ordinal acts of local law; 3) systemic and organisational acts of local law. This should therefore imply that a resolution falling within the above-mentioned *ex lege* scheme should constitute a source of universal law, in this case limited by territory, naturally (Article 87(1) and (2); Article 91(2) of the Constitution of the Republic of Poland). As a result, an act of local law should be established on the basis and within the limits of the laws on the basis of an express statutory competence to adopt it [Dąbek 2020, 103; Przybysz 2020, 99]. This assumption contains the basic feature of this type of legal acts as exclusively lower-order acts, which directly determines its function as clarifying the provisions of the act on the basis of which it is issued. Another feature will be its universality, which means that it is addressed to a generally defined

[11] This does not mean, however, that the issue of resolutions remains legally irrelevant, see Szewc and Szewc 1999, 48-49.

category of entities, motivated, however, by its content. This makes it possible to distinguish directly an act of local law from an act of internal law (an act of internal management[12]), which will be addressed only to the recipients within the structure of the entity issuing the act. Moreover, the normative character of this act is complemented by these features. The content of a local law act must be the basis for decoding the legal norms contained in that act. Among its features, this one causes numerous disputes in the judiciary. There is no doubt that a model act of local law as a universal act on the one hand and a normative act on the other, should constitute the basis for interpreting general and abstract norms from its content. It is therefore clear that the nature of legal norms and the formation by those norms of the legal situation of the addressees are decisive for the classification of a given act as an act of local law.[13] However, judicial decisions present a debatable view that if the content of the act in question contained "individual and specific provisions, it itself deprives such an act of the character of a local law act. It should be pointed out that at least one provision of the resolution should be general and abstract for the whole act to bear the attribute of an act of local law."[14] Therefore, in administrative court decisions, a resolution need only have at least one norm of general and abstract proceedings for it to be qualified as an act of local law.[15] In this light, a clear model of a local law act, which must be universal and executive and have of a normative content that is general and abstract, ceases to be a monolithic construction, because in the light of the above a mixed abstract-concrete content does not negate the attribute of a resolution as an act of local law. Due to the lack of clear and generally acceptable guidelines as to the requirements, primarily formal (who is the addressee and what is the basis for adopting a resolution), which each act of local law should meet, the boundary between this category and acts of a different nature, but in the same form (resolution) becomes extremely fluid; this only makes it difficult to determine the status of acts falling within this boundary. If we consider that an act of local law in its content is to glorify only general and abstract norms, the inclusion of other norms in its content will constitute a violation of the law, and such an act should be considered invalid by the supervisory authorities. On the other hand, if we adopt the concept resulting from some decisions of administrative courts with a more liberal tone,

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[12] Judgement of the Supreme Administrative Court in Warsaw of 6 March 1991, ref. no. I SA 1251/90, Lex no. 25961.

[13] Judgement of the Supreme Administrative Court in Warsaw of 15 April 2002, ref. no. VI SA 2160/01, Lex no. 81765.

[14] Judgement of the Supreme Administrative Court of 13 March 2013, ref. no. II OSK/ 37/13, ONSAiWSA 2014, no. 6, item 100; judgement of the Supreme Administrative Court of 14 June 2017, ref. no. II OSK 1001/17, Lex no. 2346710.

[15] Judgement of the Supreme Administrative Court in Warsaw of 15 April 2002, ref. no. I SA 2160/01, Lex no. 81765.

then if the commune decision-making authority considers the act to be internally binding, and there is even one general and abstract norm in there, this is enough to make the status of the act completely opposite. This will cause further problems, as an act of universal law requires promulgation in a relevant official journal to be effective. Failure to promulgate such an act leads to the question of its legal existence in legal transactions.

Therefore, if it is assumed that the normative character of a resolution adopted by a competent commune authority depends on the analysis of the legal basis for its issuance (the formal aspect) and how it is regulated by this resolution (the substantive aspect) and that solving specific legal problems with a generally clear concept of a local law act also seems impossible. The best example of the fact that radical and firm adherence to these two guidelines prevents a comprehensive solution to the problem is, for example, a resolution under Article 36(4) REMA, which allows for the withdrawal from the conclusion of contracts of use or lease (with or without the right to collect the fruits) by tender for a fixed period longer than 3 years or for an indefinite period. Many communes,[16] following the competence norm expressed in the second sentence of this provision, which reads: "The governor or the appropriate council or assembly may agree to waive the obligation to execute contracts through tender", adopt resolutions of a general and abstract nature, for the future and in relation to unspecific cases. In this light, one of the basic conditions for an act of local law is, after all, fulfilled. Unfortunately, however, in the majority of decisions of administrative courts[17] and decisions of the supervisory

[16] Full text of Article 36(4) REMA: "Contracts of use or lease (with or without the right to collect fruits) for a fixed period longer than 3 years or for an indefinite period shall be concluded by tender. The governor or a competent council or assembly may agree to waive the obligation to follow a tender procedure for concluding these contracts."

[17] Judgement of the Supreme Administrative Court of 13 January 2022, ref. no. I OSK 690/19, Lex no. 3335968; judgement of the Supreme Administrative Court of 31 August 2022, ref. no. I OSK 949/19, Lex no. 3443033; judgement of the Supreme Administrative Court of 8 December 2020, ref. no. I OSK 2033/19, Lex no. 3220324; judgment of the Voivodship Administrative Court in Kielce of 27 September 2023, ref. no. II SA/Ke 368/23, Lex no. 3617137; judgement of the Voivodship Administrative Court in Krakow of 16 April 2021, ref. no. II SA/Kr 177/21, Lex no. 3185236; judgment of the Voivodship Administrative Court in Kraków of 9 July 2020, ref. no. II SA/Kr 508/20, Lex no. 3034953; judgment of the Voivodship Administrative Court in Gliwice of 29 July 2019, ref. no. II SA/Gl 730/19, Lex no. 2704408; against this view: judgment of the Voivodship Court in Wrocław of 5 December 2018, ref. no. II SA/Wr 643/18, Lex no. 2595617; judgment of the Voivodship Administrative Court in Wrocław of 13 December 2018, ref. no. II SA/Wr 615/18, Lex no. 2653902 repealed in part by the judgement of the Supreme Administrative Court of 13 January 2022, ref. no. I OSK 690/19, Lex no. 3335968; judgement of the Voivodship Administrative Court in Wrocław of 27 December 2018, ref. no. II SA/Wr 603/18, Lex no. 2651398.

authority,[18] the legal basis for issuing this act does not offer the authority to adopt acts of local law, but only for an act concerning specific, individual cases described in the executive body's proposal. Therefore, relying on the content of an act can only provide confirmation of whether the authority has acted correctly in the light of the competence granted to it to create law-making facts. This is also part of the doubts expressed in the literature that the boundary between abstract-general and concrete acts is not sharp and obvious [Milczarek-Mikołajów 2020, 44; Filipek 2001, 133; Gromski 1993, 81]. Hence, there are concepts that opt for the construction of a normative act of a general and concrete character [Ruczkowski 2013, 106; Ura, 2015, 112]. It is also worth adding that internal acts as normative acts should also consist of general and abstract norms [Milczarek-Mikołajów 2020, 47]. In this light, the content of the analysed resolution allows only for distinguishing normative resolutions from other resolutions lacking this feature (e.g. those expressing a position). Therefore, a discussion on a legal act depends solely on the scope of the competence to issue it expressed in the legal provision. However, the problem arises when the provision itself is unclear. Therefore, the quoted Article 36(4) REMA seems to be an excellent example of a discrepancy in the assessment of its application. The Voivodship Administrative Court in Kielce[19] issued 7 judgements within 21 days on the determination of the legal nature of resolutions that opted to resign from the tender procedure pursuant to Article 37(4) REMA. Five supported the view that such a resolution was general and[20] the remaining two judgements were in favour of its individualised character.[21] Inspired by the criteria set out in the resolution of seven judges of the Supreme Administrative Court of 29 November 2010,[22] one can point to a certain hierarchy of guidelines enabling the settlement

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[18] For most recent decisions see: Supervisory decision of the Governor of Świętokrzyskie Voivodhsip of 10 January 2024, ref. no. PNK.I.4130.5.2024, Lex no. 3650912; Supervisory decision of the Governor of Wielkopolskie Voivodeship of 4 January 2024, ref. no. NP-III.4131.1.635.2023.7, Lex no. 3651450.

[19] Between 6 October 2020-27 October 2020.

[20] Judgment of the Voivodship Administrative Court in Kielce from 27 October 2020, ref. no. II SA/Ke 502/20, Lex no. 3088128, Lex no. 3088128; judgment of the Voivodship Administrative Court in Kielce from 14 October 2020, ref. no. II SA/Ke 438/20, Lex no. 3083645; judgment of the Voivodship Administrative Court in Kielce from 14 October 2020, ref. no. II SA/Ke 439/20, Lex no. 3076769; judgement of the Voivodship Administrative Court in Kielce of 7 October 2020, ref. no. II SA/Ke 550/20, Lex no. 3075050; judgement of the Voivodship Administrative Court in Kielce of 6 October 2020, ref. no. II SA/Ke 472/20, Lex no. 3071479.

[21] Judgment of the Voivodship Administrative Court in Kielce of 6 October 2020, ref. no. II SA/Ke 469/20, Lex no. 3096421; judgement of the Voivodship Administrative Court in Kielce of 6 October 2020, ref. no. II SA/Ke 474/20, Lex no 3083735.

[22] Resolution of the Supreme Administrative Court (7 judges) of 29 November 2010, ref. no. I OPS 2/10, Lex no. 621106 concerning in particular the nature of the resolution on the intention to close down a school and the resolution on the closing down of the school.

of doubts in the ambiguity of a competence norm. First of all, provisions of the systemic law should determine the outcome. If they do not allow for unambiguous classification of the resolution into a specific category of local law acts, internal acts or organisational acts, then substantive law provisions should be relied on, which will specify the purpose, functions or tasks of the resolution adopted. As a last resort, it is in the totality of substantive provisions relating to the requirement to adopt a specific resolution and its content that will accommodate the circumstances determining the legal nature of the resolution under consideration, and in particular whether they constitute a legal act or merely an act of application of the law. However, these general conclusions should therefore be confronted with specific legal conditions in order to verify their correctness, as will be done below.

2. LEGAL NATURE OF A RESOLUTION ON THE SALE OF REAL ESTATE FROM COMMUNE ASSETS WITH THE "PREMISES FOR LAND" SETTLEMENT

Article 4 of the Settlement Act regulates the key issue, which is also a *sine qua non condition* for the application of the "premises for land" settlement mechanism. Undoubtedly, subsection 1 of Article 4 of the Settlement Act indicates the legal basis for the issuance by the commune council of a new normative act, which fits within the issue of tasks entrusted to the exclusive competence of the commune council or poviat council pursuant to Article 18(2) CSGL or Article 12(8)(a) PSGL. This resolution also related to the issue of the property tasks of the commune (poviat) exceeding the scope of ordinary management specified in Article 18(2)(9)(a) CSGL (Article 12(8)(a) of the PSGL) concerning terms of acquisition, disposal and encumbering of real estate and leasing it for a fixed period longer than 3 years or for an indefinite period. Its purpose and function is to clarify the most important conditions for the disposal of commune real estate using the "premises for land" settlement. In this regard, it breaks the established line of views on resolutions under Article 18(2)(9)(a) CSGL, which are to constitute a set of basic rules of conduct binding the executive body of the commune in the scope of their acquisition, selling and encumbering real estate and leasing it without the possibility of determining the future content of legal acts performed on behalf of the commune by this authority.[23] It should be noted that it is up

[23] Judgment of the Voivodship Administrative Court in Olsztyn of 24 August 2021, ref. no. II SA/Ol 394/21, Lex no. 3215488; judgement of the Supreme Administrative Court of 7 October 2020, ref. no. I OSK 2141/18, Lex no. 3090714, which stated that "[…] the Council may not bind the executive body with effect against third parties in matters involving the conclusion of contracts (including lease contracts) by the commune, if the law does not grant such powers to the council;" judgement of the Voivodship Administrative Court in Olsztyn

to the executive body of the commune to manage the commune property on a daily basis, including taking actions aimed at disposing of or limiting the right of ownership to commune real estate. For this reason, the commune council cannot undertake activities that belong to matters related to the representation of the commune by its executive body. Otherwise, such actions would constitute a violation of the constitutional principle of division of local government units into executive and decision-making units.[24] On the other hand, if terms for the acquisition, selling and encumbering of land real estate by the commune council are not specified in a resolution, consent needs to be given each time the executive body intends to carry out one of the above-mentioned activities in real estate trading.

In addition to the recognition that the resolution under Article 4(1) of the Settlement Act sets out a formal requirement of the disposal procedure with the "premises for land" settlement and in this regard has consequences under civil law, especially in determining the maximum extent of offsetting the cash benefit by the transfer of ownership of real estate, its status as an act of universal law or an intra-organisational act or an expression of will by a collegial body as an indispensable element of shaping the future legal relationship with the buyer of real estate is not clear. This is related to, for example, the legal qualification of the legal provisions contained therein (universally binding, binding only internally or not involving any legal obligations), as well as its challengeability by entities that have an interest in it but are not supervisory authorities or guardians of the protection of the rule of law and human rights and freedoms.

It is therefore important whether in the light of the above such a resolution may be the subject of proceedings before administrative courts as part of the review of the activity of public administration in cases of complaints against acts of local law of bodies of local self-government units pursuant to Article(2)(5) of the Act of 30 August 2002, the Proceedings before administrative courts[25] and supervisory authorities from the perspective of the legality criterion. The problem is even more interesting because REMA

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of 17 February 2015, ref. no. II SA/Ol 1354/14, Lex no. 1653266, in which it was found that: "The decision-making body, by imposing, by way of a resolution, on purchasers the obligation to bear the costs related to the valuation of real estate, infringes Article 18(2)(9)(a) CSGL by introducing a regulation which enters into the scope of statutory regulations and the sphere of competence of the commune's executive body]" Order of the Supreme Administrative Court of 22 November 2018, ref. no. I OSK 2884/16, Lex no. 2632371, where the following view was expressed: "the commune, as the owner of commune property, has the right under Article 18(2)(9a) CSGL to determine the terms for the sale of real estate, because the decision to trade the real estate belongs exclusively to its owner."

[24] Judgement of the Voivodship Administrative Court in Opole of 10 October 2019, ref. no. II SA/ Op 254/19, Lex no. 2733989.

[25] Journal of Laws of 2019, item 2325 as amended.

distinguishes acts of local law from individual acts.[26] In turn, Article 40(2) CSGL provides the basis for commune authorities to issue local law acts on the basis of this Act for rules of commune property management, which are classified as structural and organisational acts [Szewc and Szewc 1999, 53-54; Dolnicki 2004, 5]. The domain of these regulations is that they are not addressed to an unspecified group of entities, but mainly to the commune's executive body. However, indirect effects of such acts concerning or affecting the legal situation of other addressees may not be denied. As in the present case, the resolution on the sale of real estate under the "premises for land" scheme not only will determine the main content of the tender documents (especially the tender notice), but it will also affect potential investors whose offers will have to correspond to the content of the resolution, not to mention attempts to challenge the results of the tender in the event of possible shortcomings or incorrectly defined tender conditions (discrepancy between the resolution and the tender notice). However, an analysis of Article 40(2) CSGL together with Article 4(1) of the Settlement Act, which links the said resolution with Article 18 (2)(9)(a) CSGL, confirms the classification of this resolution as a resolution whose purpose and role is to clarify in technical terms the provisions of the Settlement Act, and the scope of matters regulated by this resolution is not limited only to the units that make up the organisational structure of a given commune [Sidorowska-Ciesielska 2018; Dolnicki 2010].[27] At this point, the position of the Supreme Administrative Court should also be pointed out, according to which "commune councils that make commune regulations in accordance with Article 40(2) of Local Self-Government Law shall adjust the content of their regulations strictly to the scope of their authority and the powers conferred on them, tasks thereunder, and in case of doubt as to the scope of that authority, clarify those doubts by applying a restrictive interpretation."[28] However, it is worth emphasising once again that the nature of this resolution and its content go beyond the discussed scheme of separation of powers of the decision-making and executive body of the commune in terms of the degree of detail of determining the conditions for the sale of given property. The role of the commune council in the management of commune property should usually end with the establishment of a set of basic rules of conduct for the executive body without specific content proposals, which should

[26] This is especially the case with regard to granting a discount on the sale price of real estate in the light of Article 68(1b).

[27] A. Sidorowska-Ciesielska, who, addressing the broader issue of acts adopted by the community, indicates the possibility of regulations specified in those acts projecting on the implementation of public subjective rights of citizens and other entities not subordinate (organisation-wise and work-wise) to this authority. See also Dolnicki 2010, commentary on Article 40, thesis 3.V.

[28] Judgement of the Supreme Administrative Court of 26 May 1992, ref. no. SA/Wr 310/92, Legalis.

be used in the contract concluded by the commune represented by its executive body.[29] In turn, such a position is based on an analysis of the content of, for example, Article 18(2)(9) and Article 30(2)(3) CSGL. However, in that case, the commune council has a clear legal basis to direct, with effect on third parties, the powers of the executive body aimed at concluding and initially shaping the content of a future contract concluded by the commune.

However, it should be added that the commune is not only a local government unit established to perform public administration tasks, but also a legal person who participates in civil law transactions by making decisions concerning management of its property. One must agree with the views expressed in the literature that the distinction between civil law acts and administrative law acts will be largely impossible due to the co-existence in the commune of the sphere of *the imperium* and *the dominium*, which means that actions taken by the commune authorities, be it directly or indirectly, have civil law consequences [Matan 2021]. The convergence of these functions and effects will be particularly visible in the management of commune property, as the resolution under discussion provides an example here.

The reflections presented above are in clear contradiction to the content of the explanatory memorandum to the Settlement Act, which explicitly states that: "The resolution on the sale of real estate will not be a local act. Such an act must contain at least one general and abstract norm. The resolution specified in this draft will not contain abstract norms, therefore it will not be an act of local law and will not require promulgation in the voivodship official journal."[30] It is regrettable that such key decisions have not taken a normative form which would prevent any discussion in this respect, clearly establishing the legal nature of the act.

As already indicated in the second part, the absence of abstraction does not necessarily mean that the nature of a given act as an act of local law is ruled out. The distinction between *imperium* and *dominium* acts in the activity of a commune as a legal person and a public authority unit is highly problematic, as this discussion has tried to show. Therefore, if the intention of the legislator is to exclude this resolution from the category of acts of local law and to refrain from promulgating it, this should be expressed directly in the legal provision. Especially so since Article 4(1) of the Settlement Act in conjunction with Article 18(2)(9)(a), Article 40(2)(3), Article 41(1) and Article 42 CSGL and Article 13(10) of the Act of 20 July 2000 on the promulgation of normative acts and certain other legal acts[31] give grounds for classifying this act as a broader category of legal acts

[29] Judgement of the Supreme Administrative Court of 17 July 2014, ref. no. I OSK 873/14, Legalis.
[30] Explanatory memorandum, p. 12.
[31] Journal of Laws of 2019, item 1461.

concerning the principles of commune property management. One should agree with the position expressed in administrative courts' decisions, according to which "the mere fact of a local government decision-making authority adopting a resolution cannot yet be interpreted to mean that we are dealing with an act of local law."[32] It is worth noting that the analysed resolution will also set – in accordance with the provisions of Article 4(3) *in fine* – a deadline binding on the investor for the transfer of premises or buildings to the commune as part of the "premises for land" settlement, where under Article 2(1)(a) and (b) an investor should be understood not only as the entity that acquired commune property, but also the person who seeks to purchase the property from the commune real estate assets. The mere fact that the resolution will concern a specific and, by definition, one-off situation does not negate the existence in it of at least one general and abstract norm. Pursuant to the analysed Article 4(3) of the Settlement Act, the resolution on the sale of real estate is ultimately intended to create a general model for future settlement with the investor. The very description of the property required by the commune or the land on which a building is erected requires maintaining a certain indeterminacy by indicating only minimum requirements with expected standards, as well as a comprehensive approach to the minimum and maximum number and area. In this perspective, the required subject will be far from concretising and individualising future properties in a way that allows only one to be identified. These guidelines will only serve to indicate the expected category of real estate, which will be the basis for mutual settlements between the investor and the commune in the future. This resolution will also address the aforementioned issue of the date of transfer of ownership of these premises or buildings to the commune, calculated from the date of transfer of the ownership of the sold property to the investor. It will be crucial for determining the content of a specific obligation arising from the content of the contract specified in Article 9(4)(b) of the Settlement Act, the investor's non-performance of which will be subject to a normative penalty of 150% of the price of premises or buildings which he undertook to transfer to the commune as part of the "premises for land" settlement and which he will be obliged to pay to the under Article 11(1) of the Settlement Act.

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[32] Judgement of the Supreme Administrative Court in Warsaw of 15 April 2002, ref. no. I SA 2160/01, Lex no. 81765; for more recent judicial decisions see Judgment of the Voivodship Administrative Court in Kielce of 24 March 2021, ref. no. II SA/Ke 191/21, Lex no. 3162536, in which the court stated that the existence of a statutory authorisation to issue an act does not mean that it is necessary to state unequivocally in a provision of the statutory rank that a resolution of the commune council constitutes an act of local law. For the classification of an act as an act of local law, the character of legal norms and these norms' formation of the legal situation of the addressees are decisive. If it is confirmed that a resolution contains at least one general and abstract rule, it is an act of local law.

CONCLUSIONS

Taking into account, therefore, that the competence to establish this resolution allows the legislative body to indicate, in a binding manner, the grounds but also the conditions of the future contract for the sale of real estate, which are in principle the powers of the executive body, as well as the fact that it refers to issues binding on potential investors by setting standards and criteria for the categories of real estate expected by the commune, thus co-shaping the content of the future contractual obligation, it may be said that the intentions expressed in the explanatory memorandum to the act have not been fulfilled, because the analysed resolution goes beyond the structures binding on internal acts. Moreover, the mere regulation of the technical specification of the expected real estate will go beyond the understanding of specific and individual standards. In this perspective, the analysed resolution fulfils most of the premises for an act of local law approved in literature, presented in detail by Dąbek [Dąbek 2022; Idem 2020, 85]. Without a doubt, it is a normative, universal, general act issued for the purpose of exercising a statutory mandate containing legislative competence. Arguments that may discredit this proposal concern the issue of the abstractness of standards and self-consumption of this legal act after a successful tender and the conclusion of a relevant contract with the investor. Thus, these conditions do not determine the case. To confirm this thesis, the example of resolutions giving street names[33] or resolutions on giving or depriving a road of a certain category may be used.[34]

There is no doubt that this resolution enables the achievement of the objectives of the Settlement Act, and its key importance for mutual settlements between the commune and the investor is precisely emphasised in the fact that the tender for the sale of commune real estate may take place only after the deadlines for the review of resolutions designated for the supervisory authorities have expired. Therefore, an act was created which can formally be considered as an act of local law in the light of the above-mentioned examples and constitute an individual normative act regulating the rules for the purpose of a specific tender procedure and shaping the content of a future contract, which means that indirectly its effectiveness extends beyond the commune's organisational structure.

In the light of the above arguments, it may be assumed that the resolution under discussion will constitute an act of local law contrary to the intentions of its drafters.

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[33] Judgement of the Supreme Administrative Court of 29 June 2011, ref. no. II OSK 633/11, Lex no. 1165429.

[34] Judgement of the Supreme Administrative Court of 4 April 2008, ref. no. II OSK 102/08, Lex no. 453213; interestingly, it points out directly that local law acts may contain both provisions of universal force and regulations of an internal nature.

It is therefore necessary to submit a *de lege ferenda proposal* to amend the provisions of REMA and to adapt the content of the provisions to the actual – expressed directly in the explanatory memorandum – intention for the resolution to have a legal nature. The current analysis of the content of statutory solutions, views of legal scholars and commentators and the established line of judicial decisions in similar cases (as, for example, on the basis of the repeatedly cited Article 37(4) of the REMA) allows the creation and justification of an internally contradictory stance on the legal status of the analysed resolution. Such a situation should be considered contrary to the standards of a democratic rule of law, and in particular to the principle of decent legislation resulting from them. It is not surprising, therefore, that there is little interest in using this solution (innovative for commune real estate management) if the legal nature of a commune council's act, fundamental for this procedure, is unclear.

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IMPROVEMENT OF DEMOCRATIC SOCIAL STRUCTURES AS A RESULT OF PERSON IDENTITY, RECOGNITION AND TRUST

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Abstract. The author outlines reflections on perfectly democratic social structures pointing to contemporary social theories on social capital while taking into account the existence of person identity, culture and national identity, trust and recognition. He emphasizes the importance of these, concepts as significant factors in the formation of social and cultural ties, which undoubtedly have an impact on the improvement of democracy. He points to the dialogue that should occur in a democratic society linked to responsibility for the common good. The paper refers to the reasons for Polish democracy's weaknesses, the problems of the functioning of modern democracy that have an impact on its quality. Democracy is a challenge and requires full involvement of civil society, correct interpersonal relations, dialogical justice. Social sciences oriented to the world, person-to-person must constantly take into account potentially occurring events and real threats to a functioning democracy in order to meet all challenges.

Keywords: democracy; personal identity; trust; recognition; social capital; dialogue.

INTRODUCTION

At present, we are living in a special socio-political and economic situation, which for many reasons is completely new to us. Therefore, the democratic model, the political system, as well as the forces of social representation must take into account the considerable social instability, which cannot be indifferent for a lawyer. The cognitive realism of philosophy shows that social life is inherently multicultural due to the multiplicity of people who make up the community and the rationale of human multiplicity, which individually and uniquely experience cultural reality. This is the basic aspect that allows to notice the ambiguous or multicultural entity nature of law and politics. Politics and law are analogous in their existence and impact.

The modern world is characterized by new features of the kind of great complexity, chaos, emergence and fluidity, as well as a great diversity of societies, economies and cultures. The new times require new ways of thinking, new social theories and the presentation of challenging perspectives

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and surprising innovations on multidimensional processes in modern societies. Social theorists take widely varying perspectives in agreement, however, they all agree that we live in a world characterized by a new way of social and cultural organization. In order to depict the spirit of these new times, a wide network of new concepts and terms has been developed. A. Giddens speaks of today's world as an era of "reflexive modernization," U. Beck writes of "risk society," Z Bauman of "liquid modernity," M. Castels of "network society," and F. Jameson of "late capitalism." The presented paper adopts the method of analyzing and critiquing the literature, the process of mental cognition and analytical thinking used in the science of law and in legal practice. The problem is specified in the title of this paper.

I.

Democracy is a general concept that exists in many individual concepts and varieties. Democracy does not always develop properly, but if it does, that is because it faces challenges that raise fundamental questions about its meaning and value. Social, economic, cultural and technological changes can challenge the assumptions of familiar conceptions of democracy and create challenges that it must meet if it is to thrive. These are constant and varied challenges. Significant and visible are the challenges of globalization and environmentalization in particular. Analyzing a selection of the most frequently debated democratic innovations – deliberative, direct, cosmopolitan, ecological, associational, party-based models, it is found that they are not entirely new, as they grow out of earlier narratives of democracy by adding new threads to known content. Democracy is always recreated in new combinations and visions representing a process created by the diverse and changing meanings that democracy can have for different communities. The question should be asked: have Polish people stopped trusting democracy? It should be acknowledged that fatal downgrades have occurred in the values of the democratic state, public debate and adherence to the standards of the rule of law. All rankings very poorly evaluate the actions of politicians, who should be the voice of those who elected them. However, society does not feel that they are the perpetrators of the surrounding reality. It seems that the reasons for the weakness of Polish democracy lie within it, not in the weakness of the concept. The problem is the sphere of practice, not the formal instruments offered by the legal system. It should be mentioned that the basis of a concept of the rule of law based on the principle of law is the German idea of Rechtsstaat. This concept was first used by J.W. Placidus [Placidus 1798], recognizing that the primary goal of a democratic state is to secure human rights. Subsequent doctrinal representatives of German legal thought referring to this concept were C. von Roteck, R. von

Mohl and F.J. von Stahl. They understood the rule of law mainly as the opposite of a despotic state. R. von Mohl wrote that "the legal state can have no other purpose than the following: To order the whole life of the nation in such a way that every member of it will be assisted and protected in the free and comprehensive use and enjoyment of all its powers […] The freedom of the citizen is the overriding principle with this attitude […] all law is only designed to make freedom protected and possible" [Zmierczak 1995, 12-13]. We often hear opinions that the law is wrong. The freedom we strive for in the future is extremely dependent on civic responsibility [Bator 2006, 15-17]. The strength of a country is always demonstrated by the commitment of citizens willing to take responsibility for their own state. The public must decide whether it wants to demonstrate a willingness to realistically enjoy the privileges of democracy. Democracy, including its values, must be constantly nurtured, and the shape of the system depends mainly on ourselves. Democracy is either in the minds and consciousness of the people, or there is no democracy at all, as there can be no compulsion to be democratic. It should be emphasized that the real problem of our democracy is ourselves. The most important is the restoration of the ethics of public life, which should be based on the restoration of the basic concepts of democracy in the form of giving it a strong impetus to stimulate society to action leading us to a stage of development of public life that is close to the Western European ideal of a mature civil society [Biedrzycki 1998, 27]. At this point, it is necessary to refer to the publication of M. Safjan on challenges to the rule of law [Safjan 2007, 28ff] and Z. Witkowski [Witkowski 2015, 7ff], who already years ago drew attention to the main sins occurring in Polish democracy. M. Safjan notes, among others, that "1) the idea of a democratic state of law remains in a strong relationship with the ethical values that fall within the democratic canon; 2) the ethics of the state of law cannot be opposed to the principles of morality in public life. A democratic state under the rule of law enforce respect for its own values within its own system and the means and instruments belonging to it […]. The restoration of the ethics of public life leads by helping the vital forces of democracy, giving a strong impetus to those mechanisms which, deprived today of sufficient and at the same time necessary public interest and support, are just waiting to be revived." M. Safjan considers the reasons for the weakness of Polish democracy in, among others, the passivity of society. "Thus, as long as the awareness of the existence of a simple relationship between democracy and the ethical imperative of civic activity does not spread, we will not change reality. Associated with passivity is social i.e. civic acquiescence to rampant evil, meanness, hypocrisy, corruption, opacity of rules, unequal treatment, injustice and the constant creation of a new category of "more equal" among equal citizens. […] A major obstacle to achieving the state of a viable democracy is the state of elites, intellectuals, people with a better

understanding of reality than others, better prepared to point out desired goals and outline the state's strategy. I have the impression that today's intellectual elites, including academic elites, are passive to a surprising degree and, for the vast majority, do not join public life, thus relegating themselves to the margins. […] I believe that one of the biggest barriers to democracy in the Republic of Poland, directly related to the ethics of a democratic state, is the lack of authentic public debate. After all, one of the values of democracy, without which it would be difficult to talk about it, remains the mechanism for the formation of positions, ideas and practical solutions through the clash of authentic and opposing rationales, open and wide debate, the reliability of the arguments raised in public." Quoting the thought of J. Tischner, he states that "the alternative to the society of monologue is the society of dialogue. The principle of this society is the conviction that the truth of social life is revealed to every thinking member of society. The authority has its truth and the subject has its truth, just as the authority and the subjects have their illusion. No one can claim a monopoly on truth. This conviction opens the way to a society of dialogue" [Tischner 1992, 147].

Returning again to the question of ethics of the rule of law and how to understand the democratic standard, it is impossible to meaningfully discuss the formation of such a standard in a society the participants of which, especially its elites, have difficulty understanding what the law is and what it is intended to serve, and how its functions are carried out, and functionaries at various levels are unable to rationally apply the law. The approach to the law is highly simplistic and perhaps even primitive, limiting the meaning of the norm sought to the literal, literal wording, without taking into account how absurd or even harmful or indecent the consequences are to be *in casu*. Interpretation based on the principle of reductio absurdum seems to triumph and find full recognition not only among non-lawyers, but, unfortunately, also among representatives of the political world. This arguably results in an application of the law that shatters the common sense of rightness and rationality. The catalog of formulated and not respected demands in the subject of the state and values cannot ignore the fundamental issue of the law-making process. A violation of the democratic standard of legal and political culture is the incessant persuasion of the public by all successive ruling teams in Poland that the problems of public life lie mainly in the sphere of incomplete, not very tight, defective legislation. This results in naive expectations of various social groups and subsequent disappointments. Our attitudes are characterized by a refusal to accept responsibility for our own behavior and for the consequences of our decisions both in the public space and in the sphere of individual choices. There can be no democratic rule of law without such responsibility on the part of both the rulers and the governed. On the plane of responsibility ethics on the

side of governed is placed both thinking in terms of the common good, rationality and predictability of the means used, as well as a properly established preference for a hierarchy of values and goals. It should be noted that the current goal of the good of one environment or grouping will never be preferred at the expense of good of the state and society as a whole. Z. Witkowski, in his reflections, points to the fact of passing successive waves of the crisis of democracy and the distancing of ordinary citizens from politics and alienation from society of those holding political power. Alienation of voters, which arises spontaneously sui generis "party of the non-voters" and the ongoing relatively low rate of electoral participation testify to the fact that the political class does not provide the citizens with either their need for expression or the feeling that they are a permanent component or immanent part of the democratic process. Z. Witkowski formulates seven deadly sins: 1) pride and the slow but steady alienation of the political class, creating a "party of non-voters" gaining an increasingly systematic absolute majority; 2) voting, but not electing; 3) lack of trust in the electorate and de facto rejection of cooperation with the electorate and the maintenance of "beautiful" pathologies of peculiarly understood democracy; 4) appropriation of electoral law by political parties and far-reaching instrumentalization of electoral law by politicians; 5) conscious keeping permanently open the question of the election model and perfecting the phenomenon of "political engineering," or "the art of political manipulation;" 6) limitation of the electoral solutions of the 1997 Constitution and de facto disregard for the idea of an Electoral Code; 7) deliberate systemic weakening of the State Election Commission in 1997 and the illusory nature of legal procedures enforcing respect for election law.

The modern world seeks much more subtle or even sophisticated criteria for the evaluation of what the state and its democratic standards are. Everyone places different demands on this system. Intuitively, we feel that the direction of development in modern Europe greatly complicates and forces the expansion of a definition of the word and the need to discuss the ethical values of modern democratic state. Axiological connotation leads to a situation in which a violation of the rule of law per se is interpreted as a violation of these principles. State ethics becomes understood as an evaluation of the functioning of state mechanisms.

R. Markowski, describing democratic innovations, points out the internal problems of the functioning of democracy, stressing that external factors adversely affecting the quality of modern democracies are important [Markowski 2014, 10]. He includes among them: globalization and its often destructive impact on cultural traditions, social ties and local economies; cross-cultural migration, the emergence of masses of maladjusted people, the so-called "outsiders"; the individualization of life, disappearance of community social

ties; demographic trends, the aging of societies; economic changes leading to a significant marketization of social relations; mediatization leading to the disappearance of real, active public opinion, the increase in superficiality, the piarization of politics, the diminishing role of real debate; the shrinking role of the state, increasing ambiguity of its role and, consequently, the responsibility of the state, due to the processes of globalization, integration and mass migration and terrorism; a sense of insecurity arising from the above-mentioned processes and the dynamics of change, transformation of the social structure, demography and labor market fluctuations.

We live in a risk society, an information society, a reality crisis. The triumph of post-truth is blamed on politicians, Internet, media, education system, pop culture, elites. The issue is very complex, as we discover that the concepts used so far cease to adequately describe the world, because the world is changing faster than the language used every day. J. Habermas notes the systematic distortion of communication crippling modern societies, while A. Honneth broadens the communication problematic to include the issues of recognition and contempt. Hence, if communication and culture occupy a prominent place in many contemporary analyses, structuralist, poststructuralist and deconstructivism theories focus attention on the relationship between language and social realities in a new way.

II.

Contemporary social theories from the 20th century until our time have answered the question of how innovative theoretical and sociological approaches have brought such topics as social communication, personality, power, dominance, sexuality, cultural gender, and trust to the forefront of the theoretical and public debate in recent years. The diffuse and fragmented nature of social formations is emphasized. This fragmented nature of beliefs, values and norms does not lead, according to proponents of this view, to the emergence of opposition to the current social order, but to the reproduction of society taking the form of a dispersed, postmodern or fluid order and the change or transformation of society. The current era is a time of tremendous social change. Globalization, new information technologies, the unstoppable development of consumerism, the technoindustrialization of war – all these transformations are taking place not only in modern institutions, but also in everyday life. Modern social theory is concerned with determination of the pace of change occurring in our everyday life today and with critique of the institutional macro-factors leading to it. Social theories try to explain modernity-related changes in social conditions and institutional life by proposing new ways of thinking, among others, about the development of new information technologies, the global economy at the beginning of the 21st century.

In addition, there are other theories that try to answer the question, what is really new today? The concept of globalization, has so far been the loudest response of social theory to the complexity of modern life. The perplexities of the term extend to everything from transnational financial economies to global satellite communications. In this case, social theorists have invented new terms to describe, and indeed define, our new globalized era. There are currents in social theory that view political unrest or globalization forces as external events in society. They investigate the complex ways in which social, political and cultural processes are embedded, regulated and experienced at the level of identity and emotional life. In fact, the ways in which public life organizes the private sphere, being itself reflexively shaped by the emotional responses of individuals, have figured prominently in many strands of contemporary social theory. T. Adorno, H. Marcuse, J. Lacan, R. Barthes, A. Giddens, J. Kostrzewa, J. Kristeva, L. Irigary, J. Butler have variously explored the intertwining of the social and the erotic, symbols and the unconscious, cultural conditions and experiences, the interconnectedness of what is global and local. As a result, issues of identity, desire and emotion have become some of the most important topics in social theory.

Currently, it is thought that groups are part of the so-called social capital from which both the democratic system and government are drawn. According to some people, this diminishes both democracy and the general idea of government is threatened. According to a typical definition, social capital "refers here to such features of a society's organization as trust, norms and connections that can increase the efficiency of society by facilitating coordinated action" [Putnam 1995, 258]. J. Coleman, an influential proponent of this view, writes that "social capital is defined by its function. It is not formed by single individuals, but is made up of a wide variety of units that have in common the fact that they all have the characteristics of a social structure and that they facilitate the action of other actors – both individuals and social groups within that structure. Like other types of capital, including human capital, it is not completely interchangeable, but may be appropriate for some activities, while useless or even harmful for others" [Coleman 1988, 598; Idem 1991, 302-304]. The author considers the idea of social capital through the example of the lower structures of society, such as lasting relationships, family, labor unions, etc. [Coleman 1991, 300-21; 361-63, 590-93, 596]. These structures allow those acting as individuals and social groups for many things, including successful cooperation in many ways. They also enable to trust each other, protecting relationships from abuse. J. Jacob [Jacob 1961, 138] defines social capital in simple terms as the network of social relationships that facilitate our lives in urban environments and make our lives easier. Coleman adds that social capital reflects the relationships between individuals. Therefore, just like trust, social capital is a relational concept.

Much of the contemporary work that has emerged from interest in the problem of trust has dealt with changes that have occurred over the decades [Pharr and Putnam 2000, 47; Sztompka 1999, 58]. Trust is neither a simple nor a primitive concept. It consists of many elements, such as expectation and cognitive judgment of the motives of others' intentions, making people more or less trustworthy in a particular context. In addition, the very fact of trust involves at least risk-taking. Contemporary literature emphasizes the need for trust, rarely addressing the benefits of being trustworthy, although trust can only make sense if the people we deal with deserve our trust. In the contemporary literature on the subject, there are three different concepts of trust, and they all basically refer to the concept of trustworthiness, to how the fact of being trustworthy affects our trust. Most writers consider trust as such, and not just acting on trust, to be a matter of choice [Bohnet and Zeckhauser 2004, 467-84; Eckel and Wilson 2004, 447-65; Sztompka 1999, 78]. In contemporary discussion, it is argued that "trust in politics is secondary to social trust" (which is the trust that exists between citizens). Where disagreement exists, neither does social trust, and as a result, there is a lack of it in politics, making the political system less stable [Parry 1976, 134]. B. Manin states that the style of politics has changed, exemplified by the shift from traditional campaigns to election marketing using the media [Manin 1997, 71]. He points to the democracy of spectacle, a term used as part of the justification that modern democratic systems are dominated by media messages rather than actual politics. The fluidity of political change is characteristic of a democracy of spectacle.

Concepts of trust vary as to what good intentions would mean to a trustee. One concept is the model of contained benefits, it assumes that it is beneficial for the trusted person to maintain a relationship with the trustee, and this provides an incentive to be trustworthy [Hardin 1982, 186-87; Idem 1991]. Other theories explain the trustworthiness of the trusted person either through moral obligation or through psychological or characterological tendencies to prove trustworthy. Trust is, like knowledge, a cognitive category, as it is stimulated by expected motivation from others. All concepts should be considered in the cognitive categories of cognition, as they are all based on evaluations of the trustworthiness of a potentially trusted person. The literature pays attention to institutional or network capital following social capital, which is not an aspect of trust, nor necessarily a product of trust, as both networking, network capital, institutional capital and more general social capital are means to achieve goals and cooperate even in the absence of trust. A variety of social tools such as institutions, norms, etc. enable cooperation even in the absence of trust [Cook, Hardin, and Levi 2005, 55]. Deep-rooted distrust in society promotes hegemony [Dahl 1971, 111]. It would seem that it is hegemony, especially autocratic hegemony, that

develops distrust between citizens usually deliberately to prevent the formation of groups opposed to the ruling regime. In a characteristic way, concepts that go further, assuming the rationality of trust, are in fact a description of trustworthiness based on motivation that depends on the disposer of trust. Hence, the concept presupposes a belief on the part of the trustee that the trusted person will prove trustworthy because it is in the common interest to act for the common good. This, unfortunately, does not guarantee that the trusted person will prove to be worthy of that trust, as other benefits may indeed prevail. Therefore, there is always a risk if we act on the basis of trust. Both trust and distrust are cognitive concepts. Trust cannot be a matter of choice; knowledge of a person's moral commitment or psychological or characterological inclinations affects the degree of our trust. A well-known argument from contemporary literature on the issue is that everyone would be much better off if they were more trusting. Consequently, we should be more trusting [Hollis 1998, 17; Uslaner 2002, 71]. Although many theorists refer to recent decades as the era of globalization, the meaning of the term is not always clear. There are many different aspects of globalization, but it seems sensible to start with the economic dimension of the phenomenon. J. Bhagwati defines globalization as "the integration of national economies and the creation of an international economy through trade, foreign direct investment, (through multinational corporations and companies), short-term capital flows, the international movement of workers and people, and the movement of technology" [Bhagwati 2004, 3].

When we become aware of the diversity of cultures, practices and values in the world today, and the history of indifference and hostility between nations, we may feel that the process of globalization can encourage humanization. An important issue is the distinction regarding the division between nation and state. Let us adopt the definition of a state as a political entity with an independent system of law. Modern states are territorial in nature. The borders of states may be disputed and legitimacy challenged, but states claim the right to exercise authority over a given geographic territory. It is much more difficult to define a nation. What distinguishes a nation amongst others human groups? Theorists agree that a certain degree of subjective identification of mutual recognition are necessary, albeit not sufficient, to recognize a group as a nation. C. Calhoun states that "recognition as a nation requires, of course, social solidarity – some level of integration among the members of a nation, and a common identity – a recognition of the whole by all its members, and a sense of individuality that would at the same time involve a sense of belonging to a community" [Calhoun 1997, 4].

A. Marglit and J. Raz state that "a nation has a common character and a common culture, encompassing many different and important aspects of life; a culture that defines itself and marks different forms and styles of life,

types of activity, occupations, pursuits and relationships. We expect a national group to have a national cuisine, distinctive architectural styles, a common language, literary and artistic traditions, music, customs, costumes, ceremonies, festivities, and so on. None of these elements is essential. These are not typical examples of the characteristics of nations and other groups claiming the right to self-determination. They represent dominant cultures, and their identity is at least in part determined by culture. They have cultural traditions that permeate not only one or a few spheres of life, but gain reflection in many areas, including issues of great importance to the satisfaction of individuals." National culture is dominant, and therefore individuals born and raised as a member of a nation naturally "take on the culture of the group and are marked by its character. Their tastes and choices are determined to an extremely important degree by the culture." Although a person is able to "shed an old culture" and "acquire a new one," this is "a painful and slow process, the success of which is shared by few" [Margalit and Raz 1990, 443-44; Miller 1995, 25-26]. Mill argued that a group of people forms a nation when "the people are united by mutual sympathies […] which are a motive for them to act more willingly with each other than with others, that they desire to live under one and the same government, and at the same time desire that this government should be exercised exclusively by them, or at least by some part of them" [Mill 1995, 245]. D. Miller writes that "the concept of nation must refer to a community of people aspiring to political self-determination" [Miller 1995, 19]. B. Anderson states that it is important that in the mind of each member lives the image of a community that is perceived as a community, because regardless of the actual inequality of exploitation that may be shared by each of them, a nation is also a deep horizontal brotherhood [Anderson 1991, 6-7]. Therefore, members of a nation share a dominant or overall culture that influences many aspects of their lives and the way they view themselves, including language, religion, values, customs, tastes and preferences. National affiliation is an important part of identity and how an individual perceives himself. A bond is also formed between members of a nation based on a sense of solidarity, despite the fact that most do not know each other or individually. There is also a political element to the nation, as it aspires to political self-determination.

An indisputable value that requires sincere and reevaluated, in the spirit of community, educational nurturing is own sense of nationality [Boski, Jarymowicz, and Malewska-Peyre 1992, 71ff]. This value cannot be diminished under the conditions of globalization and the way modern people think. Thus, the legitimacy to any multinational community cannot be anonymity, nationlessness or statelessness. Every commonality makes moral sense and presents an important meaning both economically and politically when it results from the voluntary and free decision of each individual, when

it is not a forced uniformity, marginalization of other nations or depreciation of their achievements, and often an intricate path to their own distinctiveness and sovereignty. Extremely relevant in this matter are the expressed opinions of A. Kłoskowska, S. Ossowski as well as H. Skolimowski. "Each participant in the national community builds the full identity of their own person, taking into account the national identification done in a peculiar way. No one, for example, is a Pole simply and only a Pole. But every Pole is, in his own way, linked to a unit of national culture, and with that bond is linked to membership in many other cultural and subcultural communities. The one who would have no relationship either with a private or ideological homeland, neither on the plane of habits nor in consciousness, would not be a Pole […]. Treating selectively the heritage of own national culture, S. Ossowski also emphasized the role of relationships of choice, which can connect with elements of cultures of other nations. Such contacts, which are necessary and growing in the modern world, do not necessarily threaten the depth of internalization of own culture […]. In the light of contemporary conceptions of symbolic culture as a communicative process, this sense of ownership is justified by participation in the reproduction of symbolic content in its active reception. In relation to the culture of own national community, this participation is generally more complete than in relation to fragments of the culture of other communities. The internalized and valued output of this culture recognized as own intensifies the sense of human significance […]" [Kłoskowska 1990, 30-32]. H. Skolimowski states that "when I consider Poland's contribution to the treasury of European and human values, when I reflect on 'final issues', I see that the ethos of Poland is not a provincial and parochial ethos. At times, we have been taking too much of a leap into the sun. The future of the planet, the future of the human race will require great visions and taking great responsibilities, as well as new thinking. The best values of the Polish ethos resonate harmoniously with the necessities of the 21st century and centuries to come" [Skolimowski 1990, 151]. B. Wojciechowski notes that common values and shared norms make social life possible. Without them, man, despite the freedom he possesses, feels lost and alienated, and thus falls into an identity crisis [Wojciechowski 2009, 260ff]. Without the existence of a minimum common culture, we are unable to cooperate and will not consider the same institutions legitimate.

III.

Democracies have remained at the state level, and the difficulties they face are mainly global. As a result, there is an institutional crisis of democracy, which combined with the lack of general public awareness of the processes taking place in the world, causes an identity crisis,

a popularization of sentiment. We are undoubtedly dealing with the declining state of liberal democracies, both with the stoppage of its expansion in the world and with a serious institutional and identity crisis within it.

The weakness of democracy as diagnosed by A. de Tocgueville is cultural mediocrity. "The defects of the rulers and stupidity of the ruled" were to lead the state to collapse. The development of electronic media only accelerated and intensified the process of democratic culture decline by leading to a shallowing of the information provided, and therefore less well informed public opinion [Tocgueville 2005, 28ff].

The progress of globalization and the development of multinational corporations of an all-encompassing entertainment culture have reached such a level that many individuals are to some extent deprived of their emotional ability to translate private resentments into demands for political recognition. J. Habermas and A. Honneth focus on morality to emphasize the learning skills of individuals, groups and social institutions. This is an important aspect of contemporary critical theory as well as their dimension of creativity, which is sometimes contradictory to their adherence to the Frankfurt School version of social criticism. Honneth on the sociological significance of many new social movements, affirms their claims to political recognition and perceives in them radical challenges to traditional conceptions of class, economy and nation-state [Honneth 1996, 17-27; Idem 2007, 47-57] His critical theory of recognition coincides with the new politics of identity, culture, ethnicity and difference present in both post feminism and environmental movements, as well as the struggles of indigenous peoples and the politics of multiculturalism. He recognizes that at their emotional core, human relationships are always marked by radical tensions between connectivity and separateness, dependence and self-determination. It is from these interactions that individuals develop a positive emotional relationship to their own identity and a sense of certainty that enables them to act in the wider world. Honneth recognizes that it is love that prepares individuals for the difficult emotional work of reconciling claims of recognition by others with the desire for self-determination. Therefore, it can be considered that love is the foundation of both moral identity and political society. He states that a love-based sense of certainty is "conceptually and genetically prior" to other forms of identity recognition, such as a sense of self-worth and dignity. In his view, the desire for freedom is profoundly shaped by the experience of contempt, as there is an intrinsic relationship between the sense of injustice and the demand for recognition. Either injustice or the experience of contempt is the initiating factor for social antagonism or cultural conflicts against the existing social order. The author believes that this is the only way to explain the progressive trend toward a more democratic public sphere. Forms of interweaving culture and economy in the lives

of individuals, contemporary cultural processes cannot be divested of "leading to trivialization" by overlooking the important ways in which cultural creative potential can be used to counter social pathologies.

A. Elliot reports that the consensual cooperative theory of social action formulated by J. Habermas seems to have little relationship with those policy directions that dominated the early 21st century. Particularly critical of Habermas's reconceptualization of the normative dimensions of the public sphere made in terms of communicative action theory and deliberative democracy, they write that it is difficult to see how democratic ideals can be derived from the universal structure of language. Critics charge that Habermas's deep consensus theory of truth insufficiently protects liberal values such as human rights or freedom of speech [Gutmann and Thompson 2004, 87]. The holistic democratic project of Habermas does not explain the neurotic forces, the defense mechanisms of the personality activated by human beings, the compulsive behavioral patterns that prevent the very ground for rational debate from emerging in modern societies. The charge is that the notion of rational consensus adopted by Habermas does not reflect the multiplicity of moral, ethical and related value perspectives that proliferate in modern societies. Habermas, linking the variable interplay of reason and irrationality with other important factors, focuses on language, communication and dialogue. A. Honneth dealing with everyday conflicts in terms of moral experience, contempt, indignity, humiliation in his publications focuses on the notion of recognition, directing attention to the increasing demands of individuals and groups demanding recognition of their identities, needs, feelings and ways of living. He stresses that the demand for social recognition is the result of transmission of negative, painful experiences of contempt. In his view, both social antagonisms and cultural conflicts, from the psychological sense of humiliation to the political consequences of injustice, are related to an attempt to rebuild own needs and desires for a sense of self-worth. He points out that recognition, like the interpersonal dynamic process of communication, is an open-ended issue that contributes to the constant recognition and reconciliation of the poles of self-determination and dependence, individualism and solidarity. In particular, he focuses on three forms of recognition, which he links to the normative or utopian aspirations of critical theory by including self-confidence, self-esteem and self-worth. Honneth's theory of recognition has had a major impact on contemporary social theory by presenting a strategy for pursuing a new politics of identity and cultural difference by combining and reconfiguring social theory, moral theory and political philosophy. This approach shows some similarities with the concepts of other theorists of the politics of recognition. Adopting Honneth's theory in explaining social conflicts requires the ability to understand a new politics of identity, rooted in the experience

of contempt or humiliation. Identity is a complex and multifaceted concept, the meaning of which refers to many social and cultural contexts. Z. Bauman states that we are dealing with a multiplicity of identities, writing that "the troubles with the existence of a multiplicity of identities should therefore not be surprising. Applied identity games (the Internet very often conveys false identities), identities imposed or identified with a certain type of homo (homosexuality, *homo politicus*, *homo sovieticus*, *homo fiator*) or the creation of a so-called underclass, i.e. a gathering of people" [Bauman 2007, 23]. The concept of identity also refers to a sense of belonging to a particular society or group. In this sense, a person's identity has both objective characteristics relating to being a member of society and subjective ones depending on a person's perceptions, desires or experiences. J. Assmann stresses that "by collective or communal identity we mean the image of ourselves that is formed by a certain collective and with which its members identify. Collective identity is formed through the identification of participating individuals with it. It does not exist "in itself," but only to the extent that specific individuals admit to it. It is as strong or weak to the extent that it remains alive in the consciousness of the members of a collective and to the extent that it is able to motivate their thinking and acting" [Assmann 2016, 146]. Another author, B. Wojciechowski, points out that people, being members of a certain community, are shaped by it, and it forms their perception of reality [Wojciechowski 2022, 105]. Consequently, community membership largely determines the strategies of social action, i.e. the way of life pursued by its members. People relate to and evaluate each other on the basis of normative regulations of the value system and ideology characteristic of a particular community. H. Taylor notes that narrative identity allows to discover and articulate oneself, and this articulation is important because in the long run it makes it easier to remain true to oneself in the search for own way of life [Taylor 2002, 30]. This narrative identity as a pattern of authentic human legal subjectivity is pointed out by B. Wojciechowski, stating that "the accepted concept of narrative identity has the character of a threefold relationship: argumentation in shared values and universal laws, self-reflective attitude and intersubjective communication. According to this understanding, narrative identity provides a justification for the relations, relationships, behaviors, acts, preferences or situations in which the authentic legal subject finds or has found himself. Only then can the subject gain recognition in the legal sphere, truly discover himself and realize his desires. This is extremely important when we think about self-affirmation or self-discovery of people belonging to minority groups, alienated individuals or outsiders. Such a perspective allows them to be included in the community through dialogically shaped identity and recognition politics" [Wojciechowski 2023, 164]. It should be noted that identity, by its very definition, has a singular, individual and even particularistic character, which

has, by definition, a closer relationship with the empirical concrete. This is because when we speak of identity we always have in mind some specific person. The starting point for this perspective is the issue of the subject and being a subject, rather than the sense of being a subject, which is the subject of psychology. This allows for the analysis of subjectivity in the objective sense, rather than the subjective feelings associated with a person's perception of being a subject.

In the philosophy of dialoguing, the founder of which is M. Buber, the supreme value is love. He states that "feelings dwell in man, but man dwells in his love" [Buber 1971, 44]. Activity in the world is expressed through love, people become You for each other. Love is fulfilled through relationships: I and You. Its essence is responsibility for You. It expresses equality for all. For Buber, life is identical with encounter. The becoming of Self is possible through the encounter with You. A full society requires living contemporaneity, living with the other as You, to be treated not as an individual, but as a person [ibid., 56]. On the other hand, from the philosophy of dialogue and the philosophy of E. Levinas, it is possible to derive a certain ethos, in addition to the sense of interpersonal bonding, shaping mainly the formal side of justice (dialogical justice in the broader sense), to be reflected in the content of the law, which is precisely what is called dialogical justice in the strict sense, i.e. respect for the other, openness, solidarity based on common humanity, overcoming the boundaries of nations and cultures. Levinas' message seems clear, he wants to break man out of his indifference and convince him that he is constantly indebted to others and that he is responsible for them. Levinas does not question the value of reason, science, or rational social devices. He simply perceived them as something secondary, dependent in genesis and shape on social ethical contacts, unique and not amenable to a general and all-embracing law. Therefore, it is not in terms of rationality that the content contained in wholeness and infinity should be considered [Levinas 2012, 71-91; Idem 1995, 47-51]. The problem of trust appears more and more widely in the field of knowledge of social exchange. As a proof of all the above arguments – trust can and should be accepted for its value of human sublimation, hope and openness, for humanistic creativity. Trust, recognition, identity and social capital are important factors in the formation of social and cultural ties affecting the formation of the democratic system. It is necessary to take rational and systemic directional measures, oriented to the systematic and consistent elimination of the causes of injustice and harm, misery, conflict and other sources of danger, including safe human existence. Legal procedures are of no use when people lack correct, positive attitudes toward each other and an understanding of culture. The crisis of modern and multidimensional democracy, more than structural, is first and foremost a crisis

of meaning, a crisis of ethics. Therefore, its solution should not be sought only at the level of institutional and procedural reforms, creating new ones adapted to the context of globalization processes. It is necessary to start first of all from the integral experience of the person, from his freedom, in other words, from the anthropological plane. There must be a linking of political participation with the process of governance, which is not so much derived from the historically formed nation, but from the demos, which consists, according to the principle of inclusion, of adult citizens living in a common territory, regardless of their ethnicity, religion, worldview, minority participation [Dahl 2000, 37-44; Idem 1995, 119-88; Sartori 1998, 37-57]. M. Walzer states that "democracy requires a strong and vibrant civil society – if not for the sake of its emergence, then for the sake of its enduring cohesion and stability over time. From this point of view, the citizens of a democratic state are not self-sufficient creatures, they need to belong to other, more accessible, less demanding and threatening territories than the modern state, because only in such places can they acquire political competence, learn to win as well as lose, compromise, win friends and enemies, explore the ideas of opposition. It is highly risky for a democratic government when the state occupies the entire available field and there are no alternative associations, no protected social space where people can seek relief from politics, tend wounds, find encouragement, regain strength for future challenges" [Walzer 1995, 1-27]. Accordingly, we must be aware that civil society is built between the rungs of the social ladder. Beginning with individuals through overlapping communities of family, neighborhood, ethno-cultural, religious, minority, groups, movements and associations to local communities of social macro-structures. It is in these communities that democracy, personal identity, trust and recognition can be improved on the basis of the professed values that are so important to every person.

CONCLUSION

We are indeed living in a frightening post-truth era, where not only individual armed incidents, but entire histories and nations can be created. In both politics and law as well as education, there should be actions to overcome the isolationist, confrontational and aggressive goals of education pursued throughout history, replacing them with a dialogical community of values with the intention of building a creative and reconciled humanistic world community. Therefore, law and world-oriented education cannot fail to take into account the ever-present potential disorders and real threats.

Critical study of the social, legal situation should mean analyzing it both on a cultural, civilizational and personal level, and therefore observing the way in which what is public connects to what is private. R.L. Heilbroner

wrote "we need an awareness of what it means to live in dangerous times if we are to fully meet the external challenges that mark the prospects of humanity" [Heilbroner 1980, 29, 179]. In his view, people are not concerned about the future fate of the world because they are not willing to voluntarily and necessarily give up a certain amount of their comforts and excess luxuries. Global thinking and the development of pro-community moral attitudes is definitely a future task to be fulfilled by humanity. A sense of own national distinctiveness still requires the formation of ties to the native language, culture, native land, its history and spiritual and material heritage, to nature-biological basis of the nation's life. Modern, noble, true patriotism is incompatible with national megalomania and the granting of an exceptional mission to our own nation. The thoughts contained in this paper cover only selected values that present a cardinal and at the same time fundamental importance for the philosophy and practice of building a community society on a micro and macro scale. The essence of them comes down to presenting mainly those values, the affirmation and realization of which guarantees respect for own national and cultural identity, the consolidation of peaceful and ecological development of humanity, fidelity and dissemination of the ideals of humanism, including such values as love, freedom, trust, recognition, identity, tolerance, justice, solidarity, and finally the elimination of war and misery. The dialogue mentioned in this sense should include open-mindedness, responsibility, defense of own and ability to understand others' views and needs, ideals and attitudes, a negotiated way of conducting policy and making decisions, realization of human rights, and compromise that takes into account the rights and interests of all participating parties.

A well-functioning democracy requires the active participation of citizens who are aware of their rights and obligations and who are comprehensively educated, while at the same time showing solidarity and responsibility. The public discourse on the current crisis of democracy in Poland, Europe and the world lacks a comprehensive and at the same time coherent discussion of these issues, and lacks a correspondingly high democratic culture.

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PROFOUND CHANGE OR JUST A FACADE? LEGAL TRANSFORMATION OF THE ESTONIAN AND LATVIAN PENITENTIARY SYSTEMS

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Abstract. I investigated the process of transformation of penitentiary systems in two post-Soviet countries: Estonia and Latvia. Over the past 40 years, Latvia and Estonia have undergone reforms to their penitentiary systems bringing their prisons up to European standards. Both countries have abandoned the death penalty, and there are no political prisoners, and the development of democracy and the implementation of Western solutions have proceeded extremely quickly. However, the fundamental question is: to what extent were the changes to penitentiary systems profound and to what extent was it just a facade? To what extent is the readiness to train prison staff equivalent with a readiness to internalize Western standards? To what extent is the penitentiary system Western and to what extent it remains Soviet?

Keywords: Estonia; Latvia; prison; penitentiary systems.

INTRODUCTION

Over the past 40 years, Latvia and Estonia have undergone reforms to their penitentiary systems bringing their prisons up to European standards. These countries have also benefited from financial and material support from other countries to ensure the best possible outcome. Both countries have abandoned the death penalty, and there are no political prisoners, and the development of democracy and the implementation of Western solutions have proceeded extremely quickly. It is also worth noting that statistics show that the number of inmates has halved in 20 years (since the collapse of Soviet Union). However, the fundamental question is: to what extent were the changes to penitentiary systems profound and to what extent was it just a facade? To what extent is the readiness to train prison staff equivalent with a readiness to internalize Western standards? To what extent is the penitentiary system Western and to what extent it remains Soviet?

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1. METHODOLOGICAL SCOPE

The aim of this paper is to examine the core of penitentiary law and its peculiarities and identify what differentiates it from other specialized branches of law. Penitentiary law is shaped not as much by specific institutions as its overall goals. Thus, to truly understand the penitentiary law and the changes it underwent on the turn of 20th and 21st centuries, one has to learn about its current and past goals.

The primary reason for choosing this research goal is a *par excellence* scientific need. The initial assumption was that the penitentiary law ought to be approached from the perspective of the values it implements. The utilization of historical and comparative methods allows for identifying the changes that took place in various penitentiary systems since Soviet times. Furthermore, the dogmatic method allows one to better understand modern values, as well as political, social and economic doctrines made manifest by the legal norms. Each of the researched countries has been treated as a separate case study.

The author assumed that her chosen research methods will bring the best results, that is a comprehensive understanding of penitentiary law and doctrines, as well as their perception. This means not only describing the current law in force, but rather showing how it's interpreted to implement its goals. As pointed out by Z. Ziembiński, "the goals of the dogmatic method include recreating a systemic norm (which effectively creates certain social effects) from a given concept of the source of law (which usually leaves some wiggle room as to defining such norms)" [Ziembiński 1980].

Specific questions that I was trying to answer during our research: 1) How the correctional systems of Estonia and Latvia have changed over the last 40 years – legal and organizational aspects? 2) How the changes in the penitentiary systems of Estonia and Latvia are evaluated by the international community (reports of international organizations, judgments, tribunals)? 3) Have the penitentiary systems in these post-Soviet countries fully adopted Western standards, or do they still retain characteristics of their Soviet past?

The research focused on changes taking place over the past 40 years in the penitentiary systems of Estonia and Latvia (1980-2020).

This article is the result of a study utilizing three research methods – dogmatic, historical and comparative – that aimed at determining and evaluating current laws. The paper contains an overview of the law in force and statistics describing its utilization, as well as reports of international organizations and statements of state authorities. K. Jaspers' definition, describing the concept of science as containing three elements: methodical cognition, certainty of knowledge and universal validity was adopted as our starting point.

2. PENITENTIARY LAW AND SYSTEM

A penitentiary system has many definitions, which have changed along with the development of prisons and their role in a society. Historically, the term "penitentiary" referred to institutions that accepting prostitutes who vowed to reform themselves and to relinquish their sinful ways. These goals of repentance and correction are apparent in the very name "penitentiary", derived from the word "penitent."[1] In the eighteenth century the most common penitentiary model was the Shared Imprisonment System (the cells contain various, often randomly chosen prisoners, resocialization processes are essentially non-existent, and the penal facilities are only meant to isolate criminals from the rest of society).[2] In the beginning of the 19th century in Europe new penal philosophies appeared. The new goal of the penitentiary systems was to change the prisoner through the means of total isolation. Single-person cells began to dominate, in which the condemned were to repent for their sins and contemplate God by reading the Bible [Johnston 2020]. In the USA, the justice system was undergoing a massive reform throughout the first half of the 19th century. The reformers believed that the penitentiary could serve as a model for family and education and thus sought a system that valued rehabilitation over harsh punishment.[3] In later centuries, due to further advancements in education, sociology, psychiatry and psychology, more focus was placed on the mental wellbeing of prisoners and how their circumstances contribute to developing mental issues. The possibility of resocialization became known, and an understanding arose that returning a convict to the society has positive social and economic effects. In the 21st century, human rights and conviction of the international community in enforcing them have greatly increased in importance. Penitentiary systems began changing and the recidivism indicator has become the key measure of their effectiveness (the lower the better).

However, regardless of the historical era, the correctional system "is designed to keep society at large safe by separating them from individuals who have committed crimes"[4] and looking back at earlier penitentiary systems, one could come to a conclusion that a penitentiary system is strongly linked to social and political opinions, as well as the economic and geopolitical situation of a given time.

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[1] See https://www.encyclopedia.com/history/culture-magazines/penitentiaries-and-prisons [accessed: 10.05.2024].

[2] See https://www.parliament.uk/about/living-heritage/transformingsociety/laworder/policeprisons/overview/earlyprisons/ [accessed: 10.05.2024].

[3] See https://digital.library.cornell.edu/collections/prison-reform [accessed: 10.05.2024].

[4] See https://thelawdictionary.org/article/role-of-the-correctional-system/#:~:text=The%20correctional%20system%20is%20designed%20to%20keep%20society,the%20convicted%20criminal%20in%20a%20jail%20or%20prison [accessed: 10.05.2024].

Nowadays, as noted by Mike Nellis: "Across Europe, prison overcrowding, prison population growth and the pursuit of effective systems of community supervision continue to pose major challenges to criminal justice systems, in terms of both efficient institutional management and attentiveness to the human rights of suspects and offenders. These are relatively longstanding concerns, but increasingly austere financial regimes in many countries, have further intensified the search for cost-effective solutions" [Nellis, n.d.]. Solutions such as serving the sentence outside prison (under the electronic monitoring system) were implement, and attempts were made to return the convicts to the society as soon as possible. This would alleviate the burden placed on the state budget, but care was taken to keep ensuring it being safe for the society and complying with human rights.

However, before Europe was able to enter the 21st century, it had to face the legacy of soviet prison systems. And it is that transformation which interested the author of this paper, who took a close look at the penitentiary systems off Estonia and Latvia as her case studies.

3. CASE STUDIES

The paper focused on the legal solutions utilized in the two Baltic countries – Estonia and Latvia. This choice was largely motivated by their similar penitentiary history and geopolitical situation (following World War II, they formed parts of the USSR and nowadays are EU and NATO members).

Both Estonia and Latvia are former Soviet states. Throughout their existence, the Soviet authorities did everything in their might to force submission of individuals the society at large, for a variety of ideological and practical reasons. Soviet penal camps were "total institutions", the prisoners had no rights and were kept in terrible living conditions and the penal law allowed the death penalty, albeit it was rarely implemented in practice [Vavokhine 2004]. Since 1991, Latvia and other former Soviet states once again became independent, sovereign nations. Throughout this period, they had to face numerous social, economic and political challenges [Dreifelds 1989]. One of these included promptly reforming their judicial systems in the area of criminal proceedings [Joutsen 1996].

International pressure, complications in facilitating the international integration and joining the European Union have all accelerated the attempts of national and local authorities to implement the solutions aiming to implement solutions to protect human rights and dignity, improve living conditions of the imprisoned and improving the resocialization ratio, as required by numerous signed treaties and conventions [Wheeldon 2009]. Currently these two states are parties to many international agreements.

Below, I have listed a number of document of major importance to the legal changes taking place in these countries. Important international regulations impacting the penitentiary systems of European states:

1) the Universal Declaration of Human Rights (UDHR) – adopted by the UN General Assembly in Paris on 10 December 1948 during its 183rd plenary meeting;
2) European Convention on Human Rights (ECHR) – opened for signature in Rome on 4 November 1950 and came into force on 3 September 1953;
3) Standard Minimum Rules for the Treatment of Prisoners. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977;
4) Procedures for the effective implementation of the Standard Minimum Rules for the Treatment of Prisoners. UN. Economic and Social Council (1984, 1st sess.: New York);
5) European Prison Rules – on February 12, 1987, the Committee of Ministers of the Council of Europe adopted Recommendation (87)3 on European Prison Rules. These rules are a revised version of the European Standard Minimum Rules for the Treatment of Prisons of January 19, 1973. The Prison Rules were reformulated in 1987 (R 87.3). The Rules have been revised four times since 1973, most recently in 2020;
6) Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules;
7) Recommendation CM/Rec(2012)5 of the Committee of Ministers to member States on the European Code of Ethics for Prison Staff;
8) Recommendation CM/Rec(2014)4 of the Committee of Ministers to member States on electronic monitoring;
9) Recommendation CM/Rec(2018)8 of the Committee of Ministers to member States concerning restorative justice in criminal matters.

3.1. Estonia

Estonian legal system belongs to the continental European legal tradition, the Roman-Germanic family. The general principles of international law and binding international treaties are an inseparable part of Estonian law, as can be clearly seen in the shape of its penitentiary system. Judicial precedent remains a source of law in Estonia. Case law is decisive with regard to interpretation of law.[5]

[5] See https://www.baltic-legal.com/ [accessed: 10.05.2024].

The penitentiary system is based on two key legal acts: the Penal Code[6] and Code of Criminal Procedure.[7]

International Agreements that Estonia is a party to are also of key importance: UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (UNCAT); UN Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT); UN Convention on the Rights of the Child (UNCRC); UN Convention on the Rights of People with Disabilities and Optional Protocol (CRPD); UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules); UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules); UN Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules); Principles for the protection of persons with mental illness and the improvement of mental health care; Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

Currently, Estonia has three prisons with an official capacity of 3,357, indicating an occupancy rate of 76.6%. According to World Prison Brief data (as of 2020), 20.1% of detainees in Estonia were held in pre-trial jail, 4.5% of prisoners were women, while minors accounted for 0.6% of all prisoners. 35.5% of all prisoners were foreign citizens.[8]

In the past few years, Estonia's penitentiary system underwent many changes and saw the implementation of numerous modern legal solutions. One should bear in mind that after regaining its independence in 1991, Estonia's penitentiary system was strongly influenced by the Soviet system – and thus shared many of its issues at the dawn of the 21st century. The Estonian criminal justice system can be briefly characterized in a handful of bullet points: insufficient funding; retributive nature; outdated prison infrastructure; lack of efficient alternatives to imprisonment; presence of prison subcultures; dominance of Russian language within criminal justice system; stigmatization of offenders in the society [Imants, et al. n.d.].

Since the 1990s, Estonia had been adjusting its penitentiary system to the international laws and recommendations. It bears mentioning such important changes as abolishing the death penalty, improving the living conditions

[6] Passed 06.06.2001, RT I 2001, 61, 364, entry into force on 01.09.2002.
[7] Passed 12.02.2003, RT I 2003, 27, 166, entry into force on 01.07.2004.
[8] See https://news.err.ee/1026620 [accessed: 10.05.2024].

of convicts, introducing electronic surveillance systems and minimizing the number of underage detainees.

In 1998, Estonia entirely abolished the death penalty. The complete ban on capital punishment is enshrined in both the Charter of Fundamental Rights of the European Union and two widely adopted protocols of the European Convention on Human Rights of the Council of Europe.

Estonia is also a signatory to the Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The Republic of Estonia signed this protocol on 21.09.2004, after which it entered into force on 27.11.2006. Under the Protocol, "a place of detention means a place where persons are or may be deprived of their liberty, either by virtue of an order by a public authority or at its instigation or with its consent or acquiescence. Thus, places of detention comprise not only prisons or police detention centers. They also include hospitals providing involuntary psychiatric care, closed childcare institutions, as well as care homes from where people cannot leave at will. Several hundred places of detention operate in Estonia."[9]

To fulfill the requirements of the Protocol, Estonia is modernizing its places of detention. A number of new and renovated facilities have been opened and the living conditions in prisons and other places of detention have improved greatly over the past 30 years. The oldest prison facilities still in use currently only date back 20 years, which is quite exceptional on the European scale.

New regulations are being drawn up to further improve the conditions of detainees, such as the 2020 Draft Act enabling the detainees to communicate with their families through a video feed. There are also attempts to allow children visiting their imprisoned family members to bring toys with them (in accordance with Estonia's Chancellor of Justice recommendation that children's needs and interests should be taken into account when setting conditions for visits. Since 18.02.2007, the Chancellor of Justice fulfills the responsibilities of a national preventive mechanism, in accordance with OPCAT Article 3 and para. 1(7) of the Chancellor of Justice Act).[10]

Estonia also stresses the ethics of implementing the punishments and preventing recidivism. That is why it had implemented a program to minimize the number of juvenile detainees in 2007. Currently, there are no more minors detained in Estonian prisons. According to Rait Kuuse (the Deputy Secretary General for Prisons at the Ministry of Justice): "If the first offense is not serious,

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[9] Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. See https://www.ohchr.org/en/ohchr_homepage [accessed: 10.05.2024].

[10] UN Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

then alternative methods of influence are called for, such as the use of probation measures already implemented by the prosecutor's office or other alternatives to imprisonment: community service, supervision by a probation officer, electronic monitoring. These are all kinds of restraints. But even before that, we need support measures implemented by social workers in local communities. This is especially important for young people, as it allows for early detection of unlawful conduct."[11] Statistical data concerning the falling number of juvenile detainees has been show on the chart below (Illustration 1).

Illustration 1. The number of juveniles in Estonia's prison system.

Source: *Eesti Rahvusringhääling*, ERR: https://news.err.ee/1609257078/estonia-no-longer-has-juvenile-prisoners [accessed: 10.05.2024].

As mentioned before, Estonia had implemented electronic monitoring (EM) in its penitentiary system. This technology has been in use in various countries since the 80s (first introduced in 1983 in the United States) [Haverkamp 2014], however its implementation has differed greatly – in some countries, electronic monitoring is utilized as an alternative sanction, while in others it complements another form of punishment [Nišević, et al. 2015].

Electronic monitoring entered Estonia's public discourse in 2004, followed by a pilot program being launched in 2006, which encompassed placing electronic bracelets on conditionally released prisoners.[12] The first bracelets were issued on May 22nd 2007, meaning that the country had implemented this solution prior to the Recommendation CM/Rec(2014)4 of the Committee of Ministers to member States on electronic monitoring.

[11] See https://news.err.ee/1609257078/estonia-no-longer-has-juvenile-prisoners [accessed: 10.05.2024].

[12] See https://eeagrants.lv/en/2020/09/04/a-study-visit-to-estonia-on-electronic-monitoring-issues-2/ [accessed: 10.05.2024].

In its first years of implementation, Estonia's electronic monitoring was characterized by: a) responsible authority –National Prison Service; b) utilized technological solutions –radio frequency combined with GPS and alcohol monitoring); c) provider –3M; d) scope: maximum capacity of 300 simultaneous bracelets; e) applications (monitoring early released prisoners (back-doors model; monitoring in the pre-trial phase; instead of short prison sentence (up to 6 months, 1 day=1day) (front-doors model); extra measure for probation violators; victim protection; monitoring offenders sentenced for new crimes during their probation); f) monitoring center: active 24/7, operated by prison staff; g) installation: as soon as possible, performed by probation officers; h) intensity (duration divided into 3 consecutive periods (strict, medium, flexible); mandatory visits to the probation office –once per 10-14 days; probation officer performs on-site control visits at home, workplace, etc.); i) duration: under 12 months [Imants, et al. n.d.]

As of writing, there are two types of electronic monitoring in Estonia (from a technical standpoint): local home security and GPS devices. "In the case of local monitoring, a home security device is installed in the home of the serviced person and a leg bracelet is attached around his leg. The guarded person is assigned a permissible radius of movement and a schedule is drawn up for him. If the serviced person leaves the coverage area of the home security device at a time not authorized for this purpose, the device will sound an alarm. Alarm messages also come, for example, when moving the home security device, removing the leg bracelet, unplugging the device, etc. In the case of a GPS device, the above applies with the exception that the device is attached to the foot of the serviced person and its movement and adherence to the schedule can be constantly monitored. During probation, the probationer is obliged to comply with the inspection requirements, as well as the obligations imposed by the court. In the event of a violation, the probation officer will respond to the violation by issuing a warning or submitting an emergency report to the court."[13]

One of the many issues Estonia's penitentiary system struggled with in the 90s was a large number of detainees. As pointed out in the Probation in Europe report, "Due to the large number of convicts in prisons after regaining independence from the Soviet occupation there was a need to start search for new techniques and methods to guarantee the security of society" [van Kalmthout and Durnescu 2012].

In addition to the electronic monitoring and special juvenile programs, Estonia has also implemented a probation system. The preparations took place since 1991, when the penal law reform first began. In 1993, acting on

[13] See https://vanglateenistus.ee/kriminaalhooldus/elektrooniline-valve/elektrooniline-valve [accessed: 10.05.2024].

a request of the Ministry of Justice, early concepts for the Estonian Probation Service have been drafted. "In 1996 the Ministry of Justice began with drafting the Probation Supervision Act, preparing in parallel all the legal acts relating to the implementation of the Act and also preparing an implementation plan and the budget. The Probation Supervision Act was adopted in 1997 and entered into force on 1 May 1998. In drafting the Act, laws of other countries regulating similar systems were used as a basis. The probation service started to work all over the Estonia on 1 May 1998" [ibid.].

Since then, the probation system kept evolving due to various social and legal changes, as well as new organizational and technological solutions (such as the introduction of electronic monitoring). Notable documents regulating the probation system include: a) 01.03.2018. Regulation No. 19 "The Statute of the Database of Detainees, Arrestees, Detainees, and Probationers;" b) Order No. 15 of 22.02.2007 "Procedures for the execution and supervision of electronic surveillance;" c) Order No. 49 of 25.06.2004 "Procedures for the preparation, execution and supervision of community service;" d) Decree No. 37 of 7.05.2004 "Establishing additional qualification requirements."

In summary, Estonia undoubtedly strives to adjust its penitentiary system to European standards. The state is clearly moving away from the post-Soviet thought, both in terms of regulations and the means of their practical implementation. However, the high incarceration rates are still perceived as troubling. Nonetheless, as stressed by the spokesperson of the Ministry of Justice, the number of prisoners in Estonia has decreased significantly over the years[14] – the total number of crimes committed over 2011 has amounted to 42,567, while in 2021 it was as low as 25,982.[15] Detailed data is presented in the below tables:

Table 1. Number of inmates and prison population rates as of 31 January 2022

Country	Population of the country on 1st January 2022	Total number of inmates (including pre-trial detainees) [Stock]	Prison population rate
Estonia	1 321 910	2181	165.0

Source: SPACE-I_2022

Table 2. Trends in prison population rates from 2012 to 2022

Country	2012	2014	2016	2018	2020	2022	% change from 2012 to 2022
Estonia	257.8	225.1	202.9	191.4	184.4	165.0	-36.0

Source: Compiled by the author based on SPACE-I_2022

[14] See https://news.err.ee/1026620 [accessed: 10.05.2024].

[15] See https://www.stat.ee/en [accessed: 10.05.2024].

3.2. Latvia

Latvia has an independent judiciary, with a three-tiered court system. An independent judicial authority exists in the Republic of Latvia alongside legislative and executive authorities. Articles of the Chapter 6 of the Constitution ("Courts") state that in Latvia, court cases shall be heard by district (city) courts, regional courts and the Supreme Court; judges shall be independent and subject only to the law; judges shall be confirmed in the office by the Saeima (Parliament) and be irremovable (Chapter 6 of the Constitution).[16]

The two core acts regulating this Latvia's penitentiary law are the Criminal Act (adopted on June 17, 1998) and the Criminal Procedure Act (adopted by the Parliament on April 21, 2004), adopted by the Parliament on April 21, 2004. However, the legal norms broadly regulating criminal law and criminal procedure can also be found in other legal acts, such as: Prevention of the Laundering of the Proceeds from Crime Act (adopted on December 18, 1997), the Office of the Prosecutor Act (adopted on May 19, 1994) and the Investigatory Operations Act (adopted on December 16, 1993).

Similarly to the Estonia, Latvia struggles with legacy of the Soviet system. As pointed out in a 2013 report: "Latvian prison system is the legacy of the Soviet prisons system, and consequently many problems as poor conditions, large dormitories, overcrowding of cells, strong internal prisoner hierarchies, and still – disrespect of human rights remain. Several prisons are located in buildings older than 100 years, and have large dormitories accommodating up to 30 prisoners" [Kamenska, et al. 2013].

Another issue concerned the widespread use of drugs in prisons. According to "Drug abuse in Latvian prisons" research carried out in 2010, 66,1% of detainees used drugs prior to incarceration and 17.8% kept using drugs in prison [ibid.]. Moreover, the Council of Europe Committee for Prevention of Torture has heavily criticized the Latvian prison system for its "shortcomings with regard to health-care of prisoners, lack of independence of investigation of cases of ill-treatment, absence of long-term strategy to tackle inter-prisoner violence, as well as for stringent regime and lack of activities for prisoners, in particular for life-sentenced prisoners" [ibid.].

Understanding the scale of the problem, Latvia intensified its efforts to improve the penitentiary system. In 2013, Latvian government has decided to allocate LVL 55.000.000 (approx. 78,000,000 EUR) over 5 years to the construction of a new prison and finally accepted the regulation no. 191 on the Procedure of the Implementation of Prisoners Re-socialization proposed Cabinet of Ministers. Since then, each prisoner's documentation includes a section concerning resocialization and each resocialization plan is being created together

[16] Constitution of the Republic of Latvia (1922), https://www.satv.tiesa.gov.lv/en/2016/02/04/the-constitution-of-the-republic-of-latvia/ [accessed: 10.05.2024].

with the prisoner, including their opportunities for education and employment, as well as consultations with a social worker, psychologist or a chaplain).

Latvia keeps actively working to transform its penitentiary system. As early as in 1999 it launched a 5 year cooperation scheme with Canada to learn the solutions utilized in the West and attempt to implement them in the Latvian environment [Wheeldon 2010]. The project involved studio visits and mediation workshops. Various people related to the Latvian penitentiary system learned about new concepts such as "postpenitentiary support" or practices such as pre-sentencing reports and scientific appraisals. The participants have also developed their competences in the area of relations-building among coworkers and managing emotions in contacts between convicts and servicemen.

The program contributed to changing attitudes within the Latvian penitentiary system. As pointed out by Wheeldon, one of the respondents claimed that the study tour did not just alter her views about justice, but 'changed the attitude' of all the Latvians who participated. Pilot projects were identified by participants as very important in the development of Probation and provided policy makers with "practical examples and new information to allow pilot project Directors to try different programs and innovations." The pilots were identified as the 'basis of probation' because they provided 'alternatives to help convince people' that other kinds of less punitive approaches could work. In addition, these projects created community experts in alternative programming who were hired as Latvia's first Probation Officers [Wheeldon 2010].

Latvia is also working other states to better facilitate the implementation of penitentiary reforms. In 2014, Latvia launched a project implemented under the Norway Grants mechanism (Programmes in Latvia under the EEA and Norway Grants 2014-2021) aiming to familiarize the Latvian Probation Service with such solutions as electronic monitoring, mediation and to promote practices ensuring desistance from crime – especially among juvenile offenders.[17]

According to data of the State Probation Service of Latvia (SPS), who is responsible for implementing electronic monitoring, Latvian system currently utilizes radio frequency (RF) and global navigation satellite system (GNSS) technologies. The electronic monitoring system is provided by SuperCom LTD under a contract valid until June 5th, 2026 (earlier: SuperComLimited; contract till 2020). SPS rents 85 RF base stations, 97 RF tags, and 5 GNSS device sets. The terms of contract allow for these numbers to be increased by 10 RF and 10 GNSS devices. Electronic monitoring is utilized in cases of early release from imprisonment, utilizing a back-door model to facilitate reintegration.

[17] See https://eeagrants.org/news/introducing-alternatives-imprisonment [accessed: 10.05.2024].

The duration of monitoring for each individual is decided by the court and can range from 1 to 12 months. Upon a court decision to release a person under electronic monitoring, the person becomes a client of SPS and must appear at an SPS office within three working days. After the first meeting, SPS attaches the EM tag and install an EM device at the client's residence within one working day. Said installation is carried out by SPS supervision officers with remote assistance from the EM center, which operates 24/7 to provide continuous oversight and response services.

SPS begins monitoring every client with RF devices. However, if a person receives a written warning due to unfulfilled obligations concerning their location, SPS can make a choice to expend the scope of monitoring with GNSS devices. The frequency of mandatory visits at the SPS office is determined by SPS and depends on the estimated risk and individual needs. The clients under electronic monitoring do not have any specific obligations for more frequent visits than those under other supervision categories. In practice, this averages to approximately two SPS visits per month. SPS officers conduct on-site control visits to the client's activity locations, such as workplaces and other relevant sites, to ensure compliance with the terms of the EM (State Probation Service email consultation).

The key challenge in implementing electronic monitoring in Latvia was the unwilling attitude toward implementing alternatives to imprisonment of both the society at large and the judicial community, as well as an unprecedented level of cooperation with private business in the provision of public services. Questions were raised of how will the courts react? To what extent will the judges rely on information received from this technology? However, after 10 years of utilizing the system, its effectiveness appears close to 95%, encouraging the judiciary to keep using it [Imants, et al. n.d.].

The detailed statistical data concerning electronic monitoring in Latvia are shown in the table below (Table 3):

Table 3. Statistical data concerning electronic monitoring in Latvia (since introduction of EM on July 1, 2015, up to May 20, 2024)

Released from prison with EM	EM completed (Total number of clients)	terminated early for exemplary behavior	replaced EM with imprisonment (due to EM obligation breaches)	Success rate	Currently under supervision	Number of clients in a process of EM device installation
548 clients	495 clients	36 clients	21 clients	95%	31 EM clients	1

Source: State Probation Service of Latvia.

To best characterize Latvia's penitentiary system and showcase changes taking place since the fall of USSR, it bears mentioning that the total number of inmates in Latvia exceeds 3,000 people (Table 4) yet the prison population rate decreased by 43% over the past 10 years (Table 5). This might suggest positive outcomes of the changes being implemented in this Baltic state.

Table 4. Number of inmates and prison population rates on January 31st 2022

Country	Population of the country on 1st January 2022	Total number of inmates (including pre-trial detainees) [Stock]	Prison population rate
Latvia	1 848 837	3183	172.2

Source: Compiled by the author based on SPACE-I_2022

Table 5. Trends in prison population rates from 2012 to 2022

Country	2012	2014	2016	2018	2020	2022	% change from 2012 to 2022
Latvia	303.0	240.3	212.6	194.6	179.0	172.2	-43.2

Source: Compiled by the author based on SPACE-I 2022.

A research carried out by Ernst & Young Baltic SIA under a contract with the Latvian Prison Administration (IeVP) brought out some interesting data.[18] The research encompassed surveying the prisoners, interviews with state institutions and companies employing the convicts, analyzing the practices utilized in Latvia and comparing them to ones used in Lithuania, Sweden and the United Kingdom. Its ultimate goal was to appraise the challenges arising from having former convicts enter the labor market and comprehensively analyzing the market's reaction to the integration of former prisoners soon after completing serving their sentences.

The research proved that Latvian prisoners enjoy access to a wide selection of educational and resocialization programs and professional counseling provided by the National Vocational Agency (NVA), which could be seen as a positive factor in integrating the former convicts into society and the labor market. However, it also highlighted a number of areas for improvement, such as an insufficient and inadequate quality of the vocational education programs – the employers often had to retrain the former convicts themselves. It was suggested to strengthen the cooperation with educational institutions and the employers offering trainings or employment for the convicts, supporting prisoners facing difficulties in this process and expanding the scope of the educational programs and better equipping the prisons with tools necessary for vocational training.

Another issue concerned insufficient motivation of the prisoners, oftentimes caused by their psycho-physical state. It was recommended to expand

[18] See https://www.ievp.gov.lv/lv/media/5385/download?attachment [accessed: 10.05.2024].

the attempts at identifying issues relating to physical and psycho-emotional health, their appraisal and provision of comprehensive support, including psychological health. Another suggestion concerned introduction of stipends or other grants for prisoners participating in the resocialization programs or increasing the wages of the employed convicts.

Despite some shortcomings, one should generally consider the mere fact of such research being carried out by the State Administrative Institution under the supervision of the Ministry of Justice, seeking new solutions to vocational activation of the prisoners and supporting their postpenitentiary future allows for a positive appraisal of the intentions of Latvian government as it concerns the implementation of comprehensive institutional change in the way and purpose of serving sentences.

In summary, Latvia – similarly to Estonia – intensifies its attempts to bring its penitentiary system into the 21st century. Similar to other former Eastern Bloc countries, it struggles with legacy of the Soviet system whose complete transformation requires changes on legal, political and social levels, as well as major financial and organizational commitment. However, one should generally assume these actions are bringing positive outcomes. The prisons aren't overcrowded, the prison population greatly decreased and the implementation of modern solutions, despite coming with certain trepidations, has proven successful.

However, unlike the system of court oversight that remains in force in Estonia since 1998 [Luhamaa and Ristikivi 2022], the shared work with Canada has allowed the local reformers to create and test probation functions and verify their viability in local communities [Wheeldon 2010].

CONCLUSION

Up until 1989, the prison systems of Latvia and Estonia were largely isolated from their Western counterparts, forming parts of USSR's penitentiary system. It's difficult to point out the values implemented by the latter, as the totality of socio-political life in the Soviet Union aimed at a total subjugation of the citizens to the system and the Party/state authorities focused on pushing and isolating all individuals (oftentimes ignoring any and all moral principles, including mass crimes against own citizens [Caute 2017] daring to oppose the state-mandated rules, or even merely speak out about their differing ideas.

Following the fall of USSR and regaining their independence, Latvia and Estonia have begun their transformations toward more Western-inspired penitentiary systems focused on resocialization and respect for human rights. From the outset, this task was proved difficult as all countries of the former Eastern Bloc have struggled with a crime rate spike and notable financial troubles making investing in penitentiary systems unfeasible.

Another major issue concerned the social structures – the majority of prison staff consisted of officers trained under the Soviet system. Thus, despite the legal reforms, behavioral patterns formed in the previous decades remained present [Vavokhine 2004]. For sake of comparison, one could quote the statistics from Poland – another country of the former Eastern Bloc undergoing a similar transformation. According to researchers, 60% of Polish Prison Service in the 90s consisted of Soviet-era officers [Bieżuński 2015].

Furthermore, the sentiments of Latvian and Estonia societies were rather negative toward the modern solutions introduced by the Ministry of Justice, such as serving one's sentence through electronic monitoring of implementing the Norwegian solutions stressing maintaining positive relations within the prison facilities (as a part of so-called dynamic security). It bears mentioning that both countries work closely with Western countries to implement various programs supporting penitentiary reforms – between 1991 and 2003, Canada funded over 250 projects worth $CDN 54.9 million in the Baltic states of Estonia, Latvia and Lithuania [Wheeldon 2009]. A programmatic focus for Canada centered on human rights, democratic development, and good governance. This included reforming criminal and penal codes, training and technical assistance, and broader capacity development in order to transition the former Soviet 'command and control' style toward one resembling international norms and standards [Wheeldon 2010].

In summary, both Estonia and Latvia have made great strides to reform their penitentiary systems, implementing both legal and socio-political solutions. While these new solutions remain imperfect and the overall incarceration rates are still relatively high, the changes have met positive reception from the international community, including the human rights watchdogs focusing on places of detention.

According to the author, the path Estonia and Latvia took to transition from the Soviet system to the current state of their penitentiary systems enable the claim that the changes weren't a mere facade, but rather a profound change and that these states can be described as having fully westernized correctional systems.

This is of utmost importance taking into account Europe's current security situation, the attempts of the Russian Federation to undermine unity within the European Union, Putin's speeches concerning a return to the Soviet Union and returning questions of whether we're embroiled in another Cold War. It is therefore very important for the EU members, especially the Eastern European states, to not only clearly declare who their allies are but also share the Western values in many areas, including the penitentiary systems.

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AN APPROACH TO PERJURY IN PENITENTIAL BOOKS IN THE LIGHT OF THE ANCIENT LAW

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Abstract. The task of every trial since the dawn of time has been to reach the truth and establish the factual state with a broad explanation of various facts and evidence. One of the important pieces of evidence has always been the testimony of witnesses, but since ancient times they have been approached with a certain amount of caution. This is exemplified by the Code of Hammurabi, which already in its first paragraphs addresses the issue of responsibility for the spoken word, and the Latin maxim *Unus testis, nullus testis*, describing the rule of evidence law. According to this legal principle, unconfirmed testimony from one witness should be rejected, because it is considered too unreliable to establish a fact. This principle had its roots in biblical sources and Roman law. The books of penance, which were created in the era of late Christian antiquity and the early Middle Ages and which are evidence of the development of penitential practice in the Church, stood, like ancient legal cultures, also on guard so that witnesses testifying in court trials were guided only by the truth, so that false testimony would not contribute to an unjust verdict. The aim of the article is to show, in the light of the books of penance against the background of ancient laws, what consequences threatened a person who answered affirmatively to the question that, according to Bishop Burchard of Worms, should be asked of the penitent: "Have you been a false witness, that is, have you testified falsely and claimed that what was false was true? If yes, did you do it for the sake of love for someone, for a financial benefit, or out of fear?"

Keywords: ancient law; penitential books; Middle Ages; Church.

INTRODUCTION

The primary objective of criminal proceedings is to uncover the truth [Boczek 2020, 29-30; Kołodziejczyk 2019, 149-52; Michalski 2016, 88-89; Mincewicz 2020, 211-14] and to determine whether an offence has occurred. Furthermore, it aims to identify the perpetrator and hold him or her criminally liable for the commission of the prohibited act, establish their guilt, or, in contrast, to affirm the innocence of the suspected individual. Back in antiquity, Roman Emperor Hadrian framed an underlying principle for the

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administration of justice as follows, "it is better that a guilty person be freed than that an innocent should be punished"[1] [Mozgawa-Saj 2018, 107].

Therefore, in the quest for truth, and in line with the principle of material truth, all participants in the proceedings are bound to provide true testimony. In other words, they must provide responses regarding the circumstances of the case that accurately reflect the actual state of affairs and without concealing any relevant information that they possess [Malinowski 2014, 9].[2] It should be self-evident to everyone that, when appearing before a court of law or any other authoritative body, you are bound to speak nothing but the truth. This is not consistently observed in practice. In both courts and other institutions that are rested on truthfulness individuals may still make false depositions. They either carefully describe circumstances that did not occur or provide a distorted picture of actual circumstances. They are also prone to conceal facts or deny what really happened. As a result, this holds significant importance for the effective operation of the entire justice system and authorized bodies. It also influences court's judgements, which, certainly, has a profound impact on the life of individuals facing such verdicts. Unfortunately, information pertaining to criminal proceedings related to the offense of false deposition is hardly seen in the public domain. The public may even have the impression of impunity for committing the offence of perjury [Urbaniak-Mastalerz 2020, 32-33].

Making a false deposition, commonly referred to as perjury, is addressed by Polish criminal law comprehensively. As provided in Article 233(1) of the Polish Criminal Code, any person who, making a deposition aimed to be evidence in court proceedings or in any other proceedings conducted under the law, says an untruth or hides away the truth is liable to a penalty of deprivation of liberty from six months to eight years.[3] Perjury before

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[1] *Satius est impunitum relinqui facinus nocens, quam innocens damnari* (Dig., 48, 19, 5).

[2] This is how A. Malinowski explains the issue of untrue statements, "With a view to determining whether a statement is false, three key factors must be considered. First, the statement must be consistent with facts – in other words, it must be true or false. Second, the statement must be consistent with the speaker's belief in its logical value – in other words, the statement must be sincere or insincere. Third, it must be ascertained whether the speaker's statement is intended to mislead. The act of lying by a person giving deposition consists in making a statement that, in the view of the speaker themselves, is intentionally and consciously false. In other words, the speaker knowingly tells lies and delivers insincere responses. The convergence of these two factors, coupled with the intent to deceive the questioning party, is relevant. The testifying person provides information that is inconsistent with their own conviction about the facts with the intention that it will be taken as true. Therefore, statements that reflect the actual state of affairs may also be untrue if the speaker is not aware of this fact" [Malinowski 2020, 11].

[3] A witness who testifies out of fear of impending criminal liability does not commit the offence under Article 233(1a) of the Criminal Code if – insofar as they are exercising their right to defence – he or she gives a false deposition or withholds the truth, while, at the same time, their conduct does not meet the criteria of any prohibited act defined in another provision of the said code [Potulski 2022, 151-59].

a court of law is therefore a serious offence governed by the law.[4] A false deposition made at court is detrimental both to the process itself and to the perjurer. The problem has been discussed at length in the literature on the subject [Bojańczyk 2014, 137-43; Czabański and Warchoł 2007, 35-50; Dziesiński 2007, 147-59; Gruszecka 2010, 139-62; Kukuła 2012, 145-58; Młynarczyk 1971; Pawełek 2009, 152-60; Pohl 2006, 38-44; Rusinek 2008, 83-92; Sitkowska 2011; Sławiński 2015, 101-26; Tarapata and Zakrzewski 2017, 374-417; Wiliński 2007, 70-75; Zagiczek 2017, 418-44].

It is important to note, however, that false accusation, false deposition, or perjury are not contemporary phenomena. They have been around for millennia. Hence, the provisions addressing liability for false deposition, false accusation, or perjury hold a prominent position in the world's most ancient legal codes. This fact seems to suggest the enduring human propensity to misrepresent, deceive, and bear false witness. The testimony of a witness has always held a pivotal role in upholding security and law and order, which is why much attention has always been attached to the elimination of conduct and attitudes that cloud the facts in pursuit of the truth or could lead to an injustice.

The author aims to reflect on the oldest monuments of law, especially from the Early Middle Ages, and highlight, based on ancient penitential books, what consequences making a false deposition entailed. Penitential books (also penitentials) contained exhaustive lists of offences and wrongdoings, including perjury and bearing false witness, along with a "penitential tariff," which depended on who and when committed one of the listed sins. Above all, they were intended to provide guidance to confessors as to what rules they should follow when giving penance to a sinner and, additionally, to ensure that the approach to penitential matters was uniform.[5]

1. PERJURY IN ANCIENT LEGAL CULTURES

Rules and regulations concerning accountability for false accusation, false deposition, and perjury occupy a central place in ancient laws. The Code of Hammurabi, the king of Babylon ruling from 1792 to 1750 BC, addresses

[4] For liability for perjury to be established, it is essential that the individual providing the testimony be formally warned about the potential consequences of false testimony under criminal law. If no such warning has been issued, no offence can be said to occur [Nawrocki 2015, 144-57].

[5] As provided in the penitentials, penance required a sinner to perform certain actions related to each sin and to undertake self-mortification defined in terms of type (fasting, saying prayers, lying prostrate, physical self-punishment, almsgiving), quantity and quality (the length of fasting in days, weeks, months, and even years; eating only bread and water; abstaining from meat, wine, beer, fat or in another way) [Erdö 2008, 61; Story 2021, 242-43].

the question of responsibility[6] for statements made in a court case already in the four opening sections.[7]

The key evidence primarily relied on witnesses' depositions [Kuryłowicz 2006, 80]. The Code of Hammurabi emphasized their importance and scope. It prescribed execution[8] for unfounded allegations in capital cases, i.e. ones where the perpetrator faced the death penalty (para. 3). In other cases, a financial penalty sufficed (para. 4).[9] The principle of talion was put in place, that is, false testimony exposed the perjurer to the same punishment as the falsely accused person would have suffered if found guilty [Idem 2013, 164-65]. The code in question was the first to introduce the said principle, thus departing from the earlier principle of pecuniary redress, as it was, for example, in the Code of Ur-Nammu.[10] The principle was also envisaged to ensure, but not only, "that the strong do no harm to the weak, and justice be done to orphans and widows". In this approach, the punishment was design to directly affect the perpetrator who could not avoid it by paying a sufficiently large amount of money [Pędracki 1997, 26; Szamocki 2004, 43].

A common means employed in legal proceedings, according to the Code of Hammurabi, was an affirmative (assertive) oath sworn by the parties to confirm the truthfulness of their depositions. The oath was sworn before

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[6] The idea of accountability for words said appears as early as in the Code of Hammurabi, at least with regard to defamation (slander). Its para. 127 says that if a man pointed a finger at a priestess or another man's wife (probably implying her sexual misconduct) and she has avoided conviction, that man, unless he can prove his point, should be beaten in the presence of the judges and his hair shaved [Dziembowski and Szwejkowska 2013, 6].

[7] Rules on bearing false witness during court proceedings are also found in the oldest known Sumerian collection of laws, the Code of Ur-Nammu of the Sumerian "king of Ur, lord of Uruk, king of Sumer and Akkad" (ca. 2111-2094 BC). It addresses perjury in two points: "§ 28. If a man appears as a witness, and was shown to be a perjurer, he must pay fifteen shekels of silver. § 29 If a man appears as a witness, but withdraws his oath, he must make payment, to the extent of the value in litigation of the case [Riccio 2022, 86-87]. The Code of Lipit-Ishtar, who was the king of the city-state of Isin and controlled the neighbouring cities of Nippur, Ur, Uruk and Eridu, goes back to 1934-1924 BC. Its para. 17 reads, "If a man without authorization bound another man to a matter of which he (the latter) had no knowledge, that man is not affirmed (i.e., legally obligated), he (the first man) shall bear the penalty in regard to the matter to which he had bound him" [Dziembowski and Szwejkowska 2013, 5-6; Kuryłowicz 2006, 80; Pędracki 1997, 7-10].

[8] The death penalty was exacted by drowning, burning, burying, or bricking up in the case of burglars and thieves; also, impaling or drawing by cattle were also in use [Karnacewicz 2017, 68].

[9] According to the Code of Hammurabi, "§ 3. If any one bring an accusation of any crime before the elders, and does not prove what he has charged, he shall, if it be a capital offense charged, be put to death. § 4. If he satisfy the elders to impose a fine of grain or money, he shall receive the fine that the action produces."

[10] Presumably, King Hammurabi aimed to promote the equality of citizens (awils) before the law regardless of their financial status, although in those times full equality by today's standards should rather be ruled out [Pędracki 1997, 27].

the monarch, Marduk, the patron deity of Babylon, and before other local deities. The consequence of swearing the oath was, at least in some cases, exclusion from the obligation to pay damages (para. 249, 266) [Klima 2019, 285].

In the courts of ancient Egypt, the offence of perjury was punished by death because, according to Diodorus Siculus, it embraced the two greatest punishable acts that undermine respect for the gods and trust between people. Consequently, if an individual falsely accused another during court proceedings, they were required to endure the punishment that would have been imposed on the innocent party had the former been acquitted [Kuryłowicz 2013, 40-41].

The issue of bearing false witness at court and abuses related thereto also surface in the biblical law of the Old Testament[11] where it is vehemently condemned. As in the Code of Hammurabi, the principle of talion is applied. A perjurer suffered the same punishment as the accused if they had been found guilty.[12] Basically, the Old Testament does not mention the punishment of mutilation. Therefore, the principle of a life for a life, an eye for an eye should be understood figuratively as intended to ensure fair compensation rather than revenge [Szamocki 2004, 54].

The significant role of sworn testimonies in ancient Israelite court processes is further highlighted by the explicit prohibition of perjury in one of the Ten Commandments, "You shall not bear dishonest witness against your neighbour" (Deuteronomy 5:20). The objective was to foster a sense of justice during court proceedings because in ancient Israel the witness was also the accuser. A witness or a wronged person enjoyed both the right and the obligation to appear in court and present their case. Consequently, the witness would frequently play a pivotal role in determining the court's final decision[13] [Szamocki 2004, 53-54].

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[11] See 1 Kings 21:1-16 or Amos 5:10 and 12.

[12] "16 If an unjust witness takes the stand against a man to accuse him of a defection from the law, 17 the two parties in the dispute shall appear before the Lord in the presence of the priests or judges in office at that time. 18 and if after a thorough investigation the judges find that the witness is a false witness and has accused his kinsman falsely, 19 you shall do to him as he planned to do to his kinsman. Thus, shall you purge the evil from your midst. 20 The rest, on hearing of it, shall fear, and never again do a thing so evil among you. 21 Do not look on such a man with pity. Life for life, eye for eye, tooth for tooth, hand for hand, and foot for foot" (Deuteronomy 19:16-19).

[13] Since perjury and untrue statements were not uncommon in capital cases, the Deuteronomistic tradition introduced the rule of two witnesses into Israelite law. Later, it grew more universal and applied to all cases of offences (Deuteronomy 19:15), "One witness alone shall not take the stand against a man in regard to any crime or any offense of which he may be guilty; a judicial fact shall be established only on the testimony of two or three witnesses" [Szamocki 2004, 54]. On the procedural rule of *testis unus testis nullus* in the laws of the Bible and roman law, see Adamczewski 2022.

Compared to earlier solutions, the situation in the laws of ancient Athens was somewhat different. According to the legal principles in force, if the accusing party failed to obtain at least 1/5 of the votes of the judges sitting on the Heliaia tribunal examining the validity of the claim, he had to pay a fine of 1,000 drachmas and lost the right to file claims in similar cases for ever. Unlike the Code of Hammurabi, the laws of ancient Athens did not nurture the principle of talion [Skorupka 2022, 132; Zalewski 2013, 198]. Interestingly, Athens was known for the so-called sycophants. These were semi-professional accusers who specialized in bringing actions to court or threatening to do so. They blackmail other in this way to obtain a pecuniary reward in exchange for withdrawing the action [Dominiuk 2020, 187-88].[14]

2. PERJURY IN ROMAN LAW

Lying under oath was never an independent and standard offence in ancient Rome. In practice, it was prosecuted in connection with sworn, yet false testimonies made by witnesses [Litewski 2001, 174]. It should be stressed that testimony by witnesses, as in the case of the Code of Hammurabi, was undoubtedly the most important piece of evidence in Roman criminal proceedings. Ancient jurists attached great attention to it, next to discussing the hearing of slaves [Nowicka 2018, 59].[15] For example, a special type of witness

[14] Given the absence of a public prosecutor and the fact that in the vast majority of cases half of the fine that was imposed on a false accuser was paid by the state, this form of dishonest and corrupt behaviour was comparatively popular among the people of Athens [Zalewski 2013, 198].

[15] Before the court, the burden of proof rested with the party making the claim and not with the party trying to deny it, *Ei incumbit probatio qui dicit, non qui negat* (D.22,3,2). In criminal cases, evidence had to be particularly compelling; brighter than light, *In criminalibus probationes debent esse luce clariores* (C.4,19,25). The principle of free examination of evidence was adhered to, although certain rules of evidence were also followed. In particular, one witness was not enough to prove a purported fact (the two-witness rule), *Testis unus testis nullus* C. 4.20.9). There was no approved list of evidence in place. They were rational. Irrational evidence (especially *ordalia*) had been in use earlier, but it was quickly abandoned. Some of the key standards concerning witnesses were invented for the sake of the criminal process. Women and even children were allowed to testify. Bearing witness was even mandatory, although some relatives of the accused were able to refuse to testify. Swearing an oath was also required. There were also many regulations in place regarding the capacity to testify, however, they generally became obsolete at a later stage of the development of law. Hearsay evidence (witness) (*ex audit test*) was inadmissible [Litewski 2001, 183]. In statements at court, "I know" would often be replaced by "I presume/suppose." Apparently, the ancient Romans were very cautious in legal affairs. Besides, witnesses did not speak freely on their own but only responded to questions. The questioning was done by the parties, while the jurors remained passive. First the witnesses of the prosecution were heard, next those of the accused. The sequence of depositions in both groups was decided by the petitioner [Dytkowski 2016, 62].

was *laudator* (one who praises). During a trial, he or she would testify (orally or in written form) about the qualities of the accused: their good personality, conduct, and way of life. A *laudator* was required to possess an impeccable reputation. In processes involving *repetundae* (bribes), at least ten *laudatores* were required to appear [Dytkowski 2016, 60; Mossakowski 2001, 169-73].[16]

Perjury in court proceedings was already criminalized in the Law of the Twelve Tables (451-449 BC).[17] Among the offences listed in the body of the law, there is "speaking false witness."[18] It should be highlighted that in many ancient laws attempts to jointly regulate the offence of false testimony and false accusation were apparently very common, hence, presumably, the Law of the Twelve Tables also penalized what was later to evolve into *crimen calumniae*,[19] i.e. false accusation. This offence was prosecuted in the Late Republic pursuant to *lex Remmia de calmoniatoribus* – a plebiscite of Tribune Remmius from before 80 BC [Zalewski 2013, 199-200]. However, the punishment to be meted out for the said offence according to *lex Remmia* seemed somewhat controversial. According to the jurist named Martianus, a person who falsely accused had the letter K branded on their forehead, or, according to some other views, the letter K was to be placed next to the name of the convict. During the Republic, however, those convicted of *crimen calumniae* were sentenced to infamy. These individuals did not only earn a bad name, but above all, they would lose the capacity to bring an action, the right to hold offices, the right to represent anyone before court, including as a defence lawyer, as well as the right to vote and joint the military. During the Principate, arbitrary punishments were common: *calumnitor* faced the same sanction as the one that would have been imposed on the wrongly accused if found guilty; during the Dominate, the principle of talion was back on the scene [Zalewski 2013, 205-206].

Furthermore, the work of informers was also reported in ancient Rome, just as were the practices of rewarding them and attempts to eradicate such

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[16] Another case was *index*. It was an informer and an accomplice at the same time who admitted to being guilty of the offence. He or she usually managed to go unpunished and was even rewarded. Such an individual would usually be questioned during the proceedings preliminary to trial and then as a witness at court. Already during the Republic, depositions were collected from slaves (*conscii servi*), which was perfectly lawful. *Index* resembled the contemporary institution of a crown witness, who plays a pivotal role primarily in prosecuting organized crime [Dytkowski 2016, 60; Mossakowski 2013, 212-13].

[17] The Roman state evolved over four main historical periods, each with its own organizational framework: the Kingdom, the Republic, the Principate, and the Dominate. The Roman state existed from 753 BC to 476 AD [Kuryłowicz 2006, 167-68].

[18] *Lex duodecim tabulorum* 8, 23: *Si nunc quoque – qui falsum Testimonium dixisse convictus esset, e saxo Tarpeio deiceretur.*

[19] *Calumnia* – the term is translated as slander, calumny, libel, insult, or false accusation [Kumaniecki 1976, 73].

behaviours. An informer was referred to as *delator* [Mossakowski 2013, 201].[20] Making an unfounded accusation entailed not only moral but also legal accountability. Such an action demanded proper punishment. This is seen in the constitutions of the emperors Gratian, Valentinian II, and Theodosius the Great. Unfounded accusation or denunciation would often be punished by infamy, but also arbitrary penalties were handed down [Zalewski 2013, 202-203].

3. PERJURY IN PENITENTIAL BOOKS

Next to sacramentaries, penitential books (*libri poenitentiales*), also called penitentials, are among the collections of the so-called special law. They serve as indirect sources of knowledge of canon law, especially criminal law. They were, above all, meticulous collections of rules and regulations concerning the administration of the sacrament of penance [Subera 1977, 62-65]. Their origin can be traced back to the monastic communities in Ireland, Britain, and Scotland. When setting out on a mission to continental Europe, monks would carry the books of penance along with them. They would later inspire local authors to pen new collections gathering the penitential practices of Spain or Gaul [Boguniowski 2001, 268-69]. Moreover, the penitentials contributed to interpreting the sacrament of penance anew: it became a recurrent practice and was ministered also by a regular priest (presbyter) and not only a bishop, as had been the case before. Moreover, the rite of penance itself became a more private ritual, free from the public eye [Szymański 2017, 36].

Although the penitentials specified the duration of penance, each of the penitents was able to enjoy the privilege of receiving the grace of God's mercy. This can explain why *The Book of Penance of Gregory III*, collated in the 9th century, referred an Old Testament quote, "Son, be merciful in judging" (Sirach 4:10), and the Letter of James, "For the judgment is merciless to one who has not shown mercy; mercy triumphs over judgment" (James 2:13), to justify this approach. Hence, the decision to invoke the grace of mercy in specific cases was left to the discretion of bishops and priests. The rationale was that, in the eyes of God, the duration of penance is of secondary importance, rather, what holds primary significance is the suffering (*doloris*) experienced. Moreover, the mere abstention from food is not the aim in itself, instead it should be the genuine mortification following committed sins. Hence, the clear message, "that the time of penance be reduced by the faith and conversion of penitents."[21]

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[20] W. Mossakowski explores the subject of *delatores* in Roman criminal trials extensively [Mossakowski 2013, 201-19].

[21] *Poenitentiale Ps. Gregorii III (saec. IX)*, in: *Księgi pokutne. Tekst łaciński, grecki i polski*. Vol. V: *Synody i kolekcje praw*, Wydawnictwo WAM. Księża Jezuici, Kraków 2005 [hereinafter: *Księgi pokutne*], p. 347.

The penitentials do not ignore the issue of responsibility for false testimony or false accusation, either. It is worth emphasizing, however, that the oldest books of penance written between the 5th and the 7th century in Ireland, England, or Scotland do not mention that at all. Nor did the First Synod of Saint Patrick, convened in the 5th century, address the subject.[22] It appears no earlier than in *The Penitential of Cummean* of the 7th century[23] and in the 8th-century *Pseudo-Cummean Penitential*, also known as *Excarpsus Cummeani*, still, false testimony or false accusation surface in the penitentials penned in Gaul, Italy, and Spain.

In the case of *The Penitential of Cummean* and *The Pseudo-Cummean* Penitential, or a later book of penance, *The Penitential of Cordoba* from the 11th century, there are referenced to the ancient principle of talion. A person who provided false testimony to placate someone was, in the first place, required to seek reconciliation with the individual against whom they had testified falsely (to seek forgiveness). Second, they were expected to accept the same sentence (penance) as the individual whom they had harmed with untrue deposition. This situation was to be assessed by the confessor.[24]

In *The Book of Penance of Gregory III* referred to earlier, the author describes the case of *delator*. In the reviewed translation, the Latin word *delator*[25] was translated as: slandered, although the word is also rendered as informer, accuser, or denunciator, while in ancient Rome, as already said, it was tantamount to an informer. According to the penitential in question, when a slander (false accusation or denunciation) was attributed to a member of the faithful (*fidelis*), and that person was convicted or put to death because of it, the slanderer could not partake in Holy Communion for the rest of his or her life. When the case was of "low importance," such a person could be admitted to Holy Communion after five years or even after three if extraordinary circumstances occurred.[26]

Next to *delator*, *The Book of Penance of Gregory III* also alludes to a witness who offers false testimony (*falsus testis*). In such a case, when it was proven, he or she was forced to do penance for five years. If false testimony could not be proven and the committed offence was not a capital case, the penance lasted for two years.[27]

In contrast, *the Penitential of Vienna*, going back to the late 9th century, generally says that a person who bears false witness deserves a seven-year

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[22] *Synodus S. Patrici, etc. In Hibernia celebrata (456)*, in: *Księgi pokutne,* p. 2-6.

[23] The penitential was developed on the basis of the scheme of eight vices by John Cassian.

[24] *Paenitentiale Cordubense (initio XI saec*), in: *Księgi pokutne*, p. 442; *Poenitentiale Cummaeani (saec. VII)*, in: *Księgi pokutne*, p. 75; *Poenitentiale Pseudo-Cummaeani*, in: *Księgi pokutne*, p. 99.

[25] Lat. *delatio* – to provide, supply, report.

[26] *Poenitentiale Ps. Gregorii III (saec. IX)*, p. 353.

[27] Ibid.

penance, three of which on bread and water.[28] On the other hand, the already mentioned *Penitential of Cordoba* from the 11th century provided that if false testimony or accusation was brought against a bishop, the false witness should do penance for seven years; if against a priest, for five years; if against a deacon, for four years; if against a subdeacon, for three years; and if against a lay person, for one year.[29] Compared to *The Book of Penance of Gregory III*, written two centuries earlier, the Cordoba book adopted an apparently milder approach to the burden of penance. The previous penitential prohibited a person who groundlessly accused a bishop, priest, or deacon of committing an offence from receiving Holy Communion until the end of his or her life.[30]

The Pseudo-Cummean Penitential also looks at situations when a penitent gave false testimony but he or she was not driven by the desire to placate another person (*ut placeat proximo suo*). In such cases, penance depended on the status of the witness. If a lay person did so, he or she was compelled to do penance for one year; a seminary student for two years; a subdeacon for three years; a deacon for four years; a priest for five years; and a bishop for as many as six years.[31]

Bishop Burchard of Worms took a firm stand on the matter of false testimony in the early 11th century. In his view, during confession, the confessor was obliged to ask the sinner, "Have you been a false witness, that is, have you testified falsely and claimed that what was false was true? If yes, did you do it for the sake of love for someone, for a financial benefit, or out of fear?" If someone made a false deposition, he or she was equated with sinners guilty of murder, adultery, or theft. To justify his decision, Bishop Burchard relied on a passage from The Gospel of Matthew, "For from the heart come evil thoughts, murder, adultery, unchastity, theft, false witness, blasphemy" (Matthew 15:19). Therefore, in bishop's view, a false witness should be excommunicated and should do penance like an adulterer, murderer,[32]

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[28] According to *The Penitential of Vienna,* a person who is obliged to fast on bread and water but is unable to do so "should sing 50 psalms while demonstrating grace and 70 without it. If he or she does not know any psalms, let them pay a denarius per day; and if he or she has nothing of value, let them offer some of the food that they partake; for one year on bread and water, let them offer 21 solidi; and if they have nothing of value and cannot fast, let them sing 300 psalms on their knees for each week of fasting on bread and water; on Wednesdays and Fridays, let them fast until 9:00 and let them support the poor." *Poenitentiale Vindobonense (fine saex. IX)*, in: *Księgi pokutne*, p. 363.

[29] *Paenitentiale Cordubense (initio XI saec*), p. 443.

[30] *Poenitentiale Ps. Gregorii III (saec. IX)*, p. 353.

[31] *Poenitentiale Pseudo-Cummaeani*, p. 99.

[32] According to the Bishop of Worms, the following penance should be done for a murder committed out of greed with a view to seizing the victim's property or out of revenge against one's parents, "In the first year after these forty days, you should abstain totally from wine, honey, cheese, and oily fish; yet, it does not apply to the feast days of a specific bishopric, which are celebrated by all the people. If you travelled on a long journey, in an enemy's country, or while at the king's court, or affected by illness, then you may pay one denarius,

or thief.[33] A reduced penance was imposed on a penitent who bore false witness for fear of losing his or her life and of "losing their own limbs." In such cases, the penance was reduced by half, and the penitent was to be instructed not to do it again.[34]

CONCLUSION

A witness testifying before court and his or her testimony, which is hoped to contribute to the ascertainment of the truth, have invariably played a pivotal role across centuries. The institution of witness is instrumental in and widely employed across both criminal and civil proceedings. It was also addressed in historical penitential books, which proves that the members of the ecclesiastical community back in the Middle Ages also happened to distort or suppress the truth. Many disturbing behaviours were reported among the faithful, contrary to the Ten Commandments. Among them, giving false testimony during court proceedings. Hence, efforts were made to ensure that the baptized refrained from behaviours that could harm the repute of the Christian community.

An overview of ancient sources of law, including the Code of Hammurabi, roman law, and a number of mediaeval penitentials, reveals numerous

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or pay the price equivalent to one denarius, or feed three poor people, to suspend fasting on Tuesday, Thursday, or Saturday; however, you may not eat anything but only one of the foods mentioned above, that is, you may drink wine, or mead, or sweet beer. Once you return home or recover from illness, you must not indulge yourself in any way. After one year, you will return to the Church where you will receive the holy kiss. Over the second and third year, you will fast in a comparable way, unless you pay the said price for suspending the fast on Tuesday, Thursday and Saturday, regardless of where you are. Over the remaining days, you must fast carefully, as in the first year. In the remaining four years, you should fast three times forty days and on prescribed days. First before Easter with other Christians and another time before the feast of St John the Baptist. If any of the fast is left, you will complete it later. For the third time, before Christmas, you will abstain from wine, honey, sweet beer, meat, fat, cheese, and oily fish. During the same four years, you can eat whatever you want on Tuesdays, Thursdays, and Saturdays. However, if you want to eat on Mondays and Wednesdays, you must pay the price as indicated earlier. On Fridays, you must always be on bread and water. After all these years, you will receive Holy Communion, however, you will continue to live in penance all your life. And as long as you live, every Friday you will fast on bread and water; and if you wanted to pay not to do so, you could pay one denarius, or pay the price equivalent to one denarius, or feed three poor people. We allow you to do so out of mercy, and not in accordance with the canons which say, If someone deliberately slaughters a person, he must abandon the world, begin a monastic life, and serve God continuously." *Burchardi Wormaciensis ecclesiae episcopi decretorum liber decimus nonus de poenitentia (ca. 1008-1012)*, in: *Księgi pokutne*, p. 370.

[33] Ibid., p. 379.

[34] Ibid., p. 380.

irregularities and inappropriate behaviours among court witnesses. The penitentials responded to such transgressions straightforwardly and in a resolute manner. An example of such a stance is the attitude of Bishop Burchard of Worms. He ranked perjury among the gravest offences, next to murder and adultery, which were punished with excommunication. Other mediaeval penitentials also prescribed either the application of the principle of talion or denial of Holy Communion until the end of life of the individual resorting to false testimony.

The eradication of this kind of behaviour was intended to protect the interest of wrongly accused persons, their right to a good name, and, above all, to ensure that the interest of the justice system be safeguarded. Severe penalties (penances) were aimed to prevent prospective transgressions and deter potential perpetrators from hiding the truth during court proceedings. They also conveyed an educational value. Punishment and penance were also a manifestation of disapproval towards the false witness and his or her evidently debilitating influence on morals or the setting in which such reprehensible behaviour occurred.

A sombre conclusion is that, despite the severe punishments and penances imposed in ancient times, there were always individuals who, guided by various stimuli, did not recoil from providing false testimony. Even in the face of impending consequences, such individuals, either through embracing falsehoods or half-truths, or by remaining silent, contributed to unjust verdicts based on distorted reality. Has the situation improved in contemporary times? It is not easy to tell, and the confines of this paper do not permit to do so. However, as provided in Article 233(1) of the Polish Criminal Code, it needs to be kept in mind that any person who, making a deposition aimed to be evidence in court proceedings or in any other proceedings conducted under the law, says an untruth or hides away the truth is liable to a penalty of deprivation of liberty from six months to eight years.

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COMPLIANCE WITH THE PRIORITY RULE OF THE NON-APPLICATION PROCEDURE AND LIMITING THE PRINCIPLE OF EQUAL ACCESS TO PUBLIC INFORMATION

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Abstract. The Act of 6 September 2001 on access to public information is overflowing with regulations creating good practices. These regulations create access principles that organise the procedure, making it more understandable and friendly for the participants. Among this catalogue of principles, the principle of equal access to public knowledge and the principle of priority of the non-application procedure find their place. Although these principles are of equal importance, they are not always compatible. This paper aims to highlight and discuss situations in which compliance with the priority rule of the non-request procedure limits the principle of equal access to public knowledge. However, this requires a prior characterisation of these rules and a definition of their role in the access procedure.

Keywords: equality; bulletin; rule; access to public information.

INTRODUCTION

Each procedure is governed by its own rules to ensure its correctness and achieve the expected result. Their co-occurrence is to guarantee order during the procedure, its efficiency, speed and protection against delay. Generally speaking, a set of rules that are somewhat "put out of the way" protects the procedure against irregularities and prevents abuses resulting from intentional or non-culpable, but nevertheless erroneous conduct of the entity conducting the proceedings or its participant. Such functions are also fulfilled by the principles that apply to the procedure related to the provision of public information. It is regulated by the Act of 06.09.2001 on access to public information.[1] Importantly, unlike other procedures, these rules have not been placed in a specific part of the legal act, e.g. at its beginning, but have been "scattered" throughout the content of the UDIP. The reasons for this state of affairs should be sought in the volume of the legal act, as the

[1] Journal of Laws of 2022, item 902 [hereinafter: UDIP].

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regulations determining the procedure for providing public information have been included only in 23 articles. However, this in no way causes difficulties in deriving such rules from the content of the UDIP, nor does it give rise to problems in understanding them. On the contrary, one may be tempted to say that prior (made for one's needs) cataloguing of access rules accelerates familiarisation with the procedure and makes it easier to understand.

These rules can be classified according to various criteria. One of the permissible ways of differentiating the discussed rules is the division carried out based on what they specifically refer to, i.e. whether they concern the subjects of the process of making available, its subject matter, or other procedural matters. This classification distinguishes between subjective, objective and strictly procedural principles [Tomaszewska 2019, 36-41]. Due to how a specific rule is presented in the content of a legal act, it is possible to distinguish direct rules located in a way and in such regulations from which specific conduct guidelines follow [ibid.]. On the other hand, there are hidden rules that do not result directly from the provision or are dominated by a different pattern of conduct, the occurrence of which somehow imposes itself due to the content of a specific regulation. The above classifications are not separable [ibid.].

The group of so-called hidden principles undoubtedly includes the subjective principle of equal access to public knowledge, otherwise (more simply) also known as the principle of equality. It results from the content of Article 2(1) UDIP, which directly refers to the catalogue of entities entitled to information. This leads to the conclusion that it is impossible to share the position of A. Kardas and P. Kardas, according to which there are no formal provisions at the statutory level from which the principle of equality could be derived [Kardas and Kardas 2019]. According to the regulation mentioned above: Everyone is entitled to..... the right of access to public information, hereinafter referred to as the "right to public information" (Article 2(1) UDIP). The first word in the regulation is crucial. The study's main objective is to characterise the principle of equal access to public knowledge and establish its relationship with another rule – a *strictly* procedural rule, namely the principle of the priority of the non-application procedure.[2] There are certain situations and circumstances (not provided for in the regulations of the Act on the Prevention of Public Knowledge) that mean that the being in force and, above all, compliance with the principle of the priority of the non-application procedure may lead, and often leads, to the restriction of the principle of equality (equal access to public knowledge).

[2] See on the subject of principles: Bernaczyk, Jabłoński, and Wygoda 2005, 42; Bernaczyk 2008, 121-22.

1. GENERAL CHARACTERISTICS AND SUBSTANTIVE SIGNIFICANCE OF THE PRINCIPLE OF EQUAL ACCESS TO PUBLIC KNOWLEDGE

Equality is a component of the modern system of state and law [Steinborn 2004, 22]. It is closely related to human dignity and the principle of social justice [Nitecki 2008; Garlicki 2023, 96, Ziółkowski 2015].[3] The relationship between equality and justice is most visible in everyday terms, where in trivial situations, in everyday life, the individual looks for the so-called justice. A person desires justice when he feels that he has been treated differently from another person he knows, and in his opinion, he should be treated the same way. He then feels bitterness, regret and even anger. It then points to the phenomenon of discrimination and injustice. For the average individual in a larger community (local, national or EU), equality means an even distribution of privileges and burdens [Mikuła 2019]. A similar definition is already visible in the preamble to the Constitution of the Republic of Poland,[4] where the constitution-maker points to equality in the rights and duties of individuals towards the common good, which is Poland.

The principle of equality, currently expressed in Article 32 of the Constitution of the Republic of Poland (in the chapter devoted to the freedoms, rights and duties of man and citizen), assumes that: "Everyone is equal before the law. Everyone has the right to equal treatment by public authorities."[5] Notably, despite the concise definition of equality in the Constitution, it cannot be assumed that an attempt to put this value within a definitional framework is a simple procedure. The reasons for this state of affairs should be sought a.o. in the double consideration of this value. In the opinion of the Constitutional Tribunal: "the position assuming that Article 32 of the Constitution constitutes only a 'systemic principle' is not fully correct. This provision expresses the principle of equality as a norm (principle) of objective law and – a derivative of this principle – a special type of subjective right, the right to equal treatment. Everyone has the right to be treated as a person in an analogous (as to the essential elements) situation."[6]

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[3] See more: Ziółkowski 2015.

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

[5] It is further complemented by the principle of non-discrimination, according to which: "No one shall be discriminated against in political, social or economic life for any reason." Domańska emphasises that the equality rule and the prohibition of discrimination are elements of the same idea and that the ban on discrimination fulfils the equality rule [Domańska 2019].

[6] Decision of the Constitutional Tribunal of 24 October 2001, ref. no. SK 10/01, OTK ZU 7/2001, item 225, see also Deryng-Dziuk 2017; Klat-Górska 2015; Tuleja 2023.

When considering the content of constitutional regulations, it is possible to use a collective term indicating legal equality, which may be regarded as equality before and in law. In this case, it is about the legislator's obligation to shape the content of the applicable law evenly, i.e. to determine it, taking into account the idea of equality (equality in law) and, at the same time, the obligation of public authorities to treat all entities equally in the process of its application (equality before the law) [Sadurski 1988, 87ff].[7] In both cases, the idea of equality is a factor limiting the freedom of conduct of the legislator and entities applying the law, it is intended to protect against excessive interference in the sphere of freedoms and rights of entities and against their unconstitutional differentiation. In the jurisprudence of the Constitutional Tribunal, it is indicated that Article 32 of the Constitution requires equal treatment of all addressees of legal norms characterised to the same extent by the same relevant feature, and at the same time permits for different treatment of entities which do not have such a feature.[8] This interpretation leads to the conclusion that there are specific categories of entities within which these entities should be treated in the same way (because they share some common characteristic) [Idem 1979, 52]. *A contrario*, the absence of belonging to a particular group allows for different treatment from that of others showing similarity. This is closely related to the Aristotelian postulate, according to which similar things should be treated similarly, and those that are not similar should be differentiated [Kardas 2019].[9] Similar statements can be found in the case law of the CJEU. In the judgment of the General Court of 27.04.2022, it was indicated that the principle of equality requires that comparable situations must not be treated differently and that different situations must not be treated equally unless such treatment is objectively justified.[10] However, the principle of equality is not absolute,[11] and the Constitutional Tribunal's rulings allow for differentiation between similar entities when relevant and proportionate arguments dictate it, those related to other principles, values or constitutional norms that support the different

[7] See also: Szewczyk 2019.

[8] Ruling of the Constitutional Tribunal of 18 February 2014, ref. no. U 2/12, OTK ZU 2A/2014, item 12; judgment of the Constitutional Tribunal of 9 March 1988, ref. no. U 7/87, OTK ZU 1988, item 1.

[9] See also: Garlicki and Zubik 2016; Deryng 2014; Safjan and Bosek 2016.

[10] Judgment of the General Court of 27 April 2022, Robert Roos and Others v European Parliament, Joined Cases T-710/21, T-722/21 and T-723/21, https://curia.europa.eu/juris/document/document.jsf?text=&docid=258344&pageIndex=0&doclang=pl&mode=lst&dir=&occ=first&part=1&cid=2675120 [accessed: 29.08.2024]; judgment of the Court of 5 July 2017, Werner Fries v Lufthansa CityLine GmbH, Case C-190/16, https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A62016CJ0190&qid=1724945629279 [accessed: 29.08.2024].

[11] See also: Banaszak 2012.

treatment of similar entities.[12] "Equality before the law is also the legitimacy of choosing a particular criterion for differentiating legal entities."[13]

The constitutional understanding of the principle of equality plays a role in identifying the principle of equal access to public knowledge. As indicated earlier, this principle is included in the catalog of implicit principles. Justification for this identification should be sought in the location of this principle. It is derived from the content of Article 2(1) UDIP, which, in the first place (primarily), determines the scope of entities authorised to apply for public information. Thus, he creates yet another principle of a subjective nature, namely the rule of subjective universality. In any case, however, the fact that they belong to a group of principles that do not result directly from regulations that are not directly visible does not make them worse in kind, less essential, or secondary. These principles, and among them the principle of equal access to public knowledge, are of dominant importance in shaping the situation of an entity expressing the desire to obtain specific public information and taking particular steps towards realising its aspirations. This is even though the part of the provision that refers to the principle of equality has not been developed in terms of content. Article 2(1) UDIP indicates that everyone has [the same – points out K.T.] the right to access public information. At this point, the keyword is everyone because everyone has a specific right to which the administrative law doctrine assigns the name of public subjective right.

In the face of the commonly suggested understanding that equal means identical, one may be tempted to say that it is a kind of analogy in treating entities seeking access to public knowledge. Accordingly, all subjects should be treated equally – without any distinction, regardless of the unique features that differentiate them, such as young or old, sick or healthy, poor or wealthy, modest or effusive, guilty or innocent [Perelman 1959, 22-23, 31; Łazarska 2012]. However, M. Błachut rightly notes that: "analysing the various semantic contexts of the concept of equality, the use of equality as identity is of little use and impossible to implement in the legal sense" [Błachut 2005, 79-82; Sierpowska 2012; Kmieciak 1988, 57]. In law, this kind of value should instead be identified through the prism of similarity or proportionality since sameness implies conformity as to all characteristics, and equality only adequacy as to one or several of them [Błachut 2005, 79-82; Sierpowska 2012; Kmieciak 1988, 57; Sadurski 1978, 52; Steinborn 2004, 22]. Therefore, it should be assumed that everyone has the same rights, and the principle of equal access to public knowledge is about guaranteeing: the legal

[12] See the judgement of the Constitutional Tribunal of 3 September 1996, ref. no. K 10/96, OTK ZU 4/1996, item 33, see also Szewczyk 2019; Płoszka 2019.

[13] Judgment of the Constitutional Tribunal of 28 November 1995, ref. no. K17/95, OTK ZU 1995, item 37.

possibility of exercising the right of access on equal terms for all entities included in the concept of everyone and equal treatment of all persons seeking information by entities subject to an information obligation (entities referred to in Article 4 UDIP). M. Mazur defines this state of affairs as equal access to public information [Mazur 2015].

Since the principle of equal access to public knowledge in its understanding is based on the constitutional interpretation of the idea of equality, individuals (entities) interested in obtaining public information should feel confident that the procedure related to providing them with the relevant information will be based on the same rules, without any discriminatory or favouring conduct. Since everyone has a guaranteed right to access public information, an individual should not be afraid that age, gender, profession, wealth, education and other similar elements concerning them will make it difficult to obtain public information. Confirmation of the principle of equality, or in other words, one of the means to implement its existence, is the deformalization of the access procedure so that no one feels afraid of deciding to reach for public information. This is also to be achieved by the freedom of choice of means using which an individual can exercise his right of access to public knowledge, resulting from the principle of alternative [Bernaczyk 2008, 122]. An individual deciding to apply for public information does not have to worry about the fact that he is not able to formulate the application, that he is not able to prepare it properly, or that he does not know what should be included in it. The legislator has not provided formal requirements for applying for public information. However, the doctrine indicates that for purely practical reasons, it is essential that the application is precise and detailed enough to be able to read the intention of the interested party and to determine how the information is to be made available. The application does not have to contain the applicant's data, does not require justification and does not need to be signed [Sitniewski 2011, 160-61]. However, there must be opportunities to provide the expected information (e.g. only an e-mail address or a correspondence address). The totality of all these elements is to mobilise potential interested parties so that everyone, more or less educated, more or less wealthy, with a solid or weak personality, feels that he has the same opportunities to assert his rights and the same chances of obtaining the expected information. This, of course, also works the other way around; for example, entities interested in information cannot expect that the use of a request for access to public information form voluntarily developed by an entity obliged to provide information and made public will lead to a faster consideration of the submitted request – to consider it in the first place before others [ibid., 51ff]. In addition, they cannot count on the fact that using the form will result in a favourable resolution of the case *ex officio*.

Another example where compliance with the principle of equal access to public knowledge is evident (or at least should be) is the guarantee of participation in the meeting of popularly elected collegiate bodies (Article 3 UDIP). According to the regulation mentioned above and additionally, in connection with the content of Article 7 UDIP, those willing to participate in these meetings should be able to count on passive participation even in the event of increased interest and disproportionate premises and technical conditions of the entity organising the meeting. To ensure equal access and, at the same time, to protect against allegations of discrimination, this body must create objective criteria based on which it will consider the reported willingness to participate in the meeting. However, it is essential to develop evaluation measures in advance and make them public using methods that are intended to ensure the possibility of reaching all members of a given community – e.g. the local community (commune, district, voivodeship) [Kędzierska and Kotarba 2016, 163]. As indicated in the doctrine, access to meetings specified in Article 7 UDIP is not equivalent to a guarantee of participation in each meeting; however, the lack of appropriate accommodation or technical facilities may not lead to unequal treatment of the interested parties and admission to participate, for example, of persons from the immediate environment of the authority, known to the authority or favourable to it. This would undoubtedly lead to preferential treatment of the so-called chosen ones while at the same time discriminating against others and violating the principle of equal access to public knowledge. An auxiliary element in this situation is organised audiovisual and ICT transmissions, referred to in Article 18(3) UDIP. Their organisation is to respond to possible difficulties in guaranteeing participation in the meeting to anyone interested.

2. GENERAL CHARACTERISTICS AND SIGNIFICANCE OF THE PRINCIPLE OF PRIORITY OF THE NON-APPLICATION PROCEDURE

Under Article 10(1) UDIP, public information not made available in the Public Information Bulletin (hereinafter referred to as BIP) or the data portal is made available upon request. Thus, making information available does not always have to come down to providing specific data to the interested party but can also be based on creating real opportunities for independent access to public information [Baran and Południak-Gierz 2017]. Although the regulation's wording emphasises the request mode, the provision also refers to the non-requesting mode. Moreover, it uses two instruments to implement the right of access (the bulletin and the portal), which makes it a priority mode. It is no coincidence that concerning this provision, in the case law, one can find a term indicating a negative clause

of requesting access to information [Stefanicki 2004, 104],[14] and in the doctrine, there is a distinction between the principle of the priority of the non-requesting procedure, where reference in the first place to the bulletin creates grounds for claiming that it is an essential means of informing about public matters. E. Natanek-Gudowska and G. Kuca rightly point out that the legislator's introduction of a solution consisting of placing public information in the Public Information Bulletin or portal was a reasonable action [Gudowska-Natanek and Kuca 2024] positively affecting both sides of the disclosure process. Undoubtedly, this regulation has a double servile function, benefiting both entities obliged to provide information and the interested parties themselves. It has a positive effect on the situation of the entities providing the information because it reduces the unnecessary effort of the obligated party that would have to take each time the same information is made available to different interested parties. This principle leads to the exemption of obliged entities from their obligation to provide information upon request when the information is contained in BIP or a data portal.[15] This leads to time savings, reduced financial resources, and material outlays that would have to be used or incurred for each individual examination of the application and providing a response [Kędzierska 2015, 6]. The providing entity does not have to re-engage in searching for the expected information and its transmission if this information is already on the BIP website or in the data portal. Therefore, it is impossible to effectively obtain information in the application mode if the information covered by the content of the inquiry has already been made public using a legally defined publisher. Significantly, however, the entity obliged to provide information cannot refer the interested party to any website where the requested information is located but to the BIP website or data portal; moreover, in the case of BIP, it cannot be any page of the bulletin, but specifically the one run by it. An obliged entity may not invoke the fact that information has been made public in the Public Information Bulletin if the information contained there has not been made available by it. Approaching in detail the issue of the correct implementation of the request of the entity interested in information in the face of the rule of non-requestable disclosure of public information, it should also be pointed out that simply referring the interested party to the 'own' BIP website will not always be sufficient. This reference

[14] See the judgment of the Voivodship Administrative Court in Poznań of 10 August 2023, ref. no. II SAB/Po 76/23, https://orzeczenia.nsa.gov.pl/doc/18A90A06F3 [accessed: 22.08.2024], the judgment of the Voivodship Administrative Court in Olsztyn of 5 October 2023, ref. no. II SAB/Ol 65/23, https://orzeczenia.nsa.gov.pl/doc/255A47064B [accessed: 23.08.2024].

[15] See also judgment of the Voivodship Administrative Court in Gdańsk of 1 December 2005, ref. no. II SA/ Gd 436/05, https://orzeczenia.nsa.gov.pl/doc/2E4FEA63CD [accessed: 30.08.2024]; compare: judgment of the Supreme Administrative Court of 8 March 2024, ref. no. III OSK 58/22, https://orzeczenia.nsa.gov.pl/doc/067F405E9B [accessed: 23.08.2024].

requires a precise indication of where the information is located. In addition to the address of the bulletin, the referral also requires a specific tab or subpage – the access path.[16] Additionally, the information found there (in the Public Information Bulletin) must relate to the essence of the request, directly and specifically satisfy the information interest, and contain facts that are particularly important from the inquirer's point of view.[17] The point is not for the entity to find various data on the website, based on which it will create the expected (in fact processed) information. Still, it is to reach specific – simple information covered by its original interest.

Failure to include information in the Public Information Bulletin or the data portal is a prerequisite for applying for the requested information [Gudowska-Natanek and Kuca 2024],[18] but the publication planning itself does not act as a brake or excuse for the failure to comply with the information obligation.[19] If the document requested by the applicant for access under the UDIP procedure has not yet been included in the bulletin but has only just been sent for publication, it cannot be considered that the applicant has been appropriately informed.[20] Since the legislator has set 14 days as the basic deadline for the implementation of the information obligation, it cannot be required that the interested party wait patiently until the document is finally placed on the bulletin website. Such a procedure does not properly handle the request of the person concerned. It is also worth noting that making public information available in BIP also exempts the obliged entity from the obligation to confirm its existence in writing and to publish it in the bulletin.[21] The holder of this information is not obliged to make printouts from the BIP and deliver them to the interested applicant.[22]

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[16] See judgment of the Voivodship Administrative Court in Olsztyn of 5 October 2023, ref. no. II SAB/ Ol 65/23, https://orzeczenia.nsa.gov.pl/doc/255A47064B [accessed: 23.08.2024].

[17] Ibid. and see judgment of the Voivodship Administrative Court in Białystok of 27 March 2008, ref. no. II SAB/Bk 7/08, https://orzeczenia.nsa.gov.pl/doc/C1AC518E0C [accessed: 22.08.2024]; judgment of the Voivodship Administrative Court in Bydgoszcz of 22 August 2017, ref. no. II SAB/Bd 6/17, https://orzeczenia.nsa.gov.pl/doc/B5CFBF03BA [accessed: 22.08.2024]; judgment of the Voivodship Administrative Court in Wrocław of 9 November 2023, ref. no. IV SAB/Wr 263/23, https://orzeczenia.nsa.gov.pl/doc/98030C3860 [accessed: 22.08.2024], see also Bidziński, Chmaj, and Szustakiewicz 2023].

[18] Judgment of the Supreme Administrative Court of 11 July 2023, ref. no. III OSK 979/22, https://orzeczenia.nsa.gov.pl/doc/4BD2DDA322 [accessed: 22.08.2024].

[19] Judgment of the Supreme Administrative Court of 7 April 2022, ref. no. III OSK 4394/21, https://orzeczenia.nsa.gov.pl/doc/3E6168DF13 [accessed: 30.08.2024].

[20] Ibidem; compare: Supreme Administrative Court judgment of 17 June 2011, ref. no. I OSK 462/11, https://orzeczenia.nsa.gov.pl/doc/C47E066152 [accessed: 30.08.2024].

[21] Judgment of the Supreme Administrative Court of 11 July 2023, ref. no. III OSK 979/22, https://orzeczenia.nsa.gov.pl/doc/4BD2DDA322 [accessed: 22.08.2024].

[22] Ibid.

Although the wording of Article 10(1) UDIP may suggest a restriction of the principle of alternativeness and, thus, a limitation of the freedom of conduct of the interested party in the procedure, the negative effect of the regulation is only apparent. Individuals may choose between various legally guaranteed methods of obtaining public information (see: Articles 3 and 7 UDIP). Thus, establishing the principle of priority in the non-application procedure strikes at the legally guaranteed freedom of choice of means and forms by which the information is available. However, this does not result in a real limitation of the sharing process, and one may even be tempted to say that in certain situations, it works beneficially. Since the information has been previously placed in BIP and appears there continuously,[23] the unit can immediately (saving time) satisfy its interest in terms of information. They can do it without leaving home, from anywhere in the world, provided they have access to the Internet and an appropriate device (computer, phone, etc.), and they can use their skills to navigate the Internet. Thanks to the provision of public information without a request, the individual is not forced to manifest their interest by performing a conventional, legally important activity, which is the submission of a request to an entity obliged to provide information [Bernaczyk 2008, 122; Piskorz-Ryń and Sakowska-Baryła 2023].

3. THE RELATIONSHIP BETWEEN THE PRINCIPLE OF EQUAL ACCESS TO PUBLIC KNOWLEDGE AND THE PRINCIPLE OF PRIORITY OF THE NON-APPLICATION PROCEDURE

According to Article 8 UDIP, an official ICT publication – the Public Information Bulletin – was created to make public information available to the public in the form of a unified system of pages in the ICT network. "The Public Information Bulletin was created to make public information available to the public in electronic form free of charge."[24] It is difficult to fully agree with the statement in the doctrine, according to which the introduction of the obligation to publish information in the Public Information Bulletin has a disciplinary effect on the obligated [Gudowska-Natanek and Kuca 2024]. Not all public information is subject to mandatory inclusion in BIP, but only the data referred to in principle in Article 6

[23] See para. 20(1) of the Regulation of 18 January 2007 on the Public Information Bulletin (Journal of Laws No. 10, item 68), see also the judgment of the Voivodship Administrative Court in Wrocław of 2 June 2010, ref. no. IV SAB/Wr 15/10, https://orzeczenia.nsa.gov.pl/doc/B662A387C0 [accessed: 30.08.2024].

[24] Judgment of the Supreme Administrative Court of 11 July 2023, ref. no. III OSK 979/22, https://orzeczenia.nsa.gov.pl/doc/4BD2DDA322 [accessed: 30.08.2024].

UDIP,[25] information on the methods of making public information available in possession and not made available in the bulletin, and information clearly indicated in specific provisions. In addition, it should not be forgotten that not including a particular piece of information in BIP is not subject to appeal to the administrative court. The interested party also does not have standing to file a complaint in ascertaining the failure to maintain or improper maintenance of BIP websites by an entity obliged to provide information referred to in Article 4 UDIP.[26] This is due to the content of Article 10 UDIP, according to which the interested entity is not deprived of the possibility of obtaining information if it has not been made available in BIP. It can assert its constitutional right by applying for the same information in the application procedure.

In its assumption, publishing information using the so-called non-application methods, particularly with BIP, is intended to equalise opportunities for all individuals in society. The universality confirms this and is free of charge for publication. One may be tempted to say that thanks to the publication of information in BIP, it is possible to implement other procedural rules, e.g. the rule of speed or free of charge. Moreover, in the case of this type of request for information, the obliged entity does not verify because it is not able to verify the age of the person concerned, his citizenship, legal capacity and other elements relating to his physical or mental personality, as well as his economic situation.[27] This leads to the conclusion that the publication of information as part of the so-called request-free provision of public knowledge is the instrument using which the principle of equality in access to public information is most fully implemented, and thus, the statutory assumption that everyone has the right to access public information is most fully expressed. At this point, however, it is worth asking ourselves whether this is always true. Does everyone everywhere and everyone have the right to access public knowledge? Concerning the relationship between the principle of equal access and the principle of priority of the application procedure, it cannot be unequivocally stated that they always conform to each other. This is despite their equal nature as rules ordering the same procedure – the access procedure. Compliance with the principle of priority of non-application procedures does not serve the principle of equality in all circumstances. What about people who are defined as electronically

[25] This does not apply to the content of administrative and other similar acts, court rulings and positions on public issues.

[26] Decision of the Voivodship Administrative Court in Poznań of 21 September 2010, ref. no. IV SA/Po 776/10, https://orzeczenia.nsa.gov.pl/doc/5491A03D8B [accessed: 30.08.2024], compare: decision of the Supreme Administrative Court of 21 December 2005, ref. no. I OSK 1210/05, https://orzeczenia.nsa.gov.pl/doc/2DBA675E93 [accessed: 30.08.2024].

[27] See also: Bidziński, Chmaj, and Szustakiewicz 2023.

restricted[28]? What about people serving their sentences in isolation or detention centres? Can we say that they have equal opportunities to obtain information? Do they have the same possibilities of obtaining information placed in BIP? Giving a positive answer is all the more difficult if we also take into account the fact that such methods of access as access to meetings of collegiate bodies and the display or display of information in generally accessible places, as well as the use of devices installed in publicly frequented places, are by their very nature not (because they cannot be) accessible to persons deprived of their liberty [Mazur 2016]. The answers to all these questions cannot be affirmative because the legislator, when creating the principle of the priority of the non-application procedure (with a view to the benefits that it may bring to the interested parties themselves), did not foresee exceptional situations in which specific individuals *in facto* are deprived of the possibility of obtaining information contrary to the omnipresent principle of equality.[29] The lack of regulations in this respect results in the arbitrariness of the behaviour of obliged entities, which only may, but do not have to, meet the information expectations at their discretion. Despite the general publication of the data, they can show their goodwill and, as a result, make the information available again at the interested party's request. However, it is by no means their obligation. In this case, it would be incorrect to say everyone has an equal chance and can expect equal treatment.

First, it is worth referring to those mentioned above who do not have specific competencies in using computer equipment or the ability to search for information in the electronic space. Of course, one can agree with the statement that access to websites is common today [Gudowska-Natanek and Kuca 2024], but this does not mean that everyone has real opportunities to find out what is on these websites, what has been made public. This is mainly about people over 60 years of age who were not born in the times of the Internet; their teaching did not include computer science, and they could not count on having a computer because, in the times of their youth, this type of equipment was the good of the so-called elites. While the lack of appropriate equipment with Internet access in modern times does not have to be a problem because the legislator itself in Article 11(2) UDIP provides for the admissibility of installing devices in generally accessible places, enabling public information, this method of making public under the UDIP regulations is supplementary (and not obligatory, as BIP).[30] Thus, the assertion that nothing can prevent the obliged entity from making a computer available to the

[28] See more on the subject of digitally excluded people: Wensierska 2024.

[29] S. Szczepaniak points out that the regulations on making information available in the BIP are relatively modest regarding the procedural effects of making information available in this mode [Szczepaniak 2022, 237].

[30] See also: Zaremba 2009, 181.

interested party in a publicly accessible place is not valid [ibid.]. Such admissibility does not prevent inequalities in the said accessibility. This is because the entity may, but does not have to make this, because the legislator has not created this type of obligation [ibid.]. It all depends on goodwill and the free discretion of the provider. The lack of appropriate regulations for the obligatory conduct of the entity obliged to provide information is a significant limitation of access to information and, thus, of the principle of equality.

It is difficult to agree with the position that people who do not have specific skills (the elderly or the infirm) must be distinguished from people who do not have the appropriate equipment. According to M. Mazur, people who do not have specific equipment do not constitute a digitally excluded group [Mazur 2016]. On the contrary, thanks to the methods of sharing referred to in Article 11 UDIP, they have increased opportunities to obtain the information they are interested in [ibid.]. However, what is essential in modern realities is that not having specific equipment must be dictated by the lack of financial resources. Although it arouses extreme emotions, Polish society is still full of people and even entire families who lack the necessities of life (necessary for an everyday existence), not to mention having specific equipment with Internet access. Therefore, it is in vain to expect people who do not have particular equipment and have not had it before that they will be able to operate it on their own, even if such equipment is provided or rented to them. Their situation is not subject to differentiation. Obtaining information in their case is as problematic as in the case of the elderly or infirm. In both cases, we can speak of digital exclusion, although not intellectual, but physical.

At this point, the arguments according to which people who do not have equipment or knowledge about "navigating" the Internet can freely use the help of others, the help of people in their immediate environment, i.e. children, grandchildren, are not convincing here. Apart from the fact that not every such person has relatives (they are lonely) or has such people but does not necessarily live with them or visit them, asking for help requires one side to ask for assistance and a positive attitude on the part of the other side (which is not always possible). In this case, it is necessary to have appropriate commitment and, above all, patience in passing on knowledge to older people, whose understanding of "technological innovations" does not necessarily (not in every case) have to be at a sufficiently high level. All of the statements indicate that goodwill is also needed in this case, which puts the digitally excluded categories in a difficult position. It cannot be considered that they fall within the statutory concept of anyone with the right of access. Although they are legally entitled to it, they have limited chances of obtaining it if a specific piece of information has been made available in BIP and the obliged entity does not provide for an exception to compliance with the principle of priority of the non-application procedure.

These persons are effectively deprived of the right to public information due to an irrelevant feature, such as the lack of ability to use Internet resources [Kłaczyński and Szuster 2003]. The content of Article 10 UDIP does not prohibit making available to the interested party the requested information, which has previously been made public in the BIP, especially when the person, for some personal reasons, may have difficulties or limited possibilities of using the Internet [Kamińska and Rozbicka-Ostrowska 2016, 253ff]. Still, it remains within the sphere of the rights and not obligations of the addressee of the request [ibid.]. M. Kłaczyński and S. Szuster rightly point out, stressing that solutions consisting of making information available via the Internet, however modern, relatively common or inexpensive, may lead to a violation of the principle of equal access to public knowledge [Kłaczyński and Szuster 2003].

People serving an isolation sentence in a penitentiary facility are in a slightly better position. This claim is based on specific regulations that make the situation of persons deprived of their liberty more favourable, at least from the point of view of the applicable law. As emphasised in the judicature, these entities have not been systemically deprived of the possibility of obtaining public information,[31] on the contrary, there are appropriate regulations that constitute a "gate" for interested parties to reach for information made available in BIP. In this case, it is not about the rules of the UDIP but about the provisions of the Act of 6 June 1997 – the Executive Penal Code.[32] From the very beginning of KKW, the legislator indicates that the convicted person retains civil rights and freedoms, and their limitation may only result from the law and the final judgment issued on its basis (Article 4(2) KKW). The provisions of the UDIP do not prohibit inmates from accessing public information, nor does the KKW. However, it is assumed that persons whose freedom has been "restricted" due to committing a prohibited act must expect (must be aware) some limitation of their freedoms and rights. Although, this does not deprive these persons of their right to obtain public information.[33] Their opportunities to get information are, nevertheless, different from those who are not serving a custodial sentence.[34] In one of the judgments, the Supreme Administrative Court pointed

[31] Judgment of the Supreme Administrative Court of 21 June 2012, ref. no. I OSK 730/12, https://orzeczenia.nsa.gov.pl/doc/28F125EA27 [accessed: 27.06.2024].

[32] Journal of Laws of 2024, item 706 [hereinafter: KKW].

[33] Although the access to public information of persons incarcerated in prisons is not unlimited, the applicable legal provisions do not deprive this access in an absolute manner and serving a sentence in isolation conditions cannot lead to the exclusion of the application of Article 10(1) UDIP (the principle of priority of the non-request mode), see judgment of the Supreme Administrative Court of 21 April 2017, ref. no. I OSK 1850/15, https://orzeczenia.nsa.gov.pl/doc/585BB2A5A6 [accessed: 27.08.2024].

[34] Ibid.; The use of the so-called other means of communication by prisoners is confirmed,

out that the catalogue of rights to which an inmate is entitled is not exhaustive, so despite the lack of an explicit reference to access to the Internet, a person sentenced to stay in prison may assert his or her rights on general principles provided for in the Executive Penal Code.[35] Due to the circumstances in which the inmate is located, access to the Internet cannot be universal. Still, since the inmate has access to radio and television legally guaranteed in Article 102 KKW, it is worth asking whether this catalogue could not be extended to include controlled access to the Internet (access to selected websites), which in reality of the 21st century seems to be a standard.

Under Article 110a KKW, the director of the penitentiary may consent to the possession of electronic and electronic equipment by an inmate in a cell if the possession of these items does not violate the rules of order and safety that are in force in the penitentiary facility. Although the way Article 110a(4) KKW does not make it explicit, the law does not entirely exclude the possibility of having access to the Internet but creates a kind of condition. The possession of this type of communication must not threaten order or safety in the prison or the safety of the people in it. This is not equivalent to a general ban on the use of the Internet by inmates but makes the exercise of this right dependent on the decision of the director of the prison, who, when deciding on the fulfilment of the required security condition, issues a positive or negative decision on the possession of equipment and access to the Internet for the personal needs of the convict. In this, the better position of individuals is revealed, although it is only imaginary. The lack of an absolute ban on the possession of a device and a means of communication does not make it easier to obtain specific public information, as it depends on the goodwill of the prison administration. As it is accepted in the case law, the fact that the person concerned is in prison and, therefore, does not have free access to the Internet is legally irrelevant.[36] It cannot result in a finding of violation of Article 2(1) UDIP.[37]

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a.o. in Article 90(9) KKW, Article 91(11) KKW, Article 92(14) KKW, Article 115(8a) KKW, Article 105(1) and (3) and (4) KKW, Article 105c(1) KKW. Confirmation for the use of means of communication by convicts is also provided by the content of Article 223a KKW.

[35] Judgment of the Supreme Administrative Court of 21 June 2012, ref. no. I OSK 730/12, https://orzeczenia.nsa.gov.pl/doc/28F125EA27 [accessed: 27.06.2024]; judgment of the Voivodship Administrative Court in Warszawa of 15 October 2013, ref. no. II SAB/Wa 158/13, https://orzeczenia.nsa.gov.pl/doc/EF89FA5248 [accessed: 30.08.2024]; see Article 6(2) KKW, Article 102(10) KKW, Article 102 KKW, and see considerations concerning the convicted person's means of asserting his or her rights [Mazur 2015].

[36] Judgment of the Supreme Administrative Court of 11 July 2023, ref. no. III OSK 979/22, https://orzeczenia.nsa.gov.pl/doc/4BD2DDA322 [accessed: 27.08.2024], see also judgment of the Supreme Administrative Court of 21 June 2012, ref. no. I OSK 730/12, https://orzeczenia.nsa.gov.pl/doc/28F125EA27 [accessed: 27.06.2024].

[37] Ibid.

The argument that a person serving a sentence in solitary confinement should take into account the fact that, due to their location, cannot count on a full guarantee of the exercise of their rights, as is the case with an average citizen, that "he or she should take into account the restrictions on his or her freedoms and rights, which are an indispensable element of the execution of a sentence in solitary confinement conditions, is not convincing."[38] In addition, one should not forget about the content of Article 110b(1) KKW, according to which even if the consent to possess the equipment is granted, the convict in the cell is obliged to pay a flat-rate monthly fee in connection with the use of this equipment. Although due to its low value, it is difficult to find in this case a significant limitation in the availability of information published without a request, it should not be forgotten that it is not about paying the fee under standard conditions – i.e. by a usually working and earning individual.[39] Theoretically, therefore, this type of fee may be considered a kind of limiting factor, as well as the system of disciplinary penalties provided for in the KKW, among which the deprivation of the inmate of the possibility of using audiovisual and computer equipment plays an important role (Article 143(3) point 2 KKW).

At a disadvantage (as M. Mazur rightly points out) are persons subject to an isolationist preventive measure, namely those in pre-trial detention [Mazur 2015]. This is particularly puzzling and incomprehensible because these people are in an extraordinary situation – their guilt has not yet been proven. Yet, they have fewer opportunities to obtain public information. Regardless of the content of Article 214(1) KKW, according to which a pre-trial detainee enjoys at least the same rights as a convict serving a prison sentence in the ordinary system in a closed type of prison, the legislator provides for appropriate restrictions – certain kinds of exceptions (Article 209 KKW). Under Article 216(1) KKW, these units may not have means of communication, technical devices used to record and reproduce information, computer equipment, and, apart from the deposit, objects and documents that may hinder the proper course of criminal proceedings. The content of the regulation creates an absolute prohibition that cannot be repealed by an order of the director of a penitentiary facility with the appropriate content based on Article 216(3) KKW [Lachowski 2021], under which the authority at whose disposal the detainee remains may limit or determine how the detainee may exercise their rights. It is also important to note that, as is evident from Article 217c(1) KKW, a pretrial detainee may not use any

[38] Judgment of the Supreme Administrative Court of 30 May 2012, ref. no. I OSK 481/12, https://orzeczenia.nsa.gov.pl/doc/DC387CA8AE [accessed: 27.08.2024].

[39] See Regulation of the Minister of Justice of 9 December 2022 on the amount of the flat monthly fee related to the use of additional electronic or electrical equipment in a residential cell, Journal of Laws item 2623.

means of communication other than the prison telephone. This regulation imposes an absolute ban on the director of a penitentiary facility on creating opportunities for pre-trial detainees to use means of communication, such as access to the Internet [Mazur 2015]. This undoubtedly prevents them from searching for information on their own in BIP or the data portal using devices and communication systems at the disposal of the penitentiary facility.

CONLUSIONS

The presented considerations show that the statutory assumption that everyone has the right to access public knowledge in many situations may constitute a theory unsupported by reality (desired and expected). The content of Article 10 UDIP is binding and does not provide for any exceptions in the manner in which public information is made available.[40] Information previously made available in the BIP or the data portal is not subject to re-access upon request. As it was assumed at the stage of drafting the regulation, since the publication of information in BIP is universal and free of charge, everyone has the opportunity to obtain public information using this type of access path, referred to as modern and perspective [Aleksandrowicz 2004, 209-10]. This means everyone applying for information in BIP or the data portal will be treated similarly regardless of the real possibilities of reaching for it. Considering the constitutional understanding of the principle of equality, identical treatment of persons in a particular life situation may, in extraordinary circumstances, lead to a violation of equal access to public information (as referred to in Article 2 UDIP). While in the case of persons deprived of liberty (except pre-trial detainees), the legislator provides for legal solutions that are to counterbalance the obstruction in obtaining public information made available electronically, in the case of digitally limited persons, it is impossible to find a regulation that even seemingly tries to "protect them". This state of affairs is unacceptable, as these people often suffer adverse effects from not keeping up with technological progress through no fault of their own. This leads to their detriment. They cannot obtain public information on their own without the help of others, and the law does not guarantee them the possibility of receiving it through an application. Their identical treatment as any other individual cannot mean compliance with the principle of equal access to public knowledge since the constitutional principle of equality provides for the admissibility of differentiation. Legal regulation of exceptions to the principle of priority of the non-application procedure concerning persons who, for various

[40] Judgment of the Supreme Administrative Court of 21 June 2012, ref. no. I OSK 730/12, https://orzeczenia.nsa.gov.pl/doc/28F125EA27 [accessed: 27.06.2024].

objective reasons (partially or wholly through no fault of their own), are not able to obtain information in any other way than in the application mode would lead to achieving and maintaining a real, and not only legal, balance in the process of making public knowledge available. The fact that people do not have access to the Internet or are unable to use this accessibility, or have the deprivation of personal liberty should not lead to a violation of social balance by depriving certain groups of individuals of the possibility of obtaining public information. From the point of view of the interested parties, it is not only about legally guaranteed equality in the light of the applicable law but about factual equality allowing obtaining the same, on the same terms, as would be possible to obtain if they were not in a particular situation, in extraordinary circumstances.[41] It is worth noting here the statement of A. Zalasiński that: equal treatment is maintained when the differences in treatment are proportional to the degree of actual inequality [Zalasiński 2014, 314].

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[41] See on the subject of factual equality: Haczkowska 2014.

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CRIME OF FOREIGNERS IN POLAND IN THE YEARS 2004-2024 – LEGAL AND CRIMINOLOGICAL ASPECT

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Abstract. The article aims at presenting the phenomenon of crime of foreigners in Poland over the past twenty years, i.e. for the period from 2004 to 2024. The work characterizes the immigration of the population to Poland in the perspective of the subjective and causal criterion. The impact of the influx of foreigners on the internal security of the state was also discussed. The authors analyzed selected categories of prohibited acts, i.e.: crimes against property, crimes against safety in communication, crimes against life and health and drug crimes. The research was based on statistical data provided by the Police Headquarters. Data for the period from 2004 to 2024 were analyzed. The result of the work of the authors is to present the space requiring actions aimed at a more thorough examination of the problem of crime of foreigners in Poland in order to undertake further projects aimed at increasing the level of security in the discussed area. In the analysis, the authors used the method of criticism of literature and analytical-synthetic. The analysis used variables relating to the total number of preparatory proceedings initiated by the Police and data on the number of registered foreigners suspected of committing a selected criminal act.

Keywords: migration; immigration; foreigners; statistic data; criminal law; crime of foreigners.

INTRODUCTION

For several years, Poland has become a destination for immigration. The analysis undertaken in this article covers the years 2004-2024. This is an extremely important period in the development of Poland because at that time Poland became a member state of the European Union and entered the Schengen zone. These two events were important for the intensification of migration movements, which allowed Polish citizens to move freely within the territory of the Community. Free access to the labour markets

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of member states caused significant emigration of Poles in search of better earning conditions. Post-accession migrations contributed to the emergence of new challenges and problems, and also influenced the diversity of structures of the migrant population. It gave an impulse to liberalize the migration law in the field of access to the labor market for foreigners, the possibility of undertaking education. Systemic, political and economic changes initiated just after 1989 and intensified after 2004, contributed to the increase in interest of foreigners in Poland as a destination for immigration. Nowadays, the issue of migration is connected with the issue of security. The adoption of such a perspective often leads to the conclusion that migration poses a specific threat to the value of security. The aim of the article is to draw attention to the conditions conducive to immigration and their impact on the increase in crime in foreigners in Poland. For this purpose, statistical data obtained at the request of the authors from the Police Headquarters will be presented. In the analysis of the undertaken issues, the methods appropriate for the legal and social sciences were used.

1. CONDITIONS FOR MIGRATION TO POLAND

Poland as a country has a long tradition of emigration, while immigration is a relatively new phenomenon. Until now, Poland, especially for demographic reasons, has been a reservoir of labour among Western European countries [Iglicka 2008, 64]. Nevertheless, Poland is becoming an increasingly attractive place to work and live for foreigners. Currently, it can be said that it has undergone a transformation from an emigrant country to an immigration one.

The reasons for this phenomenon are, among others: a) the post-accession emigration of Poles, which prompted the authorities to take legal and institutional measures in the field of immigration, aimed at supplementing staff shortages in selected industries of the economy; b) facilitating the employment of seasonal workers from third countries; c) geographical proximity, especially for the inhabitants of Eastern Europe, and cultural affinity; d) relatively low cost of living compared to Western European countries; e) the establishment of migration networks, especially among citizens of eastern European countries, which makes migration processes more dynamic; f) perception of Poland as a safe place, even in the face of direct neighbourhood with the country in which the war is going on.

After Poland's accession to the European Union in 2004, a significant increase in the number of people leaving the country permanently[1] was observed.

[1] The data published by the Central Statistical Office illustrate the so-called migration streams in individual years, referring only to documented facts of emigration (check-out

In the years 2004-2007 the number of emigrants for permanent residence steadily increased, reaching the peak in 2006, slightly more than 46 thousand cases were recorded at that time . In the following years, this trend changed, and the number of people leaving permanently began to decrease. The last significant increase in emigration took place in 2013 – 32 103 people. In turn, after 2004, there was a gradual increase in the number of foreigners settling in Poland permanently – it was 9,495 people in that year. This situation lasted until 2009, when 17,424 foreigners settled permanently. In the following years, there was a slight decrease. What is important, since 2016 Poland has been characterized by a positive migration balance. It is necessary to pay attention to temporary migrations. Temporary immigration to Poland can be considered on the basis of data on work permits for foreigners and registered declarations on the intention to entrust work to foreigners, which is included in Table 1.

Table 1. Number of work permits issued and registered declarations on the intention to entrust work to a foreigner in the years 2008-2023.

Employment permits issued to foreigners			
Year	Issued work permits	Year	Issued work permits
2008	18 022	2016	127 394
2009	29 340	2017	235 626
2010	36 622	2018	328 768
2011	40 808	2019	444 738
2012	39 144	2020	406 496
2013	39 078	2021	504 172
2014	43 663	2022	365 490
2015	65 786	2023	320 630
Registered statements of intention to entrust work to a foreigner			
Year	Number of registered statements	Year	Number of registered statements
2008	156 713	2016	1 314 127
2009	188 414	2017	1 824 464
2010	180 073	2018	1 582 225
2011	259 777	2019	1 640 083
2012	243 736	2020	1 519 599
2013	235 616	2021	1 979 886
2014	387 398	2022	1 038 316
2015	782 222	2023	506 554

Source: Own study based on data from the Ministry of Family, Labour and Social Policy.

from permanent residence in Poland in connection with a trip abroad) and immigration (check-in for permanent residence in Poland in connection with the arrival from overseas).

Data published by the Ministry of Family, Labour and Social Policy on the employment of foreigners in Poland indicate a gradual increase in the number of work permits issued after 2008. In 2008, 18 022 such permits were issued, while in 2015 this number increased to 65 786, which means an increase of 265% compared to 2008. A significant increase, in the number of permits issued, occurred after 2016 – then 127 394 work permits were issued. In record 2021, this number reached 504,172, an increase of 295% compared to 2016. After 2021, however, there was a decrease in the number of permits issued. In 2023, 320,630 work permissions were released, which states a decrease of 36% compared to the record year 2021. During the analyzed period, most often permits were issued to citizens of Ukraine, Belarus, Moldova, Vietnam, China, India, Russia. In addition, in recent years, these nationalities have been joined by a growing number of people from Nepal, Bangladesh, Pakistan, Georgia, Tajikistan, Turkey and South Korea. Poland is now becoming a destination not only for immigration from Eastern Europe, but increasingly from Asia and Africa.

In order to better illustrate the scale of immigration in Poland, it is also worth paying attention to the possibility of employing foreigners under the so-called declaration procedure. It was introduced in 2007, when 21,797 statements were registered. Since 2008, this number has begun to systematically grow – 156,713 statements were registered in 2008 and in 2015 already 782,222. The record level was noted in 2021, when the number of registered statements amounted to 1,979,886. However, since 2022, there has been a decrease in the registration of declarations on entrusting work to a foreigner.[2] This was the result of legal changes that extended the period of work on the statement to 24 months, as well as the introduction of new regulations enabling Ukrainian citizens to work on the basis of the notification. Russia's aggression against Ukraine had an additional impact, and in October 2022 Russian citizens were excluded from the declaration procedure.

In 2023 alone, almost 2 million acts were issued legalizing the work of a foreigner.[3] The largest group are Ukrainian citizens. Not without significance is the fact of the ongoing armed conflict caused by Russian aggression against Ukraine. The immediate vicinity and the existing migration networks and previously indicated conditions contributed to the fact that Poland has become a place of refuge for Ukrainian citizens through war. In the years 2013-2021 we can talk about 'ukrainization' of immigration

[2] It should be remembered that the quoted data on temporary migration in Poland are not fully reliable. This is because one person can appear in several registers, which are not treated separately.

[3] See https://psz.praca.gov.pl/documents/10828/8179096/Informacja%20o%20zatrudnieniu%20cudzoziemc%C3%B3w%202023%20r.pdf/58c6f6b1-07b5-4fa7-9b48-7f70d74f9dbe?t=1706880934801 [accessed: 15.01.2025].

to Poland [Górny and Kindler 2023, 295]. An additional factor conducive to immigration to Poland is the policy of Western European countries and societies, which are increasingly characterized by anti-immigration attitudes. The process of changing Poland from a country of emigration to an immigration one has already begun and continues. It is also expected that this trend will not change in the coming years.

2. IMPORTANCE OF MIGRATION FOR STATE SECURITY

The effects of the influx of foreigners are manifested in various aspects of the functioning of the state. In the era of the development of modern technologies and means of communication, globalization processes, the security environment is characterized by the evolution of existing and the emergence of new categories of threats. More often, in the public space, the issue of migration is connected with security threats. Increased migratory flows can create uncertainty and concerns about the state's ability to control its borders, protect its citizens, its cultural heritage and its values. This leads to the analysis of contemporary migrations through the prism of both opportunities and threats [Bhabha 2005, 29]. The perception of migration in the context of a security threat stems from the fact that attention is now being paid to the costs of immigration borne by the state and to the burden on the social system; mass migration and mixing of cultures; and; terrorist attacks involving foreigners; linking migration with the development of crime. These factors result in the state's activities being placed in terms of the needs of the state, resulting from the need to ensure the safety of its citizens [White and Johnson 2016, 79]. Migrants, who until recently were perceived through the prism of development, today as a result of the occurrence of various phenomena and events are considered in terms of risk. The most frequently cited arguments, which are raised in the context of threats of cultural, socio-economic or political nature related to migration, are indicated by the development of the 'gray area' of employment at the expense of legal jobs; threat to national identity and cohesion and its culture; threat to the traditional family structure of the host country; development and formation of criminal groups and conducive to terrorist threats; growth of nationalist, racist, and, xenophobic among the host society; epidemiological threats; immigrants' reluctance to assimilate and integrate, the formation of „gett", the transfer of problems from places of origin to the current place of residence [Tutak 2023, 133-34].

The catalogue presented is not closed. Some of the cited arguments are related to the emotional and subjective sphere of individuals and social groups. The impact of foreigners on the level of crime in the country is a complex issue, depending on many factors, such as the scale

and structure of migration, the level of integration of immigrants, the economic situation and the policy of the host country. The fact is that foreigners commit crimes, but in many cases, these people are no more dangerous than non-migrants. The reasons that determine the commission of illegal acts can be indicated, among others, experiences, often traumas experienced by foreigners (especially refugees) in their current place of residence; problems with integration, and, which in turn translates into exclusion or discrimination in many aspects of social functioning; performing work below qualifications resulting in frustration or lack of frustration; cultural differences resulting in different behaviors, which in the host country are considered to be contrary to accepted standards and are acceptable in the country of origin; pathologies and dysfunctions in the country of origin that have affected the way society functions, for example corruption, nepotism; problems in the field of legalization of stay; national tensions; the adopted model of immigration policy implemented in a given country.

Among the security threats that are seen in migrations, especially the international charter, is terrorism. In this case, migration is treated as an important element of the penetration of dangerous people into the target countries, which ultimately aims to commit a terrorist act. The transnational nature of this phenomenon also indicates the activities of organized crime groups, which may include smuggling of migrants, trafficking in human beings, use for prostitution or forced labour, arms smuggling, and, drugs and other harmful substances. However, the most common forms committed by foreigners include common crime as the most common form of crime, which includes, among others, crimes against property, freedom, life and health, morality, justice, against public order.

3. CRIME STRUCTURE OF FOREIGNERS IN POLAND IN 2004-2024

This part of the article will present the issue of the impact of population migration on crime in Poland. The study of the issue was based on police statistics in terms of the so-called crime confirmed as a result of the initiation of preparatory proceedings [Kuć 2015, 46]. According to police data, the number of prohibited acts committed in Poland is constantly decreasing. In 2004, 1 461 217 crimes were committed, while in 2022 – 862 432, which is a decrease in the total number of crimes found by 41%.[4] Police statistics show significant dynamics in this area. The image of crime in Poland consists mainly of crimes against property. In 2020, they accounted for almost half of all crimes reported. Almost every tenth crime is determined from the

[4] See: https://dane.gov.pl/pl/institution/27,komendaglownapolicji?page=1&per_page=20&q=przest%C4%99pstwa%20&sort=-date [accessed: 20.01.2025].

Act on counteracting drug addiction and from the category against family and care, 7% share crimes against the credibility of documents, 5% – against sexual freedom and decency, 7% it is also one of the crimes against safety and in communication – driving a vehicle in a state of intoxication or under the influence of an intoxicant. Crimes against life and health account for 2% of the crimes found. A similar negligible percentage are the other categories of crimes [Włodarczyk-Madejska and Ostaszewski 2024, 111-10].

Among the perpetrators of crimes committed in Poland, migrants coming from countries outside the European Union play an increasingly important role. According to research conducted by W. Klaus, K. Laskowska and I. Rzeplińska in the work entitled: Crime of Foreigners. Legal, criminological and legal aspects of the share of foreigners in relation to the total number of perpetrators of crimes committed in Poland over 9 years, i.e. in the period from 2004 to 2012, accounted for 0.5%. Suspected of committing crimes in Poland in the years 2004 – 2012 were citizens of 61 countries – a total of 22,675 foreigners, including stateless persons – 82 people [Klaus, Laskowska, and Rzeplińska 2017, 21-20]. Currently, in Poland we notice an increasing share of foreigners among perpetrators of crimes. This phenomenon is the result of changes in the world caused by armed conflicts and the economic situation. In Poland, there is increased migration, in particular from Ukraine, which is caused by the ongoing armed conflict with Russia on its territory.

Due to the nature of the crimes committed on the territory of the Republic of Poland, the first will be characterized prohibited acts against property, which, as already indicated, constitute almost half of all crimes committed in Poland. The provisions of chapter XXXV of the Criminal Code, grouping crimes against property, protect as a generic good property in the civil sense, which includes property and other property rights (Article 44 of the Civil Code) and possession. It does not matter who is the subject of property in which the perpetrator of – State Treasury, another state legal person, local government unit or private entity reconciles. The individual property protected by the individual criminal prohibitions of this chapter is property either to the full extent (e.g., fraud) or to the extent of certain of its components (e.g., theft). Some of these prohibitions also have other, collateral protected goods (e.g. robbery crimes) [Grześkowiak and Wiak 2017, 407]. These crimes are closely related to the value of property at a given time and place. In a narrower scope, protection refers to things that are the object of property and of factual possession. In this certain sense this concept is used as an object (protection, assassination) in crimes of theft, appropriation, robbery, robbery, destruction of things and forage (Article 278-281, 284, 288, etc., 291 And 292). A property in a broader sense that includes property rights, of a material or bond nature (including any kind of benefits, profits or advantages), is subject to protection (including any

kind of benefits, or, profits or benefits) of fraud and robbery (Article 286 and 282). The concept of property includes things (mobile and real estate), the value of which can be expressed in money and which can be traded. According to Article 115(9) of the Criminal Code. Polish or foreign money or other means of payment is also a movable thing or object, cash entered in the account and a document entitling to receive a sum of money or containing an obligation to pay capital, interest, share in profits or declare participation in the company. Thus, the thing is a variety of means of payment (e.g., payment cards), cash saved in the account (i.e., non-cash money) and securities (checks, bills of exchange, shares, bonds, etc.) and other documents entitling to receive money, interest or share in profits (deposit certificates, letters of credit, shares, documents confirming participation in the trust fund) [Marek and Konarska-Wrzosek 2019, 592].

Paying attention to the structure of prohibited acts aimed at broadly understood property, it is necessary to indicate, that by analyzing selected categories of prohibited acts included in chapter XXXV of the Criminal Code, there is a significant decrease in the occurrence of these prohibited acts over the years 2004-2024. Referring to the scale of the phenomenon, it should be pointed out that in the case of a crime of theft included in Article 278 of the Criminal Code in 2024, 74,803 preparatory proceedings were initiated, which indicates a decrease in the number of proceedings conducted in relation to 2004 by 71.4%, when their number was 261,867. The situation is similar in the case of a crime of theft with burglary Article 279 of the Criminal Code where – in 2024 – 34,351 preparatory proceedings were initiated, which indicates a decrease in the number of cases in this category compared to 2004 by 88.1%. In the case of the crime of destruction of property specified in Article 288, the decrease in the number of proceedings initiated in 2024 compared to 2004 was 58.8%, the number of cases decreased from 74,917 to 30,896. A decrease in the number of preparatory proceedings was also recorded in cases for an act of Article 280 of the Criminal Code where in 2024 they were initiated 1 899, which indicates a decrease in the total number of cases in the indicated direction compared to 2004 by 95%. A similar decrease was recorded in the case of preparatory proceedings conducted towards Article 282, i.e. robbery extortion, where 241 proceedings were initiated in 2024 and this indicates a decrease in the number of cases in this category by 89% compared to 2004. Less disparities in the number of preparatory proceedings initiated were noted in the number of cases conducted towards Article 281 of the Criminal Code. In the case of the crime of robbery in 2024, 1,072 preparatory proceedings were initiated, which indicates a decrease in the number of proceedings conducted in relation to 2004 by 37%. The presented dynamics of changes over the years 2004-2024 are presented in tables 2 and 3 below.

Table 2. Offences against property – selected categories.

Qualification	278 criminal code			279 criminal code			288 criminal code		
Year	**In total**	**citizens**	**%**	**In total**	**citizens**	**%**	**In total**	**citizens**	**%**
2004	261 867	127	0,05%	288 769	75	0,03%	74 917	32	0,04%
2005	255 418	172	0,1%	240 540	48	0,02%	70 422	25	0,04%
2006	232 644	155	0,1%	181 504	34	0,02%	66 841	22	0,03%
2007	202 888	134	0,1%	142 543	35	0,02%	71 347	33	0,1%
2008	183 283	153	0,1%	124 926	26	0,02%	76 063	29	0,04%
2009	188 873	189	0,1%	134 054	29	0,02%	70 041	29	0,04%
2010	197 253	181	0,1%	129 448	49	0,04%	71 510	34	0,1%
2011	197 253	225	0,1%	129 448	62	0,1%	71 510	41	0,1%
2012	191 899	276	0,1%	120 286	50	0,04%	66 353	33	0,1%
2013	182 972	429	0,2%	111 576	73	0,1%	59 339	76	0,1%
2014	144 150	368	0,3%	99 958	75	0,1%	47 780	67	0,1%
2015	128 173	375	0,3%	91 288	80	0,1%	46 473	76	0,2%
2016	110 094	497	0,5%	74 127	127	0,2%	43 110	108	0,3%
2017	95 342	657	0,7%	62 530	155	0,2%	39 607	144	0,4%
2018	90 652	1013	1,1%	58 646	203	0,3%	38 628	184	0,5%
2019	93 614	1390	1,5%	56 912	251	0,4%	38 895	221	0,6%
2020	86 079	1225	1,4%	56 923	228	0,4%	37 153	209	0,6%
2021	96 615	1597	1,7%	52 546	262	0,5%	37 641	254	0,7%
2022	110 153	2717	2,5%	49 734	381	0,8%	38 801	329	0,8%
2023	104 193	3372	3,2%	43 389	395	0,9%	36 398	304	0,8%
2024	74 803	2042	2,7%	34 351	382	1,1%	30 896	300	1,0%

Source: Own elaboration based on data received from the Police Headquarters.

Table 3. Offences against property – selected categories.

Qualification	280 criminal code			281 criminal code			282 criminal code		
year	**In total**	**citizens**	**%**	**In total**	**citizens**	**%**	**In total**	**citizens**	**%**
2004	34 665	75	0,2%	1699	3	0,2%	2 268	15	0,7%
2005	30 245	43	0,1%	1591	4	0,3%	1 923	10	0,5%
2006	23 893	26	0,1%	1471	5	0,3%	1 591	13	0,8%
2007	17 872	21	0,1%	1126	3	0,3%	1 315	2	0,2%
2008	16 320	24	0,1%	979	2	0,2%	1 160	4	0,3%
2009	13 606	20	0,1%	1033	1	0,1%	1 086	6	0,6%
2010	12 101	32	0,3%	1047	2	0,2%	936	9	1,0%
2011	12 101	11	0,1%	1047	3	0,3%	936	4	0,4%
2012	10 272	17	0,2%	997	1	0,1%	804	5	0,6%

Qualification	280 criminal code			281 criminal code			282 criminal code		
year	In total	citizens	%	In total	citizens	%	In total	citizens	%
2013	8 804	31	0,4%	1042	6	0,6%	703	5	0,7%
2014	7 628	24	0,3%	1131	10	0,9%	712	6	0,8%
2015	6 605	29	0,4%	1221	7	0,6%	647	11	1,7%
2016	5 445	49	0,9%	1062	7	0,7%	412	3	0,7%
2017	4 097	55	1,3%	1021	10	1,0%	335	9	2,7%
2018	3 735	67	1,8%	1037	16	1,5%	338	6	1,8%
2019	3 462	85	2,5%	996	30	3,0%	331	9	2,7%
2020	2 945	79	2,7%	1012	30	3,0%	265	12	4,5%
2021	2 431	71	2,9%	1018	31	3,0%	246	4	1,6%
2022	2 545	85	3,1%	1192	57	4,8%	236	10	4,2%
2023	2 435	103	4,2%	1281	62	4,8%	232	7	3,0%
2024	1 899	118	6,1%	1072	68	6,3%	241	18	7,5%

Source: Own elaboration based on data received from the Police Headquarters.

In the case of crimes against property, which constitute the largest group of prohibited acts committed in Poland among perpetrators of prohibited acts, foreigners play a small role among the so-called suspects. However, it should be pointed out that in the case of analyzed data relating to the above-mentioned prohibited acts, the share of foreigners in relation to 2004, where foreigners constituted from 0.1% it increased in 2024 in all categories of prohibited acts. Referring to the individual categories of the analyzed prohibited acts, it should be pointed out that the increase in the share of foreigners among perpetrators of crimes in relation to 2004 was in turn: Article 278 of the Criminal Code 2.7% – 2042 people, Article 279 of the Criminal Code 1% – 382 people, Article 280 of the Criminal Code 5.7% – 118 people, Article 281 of the Criminal Code 6.1% – 68 people, Article 282 of the Criminal Code 6.8% – 18 people, Article 288 of the Criminal Code 1% – 300 people. In total – in the years 2004-2024 – 24,454 foreigners committed crimes against property in the discussed scope.

The largest number of crimes against property among foreigners on the territory of Poland was committed by citizens of European countries outside the structure of the European Union – 18 504. Among the above-mentioned countries, the largest group were citizens of: Ukraine – 9,272, Georgia – 5,372, Belarus – 1,590, Moldova – 1,016 and Russia – 937. Among the perpetrators of crimes in the European Union countries, there were 4,656 cases, the most numerous group among them were: Romanians – 1,361, Bulgarians – 603, Czechs 587, Lithuanians 444, Slovaks 418 and Germans 405. In addition to the cases mentioned, there were: 264 people of African origin, 786 of Asian

origin, 132 cases of citizens of North and South America countries and 28 people from Australia and Oceania, and 28 people without any nationality.

The second group of prohibited acts committed more and more often by foreigners are crimes against security in communication. These crimes are specified in chapter XXI of the Criminal Code. Crimes specified in chapter XXI of the Criminal Code provide protection against events that violate security in communication. Crimes defined in this chapter cause a state of threat to goods protected by law arising during land, water or air communication. The essence of these crimes is to create a threat to these goods by bringing a specific or abstract danger [Grześkowiak and Wiak 2017, 328]. Two categories of prohibited acts were analyzed, i.e.: Article 177 of the Criminal Code – causing a traffic accident and Article 178a of the Criminal Code – driving a vehicle in a state of intoxication or under the influence of a narcotic agent. Selected prohibited acts are a serious problem in Poland and throughout the world because very often the negative effect of their occurrence is the death of a human being. In the legal and criminological literature, crimes against safety in communication are called traffic crimes [Widacki 2022, 369]. Both analyzed acts are prohibited by the most frequently committed road crimes in Poland, the remaining acts are negligible [Gorzelańczyk 2024, 434].

The structure of a traffic accident misdemeanor is complex. The basic determinant of the unlawfulness of an act is a violation of traffic safety rules. The concept of these rules covers not only the rules codified in the provisions of road law or in the regulations governing rail, water or air communication, but also specific praxeological rules relating to safe participation in a given sphere of movement. For road users, this means not only the obligation to comply with the provisions of the Act of 20 June 1997, the traffic law[5] concerning in particular bypassing, evading, overtaking, crossing to the other side of the road, etc., but also safety rules resulting from the indications of practice. The crime of causing an accident in communication is material. The subject of the crime of causing a road accident – due to the sign of a violation of traffic safety rules can only be a traffic participant who is required to comply with these rules, that is, the driver of a motor vehicle, a pedestrian, a coachman, a cyclist, person running a pedestrian column [Marek and Konarska-Wrzosek 2019, 520-19]. An accident is an event related to the movement of vehicles on public roads, as a result of which death or personal injury occurred [Gorzelańczyk 2024, 431]. The second provision refers to driving a motor vehicle in a state of intoxication or under the influence of an intoxicant in land, water or air traffic. This crime is formal, it consists in abstract exposure to danger [Grześkowiak and Wiak 2021, 1102-101]. The legislator, defining in the penal code the state of intoxication as one in which the blood alcohol content exceeds 0.5 per mille or leads

[5] Journal of Laws of 2024, item 1251.

to a concentration exceeding this value, shall, or the alcohol content in 1 cubic dm of exhaled air exceeds 0,25 mg or leads to a concentration exceeding this value, determines whether the act will be a crime of Article 178a or an offense of Article 87 of the implementing code [Widacki 2022, 369-70].

Referring to the scale of the phenomenon, it should be pointed out that the total number of prohibited acts both committed with Article 177 of the Criminal Code and Article 178a of the Criminal Code from year to year is systematically decreasing. In the case of accidents in communication, we are talking about a decrease in the number of crimes from 35,436 in 2004 to 15,660 in 2024, which states a decrease of 55.8%. On the other hand, referring to driving in a state of intoxication or other intoxicant, the number of crimes from 76,685 committed in 2004 decreased to 42,905 in 2024, which indicates a decrease by 44.1%. Police statistics show that the highest number of road crimes is caused by drivers who are drunk or intoxicated. This trend is presented in Table 4.

Table 4. Security offences in communication – selected categories.

Qualification	**177 criminal code**			**178a criminal code**		
year	**in total**	**citizens**	**%**	**in total**	**citizens**	**%**
2004	35 436	202	0,6%	76 685	629	0,8%
2005	33 047	185	0,6%	83 595	583	0,7%
2006	30 695	149	0,5%	82 266	525	0,6%
2007	32 942	141	0,4%	74 679	558	0,7%
2008	33 089	119	0,4%	82 173	495	0,6%
2009	26 680	78	0,3%	80 680	448	0,0%
2010	26 595	98	0,4%	86 071	466	0,5%
2011	26 595	88	0,3%	86 076	498	0,6%
2012	25 053	120	0,5%	78 287	480	0,6%
2013	24 770	158	0,6%	127 634	1011	0,8%
2014	24 303	154	0,6%	75 133	1008	1,3%
2015	22 959	125	5,0%	66 412	998	1,5%
2016	23 411	181	0,8%	59 603	1449	2,4%
2017	22 152	201	0,9%	55 409	2213	4,0%
2018	22 321	295	1,3%	52 004	2981	5,7%
2019	21 545	325	1,5%	56 683	3683	6,5%
2020	17 829	314	1,8%	51 883	3490	6,7%
2021	17 099	341	2,0%	56 667	4268	7,5%
2022	15 803	355	2,2%	55 772	5212	9,3%
2023	16 012	418	2,6%	49 049	4905	10%
2024	15 660	367	2,3%	42 905	3817	9,3%

Source: Own elaboration based on data received from the Police Headquarters.

The share of foreigners as perpetrators of crimes defined in Article 177 of the Criminal Code and Article 178a of the Criminal Code over the twenty years in question has increased. In the case of road accidents, there was an increase in the share of foreigners in this category of prohibited acts. In 2004, there were 202 cases, while in 2024 there were 367 cases, the increase was – 1.7%. In the case of the so-called the number of non-sober foreign drivers increased from 629 in 2004 to 3,817 in 2024 (the largest number of perpetrators among foreigners was recorded in 2022 – 5,212 perpetrators, which accounted for 10% all perpetrators in this category of prohibited acts), an increase of 8.4%.

Among the perpetrators of crimes against security in communication, as in the case of crimes against property, the largest group among foreigners were citizens of European countries located outside the EU structure (total 34,774 cases) the largest group were citizens: Ukraine – 27,220, Belarus – 2,464, Georgia – 2 231, Moldova – 1,295 and Russia – 881. In the case of citizens of EU member states, 7,374 perpetrators were registered in the period under consideration, the largest group being: Germany – 1,773, Lithuanians – 1,300, Bulgarians – 684, Romanians – 496 and Czechs – 480. In addition to European citizens, among the perpetrators of prohibited acts were registered: 319 people of African origin, 1,473 of Asian origin (the largest group were citizens: Armenia – 278, India – 162, Uzbekistan 131 and South Korea – 125), 334 cases of citizens of North and South America countries and 20 people from Australia and Oceania countries, as well as 25 people without any citizenship. In total – in Poland in the years 2004-2024 – 44,317 foreigners were registered, committing a prohibited act under Article 177 of the Criminal Code or Article 178 of the Criminal Code.

Another group of prohibited acts given to the analysis are the so-called crimes against life and health. The catalogue of these crimes has been included in chapter XIX of the Criminal Code. The legal goods protected by the provisions of Chapter XIX of the Criminal Code are human life and health. Human life, which is a generic good protected in chapter XIX of the Penal Code, should be understood as the biological existence of man at every stage of his development, from conception to natural death. However, the legislator has stratified this protection due to the phases of human development. Legal and criminal protection of life begins with the emergence of life, that is, conception. From that moment on, the value of life of every human being cannot be differentiated according to the phases of its development and is subject to legal protection. Articles 148-151 and 155 of the Criminal Code protect human life from the beginning of childbirth, and separate provisions of Article 152-154 of the Criminal Code cover the protection of the life of the conceived child, in the prenatal period of development. The second generic legal good protected by the provisions of this chapter is the health of every human being.

The health protection order is based on the provisions of the Constitution of the Republic of Poland. The Constitutional Tribunal confirmed that the protection of life is connected with the guarantee of proper development, as well as obtaining and maintaining a normal psychophysical condition, appropriate for a given age. It includes a certain optimal, from the point of view of life processes, the state of the body of a person in terms of both physiological and mental functions. Such a state can be identified with the concept of psychophysical health [Grześkowiak and Wiak 2017, 312-11].

In statistical terms, crime against life and health is a small group of crimes, and in the structure of all registered crime in Poland it has a small, several percent share [Habzda-Siwek 2024, 181-202]. The following prohibited acts were analyzed: Article 148 of the Criminal Code, Article 156 of the Criminal Code, Article 157 of the Criminal Code and Article 158 of the Criminal Code. Referring to the numerical values in the case of Article 148 of the Criminal Code it should be pointed out that the number of murders committed in Poland remains at a similar level every year. The number of murders committed in 2004 was 790, while in 2024 – 517, which is a decrease by 35% in the total number of murders. However, looking at the average number of homicides over the period in question, it amounts to 634 people per year, which is a large number due to the categories of prohibited act. In the case of causing so-called serious damage to health specified in Article 156 of the Criminal Code year-on-year, a systematic decrease is recorded. The total number of offences in the category indicated in 2024 decreased by 63% compared to 2004, decreasing from 1,036 cases to 384. The decrease was also noted in the case of the crime of causing the so-called medium and light damage to health, i.e. the act of Article 157 of the Criminal Code. In this case, the number of crimes in 2024 compared to 2004 decreased by 45%, from 20,500 cases to 11,235. A significant decrease was also recorded in the case of the crime of fighting and beating as defined in Article 158 of the Criminal Code. In 2004, there were 14,849 cases, while in 2024 – 2,628, the decrease was 82%. The dynamics of changes in the discussed cases are presented in Table 5.

Table 5. Crimes against life and health – selected categories.

Qualification	148 criminal code			156 criminal code			157 criminal code			158 criminal code		
Year	**In total**	**citizens**	**%**	**In total**	**citizens**	**%**	**In total**	**citizens**	**%**	**In total**	**citizens**	**%**
2004	790	14	1,8%	10 36	4	0,4%	20 500	13	0,1%	14 849	54	0,4%
2005	720	4	0,6%	983	4	0,5%	19 736	22	0,1%	13 918	39	0,3%
2006	816	3	0,4%	1042	1	0,1%	19 646	17	0,1%	14 177	24	0,2%
2007	789	2	0,3%	927	1	0,1%	19 256	13	0,1%	13 520	24	0,2%
2008	748	7	0,9%	908	2	0,2%	19 519	8	0,04%	13 370	29	0,2%
2009	702	5	0,7%	800	1	0,1%	16 740	13	0%	10 687	41	0,4%

Qualification	148 criminal code			156 criminal code			157 criminal code			158 criminal code		
Year	In total	citizens	%	In total	citizens	%	In total	citizens	%	In total	citizens	%
2010	683	3	0,4%	779	2	0,3%	16 989	9	0,1%	10 390	26	0,3%
2011	684	4	0,6%	779	3	0,3%	16 989	14	0,1%	10 390	26	0,3%
2012	566	2	0,4%	853	1	0,1%	16 077	20	0,1%	9 434	17	0,2%
2013	603	7	1,2%	832	5	0,6%	16 935	24	0,1%	8 367	45	0,5%
2014	553	4	0,4%	734	2	0,3%	17 429	27	0,2%	7 128	59	0,8%
2015	506	4	0,8%	691	5	0,7%	16 421	37	0,2%	6 401	61	1,0%
2016	514	3	0,6%	647	2	0,3%	15 845	58	0,4%	5 863	106	1,8%
2017	557	9	1,6%	641	9	1,4%	15 674	80	0,5%	5 312	129	2,4%
2018	542	10	1,8%	602	9	1,5%	15 095	137	0,9%	4 741	169	3,0%
2019	600	24	4%	566	21	3,7%	14 413	143	1%	4 224	168	4,0%
2020	657	33	5%	483	15	3,1%	11 508	132	1,1%	3 176	169	5,3%
2021	605	43	7,1%	443	24	5,4%	11 277	145	1,3%	2 917	203	7,0%
2022	578	29	5%	566	22	3,9%	11 800	197	1,7%	3 025	172	5,7%
2023	571	40	7%	404	14	3,5%	11 901	243	2%	2 807	244	8,7%
2024	517	32	6,2%	384	24	6,3%	11 235	272	2%	2 628	218	8,3%

Source: Own elaboration based on data received from the Police Headquarters.

According to the data presented in Table 5, according to the information presented in the literature, it should be stated that the scale of the total number of prohibited acts in this category of prohibited acts decreases year by year. However, the data indicate that every year more and more crimes against life and health are committed by foreigners in Poland. In the case of the crime of murder Article 148 of the Criminal Code we are talking about a growth of 4.4% – where in 2004 there were 14 murders committed by foreigners, while in 2024 there were already 32. Regarding the number of perpetrators of a serious injury to health, the share of foreigners in the total number of perpetrators compared from 2024 to 2004 increased by 5.9%. However, the largest increase in the discussed period of time was observed among the perpetrators of the crime of fighting and beating where the increase was 7.9% the number of perpetrators among foreigners increased from 54 in 2004 to 218 in 2024, while reducing the number of all crimes committed in this category, that the mentality of foreigners in Poland has changed in the field of destructive behavior manifested by the possibility of making indications of crimes related to participation in a fight or beating another person.

Among the perpetrators of crimes against life and health, the largest group among foreigners were citizens of European countries located outside the EU – 3139 cases. In the indicated group, the most crimes were committed by citizens: Ukraine – 2053, Georgia – 418, Russia – 226, Belarus – 195 and Moldova – 131.

For EU countries there were – 543 cases: Asia – 302, North and South America – 42, Australia and Oceania – 3 and among the so-called stateless persons – 3.

The last group of prohibited acts given to the analysis are the so-called drug offences concerning the possession, trade and smuggling of narcotic drugs or psychotropic substances prohibited under the Act on counteracting drug addiction of 29 July 2005.[6] Drug crime is related to the supply of drugs. Marijuana and hashish continue to be the most popular and available drugs on the Polish market [Hołyst 2022, 333-25]. In Poland, we are seeing a steady increase in drug-related crime. Statistical data indicate, that in 2024, 35,017 preparatory proceedings were initiated in this area, which indicates an increase in the total number of cases conducted under the Act on counteracting drug addiction in relation to 2004 by 52.8%. The largest number of preparatory proceedings was initiated in 2023, where their number amounted to 37,709 and in 2022 – 37,572 cases. The development of crime in this area is set out in Table 6 below.

Table 6. Drug offences.

Qualification	**Drugs**		
Year	**In total**	**Citizens**	**%**
2004	16 519	63	0,4%
2005	18 194	94	0,5%
2006	20 772	86	0,4%
2007	19 056	69	0,4%
2008	19 340	81	0,4%
2009	20 260	107	0,5%
2010	20 832	97	0,5%
2011	22 940	117	0,5%
2012	23 025	109	0,5%
2013	25 061	262	1,0%
2014	29 065	221	0,8%
2015	30 643	244	0,8%
2016	31 013	341	1,1%
2017	32 600	503	1,5%
2018	31 023	657	2,1%
2019	34 388	1 018	3,0%
2020	34 065	1 069	3,1%
2021	36 054	1 450	4,0%
2022	37 572	2 282	6,1%
2023	37 709	2 621	7,0%
2024	35 017	2 007	5,7%

Source: Own elaboration based on data received from the Police Headquarters.

[6] Journal of Laws of 2023, item 1939.

The share of foreigners as perpetrators of drug crimes committed in Poland over twenty years increased from 0.4% in 2004 to 5.7% in 2024. The number of people committing the above-mentioned prohibited acts increased from 63 people in 2004 to 2,007 in 2024. The largest group were citizens of European countries outside the EU structure – 10,497 perpetrators, among them the largest group were citizens: Ukraine – 7,070, Georgia – 1,317 and Belarus – 1,258. The second group in terms of quantity were residents of EU countries, i.e. 1 905 people, including the largest group were citizens of: Czech Republic – 424, Germany – 417 and Bulgaria – 231. A significant increase among foreigners as perpetrators of crimes compared to the above category was recorded among citizens of Asian countries where 741 cases were recorded, the largest group were residents: Armenia – 157, Vietnam – 143, the largest group were residents, Azerbaijan – 112 and Uzbekistan – 77. Drug offences were also committed by residents of Africa – 202 persons, North and South America – 126, Australia and Oceania – 15 persons and 12 persons without any nationality.

Referring to the analyzed data, it should be noted that the share of foreigners among perpetrators of crimes has been constantly growing since 2004. Within twenty years, 86,371 people suspected of committing a crime were registered in the analyzed cases. These perpetrators came from a total of 148 countries, which proves that crime in Poland takes on an international dimension. The largest group among perpetrators of foreigners as perpetrators of prohibited acts were in total in the analyzed cases: Ukrainians – 45,615, Georgians – 9,338, Belarusians – 5,507, Germans – 2,693, Moldovians – 2,613, Russians – 2,441, Germany, Romanians – 1,988, Lithuanians – 1,838, Bulgarians – 1,664 and Czechs – 1,519. The diagnosed phenomenon requires further research in this area and taking action to develop multidisciplinary solutions aimed at counteracting the above-mentioned phenomenon.

CONCLUSIONS

Statistics clearly indicate that the share of foreigners among perpetrators of prohibited acts in Poland is constantly increasing, which results directly from the increased migration of the population to our country. In the context of security, an important element is the use of knowledge in this area to ensure a proper level of internal security of the state. A key element in this respect could be the so-called preventive measures that would reduce the risk of violations of the law by foreigners and contribute to their better adaptation in Polish society. On the basis of the analyzed data, we know which migrants most often commit prohibited acts, which is why it would be important to undertake future research aimed at determining the reason for which the above-mentioned persons commit crimes. Expanding research

will enable understanding of the problem and then introducing appropriate actions. Paying attention to the scale of the phenomenon, it should be considered reasonable to take action to improve the registration and record of foreigners in Poland, increasing international cooperation with the governments of the countries from which the largest number of people migrate annually to identify potentially dangerous people, increasing the control of the legality of stay and employment of foreigners in Poland, developing adaptation systems through the creation of integration programs enabling efficient professional and cultural adaptation of migrants. Due to the fact that people of different nationalities came to Poland, the construction of a multidimensional system would allow for effective migration management and minimize the risk of crimes committed by foreigners.

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MATER SEMPER CERTA EST? HUMAN RIGHTS VIOLATIONS IN SURROGACY ARRANGEMENTS

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Abstract. Surrogacy is a complex and controversial practice that has sparked widespread debate across a broad ideological spectrum. Proponents argue that surrogacy can fulfill the desires of individuals and couples seeking parenthood while affirming the contractual autonomy of the surrogate mother. In contrast, detractors raise significant ethical, legal, and human rights objections. This article critically examines the primary arguments from both perspectives, with particular emphasis on the ancient legal principle *mater semper certa est* within the context of modern surrogacy arrangements. The analysis reveals that surrogacy not only undermines the principles governing parenthood, particularly maternal identity, but also raises serious physical, psychological, and legal risks to both the surrogate mother and the child. Additionally, surrogacy involves the commercialization of the mother's body and the commodification of the child. These risks, coupled with contractual conditions that are often detrimental to the welfare of the surrogate mother, render the practice fundamentally at odds with human rights principles. Ultimately, the article argues that these risks and harms are too significant to overlook and that, rather than empowering women, surrogacy exploits their vulnerability, thereby undermining women's rights and dignity.

Keywords: surrogacy; vulnerability; human rights; child commodification; commercialization of motherhood.

INTRODUCTION

On April 5, 2024, during the second Casablanca Declaration conference in Rome, Swedish journalist and left feminist Kajsa Ekis Ekman noted: "When Catholics, Protestants, feminists, and Marxists agree on something, you know it's bad" [Faust 2024]. This statement highlighted the broad consensus against surrogacy, evidenced by the Declaration's 100 signatories from 75 nationalities, advocating for a worldwide ban.[1]

Surrogacy, emerging with technologies like IVF, profoundly impacts social, legal, and ethical spheres, involving a contractual agreement between

[1] Declaration of Casablanca for the Universal Abolition of Surrogacy (03.03.2023), https://declaration-surrogacy-casablanca.org/text-of-declaration/ [accessed: 07. 29.2024].

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a woman and a client, usually a couple, whereby the surrogate accepts to become pregnant through assisted reproduction, carry the pregnancy to term, and then relinquish all parental rights to the child once born.[2]

It is a practice that is often seen as contentious from religious or conservative viewpoints. Nevertheless, opposition to surrogacy extends beyond these circles, with many feminists also voicing strong objections. In fact, there is considerable debate among feminists about whether surrogacy represents a new reproductive freedom or simply another means of exercising social control over women's reproductive capacities. While some argue that surrogacy should be an available choice for women [Shalev 1989, 11-12], a significant number of feminists, on the other hand, view it as a form of exploitation, likening it to slavery or prostitution [Allen 2018, 782].

Contemporary feminist critiques of surrogacy are multifaceted and focus on three main areas: health risks to the surrogate mother, potential risks to the child, and the symbolic societal harm of commercializing reproduction. Additionally, there are concerns about the practical links between surrogacy and human trafficking, suggesting that surrogacy could be a gateway to the exploitation of vulnerable women [Andrews 1990, 167-69]. Notable feminist voices include Gloria Steinem and Julie Bindel, who have both criticized surrogacy vigorously. For instance, in June 2019, Steinem opposed a New York State Assembly bill that would have legalized paid surrogacy, arguing that it reduces women to "vessels for rent" while the fetuses they carry become the property of others. Similarly, Bindel denounced the surrogacy industry as reproductive prostitution: "for everyone who has the means to pursue surrogacy, including gay couples, adoption is also an option. Nobody has the right to a biological child, regardless of their sexuality or sex. The use of impoverished women's bodies for the benefit and convenience of those claiming parenthood as 'their human right' is anathema to women's liberation" [Bindel 2023].

Furthermore, in the legal realm, surrogacy is also a very divisive issue at the national and international levels, and its implications are complex and require careful examination from both human rights and family law perspectives.

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[2] A significant majority of children born through surrogacy arrangements – estimated at 98% to 99% (Committee on Social Affairs, Health and Sustainable Development) – result from commercial surrogacy, warranting a focus on this category. Even when legally designated as altruistic, such arrangements frequently operate in a commercial context due to substantial compensation for specific expenses that can exceed the overall cost of surrogacy. Additionally, variations in the interpretation of "reasonable" compensation can lead to concealed payments that resemble commercial practices. Consequently, altruistic surrogacy frameworks often display characteristics of commercial surrogacy, thereby complicating the practical distinction between the two. See Committee on Social Affairs, Health and Sustainable Development, *Children's rights related to surrogacy*, Ms. Petra De Sutter, 14140/23.09.2016, https://pace.coe.int/en/files/23015/html [accessed: 07.29.2024].

1. THE COMPLEXITY OF LEGAL PARENTAGE DETERMINATION

Filiation presents one of the most intricate challenges in contemporary law, as it confronts various assumptions and paradigms. Unlike other species, human filiation is not solely biological but encompasses genetic, epigenetic, affective, cultural, and voluntary aspects, all of which must be legally recognized. For instance, Article 24(2) of the International Covenant on Civil and Political Rights (ICCPR) states, "Every child shall be registered immediately after birth and shall have a name," thereby establishing their right to an identity through paternal filiation.[3] Moreover, the Convention on the Rights of the Child (CRC), along with the Council of Europe, and the Inter-American Court of Human Rights jurisprudence evince a clear inclination towards the biological-genetic paradigm.[4] In fact, the rule of determination by childbirth is the most "conventional" – in accordance with current interpretation of the Conventions – of all the rules of determination and is the foundational premise upon which decisions pertaining to the protection of the family are made, although modern family structures may challenge these traditional conceptualizations.

Furthermore, in cases where contemporary law presents challenges to the concept of filiation due to the disintegration of identity, judges are faced with the difficult task of determining which parent is effectively "silenced" and which one is given prominence [Basset 2016]. This phenomenon is not entirely new; the deprivation of parental authority silences a parent in their role, as does adoption, wherein an adoptive parent is legally constituted rather than biologically related. In both instances, the law prioritizes the child's protection, stripping the biological progenitor of their associated rights without denying their biological role. Additionally, advancements in science have further complicated filiation, introducing the concept of "collaborative parenthood," where multiple intended parents, including biological, gestational, and social parents, may contend for legal recognition. Consequently, the law or a judge's ruling must determine which parent is removed from the identity chain and which one assumes the parental role, potentially at the expense of another.

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[3] International Covenant on Civil and Political Rights, United Nations General Assembly Resolution 2200A (XXI), 16 December 1966.

[4] Although the European Court of Human Rights has addressed issues related to surrogacy – such as the child's right to identity or nationality, and the recognition of foreign birth certificates or legal parentage in countries that prohibit such practices – it has not yet examined the establishment or recognition of legal parentage *per se* in a surrogacy case. In any event, in ruling on the aforementioned issues, it has allowed solutions that come into conflict with States' legitimate concerns regarding its domestic law, the protection of children from human trafficking and compliance with the rules on international adoptions

In order to translate real filiation into legal filiation, the law requires multiple elements, not just the will of the parties involved. Specifically, family legal relationships are not contractual, even when formed by the mutual will of two persons, such as in acknowledged parentage. Indeed, the biological bond remains the fundamental premise upon which the legal bond is established. For instance, presumptions – such as the husband being presumed the father – align the biological link with the legal link, emphasizing that will alone is not determinative. In this context, the will is granted legal authority because it generally corresponds with biological reality.

Filiation, however, is more than just biological; it is a complex fact involving multiple dimensions that ideally coincide harmoniously for the child's benefit. This complexity requires a strong point of legal connection to ensure its positive and lasting impact on the child's life. When the unity between biological and other determinants of filiation is broken, jurists must identify the connection that offers the most substantial pre-existing and real bonds – whether genetic, biological, personal, or factual – while ensuring the most durable and effective support for the child.

Therefore, making the notion of procreative will an autonomous and sufficient cause for determining filiation is problematic. This is primarily because it shifts the focus to a contractual relationship between adults, wherein the intended parents decide the child's filiation through a contract. In this scenario, the child's rights become secondary, treated as an afterthought once the adults have exercised their procreative rights. Consequently, this approach places the adult's right to procreate above the child's best interests, which are only considered after the consummated fact. This perspective contradicts the principles that should govern filiation law, where the child's rights are paramount, shaping all rules and limiting parental will in the child's interest.

Analyzing rights through the lens of desire and contracts inherently prioritizes adult rights over those of children, thereby undermining the essential principles needed to balance the power disparity between parents and children. Consequently, this approach legitimizes adult choices without sufficient scrutiny, which may lead parents – motivated by their desire to become parents – to place the child in confusing and legally uncertain situations. Ultimately, when desire governs the law, it risks treating the child as an object of consent and contract, rather than prioritizing the child's inherent rights and best interests.

2. WHO IS THE MOTHER?

For centuries, the principle that a child's parentage is always determined by its mother has been a civil dogma, encapsulated in the Roman legal

principles: *mater semper certa est* (the mother is always certain) and *partus sequitur ventrem* (the offspring follows the womb). However, the rule that maternity is established simply by proof of birth and the identity of the newborn is losing its universality. In this context, modern science challenges jurists to determine who the mother is in complex cases, such as when a woman gives birth without intending to raise the child or when a child is conceived from a fertilized egg implanted into a different woman.

In light of these developments, the American landmark case *Johnson v. Calvert*,[5] established three tests for determining filiation: the genetic test, the gestational test, and the intent test. Specifically, in cases where a *genetic test* is conducted, paternity is typically ascribed to the genetic parent, according to the question of who provided the genetic material. Nevertheless, in assisted human reproduction, the genetic test alone does not determine filiation, as it would otherwise render gamete donors the legal parents. The *gestational test* considers the impact of gestation on a child's identity, asking who carried and gave birth to the child. This is based on scientific evidence that shows that gestation affects the expression of genes and causes significant changes in the child, making the gestational mother an active factor in the child's identity. For example, research reveals substantial cellular exchanges between maternal and fetal blood, with fetal cells found in the brains of pregnant women [Chan, et al. 2012; Martone 2012]. This exchange, along with epigenetic changes, underscores the gestational mother's integral role in shaping the child's identity [Klonisch and Drouin 2009]. In other words, the determination of filiation by childbirth is not arbitrary; rather, it is based on a factual foundation. Therefore, the gestational test shows that every child is entitled to a relationship with their gestational mother, regardless of the circumstances of conception, including in the case of adoption.

The *intention test* establishes filiation based on the intention expressed by the intended parents, in accordance with legal formalities. At its core, the central question is: who chooses to become a parent? Importantly, this intention must be current and demonstrate factual viability. However, relying solely on the will as the determining factor contradicts the principle of proportional equality of filiations, which ultimately undermines the foundational premise of filiation law – limiting parental autonomy in determining a child's identity. By contrast, filiation by nature exists independently of an individual's will, whereas adoption represents a different paradigm where the will cannot override the natural order. Furthermore, the shift toward the will as the sole determinant of filiation creates an imbalance, allowing parents – who are already the strongest party in the legal relationship – to unilaterally decide who their child is, beyond all other considerations.

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[5] Judgment of the California Supreme Court, *Johnson v. Calvert* 5 Cal. 4th 84 (1993), https://case-law.vlex.com/vid/johnson-v-calvert-no-892732447 [accessed: 31.07.2024].

Today, however, there is a growing recognition that no single institution has comprehensive autonomy in filiation law. Instead, all relevant factors – including genetic, gestational, and social ones – must be considered in accordance with the principle of the child's best interest in each case. When the continuity of these elements is disrupted, the judge's role becomes that of an identity seeker, tasked with identifying connections determined by factors such as genes, gestation, *de facto* relationships, intentions, and experiential filiation. Ultimately, the judge's responsibility is to discern and establish links between these elements, not to create filiation itself.

3. STRONG VOICES FOR AND AGAINST SURROGACY

Understanding surrogacy requires a comprehensive analysis of the arguments from the perspectives of the intended parents, the surrogate mother, and the children born through surrogacy. Each party has distinct views and concerns, which are crucial for a well-rounded discussion on the topic.

3.1. Arguments in favor of Surrogacy

A) Intended Parents

Surrogacy is often justified by the principle of reproductive autonomy. This principle asserts that individuals and couples should have the right to pursue reproductive options when natural conception is not possible or practical. For many, medical conditions like infertility, pregnancy complications, or high-risk pregnancies make traditional methods unfeasible. Surrogacy also offers single individuals or same-sex couples an alternative path to achieve their family-building goals. Intended parents also ground their claim for surrogacy on the principle of contractual freedom. It is argued that the surrogacy agreement can be structured in a manner that respects the wishes and rights of all parties involved, thereby supporting their reproductive goals while ensuring mutual consent and fairness.[6]

B) The Child

Supporters of surrogacy argue that it reflects the intended parents' strong committment to raising a child. They view the careful planning involved,

[6] Among other aspects, it is difficult to consider that in such agreement exists a fully informed consent because, among many other elements, "the surrogate cannot preemptively consent because she would have insufficient information to understand how she feels about the progression of the pregnancy, how she begins to emotionally bond with the fetus, and how her connection to the fetus may impact or change her previously held notions related to screening and diagnosis, or bearing a child with a disability" [Drabiak-Syed 2011, 560].

from choosing a surrogate to preparing for the child's arrival, as evidence of the parents' dedication and intentional approach to building a family.

c) The Surrogate Mother

Surrogacy is regarded as an empowering choice for women who voluntarily and with full knowledge of the facts opt to become involved in the process. They receive a financial compensation for their time, effort, and the medical procedures involved that can be a significant factor, providing economic support for the surrogate and her family. This reward, along with comprehensive medical care, is seen as a fair exchange for their considerable physical and emotional commitment.

3.2. Arguments Against Surrogacy

A) Intended Parents

Surrogacy agreements can be legally complex, especially in areas with unclear or restrictive laws, potentially leading to disputes over parental rights and contract terms. These legal uncertainties can hinder intended parents' ability to secure their parental rights and result in prolonged legal battles. Additionally, the significant financial costs of surrogacy, including medical expenses, legal fees, and compensation for the surrogate, can place considerable financial strain on intended parents, especially if unexpected complications arise.

B) The Child

Children born through surrogacy, particularly via IVF, face a range of significant health risks. To begin with, research reveals that only about 7% of embryos created through IVF result in live births, with many embryos being discarded or failing during thawing and transfer [Doughty 2012]. Moreover, surrogacy is linked to higher rates of premature birth and low birth weight, which often lead to immediate complications such as respiratory distress, feeding difficulties, infections, and jaundice. In the long term, these children may experience developmental delays, learning disabilities, chronic conditions like asthma, and vision or hearing problems. Low birth weight is also associated with heightened risks of neonatal mortality and future health issues, including cardiovascular disease and diabetes [Schieve, et al. 2002]. Furthermore, assisted reproductive technologies (ART), amplify the likelihood of genetic and developmental abnormalities [Pinborg, et al. 2023]. In some cases, correlated with a higher incidence of genetic mutations and imprinting disorders, potentially resulting in congenital malformations and developmental delays. Children conceived through ART are also more susceptible to developmental disorders, such as autism spectrum disorder.

In addition to these health concerns, surrogacy often complicates access to critical genetic and medical information, essential for managing health risks and making informed decisions. This absence of information can affect a child's understanding of their health and family history, further affecting the lives of future generations. Moreover, disputes between the surrogate and intended parents regarding pregnancy management decisions – such as whether to proceed with an abortion – can have direct consequences for the child.

Psychologically, children born via surrogacy may also struggle with understanding their genetic origins and identity, especially when donor gametes are involved. The separation from the surrogate and the lack of a clear genetic link to their social parents can lead to confusion and emotional distress [Golombok, et al. 2013]. Studies suggest that a lack of information about genetic background can result in adjustment difficulties and genealogical bewilderment [Chisholm 2012, 734].

From a human rights perspective, international frameworks, such as the UN Convention on the Rights of the Child (CRC), emphasize the child's right to know their parents and their identity. In fact, the UN Special Rapporteur on the Sale and Sexual Exploitation of Children highlighted in 2019 that surrogacy disrupts the connection between genetic, gestational, and social parenthood, thereby impacting the child's sense of identity [Trimmings, et al. 2024, 108].

Moreover, the process of being carried by a surrogate and subsequently raised by intended parents can affect the child's attachment and bonding [Allen 2018, 780]. Confusion over who the "real" mother is – whether it be the biological mother, the surrogate, or the intended mother – can create emotional conflict. Finally, the inherent commodification of surrogacy can have a detrimental effect on a child's sense of self-worth and identity. Being viewed as the product of a transaction may lead to feelings of being valued only for fulfilling the desires of others. Furthermore, practices such as pre-implantation genetic testing can reinforce eugenic attitudes, placing undue pressure on the child to meet certain selected traits, ultimately affecting their self-esteem and sense of belonging in society.

C) The Surrogate Mother

Surrogacy commodifies the female body by reducing it to a mere vessel for reproduction, ultimately undermining the dignity and autonomy of women. In this context, a deeply personal experience is turned into a commercial transaction. As Allen argues, "Forfeiture of the powerful bonds between mother and child through surrogacy contracts constitutes extreme alienation – it is an 'invasion of the market' in a deep, very private realm." This is because the womb should not be treated as "raw material." Furthermore, studies indicate that many women perceive themselves

as mothers to the baby they carry, regardless of genetic ties. The gestational bond, in their minds, is as significant as a genetic one [Allen 2018, 777].

Moreover, surrogates, especially those from lower socio-economic backgrounds, face substantial risks. Financial pressure frequently forces them to prioritize immediate economic needs over genuine willingness, which compromises their ability to provide informed and voluntary consent. In addition, power imbalances between surrogates and intended parents or agencies make negotiating terms or withdrawing from contracts challenging. This often leads to restrictive agreements that limit their rights and access to adequate healthcare. Particularly in international surrogacy, where wealthier clients engage with low-income surrogates, these risks become even more pronounced. Severe power imbalances, insufficient legal protections, and complex cross-border legal issues significantly heighten the chances of exploitation, reducing surrogates to instruments of reproduction with little regard for their rights or well-being.

From a health perspective, according to the Center for Bioethics and Culture, surrogacy poses significant risks to pregnant women. These include complications from multiple embryo transfers, gestational diabetes, fetal growth restriction, pre-eclampsia, and premature birth [Kamphuis, Bhattacharya, van der Veen, et al. 2014, 2]. Additionally, gestational surrogacy often involves donor eggs, which carry higher risks than using the surrogate's own eggs. Postpartum challenges, such as the inability to breastfeed, also affect the surrogate's health. In the long term, the effects of hormonal treatments and surgical procedures may result in mood disturbances, blood clots, and more severe conditions such as ovarian hyperstimulation syndrome or hormone-related cancers, all of which impact overall health and future fertility.[7]

Emotionally, surrogacy can also be highly challenging. Surrogates may face psychological distress after separating from the child they carried, especially if they develop a strong emotional bond during the pregnancy. The emotional complexity of surrogacy, including potential conflicts with the intended parents and feelings of loss, can have significant repercussions on a surrogate's mental health. Moreover, privacy concerns arise as surrogates must share personal medical and emotional information, which can lead to discomfort and feelings of intrusion.

In conclusion, surrogacy raises profound ethical, social, and health-related concerns. Taken together, these issues reveal the potential for long-term harm and prompt serious questions about the protection of women's and children's human rights.

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[7] See *Three Things You Should Know About Surrogacy*, https://cbc-network.org/wp-content/uploads/2022/02/3_Things_You_Should_Know_About_Surrogacy-Center_for_Bioethics_and_Culture.pdf [accessed: 08.01.2024].

4. SURROGACY AND HUMAN RIGHTS

The principle of human dignity underscores a crucial distinction between people and objects, emphasizing that humans possess inherent worth that cannot be reduced to mere economic value. Unlike objects, which can be priced and traded, individuals are recognized as subjects with intrinsic dignity. In this sense, people should be treated with respect and acknowledged as ends in themselves, rather than simply as means to an end. This principle forms the cornerstone of human rights frameworks, which aim to safeguard individuals' intrinsic value, irrespective of their economic or social standing. Moreover, human dignity demands that individuals be treated in ways that transcend commodification, which is particularly relevant when considering surrogacy. Despite any arguments for economic compensation, surrogacy raises profound ethical and legal issues due to its contractual nature regarding the use of the human body. In fact, validating surrogacy sets a troubling precedent, potentially opening the door to the commercialization of human organs, prostitution, or other forms of exploitation. This challenges us to consider why similar arrangements, like organ donation, should not be permitted under the same rationale. For instance, if a woman can autonomously choose to become a surrogate, the same logic would suggest she should also have the autonomy to donate organs, such as kidneys or bone marrow. Yet, while surrogacy proponents emphasize "voluntary, informed, and supportive" choices, accepting surrogacy under these terms might lead to a dangerous slippery slope, where other practices involving bodily autonomy could be similarly justified.

Historically, concerns about the commercialization and exploitation of human bodies have been met with strong resistance. This is reflected in the European Parliament resolutions of April 5, 2011, and December 17, 2015, which condemned surrogacy for undermining human dignity by commodifying women's bodies. Notably, these resolutions emphasized that surrogacy, especially when driven by financial motives, should be banned due to its association with trafficking and illegal adoption. Similarly, the Parliamentary Assembly of the Council of Europe rejected a 2016 report proposing surrogacy guidelines, reinforcing its opposition to the practice. More recently, on April 23, 2024, the European Parliament classified surrogacy exploitation as a minimum case of trafficking, comparing it to slavery and forced prostitution, highlighting the severity with which European institutions regard this practice.[8]

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[8] *Trafficking in human beings: MEPs adopt more extensive law to protect victims*, https://www.europarl.europa.eu/news/en/press-room/20240419IPR20580/trafficking-in-human-beings-meps-adopt-more-extensive-law-to-protect-victims [accessed: 07.29.2024].

A major objection to surrogacy is that it reduces a natural biological function – pregnancy – to a commercial contract, a view that fundamentally conflicts with the concept of personal dignity as protected by human rights. Accordingly, Article 21 of the Convention on Human Rights and Biomedicine asserts that "the human body and its parts shall not, as such, give rise to financial gain." This clause underscores that the uterus should not be viewed merely as a biological incubator. Instead, it represents a woman's unique ability to nurture and connect with the conceived child in an irreplaceable continuum. The intrinsic value of the human body and its natural functions goes far beyond commercial concerns, demanding respect for the natural processes involved in human reproduction.

Supporters of surrogacy often compare it to ART, which are legally accepted in many regions. However, while ART also raises legal and ethical concerns, equating it with surrogacy is misleading. Specifically, although surrogacy and heterologous reproductive technologies (HRT) both involve third parties, their roles differ significantly. In HRT, third parties contribute in a limited, one-time manner, with sperm or eggs being often fungible and interchangeable. In contrast, surrogacy requires the selection of a specific woman to carry an embryo, thus involving her in a continuous and personal commitment. Therefore, the surrogate's role spans from embryo implantation through gestation and childbirth, with her involvement being integral and extensive. Unlike ART, where contributions are isolated and temporary, surrogacy entails ongoing physical, psychological, and emotional engagement, encompassing all associated risks and personal implications.

Moreover, surrogacy serves as a prominent example of the commercialization of motherhood by reconfiguring the reproductive process into a commercial transaction. In this context, the Note by the Secretariat in the Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children highlights that the justifications for commercial surrogacy might endorse illicit practices in other domains, such as adoption. Consequently, if it were to become legally accepted – whether as international or national law, or through recognition principles – it would undermine established human rights norms and standards. Nevertheless, proponents of commercial surrogacy contend that frameworks similar to those rejected in the context of adoption should be adopted for surrogacy. They argue that surrogacy functions as a market-driven system designed primarily to meet adult demands for children, with parentage being defined through contractual agreements.[9] However, this commodification of surrogacy raises significant

[9] UN General Assembly, Human Rights Council, 37th session, 26 February-23 March 2018. Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, no. 27, https://documents.un.org/doc/undoc/gen/g18/007/71/pdf/g1800771.pdf [accessed: 10.08.2024].

concerns, including the risk of developing black markets, the exploitation of economically disadvantaged women, and the potential for selective breeding for financial gain. Indeed, the commercialization of surrogacy raises serious issues about the commodification of women's bodies, as surrogacy contracts often involve substantial financial transactions, with operating agencies deriving significant profits.[10]

Furthermore, surrogacy contracts reveal a significant power imbalance between the intended parents and the surrogate. Typically, key provisions require the surrogate to relinquish all parental rights to the child immediately upon birth, thereby ensuring that the intended parents become the sole legal guardians with full authority over their upbringing, education, healthcare, and other important decisions. Thus, by relinquishing her rights, the surrogate agrees not to seek custody or visitation, thereby ending her legal ties to the child. Importantly, this relinquishment is typically final and irrevocable, preventing the surrogate from changing her mind or seeking a legal relationship with the child later.[11] In any case, the prospect of financial consequences, combined with the lack of resources to secure independent legal counsel, may influence surrogate mothers who are reluctant to adhere to certain contractual provisions, regardless of how abusive they may be of their rights.

Another key provision is the requirement for the surrogate to waive her right to confidentiality, granting the intended parents unrestricted access to her psychological and medical information. Additionally, the surrogate must also waive her doctor-patient privilege, which allows intended parents and associated parties to review her medical records throughout the pregnancy. The contracts typically impose strict restrictions on the surrogate's intimate relations, requiring her and any partners to undergo medical screening for sexually transmitted diseases if she engages in intimate relations during the surrogacy process.[12] Furthermore, the intended parents have absolute rights to request an abortion or selective reduction of fetuses, without needing to justify these decisions to the surrogate.[13] Moreover, in cases where the sur-

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[10] The global surrogacy market was valued at USD 22.4 billion in 2024 and is expected to grow at a compound annual growth rate of more than 24.5% from 2025 to 2034, https://www.gminsights.com/industry-analysis/surrogacy-market [accessed: 10.08.2024].

[11] Unlike adoption, surrogacy does not grant the gestational mother the right to keep the child she is carrying, a principle often referred to as the "right of repentance" and frequently enshrined in international law (see, for example, Article 5(5) of the European Convention on the Adoption of Children, https://rm.coe.int/1680084823 [accessed: 07.29.2024]). The lack of symmetry or proportionality between the gestational mother's right to retain her child in adoption and the absence of such a right in surrogacy is clearly evident.

[12] See Lahl 2017. For details on the contract content, sample gestational surrogate contracts are readily available online.

[13] "Surrogate specifically agrees to terminate prior to eighteen weeks at the election and discretion of the Intended Parents. With the exception of termination based on

rogate's life support is necessary to sustain the pregnancy, the intended parents are given the authority to make decisions about the duration of life support, prioritizing the well-being of the fetus. If the surrogate breaches the contract, she may be required to return any fees received and could be held financially responsible for the care of any child born as a result of the breach.[14]

The rights of children born from surrogacy arrangements are also a significant concern. The rationale for surrogacy is predicated on a hypothetical "right to filiation," which is fundamentally distinct from the "right to procreation." The latter is a natural human right encompassing the freedom to reproduce and make decisions regarding whether to have children or not. However, this right does not guarantee specific outcomes, such as the birth of a child. The concept of a "right to a child" implies an entitlement to have offspring regardless of the means by which the child is conceived or born, which results in treating children as commodities rather than respecting their inherent rights and needs. Consequently, this approach undermines the child's status as a subject of rights, reducing them to an object of adult desires. Furthermore, surrogacy agreements often reveal a primary focus on obtaining a live child, suggesting that the true object of the contract is the procurement of a live and healthy child itself rather than just the gestational services. Evidence for this assertion is found in the fact that the majority of surrogacy agreements include a clause stipulating a minimal compensation in the event of a miscarriage or stillbirth This perspective highlights the problematic nature of treating children as commodities.

The global surrogacy market exploits economic vulnerabilities and includes elements of eugenics, with advertisements promoting children with desirable traits. Indeed, media outlets that promote clinics and agencies often include images and photographs of children, along with detailed information

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gender selection, which will not be permitted, the right of the Intended Parents to request termination/abortion is absolute and does not require any explanation or justification to the Surrogate, including but not limited to if any genetic abnormality or defect has been determined such as cerebral palsy or Down syndrome." "The Intended Parents reserve the ultimate and sole legal right to selectively reduce before the completion of twenty (20) weeks of gestation […]. The Intended Parents have the sole right to determine the number of fetuses to selectively reduce taking into consideration the recommendation of the Surrogate's treating physician […]. The right of the Intended Parents to request a selective reduction is absolute and does not require any explanation or justification to the Surrogate" [ibid.].

[14] "Surrogate understands and agrees that she will surrender any fees received, any future fees and may be liable for damages resulting from breach of this Agreement. Surrogate understands and agrees that reimbursable costs may include but not be limited to the following list of items: IVF Fees, Agency Fees, Attorney's Fees, Medications and Travel Expenses. Surrogate also understands that she may be liable for care and costs for a child born, until that child reaches the age of 18, if the child is born due to a breach of the section X (Abortion/Selective Reduction/Termination) of this agreement" [ibid.].

on prices, in their advertisements. These images and photographs often feature the children alongside the genetic and gestational mothers, with whom the clinics and agencies promise specific results and economic benefits, respectively. As Allen notes, citing Radin, "'[w]hen the baby becomes a commodity, all of its personal attributes – sex, eye color, predicted IQ, predicted height, and the like – become commodified as well.' If children are already manufactured anyway, why not manufacture them with desirable characteristics and specifications? Why not produce children who are more, not less, perfect? The 'quality control' aspect inevitably rears its ugly head once children are commoditized" [Allen 2018, 791].[15]

As Tieu explains, it is irrefutable that the child is the primary loser when surrogacy does not proceed as planned. Given the unique nature of surrogacy arrangements, disputes over custody are inevitable due to the child's placement in an unusual family structure with multiple family groups. For instance, what happens if there is reluctance or refusal to honor the original surrogacy agreement? What recourse is available if the surrogate mother or commissioning parents no longer wish to become parents? Such complications can lead to unfavorable outcomes, including litigation and custody disputes, which are detrimental to the child's best interests. Furthermore, surrogacy is associated with a high incidence of abortions, as intended parents may terminate the pregnancy more easily due to their lack of biological connection with the child and the surrogate mother's relinquishment of her right to decide. In gestational surrogacy arrangements, the increased likelihood of multiple births could also lead to contractual disputes if the contracting couple intended to have only one infant [Tieu 2009, 171-72].

It can be posited that the argument against the disruption of the mother-child bond in the context of surrogacy is also applicable to instances of mothers placing their infants for adoption. The fundamental distinction is that the surrogacy is an intentional decision to relinquish a child to a commissioning couple without the child's welfare being the paramount consideration. In contrast, adoption is a process of "rescuing" a child from difficult circumstances, and therefore, the child's welfare is of paramount importance. In fact, the decision to place a child for adoption is never taken lightly and is fundamentally based on the principle of the child's best interests. Ultimately, adoption is a matter of identifying the optimal outcome for the child, particularly

[15] See also notes 279-81 of Allen's article. The growing number of mobile applications exemplifies the commodification of children, with the app "Just a Baby" highlighting this trend. Its keywords – "swipe-match-connect" – and its name emphasize the objectification of children and the commercial intent behind these operations. Users can browse photos and profiles to find donors and surrogates that match their preferences, with certain characteristics commanding higher market values, such as those of Ivy League-educated donors or individuals with specific talents or appearances [ibid., 793, quoting Spar 2006, 81].

given the unfortunate circumstances, which are often irreversible. The fundamental distinction is that the surrogate mother and the commissioning parents have made a deliberate and conscious decision, prior to conception and birth, to give the child to the commissioning parents; the primary objective is not the welfare of the child but to satisfy the wishes of the intended parents. As a result, a child born from surrogacy can be expected to have the same problems as an adopted child, plus those unique to surrogacy.

CONCLUSION

The phenomenon of surrogacy, while often framed as an act of altruism and the fulfillment of parental desires, raises profound ethical and legal concerns that cannot be overlooked. For instance, the cases of high-profile individuals such as Elon Musk, Nicole Kidman, and Elton John, who have utilized surrogacy to become parents, underscore the necessity for a critical examination of this practice. Surrogacy contracts and available data indicate that participants in such arrangements are aware of their departure from established norms of parenthood, resulting in complex ambivalence regarding their parental and familial roles. This complexity is particularly evident for surrogate mothers, who endure significant psychological and physical burdens associated with pregnancy, childbirth, and the eventual relinquishment of the child. Moreover, the practice of surrogacy fundamentally fails to prioritize the child's welfare, which is often subordinated to the desires of the commissioning parents.

In this context, the Hague Conference on Private International Law has been engaged since 2015 in developing a draft international convention aimed at regulating the complexities of parentage in surrogacy arrangements, but not at abolishing the practice.

Given this backdrop, the signing of the Casablanca Declaration represents a significant and commendable step, as it advocates for the absolute prohibition of surrogacy – an action crucial for upholding the dignity of surrogate mothers and safeguarding the rights of children. Ultimately, in a society increasingly disconnected from nature and the common good, it is imperative that the law upholds the inherent dignity of all parties involved. Only an absolute ban on surrogacy would accomplish this objective.

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ON THE NEED TO CONSIDER THE POSSIBILITY OF DIRECT REDRESS AGAINST SUBCONTRACTORS IN SELECTED SERVICE CONTRACTS

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Abstract. The article discusses the issue of subcontracting in service contracts, with particular emphasis on the possibility of direct redress by creditors against subcontractors. Polish civil law stipulates a rule according to which the creditor may seek redress only from the debtor but not from subcontractors. Exceptions to this rule are provided for in few provisions (Article 738(2) or Article 840 CC) that introduce joint and several liability of the debtor and the subcontractor. In practise, this means that the creditor may directly pursue claims also from the subcontractor. International transport law has also adopted a measure of joint and several liability of the debtor (contracting carrier) and its subcontractor (operating carrier) for damage caused by the latter, allowing creditors to pursue claims directly from subcontractors. Such a measure shortens the settlement process, increases the efficiency of pursuing claims and introduces clarity in the debtor-subcontractor relationship. It reduces the risk of insolvency of the debtor, and in many cases allows him to avoid involvement in the dispute. At the same time, the author emphasises that the joint and several liability of the debtor and the subcontractor does not compromise the situation of the subcontractor. In the event that the debtor and the subcontractor are jointly and severally liable, the debtor's claim is regressive, it arises only after payment of compensation to the creditor, which prevents the debtor's enrichment at the expense of the subcontractor. In addition, this proposal reduces the number of lawsuits, thus cutting the time and costs associated with pursuing claims. In conclusion, the author proposes that similar measures be introduced to Polish civil law in a broader scope for certain service contracts. He sets out conditions for the joint and several liability of the debtor and his subcontractor, indicating the need to strike a balance between the interests of the creditor, the debtor and the subcontractor.

Keywords: subcontracting; joint and several liability; redress.

INTRODUCTORY REMARKS

Service contracts are among contracts in which the use of other persons (subcontractors and auxiliaries) in their performance is very frequent. This applies in particular to contracts such as a specific work contract, a construction contract, a contract of mandate and a service contract, to which

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the provisions on mandate contract apply (Article 750 of the Civil Code[1]), a contract of carriage or a forwarding contract, in particular, in transactions between traders. This is the result of a deepening specialisation, as well as a significant differentiation of entrepreneurs of the same industry in economic and organisational terms. Entrepreneurs with greater economic potential have wider opportunities to attract customers. Their rates are higher and thus they can use the services of other, usually smaller and cheaper, entrepreneurs when performing their obligations. Other reasons for recourse to subcontractors' services are also at stake, such as restrictions on the availability of infrastructure (especially in the railway or aviation industry), as well as regulations on providing services in a specific territory.

Situations where the subcontractor or the auxiliary fails to perform his obligations or performs them defectively give rise to significant legal problems. The need to pursue claims for damages in the order resulting from the chain of contracts executed prolongs the settlement process. There are also doubts regarding the nature of claims (independent, repayable) due to the debtor responsible for non-performance or improper performance of the obligation against his subcontractor or auxiliary who is the perpetrator of this breach of the contract. Premises for such claims and the subject matter of their limitation are disputed.

Regulations of the issues referred to above are accommodated in special rules that refer to certain types of contracts. Examples of such regulations in Polish law include Article 738(2) CC (contract of mandate) and Article 840 CC (storage contract), where joint and several liability of the debtor and his subcontractors (substitutes) are provided, and thus – the possibility of direct redress by the creditor against this subcontractor.

A similar measure is also found in international (conventional) carriage law. Transport conventions also address the issue of mutual claims between carriers participating in a single transport operation.[2]

The question arises as to the advantages and possible risks of such a solution and whether it could be introduced into national legislation for other service contracts. It is also a question of defining the conditions that would have to be met to allow these measures in a wider extent.

The purpose of this study is to try to answer the above questions. It will be preceded by a more detailed presentation of those specific rules which

[1] Act of 24 April 1964, the Civil Code, Journal of Laws of 2024, item 1061 as amended [hereinafter: CC].

[2] The construction of a contract in favour of a third party may be omitted here; in line with the prevailing view it is used in the context of a contract for the carriage of goods, where the situation of the recipient of the goods has been regulated alongside the situation of the parties to the contract. This qualification is most justified in [Goik 1975, 94-98]. See also Górski 1999, 114-16; Stec 2005, 77-78.

could constitute a model of regulation with a more general scope. The author is aware of the risk of transferring measures applied to selected types of contracts to a more general plane of contract law. Therefore, this study does not aspire to present a full solution to the problem, but should be treated as an introduction to a possible discussion, with an attempt to determine its directions.

In preparing the study, the method of investigation of the law in force. In particular, logico-linguistic methods in the form of formal-logical and linguistic analysis (comparison of legal regulations taking into account formal logic and legal methodology) and legal comparison were used, referring to the provisions of domestic law and international conventions containing uniform rules of private law. Views expressed in Polish and foreign literature are taken into account.

1. THE REGULATION OF SUBCONTRACTING IN POLISH CIVIL LAW

As a principle, the debtor may fulfil his obligation using other persons. The Act only provides for the obligation of personal delivery of the performance (Article 356(1) CC). However, the debtor is liable for the acts and omissions of the persons with whose help he performs the obligation (auxiliaries) or persons to whom he entrusts the performance of the obligation (subcontractors) as for his own actions or omissions (Article 474 CC). He therefore bears the risk of the improper acts of his subcontractors and auxiliaries [Radwański, Olejniczak, and Grykiel 2024, 357]. In assessing the debtor's liability, it is irrelevant whether the subcontractor, acted in accordance with his instructions or contrary to those instructions.[3] This principle is not limited to the acts and omissions of a subcontractor of his choice, but it also applies to any further subcontractors, even if the obligation to perform the service is beyond the will and knowledge of the debtor.[4]

[3] See judgment of the Court of Appeal in Katowice of 27 January 2021, ref. no. V AGa 254/19, https://orzeczenia.katowice.sa.gov.pl/content/$N/151500000002503_V_AGa_000254_2019_Uz_2021-01-27_003 [accessed: 05.05.2025].

[4] See Resolution of the Supreme Court of 25 February 1986, ref. no. III CZP 2/86, concerning liability of a travel agency for acts of foreign third parties which it uses in the performance of its obligations with commentary by K. Wesołowski [Wesołowski 1988]. In few scenarios only is a departure from the principle of the debtor's liability for the subcontractor allowed according to the "as for his own actions" formula in favour of the principle of alleged fault in the choice. An example of such an exceptional regulation is provided in Article 799 CC, concerning the liability of the freight forwarder for carriers (who, however, cannot be considered as subcontractors of the freight forwarder) and downstream freight forwarders [Idem 2007, 139-50]; Article 738(1) CC, concerning liability of the recipient of the order in the situation when the possibility of entrusting the carrying out of the substitute performance results from a contract, custom or when he is forced to do so, and at the same

The contractual relationship between the debtor and his subcontractor, unless formed as a contract for the benefit of a third party (*pactum in favorem tertii* – Article 393 CC),[5] does not give the creditor grounds for pursuing a claim for performance against the debtor's auxiliaries or subcontractors, nor for pursuing claims for damages arising from non-performance or improper delivery of the performance. This is a consequence of the relative nature of claims resulting from service contracts, which do, after all, involve an obligation by nature.

This means that claims arising from such contracts, as well as claims arising from other obligation-involving contracts, can only be pursued against the other party to the contract. The creditor may therefore address his demands only against the debtor, and the latter – against the subcontractor or the auxiliary.[6] This rule applies to further subcontracting or ancillary contracts.

An exception to this rule is provided in a few cases, for example for the substitute accepting the order and the keeper, regardless of whether the conditions for entrusting the making of the performance under these contracts are fulfilled or not (Article 738(2) CC; Article 840(2) CC). The provisions governing this issue also provide for joint and several liability of the person accepting the order and his substitute to the principal and the keeper and his substitute to the person placing the order for the performance of the service, but only if the contractor or keeper is liable for the acts of his substitute as for his own actions. The latter reservation is a consequence of a departure from the principle of liability for a substitute as for one's own actions, while complying with the requirements of the provisions of Article 738(1) CC and Article 840(1) CC.

The Civil Code does not regulate matters related to the pursuit of claims between the debtor and his subcontractor. The legislator must have believed that there are no special features of the obligation relationship between these persons. However, practise reveals doubts as to its validity in the case of claims for damages resulting from non-performance or improper performance of an obligation.

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time he immediately notifies the principal of the person and place of residence of his substitute. Article 840(1) CC stipulates for a similar arrangement for the keeper substitute. The departure from the principle of liability according to the "as for his own actions or omissions" formula is unique, dictated by the specific nature of the performance or the circumstances of its execution and cannot be a model for more general solutions.

[5] See Bednarek 2006, 901-905; Kubas 2020, 1188-190; Machnikowski 2023 (commentary on Article 393 CC, no. 7).

[6] Here I omit the situation of joinder of grounds for liability (Article 443 CC), in which the non-performance or improper performance of the contract by the subcontractor or the auxiliary is at the same time an unlawful act (e.g. theft of the parcel by the subcontractor carrier).

The very premise of damage is already disputed, namely whether the compensation of the damage caused to the creditor by the debtor is a necessary condition for effective pursuit of claims against the subcontractor, or whether the debt owed by the debtor towards his counterparty is already damage constituting a premise for the subcontractor's liability. This problem is resolved differently [Zagrobelny 2009, 571-81]. Some authors assume that the debt itself in the debtor's assets, which is a correlate to the creditor's claim for damages, regardless of the maturity of the claim, is tantamount to damage that enables claims to be made against the subcontractor [ibid., 575-76; Idem 2006, 283; Rudnicki 2007, 208].[7] The established line of judicial decisions presents a position that we may only talk about damage if the creditor's claim against the debtor is due.[8] The most far-reaching solution introduces a requirement for effective redress between the debtor and the subcontractor.[9]

There is no need to take a position in this discussion. It seems that the issue should be dealt with *in casu*. For example, in transport relations, the concept of damage is understood slightly differently, by reducing it to the loss, depletion or damage of the consignment (in isolation from the remaining property) [Ambrożuk 2011, 66-67], which leads to the view that the mere fact of the occurrence of such damage enables the contracting carrier to pursue claims against the operating carrier, regardless of whether he himself paid compensation to the sender or recipient of the shipment.[10] However, even in these relations, this issue is not uniformly resolved.[11]

The problem also concerns the initial run of the limitation period for claims of debtors against their subcontractors. There are generally no legal regulations introducing separate limitation periods in relations between the debtor and his subcontractor. This puts debtors in a difficult situation, especially when short limitation periods are foreseen, the course of which

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[7] Cf. also judgement of the Supreme Court of 1 February 2006, ref. no. V CSK 86/05, OSP 2007, No. 2, item 13.

[8] Resolution of the Supreme Court of 10 July 2008, ref. no. III CZP 62/08, MoP 2008, No. 16, 842.

[9] Judgement of the Supreme Court of 13 January 1962, ref. no. 2 CR 1116/60, OSPiKA 1963, No. 3, item 65; cf. also judgement of the Court of Appeals in Cracow of 6 March 1991, ref. no. I ACR 24/91, OSA 1991, No. 4, item 23.

[10] See the position of the Austrian Obersten Gerichtshof (Supreme Court) in the judgement of 20 June 2000, Transportrecht 2001, 79, in which the court explained that this line of Austrian jurisprudence has formed since the 1996 judgement of Obersten Gerichtshof (4 Ob. 2336/96z), in which the court, departing from the previously presented position, assumed that the damage in the relationship between the entitled person and the first carrier arises at the same time as the damage in the relationship between that carrier and his subcontractor. The court expressly stated that the first carrier can claim compensation regardless of whether he has repaired the damage himself. These rules apply to the relationship between further subcontractors.

[11] See Wesołowski 2020, 407, as well as positions taken in the following works: Górski and Żabski 1990, 274; Kolarski 2002, 144; Szanciło 2008, 384-85.

has been "detached" from the maturity of the claim (e.g. Article 646 CC concerning the contract for specific work[12]). Such regulations raise reasonable controversy in situations in which they have been introduced. The provisions on limitation periods for claims between carriers involved in carriage serve as an example here. The Civil Code contains a regulation concerning a specific limitation period for claims due to the carrier "against other carriers who participated in the carriage". This period shall be six months from the date on which the carrier repaired the damage or from the date on which the action is brought against it (Article 793 CC). Regulations corresponding to the provisions of Article 789(1) CC and Article 793 CC are also included in the Transport Law Act[13] (Article 5 and Article 75(1)). The 6-month time limit for bringing an action, if it runs from bringing an action against the first carrier – taking into account the time limits for hearing cases in courts – does not fulfil its role [Wesołowski 2006, 253-64].

2. CONVENTIONAL REGULATION

Special rules for the pursuit of claims for damages caused by subcontractors are contained in certain international conventions containing uniform private law provisions, in particular those governing the contract of carriage in individual modes of transport.[14] The carrier concluding the contract

[12] See Resolution of the Supreme Court of 15 October 2024, ref. no. III CZP 19/24, taken after considering the following legal issue: "should the limitation period for a claim for damages resulting from improper performance of a contract for a specific work under Article 471 CC begin pursuant to Article 646 CC, regardless of the time the damage occurred, or should the beginning of that period be determined in accordance with the rules laid down in Article 120 CC?" The SC held in this resolution that "the limitation period for a claim for compensation for damage resulting from improper performance of a specific work contract under Article 471 CC begins to run at the time specified in Article 646 CC."

[13] Act of 15 November 1984, the Transport Law, Journal of Laws of 2020, item 8 [hereinafter: Transport Law].

[14] The comments concern the conventions governing the contract of carriage of goods. The following conventions are meant here: Convention concerning International Carriage by Rial (COTIF) of 9 May 1980 (Journal of Laws of 1985, No. 34, item 158), as amended by the Vilnius Protocol of 3 June 1999 (Journal of Laws of 2007, No. 100, item 674), whereby the carriage of goods is stipulated in Appendix B – Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM) [hereinafter: RU/CIM]; two aviation conventions: the Warsaw Convention – i.e. Convention for the Unification of certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 (Journal of Laws of 1933, No. 8, item 49), as amended by the Hague Protocol of 28 September 1955 (Journal of Laws of 1963, No. 33, item 189), supplemented by the Convention, Supplementary to the Warsaw Convention, for the Unification of certain Rules relating to International Carriage by Air performed by a person other than the Contracting Carrier of 18 September 1961, also referred to as the Gudalajar Convention (Journal of Laws of 1965, No. 25, item 167) and the Montreal Convention – Convention for the Unification of certain Rules for

with the original consignor is sometimes referred to here as the contracting carrier and his subcontractor – the actual carrier.[15] The contracting carrier, who has the status of consignor vis-à-vis the operating carrier, is liable for the acts and omissions of his subcontractors as for his own actions (Article 27 1 RU/CIM; Article II of the Guadalajara Convention; Article 40 of the Montreal Convention; Article 3 CMR). This also applies to acts which in other circumstances could be treated not as an act in the performance of an obligation but as "incidental" acts while performing an obligation (e.g. misappropriation of the goods transported).[16] Some conventions also contain provisions introducing separate rules on the limitation of claims between the contracting carrier and the operating carrier (Article 24(4) CMNI[17]).

The most interesting measure, which currently exists in most international transport conventions,[18] is the joint and several liability of the contracting carrier and the operating carrier (subcontractor) for damage caused by the latter, and thus – the possibility of direct pursuit of claims by the entitled person (consignor or consignee, passenger) against the operating carrier. This provision first appeared in the Guadalajara Convention, complementing the Warsaw Convention. That Convention, which is the model for subsequent analogous regulations, provides that an action for compensation in respect of carriage performed by an operating carrier may be brought, at the choice of the claimant, against that carrier or against the contracting carrier or both, jointly or separately.

The Guadalajara Convention has articulated a number of related rules, the most important of which are: 1) the acts or omissions of the contracting

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International Carriage by Air of 28 May 1999 (Journal of Laws of 2007, No. 37, item 235); Convention on the Contract for the International Carriage of Goods by Road (CMR) of 19 May 1956 (Journal of Laws of 1962, No. 49, item 238 as amended). However, the possibility of pursuing claims directly against operating carriers presented in this study is also provided for in the provisions on the carriage of persons, including in EU regulations.

15 The terms contracting carrier and actual carrier are used in aviation conventions – the Guadalajara and Montreal Conventions. In RU/CIM uses the terms contractual carrier and substitute carriers (sub-contracting carrier). CMR does not use these terms.

16 Cf. judgement of the Court of Appeals in Warsaw of 21 February 2013, ref. no. VI ACa1095/12, http://orzeczenia.waw.sa.gov.pl/content/$N/154500000003003_VI_ACa_001095_2012_Uz_2013-02-21_001 [accessed: 18.03.2025].

17 Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI) of 22 June 2001, which Poland has not ratified, hereinafter referred to as CMNI, also referred to as the Budapest Convention.

18 CMR does not provide for such a measure, which also explains the lack of provisions in this convention regulating the limitation period separately between the contracting carrier and the subcontractor – for more detail see Wesołowski 2013, 722-28. See also judgment of the Court of Appeal in Warsaw of 24 May 2019, ref. no. VII AGa 1232/18, https://orzeczenia.waw.sa.gov.pl/content/$N/154500000003527_VII_AGa_001232_2018_Uz_2019-05-24_002 [accessed: 05.05.2025].

carrier must not subject the operating carrier to actual liability beyond the limits provided for in the convention, and any special contract under which the contracting carrier accepts obligations not arising from the convention, nor any special declaration of interest in delivery (increasing the carrier's liability), may not have effects on the operating carrier unless he has given his consent; 2) any person acting as the operating carrier or the contracting carrier, if he proves that he has acted in the performance of his functions, may invoke the limitations of liability applicable to the carrier; 3) the total amount of compensation which may be obtained from the operating carrier and the contracting carrier, as well as from persons acting for them in the performance of their functions, shall not exceed the highest compensation which can be claimed either from the contracting carrier or from the operating carrier; 4) an action for damages should be brought at the choice of the claimant either before one of the courts with which the action against the contracting carrier may be brought or before the court of the place of residence of the operating carrier or of the place of his principal place of business.

Similar solutions were adopted in the Montreal Convention (Articles 39 to 48), in part also in the amended Railway Convention (Article 27 RU/CIM) and in the Convention on Inland Navigation (see Article 4(5) CMNI). It is also adopted by some internal law systems (para. 437 HGB (*Handelsgesetzbuch* – German Commercial Code).[19] However, the accepted design of the liability of both carriers sometimes suffers from certain deviations from the model solutions. It follows from Article 45(7) RU/CIM that if the entitled person has a choice between one or more carriers and a subcontractor carrier, his right of choice expires when an action is brought against one of those carriers.

3. BENEFITS AND RISKS RESULTING FROM THE POSSIBILITY OF DIRECT REDRESS AGAINST SUBCONTRACTORS

The advantages of introducing joint and several liability of the contracting carrier and the operating carrier (subcontractor) for damages caused by the latter, and thus – the possibility of directly pursuing claims for damages against the subcontractor, are unquestionable, both for the creditor and the contracting carrier himself. In the case of the former, this proposal reduces the risk of not obtaining compensation as a result of the debtor's insolvency and also allows redress before the court competent for the subcontractor.

[19] The direct liability of the subcontractor is also known to some public law regulation. See judgment of the Court of Justice of the European Union of 21 December 2016, ref. no. C-547/15, ZOTSiS 2016/12/I-983.

With regard to the contracting carrier himself, the measure adopted in many cases will allow the settlement of the damage without his participation. It also clarifies his legal situation towards the subcontractor. The reference to the formula of joint and several liability also results in the fact that the dispute about the nature of the claim between the contracting carrier and his subcontractor becomes obsolete. Where the debtor and the subcontractor are jointly and severally liable to the creditor, this is undoubtedly a recourse claim.

This, in turn, guarantees the subcontractor that two different entities cannot effectively pursue the same claims. A claim by the debtor against the subcontractor will arise only after payment of compensation to the creditor (the person entitled according to carriage law terminology). This prevents the debtor's enrichment at the expense of the subcontractor, which often happens when the debtor enforces the claim for damages due to him against the subcontractor but does not repair the damage caused to the creditor for one or other reasons (e.g. as a result of effective raising of the claim of limitation).

The proposal also has a more general value. It shortens the path of pursuing claims for damages in order to finally repair the damage, reduces the number of lawsuits, and thus the time and costs associated with it.

At the same time, it is difficult to see any deterioration of the situation of the subcontractor himself in the measure discussed. Although there is a breach of the principle that the contract only produces *inter partes* effects, this does not pose a risk of breaching the trading security principle. Fundamentally, subcontractors should not be concerned about to whom they are liable for making the performance or the consequences of non-performance (improper performance). One can see here a certain analogy to a transfer of a claim, which in principle does not require the debtor's consent, precisely because it does change anything in his situation. A certain disadvantage for the subcontractor could come a fact that in the event of an action against the debtor and the subcontractor, the proceedings could take place in the court competent for the defendant debtor (Article 43(1) CCP[20]). This issue should not be prejudicial in the total of advantages and disadvantages of the proposal.

The regulation of specific limitation periods for claims between these carriers also deserves credit, although there may be reservations about specific solutions concerning this.[21]

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[20] Act of 17 November 1960, the Code of Civil Procedure, Journal of Laws of 2024, item 1568 as amended.

[21] More detail in Wesołowski 2006, 253-64; Idem 2020, 408-10.

4. *DE LEGE FERENDA* CONCLUSIONS

As may be seen from the above comments, the overall assessment of a proposal consisting in the introduction of joint and several liability of the contracting carrier and the operating carrier, and thus the creditor's possibility to pursue claims directly from the operating carrier, deserves praise. It is perhaps not without significance that this proposal has been shaped over many decades of application of conventions, and not as a response to the immediate need for economic practise. It begins to displace another traditional construction of this law, which is successive transport [Glass 2003, 72-95; Lamont-Black 2017, 8-21].

One may wonder here about the meaning and possibility of applying a similar measure in other contractual relationships. Such measures in Polish law refer only to contracts where there is an element of special trust. It cannot even be found in regulations governing the contract of carriage, although these are largely modelled on conventional solutions. However, it does not seem that the reason for the special trust, as well as the resulting order (in principle) to make the performance personally, could be decisive.

The proposal offered here should not be hindered by the fear of violating the construction of the obligation as a relationship from which only relative rights arise. The Polish legislator decided to extend the effectiveness of receivables not only in situations regulated in Article 738(2) and Article 840 CC, but also in the measure adopted in Article 647^1 CC. It concerns joint and several liability of the investor and the contractor of construction works towards the subcontractor for the remuneration of the latter, and thus a situation much more controversial from the point of view of the principle of security of trading (the risk of double payment of remuneration for works performed by the subcontractor, resulting from the investor's inability to invoke in a dispute with the subcontractor the allegation of performance of an obligation towards the contractor).[22]

In the context of Article 647^1 CC, it seems incomprehensible that an investor who is jointly and severally liable with the contractor for the remuneration of a subcontractor of construction works should not able to pursue claims against the latter. The introduction of such a measure would in a sense compensate the investor's situation in relation to the subcontractor. This would give him, for example, the possibility of setting off mutual claims (for the subcontractor's remuneration and compensation due to the investor or for reducing the price under warranty provisions).

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[22] See judgment of the Supreme Court of 11 January 2008, ref. no. V CSK 179/07, OSNZD 2008, No. 4, item 100. Other questionable regulatory issues are highlighted in Rzewuska 2017, 101-10; Strzępka 2017, 1485-486; Szostak 2008, 17; Klich 2010, 330; Zagrobelny 2013, 254-55.

In the case of other contracts in which there is no problem of the creditor's liability for the remuneration of the subcontractor of that provision, the proposed measure also seems entirely justified. It is therefore necessary that the conditions for its "extension" to other contracting relations be formulated. The aim is for the implementation of the basic objective of this measure, which is to facilitate redress and the settlement of damages, to not cause deterioration of the situation of the subcontractor, both in terms of substantive law and procedural aspects.

First, as was the premise of this study, the assumption of joint and several liability of the debtor and his subcontractor for damage caused by the latter's non-performance or improper performance of the obligation is possible only in the case of certain types of service contracts. Therefore, it is not an option for other groups of contracts (e.g. transfer of ownership, credit, guarantee, use of someone else's property). Moreover, this proposal also does not seem to be feasible for certain service contracts (e.g. a commission contract).

Secondly, joint and several liability with the debtor may only cover subcontractors of all or part of the performance, but not other persons (auxiliaries).

Thirdly, the measure in question should refer to situations in which the debtor bears liability for the subcontractor "as for his own actions" (cf. Article 738(2) CC). However, it would not apply to cases where the debtor were liable for the acts of a subcontractor on the basis of fault of choice, even if the fault is presumed (Article 799 CC).

Finally, the extent of the subcontractor's liability to the creditor must be delineated both by the subcontractor's own liability and by the debtor's liability to the creditor. This applies to both the principle of liability and the amount of compensation. This issue is important as different rules may apply to the issue of the debtor's liability to the creditor and the subcontractor's liability to the debtor (e.g. to the debtor, an international transport convention providing for a limitation of damages; and to the subcontractor of a national transport section, national rules not providing for such a limitation). In addition, contractual liability is generally governed by relatively binding contractual provisions, which means that the limits of liability of the debtor and his subcontractors may be different, even under the same provisions.

The limited framework of this article does not allow for a more detailed discussion of these conditions. Naturally, the matter of which specific types of contracts the proposed measure could be applied to requires closer examination. The problem of regulating the limitation period separately (the beginning of the limitation period, its length) in relation to recourse claims between the debtor and his subcontractor is also left for consideration. Provisions of international transport conventions could serve as a model here.

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ESTABLISHING A BANK BEQUEST IN FAVOUR OF A PERSON ENTITLED TO A LEGITIM*

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Abstract. The distinctive nature of the right to a legitim, which is conferred exclusively upon the descendants, spouse, and parents of the deceased, calls for the adoption of normative frameworks that serve as a robust guarantee of its effective enforcement. Within this context, certain provisions of the Polish Civil Code give rise to interpretative concerns, particularly those regulating the calculation of the legitim, the determination of the quantum of claims held by specific beneficiaries, as well as the principles and scope of debt liability arising from such entitlements. These provisions impose an obligation, subject to the statutory conditions, to take account of *inter vivos* gifts made by the deceased in each of the aforementioned scenarios. While such a legislative approach should, in principle, be regarded as entirely justified, the legislator's use of the term "gift" does not provide a clear answer as to whether, in the situations in question, other gratuitous legal transactions, distinct from a gift in the sense of a named contract under the Civil Code, should be interpreted as having the same legal effect, from the perspective of persons entitled to a legitim, as a gift made by the deceased. The *ratio legis* of the legitim and the *ratio* of inclusion of gifts in its calculation leads to the conclusion that the term employed by the legislator must be interpreted broadly. Accordingly, within the provisions on the legitim, the term "gift" should be understood as encompassing all deliberate legal acts (transactions) of the deceased which unilaterally confer a benefit upon another party at the expense of the deceased's estate, thereby resulting in a diminution of the estate's value. It should therefore be beyond doubt that, for the purposes of Articles 993 and 995 of the Civil Code, the term "gift" also encompasses, inter alia, an instruction for transfer of a bank deposit mortis causa. It also appears to be beyond doubt that the provisions of the Civil Code allowing for the sanctioning of unlawful conduct by heirs or legatees, particularly actions directed against the deceased, should apply to the beneficiary of an instruction for transfer of a bank deposit mortis causa, where such conduct results in the forfeiture of benefits obtained from the estate or as a consequence of the deceased's death.

Keywords: instruction for transfer of a bank deposit mortis causa; bank bequest; gift; right to a legitim.

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* The expression "bank bequest" does not constitute a term of legal language in the strict sense. It is used in reference to the institution regulated under Article 56 of the Act of 29 August 1997 Banking Law (Journal of Laws of 2024, item 1646 [hereinafter: BL]), namely, the instruction for transfer of a bank deposit mortis causa.

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1. FREEDOM OF TESTATION AS A FUNDAMENTAL PRINCIPLE OF PRIVATE LAW AND ITS LIMITATIONS

Freedom of testation, akin to the principle of freedom of contract, constitutes one of the foundational liberties underpinning the domain of private law [Księżak 2012, 17]. It denotes the capacity of a natural person to make legally effective dispositions of their property mortis causa by means of a will. The purpose served by the freedom of testation is self-evident. "The underlying principle is that the testator should be able to dispose of their estate mortis causa in a way that most accurately reflects their intentions, one that is both rational and responsive to the actual, as opposed to merely hypothetical, circumstances of the specific case" [Wójcik 1986, 173]. The testator may therefore dispose of their estate mortis causa in favour of any entity, disregarding close relatives or even the spouse. It goes without saying that the principle of freedom of testation is not absolute. Within the framework of the present inquiry, particular emphasis must be placed on the fact that, among the various constraints imposed on this freedom, those arising from the need, or even the necessity, to protect the interests of the testator's immediate family members are of paramount importance [Księżak 2012, 23]. While during the deceased's lifetime their closest relatives are primarily protected by the maintenance obligation, this duty expires upon his or her death due to its inherent connection with the testator (Article 922(2) of the Civil Code[1]). Although there is no longer a person legally bound to satisfy the needs of their immediate family members, those needs could still be met from the estate left behind by the testator. The case-law holds that the right to a legitim, insofar as it contributes to securing the sustenance of the testator's closest relatives, constitutes a continuation of the maintenance obligation that had previously rested upon the deceased.[2]

Both the legal doctrine and case-law emphasise at least a moral duty to support one's family, including the duty to leave benefits to closest relatives by way of succession [Witczak 2024, 551 with literature referenced therein]. Of course, from a legal standpoint, it is the law that determines which individuals from among the deceased's close relations must receive benefits upon their death. *De lege lata*, the individuals whom the legislator has placed under special protection following the testator's death are the testator's descendants, spouse, and parents. These family members are entitled to a legitim (Article 991(1) CC), and it is primarily through this institution that the protection of the testator's immediate family is implemented under the current legal framework [Kordasiewicz 2008, 413-15]. The legitim is understood primarily

[1] Act of 23 April 1964 Civil Code, Journal of Laws of 2014, item 1061 as amended [hereinafter: CC].

[2] Grounds to the judgement of 23 January 2014, ref. no. V ACa 742/13, Lex no. 797350.

as serving two key functions: "ensuring the continued support of the testator's closest family members, as a legal extension of the maintenance obligation, and "safeguarding the fulfilment of a form of intergenerational contract, along with the duty of mutual care and assistance within the family."[3]

As noted above, the freedom of testation is not absolute. The reasons for limiting this freedom are to be found, in particular, in the Constitution of the Republic of Poland.[4] The limitations are inherently bound to the constitutional imperative of safeguarding the guarantees enshrined in Article 18 of the Constitution of the Republic of Poland, namely, the protection of marriage, parenthood, and the family, as well as the right to family life as articulated in Article 47 therein. The entitlement of the testator's family members to participate in the estate, coupled with the curtailment of testamentary freedom, stems from the overarching constitutional principle that mandates the protection of values named in Article 18 of the basic law. The Constitutional Tribunal has consistently underscored the intrinsic connection between the right to a legitim, which undoubtedly serves to strengthen familial bonds, and the constitutional duty to protect marriage, parenthood, and family. The right to a legitim serves to guarantee "the solidarity inherent in the constitutional concept of parenthood, marriage, and family, thus representing a constitutionally justified limitation on the rights of the heir, in view of the need to protect the rights of others."[5] It is therefore in disputable that the absence of any form of "control" over the testator's exercise of testamentary freedom, in light of the need to protect the interests of their closest relatives, would stand in contradiction to the basic law.[6]

As previously indicated, the protection of the testator's family members within the Polish legal system is secured primarily through the institution of the legitim. Persons entitled thereto may, upon the testator's death, claim specific monetary amounts irrespective of how the testator chose to dispose of their estate mortis causa. It is to be recognised that, unlike in systems based on a fixed statutory reserve, a legitim does not impose a restriction on freedom of testation sensu stricto. The constraint on the testator's autonomy is purely economic in nature: their dispositions may extend to the entirety of the estate, while the individuals designated by the law acquire "only" a pecuniary claim corresponding to a defined fraction of the net worth of the estate [Księżak 2012, 23-24]. This implies that a testator can never exercise

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[3] So in the grounds to the judgement of the Court of Appeal in Warsaw of 23 January 2014, ref. no. V ACa 742/13, Lex no. 797350. See also grounds to the judgement of the Supreme Court of 14 March 2008, ref. no. IV CSK 509/07, Lex no. 445279 along with the case-law referenced therein.

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

[5] Judgement of the Constitutional Tribunal of 25 July 2013, ref. no. P 56/11, Legalis no. 722201.

[6] For more, see Witczak 2024, 552, with literature referenced therein.

full testamentary freedom to the exclusion of their closest relatives.[7] As aptly pointed out in the literature, "since the deceased was a member of the family, he or she cannot deny that fact by executing dispositions mortis causa, especially at a time when the interests of the family assume the greatest significance" [ibid., 56-57]. The purpose of the legitim is therefore to ensure that the closest family members designated by the law receive a specified benefit from the estate, regardless of, and even contrary to, the testator's intentions. The right to a legitim protects such individuals against the arbitrariness of the deceased's mortis causa dispositions[8] and against potential harm resulting from their exclusion.[9] As the Supreme Court has noted, "building on the premise of a close connection between the law of succession and family law, and on the interpretation of the mutual rights and obligations of spouses and of parents and children as shaped by the latter, judicial practice has consistently highlighted the value of the legitim as an instrument for safeguarding the institution of family law and social justice."[10]

2. PROTECTION OF THE TESTATOR'S CLOSEST RELATIVES AGAINST THE EFFECTS OF HIS OR HER LEGAL TRANSACTIONS *INTER VIVOS*

Given the normative framework of the legitim, it may be asserted that its function is to shield entitled beneficiaries not only from the detrimental effects of a will made by the testator, but also from certain *inter vivos* legal transactions specified by the law. The testator's closest relatives may be prejudiced not only through their exclusion from the will or by express disinheritance via a negative testamentary provision, but also as a result of legal transaction performed by the testator's during his or her lifetime which lead to a reduction in the estate whose net worth serves as the starting point for calculating the legitim [Kremis 1993, 130-31].

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[7] Judgement of the Court of Appeal w Łódź of 25 July 2013, ref. no. I ACa 141/12, Lex no. 1356561.

[8] See grounds to the resolution of the Supreme Court of 8 September 2021, ref. no. III CZP 7/21, Legalis and the case-law of the Constitutional Tribunal and the Supreme Court referenced therein.

[9] Judgement of the Court of Appeal in Katowice of 23 January 2014, ref. no. V ACa 742/13, Lex no. 1439043. Cf. e.g. grounds to the judgement of the Supreme Court of 28 April 2005, ref. no. III CK 569/04, Legalis no. 265946; grounds to the judgement of the Court of Appeal in Wrocław of 31 August 2012, ref. no. I ACa 1349/11, Lex no. 1120012; judgement of the Court of Appeal in Szczecin of 8 June 2017, ref. no. I ACa 102/17, Lex no. 2379141; decision of the Supreme Court of 5 April 2018, ref. no. II CSK 85/18, Lex no. 1770069 and the judgement of the Court of Appeal in Szczecin of 28 January 2021, ref. no. I ACa 544/20, Lex no. 2584157.

[10] Grounds to the resolution of the Supreme Court of 8 September 2021, ref. no. III CZP 7/21, Legalis.

A literal reading of the CC provisions governing the legitim suggests that the legislator has accorded particular significance, within the law of succession, to gifts, i.e. nominate contracts governed by Articles 888-902 CC, which must be considered in determining the amount of the legitim (Article 993), the scope of the relevant claim (Article 996), and its enforcement and the corresponding liability (Articles 1000-1001). Nonetheless, it would seem that a strictly textual interpretation of these provisions fails to convey their full meaning. There should be no doubt that the notion of a gift should be interpreted in light of the *ratio legis* underlying the provisions on the inclusion of gifts [Księżak 2012, 273]. The protection of the deceased's closest family members must always be ensured whenever the exercise of their subjective rights guaranteed by the law is at risk, particularly in the case of a right as exceptional as the right to a legitim. If the exercise of these rights is endangered by a situation in which the testator's estate is diminished as a result of legal transactions carried out during their lifetime, thereby rendering the protection of the testator's closest relatives upon death illusory, then the type of legal transaction that produces such an outcome should be of no relevance. It would thus appear that, similarly to gifts in the sense of nominate contracts under the CC, legal transactions executed by the testator that result in gratuitous benefits conferred at the expense of their estate, and which consequently reduce the value of the estate, should be treated in the same manner.

One of the legal transactions through which a beneficiary acquires a gratuitous financial benefit at the expense of the testator's estate is the so-called instruction for transfer of a bank deposit mortis causa. Pursuant to Article 56(1) BL, the holder of a savings account, a current-and-savings account, or a term deposit account may instruct the bank in writing to disburse, upon their death, a specified sum from the account to persons designated by them, namely, the spouse, ascendants, descendants, or siblings, subject to the condition that an instruction for transfer of a bank deposit mortis causa is excluded in the case of a joint account (Article 57 BL; see also Article 942 CC). It may be noted in passing that the legal character of the said instruction is a matter of scholarly debate. However, the prevailing view holds that it constitutes a unilateral legal transaction mortis causa, to which, by way of cautious analogy, the provisions of the CC on wills may be applied.[11] It has been repeatedly noted in the literature that the instruction for transfer of a bank deposit mortis causa bears "far-reaching similarities to a will" and that it constitutes "a special form of mortis causa disposition of the estate, operating alongside the primary form of such disposition, namely the will" [Pyzioł 1999, 114].

[11] For more, see Rakiewicz 2005, 995-1001; Szmitkowski 2001, 81-83; Piątowski, Witczak, and Kawałko 2025, 127-30.

Importantly, the amount paid pursuant to Article 56(1) BL does not form part of the estate of the account holder (Article 56(5) BL).[12] It is beyond dispute that this institution is of particular importance in the context of claims under the legitim, since, as previously mentioned, among the statutorily limited group of persons eligible to benefit from a bank bequest are those entitled to a legitim, namely the testator's descendants, spouse, and parents (see Article 56 BL and Article 991(1) CC).

The establishment of a bank bequest constitutes a mortis causa legal transaction and, as such, since the legal effects of the declaration of will made by the account holder are conditioned upon their death, the declarant may at any time modify or revoke the instruction. Revocability is one of the fundamental characteristics of mortis causa legal transactions. The deferral of legal effects until the moment of death of the person performing such transactions justifies, on the one hand, the absence of any binding force at the time a transaction is executed, and, on the other, the existence of the right to modify or revoke the said instruction (see Article 56(3) BL). A corresponding rule is set out in Book IV CC with respect to wills (Articles 944(1) and 946 CC). In the case of both an instruction for transfer of a bank deposit mortis causa and a will, it may happen that, prior to death, the account holder or testator performed not one but several legal transactions of different content, which, in extreme cases, may even be mutually exclusive. With respect to bank bequests, it is established that if the account holder has issued more than one instruction at different times, the instruction issued later takes precedence over the one issued earlier (Article 56(4) BL). The effects of revoking a will are regulated in a similar manner. Pursuant to Article 947 CC, if the testator has drawn up a new will without expressly revoking the previous one, only those provisions of the earlier will that are incompatible with the content of the later one shall be deemed revoked. It would appear that this principle should also apply to an instruction for transfer of a bank deposit mortis causa. This means that an instruction made later, i.e. one closer in time to the opening of the succession, revokes an earlier one to the extent that the two cannot be reconciled with the later bank bequest. Undoubtedly, in most cases it will be significantly easier to determine the legal effects of multiple instructions for transfer of a bank deposit mortis causa that cannot be fully executed than to ascertain the legal consequences of several successive wills. With respect to the said instruction, determining whether an earlier instruction remains consistent with a later one is reduced to a mathematical operation involving the statutory monetary limit prescribed for a bank bequest, naturally taking into account the amount of funds held in the account of the instructing party. According to Article 56(2) BL, the account holder's freedom to dispose of funds by way of a bank bequest is limited to an amount

[12] Judgement of the Court of Appeal in Gdańsk of 30 September 2020, ref. no. VI ACa 27/20, Lex no. 3316356.

not exceeding twenty times the average monthly remuneration in the enterprise sector, excluding profit-based bonuses, for the month immediately preceding the testator's death, as announced by the President of Statistics Poland (Article 56(2) BL).[13] The resolution of such a conflict will therefore depend primarily on the timing of the instructions for transfer of a bank deposit mortis causa made in favour of specific beneficiaries, and subsequently on the monetary limitation determined by the statutory threshold and the amount of funds held in the account by its holder. If such instructions were issued simultaneously and thus hold equal priority, the entitlements of the respective beneficiaries should be proportionally adjusted in accordance with the statutory limit and the total amount of funds held in the instructing party's account. It must be emphasised that the monetary limitation prescribed by the law for the instructions in question applies to all accounts held by the instructing party. It should also be noted that the revocation of a previously issued instruction becomes effective only if the subsequent instruction satisfies all the conditions required for the validity of a legal transaction and is capable of producing legal effects. The same principle applies to the revocation of a will. Where a will is revoked by the testator through the execution of a new will, the revocation of the earlier will is effective only if the new will is valid[14] and capable of being carried out in the sense that the individuals designated as heirs are capable of acquiring the benefits conferred upon them. This requires that they be sufficiently identified so as to clearly determine the circle of the testator's successors, that they have outlived the testator, and that none of the provisions of the CC mandate that they be treated as dying before the testator (Articles 928(2), 1010, and 1049(2) CC). As noted above, funds held in the testator's bank accounts do not form part of the estate solely to the extent that they are the subject of a bank bequest. In all other cases, the funds held in the deceased account holder's savings accounts, current-and-savings accounts, and term deposit accounts are subject to inheritance under the general rules. They may also be subject to an ordinary legacy, and the claim for payment of the funds held in the account, held by the account holder against the bank, may constitute the subject of a vindication legacy.

3. BENEFICIARIES OF A BANK BEQUEST

Restrictions applicable to the issuance of an instruction for transfer of a bank deposit mortis causa extend also to the category of potential beneficiaries of a bank bequest. As noted above, Article 56(1) BL sets out an exhaustive list of persons eligible to receive such a bequest, namely: the account holder's spouse, descendants, ascendants, and siblings. Whether

[13] In February 2025 this amount amounted to PLN 8,613.13 (Official Journal of Statistics Poland of 2025, item 12).

[14] Decision of the Supreme Court of 22 January 1974, ref. no. III CRN 326/73, Lex no. 1728.

a person designated by the account holder falls within this list should be assessed as of the moment of the opening of the succession.

Only persons expressly designated by the law may be beneficiaries of a bank bequest, which marks a significant distinction between this institution and the will, where the testator enjoys virtually unrestricted freedom in appointing their legal successors. The only limitation imposed on a person making a will is the catalogue of entities recognised under civil law. This means that the status of heir is determined, in principle, solely by legal capacity. Its existence is assessed upon the opening of the succession. The sole exception[15] concerns the *nasciturus*, as Article 927(2) CC explicitly provides that a child conceived at the time of the opening of the succession, meaning having no legal capacity, may still inherit, provided that it is born alive. The positive condition for acquiring an inheritance, being the capacity to inherit, can be verified only where the testator has sufficiently identified the successor in interest. Otherwise, the will should be considered ineffective. It is of course possible that a person appointed as heir in a will may not survive the opening of the succession. In fact, the testator may not be aware of that. In cases where a will satisfies all the requirements for a valid legal transaction, yet the persons designated therein have not lived up to the opening of the succession, or are deemed – by operation of law – to have predeceased it, the will is referred to in the literature as ineffective [Skowrońska-Bocian 2004, 202-204]. As noted above, by analogy, the designation, within the relevant declaration submitted to the bank, as the beneficiary of a bank bequest of a person who has not outlived or will not outlive the account holder should likewise be regarded as ineffective. Likewise, the designation of a beneficiary in a manner that fails to permit their clear identification should be deemed ineffective [Piątowski, Witczak, and Kawałko 2025, 126].

4. THE *RATIO* BEHIND THE INCLUSION OF GIFTS IN THE NET WORTH OF THE ESTATE FOR THE PURPOSE OF CALCULATING A LEGITIM AND OF THEIR INCLUSION WHEN DETERMINING THE AMOUNT OF A LEGITIM CLAIM

Any analysis of the significance of the instruction for transfer of a bank deposit mortis causa for a person entitled to a legitim[16] must begin with the fairly straightforward proposition that the legitim constitutes a claim for

[15] In view of the subject matter addressed, it is appropriate to exclude from consideration the conditional inheritance capacity of foundations and family foundations (Article 927(3) CC).

[16] Two issues, broadly simplified, merit discussion in this context: the significance of a bank bequest for a person entitled to a legitim, both in a situation where that person is simultaneously the beneficiary of the bequest, and where the bequest has been made in favour of individuals outside the circle of persons entitled under Article 991 CC.

payment of a monetary benefit representing the statutorily prescribed portion of at least the net worth of the estate. This is subject to the provision that, under Article 993 CC, debts arising from ordinary legacies and instructions are excluded from the calculation of the said net value. Bearing in mind that the legitim serves to protect the interests of the testator's closest relatives, the protection it offers should be effective in the sense that, absent specific circumstances justifying the deprivation of that right due to defined civil law events, the enforcement of the claim by the entitled party should produce a satisfactory outcome for the claimant. Such protection would be purely illusory if, during their lifetime, the testator made dispositions concerning their assets by entering into gift agreements with persons from outside the circle of the entitled to a legitim, thereby significantly reducing the active value of the estate, potentially, in extreme cases, to a near-zero level. The legislator sought to prevent such situations by introducing, at the stage of determining the amount of the legitim, an obligation to include in the net worth of the estate any gifts made by the testator during their lifetime. However, the effectiveness of this legislative intent may give rise to serious doubts if the relevant provisions are interpreted solely on the basis of their literal wording. As noted elsewhere, the law employs the relatively straightforward term "gift," understood as a nominate contract under the CC. The normative design of the legitim should shield beneficiaries from any "conduct" of the testator that unjustly diminish the estate, which, in principle, is intended to guarantee the satisfaction of their claims. The principle that the testator may not, through their own dispositions, affect the amount of the legitim appears to be largely respected by the legislature. This is reflected, as mentioned earlier, in Article 993 CC, which provides that, in determining the net worth of the estate, debts arising from ordinary legacies and instructions are not to be taken into account. Such a rule does not worsen the position of the heir, primarily due to the statutory limitation of liability for obligations arising from ordinary legacies and instructions, as set out in Article 998 CC. It should also be noted that, pursuant to Article 1003 CC, an heir obliged to satisfy a legitim claim may seek a proportional reduction of legacies and instructions [Księżak 2024, Article 993, in: thesis A.I.1.].

Gifts made by the testator during their lifetime are subject to inclusion in the net worth of the estate, and their relevance extends beyond the calculation of the legitim itself to the determination of the parties responsible for satisfying or supplementing the claim, as well as the rules and scope of liability for this specific type of inheritance debt. The rule that gifts made by the testator must be added to the net worth of the estate for the purpose of determining the amount of the legitim is subject to limitations, which, under Article 994 CC, are of a objective, temporal, and subjective nature. Pursuant to Article 994 CC, the following gifts are not included in the net worth of the

estate: minor gifts customary in a given social context; gifts made more than ten years prior to the opening of the succession, unless made to heirs or persons entitled to a legitim; gifts made by the testator before entering into marriage with the spouse claiming the legitim; and, in the case of determining the legitim for a descendant, gifts made at a time when the testator had no descendants.[17] It must be emphasised that the inclusion of gifts in the net worth of the estate is a purely technical procedure. It can be done independent of the condition of the gifted asset at the time of the opening of the succession and of whether the beneficiary is still in possession thereof. Under Article 1001(1) CC, the so-called residual enrichment of the beneficiary becomes relevant only in the context of liability for the debt linked to the legitim, in the event that the entitled party is unable to obtain full or partial satisfaction of the claim from the heir and subsequently from the vindication legatee.

5. THE SIGNIFICANCE OF THE BANK BEQUEST FOR THE AMOUNT OF LEGITIM AND THE SCOPE OF THE CORRESPONDING CLAIM. A POSITION OF THE LEGAL DOCTRINE AND CASE-LAW

Whereas the *ratio legis* behind the inclusion of gifts made by the testator in both the calculation of a legitim and the determination of the corresponding claim is beyond dispute, doubts inevitably arise with regard to the term "gift" as employed by the legislator. Adopting a purely literal interpretation gives rise to well-founded reservations about limiting the testator's detrimental dispositions, not only towards heirs but, above all, towards persons entitled to a legitim, to a single nominate contract under the CC, namely the gift, while disregarding numerous other gratuitous legal transactions that produce the same effect as the conclusion of a gift agreement. Legal scholarship rightly stresses that the "merely formal (typological) distinction" between a gift and other gratuitous legal transactions should not be the determining factor in matters concerning the calculation of legitim, the assessment of the extent of the claim, or liability for this particular inheritance debt. What should be decisive is the legal effect of the transaction, not the normative construct in which it is framed [Księżak 2012, 280].

The gratuitous character of a legal transaction executed by the testator should undoubtedly serve only as a point of departure in evaluating the relevance of a specific gratuitous benefit for a legitim claim. It is not possible to draw a simple, general, and unequivocal equivalence between all gratuitous transactions in this context. As previously said, all dispositions made from the testator's estate that reduce its assets should be treated in the same

[17] See, e.g. judgement of the Court of Appeal in Katowice of 4 April 2013, ref. no. V ACa 842/12, Lex no. 1305957.

manner. Only such benefits will prejudice persons entitled to a legitim in the same manner as gifts made by the testator. The bank bequest must be assessed in light of the above criteria, especially given that, as already noted, it may be established solely in favour of persons listed in the law, among whom there are individuals who may be entitled to a legitim.

The execution of an instruction for transfer of a bank deposit mortis causa results in a gratuitous benefit for the beneficiary of the bank bequest, and the payment of a specified sum from funds held by the testator as the account holder undoubtedly reduces the active value of the estate. Funds held in the testator's bank accounts will form part of the estate only where no bank bequest has been made, where it has been established invalidly, or where it proves ineffective. While it is generally accepted that rights transferred to designated individuals outside the succession regime, regardless of whether they are heirs, are not added to the net worth of the estate for the purposes of calculating the legitim, it is important to note that such rights are not of a uniform legal nature. Some of these rights, such as those arising from an instruction for transfer of a bank deposit mortis causa, remain under the testator's control, and it is precisely these rights to which the aforesaid principle does not apply.

In view of the fact that the law provides for multiple methods of satisfying a legitim, it is worth recalling that the testator may do so by means of a gift agreement, by appointing the person entitled to the legitim as an heir, or by establishing an ordinary or vindication legacy to their benefit. Although Article 991(2) CC uses the general term "gift," it is beyond doubt that this refers only to those gifts that have an impact on the amount of the legitim. Such gifts are credited towards the legitim in the proportion in which they were included in the net worth of the estate when calculated. It appears self-evident that, by extension, those gratuitous benefits which should be treated as having the same effect as a gift made by the testator, such as a bank bequest, should likewise be taken into account both at the stage of calculating the legitim and in determining whether, and to what extent, it has already been satisfied.

An analysis of the case-law and the positions adopted in the legal doctrine reveals that there is no consistent view regarding the interpretation of the term "gift" in the provisions of Book Four of the CC concerning the legitim. Above all, it must be noted that, regrettably, no uniform line of judicial practice has been established in this respect. One position maintains that the notion of "gift" under Article 993 CC should be interpreted broadly to encompass not only the nominate contract defined therein, but also any legal transaction that results in a gratuitous benefit,[18] that is, any deliberate legal act that causes a unilateral transfer of assets, leading to the enrichment of one

[18] Judgement of the Supreme Court of 7 April 2004, ref. no. IV CK 215/03, Lex no. 152889 and judgement of the Court of Appeal in Łódź of 25 March 2014, ref. no. I ACa 1204/13, Legalis.

party at the expense of the other (testator).[19] In support of this broader view, it is argued that such transactions, by diminishing the value of the estate, are just as detrimental to the heirs as a gift within the meaning of Article 888 CC and following provisions, since they ultimately prejudice their interests.[20] In contrast, a strictly formalist position maintains that the term "gift" as used in Article 993 CC should be understood narrowly as referring exclusively to a benefit ensuing from the performance of a contract governed by Article 888 CC, and not to any gratuitous transfer of assets from the testator's estate.[21]

The prevailing view in the literature holds that, for the purpose of calculating the legitim, amounts paid out from the testator's account pursuant to his or her instruction issued under Article 56(1) BL, although not forming part of the estate, are to be included in the value of the estate [Gwiazdomorski 1964, 1046; Pietrzykowski 1972, 1912-913; Kosik 1986, 548; Piątowski 1986, 61-62; Dyoniak 1990, 141; Szpunar 1977, 11; Idem 1998, 420; Idem 2002, 25; Stecki 1998, 314; Niezbecka 2012, Article 993, thesis 3; Skowrońska-Bocian and Wierciński 2017, Articles 993-995, thesis 8; Pazdan 2021, Article 993, Nb 5; Piątowski, Witczak, and Kawałko 2025, 129-130; cf. Piątowski 1985, 44-46]. It is consistently accepted that the value of the gratuitous benefit received by a person entitled to a legitim as a result of the execution of an instruction for transfer of a bank deposit mortis causa is to be credited towards their legitim [Gwiazdomorski 1964, 1046; Pietrzykowski 1972, 1912-913; Kosik 1986, 551; Piątowski 1986, 61-62; Dyoniak 1990, 141; Szpunar 1977, 11; Idem 1998, 421; Stecki 1998, 314; Niezbecka 2012, Article 996, thesis 1; Skoworńska-Bocian and Wierciński 2017, Article 996, thesis 1; Pazdan 2021, Article 996, Nb 6; Piątowski, Witczak, and Kawałko 2025, 129; cf. Piątowski 1985, 44-46]. Still, it must be acknowledged that dissenting views have also been voiced. Some representatives of the doctrine have expressly argued in favour of excluding the application of Articles 993 and 996 CC to instructions for transfer of a bank deposit mortis causa [Pyzioł 2004, 128].

As previously noted, there should be no doubt that one of the gratuitous benefits that can significantly reduce the testator's estate is the sum of money received as a result of the execution of a bank bequest. This effect resembles that of a gift agreement, as it involves a transfer of assets in favour of another party at the expense of the testator's estate. As already pointed out, a purely literal interpretation does not provide a definitive answer as to which the

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[19] Judgment of the Court of Appeal in Poznań of 23 May 2016, ref. no. VIII Ca 127/16, Legalis.

[20] See judgements of the Court of Appeal in Warsaw of 26 November 2014, ref. no. VI ACa 99/14, Official Database of Rulings of the Court of Appeal in Warsaw and the Court of Appeal in Wrocław of 9 November 2016, ref. no. I ACa 914/16, Official Database of Rulings of the Court of Appeal in Wrocław.

[21] See, e.g. judgement of the Supreme Court of 12 April 2013, ref. no. I ACa 286/13, Lex no. 1327634.

views prevailing in the doctrinal and judicial practice deserve acceptance. It is essential to rely primarily on a systemic interpretation. As one author aptly observed, an instruction for transfer of a bank deposit mortis causa does not operate in a legal vacuum [Księżak 2012, 284]. Treating an instruction for transfer of a bank deposit mortis causa as equivalent to a gift for the purposes of determining the amount of the legitim would entail the consistent application of the provisions on gifts to bank bequests, both at the stage of satisfying the legitim, that is, the manner in which the testator provides "compensation" to the entitled party, and at the stage of determining liability for inheritance debts. It is evident that such liability would extend solely to the debt arising from the legitim. Undoubtedly, this constitutes an inheritance debt accorded a privileged status by the legislator, in the sense that the circle of persons liable for its satisfaction has been extended beyond those "normally" encumbered with this liability, that is, the heirs and vindication legatees. As a rule, prior to the division of the estate, liability for inheritance debts rests with the heirs and the persons benefitting from vindication legacies (Article 1034^1(1) CC). However, in this respect, the legitim claim is somewhat weaker when compared with other inheritance debts, since a vindication legatee and the heirs are jointly and severally liable for the latter but not for the legitim. The liability for the legitim on the part of the legatee arises only when the entitled person's interest cannot be satisfied by the heirs (Article 999^1(1) CC) [Księżak 2011, 1081-1085; Idem 2024, Article 999^1, thesis A.1.]. Liability for the legitim is borne not only by the heirs and recipients of vindication legacies, but also by beneficiaries (Articles 1000-1001 CC), as well as ordinary legatees and the entitled designated in the relevant instruction (Article 1003 CC). In the latter case, however, legitim claims cannot be brought directly against these parties. Their liability may arise only where the heir seeks a corresponding reduction of legacies and the court upholds the claim. Adopting a broad interpretation of the term "gift" within the provisions governing on the legitim would mean that the entitled under Article 991(1) CC, if the heirs and vindication legatees are unable to satisfy the legitim-related debt, could target their claims at the beneficiaries of a bank bequest, just as they may at the recipients of gift.

6. THE ADMISSIBILITY OF APPLYING PROVISIONS SANCTIONING UNLAWFUL CONDUCT TOWARD THE TESTATOR TO BENEFICIARIES OF A BANK BEQUEST

A distinct issue concerns the admissibility of applying the provisions of Book Four CC – Inheritance – to sanction wrongful conduct on the part of beneficiaries of a bank bequest. Book Four CC provides normative mechanisms that permit certain individuals to be deprived of benefits acquired upon the testator's death where such acquisition would offend a sense

of justice. The legislator sets out limited grounds for exclusion from inheritance in Articles 928(1) and 1008 CC, yet, in the context of the discussion, attention should also be given to Article 940 CC, which permits the exclusion of the testator's spouse from intestate succession following a court judgement. This option is available if the testator had initiated divorce or separation proceedings on fault-based grounds but died before the final ruling, and the court, acting under Article 940 CC, found that the divorce or separation judgement would have been justified. This means, in the view of the adjudicating court, that the spouse's culpable conduct resulted in the permanent and complete breakdown of conjugal life [Witczak 2013, 96-97 and 379-392 along with the literature referenced therein].

The conduct named in Article 928(1) CC may serve as grounds for a declaration of heir's unworthiness to inherit, which, as a consequence, leads to his or her exclusion from the succession as if they had predeceased the opening thereof (Article 928(2) CC). Action to declare unworthiness to inherit can be initiated by individuals who have an interest in removing the heir from the succession. The legal standing to bring such an action is defined in broad terms: it is available to any person "who has an interest," and there is no requirement as to whether the interest should be legal or financial in nature [Witczak 2013, 318-20]. Disinheritance, in turn, constitutes a mechanism by which a legitim may be revoked at the testator's initiative, provided that a valid and effective will is executed expressly indicating a cause named in Article 1008 CC.

Clearly, the scope of these legal solutions as to the person varies. The broadest ambit pertains to unworthiness of inheritance, a quality that encompasses not only those deemed potentially unworthy but also the range of individuals vested with active legal standing in court proceedings. In contrast, disinheritance is more narrowly circumscribed, as it is designed to deprive individuals of the legitim, a right afforded exclusively to heirs from the first and second intestate succession groups. Disinheritance may be effected solely by the testator through a will (by the way, a similar result may also arise from other civil-law events, for example, the rejection of inheritance by a person entitled to the legitim, though such outcomes are independent of the grounds for disinheritance provided for in Article 1008 CC). The narrowest scope is afforded to the mechanism set out in Article 940 CC, as it applies exclusively to the testator's spouse and only in cases of intestate succession. The active legal standing is granted solely to heirs who inherit concurrently with that spouse [Witczak 2013, 374-79]. The aforesaid civil-law events fall within the category of the so-called negative grounds for succession, meaning that their occurrence in relation to a person who is otherwise capable of inheriting and holds a valid title to the estate results in his or her removal from the succession. Put differently, only those who are "worthy" of inheritance may actually inherit.

The issue of whether the provisions on unworthiness to inherit may be applied to beneficiaries of a bank bequest is a narrower aspect of the broader question concerning the admissibility of the same to individuals who derive financial benefits upon, and by reason of, the testator's death. The rules governing unworthiness to inherit is exceptional in nature and must be interpreted strictly, which gives rise to a fundamental question as to whether they may be applied to the beneficiary of a bank bequest. According to the prevailing view in the legal doctrine, the exceptional nature of this institution and its governing rules strongly argue against applying Article 928(1) CC to a person entitled under an instruction for transfer of a bank deposit mortis causa. It should not go unnoticed, however, that the said rules are applied to persons entitled to a legitim, despite the absence of an express statutory reference to that effect [Witczak 2013, 82].

In functional terms, the instruction for transfer of a bank deposit mortis causa bears certain similarities to a testamentary legacy: the benefit is acquired at the expense of the estate, and independently of whether the beneficiary enjoys the status of heir. Given that, pursuant to Article 972 CC, the provisions on unworthiness of inheritance apply accordingly to legacies, and under Article 981(5) CC to vindication legacies, it is worth considering whether, by way of cautious analogy, the provisions of the CC on legacy may also be valid for instructions for transfer of a bank deposit mortis causa, naturally, only to the extent that no divergent regulations arise from specific statutory provisions [Piątowski, Witczak, and Kawałko 2025, 129-30]. Although, on the face of it, the answer to this question may appear self-evident, given the exceptional nature of the wording of Articles 928-930 CC and the explicit prohibition against their extensive interpretation, which would seem to preclude the application of the provisions on unworthiness of inheritance to persons not expressly named in the law, such a position raises significant doubts when viewed through the lens of equity-based arguments. There can hardly be any justification for allowing an individual to derive a benefit from the death of a testator when that very death was caused by the individual's culpable conduct, such as committing an intentional offence against the testator's life. The absurdity of endorsing such reasoning would be plainly evident in practice. If the beneficiary of a bank bequest is an heir or a person entitled to a legitim, and this person is declared unworthy to inherit, he or she will be precluded from receiving any benefit from the estate based on their appointment as heir or any monetary benefit due under the legitim. Meanwhile, their claim filed with the bank and arising from the prior instruction for transfer of a bank deposit mortis causa, which only requires proof of identity and the certificate of the account holder's death, would nonetheless be fully met. It may, of course, be argued that the sums paid to beneficiaries of a bank bequest do not form part of the

estate. However, this argument loses much of its persuasive force in light of Article 681(5) CC, which expressly provides that the rules of unworthiness of inheritance apply to vindication legacies accordingly. Equitable considerations argue strongly in favour of an opposing view, namely, that the rules of unworthiness of inheritance should extend to individuals entitled under an instruction for transfer of a bank deposit mortis causa [Witczak 2013, 83].

Naturally, in analysing this issue, it is necessary to distinguish between two scenarios, each giving rise to a fundamentally different question. The first concerns a situation where the beneficiary of an instruction for transfer of a bank deposit mortis causa is also an heir, an ordinary legatee, a vindication legatee, or a person entitled to a legitim. So, does a declaration of unworthiness with respect to the heir also result in the forfeiture of the benefit arising from the instruction? The second concerns a beneficiary who does not fall within the group of persons who possess a passive legal standing in proceedings concerning unworthiness. Is it possible, by way of cautious analogy, to rely upon Articles 928-930 CC and seek a declaration of his or her unworthiness? Rejecting the applicability of the rules of unworthiness of inheritance to the beneficiary of a bank bequest would create a paradox: a person declared unworthy would be barred from claiming a legitim, yet that same legitim could be satisfied in whole or in part through a bank bequest granted to them even though they have been excluded from the succession pursuant to Article 928 CC.

A declaration of unworthiness is contingent upon the fulfilment of certain conditions, foremost among them the presence of expressly enumerated grounds under Article 928(1) CC, consisting of unlawful conduct attributable to the heir. The analogous application of the provisions on unworthiness of inheritance to individuals entitled under an instruction for transfer of a bank deposit mortis causa would imply that any person with an interest might seek to have the beneficiary of a bank bequest declared unworthy, should that beneficiary have intentionally committed a serious offence against the testator or interfered with the testator's freedom of testation, irrespective of whether they also inherit from the account holder (as a legatee or otherwise). As clearly noted above, equitable considerations argue that such a person should not be permitted to receive the benefit designated for them. However, it remains debatable whether the same conclusion should be drawn in a scenario where the beneficiary of a bank bequest coerced or deceived the testator into establishing an instruction for transfer of a bank deposit mortis causa to the benefit of the former. An instruction for transfer of a bank deposit mortis causa shares numerous attributes with a testamentary disposition. It is, however, far from disputed that while a defective declaration by the testator invalidates the legal transaction under Article 945(1)(2) and (3) CC, an instruction for transfer of a bank deposit mortis causa made under threat or by mistake

does not result in absolute invalidity. In such a case, the account holder has the right to revoke the legal consequences of the defective declaration of will in accordance with the general terms of civil law. While this may be of little relevance to the account holder, who in any case may revoke or amend the instruction at any time, it carries significance for his or her heirs, as they inherit the account holder's right to evade the legal effects of a defective declaration of will. This is but one of the reasons why the question so posed should be answered in the negative [Witczak 2013, 86-87].

The situation is somewhat different where the testator's spouse, who inherits under intestate succession and is simultaneously the beneficiary of a bank bequest, is excluded from the succession by a court judgment issued pursuant to Article 940 CC. The judgment issued in such proceedings does not pertain strictly to the testator's marriage in the sense that it does not dissolve the bond or result in a separation (as proceedings on this matter are discontinued upon the death of one of the parties pursuant to Article 446 of the Code of Civil Procedure); it "only" causes the exclusion of the spouse from intestate succession. Consequently, such a spouse does not inherit under intestate succession and is not entitled to a legitim. It is hardly acceptable that a testator who, during their lifetime, initiated divorce or separation proceedings alleging fault on the part of their spouse in the breakdown of conjugal life intended to bestow any benefit upon that spouse, especially considering that exclusion from succession under Article 940 CC also entails the denial of the right to a legitim. The problem, however, is that if the assessment at the moment of the opening of the succession must determine whether the person for whom a bank bequest was established falls within the circle of beneficiaries provided for in Article 56 BL, the answer, regrettably, must be affirmative. Furthermore, if the testator's spouse were also appointed as an heir to a will, a question arises whether, and if so, to what extent, a judgment issued pursuant to Article 940 CC would affect his or her entitlements under intestate succession [Dyoniak 1988, 56-64; Witczak 2013, 410]. If the similarity between a bank bequest and a will is taken into account, a definitive conclusion is far less straightforward.

CONCLUSION

In view of the fact that the right to a legitim operates as a protective instrument for the testator's closest relatives following his or her death, serving, in effect, as a continuation of the maintenance obligation previously incumbent upon the deceased, its legal structure should be designed to guarantee the effectiveness of that protection, ensuring that the claims of the entitled persons are genuinely satisfied. The objective is to guarantee that the deceased's closest family members receive a specific share of the estate upon the

testator's death, irrespective of what dispositions he or she has made mortis causa. However, since any harm to the testator's closest family members may be done not only through the execution of a will naming legal successors from outside the family circle but also through *inter vivos* legal transactions carried out by the testator that reduce the estate, it is essential that the statutory protection afforded to such persons not be merely nominal and taken into account in the course of "inheritance settlements" (particularly in relation to the legitim) covering gratuitous benefits conferred by the testator. Adequate protection of the deceased's closest family members can only be ensured if, in interpreting the applicable provisions of the CC on the legitim, particularly in the part concerning the obligation to make allowances for gifts made *inter vivos* by the testator, due regard should be given to the *ratio* of the institution. Although these provisions refer solely to "gifts," where the exercise of the right to a legitim is jeopardised by legal transactions performed by the testator that reduce the estate, the category within which such transactions fall, whether or not they constitute a gift in the sense of a named contract under the CC, should be of no relevance. It thus seems justified to treat, by analogy to a gift as defined by the CC, any legal transaction performed by the testator that results in gratuitous transfers made at the expense of his or her estate, and which ultimately lead to the lowering of its value, in the same way. Undoubtedly, an instruction mortis causa is such a transaction. It likewise appears uncontroversial that, by way of analogy, the provisions of the CC permitting the sanctioning of unlawful conduct by a beneficiary should apply to the recipient of such an instruction, thus allowing for the forfeiture of the benefit assigned to them by the testator.

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DANGER OF DEATH AS A CIRCUMSTANCE AFFECTING THE RELAXATION OF THE DISCIPLINE OF THE SACRAMENTS

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Abstract. With defining the discipline of the sacraments, the legislator has introduced a series of exceptions that in the danger of death abolish or mitigate some of the conditions that are applicable under normal circumstances. This paper is an attempt of the synthesized presentation of these rules. At first, the definition of the term of the danger of death was formulated, followed by systematic presentation of norms mitigating the discipline of the sacraments in the danger of death. At the end of the paper, *the mind of legislator* and purpose of the mitigation of law in danger of death was presented.

Keywords: sacraments; discipline of sacraments; danger of death; case of necessity; mitigation of the law.

INTRODUCTION

The Holy Sacraments, instituted by Christ, were entrusted to the Church not only to sanctify the faithful, strengthen their faith and enable its expression, but also to build and solidify the Church community.[1] The universal right of the faithful to receive the sacraments[2] implies a corresponding duty of the ministers to prepare them for their reception and to administer them if the faithful "seek them at appropriate times, are properly disposed, and are not prohibited by law from receiving them" (Canon 843 § 1 CIC/83). The universal legal norms of the Church governing preparation for the sacraments, the conditions necessary for their celebration and reception are referred to as the discipline of the sacraments. The significance of these norms is underscored by the existence of a dedicated

[1] *Codex Iuri Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars. II, p. 1-317 [hereinafter: CIC/83], Canon 840.

[2] Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio dogmatica de Ecclesia *Lumen gentium* (21.11.1964), AAS 57 (1965), p. 5-75 [hereinafter: LG], no. 37.

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institution within the Roman Curia: the Dicastery for Divine Worship and the Discipline of the Sacraments.[3]

The regulations governing discipline of the sacraments can be classified into three categories. The first encompasses the conditions necessary for the validity of a sacrament. The second pertains to elements that determine the liceity of its administration, reception and the relevant procedures. Lastly, the third group includes regulations specifying the rites applicable to the celebration of the respective sacrament. Recognizing the importance of the sacraments for the life of the Church, the legislator has reserved the approval of conditions necessary for sacramental validity to the highest ecclesiastical authority, while allowing Episcopal Conferences and individual bishops to establish only the elements required to ensure the liceity of the rites performed.[4]

In defining the discipline of the sacraments, the legislator introduced a number of provisions that waive or mitigate certain conditions applicable under normal circumstances in the cases where a danger of death occurs. For the most part, in such exceptional situations, these rules permit the omission of certain elements established by the Church as necessary to ensure the liceity of sacrament administration or reception. However, some provisions grant further exemptions from the elements established by the Church as necessary conditions for the validity of a sacrament. These, however, are limited to the elements derived from positive ecclesiastical law rather than from divine law, from which one cannot dispense.

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[3] The name Sacred Congregation for the Discipline of the Sacraments appeared in 1908 in the Apostolic Constitution of Pius X *Sapienti Consilio*. During the successive reforms of the Roman Curia, the name of this Dicastery changed, it was also merged with the Congregation for Divine Worship, only to later regain autonomy. Finally, in the Constitution *Pastor Bonus*, John Paul II reunited these two Congregations, creating the Congregation for Divine Worship and the Discipline of the Sacraments, which in the Apostolic Constitution of Francis *Praedicate Evangelium* assumed the name Dicastery for Divine Worship and the Discipline of the Sacraments and retained its previous competences and tasks. Franciscus, Constitutio apostolica *Praedicate Evangelium* de Curia Romana eiusque servitio pro Ecclesia in mundo (10.02.2022), AAS 114 (2022), p. 375-455, no. 88-97.

[4] Canon 841 CIC/83: *Cum sacramenta eadem sint pro universa Ecclesia et ad divinum depositum pertineant, unius supremae Ecclesiae auctoritatis est probare et definire quae ad eorum validitatem sunt requisita, atque eiusdem aliusve auctoritatis competentis, ad normam can. 838, §§ 3 et 4, est decernere quae ad eorum celebrationem, administrationem et receptionem licitam necnon ad ordinem in eorum celebratione servandum spectant*. Canon 838 § 3 CIC/83: *Ad Episcoporum Conferentias spectat versiones librorum liturgicorum in linguas vernaculas fideliter et convenienter intra limites definitos accommodatas parare et approbare atque libros liturgicos, pro regionibus ad quas pertinent, post confirmationem Apostolicae Sedis, edere*.

1. DANGER OF DEATH

Let us first examine the nature of the special circumstance of a danger of death. In canon doctrine, two terms have been developed in reference to this situation: *periculum mortis* and *articulus mortis* [Montini 2015, 278].

The term *periculum mortis* describes a situation in which an individual faces a real and significant risk of losing their life, while still standing a chance of survival. For a person exposed to such risk, the likelihood of survival and the likelihood of death may appear equally uncertain or differ in degree, but both possibilities are consciously perceived. Importantly, the potential end of our earthly lives is an ever-present aspect of our reality, even if we are often only dimly aware of it in our daily existence. For example, moving through city streets, we may become involved in a traffic accident, suffer the consequences of an unexpected natural disaster or become a victim to a crime. Nevertheless, to qualify as *periculum mortis* in the legal sense, it is necessary that certain circumstances and arguments occur to justify our anticipation of a potential life-threatening danger. This remains true even if the situation does not ultimately result in death or the end of life occurs only in the distant future [Idem 1998, 310-11].

Articulus mortis, in contrast, describes a situation where death is imminent and its inevitability is morally certain. While this moral certainty of death does not entirely rule out the survival, the possibility is remote and largely theoretical. However, it excludes a reasonable likelihood of avoiding death, which might only occur under extraordinary circumstances [Capello 1962, 370].

Both *periculum mortis* and *articulus mortis* involve specific defining circumstances that persist for a certain period of time, which may be substantial, particularly in the case of the former. The danger of death is a condition that can be experienced over an extended period of time. What is crucial, though, is that it always involves some probability of death in the relatively near future, even if the risk itself is prolonged [Ciprotti 1983, 2].

In current legislation, the two concepts have been unified, and whenever the Code refers to *periculum mortis*, it should be understood to encompass both the classic situation of the probability of death and cases where death is imminent. This equalization resulted from a broad doctrinal interpretation of the provisions traditionally applicable to *articulus mortis*, extending them to cases involving the risk of death. As a result, in Book IV CIC/83, the term *periculum mortis* appears twenty times, whereas *articulus mortis* is absent [Montini 2015, 280].

Nowadays, what seems more relevant for pastoral practice is the ability to distinguish between the danger of death caused by external factors, such as an impending execution, war, dangerous travel, risky surgery, and that

arising from the condition of the individual, e.g. their advanced age or serious illness. The determination of the existence of the danger of death, its duration or cessation, relies on empirical observation or familiarity with the specific case. Expert opinions from doctors or other specialists may also provide valuable insight. Ultimately, the decision as to whether *periculum mortis* exists in a given situation rests with the minister, who, according to Canon 144,[5] may act even in cases of factual doubt as to whether the person receiving the sacrament is in danger of death.

It should also be noted that the legislator didn't use the term *periculum mortis* in all instances where the Code allows the discipline of the sacraments to be relaxed in view of a danger of death. The term *casus necesitatis*, translated as an incident/case of necessity, appears in a number of places. A threat to the life of the recipient of the sacrament, especially when death might occur at any moment, clearly constitutes a circumstance where the legislator has allowed for the application of provisions containing this clause.[6]

When analyzing the Code's norms regarding the special circumstance of a danger of death, we will come across provisions that relax the discipline of the sacraments. These primarily concern the elements necessary for the licit administration or reception of the sacrament or the compliance with the prescribed rite. However, the Code also allows for cases where the conditions required for the validity of the sacrament do not have to be followed.[7]

2. PROVISIONS ON THE LICEITY OF THE ADMINISTRATION, RECEPTION AND CELEBRATION OF THE SACRAMENTS

The option to abstain from observing the conditions necessary for the licit administration or reception of a sacrament is the most common

[5] Canon 144 § 1 CIC/83: *In errore communi de facto aut de iure, itemque in dubio positivo et probabili sive iuris sive facti, supplet Ecclesia, pro foro tam externo quam interno, potestatem regiminis exsecutivam*.

[6] For example in canons regarding the celebration of baptism: Canons 850, 853, 857, 860 CIC/83.

[7] Among the regulations taking into account the circumstance of danger of death, there are also those, which do not so much allow for the omission of certain elements or failure to meet the conditions, but which outright command and impose the obligation to administer the sacrament without fulfilling what is necessary for licitness, or even for validity in ordinary circumstances. In addition to the obvious obligation of pastors to administer viaticum to the faithful in danger of death, imposed by Canons 911 and 921 [Rivella 1996a, 314-20], we also find Canon 866 § 2, which orders a child to be baptized immediately in danger of death, and Canon 867 § 2 permits this even against the will of the parents [Rivella 1996b, 66-75]. This type of regulation also includes Canon 986, which obliges every priest to hear the confessions of the faithful in danger of death, including those who, due to a lack of permission or a prohibition resulting from an ecclesiastical penalty, cannot validly hear confessions.

solution found in the canons which employ the term *periculum mortis* (or the broader *casum necesitatis*) to describe a circumstance permitting the relaxation of the discipline of the sacraments. These instances can be classified into several groups, which will be discussed below.

2.1. Exemption from the requirement to comply with the conditions concerning the place of celebration of a sacrament

Under ordinary circumstances, all sacraments, with the exception of the Anointing of the Sick, should be administered and received in a church or, possibly, in another holy place.[8] However, in cases of danger of death or even less severe circumstances, the legislator allows for the sacraments to be celebrated outside of holy places.

Due to the unique nature of Baptism, as the gateway to other sacraments and a prerequisite for salvation (Canon 849 CIC/83), the requirement to celebrate it in a parish church[9] or another church or chapel within the parish may be waived not only in danger of death, but also in cases of significant inconvenience caused by other circumstances. In such situations, Baptism may be celebrated in another church or chapel, or even in another suitable location.[10] Furthermore, Baptism may also be performed in private homes or hospitals, but only with the relevant ordinary's permission or under compelling necessity, as it is explicitly forbidden under ordinary circumstances.[11] This necessity, in addition to other possibilities, may arise from the danger of death of the candidate for Baptism and the lack of time to reach the Church, which could endanger him or her even more.

A similar rule applies to the celebration of the Eucharist, which must occur in a holy place. However, in special cases where circumstances prevent this, the Eucharist should be celebrated in a dignified location.[12] One of such circumstances may involve a danger of death of the celebrant, the participants, or both.

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[8] See Canons 857 § 1, 881, 932 § 1, 964 § 1, 1011 § 1, 1118 § 1 CIC/83.

[9] Canon 857 § 1 CIC/83: *Extra casum necessitatis, proprius baptismi locus est ecclesia aut oratorium*. Canon 860 § 1: *Praeter casum necessitatis, baptismus ne conferatur in domibus privatis, nisi loci Ordinarius gravi de causa id permiserit.*

[10] Canon 859 CIC/83: *Si ad ecclesiam paroecialem aut ad aliam ecclesiam vel oratorium, de quo in can. 858, § 2, baptizandus, propter locorum distantiam aliave adiuncta, sine gravi incommodo accedere vel transferri nequeat, baptismus conferri potest et debet in alia propinquiore ecclesia vel oratorio, aut etiam alio in loco decenti.*

[11] Canon 860 § 1 CIC/83: *Praeter casum necessitatis, baptismus ne conferatur in domibus privatis, nisi loci Ordinarius gravi de causa id permiserit.*

[12] Canon 932 § 1 CIC/83: *Celebratio eucharistica peragatur in loco sacro, nisi in casu particulari necessitas aliud postulet; quo in casu, in loco honesto celebratio fieri debet.*

A similar provision was put in place with regard to the place of administration of the sacraments of Confirmation and Penance, but in these cases the legislator requires a just and reasonable cause.[13]

Obviously, a situation where a candidate for Confirmation or a penitent is in danger of death should be considered a legitimate reason to administer these sacraments in a location other than a church or chapel. This principle, especially in the case of the sacrament of Penance, is applied both during military operations by military chaplains and by priests visiting the sick and dying, or in similar emergencies, such as road accidents.

2.2. Licit administration of sacraments by unauthorized or extraordinary ministers

The provisions of Book IV CIC/83 specify who can validly administer each sacrament. With the exception of Baptism, Marriage and the distribution of Holy Communion, sacraments may be dispensed only by clerics with the appropriate degree of ordination. However, in addition to the provisions regarding validity, the law also imposes other conditions that the minister of the sacrament must meet to ensure it is administered licitly. These include, for example, jurisdiction over the territory or the person receiving the sacrament, as well as the authorization granted by a competent authority or vested in a specific office. Nevertheless, certain regulations provide exemptions from these additional conditions when the recipient of the sacrament is in danger of death.

In the case of the sacrament of Baptism, the ordinary minister is a cleric, and the relevant pastor in particular (Canon 861 § 1 CIC/83). However, when necessary, i.e. above all in danger of death, any person with the right intention can baptize.[14] On the one hand, this provision underscores the necessity of Baptism for salvation and the resultant missionary duty given to the Church by Christ to administer this sacrament. On the other hand, however, it highlights the importance of catechesis on the subject, to ensure that everyone is aware of this obligation and capable of administering this sacrament when required [Tejero 2023, 537]. Such circumstances justify minister's failure to comply with the prohibition

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[13] Canon 881: *Expedit ut confirmationis sacramentum in ecclesia, et quidem intra Missam, celebretur; ex causa tamen iusta et rationabili, extra Missam et quolibet loco digno celebrari potest*. Canon 964 § 3: *Confessiones extra sedem confessionalem ne excipiantur, nisi iusta de causa*.

[14] Canon 861 § 2 CIC/83: *Absente aut impedito ministro ordinario, licite baptismus confert catechista aliusve ad hoc munus ab Ordinario loci deputatus, immo, in casu necessitatis, quilibet homo debita intentione motus solliciti sint animarum pastores, praesertim parochus, ut christifideles de recto baptizandi modo edoceantur.*

on administering the sacrament of Baptism outside one's territory without proper authorization.[15]

Under Canon 882 CIC/83 the subsequent sacrament in the path of Christian initiation, i.e. Confirmation, is typically administered by a bishop or a duly authorized presbyter. However, when a person is in danger of death, this sacrament may be administered by a parish priest or even any presbyter, even if they do not hold the requisite authorization.[16]

Another sacrament of critical importance for the faithful's pursuit of holiness is the sacrament of Penance. This sacrament is subject to special protection under canon law to eliminate the risks of abuse in its administration. In addition to the obligation to maintain the secrecy of confession and severe penalties for offenses related to the administration of this sacrament, canon law requires that, to grant valid and licit absolution, a priest must have except ordination also the faculty to confess the faithful to whom he forgives sins (Canon 966 § CIC/83). However, if the penitent is in danger of death, the minister can validly and licitly grant absolution even if he lacks this faculty.[17]

The Code of Canon Law requires Catholics wishing to marry to do so in the presence of an authorized person and two witnesses. The regulations detail the catalogue of persons who have the authority to assist in a marriage, and provide that marriage celebrated before an unauthorized person is deemed concluded invalidly (Canon 1108-1112 CIC/83). However, also in this case, Canon 1116 § 1, 1º allows prospective spouses in danger of death to marry validly and licitly in the presence of witnesses only.[18]

2.3. Exemption from the mandatory preparation of the faithful for the sacraments of Christian initiation and from other preparatory legal procedures and rites

The Church, recognizing the sacraments as essential to building and strengthening the community of the faithful (Canon 840 CIC/83), requires adequate preparation for their reception. This responsibility lies with the priests and extends beyond catechesis (Canon 841 CIC/83)

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[15] Canon 862 CIC/83: *Excepto casu necessitatis, nemini licet, sine debita licentia, in alieno territorio baptismum conferre, ne suis quidem subditis.*

[16] Canon 883 CIC/83: *Ipso iure facultate confirmationem ministrandi gaudent: […] 3° quoad eos qui in periculo mortis versantur, parochus, immo quilibet presbyter.*

[17] Canon 976 CIC/83: *Quilibet sacerdos, licet ad confessiones excipiendas facultate careat, quoslibet paenitentes in periculo mortis versantes valide et licite absolvit a quibusvis censuris et peccatis, etiamsi praesens sit sacerdos approbatus.*

[18] Canon 1116 § 1 CIC/83: *Si haberi vel adiri nequeat sine gravi incommodo assistens ad normam iuris competens, qui intendunt verum matrimonium inire, illud valide ac licite coram solis testibus contrahere possunt: 1° in mortis periculo.*

to include the fulfilment of conditions and performance of administrative formalities and procedures necessary for the licit reception of the sacraments.

For a child's licit Baptism, the minister must ordinarily obtain the parents' consent and have a reasonable hope that the child will be raised Catholic (Canon 868 § 1, 2° CIC/83). However, in danger of death, this hope is not required. The sacrament can be licitly administered even if the parents are not Catholic, and therefore there is a reasonable belief that they will not raise the child in the faith. Moreover, in such a case the legislator allows for a licit administration of baptism even against the parents' will.[19]

For an adult to receive the sacrament of Baptism licitly, the candidate must be instructed in the truths of the faith and Christian duties, and undergo a trial period of Christian life in the catechumenate (Canon 865 § 1 CIC/83). However, when the candidate for Baptism is in danger of death, this requirement of preparation is waived and only the intention to receive Baptism and the pledge to keep the precepts of the Christian faith is sufficient.[20]

Likewise, the reception of the sacrament of Confirmation ordinarily requires proper instruction of the candidate, being in a state of sanctifying grace, having the right intention and the ability to renew baptismal promises. In a life-threatening event, however, these conditions are dispensed with[21].

It is the responsibility of parents and the parish priest to ensure that children are appropriately prepared to receive Holy Communion for the first time. This preparation is aimed at imparting knowledge about the Eucharist and ensuring that the children understand the mystery of Christ's presence in it and are ready to receive it with faith and devotion (Canon 913 § 1 and 914 CIC/83). In danger of death, however, these preparations and requirements are reduced only to the child's basic ability to distinguish between food and the Body of Christ and to receive Holy Communion in a reverent manner.[22]

Another provision concerning Holy Communion is the rule that allows for it to be received a second time on the same day only when participating in a Eucharistic celebration (Canon 917 CIC/83). In the case of Viaticum,

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[19] Canon 868 § 2 CIC/83: *Infans parentum catholicorum, immo et non catholicorum, in periculo mortis licite baptizatur, etiam invitis parentibus.*

[20] Canon 865 § 2 CIC/83: *Adultus, qui in periculo mortis versatur, baptizari potest si, aliquam de praecipuis fidei veritatibus cognitionem habens, quovis modo intentionem suam baptismum recipiendi manifestaverit et promittat se christianae religionis mandata esse servaturum.*

[21] Canon 889 § 2 CIC/83: *Extra periculum mortis, ut quis licite confirmationem recipiat, requiritur, si rationis usu polleat, ut sit apte institutus, rite dispositus et promissiones baptismales renovare valeat.*

[22] Canon 913 § 2 CIC/83: *Pueris tamen in periculo mortis versantibus sanctissima Eucharistia ministrari potest, si Corpus Christi a communi cibo discernere et communionem reverenter suscipere possint.*

which by its very nature is given in danger of death, this rule obviously does not apply.[23]

Preparation for the sacrament of Marriage is extensively detailed in the Code of Canon Law, where the legislator dedicated a separate chapter to it. Additionally, Canon 1067 introduces an obligation for the bishops' conference to prepare detailed regulations outlining the formalities and responsibilities of priests to ensure that the sacrament will be received validly and licitly (Canon 1066 and 1067 CIC/83). The key document that prospective spouses must present before they marry is a baptismal certificate, which confirms their acceptance of Baptism, as well as their single status.[24] This document is so important that the prenuptial protocol cannot be initiated unless the couple presents it [Majer and Adamowicz 2019, 58-59]. Meanwhile, the canonical examination itself aims at preventing marriages from being invalidated due to an impediment or defect in consent.[25] Nevertheless, when the couple are in danger of death, their statement is considered sufficient to confirm the fact of Baptism, single status and the absence of impediments.[26]

Additionally, licit assistance in the celebration of Marriage involves obtaining the consent of the local Ordinary in specific situations such as mixed marriages, marriages that cannot be recognized by state law, proxy marriages and other cases listed in Canon 1071 § 1. However, when necessary, and therefore also in danger of death, this consent may be omitted.[27]

2.4. Reduction of the rite of sacrament celebration to its most essential element or permission to use an extraordinary rite form

Since the Church is formed and embodied through its sacraments (LG 11), it is up to the highest authority in the Church to determine what is required for their validity (Canon 841 CIC/83). It is also the Holy See that issues

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[23] Canon 921 CIC/83: *Etiamsi eadem die sacra communione refecti fuerint, valde tamen suadetur ut qui in vitae discrimen adducti sint, denuo communicent.*

[24] Polish Bishops' Conference, *Dekret ogólny o przeprowadzaniu rozmów kanoniczno-duszpasterskich z narzeczonymi przed zawarciem małżeństwa kanonicznego* (08.10.2019), "Akta Konferencji Episkopatu Polski" 31 (2019), p. 28-39, Article 20.

[25] Ibid., Article 2.

[26] Canon 1068 CIC/83: *In periculo mortis, si aliae probationes haberi nequeant, sufficit, nisi contraria adsint indicia, affirmatio contrahentium, si casus ferat etiam iurata, se baptizatos esse et nullo detineri impedimento.*

[27] Canon 1071 § 1 CIC/83: *Excepto casu necessitatis, sine licentia Ordinarii loci ne quis assistat: 1° matrimonio vagorum; 2° matrimonio quod ad normam legis civilis agnosci vel celebrari nequeat; 3° matrimonio eius qui obligationibus teneatur naturalibus erga aliam partem filiosve ex praecedenti unione ortis; 4° matrimonio eius qui notorie catholicam fidem abiecerit; 5° matrimonio eius qui censura innodatus sit; 6° matrimonio filii familias minoris, insciis aut rationabiliter invitis parentibus; 7° matrimonio per procuratorem ineundo, de quo in can. 1105.*

liturgical books and approves translations and adaptations made by bishops' conferences (Canon 838 § 2 CIC/83). Ministers administering the sacraments are obliged to strictly adhere to these books in celebrating the rites and are not allowed to "add, omit, or alter anything in them on one's own authority."[28] However, the legislator has provided certain exceptions from this rule when the person receiving the sacrament is in danger of death.

In the case of Baptism, Canon 850 reiterates the general principle mandating the observance of the rites described in the liturgical books. At the same time, it introduces an exception: in cases of necessity, which, as previously stated, also include the danger of death, some of the prescribed rites may be omitted, and only those necessary for the valid administration of the sacrament must be observed.[29]

According to Canon 960, which repeats almost verbatim a provision from the *Ordo Panitentiae* liturgical book,[30] only individual confession and absolution constitute the ordinary method of administering the sacrament of Penance. However, if a person is in danger of death and there is no time for individual confession, the law permits the extraordinary form of simultaneous absolution of multiple penitents.[31]

Canon 1000 §1 reiterates the obligation to carefully follow the liturgical books in administering the sacrament of Anointing of the Sick. Nevertheless, it allows for the rite to be shortened and simplified if necessary, particularly in cases involving the risk of death.[32]

An similar provision appears in canon 1119, which applies to the celebration of Marriage: the rites specified in the liturgical book must be observed, except in cases of necessity.[33]

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[28] Canon 846 § 1 CIC/83: *In sacramentis celebrandis fideliter serventur libri liturgici a competenti auctoritate probati; quapropter nemo in iisdem quidpiam proprio marte addat, demat aut mutet.*

[29] Canon 850 CIC/83: *Baptismus minstratur secundum ordinem in probatis liturgicis libris praescriptum, excepto casu necessitatis urgentis, in quo ea tantum observari debent, quae ad validitatem sacramenti requirantur.*

[30] *Individualis et integra confessio atque absolutio manent unicus modus ordinarius, quo fideles se cum Deo et Ecclesia reconciliant.* Sacra Congregatio de Cultu Divino, *Ordo Panitentiae* (02.12.1972), Typis Polyglottis Vaticanis 1973, 31.

[31] Canon 961 § 1 CIC/83: *Absolutio pluribus insimul paenitentibus sine praevia individuali confessione, generali modo impertiri non potest, nisi: 1° immineat periculum mortis et tempus non suppetat sacerdoti vel sacerdotibus ad audiendas singulorum paenitentium confessiones.*

[32] Canon 1000 § 1 CIC/83: *Unctiones verbis, ordine et modo praescriptis in liturgicis libris, accurate peragantur; in casu tamen necessitatis, sufficit unctio unica in fronte vel etiam in alia corporis parte, integra formula prolata.*

[33] Canon 1119 CIC/83: *Extra casum necessitatis, in matrimonii celebratione serventur ritus in libris liturgicis, ab Ecclesia probatis, praescripti aut legitimis consuetudinibus recepti.*

2.5. Permitted use of unconsecrated water for Baptism and oil consecrated by the presbyter during the rite of Anointing of the Sick

The regulations governing the rite of Baptism provide for two forms: immersion or pouring, depending on the regulations issued by the bishops' conference (Canon 847). In both cases, however, the water used should be consecrated, either during the baptismal ceremony itself or beforehand (e.g. at Easter). However, this requirement is waived in cases of necessity, which obviously include the danger of death.[34]

When holy oils are used to administer the sacraments, consecrated oil or oil blessed by the bishop should be used. This principle applies also to the sacrament of Anointing of the Sick and the oil of the sick, which is blessed each year by the bishop at the Chrism Mass (Canon 847 CIC/83). However, Canon 847 which establishes this rule, provides for a direct exception contained in Canon 999, 2°. When necessary, it allows the presbyter to consecrate the oil during the celebration of the sacrament of Anointing of the Sick and then use it for the rite.[35]

3. PROVISIONS RELATING TO THE VALIDITY OF SACRAMENTS

The current Code of Canon Law includes five canons referring to the conditions specified by the authority of the Church as necessary for the validity of the sacraments, which may be waived in cases of danger of death. These provisions pertain to the sacraments of Confirmation, Penance and Marriage.

Canon 887 provides that a presbyter with the authority to administer the sacrament of Confirmation in a specific territory cannot validly administer the sacrament outside that territory. However, this invalidity clause is waived when the recipient of Confirmation is in danger of death. This exception is expressed by reference to the previously discussed provision from Canon 883, 3°,[36] which permits any presbyter to confer Confirmation anywhere in cases of danger of death, including outside his assigned territory[37] [Le Tourneau 2011, 117].

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[34] Canon 853 CIC/83: *Aqua in baptismo conferendo adhibenda, extra casum necessitatis, benedicta sit oportet, secundum librorum liturgicorum praescripta.*

[35] Canon 999 CIC/83: *Praeter Episcopum, oleum in unctione infirmorum adhibendum benedicere possunt: 1° qui iure Episcopo dioecesano aequiparantur; 2° in casu necessitatis, quilibet presbyter in ipsa tamen celebratione sacramenti.*

[36] Canon 883 CIC/83: *Ipso iure facultate confirmationem ministrandi gaudent: 3° quoad eos qui in periculo mortis versantur, parochus, immo quilibet presbyter.*

[37] Canon 887 CIC/83: *Presbyter facultate confirmationem ministrandi gaudens, in territorio sibi designato hoc sacramentum extraneis quoque licite confert, nisi obstet proprii eorum Ordinarii vetitum; illud vero in alieno territorio nemini valide confert, salvo praescripto can. 883, n. 3.*

The next two canons abrogating the conditions necessary for the validity of the sacraments concern the sacrament of Penance. The first one refers to the mentioned before requirement set forth in Canon 966, which mandates that a priest, in order to validly grant absolution, have both the authority of ordination and also the faculty to hear the confessions of the faithful.[38] In a situation of danger of death, Canon 976 allows a priest who is not authorized to hear confessions to validly do so, even when an authorized priest is present[39] [Pastuszko 1995, 28].

The second important provision regarding the sacrament of Penance, which contains an invalidity clause, is Canon 977. It prohibits a priest from validly absolving an accomplice in a sin against the sixth commandment. This means that a priest cannot validly give absolution to a person with whom he has committed the sin of impurity. However, the canon also provides for an exceptional situation in which this norm is abrogated. This situation is the case of danger of death, when a priest can validly grant absolution even to an accomplice in a sin against the sixth commandment.[40] In such circumstances, the priest does not commit the offense referred to in Canon 1384 and does not incur *latae sententiae* excommunication.

The third sacrament with respect to which the validity conditions may be relaxed in case of danger of death is Marriage. The Church requires Catholics to marry before an authorized cleric and in the presence of two witnesses under pain of nullity.[41] In addition, the law provides for twelve situations in which a valid marriage cannot be concluded, referred to as the so-called diriment impediments. Some of these diriment impediments are derived from divine law, while others are established by the Church. According to Canon 85, authorized ecclesiastical authority may dispense from the latter.

Canon 1078 of the Code gives such authority to dispense from the impediments of ecclesiastical law to the Ordinary of the relevant venue, except for those from which dispensation is reserved to the Apostolic See.[42] However,

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[38] Canon 966 § 1 CIC/83: *Ad validam peccatorum absolutionem requiritur ut minister, praeterquam potestate ordinis, facultate gaudeat eandem in fideles, quibus absolutionem impertitur, exercendi.*

[39] Canon 976 CIC/83: *Quilibet sacerdos, licet ad confessiones excipiendas facultate careat, quoslibet paenitentes in periculo mortis versantes valide et licite absolvit a quibusvis censuris et peccatis, etiamsi praesens sit sacerdos approbatus.*

[40] Canon 977 CIC/83: *Absolutio complicis in peccato contra sextum Decalogi praeceptum invalida est, praeterquam in periculo mortis.*

[41] Canon 1108 § 1 CIC/83: *Ea tantum matrimonia valida sunt, quae contrahuntur coram loci Ordinario aut parocho aut sacerdote vel diacono ab alterutro delegato qui assistant, necnon coram duobus testibus, secundum tamen regulas expressas in canonibus qui sequuntur, et salvis exceptionibus de quibus in cann. 144, 1112, §1, 1116 et 1127, §§1-2.*

[42] Canon 1078 CIC/83: *§ 1. Ordinarius loci proprios subditos ubique commorantes et omnes in proprio territorio actu degentes ab omnibus impedimentis iuris ecclesiastici dispensare potest, exceptis iis, quorum dispensatio Sedi Apostolicae reservatur. § 2. Impedimenta quorum dispensatio Sedi*

the subsequent canon extends this authority in cases of danger of death, empowering the Ordinary to dispense from all diriment impediments established by Church law, as well as from the canonical form. The only exception remains the obstacle of presbyteral ordination[43] [Suchocki 1998, 346].

Paragraph two of this canon vests the same power to dispense from the norms in cases of danger of death in the pastor and minister of the sacrament of Marriage, but only if the Ordinary cannot be reached. The third paragraph, on the other hand, grants similar authority of dispensation in the internal forum to the confessor, but limits it to secret impediments[44] [Renken 2010, 92].

The last provision relaxing the validity requirements for Marriage concerns the canonical form. In a case of danger of death when a person competent to assist in the marriage cannot be reached, mentioned before Canon 1116 permits a marriage to be validly concluded in the presence of witnesses alone.[45]

CONCLUSIONS

Examining the extensive range of norms established by the Church that cease to be valid in the situation of danger of death, one might initially conclude that at this final moment of a person's life, the legislator relinquishes their authority to legislate the discipline of the sacraments (it should be noted that all canons of the Code referencing *periculum mortis* pertain to the sacraments). However, such a conclusion would be mistaken, as this particular relaxation of the law is itself established precisely by the norms of canon law. When confronted with the unique moment of a faithful person's imminent death, the Church assumes that even if the believer has not been diligent in practicing faith during their life, at the moment of death

Apostolicae reservatur sunt: 1° impedimentum ortum ex sacris ordinibus aut ex voto publico perpetuo castitatis in instituto religioso iuris pontificii; 2° impedimentum criminis de quo in can. 1090.

[43] Canon 1079 § 1 CIC/83: *Urgente mortis periculo, loci Ordinarius potest tum super forma in matrimonii celebratione servanda, tum super omnibus et singulis impedimentis iuris ecclesiastici sive publicis sive occultis, dispensare proprios subditos ubique commorantes et omnes in proprio territorio actu degentes, excepto impedimento orto ex sacro ordine presbyteratus.*

[44] Canon 1079 CIC/83: *§ 2. In eisdem rerum adiunctis, de quibus in § 1, sed solum pro casibus in quibus ne loci quidem Ordinarius adiri possit, eadem dispensandi potestate pollet tum parochus, tum minister sacer rite delegatus, tum sacerdos vel diaconus qui matrimonio, ad normam can. 1116, § 2, assistit. § 3. In periculo mortis confessarius gaudet potestate dispensandi ab impedimentis occultis pro foro interno sive intra sive extra actum sacramentalis confessionis.*

[45] Canon 1116 § 1 CIC/83: *Si haberi vel adiri nequeat sine gravi incommodo assistens ad normam iuris competens, qui intendunt verum matrimonium inire, illud valide ac licite coram solis testibus contrahere possunt: 1° in mortis periculo.*

they nonetheless desire all that is necessary for salvation, which they can receive from the Church [Dziadosz 1953, 138]. The Church, therefore, seeks to provide all possible assistance at this time, setting aside its specific regulations and recognizing that the greatest aid it can offer is the granting of sacramental grace [Abonneau 1957, 947]. This approach strongly affirms of the overarching canonical principle that the salvation of souls is the supreme law of the Church (Canon 1752).

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THE CRIME OF ECOCIDE IN THE CONTEXT OF THE CONCEPT OF ECOLOGICAL SIN – SELECTED ASPECTS

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Abstract. This article examines the concept of the crime of ecocide in the context of environmental sin, with a particular focus on the legal aspects. The crime of ecocide, understood as the indiscriminate and prolonged destruction of the natural environment, is receiving increasing attention in the international debate on its inclusion in the catalogue of the most serious crimes under the jurisdiction of the International Criminal Court. In this context, an analysis of the concept of ecological sin, derived from Catholic social teaching, which emphasises man's moral responsibility for the destruction of the environment, is carried out. The aim of the article is to explore and compare two key concepts: ecocide as an international crime and ecological sin as an ethical-religious category, in the context of contemporary environmental challenges. The article seeks to show how these two categories can complement each other, pointing to the need to strengthen moral and legal responsibility for environmental destruction. Due to the overview nature of this paper, it follows a methodology based on a descriptive approach and critical analysis. Within this approach, particular emphasis will be placed on the analysis of papal encyclicals, doctrinal texts and legal provisions related to the topic of ecocide and ecological sin. In addition, the study will take into account an in-depth analysis of scientific literature, including monographs, articles published in reputable journals and reports of international organisations. Such a multifaceted review of the material will provide a broad theoretical and legal context to critically examine current legal and ethical regulations on environmental protection and crimes against nature. The analysis will also relate to the debate on ecotheology and the role of ethics in shaping environmental legislation at the international level.

Keywords: ecocide; ecological sin; environmental degradation; Catholic social teaching; protection of ecosystems.

INTRODUCTION

In the face of increasing environmental degradation and the growing effects of climate change, questions of legal responsibility for the destruction of ecosystems are becoming increasingly pressing. The crime of ecocide is the subject of intense international debate, with calls for its recognition as one of the most serious crimes under the jurisdiction of the International

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Criminal Court. Alongside this legal context, the notion of ecological sin, derived from religious-ethical traditions, particularly Catholic social teaching, is also emerging in the discourse. Ecological sin refers to the moral responsibility of human beings for actions leading to the destruction of the environment, which introduces a new dimension in the assessment of the ethical consequences of the degradation of nature. Contemporary international law is beginning to recognise the need for a systemic view of environmental protection, including the criminalisation of actions leading to massive ecological damage. Ecocide, although not yet formally recognised as a crime, is increasingly emerging in discussions about the future of global legal accountability. In this context, it is worth looking at how ethical categories such as ecological sin may influence the development of international legal norms.

The purpose of this article is to explore the relationship between the concept of the crime of ecocide and the concept of ecological sin, with a particular focus on their potential legal implications. The analysis focuses on how these two approaches – one derived from international law and the other from religious tradition – can complement each other in the development of new legal frameworks that can effectively respond to global environmental challenges.

1. ENVIRONMENTAL SIN – AN ATTEMPT AT DEFINITION

The negative effects of human activity on the environment are often referred to as 'ecological sin', which points to the moral aspect of the destruction of nature. In this view, man's destructive activity is not seen as the fulfilment of God's command to 'make the earth subject to himself' (Gen 1:28), but as a negation of the original mission entrusted to mankind [Bar 2020, 38]. Rather than responsibly stewarding the created world, man acts to the detriment of nature, which constitutes a misappropriation of his task to protect and care for the Earth. One of the key sources for the development of this concept was the teaching of the popes, in particular John Paul II, who significantly expanded the reflection on ecology that had already begun during the Second Vatican Council. In the documents of his pontificate – in particular in encyclicals such as *Redemptor Hominis*, *Sollicitudo rei Socialis*, *Centesimus annus* and *Evangelium Vitae* – there were numerous references to issues related to human responsibility for the natural world. John Paul II emphasised the need to care for the natural environment, treating care for creation as an integral part of man's mission on Earth. In these documents, the Pope addressed topics such as the progress of civilisation, the sustainable use of natural resources, responsibility for future generations and the ethical challenges of the continuing impacts of human activity on ecosystems. John Paul II's teaching became an important inspiration for the development of ecotheology, i.e. theological reflection on human

responsibility for the natural world. The Pope clearly indicated that the issue of ecology is not merely a technological or political problem, but has a profound spiritual and moral dimension. Man, as part of creation, is responsible not only for his own development, but also for the protection of the earth as a common good, given by God to all mankind. In this way, his teaching has helped to arouse an ecological consciousness in the Catholic Church and beyond, laying the foundations for a contemporary environmental ethic that emphasises a harmonious relationship between man and nature.

In the final document of the October 2019 Amazon Synod, Pope Francis referred to the proposal of John Paul II, postulating a definition of 'ecological sin' as an act or omission that violates relationships with God, neighbours, communities and the environment. He pointed out that this type of sin has consequences for future generations and manifests itself, among other things, in habits of destroying and polluting the environment, in violations of the principles of interdependence and in a lack of solidarity among creatures, which is also an offence against the virtue of justice. The Pope stressed that the Church, as a member of the international community, should actively address the topic of ecology [Babiński 2012, 252]. Examples of ecological sin include excessive accumulation of wealth, exploitation and destruction of nature, cruelty to animals and littering of forests, oceans, the atmosphere and even outer space. Although not a complete list, these phenomena show that the term 'ecological sin', has gained a place in professional, journalistic and colloquial discourse. It has been emphasised that the cause of the ecological crisis is, among other things, the unfair exchange of goods, which leads to developmental inequalities between countries. Lack of access to modern technologies and unequal distribution of natural resources force poorer countries to use energy-intensive and environmentally harmful solutions.

The ecological sin is also linked to insufficient intergenerational solidarity, which means a lack of concern for future generations who will have to deal with the consequences of current neglect. Any action in the ecosystem should take into account its impact on other areas of life and on the quality of life of future generations. Man is not the owner of natural resources but their steward, which means that he does not have the right to treat them as his exclusive property, using them thoughtlessly or destroying them [Łukomski 1997, 262]. The source of ecological sin, and the accompanying ecological crisis, is the so-called 'anthropological error', i.e. the belief that man can freely exploit the earth's resources, questioning their value and the order God has given to creation. In practice, this leads to an exploitative, short-sighted and often predatory approach to nature, with no regard for the far-reaching consequences. A misunderstanding of one's role in the world and a false belief in man's unlimited capabilities

lead to irresponsible decisions and actions that do not take into account the real needs and well-being of all creation [Babiński 2012, 258].

The world created by God is meant to be a place for the realisation of the human vocation, and man should respond to God's love by respecting and creatively using nature's resources. Ignoring this plan leads to environmental degradation. Rabid, short-sighted thinking and actions, with no concern for long-term consequences, contribute to deepening the ecological crisis, the consequences of which are borne by both present and future generations. Armed conflicts are recognised as one of the most serious pathologies in social relations, which at the same time constitute a significant cause of the ecological crisis. Wars, by directly destroying the environment, lead to permanent damage to ecosystems, and often their scope is global and difficult to repair. This destruction not only extends to infrastructure and natural resources, but also alters the political and social landscape, making the process of reconstruction and environmental protection even more difficult. Extinguishing armed conflicts and building international cooperation for peace are key elements in minimising the negative effects of wars and the resulting environmental destruction.[1] This aspect also appears to be crucial in the context of the examples of ecocide following Russia's aggression against Ukraine.

The demand for global peace-building, with an awareness of the potential consequences of the use of vast arsenals of weapons, gains importance in the context of contemporary environmental challenges. Today's calls for the protection of nature and the preservation of ecological balance are closely linked to the idea of peace, and inaction in this regard contributes to the deepening of the ecological crisis. In the context of contemporary conflicts, such as the war in Ukraine, they take on particular force. The Council's call to 'read the signs of the times' in relation to ecological issues obliges the international community to take decisive action. The Pope's appeals for commitment to the struggle to save the environment and his insistence that shirking this responsibility, as well as a lack of commitment to counter environmental catastrophe, should be considered a grave moral offence. The whole of humanity – individuals, states and international organisations alike – has a responsibility to protect nature and must actively engage in efforts to save it. Environmental responsibility is everyone's responsibility, and avoiding this responsibility not only jeopardises the future of ecosystems but also violates basic principles of justice towards future generations.

This points to the need for an ecological conversion, but also to the fact that world peace and care for the environment are inextricably linked. Actions for sustainable development and nature conservation are, according to him,

[1] Ioannes Paulus PP. II, Post-synodal exhortation *Reconciliatio et Paenitentia* (02.12.1984), AAS 77 (1985), p. 185-275.

an integral part of global peace-building. This combination of ecology and the ethic of peace poses new challenges to humanity, requiring it to take greater responsibility and make a concerted effort to prevent both ecological destruction and conflicts that may exacerbate the environmental crisis.[2]

Environmental sin is the result of a lack of responsibility towards future generations, resulting from inadequate intergenerational solidarity. In his view, concern for the quality of life of future generations, who will have to grapple with the consequences of the mistakes made by present generations, is one of the most important moral challenges. Environmental sin manifests itself primarily in environmental pollution, which contradicts the virtue of justice, since it harms not only contemporary societies but also those who will come after us. It is important to put this concept in the context of global responsibility, which is in line with the 1987 Brundtland Report 'Our Common Future', presented at the United Nations. This report introduced the concept of sustainable development, which emphasises that the actions of today's generations must not harm future generations.[3] Caring for nature is not just a technical issue, but a profoundly moral one, requiring a change in attitudes and structural reforms at the global level.

Mention should also be made of the United Nations Convention on Climate Change (UNFCCC), signed in 1992, which became the basis for global action to combat global warming. Equally important are the Kyoto and Paris Protocols, which addressed the topics of sustainable development and the reduction of greenhouse gas emissions [Zbierska 2007, 76-78]. Considerations of environmental sin are not limited to theoretical considerations, but have had a significant impact on the formation of global environmental awareness and the development of legal mechanisms to protect the environment. New calls for a paradigm shift in thinking about nature – from an exploitative approach to one based on responsibility and solidarity resound in an important way. An environmental sin in this context is not only an act of negligence, but also a deeper moral obligation to act to protect the Earth for future generations.

2. THE CRIME OF ECOCIDE – ASSUMPTIONS

Moving from the concept of ecological sin to the concept of the crime of ecocide, it is worth noting that both terms refer to the consequences of human actions that have a negative impact on the environment, but differ in their meaning and legal consequences. Ecological sin, derived from

[2] Ibid.

[3] See https://www.are.admin.ch/are/en/home/media/publications/sustainable-development/brundtland-report.html [accessed: 07.10.2024].

the social teaching of the Church, focuses on the moral and ethical aspects of human activity towards nature. It reflects a deep concern for future generations, indicating the individual's responsibility for environmental degradation and the destruction of natural resources.

Ecocide, on the other hand, as a legal term, refers to actions that lead to massive destruction of ecosystems and aim to eliminate or weaken their ability to live. Thus, ecocide implies more serious consequences that can be qualified as a crime under international law. The two concepts are linked in that ecological sin often leads to acts that can be qualified as ecocide, especially when they involve the systematic destruction of the environment for economic or political gain. In this way, ecological sin can be seen as a moral foundation that justifies the need to criminalise actions that constitute ecocide. Ultimately, understanding ecological sin as a moral obligation to care for the environment can provide a strong argument in the debate on the introduction of legal regulation of the crime of ecocide, highlighting the importance of the unity of ethics and law in the context of protecting our planet.

The term 'ecocide' was first coined by Professor Arthur W. Galston in 1970, at a conference in Washington DC. He defined it as the massive damage and destruction of ecosystems [Bar 2020, 34]. The term gained particular relevance in the context of the then ongoing Vietnam War, where the US military made extensive use of an herbicide known as 'Agent Orange'. This dangerous substance, a mixture of chemicals, was not only used for defoliation, which in itself posed a serious ecological threat, but also contained toxins that had dramatic health effects on humans. The scale of the destruction caused by the use of such substances was widely discussed at the 1972 UN Stockholm Conference, which focused on environmental issues. It was in this context that Swedish Prime Minister Olof Palme first publicly used the term 'ecocide', explicitly referring to the Vietnam War as an example of this phenomenon. Although the topic aroused much excitement and discussion, the final document of the conference made no formal reference to the concept of ecocide. A year later, in 1973, American law professor Richard A. Falk undertook the ambitious task of codifying ecocide as a crime. In his article published in the Revue Belge de Droit International, he proposed the creation of an International Convention on the Crime of Ecocide, tackling the challenge of defining the term. Falk pointed out that ecocide consists of 'the conscious or unconscious infliction of irreversible damage on the environment in times of war and peace'. His work was a step towards formalising the concept in the context of international law, opening the door to further discussions on legal responsibility for environmental destruction [Falk 1973].

Analysing these events, it is clear that ecocide is not only a war-related problem, but also involves a wide spectrum of human activities that lead to environmental degradation. As awareness of the impact of human

activities on ecosystems increases, the need to define ecocide and to introduce appropriate regulations becomes more important. Such actions can help to protect not only nature, but also the health and lives of future generations, making the topic not only a legal issue, but also an ethical one. In 1985, another attempt to include a definition of ecocide in the Genocide Convention was made by Benjamin Whitaker, the UN Special Rapporteur on Genocide. He described ecocide as 'adverse changes, often irreversible, to the environment', but this initiative also failed.[4]

Although ecocide was included in early drafts of the Rome Statute establishing the International Criminal Court in 1998, under pressure from countries such as the United States and France, it was eventually removed before the Statute was adopted. Only Article 8 was introduced, defining certain acts as war crimes that are likely to cause 'widespread, prolonged and serious environmental damage.'[5] It is noteworthy that this framing limits ecocide to the context of warfare, although it can also occur in other situations.

In 1990, Vietnam, in response to the tragic experience of war, became the first country to codify ecocide, introducing regulations in its penal code that provided penalties for the mass destruction of people and natural resources. A year later, the Russian Federation introduced similar legislation, imposing penalties for the mass destruction of ecosystems [Zierler 2011]. Today, criminal liability for ecocide is in force in many countries, such as Belgium, Chile, Kazakhstan, Ukraine and Georgia. Bills on the matter have been tabled in Brazil, Italy, Mexico, the Netherlands, Peru and Scotland, among others. In April 2021, the French National Assembly criminalised ecocide, introducing severe penalties for deliberate pollution.[6]

Efforts to recognise ecocide are also being made in European Union legislation, where the European Parliament has asked the Commission to examine the meaning of ecocide (European Parliament Resolution of 20 May 2021). A watershed moment in the debate on this topic came in June 2021, when an international panel of experts on the legal definition of ecocide, set up by the Stop Ecocide Foundation, presented a new definition of ecocide. A panel of lawyers from different countries defined ecocide as 'unlawful, reckless acts that are likely to cause serious, long-term damage to the environment'[7] pointing to the need to protect natural resources and ecosystems on an international level. The proposed definition therefore introduces two criteria that must be met for a behaviour to be considered unlawful. First, there should be a substantial likelihood that the act or omission in question

[4] See https://digitallibrary.un.org/record/108352?v=pdf [accessed: 07.10.2024].

[5] Rome Statute of the International Criminal Court (1998).

[6] See https://wyborcza.pl/7,75399,27108787,ekobojstwo-jak-ludobojstwo-czy-miedzynarodowy-trybunal-karny.html [accessed: 07.10.2024].

[7] See https://www.stopecocide.earth/legal-definition [accessed: 07.10.2024].

will cause serious, widespread or long-term damage to the environment. The Panel notes that this first threshold may be too broad, as there are legitimate and socially beneficial activities that may nevertheless lead to such damage.[8] For example, the construction of new housing estates or transport infrastructure can have serious environmental consequences, despite the fact that these are considered desirable investments.

Similar proportionality issues arise in the Rome Statute, particularly in Article 8(2)(a)(iv) and Article 8(2)(b)(iv), which deals with provisions protecting the environment during armed conflict. In this context, damage is assessed in relation to potential military gains or other war necessities. Accordingly, the Panel decided that it was necessary to add a second criterion, which relates to the unlawfulness or wantonness of the action in question. As a result, in order to bring charges, there would have to be evidence of a substantial likelihood of serious, widespread or long-lasting harm caused by acts or omissions that are either unlawful or show a lack of prudence.[9]

Ecocide is a complex phenomenon that can take different forms depending on the context and the actions that lead to environmental destruction. One of the most well-known examples is the discharge of toxic substances into waterways by industry, which leads to severe pollution of aquatic ecosystems. In such cases, aquatic organisms, including fish and other creatures, die and the drinking water for local communities becomes contaminated. Another example of ecocide is the massive deforestation that takes place in tropical rainforests such as the Amazon. Cutting down forests on a huge scale to obtain land for agriculture or the timber industry leads to a loss of biodiversity, soil erosion and negative effects on the climate. Such activities not only threaten local ecosystems, but also have far-reaching consequences for the entire planet. The immoderate use of pesticides and herbicides in agriculture is another example of ecocide. As well as destroying vegetation, these substances have dramatic health consequences for humans, including long-term diseases and genetic defects. Activities related to the extractive industries also fall under the definition of ecocide. The expansive extraction of oil or coal leads to significant environmental degradation, groundwater and air pollution. An example is the environmental catastrophe associated with the 2010 oil spill in the Gulf of Mexico, which had catastrophic consequences for local ecosystems and the economy.[10] The destruction of natural habitats, for example as a result of urbanisation or infrastructure construction, is another aspect of ecocide. These activities lead to loss of habitat for many species, threatening their survival and contributing to the extinction of some species [Nowak 2023, 76-78].

[8] Ibid.

[9] Rome Statute of the International Criminal Court (1998).

[10] See https://www.aquaquick2000.com/pl/wyciek-ropy [accessed: 07.10.2024].

The environmental impact of warfare cannot be overlooked either. The use of chemical weapons or the bombing of natural areas during armed conflicts causes long-term ecological damage. In the context of the armed conflict in Ukraine, the concept of ecocide takes on particular significance. The environmental destruction resulting from warfare has serious long-term effects on ecosystems and human life, as well as on the country's ability to recover from the end of hostilities. During the war in Ukraine, as a result of Russian aggression, there are numerous actions that can be considered examples of ecocide. Examples include the bombing of industrial infrastructure, causing toxic substances to spill into rivers and land. In eastern Ukraine, a region rich in heavy industry, damage to coal mines, chemicals and factories has been a particular danger, with the potential to contaminate groundwater, soils and air. The destruction of forests, agricultural areas and attacks on energy installations also have far-reaching ecological consequences. The destruction of Ukraine's green areas not only contributes to soil erosion, but also destroys natural plant and animal habitats, leading to large-scale ecosystem disruption. In addition, warfare leads to significant contamination of the atmosphere and soil through the use of heavy weapons and explosions. The use of munitions, bombs and other military materials can cause pollution that will affect human and animal health and agricultural production long after the conflict is over. All these examples show that ecocide is a global problem, with impacts not only on local communities, but also on the entire planet.

Ecocide refers more to the creation of a dangerous situation than to the achievement of a specific result. It means committing an act in the full knowledge that there is a significant likelihood of serious, widespread or long-term damage to the environment. Accordingly, the crime of ecocide is defined as a formal rather than a substantive offence. There were considerations as to whether the definition should include an explicit reference to climate change. In the end, however, it was decided that a better approach would be a general formula, which is likely to be supported by the majority of states. It is worth noting that the absence of a direct reference to climate change does not exclude the possibility of liability based on the interpretation of a particular case.

Ecocide has the potential to become the first crime that would not be directly related to harm to people. In this case, protection would cover not only the individual, but also the natural environment, which means that harm to people would not be a necessary condition for initiating criminal proceedings. It is important not to limit the concept of ecocide to issues related to human rights; it is worth adopting a broader perspective and considering it in the context of "laws of nature" and "laws of the ecosystem". The introduction of criminalization of ecocide could be a new, practical

legal tool, enabling real prosecution of those responsible for environmental destruction on a global scale. In this way, ecocide gains the status of a crime that not only protects people, but also takes care of the future of our planet, opening the way to a more comprehensive approach to the protection of ecosystems and natural resources. According to the latest study, 72% respondents from G20 countries (except Russia) and four non-G20 countries: Austria, Denmark, Kenya and Sweden, support the criminalisation of actions by governments or corporations that cause serious, long-term and often irreversible damage to nature and climate, referred to as "ecocide."[11]

A conflict of interest between compliance with environmental protection regulations and the pursuit of profit maximisation can lead to a situation in which actions contribute to ecocide. In this context, penalising ecocide becomes an important step towards protecting ecosystems and responsible management of natural resources. Developing a draft definition of ecocide is not only a legal step, but also a social one that can influence a change in the approach to environmental protection.

3. THE CROSS-RELATIONSHIP BETWEEN THE ISSUES OF ECOLOGICAL SIN AND ECOCIDE IN THE LEGAL CONTEXT

In the context of ecological sin, ecocide can be seen as an extreme manifestation of this sin. Ecological sin consists of an action or omission that leads to the degradation of the environment and, consequently, to the destruction of the basis of life for future generations. Therefore, criminalizing ecocide can be an important step towards correcting the moral and ecological mistakes of the past and building a more sustainable future in which environmental protection is a priority and not an obstacle to achieving profits. The crime of ecocide and ecological sin are two concepts that can be analyzed together in the legal context, although they come from different disciplines. Ecocide has its roots in the concepts of international law and human rights, while ecological sin stems from the tradition of ethics and theology, especially Christian ethics. However, both terms refer to the deep responsibility of humans for the destruction of the natural environment and its consequences for humanity.

Although ecocide is not yet formally recognized as a crime in international law, there are increasingly voices saying that it should be included in the list of the most serious crimes, alongside war crimes, genocide, and crimes against humanity. Contemporary international law is striving to recognize the crime of ecocide as a violation of global ethical and legal norms. Such

[11] See https://klimat.rp.pl/klimat-i-ludzie/art41097641-ekobojstwo-bedzie-przestepstwie-mieszkancy-najbogatszych-panstw-swiata-zgodny [accessed: 07.10.2024].

action would be an expression not only of the protection of natural resources, but also of responsibility towards humanity, because environmental degradation can lead to catastrophic social consequences, such as climate migration, hunger, or deterioration of health conditions. From a legal point of view, introducing ecocide as an international crime would mean the need to develop precise legal definitions and mechanisms for prosecuting the guilty, both at the level of states and international corporations.

Although ecological sin is a theological concept, it is also beginning to play a role in the legal context, especially in countries where religion plays a significant role in shaping law and public morality. In the context of Catholic social teaching, ecological sin is understood as a violation of the order of creation, which has its moral, social and legal consequences. In the encyclical Laudato Si', Pope Francis speaks of the need for a new form of law and morality that would include care for the "common home". In this context, law should be a tool that protects not only humans, but the entire creation – plants, animals and ecosystems. Introducing the category of ecological sin into the legal discussion, although derived from religious tradition, can be an important step towards expanding the concept of legal responsibility. An ethical imperative is at work here: failure to protect the environment, degradation of nature, or massive waste of natural resources can be considered a violation of the basic principles of justice, and thus an offense that should be prosecuted and punished. Although ecological sin and ecocide have different foundations and motivations, both concepts indicate the need for systemic changes in law. Environmental protection is no longer just a matter of regulations concerning the protection of nature or industry – it becomes a matter of fundamental human rights and future generations. In international law, the debate on ecocide as a global crime is a step towards understanding that environmental violations are a crime not only against nature, but also against all human existence.

CONCLUSIONS

The conclusions drawn from the analysis of the crime of ecocide in the context of ecological sin and its legal implications indicate the complexity of the problem, which affects both the area of ethics and international legal regulations. Currently, although ecocide has not yet been formally recognized as a crime by international legal institutions, its recognition seems increasingly necessary from the perspective of global responsibility for environmental protection. Actions aimed at introducing this category into the jurisdiction of the International Criminal Court may in the future constitute a step towards developing effective mechanisms of responsibility for the mass destruction of nature. On the other hand, the concept of ecological

sin, which comes from religious and ethical tradition, enriches the debate with the moral dimension of responsibility for the environment. Ecological sin refers not only to material damage caused to ecosystems, but also to the inappropriate attitude of man towards the natural world and his responsibility towards future generations. John Paul II and Pope Francis emphasized that the destruction of the environment is a moral offense against justice and intergenerational solidarity. From a religious-ethical perspective, environmentally damaging activities are not only a violation of the laws of nature, but also a disregard for the divine plan of creation.

The combination of these two perspectives – legal and ethical – leads to the conclusion that effective environmental protection requires an integrated approach that includes both legal regulations and moral obligations. International law, in attempting to protect nature from mass destruction, should draw on ethical foundations that emphasize human responsibility not only towards contemporary societies, but also towards future generations and the entire creation. In this context, both the crime of ecocide and ecological sin play a key role in shaping new norms that can respond to global ecological challenges. Introducing the concept of ecocide into the international legal system could strengthen the tools of environmental protection, while at the same time emphasizing the moral importance of protecting the Earth. In the future, international law will have to further integrate issues of environmental protection with the broadly understood responsibility for the effects of human actions, taking into account both the perspective of intergenerational justice and the protection of ecological harmony.

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