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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 2.

The current issue contains 49 scientific articles, structured by discipline (e.g. legal sciences and canon law). The authors of the published texts represent 31 research centres, including 3 foreign (Central European Academy – Hungary; Ivane Javakhishvili Tbilisi State University – Georgia; Trnava University in Trnava – Slovak Republic) and 28 domestic (Academic Center for Strategic Analysis; Academy of Zamość; Cardinal Stefan Wyszyński University in Warsaw; Casimir Pulaski Radom University; Jan Długosz University in Częstochowa; Jan Kochanowski University in Kielce; Koszalin University of Technology; Kujawy and Pomorze University in Bydgoszcz; Maria Curie-Skłodowska University in Lublin; Nicolaus Copernicus Superior School; Polish Academy of Sciences; The John Paul II Catholic University of Lublin; The Pontifical University of John Paul II in Krakow; The SGH Warsaw School of Economics; The University College of Enterprise and Administration in Lublin; University of Gdańsk; University of Opole; University of Siedlce; WSEI University; WSGE University of Applied Science in Józefów; WSPiA University of Rzeszów; University of Silesia in Katowice; University of Szczecin; University of Warmia and Mazury in Olsztyn; University of Warsaw; VIZJA University in Warsaw; War Studies University; Warsaw University of Technology).

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

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

LEGAL SCIENCES

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THE WAR IN UKRAINE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: REFLECTIONS ON *UKRAINE AND THE NETHERLANDS V. RUSSIA* (JUDGMENT OF 9 JULY 2025)

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Abstract. The article situates the judgment within the broader context of Strasbourg's engagement with armed conflicts, analyzing its doctrinal innovations on jurisdiction, attribution, and evidentiary standards. It explores how the Court balanced its human rights mandate with questions of international humanitarian law, while addressing the challenges of evidentiary assessment in inter-State disputes. Beyond the specific findings, the judgment has implications for the future of accountability for mass violations of human rights, as well as for the evolving role of the Convention system in situations of war and occupation. However, the practical impact of the ECtHR's judgment will be constrained by the respondent state's non-appearance before the Court and its demonstrated refusal to communicate with the Court following the aggression on Ukraine.

Keywords: Russia's war; Ukraine; European Convention on Human Rights; European Court of Human Rights; inter-state complaints; armed conflict; human rights.

INTRODUCTION

Since the entry into force of the European Convention on Human Rights[1] (ECHR, the Convention) in 1953, slightly more than thirty inter-state applications have been brought before the European Court of Human Rights (ECtHR, the Court). The vast majority have arisen in response to profound political and/or military conflicts. The inter-State complaint mechanism has long been regarded as a remedy of last resort within the Convention system, reflecting the Council of Europe member States' collective pledge to uphold "those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, ETS No. 5.

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democracy and on the other by a common understanding and observance of the human rights upon which they depend."[2]

The ECtHR's judgment in *Ukraine and the Netherlands v. Russia*, delivered on 9 July 2025,[3] stands out as extraordinary in several ways. It is exceptional in scope (four consolidated applications, covering events between 2014 and 2022, the judgment itself extending to 500 pages plus three appendices), in evidentiary complexity (drawing on an enormous volume of material and interventions), and in its gravity from a human rights perspective, given the allegations of the most serious possible nature.

This article does not attempt to provide a detailed commentary on every aspect of the judgment, which would not be feasible in a single study of this format. Instead, it advances three core theses: firstly, the Court has given its most comprehensive articulation to date of the Convention's application to occupied territories and areas under decisive influence of a state-party to the ECHR. Secondly, the Court refined its evidentiary practice for inter-state disputes involving allegations of massive human rights violations, which has important methodological implications. Thirdly, the judgment reflects an interpretation of the Convention in harmony with the international humanitarian law (IHL).

1. BACKGROUND OF THE CASE

Russia's intervention in Ukraine began in early 2014 with the occupation and purported annexation of Crimea, followed by hostilities in Donbas involving armed groups supported, equipped, and directed by Russia. The situation escalated dramatically with the fullscale invasion launched on 24 February 2022. Across these phases, multiple patterns of alleged violations emerged: indiscriminate and targeted attacks against civilians, extrajudicial killings, torture and sexual violence, arbitrary detention and enforced disappearance, destruction and pillage of civilian property, restrictions on media and association, and the unlawful transfer of protected persons, including the removal of Ukrainian children to Russia.

Between 2014 and 2022, Ukraine lodged a series of inter-state applications concerning Crimea, Eastern Ukraine, and later the nationwide hostilities. The Netherlands intervened in relation to the downing of Malaysia Airlines flight MH17 on 17 July 2014, which killed 298 persons, including 196 Dutch nationals. The Grand Chamber consolidated several inter-state

[2] See the Preamble to the Convention.

[3] Judgment of the ECtHR *Case of Ukraine and the Netherlands v. Russia* (merits) of 5 July 2025, appl. nos. 43800/14, 8019/16, 28525/20 and 11055/22.

applications,[4] which allowed to undertake joint factual assessment and legal evaluation under the Convention. The case drew an unprecedented number of third party interventions from Council of Europe member States (twenty-six) and non-state entities (seven).

On 16 March 2022, the Committee of Ministers decided that the Russian Federation ceased to be a member of the Council of Europe, which resulted in numerous legal consequences [Drzemczewski and Lawson 2022, 38ff]. Russia ceased to be a Contracting Party to the Convention on 16 September 2022. The Grand Chamber therefore assessed Russia's conduct up to that date, while also considering later effects insofar as they resulted from pre-September 2022 violations (e.g., continuing harm to next-of-kin or continuing effects of administrative practices). Russia participated in the admissibility phase of the proceedings; however, soon after the aggression on Ukraine and its expulsion from the Council of Europe it stopped all communication with the Court. Consequently, the proceedings were conducted in the absence of the respondent state – a situation which was not unheard of in the history of international litigation, but which made the whole process more complicated and fragile.

In its preliminary observations, the Court has noted that "In none of the conflicts previously before the Court has there been such near universal condemnation of the 'flagrant' disregard by the respondent State for the foundations of the international legal order established after the Second World War and such clear measures taken by the Council of Europe to sanction the respondent State's disrespect for the fundamental values of the Council of Europe: peace, as already underlined, but no less importantly human life, human dignity and the individual rights guaranteed by the Convention."[5] This statement reflects well the legal and factual nature of the case considered by the Court. Given the gravity of the allegations and the broader international context of Russia's war against Ukraine, the Court did more than merely "examine" the case. It invoked the very foundations of the Council of Europe, its basic values and historical context, leaving no doubt as to the unprecedented character of the proceedings.

It is also worth noting that while the Court's sole basis of legal application is the Convention, it is impossible to view this case in isolation from general international law, and in particular from international humanitarian law, the law of armed conflicts, and the law of state responsibility. It should also be recalled that the Convention forms an integral part of international law and must be interpreted in harmony with it.[6]

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[4] See footnote 3.

[5] See para. 177 of the judgment.

[6] See, for instance, the judgment of the ECtHR in *Hassan v. United Kingdom* [GC] of 16 September 2014, appl. no. 29750/09, para. 102.

2. EVIDENTIARY STANDARDS

A central challenge in *Ukraine and the Netherlands v. Russia* was evidentiary. The scale, complexity, and duration of the armed conflict – spanning nearly eight years and involving both regular Russian forces and proxy entities – posed acute difficulties for the Court's fact-finding role. The respondent state's failure to cooperate with the Court was a huge obstacle in gathering necessary evidence. However, the Grand Chamber's approach reflects continuity with its existing evidentiary jurisprudence [Balcerzak 2016, 13-29] and innovations tailored to the exceptional context of inter-state conflict cases.

As in its prior case-law, the Court reaffirmed that the applicable standard of proof is that of "beyond a reasonable doubt". Yet, consistent with the tradition in inter-state and conflict-related cases, the Court acknowledged that such proof "may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact."[7] In the *Ukraine* and the *Netherlands* case, the Grand Chamber recognized the difficulty of obtaining direct evidence in a war zone, particularly given Russia's refusal to cooperate in the proceedings. Consequently, the Court adopted a holistic evidentiary method**,** giving significant weight to patterns of conduct, corroborative UN and NGO reports, and the accumulation of consistent testimonial and satellite evidence.

One notable aspect of the judgment is the Court's extensive reliance on third-party material. Reports of the UN Human Rights Monitoring Mission in Ukraine, OSCE fact-finding missions, and NGOs such as Amnesty International and Human Rights Watch were systematically referenced. The Court clarified that although such materials are not determinative on their own, their convergence may provide a sufficiently reliable evidentiary basis for establishing facts, even though they should be examined with caution.[8] This is consistent with its earlier reliance on independent reports in *Georgia v. Russia (II)*, however, the Ukraine judgment represents a more robust inclusion of international monitoring mechanisms into the evidentiary sources.

The *Ukraine and the Netherlands v. Russia* judgment thus reflects an application of a flexible, context-sensitive evidentiary standard**.** The reliance on cumulative inferences, adverse presumptions in the face of non-cooperation of the respondent state, and a willingness to consider credible third-party reports signal that the Court will not allow evidentiary obstacles to shield

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[7] See *inter alia* the judgments of the ECtHR in: *Cyprus v. Turkey* [GC] of 10 May 2001, appl. no. 25781/94, para. 113; *Georgia v. Russia (II)* [GC] of 21 January 2021, appl. no. 38263/08, para. 142, and *Ukraine v. Russia (re Crimea)* of 14 January 2021, appl. nos. 20958/14 and 38334/18, para. 257.

[8] See the ECtHR's decision on the admissibility of the *Ukraine and the Netherlands v. Russia* of 30 November 2022, appl. nos. 8019/16, 43800/20, 28525/20, para. 443.

states from responsibility in situations of mass violations. At the same time, this approach raises questions about the balance between judicial caution and the need to address serious human rights violations in armed conflict. Fortunately, the Court was able to reject excessive formalism and made an effort to maintain high evidentiary standards.

3. ADMISSIBILITY AND JURISDICTION

The admissibility of three of the four consolidated applications had already been examined and confirmed in the Grand Chamber's admissibility decision of 30 November 2022.[9] At that stage, the Court addressed the 'familiar' admissibility issues arising with inter-state cases, including the exhaustion of domestic remedies (which is inapplicable where remedies are not available, ineffective or illusory, as well as when the applicant state complains of legislative measures or an administrative practice) and the four-month rule (formerly six-months), calculated from the date of the adoption of a final decision. The respondent state participated in these proceedings, including at the hearing on 22 January 2022, one month before Russia's full-scale invasion, which allowed the Court to fully examine and ultimately reject the objections as to the admissibility of the case. The admissibility of the fourth application (no. 11055/22, lodged by Ukraine after Russia's aggression), was subsequently examined and confirmed in the Court's judgment of 9 July 2025.

With respect to jurisdiction, the Court reaffirmed and elaborated on the principle that the Convention applies to acts attributable to a state on the basis of either effective territorial control or the exercise of authority and control by its agents**,** even outside its national borders. These principles have been well-established in the Court's case law and are rooted in the law of international state responsibility. The scope of Convention obligations is not territorially confined but extends to situations where a State, through military occupation or proxy governance, effectively substitutes its authority for that of the territorial sovereign. In line with its earlier case-law,[10] the Court reiterated that the decisive criterion is the factual control exercised by the state, not formal annexation or recognition under international law.

Crucially, the Court rejected Russia's arguments raised at earlier stages of the proceedings that sought to limit its jurisdictional responsibility, holding instead that both the direct presence of Russian armed forces and the activities of local

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[9] See footnote 8.

[10] See the judgments of the ECtHR in: *Loizidou v. Turkey* (preliminary objections) of 23 March 1995, appl. no. 15318/89, paras. 62-64; *Al-Skeini v. United Kingdom* [GC] of 7 July 2011, appl. no. 55721/07, paras. 131-142, and *Catan v. Moldova and Russia* [GC] of 19 October 2012, appl. nos. 43370/04, 8252/05. and 18454/06, paras. 106-110.

de facto administrations under Russia's "decisive influence" sufficed to engage responsibility under Article 1 of the Convention. This approach aligns with the law of state responsibility, as reflected in Articles 4, 8, and 11 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts,[11] which emphasize attribution through effective control or direction. As commentators have observed, this dual emphasis on attribution and jurisdiction represents one of Strasbourg's distinctive contributions to the general international law of responsibility, effectively operationalizing the Convention within conflict settings [Milanović 2011, 136ff].

As a result of this approach, the Grand Chamber in *Ukraine and the Netherlands v. Russia* took into account all acts attributable to Russia and its proxies between 2014 and 16 September 2022 (the date on which the Convention ceased to apply in respect of Russia following its expulsion from the Council of Europe on 16 March 2022). This temporal and substantive scope extended not only to the administrative and legislative measures imposed by the *de facto* authorities but also to the conduct of hostilities and related violations of the IHL. The Court's readiness to assess acts committed during active armed conflict marks an important development compared to its earlier, more hesitant stance in *Georgia v. Russia (II)*.

In the latter judgment, the Court held that "in the event of military operations – including, for example, armed attacks, bombing or shelling – carried out during an international armed conflict, one cannot generally speak of 'effective control' over an area."[12] According to the Court, the chaotic conditions of ongoing hostilities precluded the attribution of extraterritorial jurisdiction, thereby creating a sort of "legal vacuum" – when it comes to the application of the Convention – during the most intense phases of conflict. While arguably reflecting the factual reality of dynamic battlefield situations, the Court's reasoning somewhat blurred the distinction between jurisdiction (the threshold issue of whether Convention obligations apply) and responsibility (the question of whether a violation has occurred). As a result, the Court's stance in *Georgia II* suggested that the attribution of responsibility for grave violations committed during the conduct of hostilities might be practically foreclosed, which is difficult to reconcile with the object and purpose of the Convention.

By contrast, in the *Ukraine and the Netherlands v. Russia* judgment, the Court did not follow the *Georgia II* approach**.** Instead, it held that Russia's sustained military presence and decisive influence over proxy administrations in Eastern Ukraine and Crimea sufficed to establish jurisdiction not only for occupation-related governance but also for active hostilities

[11] Appendix to the United Nations General Assembly resolution 56/83, 12 December 2001.

[12] See para. 126 of the *Georgia v. Russia (II).*

carried out by its armed forces and affiliated groups.[13] In doing so, the Court closed the accountability gap identified in *Georgia II*, ensuring that serious violations of human rights – such as indiscriminate shelling, arbitrary detention, and enforced disappearances – fall within the Convention's scope even during periods of armed confrontation.

4. INTERACTION BETWEEN THE CONVENTION AND THE INTERNATIONAL HUMANITARIAN LAW

The Grand Chamber's judgment in *Ukraine and the Netherlands v. Russia* marks an important development in the long-standing debate on the relationship between international human rights law (IHRL) and international humanitarian law (IHL). By affirming the applicability of the ECHR to the full spectrum of Russian conduct in Ukraine from 2014 until 16 September 2022, the Court rejected the view that periods of armed conflict create "legal black holes" in which human rights protection seems to be "suspended". Instead, the Court emphasized the complementarity of the two bodies of law, reinforcing a trend evident in its earlier case-law but never articulated with such clarity in the context of a large-scale international armed conflict.

Importantly, the Court did not treat IHL as displacing or derogating from the Convention but rather as an interpretive framework for determining the scope and content of Convention rights in situations of armed conflict. For instance, in assessing allegations of indiscriminate shelling and civilian targeting, the Court expressly acknowledged the relevance of IHL norms on distinction and proportionality,[14] while grounding its analysis in the substantive guarantees of Articles 2 and 3 ECHR. This reflects the approach taken in earlier cases such as *Hassan v. United Kingdom*,[15] where the Court interpreted Article 5 ECHR in light of the rules of the III and IV Geneva Conventions. However, unlike in *Hassan*, where the Court seemed to be "overfocused" on the IHL, in *Ukraine and the Netherlands v. Russia* the Court struck a more balanced position by affirming both the independent force of the Convention and its interpretive dialogue with the IHL.

Doctrinally, the Court's position resonates with the view that IHL and IHRL operate as mutually reinforcing regimes, each supplying context and content to the other. Scholars such as Sassòli have long argued that the interplay between the two branches of international law ensures that civilians and combatants are not deprived of fundamental guarantees under the guise of armed conflict [Sassòli 2024, 458ff]. However, as one author has

[13] See paras. 362-366 of the judgment.
[14] See para. 411 of the judgment.
[15] See footnote 6.

underlined, human rights law and the IHL should not be considered 'intertwined' or 'interchangeable', even though they both refer to values such as life, dignity, and fundamental freedoms in armed conflicts [Dinstein 2004, 20].

In this sense, the judgment of 9 July 2025 represents a doctrinal consolidation: it reaffirms the Convention's extraterritorial scope, clarifies the complementarity of IHL and human rights law, and avoids the pitfalls of fragmentation. While challenges remain – particularly regarding the evidentiary threshold for establishing violations in the "fog of war" – the Court has provided a framework that strengthens the indivisibility of human rights, even in times of war.

5. VIOLATIONS OF THE CONVENTION

As mentioned, the *Ukraine and the Netherlands v. Russia* judgment is unique due to the gravity of the violations, their cumulative scale, and systemic character. The Court did not confine itself to isolated breaches; instead, it identified a persistent pattern of violations across multiple Convention provisions, occurring in the context of Russia's effective control over parts of Eastern Ukraine and its conduct of military operations. The multiplicity and density of findings in a judgment of 500 pages make it hardly possible to analyze in detail in the format of an article. Nevertheless, the following overview highlights the most crucial violations found in the judgment under consideration:

The Court found numerous breaches of Article 2 of the ECHR (right to life), both substantive and procedural. Substantively, it attributed responsibility to Russia for deaths caused by indiscriminate shelling, extrajudicial executions, and the failure to protect civilians under its effective control. Of particular note is the Court's attribution of responsibility for the downing of Malaysia Airlines flight MH17. Procedurally, the Court stressed the systemic failure to conduct independent investigations into loss of life, consolidating its case law on the duty to investigate under Article 2.

Equally extensive were the findings under Article 3 of the ECHR, where the Court established that Russia bore responsibility for torture and inhuman or degrading treatment committed in detention facilities under separatist control, with widespread use of physical violence, intimidation, and deprivation of basic necessities. Importantly, the Court emphasized that these were not sporadic instances but reflected a systematic practice attributable to the respondent State. The lack of effective remedies and investigations further aggravated these violations.

Further, the Court held that arbitrary and prolonged detentions by separatist forces, supported and directed by Russia, violated Article 5 of the ECHR

(right to liberty and security of person). It rejected the respondent state's attempt to characterize the detentions as beyond its jurisdiction, reaffirming the principle that effective control suffices to trigger Convention obligations. Moreover, the lack of judicial oversight or *habeas corpus* remedies in the territories in question constituted a structural violation of the right to liberty.

With respect to Article 8 of the Convention (right to respect for private and family life), the Court found numerous violations, including forced displacement, arbitrary searches, and restrictions on family reunification. While findings under Article 8 often appear ancillary in inter-State cases, here the Court highlighted the systemic disintegration of private and family life resulting from Russia's support of separatist authorities. Another notable example of a grave violation of Article 8, as well as other provisions of the Convention, consisted in the practice of abduction and forcible transfer of Ukrainian children to Russia.

The Court's findings under Articles 9-11 of the ECHR (freedom of religion, freedom of expression, freedom of association and peaceful assembly) reveal the breadth of systemic interference with civil and political freedoms in the territories under Russia's effective control. With respect to Article 9, the Court identified a pattern of harassment and repressions directed against religious minorities, notably Protestant communities, Jehovah's Witnesses, and members of the Ukrainian Orthodox Church not aligned with the Moscow Patriarchate. The evidence demonstrated that such groups were subjected to raids, confiscation of property, restrictions on worship, and intimidation of clergy, amounting to an administrative practice of denying freedom of religion. The Court found that the violations of Article 9 were "officially tolerated by the superiors of the perpetrators and by the higher authorities of the respondent state."[16] It should also be recalled that in the Court's case-law, an '*administrative practice*' is usually considered as a repeated and consistent pattern of conduct, tolerated or encouraged by State authorities, which discloses the existence of systemic violations rather than isolated or sporadic incidents. Such a practice may be established through sufficiently numerous and concordant acts, coupled with official tolerance or a lack of reaction, thereby dispensing with the applicants' need to prove each individual violation.

Article 10 violations were established in relation to systematic intimidation, abduction, and ill-treatment of journalists, as well as the closure of independent media outlets. The Court emphasized that these measures were deliberate instruments of information control, intended to suppress dissent and stifle the dissemination of facts about Russia's military presence. In doing so, the Court emphasized that freedom of expression remains of heightened importance in conflict settings, particularly when reporting on violations of humanitarian law is at stake.

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[16] See para. 1276 of the judgment.

In relation to Article 11 of the ECHR, the Court examined extensive interferences with the right to peaceful assembly and association, focusing in particular on the treatment of protesters and civic activists in the territories under Russia's effective control. The evidence demonstrated a consistent pattern of dispersal of peaceful demonstrations, frequently through the use of force, intimidation, and arbitrary detention. Protesters expressing pro-Ukrainian views or opposing the presence of Russian forces were systematically targeted, often with violence, while organizers faced harassment and prosecution. The Court observed that these interferences were neither isolated nor incidental to the conflict, but reflected a deliberate policy aimed at suppressing avenues for public expression of opposition.

As regards Article 1 of Protocol no. 1 to the ECHR (right to peaceful enjoyment of possessions), the Court established that Russia was responsible for a wide range of violations in the territories under its effective control. These included large-scale destruction and appropriation of private homes, businesses, vehicles, and agricultural property, either as a direct consequence of shelling and looting by forces under Russian command or through expropriations conducted by local separatist authorities with Russian support. The Court treated these acts not as incidental wartime damage but as a systematic practice of unlawful deprivation of property. It further noted the absence of any compensation mechanisms or effective domestic remedies.

CONCLUSIONS

The judgment in *Ukraine and the Netherlands v. Russia* is, in every respect, unprecedented in the history of the European human rights system. As the Court itself emphasized, the ruling "marked a watershed moment in the history of the Council of Europe and the Convention."[17] This was not just a judicial hyperbole: never before had the Court been called upon to address such a scale and multiplicity of human rights violations, committed in the context of an ongoing armed conflict and occupation. The challenges of establishing jurisdiction, attributing responsibility, and examining the systemic character of the abuses were enormous. However, the Court provided a coherent and doctrinally rigorous account of how the Convention applies in conditions of active hostilities and prolonged occupation – realities that the drafters of the 1950 Convention could hardly have envisaged, even though the treaty provides for a clause allowing to derogate from some obligations 'in times of war or other public emergency threatening the life of the nation' (Article 15).

[17] See para. 349 of the judgment.

At the same time, the judgment carries a powerful symbolic dimension. In a way it is the Court's final pronouncement on Russia's twenty-five years of presence in the Convention system (1998-2022). That 'experiment' ultimately failed: the values of the Convention proved incapable of restraining Russian politicians' imperial ambitions, and Moscow's disregard for the Court and its jurisprudence grew increasingly manifest both before and after the aggression against Ukraine. However, it would be too simplistic to describe the years of Russia's membership in the Council of Europe as entirely 'lost'. For numerous Russian citizens, the Court provided a forum of last resort in vindicating their individual rights. The paradox remains that while Russia's state practice eroded the system, Russian individuals simultaneously made use of it more than almost any other national population. The judgment of July 2025 closes this chapter by demonstrating, sadly, that the authoritarian or totalitarian ambitions ultimately trumped the values of the European human rights system.

The prospects for the execution of the *Ukraine and the Netherlands v. Russia* judgment are bleak. Russia refused to participate in the proceedings, and since its expulsion from the Council of Europe in March 2022, it has treated the organization with open contempt. There is little basis for expecting voluntary compliance. Nevertheless, the judgment should not be considered as a moot exercise. The Court fulfilled its institutional mandate: the inter-State procedure was activated, adjudicated, and concluded in accordance with the Convention. The judgment is therefore symbolic in more than one sense: it affirms the resilience of the Strasbourg system under extreme strain and it provides an authoritative legal record of violations that will serve as a reference point for decades to come.

As has been noted, the judgment is also a milestone in doctrinal terms. It consolidates and systematizes the Court's case-law on the application of the Convention during active hostilities and foreign occupation, building upon earlier precedents such as *Cyprus v. Turkey* and *Georgia v. Russia (II)*. The Court's examination of allegations under Articles 2, 3, and 5 in conditions of armed conflict, its findings on the abduction and transfer of children under Article 8, and the infringements of civil and political freedoms (Articles 9-11) have tremendous importance. In addition, the Court expressly referred to the broader institutional response of the Council of Europe, noting that any future application of Article 41 must be coordinated with the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine and a future compensation mechanism [Mężykowska 2025, 74-88].

It should also be noted that the inter-State judgment does not close the Strasbourg's docket on Russia. Thousands of individual applications remain pending (as of August 2025), many of them raising issues closely linked to the violations established in the July 2025 judgment. While the immediate

execution of such judgments is unrealistic, they nonetheless create binding obligations under Article 46 ECHR. Whether or not Russia presently acknowledges them, these obligations will remain in international law and will be claimed by victims for years or decades to come.

The broader lesson can be described as sobering. It was known long before Russia's aggression that an armed conflict remains the most destructive environment for the protection of human rights. The war in Ukraine has generated violations on a scale that is shocking even against the backdrop of the Court's long engagement with conflict situations. The ECtHR's jurisdiction did not extend to questions of international criminal responsibility, such as the crime of aggression, war crimes, or crimes against humanity, but the violations it could examine under the Convention already attest to the gravity of Russia's conduct. These legal consequences will not fade quickly.

In conclusion, the Convention system has withstood what can only be described as a hurricane. The inter-State mechanism operated as intended: allegations were received, rigorously examined, and confirmed with much precision and diligence. Whether the eventual execution of the judgment occurs will depend on political developments, above all the determination of the international community to uphold the principles of the United Nations Charter and human rights treaties. However, the *Ukraine and the Netherlands v. Russia* judgment ensures that the record of violations is authoritatively established and that the voices of victims were heard.

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EXTRAORDINARY MILITARY JUDICIARY IN THE EARLY SECOND POLISH REPUBLIC – AN INTRODUCTION TO RESEARCH

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Abstract. This article examines the structures of the extraordinary military judiciary system established in the formative years of the Second Polish Republic. Their role was of particular importance in shaping military justice after the period of partitions, handling cases initiated before 1918, and ensuring the swift prosecution of soldiers who disobeyed orders. The discussion focuses on the principal forms of extraordinary "wartime" military courts: the Supreme Military Court, Garrison and General District Courts, Summary and Field Courts, and the State Defence Tribunal. The analysis draws on the relevant legislative framework as well as other primary sources. The study serves as a preliminary contribution to further, in-depth research on the subject.

Keywords: Second Polish Republic; extraordinary judiciary; military justice; military court structures; interwar military affairs.

INTRODUCTION

The formative years of the reborn Polish state were particularly challenging. Alongside the enactment of new legislation, the large-scale replacement of administrative personnel after the period of partitions, and the struggle to secure national borders, the authorities also faced the task of establishing state institutions, including those responsible for administering justice. The creation of extraordinary judicial bodies was intended not only to provide a measure of procedural continuity for cases initiated before 1918, but also to serve as the foundation for the comprehensive reconstruction of the military judiciary system. Another key feature of extraordinary judiciary was its capacity to hear cases, such as espionage, insubordination, or desertion,

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directly at the front. These courts were often set up ad hoc, for example in the form of field tribunals, which helped to curb such offences among soldiers during wartime operations. Some of these courts remained in operation throughout the entire interwar period.

The aim of this study is to outline the principal structures of the extraordinary military courts, presented in the chronological order of their establishment, together with a description of the proceedings conducted before them. The analysis draws on enacted legislation as well as other relevant primary sources.

This article is intended as an introduction to in-depth research into the activities of these judicial bodies. Based on archival records preserved in the Central Military Archives, the Archive of New Records in Warsaw, partially within the holdings of the Institute of National Remembrance, and in the Archives of the Polish Institute and General Sikorski Museum in London, it would be possible to reconstruct in detail the functioning of these institutions. Such research might encompass, for example, compilations of proceedings, statistical data on recorded offences, and analyses of the processes that culminated in judicial decisions.

1. SUPREME MILITARY COURT (SMC)

The Supreme Military Court was established by decree[1] of the Head of State on 8 February 1919. Under this decree, the Court was seated in the capital city of Warsaw (sec. 1), and its jurisdiction extended over the entire Polish Army, irrespective of the station or operational deployment of individual units (sec. 1). Until the introduction of a uniform code of criminal procedure across all military courts, the Court conducted first-instance proceedings according to whichever procedure was considered applicable in a given case (sec. 2). It was later designated the highest appellate and supervisory body for all military courts, including field tribunals, and served as the cassation authority in cases decided by the General District Courts (sec. 3). The decree also authorised the Court to review judgements of field courts, by way of an extraordinary remedy, in instances where a party petitioned for the reopening of proceedings on the grounds of a gross violation of law by the lower court, or where the decision had been based on erroneous factual assumptions (sec. 3-4). In addition, the Court was entrusted with bringing to a close proceedings pending before the former military courts of the partitioning powers within the territory of the Republic, as well as cases involving Polish citizens residing abroad (sec. 5).

[1] Journal of Military Orders of 8 February 1919, No. 14, item 502. It contained a total of 7 provisions.

Within the jurisdiction of the Supreme Military Court[2] were offences committed by commanders of individual General Districts, corps and army commanders, senior service officials, and the heads of departments within the Ministry of Military Affairs (sec. 6). Proceedings before the Court were to be conducted in accordance with Articles 14, 62, and 67 of the Act on the Provisional Organisation of the Military Judiciary[3] (sec. 7). It should be noted that these provisions were supplemented by an order issued on 14 February 1919 by Colonel Jerzy Wroczyński, then head of the Ministry of Military Affairs, which defined the posts within the SMC.[4] The judicial corps was to consist of eight officers: the President of the Court, a Vice-President, five members, and one senior secretary. The prosecution service comprised a Prosecutor and two Deputy Prosecutors. In addition, eleven military officials were assigned to both the Court and the Prosecutor's Office to provide administrative support, including secretaries and clerks.[5] The first composition[6] of the Court included Brigadier General Franciszek Niżałkowski as President, with Brigadier General Jan Roszkowski, Colonel Edward Szpakowski, Colonel Jan Czapliński, and Colonel Jak Wozmek serving as members. On the prosecution side, Brigadier General Leon Iwanowski was appointed Prosecutor of the Supreme Military Court, assisted by Colonel Cezary Piotrowski and Major Emil Mecnarowski as Deputy Prosecutors.

The ceremonial opening of the Supreme Military Court took place on 8 July 1919. The session was presided over by the Court's President,

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[2] An interesting collection of proceedings conducted by the Supreme Military Court in the early years of the independent state can be found, among others, in the Collection of Military Court Records, 1920-1939, held at the Archive of New Records in Warsaw, ref. no. 2/1510/0.

[3] It is worth citing the following provisions: the Regulation of the Council of Ministers of 10 May 1920 on the Entry into Force in the Territory of the Republic of the Act on Military Criminal Procedure for the Common Armed Forces of 5 July 1912 (Journal of Laws No. 59, item 368). Article 14: "Section 1. Where an individual has committed several punishable acts, some falling under military jurisdiction and others under civilian jurisdiction, each competent court is to proceed independently. Section 2. In determining the penalty, the court delivering the subsequent judgement shall duly take into account the sentence imposed by the earlier decision. Section 3. Where one of the concurrent offences carries the death penalty or life imprisonment, proceedings in respect of that offence shall take precedence over those concerning acts subject to a lesser penalty. Section 4. As a rule, the sentence handed down by the court that first rendered a final judgement is to be executed first." Article 62: "The competent commander orders the convening of summary courts and announces it in an order." Article 67: "A summary court may be held at any time, even in the open air."

[4] Journal of Military Orders of 19 February 1919, No. 19, item 630.

[5] The order also granted authorisation that, if necessary, officers of the judicial corps with judicial powers could be assigned as reporting judges, as well as senior assistant officers.

[6] The Court's composition was formally determined by the Decree of the Commander-in-Chief of the Polish Armed Forces of 1 March 1919 (Journal of Military Orders of 18 March 1919, No. 30, item 950).

Franciszek Niżałkowski, who stressed that the Court was commencing its work without a proper, binding and uniform statute regulating military criminal procedure [Zaczyński 1919, 281]. The primary task of the SMC was to break with the tradition of the former *audytoriaty*, i.e. single-instance courts which conducted proceedings without permitting either appeal or cassation, with the sole possibility of recourse being a revision of the judgement on grounds of nullity [ibid., 281-82].

Until 1939, the SMC served as the appellate instance for admiralty courts as well as for judgements issued by military district courts.[7] It was undoubtedly the most important judicial body in interwar Poland.[8] Particularly notable was its initial function as an institution designed to bring order to ongoing proceedings even before the adoption of unified legislation. Although the regulations governing its activities evolved over time, it may be said that in the formative years of the Polish state the Court fulfilled its intended role, and in the later interwar period it stood as a cornerstone of the entire judicial system of the Second Republic.

2. GARRISON COURTS AND GENERAL DISTRICT COURTS

The Regulation of 10 May 1920[9] established a judicial system to adjudicate criminal cases within the armed forces. Garrison courts[10] dealt with cases involving enlisted soldiers (Article 12(1)). Their jurisdiction extended to offences punishable by imprisonment of no more than one year, regardless of any additional penalties, as well as to offences carrying sentences of up to three years' imprisonment, provided that, in view of mitigating circumstances, no penalty exceeding one year's imprisonment (together with any additional sanctions) was anticipated (Article 12(1)(a) and (b)). The applicable provisions of the Regulation varied according to the territory in which the offence was committed. In areas governed by the Russian Penal Code of 1903, garrison courts heard cases involving infractions and misdemeanours punishable by up to one year's imprisonment, also where combined with fines or other additional penalties

[7] Decree of the President of the Republic of Poland of 29 September 1936, the Law on the Organisation of the Common Courts (Journal of Laws No. 76, item 536), Article 33.

[8] Before the Supreme Military Court, judges of district courts were likewise held accountable for offences committed in the exercise of their official duties. This was established by the Secret Order of Corps District Command No. III of 1 December 1925, L.51, item 6. Central Military Archives, Rembertów, Warsaw, ref. no. DOK III/25.

[9] Regulation of the Council of Ministers of 10 May 1920 on the Entry into Force in the Territory of the Republic of the Act on Military Criminal Procedure for the Common Armed Forces of 5 July 1912 (Journal of Laws No. 59, item 368).

[10] Order on the Establishment of Garrison Courts and the Reorganisation of Courts for the Exercise of Summary Jurisdiction and of Mobile Investigative Commissions, 30 November 1920. Central Military Archives, Rembertów, Warsaw, ref. no. I. 351.3.3.

(Article 12(2)(a) and(b)). They also adjudicated abuses of law punishable by imprisonment where, owing to mitigating circumstances, no penalty harsher than one year's imprisonment (together with fines and other sanctions) was expected (Article 12(2)(c)). The Regulation further provided that, in areas where the Austrian Penal Act of 1852 or the German Penal Code of 1871 remained in force, garrison courts exercised equivalent jurisdiction. Under Austrian law, they dealt with violations and other offences punishable by up to one year's imprisonment (Article 12(2/2)(a) and (b)), while under German law they heard infractions and misdemeanours punishable by fortress confinement not exceeding one year or by a fine, irrespective of mitigating circumstances, excluding crimes carrying penalties of penitentiary imprisonment or death (Article 12(3) (a) and (b)). It is also noteworthy that the decision to refer a case to a garrison court lay with the commander competent for that body (Article 78).

Garrison courts were composed of a judge together with a number of officers from the judicial corps (Article 34). Prosecutorial functions were performed by a judicial officer, while the indictment was replaced by a written order of the competent commander, which had to be delivered to the officer with instructions to submit a motion for punishment before the court (Article 35). At hearings, the prosecutor, the judicial officer, and a court clerk were required to be present (Article 32). It is worth noting that these provisions also applied to the functioning of so-called naval courts established for the navy[11] (Article 36).

In the early years of the Second Polish Republic, general district courts were also in operation.[12] Like the other judicial bodies described here, they were of a highly specific nature [Szczygieł 2017, 93]. They consisted of a presiding judge [Wyszomirski 1938, 345-46] and military judges (Article 39). Their jurisdiction extended to all cases not assigned to garrison courts, as well as to appeals against garrison court judgements, including, in accordance with the statute on military criminal procedure then in force, the examination of complaints lodged with these bodies (Article 13(1) and (2)). The number of such courts varied frequently, reflecting the establishment and reorganisation

[11] Draft Act on the Supreme Authorities of the Navy, Chancellery of the Sejm of the Republic of Poland, Records of Cases Referred to the Military Commissions, Archive of New Records in Warsaw, ref. no. 42.

[12] Regulation of the Minister of Military Affairs of 30 November 1920 on the Establishment of Military Garrison Courts and the Division of Military General Districts into Judicial Circuits (Journal of Laws No. 5, item 22). The following districts were established: I Warsaw General District (circuits: Warsaw, Modlin, Ciechanów, Łomża, Białystok), II Lublin General District (circuits: Lublin, Siedlce, Chełm, Ostrów), III Kielce General District (circuits: Kielce, Częstochowa, Piotrków), IV Łódź General District (circuits: Łódź, Kutno, Włocławek), V Kraków General District (circuits: Kraków, Tarnów, Nowy Sącz), VI Lwów General District (circuits: Lwów, Przemyśl, Stryj, Stanisławów, Złoczów), VII Poznań General District (circuits: Poznań, Bydgoszcz, Ostrów), VIII Pomeranian General District (circuits: Grudziądz, Toruń, Starogard).

of districts [Materniak-Pawłowska 2001, 277-78]. Depending on the cases on the docket, adjudicating officers were appointed as appropriate. These courts also tried serious crimes punishable by death or life imprisonment (Article 44).[13] Proceedings encompassed so-called preparatory sessions held outside the main trial, for instance, when the investigating judge disagreed with the prosecutor on a motion (Article 40(1)); when complaints were lodged against a judge's decision in cases provided for by the Act on Military Criminal Procedure (Article 40(2)); when a presiding judge, on reviewing an indictment, considered further investigation necessary (Article 40(3)); or when appeals were brought against the judgements of lower courts under paras 34 and 342 of the Act (Article 40(4)). Where a party received an unfavourable judgement, an appeal could be filed with an appellate court established within the relevant general district court, composed of two military judges (Article 48). The same provisions likewise applied to admiralty courts (Article 49).

The judicial structure may be summarised as follows [Skelnik 2010, 133]: 1) For criminal cases in the armed forces, garrison courts and general district courts were established; 2) In the navy, their equivalents were naval courts and admiralty courts; 3) Common to both branches was the Supreme Military Court.

Following the conclusion of the Polish–Bolshevik War in 1921, reforms were introduced. Garrison courts were reorganised as regional military courts, while general district courts became military district courts. From that point onwards, not only the terminology but also certain aspects of jurisdiction underwent a marked evolution.[14]

3. SUMMARY COURTS AND FIELD COURTS

In the early years of the independent Polish state, summary courts played a particularly important role. Their primary purpose was to curb

[13] In such cases, adjudicating panels were composed as follows: Two military judges, one of whom acted as presiding judge and director of proceedings, together with three assessors, appointed in accordance with rank. A) Generals and equivalent ranks – one member of the Supreme Military Court and the head of the general district court (or his deputy) as the second member, with three generals appointed by the Minister of Military Affairs serving as assessors; B) Regimental commanders and equivalent ranks – the head of the court (or his deputy) and a military judge, together with three generals or colonels holding command appointments as assessors; C) Staff officers – two military judges and three staff officers as assessors; D) Junior officers – two military judges, one staff officer, and two junior officers as assessors; E) Enlisted men – two military judges, with one junior officer and two enlisted soldiers as assessors.

[14] Regulation of the Minister of Military Affairs of 30 November 1920 on the Establishment of Military Garrison Courts and the Division of Military General Districts into Judicial Circuits (Journal of Laws, No. 5, item 22).

crimes that threatened national order and security, as well as the general interests and reputation of military service [Przyjemski 2005, 20-24]. They dealt with charges such as espionage on behalf of a foreign power, unauthorised recruitment, cowardice, and looting. The first provisions on summary proceedings can already be found in the decree of the Commander-in-Chief of 1919.[15] Greater significance, however, attaches to the Regulation of 10 May 1920 discussed above, which at that stage of development of the military judiciary systematised the functioning of summary jurisdiction.[16]

Summary proceedings were conducted solely against persons subject to military jurisdiction. In the early years, their scope depended on the territory in which the offence had been committed, and applied as follows (Article 60): a) in the former Austrian partition – murders, robberies, arson, public rapes, and malicious damage to property; b) in the former Russian partition[17] – assaults, homicides, arson, and violations of property; c) in the former Prussian partition – murders, robberies, arson, and the damage or destruction of property.

The decision to establish summary jurisdiction in any given case lay with the Minister of Military Affairs, who in exceptional circumstances could delegate this authority to commanders of the relevant general districts (Article 60). The establishment of such bodies had to be publicly announced in military orders (Article 62). A summary court was composed of the same personnel who served in the general district courts, and its proceedings could take place at any location within the district in which it had been established (Article 65). Proceedings were initiated by the prosecutor through the immediate delivery to the district court of an order from the competent commander, issued once an investigation had been completed under the applicable criminal procedure. Summary courts convened with remarkable speed, within 24 hours of receiving the order. Alongside the court sat an escort and an execution squad, ready to carry out a death sentence immediately if imposed. Clergy were also present so that the condemned could confess before execution if they wished (Article 66). Summary courts could be convened at any time, and hearings were held even in the open air (Article 67). The Regulation also allowed for the establishment of summary courts in the field and at sea. In such cases, the competent unit commander was authorised to convene them[18] (Article 76), but only for the offences

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[15] Decree of the Commander-in-Chief of 3 January 1919 on the Regulations for Wartime Summary Courts (Journal of Military Orders, No. 1, item 5).

[16] Regulation of the Council of Ministers of 10 May 1920 on the Entry into Force in the Territory of the Republic of the Act on Military Criminal Procedure for the Common Armed Forces of 5 July 1912 (Journal of Laws No. 59, item 368).

[17] For detailed accounts of Russian military justice see Lubodziecki 1926.

[18] The competent commander was responsible for confirming the judgements. The standard formula of confirmation read: "I approve the judgement and order its immediate execution." Example:

specified in Article 60 of the Regulation, i.e. cowardice, looting, espionage for a foreign power, and insubordination. In all other cases, this authority was reserved for the Commander-in-Chief. Field summary courts closely resembled those convened aboard ships, the main difference being that in naval proceedings a naval officer presided. Every order and judgement had to be reported immediately to the Commander-in-Chief[19] (Article 77).

The adjudicating panel of "ordinary" summary courts generally consisted of a staff officer, captain or cavalry captain as presiding judge, two junior officers, an officer cadet or sergeant, a non-commissioned officer, and a senior private. These proceedings did not involve a preliminary investigation; evidentiary proceedings were limited to hearing the parties present, and witnesses were examined only if the court considered it necessary [Szczygieł 2016, 71-72]. Judgements were final and could only result in conviction or acquittal. There was no right of appeal. The sole possibility of avoiding punishment lay in the Commander-in-Chief's right of pardon. Summary procedure was excluded in respect of persons under 17 years of age, pregnant women, those suffering from serious illness or mental incapacity, and cases falling outside the scope of summary jurisdiction.[20]

Another form of extraordinary military jurisdiction was the field court[21] [Rybicki 1928, 46-48]. The first such courts were established in Galicia, at Przemyśl and Lwów. In their initial period they lacked fixed organisational structures or detailed procedural rules [Daniec 1928, 344-50]. Their legal status was fluid, as the borders of the state were still unsettled, meaning that the applicable law varied according to where a unit was stationed[22] [Müller 1932, 43-45], with German and Austrian provisions predominating [Szczygieł 2016, 61-62]. One of the first significant documents regulating their operation was an order issued by the Command of the Polish Army on 5 March 1919.[23]

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judgement of the Field Court of the Supreme Command of 28 January 1921. Central Military Archives, Rembertów, Warsaw, Supreme Command of the Polish Army, ref. no. I. 301.22.8.

19 For example: Letter from the Judicial-Legal Section of the Supreme Command of the Polish Army, dated 24 March 1920 and signed by Józef Piłsudski, concerning the annulment of the judgement of the Field Court of the Stage District in Vilnius of 5 March 1920. Central Military Archives, Rembertów, Warsaw, Supreme Command of the Polish Army, ref. no. I. 301.22.1.

20 These conditions were set out in the Decree of the Commander-in-Chief of 3 January 1919 on the Regulations for Wartime Summary Courts (Journal of Military Orders, No. 1, item 5).

21 Also significant was the Instruction defining the relationship of field courts both to their judicial superiors and to the division commander, or, where applicable, the stage district commander. Central Military Archives, Rembertów, Warsaw, Supreme Command of the Polish Army, ref. no. I. 301.21.1.

22 As a rule, a field court was established wherever a unit was stationed.

23 Order of the Supreme Command of the Polish Army of 5 March 1919 on the Organisation of Field Courts in the War Zone, No. 1491/IV, General Staff, together with the related Order of the Supreme Command of the Polish Army of 24 July 1920, Nos. 6298/20/Sąd and 6353/V/

On the basis of the cited order, proceedings in their initial phase had the following characteristics: the judicial superior was the division commander; jurisdiction extended to military personnel under that commander's authority (civilians were subject to these provisions only in exceptional cases); a field court consisted of at least two officers of the judicial corps, one of whom acted as investigating judge; judgements were not subject to appeal: if confirmation was refused, the case files were referred to the Supreme Commander for decision; a death sentence likewise required the Supreme Commander's approval before execution; each field court maintained a so-called field detention centre for persons under investigation; the court was tied to the front and to the stationing of a specific unit and was not subject to evacuation; and the files of completed cases were forwarded to the Military Archives in Warsaw [ibid., 65-67].

The procedure itself was relatively straightforward. Hearings began with the announcement of the judges' names and the taking of an oath. The order of accusation was then read, and the accused was required to answer all questions. Evidentiary proceedings could be conducted, usually through the examination of witnesses; in espionage cases, testimony was often provided by officers of the intelligence services. The judgement was drafted by an officer of the judicial corps.[24] Until the introduction of uniform provisions on field proceedings throughout the country, appeals against unfavourable judgements lay with the Supreme Military Court. Later, the process was modified. The accused submitted a protocol statement setting out objections to the judgement, the judicial superior added his opinion, and the complete documentation was transmitted to the Supreme Commander, who had the authority either to approve the judgement or to amend it [ibid., 68].

Field courts were likewise upheld in the Regulation of May 1920.[25] As before, their establishment was by order of the Commander-in-Chief,[26] and panels were convened at the summons of the competent commander (Article 69). Each panel consisted of a military judge, who directed the

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Gen. Rozwadowski. Central Military Archives, Rembertów, Warsaw, Supreme Command of the Polish Army, Directorate of Field Judiciary, ref. no. I. 301.22.1.

[24] Order of the Supreme Command of the Polish Army, Directorate of Field Judiciary and Military Legal Service, No. 9842/20/Sąd. Central Military Archives, Rembertów, Warsaw, Supreme Command of the Polish Army, Field Courts, ref. no. I. 301.22.1.

[25] Regulation of the Council of Ministers of 10 May 1920 on the Entry into Force in the Territory of the Republic of the Act on Military Criminal Procedure for the Common Armed Forces of 5 July 1912 (Journal of Laws No. 59, item 368).

[26] In the early years, when the state borders had not yet been definitively drawn, the criterion for determining whether a population fell under the jurisdiction of field courts was the presence or absence of parliamentary representation for the inhabitants of a given territory. Proclamation poster of 26 June 1920, Central Military Archives, Rembertów, Warsaw, Supreme Command of the Polish Army, ref. no. I. 301.21.1.

hearing, and four assessors, with the presiding role assigned to the senior officer by rank (Article 70). Commanders were guaranteed a sufficient number of judicial corps officers to ensure the proper conduct of investigations, the functions of the presiding judge, and the role of prosecutor (Article 73). In hearings held in the field and at sea, no investigating judges were appointed.[27] The Commander-in-Chief also had the authority to direct that a person not otherwise subject to military jurisdiction be tried under it if there was a risk of that person being detained either in enemy country or territory, or by the enemy's allies (Article 75).

Both summary and field proceedings outlasted the formative years of the independent Polish state and continued in use until the fall of the Second Republic. The legal basis for summary jurisdiction throughout the interwar period was the order of 1 April 1922,[28] although its provisions were repeatedly amended.[29] The Military Code of Criminal Procedure of 1936[30] retained this procedure and its corresponding norms; in practice, the rules of summary jurisdiction changed little during the interwar years.

A similar situation applied to field proceedings. After the conclusion of military operations in April 1925,[31] a special instruction was issued for field courts, which remained in force for many years. Only the Military Code of Criminal Procedure of 1936 unified these provisions by incorporating them into the Code itself [Szczygieł 2017, 329]. In substance, however, they differed little from the earlier regulations discussed above.

4. STATE DEFENCE TRIBUNAL

The State Defence Tribunal was established by the Regulation[32] of 11 August 1920. Its primary function was to examine and adjudicate cases

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[27] Adjudication in the field was carried out by field courts; on vessels serving within fleet formations, jurisdiction was exercised by fleet courts-martial; and on vessels assigned to independent missions, shipboard courts-martial were convened.

[28] Order of the Minister of Military Affairs of 1 April 1922, No. 3037/I/22, Department IX of Justice.

[29] The significance of this jurisdiction was underscored in the Order of the Supreme Command of 24 July 1920, No. 6298/20/Sąd and 6353/V/Gen. Rozwadowski, which declared that "judges bear personal responsibility for ensuring swift, uncompromising and resolute adjudication, demanded by the imperative of defending the State." Central Military Archives, Rembertów, Warsaw, Supreme Command of the Polish Army, ref. no. I. 301.21.1.

[30] Decree of the President of the Republic of Poland of 29 September 1936 – Military Code of Criminal Procedure (Journal of Laws No. 76, item 537).

[31] Instruction for Field Courts (ref. no. 2/1925 II), approved for official use by the Minister of Military Affairs by letter of Section III of the General Staff, L.2088, Regulation of 15 April 1925.

[32] Regulation of the Council of National Defence of 11 August 1920 on the Establishment

referred by the Council of National Defence [Brzostek and Giżyńska 2016, 82-83]. These cases had to bear the hallmarks of particularly serious offences, as defined in the criminal statutes, and involve dangers or harms detrimental to the defence of the state. They encompassed offences committed both on the battlefield and within the country, and concerned not only civilians and members of the armed forces but also holders of the highest state offices (Article 1). According to the Regulation, the adjudicating panel of the Tribunal consisted of (Article 2): the President of the Tribunal, judges of the Supreme Court, judges of the Supreme Military Court, the chair of the Sejm Military Commission, and two government delegates, one of whom was required to have advanced military education. The permanent President of the Tribunal and his deputy were appointed by the Prime Minister on the motion of the Council of National Defence (Article 3). Membership could not be declined (Article 4). In adjudicating cases, the Tribunal applied the relevant provisions of the Military Criminal Code as well as those of the regional statutes[33] applicable to the specific offence (Article 8). Of particular note is that the prosecutorial function was performed by the Minister of Justice, who could delegate it to his deputies, senior ministry officials, representatives of the Prosecution Office of the Supreme Court, or, by agreement with the Minister of Military Affairs, to prosecutors attached to the Supreme Military Court (Article 5).

The members of the Tribunal were required to take an oath in accordance with the judicial formula in force at the time (Article 7). A key prerogative of the Council of National Defence was the power to order investigations into charges brought against specific individuals, or to inquire into particular events and seek to establish their causes (Article 9). Investigations were conducted by a delegate of the State Defence Tribunal, who could act independently, in cooperation with the relevant authorities, or through the civilian and military judiciary. He was vested with the rights of an investigating judge (Article 10). Case files were forwarded to the Minister of Justice who, in the absence of objections, submitted a motion for a main hearing. Where doubts arose, he could instead recommend discontinuance or refer the case to a civil or military court. Main hearings were conducted before a six-member panel (Article 12), and judgements were reached by simple majority vote (Article 14). Orders issued by the Tribunal or its delegates in the course of proceedings were binding on all authorities, offices, and units of the Armed Forces of the Republic (Article 16). With the dissolution of the Council of National Defence, the Tribunal itself was disbanded, and the files of pending cases were transferred to the competent courts or prosecutors (Article 17).

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of the State Defence Tribunal (Journal of Laws No. 81, item 538).

[33] The unification of law in Poland gathered real momentum only after the creation of the Codification Commission in 1919.

By its very name, this body appeared to be a major institution of justice in the newly independent Polish state. Yet its existence was short-lived. It was dissolved by the Act[34] of 9 December 1920. Only one case ever came before it, i.e. that of General Aleksander Boruszczak, accused of surrendering Vilnius to the Bolsheviks without a fight. The matter remained unresolved prior to the Tribunal's dissolution, and in 1921 the case files were transferred to the Military Court of the Warsaw District Command, which discontinued the proceedings for lack of evidence [Marszałek 1992, 125-36].

In conclusion, although the State Defence Tribunal proved short-lived, the rationale for its creation was entirely justified, especially given the context of the Polish–Soviet War. Acts of insubordination by soldiers or treason by civilians threatened not only public morale but also the cohesion of the armed forces, and could have risked outright defeat at the front. For that reason, the establishment of an extraordinary judicial institution in the form of the Tribunal was of considerable importance.

CONCLUSIONS

Extraordinary military jurisdiction constituted a significant element of the administration of justice in the Second Republic. Although not all of the courts endured throughout its existence, the decision to establish the institutions examined above during the formative years of independence was well founded. Each body dealt with different categories of cases, exercised specific competences, and operated within a defined procedural framework. The most important was undoubtedly the Supreme Military Court, which, despite changes in its authority, remained in operation until the end of the interwar period. By contrast, the State Defence Tribunal proved short-lived, although the reasons for its creation were nonetheless entirely justified.

In conclusion, the extraordinary jurisdictions discussed here fulfilled their intended functions and contributed to consolidating the system of military justice. It should be recalled, however, that these were courts of a distinctly "wartime" character. Even though the years up to 1939 were comparatively peaceful, these courts continued to function. As a result, at the outbreak of war there was no need to establish new judicial bodies or to hurriedly issue appropriate regulations, for both the institutions and the legal framework were already in place.

[34] The State Defence Tribunal was formally dissolved by the Act of 9 December 1920 on the Repeal of the Regulation of the Council of National Defence of 11 August 1920 on the Establishment of the State Defence Tribunal (Journal of Laws No. 119, item 785).

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DEEPFAKE AND SELECTED CRIMES IN POLISH AND GERMAN CRIMINAL LAW

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Abstract. This study examines the issue of deepfake technology, with particular emphasis on its mechanisms, applications, and the potential threats it poses in various areas of social life. It outlines the elements of prohibited acts that may be committed by individuals who create or distribute deepfake content. The aim of the article is to analyse the deepfake phenomenon in the context of selected provisions of the Polish Penal Code, as well as in light of the relevant provisions of German criminal law. In addition, the article discusses the provisions contained in the Artificial Intelligence Act, which establish a system of protection against the malicious use of deepfake technology based on transparency obligations. The study provides an assessment of the applicable provisions of Polish and German criminal law with regard to the protection of persons who may be harmed by the dissemination of deepfake content, and also evaluates the regulatory framework adopted at the EU level.

Keywords: Polish Penal Code; German Penal Code; Artificial Intelligence Act; deepfake; manipulation.

INTRODUCTION

Accelerated technological progress gives rise to completely new, previously unknown threats related to the creation of a false image of reality. Manipulation of information has now taken on a particularly dangerous form; content, such as videos, images and sounds generated by artificial intelligence, known as deepfakes, has become a tool for spreading misinformation, while it is not always possible to verify the authenticity of content. Deepfakes are not a uniform phenomenon – their harmfulness depends on the context of the content created. Deepfake technology is used in applications ranging from the entertainment industry to education, but is most often used to produce

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fake pornographic films; deepfake recordings are also used as an instrument of blackmail and fraud. Rising concerns over deepfakes are prompting calls for legislative action at both national and EU levels.

The aim of the present article is to analyse the phenomenon of deepfakes in the context of selected provisions of the Polish Penal Code[1] (Articles 190a(2), 191a, 212 and 216) and to highlight the risk that this technology may be used to commit other crimes, such as fraud (Article 286 PC) or coercion (Article 191(1) PC). Issues associated with deepfakes are also analysed in the light of German criminal law, especially with regard to such crimes as insult, defamation, slander, violation of the protection of private life and infringement of personal rights by taking photos. A proposal to introduce a new legal regulation on combating deepfakes into the German Penal Code is also presented.[2]

Moreover, the article discusses the provisions of the EU Regulation – the Artificial Intelligence Act (AI Act)[3] regarding deepfake content, a legal definition of deepfakes, and provisions creating a system of protection against harmful uses of deepfakes based on transparency obligations.

The present paper assesses the applicable provisions of Polish and German criminal law concerning the protection of persons potentially harmed by the dissemination of deepfake content, as well as evaluating the regulations adopted at the EU level.

1. THE ESSENCE OF THE DEEPFAKE PHENOMENON

Deepfake is a technology that uses artificial intelligence systems to generate or modify images, sounds or video recordings so that they ultimately depict something that did not actually happen. In practice, deepfake technology is most often used to publish videos online that are intentionally fake but appear authentic. The term deepfake is a combination of two English words: "deep" – profound and "fake" – false. The first element of the name "deep" comes from the term deep learning, which denotes a machine learning method (an artificial intelligence technology) that uses multi-layer neural networks to independently analyse and recognise data in order to effectively solve complex tasks such as image recognition, natural language processing, speech analysis or content

[1] Act of 6 June 1997, the Penal Code, Journal of Laws of 2025, item 383 [hereinafter: PC].

[2] Strafgesetzbuch in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I S. 3322).

[3] 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 (hereinafter referred to as the Artificial Intelligence Act). OJ EU.L.2024.1689 of 2024.07.12, LEX/el. 2025 [hereinafter: Artificial Intelligence Act or AI Act].

generation. A deepfake is a highly realistic falsification created with advanced technology that is difficult for recipients to recognise as false.

Deepfake technology uses an algorithm called GAN – generative adversarial networks – to replace a real image or video of a person with a fake image or video. One of the advantages of GANs is that they can learn from a given dataset [Almars 2021, 24-25]. GANs consist of two main AI systems – the first is called a generator, the second is a discriminator [Dąbrowska 2020, 90]. The generator creates fake images, videos, or sounds in an attempt to imitate real-life data. The discriminator determines whether the generated content comes from the generator and is real. The entire process iteratively improves both networks, resulting in the generator becoming better at creating realistic images and the discriminator becoming better at detecting them. This leads to the creation of images and videos that look very realistic, and are produced entirely by artificial intelligence [Rajtar 2025, 194].

The growing use of deepfake technology in a wide range of sectors is facilitated by widespread access to tools and software capable of sophisticated visual and audio manipulation. Deepfakes can now be easily created using applications that change a person's face and voice, synchronise facial expressions and lip movements with a selected audio track, generate voices that imitate specific individuals, or create character animations based on photographs.

Currently, there are three basic types of deepfake creations: Face Swapping, Voice Swapping and Body Puppetry. In recent years, several AI-based methods have been developed to manipulate faces in videos. They are used to replace faces in a film, control a person's lip movements, facial expressions and head or synthesise new (pseudo) identities in order to in order to seamlessly integrate an actor's face into existing footage. This method, called Face Swapping, allows one to create fake videos in which a person makes statements they have never made in real life. This effect is achieved by reconstructing a three-dimensional face model based on a video stream. The manipulator can then freely control the footage based on subsequent video frames and create deceptively realistic facial expressions in the target individual.

Deepfake software can also be used to reconstruct a person's voice (Voice Swapping). For example, politicians can be digitally manipulated to appear to say words they have never spoken. This technology can also become a problem in business; in certain circumstances, fraudsters can create audio recordings with the voices of key employees to order a money transfer over the phone, etc. It is also possible to transfer individual movements or even entire movement sequences from filmed material onto another person. This form of deepfake is called body puppetry [Gradek-Lewandowska 2020].

Due to the fact that deepfake technology was designed as a falsification instrument, it is inherently associated with destructive potential [Kiełpiński 2023, 97]. This technology contributes to numerous abuses,

including attempts at electoral manipulation, discrediting politicians, creating pornographic content (so-called deep porn), and catalysing financial fraud schemes. The list of harmful uses of deepfakes is long and growing. Deepfakes are considered a powerful instrument of misinformation, and their appearance in public space reduces trust in the media, increases the feeling of insecurity among citizens and threatens the functioning of democratic societies. On the other hand, deepfakes can also have positive applications, e.g. in education, entertainment or tourism [Łabuz 2024, 784].

Due to the widespread and ever-increasing use of deepfake technology, which poses a threat in many areas of social and economic life, both researchers and practitioners have initiated a debate on the rules for creating and using deepfake content. Attempts to define this phenomenon have resulted in scientific studies focusing primarily on audio and visual forms of deepfakes, omitting textual forms. This understanding of deepfakes is also related to the belief, firmly established in the public consciousness, that this technology is primarily a tool that enables the impersonation of another person's identity using generated images and sounds [ibid., 787].

2. EU LEGAL FRAMEWORK FOR DEEPFAKE TECHNOLOGY

EU legislators have also recognised the threat posed by the widespread use of deepfake technology and have introduced procedures to protect citizens from manipulation and misinformation. These procedures are provided for in the Artificial Intelligence (AI) Act, which officially entered into force on 1 August 2024. The AI Act is the first legal solution in the world to establish a comprehensive legal framework specifying harmonised rules for the creation, use and dissemination of AI systems. In principle, the AI Act takes effect on 2 August 2026, although the application of individual provisions is deferred and will follow the timetable set by the EU legislator (Article 113 AI Act).

The AI Act introduces a legal definition of deepfake, which plays a key role in regulating the creation of synthetic content and is also important for conducting in-depth scientific research and legal analysis. According to Section 3(60) AI Act, "'deep fake' means AI-generated or manipulated image, audio or video content that resembles existing persons, objects, places, entities or events and would falsely appear to a person to be authentic or truthful." Importantly, the definition of deepfake focuses mainly on audio and visual forms. And although it is not limited to a specific medium, it does not apply to textual forms. The legislator's position in this respect is consistent with the views of the doctrine, in which the belief dominates that focusing solely on audio and visual content more accurately reflects the essence of the a deepfake [Łabuz 2024, 787].

The EU legislator has classified deepfake technology as a limited-risk system, making it necessary to implement transparency obligations under Article 50(2) and (4) AI Act. The AI Act establishes a transparency obligation on two levels. First, it requires AI system providers to mark AI-generated and manipulated content in a machine-readable format (Article 50(2) AI Act), secondly, it requires entities using AI systems to disclose only deepfake content and texts published for the purpose of informing the public about matters of public interest (Article 50(4) AI Act). Recital 133 AI Act provides an open catalogue of technical solutions for tracing the origin of information, including the use of watermarks, metadata identification, watermarks, metadata identifications, cryptographic methods for proving provenance and authenticity of content, logging methods,, digital fingerprints and other effective techniques for identifying synthetic content. It can be assumed with a high degree of certainty that transparency obligations will be fulfilled through disclosure of information and the use of watermarks [Łabuz 2023, 23]. The provisions of Article 50(2) and (4) AI Act also introduce exceptions to the obligation to mark deepfake content by AI system providers and entities using a specific AI system. Failure to comply with the transparency obligations imposed by the AI Act is subject to administrative fines as defined in Article 99 AI Act.

It should be emphasised that the provisions of the AI Act require providers of AI systems to mark content generated and manipulated by AI and provide for the obligation for entities using AI systems to disclose deepfake content, but do not provide for the obligation to remove such content from virtual space. Certainly, the use of technical solutions, such as watermarks, and the inclusion of relevant information can help identify deepfake content, but it will not solve the problem of malicious intent behind the creation and dissemination of deepfakes. Even when watermarked, falsified content can still be distributed to mislead recipients, hoping that many will miss or misunderstand the watermark [Lisińska and Castro 2024]. Moreover, the principle of transparency does not provide protection for individual victims of deepfake technology, because the AI Act only provides legal protection to recipients of content created or manipulated by AI, and does not refer in this respect to persons to whom deepfake technology may have caused serious harm.

The AI Act is not the only EU act regulating the issue of deepfakes. Article 35(3)(k) of the Digital Services Act imposes an obligation on providers of very large online platforms and very large online search engines to identify and mitigate the risks associated with the dissemination of artificially generated or manipulated content, such as deepfakes.[4] However, as far

[4] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on the single market for digital services and amending Directive 2000/31/EC (Digital Services Act), OJ EU.L.2022.277.1 of 2022.10.27. Lex/el. 2025 [hereinafter: Digital Services Act or DSA].

as personal data and their misuse for deepfakes are concerned, the limitations and requirements apply concerning the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights (ECHR)[5] and 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 (GDPR).[6]

3. DEEPFAKE AND SELECTED CRIMES IN POLISH CRIMINAL LAW

Polish criminal law does not directly address the problem of deepfake; the terms deepfake or deep porn do not feature in Polish criminal legislation at all. It should be noted, however, that deepfake technology is a tool for creating and disseminating false content, which inherently implies the intentional falseness of the effects of its action (the intention to mislead) [Szpyt 2019, 79], and as such is punishable by Polish criminal law for falsification of reality. It is therefore necessary to pay attention to the purpose for which deepfakes are used, in what context they occur, and what consequences they bring about [Mamak 2020]. Taking the above into account, it should be stated that the use of deepfake technology may constitute a crime, and the legal problems arising in this context may be resolved under criminal law in terms of the criminal liability of their creators and those who disseminate them.

In the context of deepfake technology, identity theft constitutes one of the primary offences of concern. It is now firmly embedded in public discourse that deepfakes function predominantly as tools for impersonating another person's identity through the generation or manipulation of visual and audio content. The Penal Code penalises identity theft in Article 190a(2).[7] This act involves impersonating another person, using their image, other personal data or other data by which they are publicly identified in order to cause property or personal damage to them. Due to the fact that the legislator used the words "person" and "personal data" in the provision, it must be assumed that only the identity of a natural person is at stake, and the perpetrator must impersonate another, actually existing person, not a fictitious one (e.g. a literary character)

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[5] Journal of Laws 1993, No. 61, item 284, Lex/el. 2025.

[6] OJ EU.L.2016.119.1, Lex/el. 2025.

[7] Article 190a PC states: "§ 1. Whoever, by persistently harassing another person or their closest relative, causes in that person a sense of threat, humiliation or torment that is justified by the circumstances, or significantly violates that person's privacy, shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years. § 2. The same penalty shall apply to anyone who, impersonating another person, uses his or her image, other personal data or other data by means of which he or she is publicly identified, thereby causing property or personal damage to that person."

and only a living person [Mozgawa 2025a]. As for the definition of the term "image", the Dictionary of the Polish Language provides two meanings: "someone's likeness in a drawing, painting, photograph, etc." and "the way in which a person or thing is perceived and represented."[8] Mozgawa emphasises that under Article 190a(2) PC, both meanings of the word "image" will be taken into account, and the use by the legislator of the term "image or other personal data" means that the image is part of personal data [ibid.].

The conduct consisting in the perpetrator taking actions as another person meets the criteria of the crime under Article 190a(2) PC [Zoll 2017, 592]. The doctrine emphasises that impersonation is pretending to be another person, misleading others about one's identity, and presenting oneself as someone else [Lachowski 2023a, 1020]. It can therefore be stated that impersonation is directly linked to the perpetrator and requires them to adopt someone else's identity, whereas in the case of deep porn production we are dealing with a "combination of images" of two different people without the perpetrator adopting their personality. In this situation, due to the lack of the element of impersonation, a perpetrator who creates false pornography (deep porn) cannot be held criminally liable under Article 190a(2) PC [Ziobroń 2021, 229].

Another deepfake-related crime is recording the image of a naked person or a person engaged in sexual activity by using violence, unlawful threat or deception against them, or disseminating the image of a naked person or a person engaged in sexual activity without their consent – Article 191a PC.[9] This provision mainly protects human intimacy, which is closely related to the right to privacy. Therefore, human sexual freedom is protected as the freedom to decide on the recording or dissemination of one's naked image or one's image during sexual activity – this aspect of freedom is related to human dignity, due to the intimate sphere to which it refers [Wala 2025, 467]. Lachowski emphasizes that a crime can only occur when the injured party is a participant in the sexual act and has not consented to its dissemination. The concept of an image should be understood as a likeness of a person that allows for their identification, while a naked person is one whose intimate parts of the body are exposed and who is at least half naked. In the case of men, intimate body parts will be the buttocks and genitals, and in the case of women – breasts, buttocks and genitals [Lachowski 2023b, 1027-1028]. Mozgawa specifies that the legislator, when speaking about sexual activity (during which a person is recorded) means both sexual intercourse and other sexual activity [Mozgawa 2025b].

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[8] See https://sjp.pwn.pl/slowniki/wizerunek.html [accessed: 01.09.2025].

[9] Article 191a PC reads: "§ 1. Whoever records the image of a naked person or a person during a sexual act, using violence, unlawful threat or deceit against that person, or disseminates the image of a naked person or a person during a sexual act without their consent, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years. § 2. Prosecution takes place at the request of the injured party."

Ziobroń notes that in the case of fake pornography, two images are disseminated: the image of the person whose face was used and the image of the naked person whose body was recorded in the film. Therefore, it cannot be claimed that a participant in a sexual act is a person whose face has only been pasted on using deepfake technology, because he or she is neither the subject of the sexual act nor is naked, while images of naked bodies in deep porn productions belong to pornographic film actresses who, in principle, consent to their recording [Ziobroń 2021, 230]. The above statements lead to the conclusion that under Article 191a PC there is no legal basis for assigning criminal liability to a person who creates and distributes deep porn content.

Crimes of particular relevance to the analysis of deepfake technology include defamation[10] – Article 212 PC and insult[11] – Article 216 PC. The essence of the crime of defamation is the negative consequences that a specific entity may suffer due to the content of the slander, which may contribute to the loss of trust necessary for a given position, profession or type of activity. The subject of protection under Article 212 PC is the external part, perceived as the "good name" of the entity to which it applies [Błachnio 2024, 1080]. The crime of defamation, in the absence of normative restrictions, may be committed in any form that enables the transmission of information to another person. It can occur using various means of transmitting information, not only orally, but also in writing, print, image, caricature or through an artistic work [Raglewski 2017, 32]. By presenting a specific person or institution in a bad light, deepfakes can even destroy their life or, in the case of an institution, negatively affect its functioning and social perception [Mamak 2020]. Deepfake authors who disseminate content that

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[10] Article 212 PC states: "§ 1. Whoever accuses another person, group of persons, institution, legal person or organizational unit without legal personality of such conduct or characteristics that may humiliate them in public opinion or expose them to the loss of confidence necessary for a given position, profession or type of activity, shall be subject to a fine or restriction of liberty. § 2. If the perpetrator commits the act specified in § 1 through the mass media, he or she shall be subject to a fine, restriction of liberty or imprisonment for up to one year. § 3. In the event of conviction for the offence specified in § 1 or 2, the court may order compensation to be paid to the injured party, the Polish Red Cross or another social cause indicated by the injured party. § 4. The offence specified in § 1 or 2 shall be prosecuted on private accusation."

[11] Article 216 PC states: "§ 1. Whoever insults another person in his presence, or even in his absence but in public, or with the intention that the insult shall reach such a person, shall be subject to a fine or the penalty of restriction of liberty. § 2. Whoever insults another person using the mass media shall be subject to a fine, restriction of liberty or imprisonment for up to one year. § 3. If the insult was caused by the offended party's provocative conduct or if the offended party responded by violating the personal inviolability or by a reciprocal insult, the court may refrain from imposing a penalty. § 4. In the event of conviction for the offence specified in § 2, the court may order compensation to be paid to the injured party, the Polish Red Cross or another social purpose indicated by the injured party. § 5. The prosecution takes place on private accusation."

attributes negative behaviour or characteristics to the injured party, e.g., related to their character, health, or sexual preferences, which expose them to loss of trust or humiliation in public opinion, may be held liable under Article 212 PC. The crime of defamation can cover various types of deepfakes concerning not only individuals but also institutions.

Deepfake technology can play a particular role in cases of insult. The protected legal interest in the offence under Article 216 PC is dignity, perceived as the inner part of a person. Insults refer to the perpetrator's behaviour that expresses contempt for another person, in particular by humiliating them, degrading their dignity and making them feel offended. This applies to all behaviours of the perpetrator, regardless of their form [Zgoliński 2023, 1147-148]. Insults can therefore be made, for example, through gestures, writing, as well as verbally and by means of images. If the victim's face is pasted onto the silhouette of another character who behaves in a way that is incompatible with the dignity of the person, then we are dealing with an insult. Such a photomontage featuring the victim's face can be used in pornographic production (deep porn), where the victim is involved in an act that will be perceived as degrading in the eyes of the public [Mamak 2020]. With the use of deepfake technology, a person can therefore be insulted by being humiliated or ridiculed in a generated video.

It should be noted that for certain persons the Penal Code provides for a separate category of crime, e.g. Article 135(2) PC concerns insulting the President of the Republic of Poland.[12] A separate crime is insulting the nation or the Republic of Poland, as defined in Article 133 PC,[13] as well as a group of people or an individual because of their national, ethnic, racial or religious affiliation.[14]

Deepfake technology can also be used to commit other crimes such as fraud – Article 286 of the Penal Code or coercion – Article 191(1) PC. In the context of the production and distribution of deep porn, coercion would consist in an unlawful threat to distribute a given recording in the absence of the required behaviour by the perpetrator, e.g. payment of a certain sum of money [Ziobroń 2021, 233]. Fraud, on the other hand, means that the perpetrator, through his deceitful actions, leads another person to a false impression of the actual state of affairs, e.g. as to the characteristics of the

[12] Article 135(2) PC states: "Whoever publicly insults the President of the Republic of Poland shall be subject to the penalty of imprisonment for up to 3 years."

[13] Article 133 PC: "Whoever publicly insults the Nation or the Republic of Poland shall be subject to the penalty of imprisonment for up to 3 years."

[14] Article 257 PC states: "Whoever publicly insults a group within the population or an individual because of his or her national, ethnic, racial or religious affiliation or because of his or her lack of religious beliefs or for these reasons breaches the personal inviolability of another individual, shall be subject to the penalty of imprisonment for up to 3 years."

goods sold or the circumstances of the transaction, as a result of which the injured party disposes of his property in an unfavourable manner [Guzik-Makaruk and Pływaczewski 2016, 1522]. Another means of misleading may be deepfake technology by means of which the perpetrator generates a video in which, for example, well-known public figures (celebrities, politicians, entrepreneurs) advertise fictitious investments or cryptocurrencies, and the misled victims invest funds, believing in the authenticity of the recording.

Despite identifying selected examples of crimes whose elements would correspond to the use of deepfake technology, it must be noted that Polish criminal law does not fully take this issue into account. In view of the harmful nature of this phenomenon, it should be stated that the applicable regulations are fragmentary and do not fully address the specific nature of the threats arising from deepfake technology; they are inadequate to the character of the threat, and the legal protection afforded to victims is insufficient.

4. DEEPFAKE AND REGULATIONS IN GERMAN CRIMINAL LAW

German law does not yet contain specific legal regulations regarding deepfakes. Depending on the circumstances of the specific case within the scope of criminal law – particularly with regard to the intended purpose of deepfakes and their dissemination – it is necessary to rely primarily on the existing regulations governing individual criminal offences. It should be noted that such punishable acts will include crimes against honour and physical integrity[15]: insult (para. 185 StGB), if the deepfake being distributed is to be perceived as an offensive value judgement towards the person concerned or towards a third party [Kumkar and Rap. 2022, 199 and 226; Heckmann and Paschke 2022], defamation (para. 186 StGB), insofar as the deepfake is used to state or disseminate a fact about another person that is likely to make them contemptible or humiliate them in public opinion, and slander (para. 187 StGB), if the deepfake is used to state or disseminate a false fact about another person that is likely to make them contemptible or humiliate them in public opinion [Tuora-Schwierskott 2018, 270].

Criminal liability may also arise under Section 201a of the German Penal Code (StGB) for violating the protection of private life and infringing personal rights through photographing. Pursuant to para. 201a(2)[16] of the German Penal Code, it is a crime to provide a third party with photos of another person, which infringes upon the personal sphere of life of the person being photographed,

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[15] Strafgesetzbuch in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I S. 3322), das zuletzt durch Artikel 12 des Gesetzes vom 27. März 2024 (BGBl. 2024 I Nr. 109) geändert worden ist.

[16] Ibid., p. 276

as well as to make available to a third party an image taken by another person without permission, which may seriously damage the reputation of the person being photographed. Also in this case it is sufficient "if only parts of a person are depicted" (in particular, for example, the face); the crime may be committed by the fact of making a photomontage [Lantwin 2020, 78-79].

Offences under other criminal laws – i.e. laws other than the Penal Code – may also be taken into account in the case of deepfake abusers. Therefore, in accordance with para. 33 in conjunction with para. 22 of the Art and Photographic Copyright Act (KunstUrhG),[17] dissemination or public display of an image without the consent of the person depicted in it is punishable. The penalty for such an offence is up to one year of imprisonment or a fine.[18]

Furthermore, criminal liability for copyright infringement may also be taken into account, as when creating deepfakes – especially pornographic deepfakes – the photo and video materials taken by the author and used by third parties, edited and then distributed without the author's consent are protected by copyright [Haag 2023]. Pursuant to para. 106 of the Intellectual Property and Copyright Act (UrheberGesetz UrhG)[19] for such crimes, a prison sentence of up to three years or a fine is stipulated, and the provision reads: "Whoever reproduces, distributes or makes publicly available a work or adapts or processes the work without the rightholder's consent in cases other than those permitted by law, shall be subject to the penalty of imprisonment for up to three years or a fine."

In turn, the provision of para. 108 UrhG contains a description of further punishable acts, namely, the following: a third party, without the author's consent, reproduces, distributes or publicly makes available a scientific edition or an adaptation of such an edition, uses a posthumous work or an adaptation or transformation of such a work, reproduces, distributes or publicly makes available a photograph or an adaptation or transformation of a photograph, uses a performance of a work by an artist, uses a phonogram, uses a radio broadcast, uses an image carrier or an image and sound carrier, uses a database [Heckmann and Paschke 2022]. It should therefore be stated that the scope of the described acts of using the work contrary to the author's will is quite wide.

Since the fight against deepfakes has been recognised as an issue of exceptional importance, a draft amendment to the Criminal Code concerning the

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[17] Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie in der im Bundesgesetzblatt Teil III, Gliederungsnummer 440-3, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 3 § 31 des Gesetzes vom 16. Februar 2001 (BGBl. I S. 266) geändert worden ist.

[18] Para. 33 of the of the Art and Photographic Copyright Act (KunstUrhG).

[19] Urheberrechtsgesetz vom 9. September 1965 (BGBl. I S. 1273), das zuletzt durch Artikel 25 des Gesetzes vom 23. Juni 2021 (BGBl. I S. 1858) geändert worden ist.

protection of privacy – providing detailed regulation of deepfakes – has been submitted to the Bundestag.[20]

The new paragrap. 201b of the German Penal Code proposes prison sentences of up to two years or a fine for violating personal rights through digital forgery. In serious cases, such as the dissemination of pornographic deepfakes online, the expected range of penalties includes up to five years of imprisonment. Deepfakes that are shared "to pursue primarily legitimate interests," for example in the fields of art, science, or journalism, will not be covered by this new provision [Sittig 2024].

The proposed legal regulation is as follows: "§ Whoever infringes the personal rights of another person by making available to a third party media content generated or modified by computer technology, giving the appearance of a realistic image or sound recording of the physical appearance, behaviour or oral statements of that person, shall be subject to the penalty of imprisonment for up to two years or a fine. The same applies if the offence referred to in sentence 1 concerns a deceased person and as a result his or her right to personal protection is seriously impaired.

In the cases referred to in section 1 sentence 1, anyone who makes media content publicly available or makes available media content the subject of which is a process concerning the most personal sphere of life shall be punished with imprisonment of up to five years or a fine."

However, the above provisions do not apply to acts undertaken for the purpose of pursuing overriding legitimate interests, namely art or science, research or teaching, reporting on current events or history, or for similar purposes. The legislative initiative also provides that image or sound carriers, or other technical means used by the perpetrator or participant, may be subject to forfeiture.

Further initiatives result from the provisions of EU law. The legislator establishes some of the risk mitigation measures referred to in Article 35 of the Digital Services Act as mandatory requirements. Article 35(1)(2)(k) DSA[21] still leaves the requirement to label deepfake content at the discretion of service providers. The German legislator has not yet addressed this issue, although it will undoubtedly have to do so in the near future.

[20] Entwurf eines Gesetzes zum strafrechtlichen Schutz von Persönlichkeitsrechten vor Deepfakes, Drucksache 20/12605, (Drucksache 20/12605).

[21] OJ EU.L.2022.277.1, Lex/el. 2025.

CONCLUSION

A new category of socially dangerous behaviour is related to the harmful use of deepfake technology, and the applicable legal regulations do not guarantee citizens a sufficient level of legal protection in this regard. Consequently, the introduction of new criminal-law solutions appears necessary, particularly in light of the entry into force of the Artificial Intelligence Act, which is becoming a point of reference for the creation of more effective protective mechanisms.

The EU AI Act introduces a legal definition of deepfake that focuses on audio and visual forms and does not apply to text-based forms. Moreover, the legislator classifies deepfake technology within the category of limited-risk systems, which entails the fulfilment of transparency obligations, but does not establish provisions requiring the removal of deepfake content from the digital space. The provisions of the AI Act designate only the recipients of deepfake content as subjects of legal protection, while they do not provide legal protection to the individual victims of this technology. In this situation, it is necessary to introduce regulations at the national level that will ensure such legal protection.

The analysis of the current legal status in Poland allows us to conclude that the provisions of the Penal Code do not meet the contemporary challenges resulting from the development of deepfake technology. Although deepfakes may be subject to criminalisation under the above-mentioned provisions, the applicable regulations are fragmentary, inadequate to the nature of the threat, and provide insufficient legal protection for victims. This situation justifies undertaking a legislative initiative aimed either at updating the applicable provisions of the Penal Code or introducing new ones which, inter alia, would establish criminal liability for failure to comply with the rules governing the creation of deepfake content, and would extend the scope of criminalisation relating to the dissemination of the image of a naked person to include artificially generated images, where such images misleadingly suggest that they depict the person in question [Mamak 2020].

The foregoing considerations relating to the current provisions of German criminal law indicate that the German Penal Code does not contain specific legal regulations concerning deepfakes. Criminal liability for the dissemination of deepfake content is likewise fragmentary and is based on the provisions governing individual prohibited acts. Additional conclusions also arise from the analysis of the current German legal framework, namely that the fight against deepfakes, given the specific nature of the phenomenon, cannot be limited solely to provisions of criminal law itself. It is necessary to extend criminal provisions to copyright law and to undertake legislative initiatives covering new aspects of crime. Therefore, it seems reasonable to penalise

actions involving the infringement of another person's personal rights by making available to a third party media content generated or modified by computer technology, giving the appearance of a realistic image or sound recording, appearance, behaviour or oral statements of that person.

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ABOUT THE THING ITSELF. KATARZYNA STĘPIEŃ'S LOOK AT THE PHILOSOPHY OF LAW

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Abstract. The text has been written as part of the project "The Scientific Position of Women in the Church and the World," the idea of which is to draw attention to the achievements of women in various fields of science, with particular emphasis on the achievements of female lawyers employed at the Catholic University of Lublin. The aim of the article is to present the profile and interdisciplinary research work of Katarzyna Stępień, dr. habil., head of the Department of Philosophical Anthropology and Philosophy of Law at the Faculty of Philosophy of the Catholic University of Lublin. The considerations presented here reflect the two-track nature of Katarzyna Stępień's involvement and activity. First, I explore the specific nature of her philosophical reflection on law, and then her work for the university and the popularization of science.

Keywords: philosophy of law; university; interdisciplinary scientific research; popularization of science.

INTRODUCTION

A lot has been said recently about the human rights crisis, which is systematically deepening as a result of the escalation of conflicts in many regions of the world, unregulated technological progress and the breakdown of the effectiveness of international law. In its 2024 *State of Human Rights Report*, Amnesty International presents an alarming picture of disregard for international standards in various areas of life, which is primarily related to the rivalry of superpowers and the "wave of collapsing democracies", the growing global inequalities, as well as the uncontrolled use of modern technologies for mass surveillance or information manipulation. Amnesty International predicts that the rapid development of artificial intelligence (AI) along with the dominance of Big Tech (a business model based on building behavioural profiles) will exacerbate human rights abuses on an unprecedented scale if regulation continues to lag behind progress.[1]

[1] *The State of The World's Human Rights*, https://amnesty.org.pl/wp-contentuploads/2025/04/Amnesty-International-Report-2024-25.pdf [accessed: 21.07.2025].

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The problem is that in a world of information overload and lack of wisdom, law-making alone is not enough. We too easily succumb to the illusion that mistakes always concern practices that need to be regulated somehow, not theories and ideas. It is all the more worth reminding that the chaos of today's changes is to a large extent the aftermath of misinterpreted ideas and badly set goals, and what we admit today under the pressure of facts, was announced *ante factum*.

In the face of these and other challenges, social institutions, including universities, should rethink their role. A university can no longer be merely a place for acquiring knowledge, a "factory of skills," or a vocational school. It should be a forge of thought – a place where informed and responsible citizens are educated, capable of navigating a world of rapid change. The role of the academic teacher is also being redefined. Today, more than just knowledge providers, we need guides and mentors – people who inspire, stimulate reflection, and at the same time set a good example when, as a result of the growing crisis of authority and the twilight of code ethics, institutional support and norms are lacking, and the pluralism of ideas is slipping into relativism.

The Catholic University of Lublin, which has always upheld intellectual freedom, creating a space for independent reflection and science free from ideology, continues to respond to the social, cultural, and moral needs of people in a highly polarized and conflicted world. It not only educates but also shapes, becoming a place of authentic dialogue – between science and faith, as well as between different intellectual environments and traditions. However, the university would lose its character and the meaning of its existence if it did not have its mentors – professors whose thoughts, publications and teaching activities have a real impact on students' attitudes, teaching them a critical approach to reality and active participation in social life.

The history of the Catholic University of Lublin consists of the activities of many outstanding professors, including women, who, by breaking stereotypes and barriers – especially at a time when the role of women was mainly associated with the home environment – paved the way for the next generations of scientists. It is worth citing these examples because, as statistics show, the potential of women in science is still not fully recognized, appreciated and used (only about a third of scientists in the world are women).

I devote this article to the profile and research work of one of such women – Professor Katarzyna Stępień, head of the Department of Philosophical Anthropology and Philosophy of Law at the Faculty of Philosophy of the Catholic University of Lublin. It was created as part of the project "The Scientific Position of Women in the Church and the World," the idea of which is to draw attention to the achievements of women in various fields of science, with particular emphasis on the achievements of female lawyers employed at the Catholic University of Lublin.

Of the many reasons why it is worth taking a closer look at Katarzyna Stępień's work, two deserve special emphasis. Firstly, the Professor is the face of the Catholic University of Lublin, and her original achievements, including interdisciplinary research in the field of law and philosophy on the one hand, and various forms of non-scientific activity on the other, make the Lublin university famous. She studied law at the Maria Curie-Skłodowska University (1993-1998), but it was with the Catholic University of Lublin that she associated her entire professional life, and to a large extent her personal life as well, through numerous and long-term friendships. Here, in 1995, she graduated in philosophy, obtained further academic degrees, and at the same time held positions in the structures of the university and the Polish Society of Thomas Aquinas as a secretary and editor of scientific publications.

Secondly, the Professor's deeply humanistic view of law deserves recognition, manifested in the constant confrontation of legal knowledge with its philosophical, social and political foundations. Katarzyna Stępień perceives law as a multi-layered social practice, which, for better understanding, should be considered from different perspectives. Referring to philosophical discussions, she seeks to expand the boundaries of legal imagination to include knowledge about man, his nature and the specificity of human action, in order to show how far erroneous anthropological assumptions translate into the corruption of law. An important issue, although rarely taken up by lawyers.

Further considerations will correspond to the two-track nature of Katarzyna Stępień's involvement and activity. First, I will show the specificity of her philosophical reflection, and then her work for the benefit of the university and the promotion of science.

1. RESEARCH INTERESTS

Katarzyna Stępień was educated under the supervision of many excellent professors, but she also had the special privilege of being a student of the founder of the so-called philosophical school of Lublin – Father Prof. Mieczysław Albert Krąpiec, under whose supervision she wrote her master's thesis entitled *Funkcja celu w koncepcji prawa u św. Tomasza z Akwinu* ("The Function of the Goal in St. Thomas Aquinas's Concept of Law"), as well as a student of Krąpiec's successor in the Department of Metaphysics – rev. prof. Andrzej Maryniarczyk – the supervisor of her doctoral dissertation entitled *Spór o podstawy racjonalnego prawa. Analiza wybranych stanowisk* ("The Dispute over the Foundations of Rational Law. An analysis of Selected Positions").

Faithfulness to the basic assumptions, principles and methods of Krąpiec's metaphysical realism largely determines the philosophical approach of Katarzyna Stępień. At the same time, she shows courage of thinking

and a creative attitude to the master's philosophical legacy, developing her own reflections in the field of philosophy of law and taking up new issues that Krąpiec did not deal with. Her main areas of scientific interest are: (1) philosophy of law and its place in contemporary types of explanation of law, taking into account the specificity of realistic philosophy of law; (2) the anthropological foundations of law and their significance for the integral understanding of law and human rights; (3) cultural determinants of law, with particular emphasis on rules and determinants of human action other than law (metaphysics of human action, law and morality, educational function of law, cultural and civilizational determinants of law). Over the past years, K. Stępień has significantly developed and increased her publishing output. I do not undertake a detailed discussion of it here, I will limit myself to paying attention to the most important studies.

The first area of research falls within the trend of realistic philosophy of the so-called Lublin school, rooted in Thomism and analyzing law on the ontic plane as a specific type of being (belonging to the category of being called relation), in the aspect of the reason for its existence and the foundations of rationality. The aftermath of considerations on this subject is primarily the monograph *W poszukiwaniu podstaw racjonalności prawa* ("In Search of the Foundations of the Rationality of Law") [Stępień 2015a], in which the author shows rational and free human nature as a place where law is realized in the strict sense – as a certain rule and measure of action for the sake of the goal. The law links the acting being to the good that is due to it by virtue of its nature, i.e. it assigns action to the end as the motive of action. Due to the fact that this assignment is rational in nature, it is the fruit of the action of reason, and not an act of will, the ultimate foundations of the rationality of law should be sought in the rational structure of being, and more precisely – in real inter-beingal relations characterized by the obligation to act and in the rational nature of human persons who are subjects-correlates of the legal relationship. This is an important remark because linking the law with the order of being protects against relativism and guarantees the objectivity of the law, and at the same time it values the human person as capable of reading the rational order of beings and acting according to the acquired knowledge.

The next question setting the framework for Professor's research concerns the final subjective grounding for natural law. Considerations on this subject have been taken up in two articles. The first one *Idee, prawo odwieczne i porządek natury* ("Ideas, the Eternal Law and the Order of Nature") [Stępień 2006, 281-95] shows the relationship between natural law and eternal law against the background of Augustin's concept of ideas and Aquinas's theory of ontic participation. The second one, entitled *Cel prawa i działania prawnego* ("The Purpose of Law and Legal Action") [Stępień 2008b,

237-52] contributes to the discussion on the dysfunction of contemporary legal culture. K. Stępień argues that one possible cause of this dysfunction is the omission of teleological explanation, i.e., the role of final cause in legal theory and practice. Therefore, she proposes that the internal relationship between law as a rule of action and the purpose should be considered based on the concept of the common good. This is a normative category of statutory law, still used as a tool for revealing the foundations of law, also in the context of the contemporary concept of human rights, understood as a plane of grasping by law particular areas of the good of a person.

The starting point for the research undertaken in the second area of interest are the accusations formulated against the contemporary concept of human rights, among others: atheoreticalness, lack of philosophical (especially metaphysical and anthropological) justifications, indefinability, excessive practicalism, relativism, internal contradiction, etc. According to Katarzyna Stępień, these accusations could be avoided if international and domestic protection of human rights went hand in hand with philosophical reflection on the determinants of human rights, their essence and justification. Hence the need for research aimed at explaining the essence of human rights and their connections with the philosophical understanding of human nature. Who man is? What is the meaning of his life and what is authentic good for him? K. Stępień addresses these issues in several texts.

In the articles *Human Rights and Nature* [Stępień 2007, 247-55] and *Antropologiczno-metafizyczne podstawy praw człowieka* ("Anthropological-Metaphysical Foundations of Human Rights") [Stępień 2011b, 63-76] the author develops the understanding of human nature as an internal principle of action and a source of rights (nature as a norm of law), while law is understood as a real interpersonal relationship, characterized by the obligation to act or not to act. On the other hand, in the encyclopedic entry *Godność osobowa* ("Personal Dignity") [Stępień 2016a, 376-83] reflects on the concept of dignity, central to the contemporary concept of human rights, indicating the reference of rights to their anthropological source.

The issue of the rights of the person is developed in studies on the rights of communities that are a natural environment of life for a person, such as the family or the nation. In the articles *O prawa rodziny* ("For the Rights of the Family") [Stępień 2010, 67-73] and *Obraz rodziny w Konwencji o prawach dziecka* ("The Image of the Family in the Convention on the Rights of the Child") [Stępień 2015b, 114-21] Stępień reminds after John Paul II that the rights of the family are not only a mathematical sum of the rights of its constituent members. The family as a community of parents and children, and often a community of many generations, has its own subjectivity, and consequently it demands specific rights corresponding to this subjectivity.

In turn, in the text *Prawo narodów do istnienia a ludobójstwo* ("The Right of Nations to Exist and Genocide") [Stępień 2013a, 134-41] the author refers to John Paul II's appeal to the UN in 1995 for respecting the rights of nations. In the course of deliberations, she juxtaposes the fundamental rights of nations, including the right to exist (in the context of the crime of genocide), which leads her to the conclusion that the greatest and most severe violations of human rights in history were committed through the mediation of the state apparatus (crimes against humanity, genocide). This grim discovery became the subject of the next article *Prawa człowieka a państwo* ("Human Rights and the State") [Stępień 2011c, 193-98] devoted to the relationship between man and the state as the main entity obliged to protect human rights.

Finally, the third area of Katarzyna Stępień's scientific interests focuses on rules of human action other than law (e.g. moral virtues as an improvement of action) and the problem of cultural and civilizational determinants of law. The opportunity to address these issues was the research and editorial work on *Powszechna Encyklopedia Filozofii* ("Universal Encyclopedia of Philosophy") and *Encyklopedia Filozofii Polskiej* ("Encyclopedia of Polish Philosophy"), as part of which the Professor reflected on the specificity of Polish philosophical-legal and philosophical-social considerations. Taking in her attention to the successive centuries of Polish literature and spiritual culture, from the Middle Ages to modern times, she came to the conclusion that a kind of separate attitude of thinking had been formed – original, different from the approaches of Western thought – which can be described without exaggeration as the Polish school of the theory of civilization. This approach, represented by many distinguished thinkers, such as Paweł Włodkowic, Jan Kochanowski, Erazm Majewski, Bogumił Jasinowski, Henryk Romanowski and others, is characterized by an appreciation of the personalism of European civilization and realism in the assessment of the organization of social life and political principles.

Interest in this issue has been expressed, *inter alia*, in articles on the necessary conditions for human moral perfection, the educational function of law, as well as the role of elites in democracy: (1) *Kultura prawa a kultura osoby* ("The Culture of Law and the Culture of the Person") [Stępień 2014, 85-92] (2) *Ideał nauczyciela i wychowawcy w pedagogice klasycznej* ("The Ideal of a Teacher and Educator in Classical Pedagogy") [Stępień 2013b, 71-84] (3) *O roli elit w demokracji według Cz. Znamierowskiego* ("On the Role of Elites in Democracy according to Cz. Znamierowski") [Stępień 2011a, 75-84] They also resulted in the popularization of the thought of outstanding authors dealing with the relationship between law and morality: Jacek Woroniecki, Feliks Wojciech Bednarski and Mieczysław Kreutz.

2. RIGHTS OF THE CHILD

If the significance and originality of the research work is determined by its focus on a key issue, constantly deepened and approached from different perspectives, then Katarzyna Stępień is undoubtedly a specialist in children's rights. She devoted a series of articles to this topic: (1) *Prawo do wychowania* ("The Right to Education") [Stępień 2008a, 93-102] (2) *Prawa dziecka a szkoła i wychowanie* ("Children's Rights and School and Upbringing") [Stępień 2011d, 121-131] (3) *Problem praw ucznia* ("The Problem of Pupil's Rights") [Stępień 2009, 82-87] (4) *Rozwój dziecka w kontekście współczesnej ochrony praw dziecka* ("Child Development in the Context of Contemporary Protection of Children's Rights") [Stępień 2012, 111-31] (5) *Antropologiczne podstawy praw dziecka* ("Anthropological Foundations of Children's Rights") [Stępień 2018, 9-33], but above all the habilitation dissertation *Filozoficzne źródła sporu o rozumienie praw dziecka* ("Philosophical Sources of the Dispute over the Understanding of Children's Rights") [Stępień 2016b]. This work, as one of the few publications contributing to the global debate on the anthropological foundations of children's rights, constitutes a significant novelty in Polish philosophical and legal thought.

No one needs to be convinced of the importance of the considerations undertaken. Failure to respect children's rights is a global problem today, the effects of which affect not only individuals but entire societies. According to UNICEF, one in four children in the world lives in a region affected by a humanitarian crisis, often caused by war. In such conditions, the most basic rights of children (i.e. the right to life, health, education, protection from violence, as well as the right to participate in social life and express their own opinions) are violated.[2] Another area that requires urgent action is the safety of children and young people online, which, in addition to benefits, also carries serious risks (i.e. pathological content, disinformation, data abuse, etc.).

Although the legal protection of children is anchored in international documents (e.g. the UN Convention on the Rights of the Child), both the very understanding of children's rights (the subject and object of rights, the specificity of the goods belonging to these rights as human rights, the specificity of the child as a dependent being, etc.) and the systemic mechanisms of their protection are the subject of dispute among representatives of specific legal sciences. K. Stępień analyzes and explains this dispute, organizing its various aspects from a philosophical perspective.

The context for the implementation of this task is provided by realistic philosophical anthropology understood as the metaphysics of the person

[2] See https://unicef.pl/co-robimy/aktualnosci/news/unicef-alarmuje-co-czwarte-dziecko-na-swiecie-zyje-w-krajach-dotknietych-kryzysami-humanitarnymi [accessed: 19.07.2025].

(metaphysical personalism). To be more specific, the author uses the substantive and methodological potential of realistic philosophical anthropology to explain problems formulated on the basis of detailed legal sciences and pedagogy in the field of children's rights. The premis of this approach is, on the one hand, the Professor's conviction that the applied potential of the philosophy of man has not yet been fully utilized, and, on the other hand, the conviction that realistic philosophical anthropology, presenting a general and theoretical concept of man, should serve to solve problems formulated within the framework of specific and practical sciences about man.

The first chapters of the dissertation present the circumstances of the birth of the idea of the protection of children's rights, its stages and attempts at positivization, the substantive and formal premises for protection, and the characteristics of the subject and object of individual rights, adopted in law. On the basis of the fundamental documents of international law, especially the Universal Declaration of Human Rights and the Convention on the Rights of the Child, Katarzyna Stępień first describes the obligation relationship between the child (the subject of rights) and the goods due to him (subjective right) in a social situation, and then defines the most important points of the dispute over the understanding of children's rights, placing them on two levels: formal (elements of the doctrine of protection of children's rights, definition of the child and children's rights, catalogue of rights, sources of protection, the problem of claims for the protection of children's rights, premises for distinguishing a specialized type of protection, etc.) and material (content-based formulation of rights, understanding of individual rights of the child under protection, such as life, subjectivity, health, etc., the child's status in the family, at school, in culture, in relation to the community).

The considerations constituting the central part of the dissertation concern the philosophical sources of the dispute, which mainly focuses on the understanding of the child as a human-person. The discussion on this subject seems to reflect the more general anthropological chaos of contemporary culture (the so-called anthropological error), as evidenced by the lack of precise definition of human rights and children's rights in the literature, which in a way forces the use of intuitive or colloquially understood terms.

According to Katarzyna Stępień, it is impossible to deal with these difficulties without revealing the anthropological foundations of children's rights: "Since children's rights are an element of human rights, they are subject to the characteristics of rights adopted in the contemporary understanding of human rights [...] Therefore, the premises of rights should be sought in the personal way of existence and existential status of the child, i.e. a human being at an early stage of development" (transl. M. Borkowska) [Stępień 2016b, 98-99]. As K. Stępień argues, only in this way can the sources of diverse

interpretations of children's rights be identified, and ultimately proposals for resolving the dispute can be formulated.

Adopting such a perspective sheds light on other issues entangled in the cultural and ideological context of the dispute over children's rights. Particularly noteworthy is the problem of contemporary redefinitions of the classical understanding of marriage and family, which results in attempts to equate the so-called alternative models of the family with the traditional family. Referring to these issues, K. Stępień emphasizes that the social status of a child depends on the status of the family and the determination of its function. In the family, man is not only born to life, but also constantly "born in his humanity", matures to be fully himself – a rational being, free and developing through love. In the family the rights of the child are realized. This means that any dysfunction that destroys the life of the family, changes the status of the child and limits the possibilities of exercising his rights.

The crisis of the family reveals another dimension of the dispute, related to upbringing. Stępień warns against the effects of 20th-century anti-pedagogical trends (democratic education, *unschooling*, alternative pedagogy), that negate the need for educational influence as such. This tendency is often accompanied by a kind of absolutization of the state of childhood and at the same time a depreciation of maturity in favor of striving for eternal childhood, which results in the infantilization of the entire culture. In the Professor's opinion, these ideas – although motivated by the recognition of the child's autonomy – have brought almost irremediable confusion in the matter of defining new attitudes, postulated in place of educational interactions. This situation also indirectly translates into the understanding of children's rights, the child's relationship with adults, as well as the attitudes of the latter towards children.

As Katarzyna Stępień argues, in order to turn back from the wrong path, it is necessary to recognize that "A child as a subject of action requires help in realizing himself through learning the truth and acquiring good, hence he is the subject of such rights as: on the level of cognition – the right to education, on the level of action and creation – the right to education, on the religious level – the right to religion" (transl. M.Borkowska) [Stępień 2016b, 229]. Seen from this perspective, education no longer appears as oppression imposed from the outside on defenseless beings, but a right rooted in man's ability to act rationally and freely.

These are just some of the areas of dispute over the understanding of children's rights analyzed in the dissertation. These considerations lead to an unambiguous conclusion: in order to resolve the disputed issues within the framework of positive law, they should be placed against the broader background of the concept of man-person, which requires the necessary conditions of just and just law to be sought in the extra-legal sphere

– in the nature of the personal being with its objective inclinations to life, to the transmission of life and personal development. There is a close connection between the indicated areas of dispute, the diversity of positions and adopted solutions, and the concepts of: man, child, family and upbringing. K. Stępień believes that the most adequate theoretical reference for the discussed problems is provided by realistic philosophical anthropology and selected areas of classical philosophy of education (*paideia*). Reaching for these sources, she formulates philosophically stimulating and at the same time practical postulates that can be applied on the basis of legal sciences as well as other specific and practical disciplines about man.

By the way, it is worth making one more remark. The habilitation dissertation reveals the most important features of Katarzyna Stępień's work – in addition to the erudite language and rich source base, the in-depth analyses, in which the author's presence is always clearly marked, deserve recognition. K. Stępień is not afraid to formulate original, critical, and sometimes politically or socially unpopular opinions and observations, but courageously challenges the usual patterns, explores the unknown, searching for the truth despite uncertainty and obstacles, often against the current of intellectual trends or fashions.

3. ORGANIZATIONAL, SOCIAL AND POPULARIZING ACTIVITIES

A commonly used criterion for evaluating the work of scientists is publication achievements. However, such a practice has significant limitations, because it omits or pushes into the background other activities, often important in the context of the functions of the university not directly related to individual research work, such as popularization of science, teaching, mentoring, as well as participation in the activities of various institutions of social life. In short: science should be measured not by how much and where you publish, but by what value you create. This thought aptly describes the attitude of Katarzyna Stępień, for whom social, organizational and popularizing activities are – as she often emphasizes – at least as important as scientific work.

This commitment, roughly speaking, includes the implementation of three tasks: (1) promoting philosophy in order to deepen the understanding of socially important issues and avoid misunderstandings related to them, (2) promoting various fields of philosophy and showing the possibilities of their application to solve contemporary problems, (3) promoting the scientific community of the Catholic University of Lublin, especially the achievements of the Lublin philosophical school in the field of metaphysics, anthropology and philosophy of law, which is one of the tasks of the Department of Philosophical Anthropology and Philosophy of Law.

A special place in Katarzyna Stępień's activities is occupied by the popularization of science, involving various tools for reaching the audience: occasional articles, reports from conferences, interviews published in popular science periodicals, as well as editing and co-editing of works in the field of philosophy, mainly in the form of projects and studies of new publishing series, i.e. *Zadania Współczesnej Metafizyki* ["Tasks of Contemporary Metaphysics"],[3] *Wykłady Otwarte* ["Open lectures"][4]). Particularly noteworthy is a series of interviews conducted with representatives of the Lublin community, devoted to various aspects of practicing philosophy: "On the Lublin Philosophical School", "On Polish Philosophy and the Lublin Philosophical School in the Context of Work on the Encyclopedia of Polish Philosophy", "On the Need for a Guide to Philosophy", "On Catholic Educational Ethics and Its Author", "Faith and the Deceptive Traps of Atheism", "On the Service of Culture".

Katarzyna Stępień strives to demonstrate that philosophy, including the philosophy of law, is by no means the domain of a narrow elite of initiates, but rather concerns everyone – uniting those who, despite diverse interests, aspire to live well, have the courage to think critically, ask questions, and seek meaning. It is no surprise that it is her organizational, social, and popularizing activities that have earned her the greatest number of honors, including the Rector of the Catholic University of Lublin Awards for: organizing international symposia in the "Tasks of Contemporary Metaphysics" series (2004); for her participation in the development of the 10-volume Universal Encyclopedia of Philosophy (2009); and for outstanding organizational, social, and popularizing activities (2011); the FENIKS 2016 Award in the "Publishing Series (Collected Works)" category for publishing the "Tasks of Contemporary Metaphysics" series; and the Medal of the Commission of National Education for special contributions to education and upbringing (2017). The President of the Republic of Poland Andrzej Duda honored Katarzyna Stępień with the Silver Medal for Long Service (2021).

CONCLUSION

As I have tried to show, Katarzyna Stępień's achievements are a testimony to the skilful and consistent combination of research work with social activity for the protection of human rights and the popularization of science.

Convinced that the law needs philosophy, Katarzyna Stępień conducts interdisciplinary scientific research, in which she traverses various areas

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[3] 2006-2014. Series: *Zadania Współczesnej Metafizyki*. Vol. 8-16, edited by Andrzej Maryniarczyk, Katarzyna Stępień, et al. Lublin: Polskie Towarzystwo Tomasza z Akwinu.

[4] 2011-2017. *Wykłady otwarte im. Ojca Profesora Mieczysława Alberta Krąpca*, edited by Andrzej Maryniarczyk, Katarzyna Stępień, et al. Lublin: Polskie Towarzystwo Tomasza z Akwinu.

of the humanities and social sciences, using the methodological apparatus of realistic philosophical anthropology. In this way she makes an important contribution to the Polish tradition of humanistic studies on law, placing the philosophy of law among full-fledged philosophical disciplines.

Calling for a law that respects the dignity and subjectivity of the person, she emphasizes that the philosophy of law cannot (like the dogmatics of law) accept the existing legal order without criticism, but should evaluate it from the point of view of rationality and rightness. *Ius est ars boni et aequi*. And when it is detached from its ethical, anthropological and cultural foundations, it becomes nothing more than the letter of the law, susceptible to manipulation and various distortions – the more dangerous the more binding regulations serve as a tool in the hands of political power.

This remark refers to another, more practical, task of the philosophy of law, which is to build the foundations of civic and ethical education. People should not only know their rights, but also be able to protect these rights and live in accordance with them. Katarzyna Stępień understands this very well, which is why for years she has been involved in educational activities, social campaigns and public debates aimed at deepening social awareness and sensitivity to human rights, including children's rights. It can be said that the popularization of science is a kind of extension of her research work, resulting from the conviction that knowledge on matters of such fundamental importance cannot only be the property of scientists, but should reach a wider audience, becoming a tool for shaping a more conscious, sensitive and engaged society.

It seems even that popularizing knowledge better than scientific research reveals Katarzyna Stępień's general disposition as a critical, open, consistent, and at the same time kind person who knows how to listen. So if Leszek Kołakowski is right when he claims that nature rarely combines in one person the strength of character needed by military commanders, with the strength of the intellect [Kołakowski 1988, 118], then prof. Stępień is this peculiar exception. She does not resemble a soldier in her manner, but she is characterized by a truly soldierly stubbornness and consistency, which, merged with her passion for science, ensures the success of her projects. Perhaps all of this put together explains the mystery of her popularity in our *Alma Mater*.

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ASSESSMENT OF THE ELECTORAL COMMITTEE'S SUBJECTIVITY IN TERMS OF LEGAL CAPACITY

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Abstract. It seems a truism to say that in a democratic state under the rule of law, it is the law that should be created in such a way that its addressees have not only the feeling, but the certainty that it is a transparent, clear and logical law. The rules for the creation of legislative authority in Poland are set out primarily in the Constitution and the Electoral Code. Also, those legitimized to exercise legislative power should be elected according to transparent rules, through fair elections, in accordance with the applicable principles of electoral law, including, first and foremost, the principle of free elections and the principle of equal electoral opportunities, as those underlying the establishment of electoral committees in the Polish legal system. Despite a number of tasks imposed on this entity by the legislator, both of a substantive and procedural nature, legal capacity has not been granted to this entity, which also gives rise to a number of legal consequences both in the course of the election campaign and after its completion.

Keywords: legal capacity of election committee; legal subject; legal personality; election committee.

INTRODUCTION

The functioning of an episodic entity such as an electoral committee, to which the legislator has assigned a number of important tasks and competencies, forces one to consider its nature. In the Polish science of law for years there has been a discussion on the issues of subjectivity, capacity and legal personality [Wieczorkiewicz-Kita 2002, 76]. The discussion also includes considerations as to the types and categories of civil law subjects found in the

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Polish legal system. Introduction on the grounds of the Civil Code in 2003[1] the third category of legal entities, namely, organizational units that are not legal persons, to which the legislator grants legal capacity, has not ended this debate, which has lasted for more than half a century. According to Z. Świderski, "under Polish law there are no grounds for equating legal personality with legal capacity," making the concept of *legal personality* broader than that of legal capacity [Sobolewski 2024; Kubiak-Cyrul 2024]. Moreover, A. Kidyba points out that personality, although it is a broader category than subjectivity, is not , "opposite to it" [Kidyba 2006, 152]. At the same time, this author proves, by juxtaposing the characteristics common to legal entities and the categories of entities defined in Article 33[1] of the Civil Code,[2] that the determinant of "participation in trade, including in the sphere of civil law relations," is that these entities have legal capacity, legal capacity, judicial and procedural capacity [Kidyba 2006, 152]. In order to understand the essence of the legal position of the electoral committee, it is necessary to analyze the assessment of the legal subjectivity of the electoral committee in particular in terms of its legal capacity.

1. INTRODUCTORY REMARKS

Legal capacity, as an attribute of legal entities, both natural persons and legal entities, as well as entities referred to in Article 33[1] CC, is an institution of law that is unquestionable in its essence. It is commonly understood as the ability to be a subject of rights and obligations in the sphere of civil law [Grzybowski 1974, 357]. The concept of subjective right has been the subject of much controversy [Radwański 2004, 86; Benio 2014, 156; Pyziak-Szafnicka 2012, 792]. In A. Wolter's terms, a subjective right is "one or more rights functionally related to each other and constituting an element of a given type of legal relationship" [Wolter 1972, 109]. Subjective right is defined by Z. Radwański as "a certain complex legal situation designated for subjects by the norms in force and protecting the legally recognized interests of these subjects" [Radwański 2004, 89; Idem and Olejniczak 2011, 89]. Considerations undertaken by A. Stelmachowski in determining the origin of laws and their subjects [Stelmachowski 1998, 242], seem to be irrelevant, as M. Benio also rightly argues [Benio 2014, 156], especially when taking into account the time limits of the existence of subjects of the right. For the granting of a right by the legislature will not be able to take place when the addressee of the right is not specified.

[1] Act of 14 February 2003 amending the Civil Code and certain other acts, Journal of Laws of 2003, No. 49, item 408, Article 331.

[2] Act of 24 April 1964, the Civil Code, Journal of Laws of 2024, item 1061 [hereinafter: CC].

After a linguistic interpretation of Article 1 CC, it should be stated that the provisions of the Civil Code regulate only civil law relations involving natural or legal persons. The consequence of this is the assumption that legal capacity is granted only to these subjects of law [Radwański 2003, 4]. Thus, here it is necessary to emphasize the lack of coherence between the provisions of Article 1 CC, and the content of Article 33[1] CC. The distinction of a new category of legal subjects became an expression of the legislator's application of the normative legal-technical method in the implementation of the demand formulated for years by the doctrine of law, and concerning the normalization of the category of subjects of civil law and the precise definition of subjects to which legal personality is granted. In the course of the economic development of the country, including in the previous legal-civil regime, in social and economic transactions appear, hitherto unknown to the legislator, and consequently also unnamed, unions or configurations of natural persons who carry out certain tasks and objectives, and who have not been granted legal personality. The qualification of such entities to any of the categories of legal entities, in view of the dichotomous division of such entities that has been established and functioning for years, has often caused significant problems for participants in socio-economic circulation, as well as courts and public administration bodies. Despite the heated discussion in this regard, which lasted for years[3] and resulted in a lack of consistency in the positions taken by the Supreme Court in this regard, the legislature ultimately adopted a solution to the extent of the consensus that could be reached. A third category of legal entities was established, defining them as, "organizational entities that are not legal persons, to which the law grants legal capacity."

The location of a subject of law within a strictly defined chronological framework is a prerequisite for it to realize the possibility of being a subject of rights and obligations under the law.

The legislator indicated, depending on the type of electoral committee, that the beginning of its existence, is the decision of the authorized body on the formation of an electoral committee or by a group of at least 15 citizens with the right of election, and then notification, with the fulfillment of the conditions specified in the Election Code, to the competent electoral body. The election committee shall be dissolved by operation of law in the cases specified in the provisions of Articles 100 and 101 of the Electoral Code,[4] after the expiration of 60 days from the date of acceptance of the election committee's financial report by the competent electoral body or ineffective expiration of the time limit for filing a complaint or appeal referred to in Article

[3] Advocates of the separation of the third category of legal subjects were A. Wolter, S. Sołtysiński, S. Szer, J. Ignatowicz, J. Szwaja, K. Stefaniuk, A. Szajkowski, A. Klein et al. In opposition to this concept stood Z. Radwański, S. Grzybowski and J. Skąpski.

[4] Act of 5 January 2011, the Electoral Code, Journal of Laws of 2025, item 365 [hereinafter: EC].

145(1) and (5) EC, or issuance of a ruling referred to in Article 145(2) or (5) EC, accepting the complaint or appeal against the decision of the competent electoral body to reject the report. An electoral committee that is entitled to a subjective subsidy (for each MP, senator and Member of the European Parliament seat obtained) referred to in Article 150 or Article 151 EC shall be dissolved by operation of law 6 months after the date of receipt of the subsidy. The next cut-off moment for the functioning of an electoral committee that has registered lists of candidates or a candidate is the day on which the court decision on the resolution of a protest against the validity of elections, the validity of elections in an electoral district or the validity of the election of a specific person becomes final. The legislator also allows the dissolution of an election committee before election day in accordance with the provisions on its formation. The dissolution of the committee shall be immediately notified to the electoral body that accepted the notice of formation of the committee, and if the dissolution of the committee occurred after the registration of a list of candidates or a candidate, also to the competent electoral commission. In turn, the electoral committee of voters is dissolved by law if the number of persons who formed the electoral committee is less than the minimum number required for the formation of a given electoral committee of voters, as specified in the Code (Article 101(3) EC). The legitimacy of introducing such a significant differentiation of electoral committees of voters with respect to other types of electoral committees is questionable. The Supreme Court, in its justification for the decision of November 10, 2011[5] stated that, "the dissolution of a committee and the cancellation of its registration can only apply to a committee that exists within the meaning of the Election Code,"[6] not, as the complainant in the case in question argued, at the stage of forming an electoral committee. This order was glossed by A. Rakowska, drawing attention to the many inaccuracies it contains [Rakowska 2012, 99-108]. The glossator rightly raised the necessity of re-interpreting the linguistic interpretation, the result of which is the statement, that the legislator, by using the verb *formed* in the provision of Article 101(3) EC, refers to the legal and factual state on the date of registration of the electoral committee [ibid., 106]. Here she also cites the position of the State Electoral Commission (PKW) expressed, although with regard to the referendum group in the local referendum, but which can be adequately applied to election committees as well. According to it, "it is possible to complete the composition of the initiative group until the submission of the referendum application," while at the same time "withdrawal from the initiative group after the submission of such an application has no legal significance" [ibid.]. It is impossible not to agree with A. Rakowska that the adoption

[5] Ref. no. III SW 102/11, Lex no. 1647050.

[6] Ibid.

of the position expressed by the Supreme Court, rather than the application of a literal interpretation, could lead to behavior of an unlawful nature aimed at disqualifying another participant in the electoral competition, and consisting in solicitation of a statement of intent by a member of the electoral committee of voters to withdraw from the group [ibid., 107]. Adoption of the Supreme Court's proposed understanding of the wording of the provision of Article 101(3) EC would consequently lead to the statement that, according to Article 101(2) EC, once the competent electoral body has accepted the notification on the formation of a coalition electoral committee, changes in the composition of the electoral coalition are impermissible [Rakowska 2012, 107]. In addition, according to A. Rakowska, a unilateral statement by a participant in an electoral coalition to withdraw from the electoral coalition would not give rise to legal consequences and would not violate the principle of equal electoral opportunities vis-à-vis electoral committees of voters [ibid.]. Hence, it should be postulated to consider the legitimacy of applying the basic one of the interpretative principles, i.e. the linguistic interpretation with regard to the content of Article 101(3) EC, and even, in the event of further interpretative problems, with a view to observing the principle of equal electoral opportunities, the introduction by the legislator of the proviso used in para. 2, namely, that "a unilateral statement of a member of an electoral committee on withdrawal from it together with the registration of the electoral committee of voters by the competent authority does not give rise to legal effects."

2. RECORD-KEEPING DUTIES OF THE ELECTION COMMITTEE

One of the obligations imposed by the legislator on the electoral committee, is to have a Tax Identification Number (NIP), as well as an entry in the National Official Register of National Economic Entities REGON, kept by the President of the Central Statistical Office. At the request of the electoral committee, the relevant authorities are required to issue a confirmation of the assignment of the NIP number and a decision on the assignment of the REGON number, no later than the end of the second working day following the day of submission of the application for the number. This obligation is not constitutive, that is, it does not condition the formation of the committee itself, and then the validity of the actions taken by the electoral committee in the course of the electoral process. It should be assumed, following J. Szymanek, that in the current state of the law, the assignment of a NIP and REGON number is an activity that concludes the "procedure of its formation" [Szymanek 2011, 107]. According to the wording of Article 2(1) and (2) of the Act of October 13, 1995 on the principles

of registration and identification of taxpayers and payers[7] natural persons, legal entities and organizational units without legal personality, which are taxpayers under separate laws, are subject to registration obligation. Other entities are also subject to this obligation if they are taxpayers under separate laws, as well as tax payers. Undoubtedly, the fact of conducting any elements of business activity results in the need to fulfill the registration obligation in the state tax system. Mere participation in civil law transactions is not a prerequisite for the fulfillment of this obligation to the same extent by all legal entities, since individuals may also use the PESEL number. The lack of a strictly defined circle of entities to which the status arising from Article 331 CC would be attributed, also often results, as aptly argued by B. Rogalska, in requests to the tax authorities to specify by them, using the exclusion method, specific types of entities that, in the opinion of the authority, meet the conditions outlined by the legislator in the context of the wording of Article 331 CC [Rogalska 2014]. Therefore, it is necessary to agree with the cited author that the categorization of entities according to the rules arising from the civil law does not have a direct impact and meaning on the tax registration system conducted in Poland [ibid.], because regardless of the classification of the legal entity, each of them will be subject to the tax registration obligation. Although the legislator has set a 7-day deadline for entities subject to registration and identification obligations under the provisions of the Law on the Principles of Registration and Identification of Taxpayers and Payers (Article 9(1)) to make an identification notification (update notification), the legislator has not indicated in the provisions of this normative act the sanctions for failure to fulfill this statutory obligation.

Another registration obligation incumbent on election committees is to report to the National Official Register of National Economic Entities (REGON). This register covers legal entities, unincorporated organizational units, natural persons conducting business, and their local units. It is maintained by the President of the Central Statistical Office in a computerized manner, in accordance with the disposition of Article 42(1) of the Act of June 29, 1995 on Public Statistics1 and para. 1 of the Decree of the Council of Ministers of July 27, 1999.[8] An application for entry in the register of entities shall be submitted to the statistical office of the province competent for the entity's headquarters or place of residence, within 14 days from the occurrence of circumstances justifying the entry, and an application for a change in the characteristics covered by the entry and an application for deletion – within 7 days from the occurrence of circumstances justifying

[7] Journal of Laws of 2025, item 237 as amended.

[8] Regulation of the Council of Ministers of 30 November 2015 on the manner and methodology of maintaining and updating the national official register of national economy entities, application forms, questionnaires and certificates, Journal of Laws item 2009 as amended.

the change or deletion. The application shall be accompanied by documents specified by the provisions of other laws, confirming the establishment of the entity or the commencement of its activity, a change in the characteristics covered by the entry or the deletion of the entity (Article 42(6) of the Act on Public Statistics). The REGON register is a continuously updated collection of information on national economy entities maintained in an IT system in the form of a central database, the purpose of which is primarily to ensure a uniform identification and classification policy for these entities.[9] Thus, the legislator has strictly defined not only the timeframe for fulfilling the obligation to report the entity, but also to make changes regarding the entity, including its deletion from the register. Moreover, in Chapter 8 of the Law on Public Statistics, sanctions have been specified by the legislator for refusing to perform the statistical obligation (Article 57) and for submitting statistical data after the specified deadline (Article 58), consisting in imposing a fine on entities that fail to fulfill their obligations in this regard.

The record-keeping duties discussed will, in practice, apply to the electoral committee of voters. Since the function of electoral committees of political parties, coalition electoral committees of political parties, and electoral committees of organizations is performed by their bodies authorized to represent these entities externally, and all of them function in specific registers, or, as in the case of ordinary associations, the circumstance of their formation is reported to the competent supervisory authority [Czaplicki 2014],[10] it is not uncommon from this fact to draw a conclusion about the qualification of the entities forming the electoral committee to a certain category of legal entities and, at the same time, also to be in possession of entries in the records in question. In one of the explanations, the PKW indicated that "the electoral committee of a political party may use the NIP and REGON numbers of the political party that established the committee."[11] It seems that, *per analogiam*, this possibility also applies to social organizations that appear in the applicable registers. Therefore, the potential circle of election committees applying for a NIP and REGON number may actually include only electoral committees of voters. This type of electoral

[9] See http://bip.stat.gov.pl/dzialalnosc-statystyki-publicznej/rejestr-regon/informacje-ogolne/ [accessed: 01.06.2025].

[10] From the fact of the obligation to indicate in the notification on the formation of an electoral committee an organisation, which is possible only in municipal elections, rightly K.W. Czaplicki deduces that such "election committees may be formed by all associations and social organisations entered in the relevant registers."

[11] Explanations of the State Electoral Commission of 5 August 2011, ZKF-503-2/11. These explanations appear to be still valid despite the failure to include this information even in the body of the most recent PKW document issued on 20 July 2015 entitled Explanations concerning the rules for financing election campaigns in the elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland, scheduled for 25 October 2015, ZKF-503-2/15.

committees, from the beginning of their functioning in the electoral process, has been the most frequently chosen formula for joining electoral competition. Thus, it is incumbent on election attorneys to both report and update, and then apply for deletion from the type of records in question. Despite the sanctions specified to some extent by the legislator for failure to comply with obligations of a registration and record-keeping nature, the entities obliged to implement it in the per-election and election process, in most cases do not implement it within the statutory deadline. This state of affairs is influenced, in our opinion, not only by the level of legal awareness of election committee plenipotentiaries, but also by the failure of registration authorities to draw consequences to a degree that is considered severe. The introduction of significant conveniences in the form of the possibility to submit an electronic document bearing a secure electronic signature verified by a valid qualified certificate or a trusted profile on the ePUAP platform should be evaluated positively. The concept of using the already discussed election platform, correlated also with the administrative bodies to which the obligations imposed by the legislator should be fulfilled, still seems worth considering. Direct transmission of the required authenticated data by the electoral committee's plenipotentiaries, the possibility of their modification, and then also the possibility of deleting, de-registering the electoral committee from these records would certainly contribute to increasing the degree of implementation of this statutory obligation. Obligation to keep accounts under the rules set forth in the Law of September 29, 1994 on accounting[12] for non-business entities (Article 128 EC), the obligation to collect funds of the election committee only in one bank account (Article 134(1) EC), as well as the powers arising from normative acts concerning these records,[13] are the starting point for the bank with which the election committee is to conclude a bank account agreement. On the other hand, given the episodic nature of an entity such as an electoral committee, it is worth considering the legitimacy of even such a rigorous registration, especially in the REGON register, of the least numerous in terms of the number of members, of electoral committees of voters in local elections. In our opinion, defining strictly the types of electoral committees, specifying the minimum number of their members,[14] while indicating the maximum amount of receipts of the committee's funds, which would be exempted from reporting to the REGON register, would in no way affect the implementation of tasks under the Law on Public Statistics. Data on these smallest election committees

[12] Journal of Laws of 2023, item 120 as amended.

[13] Article 11(2)(4) of the Act of 13 October 1995 on the rules for recording and identifying taxpayers and payers.

[14] Taking into account the current legislation on the formation of electoral committees – note by authors.

could be provided by the relevant election authorities. In this way, the fiction of full implementation of the obligations related to the deletion of these small election committees from the REGON register would be eliminated.

3. LEGAL CAPACITY AS AN ATTRIBUTE OF A LEGAL ENTITY VS. CHARACTERISTICS OF AN ELECTION COMMITTEE

Possession of legal capacity is an attribute that allows the basic assignment of a given entity to a certain category of legal entities functioning in the Polish legal system. The first of the normative methods is the formulation of a group of characteristics by the legislator, which should be possessed by a legal entity pretending to be a legal person [Radwański 2003, 4]. The normative method of regulation adopted in the Polish science of civil law, the overriding feature of which is the indication and granting of legal personality explicitly by the legislator, leads to the conclusion that neither legal personality nor legal capacity has been granted explicitly to election committees in the provisions of the Electoral Code [Czakowska and Raźny 2011, 80]. The legislator established in Article 84 EC the exclusive right to take all actions in the electoral process to legal entities such as election committees. The nature of electoral activities can be described as organizational, financial and agitation [Czaplicki 2014]. The scope of these tasks is so broad that it allows, at the very least, to assume that an election committee may have the characteristics of an organizational unit from Article 331 CC [Pazdan 2013, 139; Czakowska and Raźny 2011, 81][15]. The intention of the legislator, through the establishment of this category of entities, was certainly to create a kind of alternative for all those legal entities which, for various reasons, do not have the legal capacity directly granted by the legislator, but to whom this capacity has, as it were, been granted through a number of rights and obligations imposed on them by way of normative acts [Pazdan 2013, 145]. This solution is quite justified in the face of evolving socio-economic relations and various configurations of entities appearing in circulation, which become parties to civil law relations. An enumerative enumeration of them, therefore, was and still is not possible today. On the other hand, such a solution encounters in the practice of economic turnover difficulties of interpretation by its participants themselves, electoral bodies, public administration bodies and judicature. An organisational unit always

[15] In civil law doctrine, there are several terms for these entities: 'defective legal person', by A. Wolter, 'incomplete legal person' – T. Sokołowski, 'statutory person' – J. Frąckowiak, 'entities without legal personality' – M. Pazdan, 'statutory entities' – A. Kidyba, 'non-personal legal entities' – A. Szajkowski, Z. Radwański – 'incomplete legal persons'. In the absence of a uniform nomenclature in this area, we will use the term organisational unit from Article 331 CC.

serves as a point of reference for legal regulation, and its indispensable element is "the attribution […] of the effects of the behaviour of certain individuals" [Frąckowiak 2012, 1134]. The necessary conditions for an organisational unit to function are the fact that it has its own organisational structure, conducts specific activities and has at its disposal appropriate financial means (assets) necessary to conduct these activities, the existence of a specific composition and specific representation. From the perspective of an electoral committee, these conditions are predominantly fulfilled. This is because an election committee is always formed by an entity indicated by the legislator. Thus a category of entity appears, namely the founder, who may be a natural or legal person. The activity of election committees is strictly defined by the legislator, and the entity is obliged to conduct financial management respecting the principle of openness. The main task assigned to the committee, which is the exclusive conduct of the election campaign, is predominantly associated with the supervision of a strictly defined, transparent financial management. In this respect, the legal structure of the electoral committee is similar to the legal forms of ordinary associations and civil partnerships. An ordinary (non-registered) association is a simplified form of association without legal personality.[16] Therefore, it should be assumed that all the features attributed to a registered association, i.e. the voluntariness of its association, its permanence, self-governance and the non-profit nature of the work of its members, also belong to an ordinary association. However, the issue of the legal capacity of a non-registered association, with all the specifics and normative context of its functioning, seems to be at least a debatable issue. Z. Radwański classified this type of association in the category of organisational units from Article 33[1] CC, arguing that it has legal capacity [Radwański 2003, 7]. He derived it from the basic features of an organisational unit that an ordinary association would have, such as the organisational structure reflected in the bylaws, which also define the name, purpose, area, means of operation, seat, and representative of the association [ibid.]. The *quasi-assets* of an ordinary association were defined by Z. Radwański as contributions from its members [ibid.]. However, in our opinion this view is too far-reaching. For it remains in contradiction with the normative method of regulating legal personality (also subjectivity), which, by the way, Z. Radwański was an advocate of. One has to agree with J. Frąckowiak that it is not so much difficult [Frąckowiak 2012, 1211],[17] but it is simply impossible in the current legal state to adopt a different conception of the regulation of this issue than the one strictly resulting from

[16] Articles 40-43 of the Act of 7 April 1989 on Associations (Journal of Laws of 2020, item 2261 as amended).

[17] J. Frąckowiak thereby refusing to confer on the ordinary association the attribute of a 'legal entity'.

the wording of Articles 33 and 33[1] CC. Irrespective of the legal category, an election committee is obliged to appoint its own election agent and financial representative. The fact that the legislator has not explicitly granted legal capacity nevertheless makes it possible for the committee to function precisely through its plenipotentiaries. A specific deviation from the permanent omission by the legislator of the provision on the legal capacity of an election committee is the right granted to election committees of organisations and election committees of voters to take out bank loans only for the purposes related to the elections (Article 123(3) EC). This is certainly not a deliberate action of the legislator aimed at aggravating the emerging doubts regarding the subjectivity of the election committee, but a consequence of guaranteeing the implementation of equal electoral opportunities [Czakowska and Raźny 2011, 80-81]. The legislator, taking into account the temporary nature of the electoral committee, as well as the necessity to guarantee the certainty of economic turnover with the participation of these subjects of law, established a certain general principle. It consists in holding the financial proxies responsible for the property obligations of the election committee (Article 130(1) EC). This rule is supplemented by the establishment of the liability of other entities participating in the electoral process in the event that the assets of the financial representative cannot cover the claims against the electoral committee. In such a case, the liability for the property obligations of the electoral committee of a political party or organisation is borne by the political party or organisation that formed the electoral committee. In the case of an electoral committee formed by an ordinary association, the liability is borne jointly and severally by the members of the association. And with regard to the electoral committee – jointly and severally by the persons who are members of the committee (Article 130(3) of the Code of Criminal Procedure). The joint and several liability of the members of the electoral committee is applied only in a case strictly specified by the legislator. The problem of responsibility for the property obligations of the electoral committee was the subject of a lively discussion during the legislative work on the draft Electoral Code. One of the amendments to this draft proposed to establish and sanction the principles of liability in a manner much more far-reaching in its consequences than the one in force today. Property obligations were to have the character of non-transferable, and legal actions aimed at the disposal of such obligations would be null and void.[18] The wording of the property liability provision was also intended to include the proviso that "where a third party has made a monetary contribution which the creditor cannot refuse to accept, the members

[18] The proposal made by the adviser to the head of the Prime Minister's Office, M. Marquez-Vasque, see https://orka.sejm.gov.pl/Biuletyn.nsf/0/AD87D312CF24A9D5C1257642004C8FDC/$file/0267806.pdf [accessed: 04.07.2025], p.4.

of the election committee shall be deemed to be unjustly enriched."[19] The justification for the provision formulated in this way was "to prevent the disposal of financial obligations to third parties, in particular to carry out acts such as assumption of debt or exemption from debt."[20] The structure is then similar to that of a civil partnership, the essence of which consists in the cooperation of partners in order to implement a common economic intention (Article 860 CC). The overriding aim of the election committee is to conduct an election campaign, which, in principle, cannot take place without any financial resources at its disposal. The legislator prescribes that the financial management of the election committee be carried out on the basis of the applicable accounting principles, including in particular the accumulation of financial resources in a separate bank account. The conduct of the election campaign, culminating in electoral success, is the main task and objective of all members of the election committee. Subsidiary liability of its members is a kind of equivalent of joint and several liability of partners in a civil partnership (Article 864 CC). However, a civil partnership is no longer denied not only legal personality, but also legal capacity [Radwański 2003, 7; Idem and Olejniczak 2011, 199; Gniewek 2014, 85]. Thus, a civil partnership does not belong to the category of entities referred to in Article 331 CC. One has to agree with K.W. Czaplicki that the type of liability adopted is of an extremely restrictive nature.[21] Only the scope of responsibility adopted in such a way, in view of the not directly regulated legal status of the election committee, can significantly contribute to increasing the openness and transparency of the financial aspect of the conducted election campaigns.

The issue of the protection of personal rights is an extremely important element related to the participation of all types of entities in the electoral process – from candidates, through members of electoral committees, electoral committees, voters, to electoral bodies. The legislator has not granted the electoral committee the legal capacity to protect its personal rights either. It is argued in the doctrine of law that personal goods belong to every subject of the law, taking into account its specificity [Brzozowski, Kocot, and Skowrońska-Bocian 2010, 125ff; Nazaruk 2014]. It follows from the wording of Article 94 EC that only the name and abbreviation of the name and the graphic symbol of the electoral committee are protected. This protection is granted from the moment the committee is established. As emphasised by K.W. Czaplicki "this protection does not belong to the competence of the electoral bodies, because electoral committees enjoy, on general principles […], the legal protection provided for personal property (Articles

[19] Ibid.

[20] Ibid.

[21] See https://orka.sejm.gov.pl/Biuletyn.nsf/0/EDB75576F1C516E5C12576FF00302BF2/$file/0358606.pdf [accessed: 04.07.2025], p. 10.

23, 24 and 43 CC)" [Czaplicki 2014]. Thus, the legislator has clearly indicated that the protection of the personal rights of the election committee itself has a very limited scope. At the same time, the electoral committee has not been given any powers related to the taking of legal action in this protection by the committee itself. Therefore, it should be concluded that the electoral committee was not granted legal capacity in this case either. Legal capacity, as an attribute of legal existence, is not gradable. However, on the basis of the provisions of the Electoral Code, such a conclusion can be drawn. This is because the legislator grants certain powers and duties, the implementation of which by the electoral committee makes it possible for it to be treated as an entity with quasi-legal capacity. However, this thesis should be firmly rejected, as it is not reflected in the Polish legal system [Żukowski 2004, 105].[22] The lack of legal capacity of an electoral committee, with numerous obligations imposed on it in the course of the electoral process, in practice results in problems in interpreting their legal status, both in the sphere of civil and legal transactions and in court proceedings. The time space within which the electoral committee operates is predominantly limited by the framework of the electoral calendar. The legislator therefore creates a fiction in terms of the electoral committee's real impact, as it generally ceases to exist shortly after the voting takes place. This is also the purpose for which it was established, to conduct the election campaign. However, the effects of the legal relations established in the course of the electoral process, can also occur outside this timeframe.

CONCLUSIONS

The ambiguity of the legal status of the electoral committee raises a number of doubts both in the practice of law (from the point of view of the participants in the electoral process), the judicature and the doctrine. From the concept of normative creation of legal entities adopted in the Polish legal system, as long as it is respected, it follows unequivocally that only those entities which have been directly granted legal personality by the legislator are legal persons. Similarly, with regard to the so-called incapacitated legal persons, whose status depends on the legal capacity granted by the legislator. The catalogue of competences and tasks belonging to the exclusive competence of election committees is quite broad and, in our opinion, allows one to assume that the election committee has, in fact, a quasi-legal capacity that is incomplete. In view of the impossibility of gradation of legal capacity,

[22] A. Żukowski also points to the "limited legal capacity to act" of the electoral committees. The thesis on the limited legal capacity of electoral committees is part of the justification of judgment of the Provincial Administrative Court in Szczecin of 22 September 2010 (ref. no. II SA/Sz 318/10), decision of the District Court in Toruń of 31 October 2013 (ref. no. I Ns 248/13).

it is necessary - in our opinion – to give the electoral committees legal capacity with regard to the electoral activities they perform. The electoral process, and in particular one of its stages, i.e. the electoral campaign, requires from the entities conducting it exclusively, i.e. the election committees, increased activity in the social and economic sphere.

The use of *substitutes* for generally accepted legal solutions sometimes leads to over-interpretation of the binding regulations, to interpretations going beyond what is permissible, which in effect leads to legal confusion, particularly for interested litigants. It seems to be a truism to state that in a democratic state under the rule of law, the law should be created in such a way that its addressees have not only a feeling, but certainty, that it is a transparent, clear and logical law. The principles for the creation of legislative authority in Poland are set out primarily in the Constitution and the Electoral Code. Also those legitimised to exercise legislative authority should be elected according to transparent rules, by way of fairly conducted elections, in compliance with the applicable principles of the electoral law, including, above all, the principle of free elections and the principle of equal electoral opportunities, as those underlying the establishment of electoral committees in the Polish legal system.

In view of the above, it seems necessary to reflect again on the legal capacity granted by the legislator to the electoral committee. It could be a form of peculiar qualification to 'be an independent subject of rights and obligations' [Radwański and Olejniczak 2011, 199] to the extent necessary to undertake, on an equal footing with other subjects of law, legal actions in the course of the electoral process. The duration of the legal capacity would be determined by the will of the election committee to participate in subsequent campaigns related to the next elections. In the situation of pending proceedings involving the election committee (civil, administrative, enforcement), the legal capacity would continue and there would be no possibility to dissolve the election committee.

In other cases, on the other hand, the electoral committee could be dissolved by application at any time after the electoral process by the body that registered it.

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RESPONSIBILITY OF THE HEALTHCARE FACILITY MANAGER WITHIN THE QUALITY SYSTEM IN HEALTHCARE – BETWEEN MANAGEMENT AND LEGAL RISK

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Abstract. This article addresses the issue of the Healthcare Facility Manager's responsibility within the context of implementing quality and patient safety systems, with particular emphasis on the Act of June 16, 2023, on Quality in Healthcare and Patient Safety. The aim of this study is to analyze the scope of the Manager's duties and to assess to what extent the new legal regulations shape their role as the guarantor of quality and safety of healthcare services. The article is interdisciplinary, combining legal, organizational, and ethical approaches. The results may serve as a starting point for further research on the implementation of the Act on Quality in Healthcare and Patient Safety, and on the relationship between the formal responsibility of the Manager and the actual management conditions within the healthcare system.

Keywords: quality in health care; management of a healthcare entity; patient safety; accreditation standards; manager of a healthcare facility.

INTRODUCTION

The quality of medical services is currently a key element in the management of medical facilities in the face of growing legal and social demands. In Poland, this issue gained particular importance after the socio-economic transformation, and the role of the state in shaping the culture of quality is constantly increasing [Jopkiewicz 2013, 131]. The contemporary healthcare system is based on the assumption that patient quality and safety are paramount values, and their guarantor is the Healthcare Facility Manager. The issue of the Healthcare Facility Manager's responsibility constitutes one of the key, yet most ambiguous, areas of modern medical law. The Manager is legally obliged to ensure conditions that enable the safe and lawful provision of healthcare services, while simultaneously acting as the guarantor of quality within the healthcare entity. The new Act of June 16, 2023, on Quality in Healthcare and Patient Safety, strengthened this obligation, assigning the Manager a wide scope of organizational, ethical, and legal responsibility.

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In practice, this means that the Manager is responsible for almost all aspects of the healthcare entity's functioning, from the quality of medical procedures and compliance with patient rights, to the safety of staff and patients. This responsibility encompasses both the formal legal and the axiological dimensions, yet the real possibilities for its execution are often limited by systemic, organizational, and financial conditions. The literature increasingly suggests that this is a model of "responsibility without agency" a situation in which the person managing the facility is accountable for outcomes over which they do not have full control[1] [Bovens 2007, 447-68].

1. THE CONCEPT OF QUALITY IN HEALTHCARE – THEORETICAL AND AXIOLOGICAL CONTEXT

The category of quality in healthcare is multidimensional, evolving from the simple provision of clinical safety to the comprehensive management of processes, systems, and patient experience. Theoretically, this concept integrates legal, managerial, economic, and ethical perspectives. Understanding this interdisciplinary context is crucial for a proper assessment of the Manager's responsibility. In the traditional model of paternalistic medicine, the quality of service resulted from the physician's authority and competence, rather than from standardized procedures. It was only in the second half of the 20th century, with the development of quality management concepts (TQM, ISO, EFQM), that the focus shifted from individual professional liability to organizational and systemic responsibility.

Nevertheless, it should be stated that quality in historical terms has accompanied man since the beginning of civilisation [Dobska and Dobski 2012, 11]. And so since ancient times, there has been a dispute over a universal definition of quality. It also seems that as long as the world is evolving and technological progress is constantly increasing, there will not be a single definition of quality accepted by all [Ćwik 2023, 45-46]. Ancient Babylon became the cradle of the concept of quality, where the first documented records of quality can be found. Already in ancient times, a set of laws, dispositions and sanctions was established in the form of legislation. The Code of Hammurabi (18th century BC), considered to be the oldest in the world, contained a comprehensive code of laws and defined a system of penalties for the improper

[1] An example is the Act of 8 June 2017, on the method of determining the lowest basic salary of certain employees employed in healthcare entities (Journal of Laws of 2022, item 2139), which limits the influence of healthcare entities' Managers on shaping the level of employee salaries. The annual statutory wage increase exceeds the dynamics of the increase in the valuation of services financed by the NFZ (National Health Fund), which, in the absence of reimbursement for over-performance, leads to a systematic increase in hospital debt, and consequently, to the deepening of the public finance sector deficit.

performance of services was based on the laws of the talion. The code is a set of casuistic laws and was also applicable to the industry today called medicine. In the Code of Hammurabi we find references to: "If a physician inflicts a severe wound with a bronze knife and kills the patient, or if he opens a swelling and destroys his eye, the physician's hands must be chopped off" [Garbacz and Guziak 2012, 11; Seyda 1962, 10]. The first quality standards emerged in the Middle Ages, were developed by merchants and craftsmen and set a certain way of behaviour for both guild members and their apprentices [Kowalczuk et al. 2010, 79].

Quality found its way into the circle of interest of science. Qualitology as a science of quality into the canons of the sciences was introduced in the 1970s by Professor R. Kolman. It is still a young scientific discipline and is still in its formative stage [Hamrol and Mantura 2002, 15]. Despite the formation of an interdisciplinary field of knowledge, quality science, defining the concept is not an academic problem, because each company, having recognised the expectations of customers and its own capabilities, must define what quality is for it and formulate it for its own use [Blikle 2014, 36].

When considering 'quality' and its existence, it is important to state that it is a completely abstract and therefore intangible concept. Quality arises when the purpose to be served by the service or good purchased is satisfied. The fulfilment of a health service sets the goal of taking care of health. A. Czubała defines quality as "the degree to which buyers' expectations are met. A service has quality if its realisation meets or exceeds the expectations of purchasers" [Grzebieluch 2013, 68].

In attempting to define quality and medical services, it is necessary to look at the essence of service as such, which is an overarching concept. Analysing the literature in search of a definition of service, it can be concluded that "a service is a set of values, activities and processes and the interactions occurring between an entity that needs them and an entity that is able to provide them in order to satisfy those needs" [Wiśniewska 2016, 19-20]. Referring to the medical service, it is a specific type of service and its element is the health service. Pursuant to the Act of 15th April 2011 on medical activity,[2] a healthcare service is an activity aimed at preserving, saving, restoring or improving health, as well as other medical activities resulting from the treatment process or separate provisions regulating the principles of their performance. The nomenclature adopted in the Act indicates the sequence of consecutive activities necessary to achieve an appropriate therapeutic effect [Walków and Witczak 2012, 209].

It is worth noting that the process of providing a medical service is multifaceted. According to the definition quoted above, it is a process that results

[2] Act of 15 April 2011 on therapeutic activity, Journal of Laws No. 112, item 654.

in the production of an intangible good that satisfies the needs of the patient. A characteristic of health services, like other services, is its intangible nature. A health service is specific in its nature. Its provision is linked to the good that is subjectively felt to be the most important for a person, namely his or her health. Furthermore, a medical service is classified as a professional service characterised by a high level of individualisation, a disparity of knowledge between the patient and the provider [Korczyńska 2012, 68]. The most characteristic feature of a health service is the psychological complexity of the process of its provision, including the stress resulting from crisis situations affecting difficult decision-making. The next characteristic is the interaction at the level of patient and medical staff. The attitudes of both parties play an important role in this interaction. The specificity of the medical service provided is related to the fact that it is a type of professional service [Waszkiewicz and Białecka 2012, 260].

The specificity of medical services was well defined by A. Siciński, who stated that "modern science-based medicine, even if it becomes even more scientific than it is today, if it wants to be effective, should take into account that the object of its interests and treatments are people – 'objects' that are not necessarily rational, guided in their actions not only by scientific principles, but by various beliefs, ideas, ideals, emotions, making the most varied, multifariously conditioned choices. Knowledge of judgements, beliefs, attitudes about human health is and will be a condition for the effectiveness of even the most 'scientific' medicine. The provision of medical services exposes the human being: on the one hand, the doctor (his/her personality, influence on the nature of the relationship with the patient), and on the other hand, the patient with his/her needs and expectations. The unique nature of medical services is also linked to the special role of medical personnel who, in the performance of their duties, determine the health of another human being and influence the quality of the service" [Krot 2008].

Such an approach dissociates itself from the accepted dogma of neoclassical economics of the homo economicus model, in favour of the *homo satisfaciendus* model. The paradigm of the figurative economic man (*homo economicus*) is characterised by an infinite capacity to make rational decisions according to the principle of minimax, i.e. maximising benefits while minimising costs; it refers to a rational decision-maker making optimal choices under fully informed conditions, able to assess risks and acting consistently [Polkowska 2011, 88]. Given the characteristics of the medical service, the above has been replaced by a 'bounded rationality' model. It takes into account incompleteness of information and other suboptimal conditions (time pressure, conflicting stakeholder objectives, etc.). Unlike the neoclassical model, intuition and subjective assessment are as important as calculation and objective analysis. The result of such an analysis is a satisfactory rather

than an optimal outcome. "Satisfactory minimum" in the bounded rationality model is the result of decisions made by people who are in fact satisfied with sufficiently satisfactory solutions without seeking the optimum. Thus, behavioural economics verifies neoclassical assumptions while drawing on the contributions of other scientific disciplines, mainly cognitive and social psychology and, increasingly, neuroscience [Szczech-Pietkiewicz 2020, 28].

"The problem of quality of health services is one of the basic ones for the functioning of health protection" [Kędra and Chudak 2011, 83]. Just like the concept of quality itself, the definition of quality in health care is a multifaceted and multidimensional concept and depends on the perspective of the stakeholders: patient, provider and payer. As in any of the quality management systems, so in medical services a special place has been reserved for the customer – the patient, whose expectations deserve special attention [ibid., 86]. The World Health Organisation's definition of healthcare quality states that it is "the degree to which health services involving individuals and populations increase the likelihood of achieving expectations for treatment outcomes and demonstrate compliance with current and professional knowledge." "Defined by the Joint Commission on Accreditation of Healthcare Organisations, it is the most common emerging definition of healthcare quality, which defines quality as the degree to which any service provided to a patient, delivered in accordance with current knowledge, results in a likelihood of achieving the desired outcome of care and a reduction in the likelihood of adverse outcomes" [Bembnowska and Jośko-Ochojska 2015, 458].

The pioneer of healthcare quality research in the 1960s was A. Donabedian, who is now recognised as the founder of the concept of quality in medicine. When he published Evaluating the Quality of Medical Care in July 1966, he could not have predicted that it would become the most cited paper in public health for the next five decades. What's more, this publication became the foundation of his groundbreaking research on the theory and practice of quality management and the inspiration for the development of health services science. "According to his conception, quality is the kind of care in which the measurable good of the patient is maximised, taking into account the balance of expected benefits and losses accompanying the care process in all its elements" [ibid.].

A. Donabedian has conducted research involving different population groups, focusing on the quality of healthcare. According to his model, improvements in the structure of the care system should translate into better clinical outcomes, which in turn lead to improved patient health. As a result of these analyses, he proposed a concept for assessing quality of care based on three key elements: structure, process and outcome. However, he emphasised that if even one of these aspects fails, there can be no high quality health care services. A. Donabedian also pointed out that efforts to improve these three areas must be closely linked to genuine concern for patients' needs.

Despite the fact that A. Donabedian devoted his life to research in the field of healthcare quality then, at the end of his life, he was often hospitalised and observed a system that, he claimed, "does not work" from the patient's point of view. Optimistic to the end and knowing the social, emotional and ethical aspects of quality improvement, Donabedian stated: "Healthcare is a sacred mission... a moral enterprise and a scientific endeavour, but fundamentally not commercial. We don't sell a product. We don't have a consumer who understands everything and makes rational choices – and I include myself here. Doctors and nurses are stewards of something precious... Ultimately, the secret of quality is love. You have to love your patient, you have to love your profession, you have to love your God. If you have love, you can work backwards to monitor and improve the system" [Donabedian 2001, 137-41]. Thus, the research of A. Donabedian became the premise for the construction of contemporary quality management systems.

Current legislation on quality in health care is not concentrated in a single piece of legislation and is scattered. In addition, frequent amendments to the law make it necessary to keep track of changes in many legal acts. Furthermore, the aspects that we today include in the concept of quality of health care services are found in large comprehensive legal acts. According to Article 68 of the Constitution of the Republic of Poland, every citizen has the right to health care and the right to healthcare services financed from public funds. The Act on Patients' Rights and the Ombudsman guarantees the patient the right to health services corresponding to the requirements of current medical knowledge, to reliable information on the state of health, to respect for intimacy and dignity, in particular during the provision of health services, to respect for private and family life, to pastoral care [Michalak 2011, 170; Wroński, Cywiński, and Bocian 2008, 42].

The topic of quality is not new in the Polish healthcare system, specific solutions have been in place for many years, such as the accreditation system, reporting and monitoring of adverse events, patient satisfaction surveys, and the implementation of medical records [Twarowski 2024]. As early as 2017, a draft law on quality in health care and patient safety appeared on the website of the Government Legislation Centre, with the assumption that it would become effective in 2018. Despite widespread criticism, work on the bill was not discontinued and a new version of the proposed law appeared in the Government Legislation Centre on 22 July 2022. After many years of heated discussion in the public domain on the shape of the legislation to ensure proper quality in the provision of health care services and thus patient safety, the Act of 16 June 2023 on Quality in Health Care and Patient Safety[3] came into force on 8 September 2023, replacing the Act of 6 November 2008 on Accreditation in Health Care.[4]

[3] Journal of Laws of 2023, item 1692.

[4] Journal of Laws of 2016, item 2135.

2. THE QUALITY SYSTEM IN POLISH HEALTHCARE – LEGAL ASPECTS

The introduction of the new Act on Quality in Healthcare and Patient Safety opened a new stage in the perception of quality in healthcare. The evolution of legal regulations concerning quality indicates that the real challenge no longer concerns the mere existence of quality systems, but rather the way they function within the context of the organizational culture of healthcare, which redefines the understanding of the Healthcare Facility Manager's responsibility.

Compared to its predecessor, the new Act is not an entirely innovative solution, but it is a more comprehensive regulation that takes into account not only the accreditation process, which is de facto a voluntary procedure, but also introduces obligatory quality elements for healthcare entities.

As stated in the justification for the draft Act, the purpose of the legislation is to implement legal and organizational solutions that will comprehensively and coordinatedly realize healthcare policy priorities in the area of quality. The subject of regulation covers solutions in the scope of: 1) Authorization (Provisions of Chapter 2); 2) Internal Quality and Safety Management System (Provisions of Chapter 3); 3) Accreditation (Provisions of Chapter 4); 4) Medical Registers.

The Act introduces new solutions in strategic areas of the healthcare system and imposes additional obligations on the management of healthcare entities. In order for a hospital to provide healthcare services financed from public funds, it will be necessary to obtain authorization issued by the President of the National Health Fund. The purpose of the authorization is to confirm that the entity providing medical services financed from public funds meets the conditions for the provision of healthcare services as defined in the regulations issued pursuant to Articles 31d and 31da(1) of the Act of 27 August 2004 on Healthcare Services Financed from Public Funds.[5] This requirement simultaneously constitutes one of the conditions for obtaining authorization, as specified in Article 7 of the Act. The second mandatory condition is the implementation of an internal system, which is defined in Article 18 of the Act.

The Act introduces a mandatory requirement for healthcare entities to establish an internal quality and patient safety management system, irrespective of whether they are financed from public funds. Within this internal system, entities providing medical services are obliged, pursuant to Article 18(3) of the Act, to identify the risks of adverse events and to monitor such events, to determine priority areas for improving the quality and safety of healthcare services, to define criteria and methods for supervising quality and safety, to monitor quality indicators, and to conduct patient satisfaction surveys.

[5] Journal of Laws of 2024, item 146.

A careful analysis of the explanatory memorandum to the Act indicates that healthcare entities will also be required to appoint teams responsible for the assessment and analysis of adverse events and to create the necessary conditions for their effective operation. It is worth emphasizing that the draft Act introduces provisions concerning the protection of medical personnel in connection with the reporting of adverse events. This protection is intended to encourage staff to disclose as many adverse events as possible, without fear of sanctions or retaliatory measures, thereby supporting the development of a culture of safety within patient care.

The implementation of these solutions corresponds to the directions indicated in international research and literature, which emphasize the importance of a systemic approach to a modern organizational culture based on transparency and a culture of learning. The concept of "no-blame culture", promoted by the Institute of Medicine in its report *To Err Is Human*, assumes that employees should not be punished for errors but rather analysed for the systemic causes of events [Kohn, Corrigan, Donaldson, et. al. 2000]. The author of the book *To Err Is Human* argues that the problem is not bad people in healthcare, but good people working in bad systems that need to be improved in terms of safety. Nevertheless, newer concepts, such as "just culture", emphasize the need to balance individual responsibility with systemic analysis of events – even if this means responsibility for predictable and preventable errors [Parker and Davies 2020, 646-60]. In the Polish medical environment, where a culture of formal responsibility often prevails, implementing a transparent and supportive management atmosphere can significantly improve the quality of medical services and patient rights. Empirical studies confirm that in a blame culture, as many as 42% of error reports directly blamed a specific individual, significantly limiting the educational and corrective dimension of the patient safety system [Cooper, Edwards, Williams, et al. 2017, 455-61]. Furthermore, the results of a study conducted in the nursing environment showed that a developed just culture fosters open incident reporting, increases employee trust, and subordinates responsibility to the clear principle of proportionality [Logroño, Al-Lenjawi, Singh, et al. 2023, 348]. Similar conclusions come from other analyses conducted at the medical and management levels – systems equipped with clear rules and leadership support promote incident reporting and foster more effective learning [Pozzobon, Sears, and Zuk 2024, 44-55].

In the context of management, psychological safety also plays a key role, meaning a team's sense of psychological safety, enabling them to report errors without fear of repercussions. A study published in the Journal of Patient Safety demonstrated that collaborative leadership, shared responsibilities, and a feedback system are crucial for building a culture conducive to reporting problems [Słowińska 2015, 54-57]. In turn, analysis of NHS and WHO

data emphasizes that healthcare institutions should strive for transparency and the creative use of errors as a source of systemic learning.[6]

Recent evidence suggests that public health structures not only promote but actually require health institution managers to shift from an administrative to a quality-oriented approach through the active implementation of complaint systems, monitoring, internal training, and transparent audits.[7] In this context, leadership involves implementing policies that enable both the prevention of errors and their constructive explanation.

Referring to the statutory obligation to report adverse events, introduced by the Act on Quality in Healthcare and Patient Safety of 2023, most healthcare institutions remain at an early stage of implementing monitoring systems. This conclusion arises from a 2024 study conducted by the Patient Rights Ombudsman, which examined the functioning of the reporting and monitoring system for adverse events in hospitals. The study revealed significant variation in the level of organizational maturity and a lack of uniform reporting standards. More than 60% of hospitals reported no more than 50 adverse events in 2023, regardless of their size or scope of activity, indicating a substantial underreporting of actual incidents.

In many facilities (approximately 40%), the reporting process still relies on paper-based documentation, while root cause analyses and the implementation of corrective measures remain fragmented. Data collected by the Patient Rights Ombudsman show that information about adverse events is mostly communicated to the management level, but only to a limited extent reaches the broader staff, which restricts the educational and preventive function of the system. The findings emphasize the need to build a safety culture based on analysis and problem-solving rather than blame attribution, as well as the importance of creating a centralized system for collecting adverse event data, enabling standardized analysis and systemic improvement of healthcare quality [Mirska 2025, 14-17].

The Act also defines the procedure for granting accreditation in healthcare as a voluntary external assessment of quality. The provisions of the Act clarify and systematize the accreditation process, particularly with regard to its course, timelines, and the participants involved. Accreditation standards in healthcare play a crucial role in improving the quality and safety of patient care. The evolution of these standards, from the 2016 version to the most recent 2024 edition, reflects the dynamic changes in medicine, technology, and societal expectations. The new standards introduce more detailed requirements, incorporating advanced digital tools, an interdisciplinary approach

[6] See https://www.pslhub.org/learn/culture/tackling-the-blame-culture-nhs-staff-survey-results-2020-r4261/?utm_source=chatgpt.com [accessed: 03.08.2025].

[7] Ibid.

to care, and a stronger emphasis on patient engagement [Kęp. 2024]. The Act introduces mandatory compliance with accreditation standards and provides for the possibility of revoking a granted accreditation if the standards are not met during the accreditation review.

Accreditation standards largely reflect, in a rigorous manner, the regulations in force within the healthcare system, serving as their practical implementation in the organizational and managerial spheres. Quality management in healthcare should be characterized by a patient-centred orientation, a systemic approach, and structured activities encompassing all stages of service delivery, with the active involvement of all staff – led by the management of the healthcare entity.

In the context of original research, including in-depth interviews with the management staff of healthcare entities, Hospital Managers highlighted the difficulties resulting from the growing complexity of the quality system and the scope of imposed duties, while simultaneously indicating that possessing accreditation is, in their perception, obligatory. As they pointed out, "the system demands responsibility from us without real influence," and "it is difficult for me to learn the new quality system and all the accreditation standards." Some respondents noted that "the new standards impose significantly more obligations; I am not always familiar with this subject matter because I am not a physician," or "I am concerned that I do not have the capacity to personally verify such a vast scope covered by the standards." These statements reveal a discrepancy between the formal construction of responsibility and the real capabilities of the management of healthcare entities. Managers, although burdened with legal and organizational responsibility, often do not possess adequate tools or resources to effectively implement the assumptions of the quality system. This tension between normative responsibility and practical agency is becoming one of the key challenges in contemporary healthcare management. The Act in question also provides for the refinement of the rules for creating and financing medical registers as part of the amendment to the Act of 18 April 2011, on the Information System in Healthcare.[8]

In the described system, various entities are assigned specific roles to ensure the effectiveness and supervision of service quality. The Act on Quality in Healthcare and Patient Safety assigns the Minister of Health the role of the key entity responsible for the coordination of the quality system in healthcare. The Center for Monitoring Quality in Healthcare (CMJ) functions in the system as an executive and expert institution, supporting the implementation, evaluation, and development of quality mechanisms in healthcare. In practice, the CMJ serves as the substantive background for the state's quality policy – it collects data, conducts research, and provides

[8] Journal of Laws of 2022, item 1555 as amended.

organizational support, contributing to the development of patient safety culture. The Healthcare Facility Manager plays a crucial role in realizing the provisions of the Quality in Healthcare and Patient Safety Act, being responsible for creating and operating the internal quality management system and ensuring the safety of services provided.

3. RESPONSIBILITY OF THE MANAGER OF A MEDICAL ENTITY

The analysis of the responsibility of the manager of a medical entity should begin by pointing to the most superior legal act that regulates this issue, namely the Act of 15 April 2011 on therapeutic activity.[9] Article 46 of the aforementioned Act indicates that the responsibility for the management of a medical entity that is not an entrepreneur lies with the manager. Article 19 of the Act of 16 June 2023 on Quality and Patient Safety[10] clearly corresponds with the quoted article, indicating that the person responsible for the operation of the internal system is the manager of the entity performing therapeutic activity within the meaning of Article 2 paragrap. 2(1) of the Act of 15 April 2011 on therapeutic activity.

This way of managing quality is also reflected in the Total Quality Management philosophy put forward in the 1950s by E. Deming, and still regarded today as one of the most perfect forms of quality management that involves the whole organisation.

By doing a search of the most well-known certified quality management systems, it is important to recognise, and top management involvement is the key to managing long-term success through customer satisfaction. Thus, the involvement of the head of the treatment entity as the person responsible for running the internal system is most likely to come from the most excellent quality management philosophies.

Turning directly to the role and responsibility of the manager of a healthcare entity under the Quality and Patient Safety Act, the legislator has used the concept of a healthcare entity. This therefore means that certain provisions of the Act, including those sanctioning the duties and responsibilities of managers, apply not only to healthcare entities, but also to professional practices. At the same time, the provisions of the Act do not mention a manager within the framework of Article 2 of Healthcare Quality Act. Thus, it is necessary to refer to the regulations contained in the content of Article 2, but of the Act on therapeutic activity. Based on this regulation, the manager is both the director in a public institution and the management board in a therapeutic entity run in the form of a capital company.

[9] Journal of Laws of 2024, item 799.

[10] Journal of Laws of 2023, item 1692.

With regard to individual and group professional practices, the function of a manager is also performed by partners in partnerships or civil partnerships and by a sole trader [Łokaj 2023].

Analysing the duties of the manager of the healthcare entity, let us start with the most obvious ones and those that stem directly from the provisions of the Act. Thus, as indicated earlier, that the person responsible for running the internal system is the manager of the entity performing therapeutic activity. Within the framework of the above, the legislator has defined the tasks of the responsible person, which include: 1) conducting a root cause analysis of the adverse event; 2) providing the resources and information necessary to adequately monitor the quality and safety of the healthcare services provided; 3) the development of documents setting out the principles, procedures, methods and job descriptions referred to in Article 18(1).

At this point, it is worth participating in managerial competencies and their application within the framework of the discussed topic. A modern manager can perform his/her basic managerial roles and functions effectively and carry out tasks efficiently if he/she has not only the appropriate general and specialised knowledge, experience, the desired set of personality traits, abilities, intelligence, but also basic, specific managerial skills, fixed as habits [Ćwik and Zbroja 2013, 131]. One of the techniques that will find application in the implementation of the tasks set out in the Quality and Patient Safety Act will be the effective delegation of decision-making authority to lower levels of management. "Proper delegation saves time for the most important functions of a manager" [Królczyk and Królczyk 2012, 37]. It is relatively easiest to delegate simple and routine tasks, but respecting knowledge and showing care for staff development, the leader also assigns more difficult tasks. A subordinate to whom tasks and powers have been delegated becomes responsible to the manager for undertaking the relevant task and the manager remains responsible for causing the task to be carried out, delegation leads in fact to double responsibility (according to the principle of *delegatus non potest delegare*) [Dźwigoł-Barosz 2011, 149]. By delegating duties and powers together with resources, the supervisor transfers full direct responsibility to the subordinate, while himself retaining indirect responsibility for deciding to whom and what tasks he has delegated. However, he or she cannot relinquish the duty to supervise his or her own work or to ensure that subordinates perform the tasks assigned to them. Thus, to quote Ch. J. Barnard, who formulated one of the most important principles of decision-making thus: "the beautiful art of deciding consists in […] not deciding what someone else can decide" [Barnard 1938, 194].

Although the Act formally assigns numerous responsibilities to the manager, explicitly stating that the person responsible for maintaining the internal system is the manager of the entity performing medical activities

within the meaning of Article 2(2)(1) of the Act of 15 April 2011 on Medical Activities, hereinafter referred to as the "responsible person," their actual authority and resources may in many cases be insufficient to effectively perform these tasks. The manager often becomes the "point of contact" – responsible for systems, procedures, and oversight, but does not always have influence on clinical or financial decisions. Therefore, one can speak of "systemic responsibility" – formally assigned, but not always enforceable in practice. Therefore, in this context, it should be clearly indicated that the entire process of compliance of the medical facility with the provisions of the Quality and Patient Safety Act is the responsibility of the manager of the medical facility, i.e. the person who represents the entity externally and manages and supervises the entire process. Admittedly, although it is clear that the function of the healthcare entity manager comes down to supervising the functioning of the internal quality and safety management system, the responsibility is already personal.

This view is also expressed by the District Court in Łomża (ref. no. III P 62/24), which states that quality management in healthcare should be characterized by patient focus, a systemic approach, and organized action encompassing all stages of service provision, with the active involvement of all staff, led by the healthcare facility's management. The quality of medical services is interdisciplinary and encompasses both compliance with current knowledge and standards and elements relevant to the patient. The award of accreditation confirms that management ensures the facility operates in accordance with good practice standards.

Having analysed the provisions of the Act, one does not find premises preventing the delegation of powers and tasks to subordinate persons. Therefore, these persons, within the framework of the tasks performed by them, will only be liable towards the medical entity on the basis of responsibility resulting from the proper performance of the tasks entrusted to them. This responsibility is differentiated with respect to employees hired on the basis of an employment contract, where the responsibility is regulated by the Labour Code, and persons performing tasks on the basis of civil law contracts, the responsibility will be regulated on the basis of the Civil Code. Thus, if the non-compliance caused a specific damage to the healthcare entity, resulting in liability for damages, e.g. a claim by a patient or the imposition of a penalty by controlling entities, the healthcare entity has the possibility of a recourse claim also against a specific employee, who, for example, by using certain equipment in the course of providing services, was the direct cause of the given damage [Łokaj 2014].

The above considerations referred explicitly to the premise verbalised in the Quality and Patient Safety Act for the liability of the manager of a health care entity. However, an analysis of the content of the Act indicates other

obligations on the part of the manager that may result in professional liability. The first premise is found in Article 4 of the Quality and Patient Safety Act. This provision refers to quality indicators. While the indicators themselves are not concretised in the Act, it is specified that they will be measured in three areas: clinical, consumer and management. Article 15 of this provision provides statutory authority for the President of the National Health Fund to monitor indicators, publish them on the Fund's website, and bill healthcare services based on the achievement of quality indicators. These provisions establish the manager's responsibility as a manager who influences the values of the indicators achieved by the facility and, consequently, the amount of the "financial bonus" resulting from the correction indicators established by the President of the Fund. Another obligation relating on the head of a healthcare entity under Article 7 of the Quality and Patient Safety Act is to obtain authorisation. Authorisation is a novelty introduced by the Quality Act. It is a prerequisite for hospitals to carry out treatment activities within the profiles of the basic hospital care system. Therefore, a hospital which wants to enter the so-called hospital network and have a guarantee of concluding an agreement with the NFZ, without a competition procedure, must obtain such authorisation. It is therefore an obligatory element of entry into this system [Rożdżeński 2024]. Therefore, the provision in question imposes an obligation to have authorization and for the manager an obligation resulting from constant supervision over the process of obtaining authorization.

This model of managerial responsibility reveals a significant legal and organizational problem. The dilemma of individual and collective responsibility in quality management is a key issue in contemporary medical law and healthcare management science. In the practical operation of healthcare facilities, responsibility for the quality and safety of services is multi-leveled – extending from systemic decisions made by public institutions, through the organizational responsibility of the individual, to the individual actions of medical personnel. The manager of a healthcare facility occupies a special place in this system – formally a guarantor of quality, but in reality, they operate under the shared responsibility of the entire team and with limited influence on all processes occurring within the organization. This situation creates a dilemma between the scope of their personal legal responsibility and the dispersed, collective nature of actions affecting the quality of healthcare services. As a result, the line between individual and collective responsibility becomes blurred, leading to ambiguity in assessing culpability and perpetration in cases of quality standard violations or adverse events. The analysis of this phenomenon is of significant importance for the interpretation of the statutory duties of managers, as well as for the development of an organizational culture based on shared responsibility and learning from mistakes, rather than on sanctioning individuals.

CONCLUSION

The Quality and Patient Safety Act is another piece of legislation that imposes obligations on the manager of a healthcare provider. While it does not in itself indicate a sanction for not fulfilling this duty, its content has consequences that are a sanction set out in other legislation or professional consequences incurred. The manager of a healthcare entity has an important role in the management of a healthcare facility. In the health care system, the organisation of the hospital is crucial for the quality of health services and patient safety. The responsibility for organisation lies with the manager of the healthcare entity, who bears the consequences of organisational errors. Far-reaching conclusions indicate that these errors, resulting from mismanagement, lack of supervision or faulty organisation of processes, can lead to serious health, legal and financial consequences. The legal bases for the liability of the manager of the treatment entity are:

1. Civil liability: relating to liability for damage caused to patients or third parties, often as a result of organizational negligence (Articles 415 and 430 of the Civil Code). Under civil law, the liability of the manager of a healthcare facility derives from two basic regimes: contractual liability and tort liability. Both of these legal mechanisms apply to damage caused to a patient, and may arise from both actions and omissions on the part of medical or organizational staff, for which the healthcare facility as a whole is responsible. As indicated by the Court of Appeal in Kraków in its judgment of February 22, 2022 (ref. no. I ACa 1134/21), failure by hospital managers to provide a patient with safe conditions constitutes a breach of due diligence, and due to the relationship of authority and subordination, pursuant to Article 430 of the Civil Code in conjunction with Article 415 of the Civil Code, justifies attributing liability to the healthcare facility. Liability understood in this way is institutional in nature. In employment relationships, liability for damage caused to patients by staff generally rests with the healthcare facility, as the employer (Article 430 of the Civil Code in conjunction with Article 120 of the Labor Code). However, in a structure based on civil law contracts, Article 429 of the Civil Code applies, imposing on the manager the obligation to exercise due diligence in the selection and supervision of contractors. In this approach, the manager's liability is not subsidiary in nature, but stems from their own organizational obligation. In cases where the manager's decisions are culpable, in particular intentional or grossly negligent, the general principle of Article 415 of the Civil Code applies, allowing for the assignment of personal liability. This construction leads to the conclusion that the manager of a healthcare facility is not only a participant in the quality system, but its guarantor in the legal and ethical sense.

However, the Draft Act Amending the Act on Patients' Rights and the Patient Ombudsman and the Act on the Emergency Notification System (RCL UD207), Article 69b provides for the possibility of imposing a fine of up to 20 times the average salary directly on a natural person holding a managerial position (e.g., a hospital director) from their personal assets if that person, in the exercise of their function, has, through their action or omission, permitted a violation of the prohibition specified in Article 59(2) or a failure to take actions necessary to discontinue a practice infringing the collective rights of patients. The justification indicates that the new authority of the Patient Ombudsman is analogous to that held by the President of the Office of Competition and Consumer Protection. Commentary on the provision of Article 106(1) of the Act of 16 February 2007 on Competition and Consumer Protection, which is analogous to the proposed Article 69b of the Act on Patients' Rights and the Patient Ombudsman: "The purpose of the regulation in question is to ensure the greatest possible effectiveness of the Act's provisions. It can be assumed that the risk of penalizing an entrepreneur will only in some cases be sufficient to discipline individuals and persuade them to behave as desired by the legislator. Personal liability may be a much more effective means of pressure in this context, persuading those responsible for managing the entrepreneur to act in accordance with the law." In practice, the civil liability of a manager can take various forms, and as a rule, the healthcare facility is liable for damages caused by its personnel, from claims for damages and compensation by patients or employees, to recourse claims by the entity against the manager in the event of proven fault in supervision or organization.

2. Criminal liability: arising from the provisions of the Penal Code, including Articles 160, 231, and 296, concerning, among other things, endangering the life and health of patients, abuse of authority or acting to the detriment of the institution, crimes against property, official misconduct, and crimes against documentation. In the context of criminal liability, organizational errors pose a growing risk for management. An interesting example of an organizational error is liability for leaving a foreign body in the surgical site. In the case of suturing a foreign body in a patient's body, organizational errors may also occur, such as failure to assign tasks to staff members regarding material counting or improper communication between staff members. It is worth noting the judgment of the District Court in Zgorzelec of March 13, 2013 (ref. no. II K 63/10), in which the court noted that "an organizational error is not a case of medical malpractice, although it may involve a technical, therapeutic, or diagnostic error." One can also cite the judgment of the District Court in Słupsk of 5 December 2017 (ref. no. XIV K 54/15), where the Director

was accused of failing to fulfil his duties as director of the Provincial Hospital in S., being responsible for the organisation of optimal conditions for performing medical duties, thus exposing the patient to a direct risk of loss of life or serious damage to health (Article 160(2) of the Penal Code).

3. Professional liability: This is handled by professional self-governing bodies, such as Medical Courts. It concerns violations of ethical and professional deontological principles. This type of liability directly impacts the professional status of a physician, as well as that of those in management positions, provided they are licensed to practice medicine.
4. Ethical responsibility: Healthcare managers have a moral obligation to ensure the well-being of patients. Neglect or disregard for ethical standards leads to a loss of public trust and negative consequences for the institution's image.

A detailed analysis of the above issues is a separate subject of analysis.

An analysis of the issue also reveals an increasing need to implement *compliance* standards. Although compliance in medicine is not a new concept, it was used in a completely different field of definition. It was still known in medicine in the last century and denoted the degree of conformity of a patient's behaviour to medical recommendations. Good *compliance* in medicine corresponded to the patient's consistent adherence to medical recommendations [Borowa and Mnich 2012, 2]. The concept gradually began to be adopted in economic sciences in the 1990s during the detection of economic crimes. And the financial crisis at the beginning of the 21st century, initiated by the symbolic collapse of Lehman Brothers, led to the expansion of *compliance* to other companies and industries.

In professional business language, compliance is understood to mean compliance with applicable laws, instructions and internal company procedures. However, there is no explicit requirement in the Polish legal system for an organisation to have *compliance* structures [Chmielewski and Ciesiołkiewicz 2017, 5]. The ever-increasing number of legal norms and non-legal regulations increases the risk of non-compliance. Compliance covers every sphere of an individual's functioning in public life. Intense lawmaking activity and new regulations of national and international organisations mean that an entity, wishing to participate effectively in business, is forced to implement new solutions and at the same time minimise their risk. *Compliance*, as an interdisciplinary field, is currently undergoing intensive development. Compliance management is no longer the domain of private entities alone. Changing legislation, as well as planned regulations, codes of ethics and procedures, make the issue of compliance important for organisations in the public sector, for which legislation makes it mandatory to implement certain compliance solutions. However, the broader public sector has important

specificities that must be taken into account when implementing *compliance* solutions. In public authorities, compliance encompasses not only generally applicable law and internal law, but also organisational culture and professional ethos [Wiatrak 2021, 130-31].

Considering the analysis, it should be recognized that the current model of responsibility for healthcare facility managers, reinforced by the Quality Act of 2023, creates a tension between formal responsibility and actual agency. Although the manager is legally responsible for quality and safety, he or she often operates under limited systemic and financial influence, leading to a model of "responsibility without agency." The expansion of formal requirements, such as an internal quality management system, authorization, and accreditation, is not always balanced by structural support and resources. This results in implementation gaps (e.g., underestimation of adverse events), ambiguity in assessing blame, and a blurring of the line between individual and collective responsibility.

Recommendations (*de lege ferenda*): Public authorities must support the development of a safety culture based on root cause analysis and the search for solutions, rather than on assigning blame, by promoting just culture and psychological safety to increase the transparency of error reporting. The Act itself has not changed employee awareness.

Consideration should be given to introducing personal liability for employees of healthcare entities entrusted with tasks within the internal quality system (based on delegation of authority), similar to official liability (for damage caused by unlawful acts or omissions while performing tasks). Such a solution would foster greater shared responsibility and more effective enforcement of quality standards, balancing managerial responsibility.

Systemic strengthening of management tools by providing managers with adequate resources and tools (e.g., digitalization, training) necessary for effective quality management and oversight of a wide range of procedures, in order to reduce the "responsibility without agency" model.

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EXTRAORDINARY APPEAL AS AN EFFECTIVE INSTRUMENT FOR THE PROTECTION OF CONSTITUTIONAL RIGHTS AND FREEDOMS

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Abstract. An extraordinary appeal is one of the extraordinary remedies, historically the "youngest" in the current system of domestic legal remedies available against decisions made in court proceedings. The main argument accompanying the introduction of this institution into the Polish legal system was the belief that court judgments should be fair, issued on the basis of correctly reconstructed legal norms, and correspond to correctly collected and assessed evidence. Its primary function was to correct final court judgments. The idea was that it would become a remedy allowing for the effective protection of the rights and freedoms guaranteed in the Polish Constitution. The adopted structure of the constitutional complaint does not allow for verification of the correctness of the court ruling itself, which may have been issued on the basis of a provision consistent with the Constitution, but at the same time interpreted in a manner inconsistent with the principles or freedoms and rights of human beings and citizens set out in the Constitution. In this respect, an extraordinary appeal is a special form of pro-constitutional interpretation of the law and also allows for verification of the correctness of its application by common and military courts. A detailed analysis of this institution carried out in this study also indicates that it has many shortcomings. However, the legitimacy of introducing extraordinary appeals into the catalogue of domestic extraordinary remedies is undoubtedly confirmed with each new ruling of the Supreme Court.

Keywords: appeal; extraordinary appeal; protection of constitutional rights and freedoms.

1. PRELIMINARY REMARKS

The extraordinary appeal, introduced into the national legal system by the Act of 8 December 2017 on the Supreme Court,[1] is still classified as a new extraordinary appeal in the system of national legal remedies available against decisions made in court proceedings. In the literature, it has been classified as a kind of second-order extraordinary control measure, thus emphasising its extraordinary nature [Kotowski 2018, 51-52]. The explanatory

[1] Journal of Laws of 2021, item 1904 as amended [hereinafter: the Supreme Court Act].

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memorandum to the 2018 draft law on the Supreme Court clearly states that the purpose of extraordinary appeals is to correct final court rulings. The main motive behind the introduction of the institution of extraordinary appeal was the belief that court judgments should be fair, issued on the basis of correctly reconstructed legal norms, and correspond to correctly collected and assessed evidence. *A contrario*, it was considered that judgments that did not meet these standards, and were therefore inconsistent with the basic criteria of justice, required correction, even if they were already final.[2]

The place of extraordinary appeals in the system of legal remedies is primarily determined by their public law function. Already in the justification of the judgment of the full bench of the Constitutional Tribunal of 19 February 2003, P 11/02,[3] it was clearly emphasised that the Polish legal system lacks an extraordinary appeal measure that would allow for the effective protection of the rights and freedoms guaranteed in the Polish Constitution.[4] The role of such a special instrument is not fulfilled by a constitutional complaint, which in the Polish legal system has been narrowly defined and is intended solely to remove from the legal system a provision that violates rights and freedoms, rather than – to correct defects resulting from the incorrect application of the law, even in situations where such defects are evident and have been noticed by the broadly understood judicial authorities (see also the justification for the decision of the full bench of the Constitutional Tribunal of 12 March 2003, S 1/03[5] and the decisions of the Constitutional Tribunal of 16 June 2014, Ts 33/14,[6] of 2 February 2012, SK 14/09,[7] of 18 October 2022, SK 72/21,[8] and of 8 November 2022, SK 7/22[9]).

The explanatory memorandum to the draft law states that, in this respect, the institution of extraordinary appeal not only does not conflict with constitutional appeal (Article 79(1) of the Polish Constitution), but also fills the gap left by it. The constitutional complaint was constructed in such a way that any ruling by the Constitutional Tribunal would boil down to a hierarchical review of norms, taking place in isolation from a specific case, even though that case was the basis for the complaint [Czeszejko-Sochacki 2003, 82]. The adopted structure of the constitutional complaint does not allow for verification of the correctness of the court ruling itself, which may have been issued on the basis of a provision consistent with the Constitution, but at the same time

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[2] Sejm print no. 2003, Sejm of the 8th term, Draft Act on the Supreme Court, Justification, p. 4.
[3] OTK-A 2003, No. 2, item 12.
[4] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended [hereinafter: Polish Constitution].
[5] OTK-A 2003, No. 3, item 24.
[6] OTK-B 2014, No. 5, item 478.
[7] OTK-A 2012, No. 2, item 17.
[8] OTK-A 2022, item 67.
[9] OTK-A 2022, item 68.

interpreted in a manner inconsistent with the principles or freedoms and rights of human beings and citizens set out in the Constitution. In this respect, an extraordinary appeal is to be a special form of applying a pro-constitutional interpretation of the law, as well as verifying the correctness of its application by common and military courts [Michalak 2019, 90]. Pro-constitutional interpretation consists in shaping a legal norm in such a way that it reflects the constitutional context, including in particular the principles and rights and freedoms of human beings and citizens, while remaining within the limits set by the wording of the legal provision [Szczucki 2015, *passim*].

As a result of observations made in the course of legal practice, it was decided that it was necessary to introduce a legal measure allowing for the review of judgments from the point of view of their compliance with the Polish Constitution. In the explanatory memorandum to the draft law on the Supreme Court, introducing the institution of extraordinary appeal, it was emphasised that "in legal transactions, there are final judgments that fall far short of the expected standards, i.e. the fairness of court judgments, their basis on correctly interpreted legal provisions, and their reflection of the collected and correctly assessed evidence," but the primary power to consider a new means of reviewing court judgments consists in "the extraordinary review of final court rulings on the grounds that they are grossly unjust or lead to the violation of human and civil rights and freedoms enshrined in the Polish Constitution."[10]

Pursuant to Article 89(1) of the Supreme Court Act, if necessary to ensure compliance with the principle of a democratic state ruled by law that implements the principles of social justice, an extraordinary appeal may be lodged against a final ruling of a common court or military court concluding proceedings in a case, provided that: the ruling violates the principles or freedoms and rights of human beings and citizens set out in the Polish Constitution, or the ruling grossly violates the law through its incorrect interpretation or improper application, or there is an obvious contradiction between the court's findings and the evidence gathered in the case – and the ruling cannot be overturned or amended by other extraordinary means of appeal.

The legislator has adopted solutions aimed at giving the extraordinary appeal an exceptional character, applied subsidiarily, especially when it is still possible to correct errors resulting from a court ruling without causing new unjust consequences of a flawed judgement. Undoubtedly, the legislator has given priority to the principle of justice, understood as issuing a ruling that is free from defects, consistent with substantive and procedural law, and based on correctly collected and verified evidence. The structure of the extraordinary appeal reveals mechanisms aimed at ensuring the stability of final court rulings to the extent that this is compatible with the main objective of the measure being introduced [Szczucki 2021, 478].

[10] Sejm print no. 2003, Sejm of the 8th term, Draft Act on the Supreme Court, Justification, p. 5.

The purpose of this instrument is to ensure that judgments which should not be handed down in a democratic state governed by the rule of law and implementing the principles of social justice, i.e. judgments which grossly violate the law or are based on findings of fact that are clearly contrary to the evidence, can be removed from legal circulation. In this way, the extraordinary appeal implements the constitutional principle of the reliability of public institutions (expressed in the preamble to the Polish Constitution), the principle of a just state (Article 2 of the Polish Constitution) and the principle of legality (Article 7 of the Polish Constitution). At the same time, however, an extraordinary appeal constitutes a departure from the constitutional principle of the stability of legal relations established by final court rulings (Articles 2 and 45 of the Polish Constitution). The structural assumption of an extraordinary appeal is therefore to define its premises in such a way that it serves to eliminate court rulings with particularly serious defects from circulation, as well as its relatively subsidiary nature. For this reason, the legislator made the admissibility of an extraordinary appeal dependent on the unavailability of other means of appeal (Article 89(1) *in fine* of the Act on the Supreme Court), and also narrowly defined its subjective and objective scope, granting the right to lodge it only to selected public authorities (Article 89(2) of the Act on the Supreme Court) and limiting its application to the most serious cases of violation of the law (Article 89(1) points 1-3 of the Supreme Court Act).

An extraordinary appeal is an instrument with a narrowly defined subjective scope. It may only be lodged by entities with special standing: the Ombudsman, the Prosecutor General, and (within the scope of their competence) the President of the General Prosecutor's Office of the Republic of Poland, the Ombudsman for Children's Rights, the Patient Ombudsman, the Chairman of the Financial Supervision Authority, the Financial Ombudsman, the Ombudsman for Small and Medium-sized Enterprises, and the President of the Office of Competition and Consumer Protection (Article 89(2) of the Supreme Court Act). With regard to judgments that became final before the entry into force of the Supreme Court Act (i.e. before 3 April 2018), only the Ombudsman and the Prosecutor General are entitled to lodge an extraordinary appeal (Article 115(1a) of the Supreme Court Act).

2. THE SCOPE OF EXTRAORDINARY APPEALS HAS ALSO BEEN NARROWLY DEFINED

According to Article 89(1) of the Supreme Court Act, an extraordinary appeal may be lodged only if it is necessary to ensure compliance with the principle of a democratic state ruled by law that implements the principles of social justice (general basis) and provided that it is demonstrated that

there has been: a violation of the principles or freedoms and rights of human beings and citizens specified in the Polish Constitution; a gross violation of the law through its incorrect interpretation or improper application; an obvious contradiction between the relevant findings of the court and the content of the evidence gathered in the case (specific grounds).

First and foremost, however, in accordance with the wording of Article 89(1) *in principio* of the Supreme Court Act, an extraordinary appeal may only be lodged "if it is necessary to ensure that the final judgments of common and military courts comply with the principle of a democratic state ruled by law, which implements the principles of social justice."

Each extraordinary appeal must therefore be based on a general ground and at least one of the three specific grounds listed in Article 89(1) of the Supreme Court Act.

In light of Article 398^4(1)(2) of the Code of Civil Procedure in conjunction with Article 95(1) of the Supreme Court Act, an extraordinary appeal should contain not only a statement of its grounds, but also their justification.[11] The complaint should therefore contain a statement of the grounds and a separate argument – justification of the grounds for the complaint. Merely referring to a general ground and one of the three specific grounds, without a specific explanation of why they require the reversal of the judgment in the case, does not constitute a justification for the complaint, but at most a statement of the grounds. The complainant should explain in a factual and comprehensive manner what the violation of the law consists of. Otherwise, it is not possible to assess the merits of the extraordinary complaint at all, and the letter itself remains only a substitute for an appeal. The lack of an exhaustive and coherent justification of the grounds on which the complainant bases the complaint constitutes a defect disqualifying the pleading and must lead to the rejection of the complaint without calling on the complainant to remedy the deficiencies.[12]

The general basis for lodging an extraordinary appeal, as formulated in Article 89(1) *in principio* of the Supreme Court Act, clearly refers to the

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[11] Supreme Court decision of 30 June 2020, ref. no. I NSNp 3/19; judgment of the Supreme Court of 25 June 2020, ref. no. I NSNc 21/20; judgment of the Supreme Court of 3 June 2019, ref. no. I NSNc 7/19.

[12] Similarly: resolution of the seven-judge panel of the Supreme Court of 30 April 1938, ref. no. C III 319/37, and judgments of the Supreme Court: of 8 February 1935, ref. no. III C 778/34; of 9 March 1936, ref. no. C III 915/35; of 21 October 1938, ref. no. C II 325/38; of 25 April 2013, ref. no. I UK 572/12; of 16 July 2014, ref. no. II PK 266/13; of 24 June 2015, ref. no. I PK 227/14; of 3 June 2019, ref. no. I NSNc 7/19; Supreme Court rulings of: 6 November 1996, ref. no. II UKN 12/96; 20 November 1996, ref. no. I PKN 22/96; 11 March 1997, ref. no. III CKN 13/97; 13 June 2008, ref. no. III CSK 104/08; 28 April 2010, ref. no. II PK 326/09; 27 January 2012, ref. no. V CSK 174/11; 30 June 2020, ref. no. I NSNp 3/19.

principle of a democratic state ruled by law, implementing the principles of social justice, as expressed in Article 2 of the Polish Constitution. As clearly emphasised in case law, Article 89(1) *in principio* of the Supreme Court Act must be interpreted in accordance with the Polish Constitution, taking into account the rich body of legal scholarship and case law, which has derived numerous detailed derivative principles from Article 2 of the Polish Constitution, such as: the principle of procedural justice, the principle of protecting citizens' trust in the state, the principle of protecting legitimately acquired rights, the principle of protecting interests in progress, the principle of non-retroactivity of the law, the principle *of ne bis in idem*, and the prohibition of excessive interference [Banaszak 2017, 181; Sokolewicz and Zubik 2016, 127-30]. In the justification of the general basis for an extraordinary appeal, it is necessary to explain specifically how the contested decision is inconsistent with the principle of a democratic state ruled by law that implements the principles of social justice, in particular by: indicating the violated derivative principle derived from Article 2 of the Polish Constitution and the manner of its violation. When constructing the general basis for the complaint, the complainant is not limited to the catalogue of derivative principles formulated in case law, so he may also refer to another derivative principle, provided, however, that he presents in detail the line of reasoning by which he derived such a principle from Article 2 of the Polish Constitution.

The procedural structure of an extraordinary appeal in terms of the grounds for this remedy is, on the one hand, closely related to the structure of the grounds for other remedies adopted by the legislator, both ordinary remedies (appeal, complaint) and extraordinary remedies (cassation, cassation appeal). This undoubtedly makes it easier for entities filing extraordinary appeals to formulate allegations that correspond in form to the allegations based on the grounds for appeals that have been well known to all court procedures for years. The normative similarities between the grounds for extraordinary complaints indicated in points 2 and 3 (but also in point 1 of Article 89(1) of the Supreme Court Act and the grounds for cassation specified in the Code of Civil Procedure (the provision of Article 89(1) point 2 of the Supreme Court Act corresponds in a significant extent to Article 398^3 point 1 of the Code of Civil Procedure, Article 523(1), first sentence, of the Code of Criminal Procedure and Article 438 points 1-2 of the Code of Criminal Procedure; the parallel between Article 89(1) point 3 of the Supreme Court Act and Article 438 point 3 of the Code of Criminal Procedure is very clear).

The Supreme Court Act requires the entity filing an extraordinary appeal to indicate in it the occurrence of one of the legal violations referred to in points 1-3 of Article 89(1) of the Supreme Court Act.

While all the grounds for an extraordinary appeal listed in points 1-3 of Article 89(1) of the Supreme Court Act – due to their far-reaching convergence with the grounds for cassation or appeal can be treated as violations constituting grounds for the entity entitled to lodge an extraordinary appeal to raise objections to the ruling, the issue of the correct interpretation of Article 89(1) *in principio* of the Supreme Court Act is not so clear. As indicated in the case law of the Supreme Court, pointing to one of the irregularities specified in Article 89(1) points 1-3 of the Supreme Court Act is a necessary but insufficient condition for the admissibility of an extraordinary appeal and, in the further procedural perspective, its effectiveness. The complaint must refer to the condition referred to in Article 89(1) *in principio* of the Supreme Court Act.[13]

The legislator has determined that an extraordinary appeal may only be lodged "if it is necessary to ensure compliance with the principle of a democratic state ruled by law that implements the principles of social justice."

Referring to the relationship between the conservatively constructed grounds for this appeal listed in points 1-3 of Article 89(1) of the Supreme Court Act and the initial part of this provision, which makes the admissibility (and, in the longer term, its possible validity) of an extraordinary appeal dependent on it is "necessary to ensure compliance with the principle of a democratic state governed by the rule of law, which implements the principles of social justice," the Supreme Court indicated that "Article 89(1) *in principio* of the Supreme Court Act defines – in a somewhat unusual form, unknown to procedural laws – the basis for appeal. The systemic placement of the fragment of the provision referring to ensuring compliance with the principle of a democratic state ruled by law that implements the principles of social justice (immediately before and on a par with the abstractly characterised violations referred to in the provisions of Article 89(1) points 1-3 of the Supreme Court Act) clearly indicates that the legislator's intention was to formulate in this fragment of the editorial unit of the Supreme Court Act the basis for an extraordinary appeal equivalent to those referred to in points 1-3 of the provision."[14]

As clearly emphasised in case law and literature, attention should be paid to the use of the phrase "if" in the structure of the provision, connecting the first part of the sentence, which forms the original premise, with the second part of the sentence, in which the specific grounds for lodging an extraordinary appeal are listed in three points. The phrase *o ile* used by the legislator clearly indicates that it is necessary for the original premise and at least one of the "specific" grounds for an extraordinary appeal listed in Article

[13] See the decision of 3 April 2019, ref. no. I NSNk 1/19.

[14] Ibid.

89(1) points 1-3 of the Supreme Court Act to exist simultaneously. If the legislator's intention was to assume that the three grounds listed in Article 89(1) points 1-3 of the Supreme Court Act are only examples of the original condition (i.e. lodging an extraordinary appeal if it is necessary to ensure compliance with the principle of a democratic state ruled by law that implements the principles of social justice), it would have used the term "by" (or through)" instead of the conjunction "if". In the case of an extraordinary appeal, both its admissibility (as well as, in the further procedural perspective, its effectiveness) depends on the (combined) fulfilment of the following conditions: (1) the complainant demonstrates that the original condition of "necessity" to ensure compliance with the principle of a democratic state governed by the rule of law that implements the principles of social justice has materialised, and (2) the complainant demonstrates that any of the specific conditions listed in Article 89(1) points 1-3 of the Supreme Court Act have been met. This approach constitutes a completely new procedural development from the point of view of the normative schemes for the construction of grounds for appeal adopted by the legislator to date and the legislative technique used by the legislator.

If the reference to the need to ensure compliance with the principle of a democratic state governed by the rule of law, which implements the principles of social justice, is not to be merely declarative in nature, and this condition is not to be a purely symbolic element of an extraordinary appeal, which in reality has no greater procedural significance, then this requirement must be satisfied by the author of the extraordinary appeal being obliged to indicate the state of violation of the principle of a democratic state governed by the rule of law, which implements the principles of social justice, caused by the contested decision. In other words, the author of the extraordinary appeal should indicate (and demonstrate) a violation of a specific principle of a democratic state governed by the rule of law, which implements the principles of social justice, and specify this violation in a reasoned allegation in the extraordinary appeal.[15] Therefore, the basic condition for the admissibility of an extraordinary appeal specified in Article 89(1) *in principio* of the Supreme Court Act, taking into account the nature of the extraordinary appeal, which is, after all, directed against a specific, final judgment of a common court or military court – should be understood as a requirement for the entity filing the extraordinary appeal to indicate a violation in the form of the contested ruling being inconsistent with the principle of a democratic state ruled by law that implements the principles of social justice (violation by the contested ruling of the principle of a democratic state ruled by law that implements the principles of social justice),

[15] Ibid.

supplemented by an indication of the materialisation of one (or more) of the violations specified in Article 89(1) points 1-3 of the Supreme Court Act.

The author of an extraordinary appeal cannot limit himself to a mechanical citation of terms referring to the grounds for an extraordinary appeal specified in the Act: he is obliged to cite and justify the grounds for lodging an extraordinary appeal (Article 95(1) of the Act on the Supreme Court in conjunction with Article 398^4(1)(2) of the Code of Civil Procedure). They are also obliged to specify in the petition the remedy sought and the nature of the violation referred to in Article 89(1) *in principio* of the Supreme Court Act (based on the facts of the specific case).

Similarly, the author of a cassation appeal may not merely state that there has been a violation of substantive law through its incorrect interpretation or improper application (Article 398^3(1)(1) of the Code of Civil Procedure), but is obliged to specify the specific provision (or provisions) that has been misinterpreted or misapplied, similarly, the author of an extraordinary appeal is required to meet the obligation to concisely (but precise) explanation of the specific violations of law which he considers to be the infringements referred to in Article 89(1) of the Supreme Court Act, i.e., *verba legis*, "citing the grounds for cassation (extraordinary appeal") and their justification.[16]

The author of the extraordinary appeal is obliged to indicate *in concreto* how the contested judgment is inconsistent with the principle of a democratic state ruled by law that implements the principles of social justice, i.e. to indicate what the alleged violation consists of in this respect (Article 95(1) of the Supreme Court Act in conjunction with Article 398^4(1)(2) of the Code of Civil Procedure in conjunction with Article 89(1) *in principio* of the Supreme Court Act). Given the unusual legislative approach to the specific basis for an extraordinary appeal referring to the need to ensure compliance with the principle of a democratic state governed by the rule of law that implements the principles of social justice, this task is more difficult than articulating the grounds for an extraordinary appeal referring to points 1-3 of Article 89(1) of the Supreme Court Act. As pointed out in the case law of the Supreme Court, while in the case of the grounds for extraordinary appeals listed in points 1 to 3 of the cited provision, the formulation and specification of the allegation made in the appeal naturally facilitates a fairly precise formulation of the grounds for the appeal, which "profiles" or imposes a procedural scheme for the composition of the appeal (i.e. the need to refer in the petitum and justification of the appeal to a gross violation of a specific provision or provisions of law through their incorrect interpretation or improper application, or to indicate a specific significant factual finding

[16] See comments relating to the extraordinary appeal concerning criminal proceedings contained in the Supreme Court's decision of 3 April 2019, ref. no. I NSNk 1/19.

that contradicts a specific "excerpt" from the evidence gathered in the case), articulating an allegation referring to the basis of the extraordinary appeal indicated in the provision of Article 89(1) *in principio* of the Supreme Court Act is, in a sense, difficult. This is precisely because of the wording of this basis for the complaint, which, although it refers to a principle codified in one specific provision (Article 2 of the Polish Constitution), this provision is, firstly, very general in nature (establishing the principle of the state system in a manner susceptible to a variety of interpretations) and, secondly, the principle of a democratic state governed by the rule of law, which implements the principles of social justice, consists of a whole spectrum of other principles. These structural characteristics of Article 2 of the Polish Constitution alone make it difficult to compose an admissible extraordinary appeal. These difficulties are compounded by the need to link the principles derived from Article 2 of the Polish Constitution to the specific legal and factual circumstances underlying the contested ruling or rulings.

One of the issues raised is the very limited possibility of substantive examination of extraordinary appeals in criminal cases. It has been noted that the wording of the grounds for extraordinary appeals, as well as the provision of Article 90(2) of the Supreme Court Act, may lead to the effective elimination of the effectiveness of extraordinary appeals in criminal cases [Dziga 2019, 158]. It has also been argued that extraordinary appeals are not in fact a new concept, but rather an inconsistent compilation (a hybrid of civil and criminal law?) of existing solutions [Gruszecka 2018, 28].

In case law and literature, the issue of the conflict between extraordinary appeals and appeals for a declaration of the unlawfulness of a final judgment is also very clearly highlighted. In case law, this issue was originally resolved in a way that *effectively* makes it difficult for the interested party to use the institution of a complaint for a declaration of the unlawfulness of a final judgment, which is intended to lead to obtaining a preliminary ruling necessary to initiate proceedings for damages against the State Treasury. The Supreme Court ruled that: "As of 4 April 2018, a party filing a complaint for a declaration of unlawfulness of a final ruling, in fulfilling the obligation provided for in Article 424^5(1)(5) of the Code of Civil Procedure, must prove that it has submitted a request to the competent authority (Article 89(2) of the Supreme Court Act) to lodge an extraordinary appeal and that this request has not been granted. Failure to demonstrate this circumstance, according to case law, should lead to the rejection of the complaint on the basis of Article 424^8(1) of the Code of Civil Procedure."[17] According to T. Zembrzuski, the possibility of effectively appealing to the Supreme Court for a declaration of the

[17] Supreme Court decision of 30 August 2018, ref. no. III CNP 9/18, OSNC 2018, No. 12, item 121. See also Supreme Court decision of 18 July 2019, ref. no. V CNP 8/19, Lex no. 2714703; Supreme Court decision of 22 November 2019, ref. no. V CNP 26/19, Lex no. 2772816.

unlawfulness of a final judgment arises only when (a *sine qua non* condition) when the interested party obtains a response from at least one legitimate entity refusing to file an extraordinary appeal on their behalf [Zembrzuski 2019, 35]. It is worth noting that in the resolution of seven judges of 15 October 2020, the Supreme Court ruled that: "A party filing a complaint for a declaration of unlawfulness of a final judgment (Article 424^1 of the Code of Civil Procedure) is not obliged to prove that it was not and is not possible to challenge the contested judgment by way of an extraordinary appeal; thus, the appeal is not subject to dismissal on the basis of Article 424^8(1) of the Code of Civil Procedure in conjunction with Article 424^5(1)(5) of the Code of Civil Procedure or Article 424^8(2) of the Code of Civil Procedure" (ref. no. III PZP 4/20). The Supreme Court decided to give the resolution the force of law and determined that the interpretation of the law adopted in the resolution is effective from the date of its adoption.

In its previous case law, the Supreme Court has also held that the subsidiary nature of a complaint seeking a declaration of the unlawfulness of a final judgment in relation to an extraordinary appeal results from Article 89(4) and 115(2) of the Supreme Court Act.

"Article 424^1(1) of the Code of Civil Procedure stipulates that one of the conditions for the admissibility of a complaint alleging the unlawfulness of a final judgment is that the complainant has exhausted all legal remedies available under the legal system (legal remedies) available under the legal system to correct an unlawful final judgment by amending or overturning it. The case law of the Supreme Court (Civil Chamber)[18] indicates that this solution corresponds to the subsidiary nature of a complaint seeking a declaration of unlawfulness of a final judgment, as an extraordinary legal remedy which does not serve to set aside or amend a final judgment, but initiates the first phase of proceedings aimed at enforcing the State Treasury's liability for damages on account of issuing an unlawful final court ruling (Article 417^1(2) of the Civil Code in conjunction with Article 77 of the Polish Constitution). This liability may only be enforced if the injured party has done everything possible to eliminate the source of the damage. Only the ineffectiveness of available procedural tools or their absence may, in the event of damage, justify a claim for compensation and, thus, the admissibility of a complaint seeking a declaration of the unlawfulness of a final and binding court ruling."[19]

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[18] Supreme Court decisions of: 30 May 2018, ref. no. IV CNP 2/18; 21 January 2020, ref. no. I CNP 15/19; 17 January 2020, ref. no. II CNP 36/19; Supreme Court ruling of: 15 January 2020, ref. no. I CNP 19/19; 9 January 2020, ref. no. III CNP 9/19; 5 November 2019, ref. no. V CNP 28/19; 26 September 2019, ref. no. V CNP 13/19.

[19] See Sejm document No. 2696 of the 4th term of the Sejm, point 4; in case law, see Supreme Court rulings of 30 August 2018, ref. no. III CNP 9/18, OSNC 2018, No. 12, item 121, and of

It should be clearly emphasised that an extraordinary appeal is one of the instruments enabling the enforcement of judgments of the European Court of Human Rights. In the context of proceedings before that Court, it is worth noting that it is not necessary to request a legitimate entity to lodge an extraordinary appeal in order to be able to effectively lodge a complaint with the European Court of Human Rights. Currently, therefore, an extraordinary appeal is not considered one of the available domestic remedies that must be exhausted before lodging a complaint with the Court [Balcerzak 2018, 12; Kluza 2020, 118]. At the same time, the Supreme Court's ruling granting the extraordinary appeal may be subject to review in proceedings before the European Court of Human Rights. It is an act of judicial power subject to review under the Convention for the Protection of Human Rights and Fundamental Freedoms. It should therefore be considered whether it is possible to give extraordinary appeals such statutory characteristics that, if fulfilled, would result in this institution being recognised as the final remedy in the system of domestic remedies, the use of which should ultimately precede the admissibility of an appeal to the Court.

The regulation concerning cassation appeals contained in the Supreme Court Act is not exhaustive. Practice, however, illustrates a number of problems that arise at the stage of applying this institution. There is therefore a need for comprehensive regulation of the procedure in these cases, or alternatively, for a reference to the provisions of the Code of Civil Procedure in a numerical manner, by listing in detail the provisions applicable to extraordinary appeal proceedings.

In particular, consideration should be given to extending the currently limited list of entities entitled to lodge an extraordinary appeal by including in this privileged group the party to the proceedings itself, represented by a qualified legal representative under the so-called mandatory representation by a barrister or solicitor.

An extraordinary appeal cannot be lodged again against the same ruling in a case in which such a measure has already been considered in the interest of a given party to the proceedings (Article 90(1) of the Supreme Court Act). However, the party on whose behalf the extraordinary appeal was lodged has no procedural rights to claim damages from the State Treasury in the event of incorrect drafting of such an appeal (from the point of view of the structural formal requirements of the appeal) by the entitled entity.

It should also be noted that, in the Act on the Supreme Court, unlike judgments issued as a result of the examination of a cassation appeal or cassation (*a contrario* to Article 90(2) of the Act on the Supreme Court in conjunction with Article 398^3(3) of the Code of Civil Procedure), there are no

20 December 2018, ref. no. III CNP 19/18, unpublished.

provisions providing for the possibility of lodging an extraordinary appeal against judgments of the Supreme Court issued as a result of the substantive examination of a complaint for a declaration of the unlawfulness of a final judgment, given that the grounds for an extraordinary appeal are broader than those for an appeal for a declaration of the unlawfulness of a final ruling, as can be seen from a comparison of Article 424^4 sentence 2 of the Code of Civil Procedure with Article 89(1) of the Supreme Court Act, and in accordance with Article 424^1(a)(1) of the Code of Civil Procedure, a complaint for a declaration of unlawfulness of a final judgment is not admissible against judgments of the court of second instance against which a cassation complaint has been lodged and against judgments of the Supreme Court.

Furthermore, the provisions of the Code of Civil Procedure concerning cassation appeals and appeals for a declaration of unlawfulness of a final judgment have not been adapted to the Act in question with regard to the grounds for appeal (cf. Article 398^3(1)(2) and (3) of the Code of Civil Procedure and Article 424^4 of the Code of Civil Procedure and Article 89(1) points 1-3 and Article 90(2) of the Supreme Court Act).

In view of the constitutional standard of the right to a court and the right to defence, it also seems reasonable to extend the extraordinary appeal to misdemeanours. In the cases indicated, human rights may also be violated in the course of court proceedings. The gravity of these acts is obviously less, but this does not justify depriving the lower courts of any control over their jurisdictional activities in the ordinary course of proceedings.

The problems indicated certainly do not exhaust all the observed needs of practice related to the application of legal regulations concerning the institution of extraordinary appeals. This is primarily due to the "novelty" of the presented appeal measure. Hence the need for further in-depth observation of this remedy, the legitimacy of which is undoubtedly still being confirmed with each new ruling of the Supreme Court.

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NEW TRANSFERABLE COMMODITY DOCUMENT IN THE WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

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Abstract. Digitization of documentation in commercial transactions is important to make them easier, faster and less costly. However, the digitization process faces particular problems with regard to documents that constitute negotiable documents of title. The article presents the assumptions of the work underway at UNCITRAL on a convention providing for the introduction of negotiable documents of title in both paper (NCD) and digital (NECR) versions, intended for use in various branches of transportation, on the model of bills of lading, which for years have documented the carriage of cargo by sea. The conduct of this work is a response to the demands of the stakeholders of transport relations, participating in inter-branch transport in particular. The focus of their attention remains the possibility of using such a document especially in the framework of a documentary letter of credit. The preliminary assumptions of the convention adopted by UNCITRAL are discussed against the background of the experience of digitization of bills of lading in road transport (eCMR), as well as attempts to digitize bills of lading, indicating the problems noted so far, the solution of which can be expected in the regulations of the convention under development.

Keywords: tradable securities; digital waybills; digital freight documents.

INTRODUCTION

Transport services and payments related to commercial transactions are among the sectors of the economy for which digital transformation and new technologies are of great importance. They are among the areas referred to as the "Internet of Everything," i.e., networks connecting people, objects, data, and processes used for the digital exchange of value and ensuring constant connectivity. It is this, together with the development of the Internet and information and communication technologies, that has become a key feature of today's economy and society [Pieriegud 2016, 15].

Two issues in particular are currently being discussed in international organizations that create the legislative framework for international transport:

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the dematerialization of transport documents/waybills and granting them the status of securities, following the example of maritime bills of lading.

The purpose of this article is to present the assumptions of the work carried out at the United Nation Commission on International Trade Law[1] forum on a convention providing for the introduction of new negotiable cargo documents, including in digital form, intended for use in various modes of transport, similar to bills of lading used in sea freight transport. The issues indicated are closely related to the functions that each of the transport documents/waybills performs in trade.

1. FUNCTIONS OF BILLS OF LADING AND WAYBILLS

These are issues that are closely related to the functions that each of these documents performs in trade. Bills of lading, issued for the carriage of cargo in other modes of transportation than maritime transport, perform primarily an evidentiary function, certifying the conclusion of the contract of carriage, its contents and the condition of the cargo handed over to the carrier. In maritime transport, sea waybills have this status. Bills of lading, on the other hand, perform several functions: a) constitute evidence of the contract of carriage; b) constitute proof of acceptance of the cargo on board the ship and thus fulfillment of the seller's obligations, sometimes without admitting proof to the contrary; c) as a security representing the cargo in transit (symbolic possession), embody the right to dispose of the cargo and receive it; as a result, only the holder of the bill of lading and only he can give instructions to the carrier as to the destination of the cargo and demand delivery of the cargo upon presentation of the bill of lading.

By transferring title to the document, the holder can sell the cargo or encumber it with a right in rem. It is this function that makes it the most significant and complex document among all the documents required in an international transaction.

The commercial value of the bill of lading thus extends beyond freight relations, as it facilitates the turnover of cargo during carriage (under contracts of sale or collateral in kind), as well as allows relationships to be established under conditional forms of payment, especially under documentary letters of credit, raising the guarantee that sellers will receive payment. The bill of lading, as a security paper, is also collateral for the benefits of cargo insurers in shipping [Thomas 2020, 106; Orru' 2020, 136].

It should be emphasized that a special commercial value is associated with negotiable bills of lading (negotiable B/L). It is associated with the

[1] Hereinafter: UNCITRAL.

transfer to the purchaser, the subsequent holder of such a bill of lading, of the title to dispose of the cargo in transit and to receive it, and, importantly, the transfer of the document may lead to the granting of a broader range of rights to the purchaser than those enjoyed by the transferor (negotiability). He derives his legal position from the fact that he has become the legitimate holder of the document, without reference to the rights of the predecessor.

The rights embodied by such a security follow the document and the transfer/issuance of the document entails the transfer of the right it represents [Romanowski 2025, 6]. Such shipping documents are bills of lading to order) transferred by endorsement, and bearer bills of lading (bearer B/L), transferred by the mere issuance of the document [Dragun-Gertner 2006, 106]. However, they do not include registered bills of lading (straight B/L), where the transfer of cargo rights represented by the bill of lading requires an assignment.

2. DIGITIZATION OF TRANSPORT DOCUMENTS

The diversification of the legal status of transport documents is a result of the diversity of legal regulation of international cargo transportation. This carriage within each branch of transport is subject to separate legal regulation.[2] In the era of door-to-door intermodal/multi-modal transportation, this multiplicity of regulations creates further complications. Convention norms are based on the assumption of paper documentation of carriage, and they refer to the issuance of a "document" as a bill of lading, rather than the compilation and management of a set of data.[3] Making transport documents digital therefore requires both legislative and technological undertakings. This is one of the key elements of digital transformation in the transportation sector.

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[2] Applicable: Berne Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 (Journal of Laws of 1985, No. 34, item 158) amended by the protocol drawn up in Vilnius on 3 June 1999 (Journal of Laws of 2007, No. 100, item 674); Uniform Rules concerning the Contract of Carriage of Goods by Rail (CIM) forming Appendix B to the COTIF Convention; Geneva 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, supplemented by an additional protocol concerning electronic consignment notes drawn up in Geneva on 20 February 2008 (Journal of Laws of 2019, item 1487; The Montreal Convention for the Unification of Certain Rules for International Carriage by Air of 28 May 1999 (Journal of Laws of 2007, No. 37, item 235); The Brussels Convention of 1924 on the Unification of Certain Rules Relating to Bills of Lading (Hague Rules – RH (Journal of Laws of 1937, No. 33, item 259), amended by the Brussels Protocol of 1968 (Hague-Visby Rules - RHV) (Journal of Laws of 1980, No. 14, item 48) and the Brussels Protocol of 1979 (Journal of Laws of 1985, No. 9, item 26).

[3] This was raised as part of UNCITRAL's work on a new transport document: United Nations Commission on International Trade Law Fifty-fifth-session New York, 27 June-15 July 2022, Work programme Results of the preparatory work by the UNCITRAL secretariat towards the development of a new international instrument on negotiable multimodal transport documents Note by the Secretariat, 2022 A/CN.9/1101, para. 33.

However, the example of the 2008 Protocol to the CMR Convention shows that even if a legislative compromise has been reached internationally, the enactment of legal solutions faces technological obstacles. Regulated here (eCMR) is a digital version of the traditional consignment note (CMR) to be used in international road transport. It is expected to reduce costs and increase facilitation for transport companies, streamline and speed up customs clearance of transported goods. According to estimates by the European Commission of the European Union, its introduction could save more than a billion euros a year.[4] In addition, the positive environmental effects associated with dematerializing waybills and moving away from the paper form of these documents are emphasized.

However, the implementation of the provisions of this protocol requires standardized platforms for the secure transmission and exchange of eFTI (Electronic Freight Transport Information[5]) so that the electronic documents generated on them are respected in circulation [Pieriegud 2016, 16].[6]

In the EU, it was assumed that this would be possible from August 2025. Meanwhile, the lack of key technical and certification regulations has caused delays of almost two years. The relevant 3 EU implementing and delegated regulations[7] came into force on January 9, 2025. However, the next required

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[4] European Commission, Towards Paperless Freight Transport: EU takes a step forward with eFTI Ragulation implementation, 2025, https://transport.ec.europa.eu/news-events/news/towards-paperless-freight-transport-eu-takes-step-forward-efti-regulation-implementaion-2025-01-09 [accessed: 08.05.2025].

[5] Regulation (EU) 2020/1056 of the EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 July 2020 on electronic freight transport information, OJ L 249/33: Article 3(4): 'electronic freight transport information' or 'eFTI' mean a set of data elements processed by electronic means for the purpose of exchanging regulatory information between the operators concerned and between the operators concerned and the competent authorities; Article 3(10): the 'eFTI' platform mean a set of data elements processed by electronic means for the purpose of exchanging regulatory information between the operators concerned and between the operators concerned and the competent authorities; Article 3(10): the 'eFTI' platform means an information and communications technology (ICT)-based solution, such as an operating system, operating environment or database, designed for use in processing eFTI; Article 3(1): 'regulatory information' means information, whether or not it is presented in the form of a document related to the transport of goods within the territory of the Union, including by way of transit of goods, to be made available by the concerned economic operator in accordance with the provisions referred to in Article 2(1), in order to prove compliance with the relevant requirements set forth in the acts establishing these provisions.

[6] The view that the use of cloud computing technology is an alternative that does not require significant investment costs associated with the construction of appropriate infrastructure must therefore be revised.

[7] Commission Implementing Regulation (EU) 2024/1942 of 5 July 2024 – establishing common procedures and rules governing access by authorities to electronic freight transport information; Commission Delegated Regulation (EU) 2024/2024 of 26 July 2024 – supplementing Regulation (EU) 2020/1056 by establishing a common eFTI data set; Commission Delegated Regulation

actions at the national level cannot be implemented until the regulations on platform certification and technical specifications for systems, as provided for in the regulation, are worked out at the EU level.[8] For this reason, full implementation has been postponed until July 2027. The plan calls for,[9] that from January 2025, eFTI-compliant IT systems will be developed in member states, the European Commission will adopt the missing implementation rules of the Regulation by September 2025, and from January 2026, service providers and eFTI platforms can start preparing for operation, and member state authorities can start accepting data that will be stored on certified eFTI platforms for inspection purposes. Full implementation of eFTI will take place from July 2027 and all member states will have to accept information made available electronically by operators through certified eFTI platforms.

Efforts to dematerialize bills of lading began in the second half of the 20th century. Activity in this regard was first undertaken by non-governmental international organizations,[10] as well as those involved in the trade.[11] These were systems based on either document deposition or carrier notification (notification) [Dragun-Gertner 2004, 108]. Prepared by UNCITRAL, a new convention on the carriage of cargo by sea for all or part of the route, the so-called Rotterdam Rules (RR) of 2009,[12] which included provisions on the dematerialization of bills of lading, which could be the basis for global solutions, ultimately did not come into force. Thus, the RH and RHV norms, which are based on the paper version of the bill of lading, remain current in circulation. Whether these legal instruments can be applied to electronic bills of lading is a matter of doubt [Kochanowski 2022, 344].[13] Hamburg

(EU) 2024/2025 of 15 July 2024 – amending Part B of Annex I to Regulation (EU) 2020/1056, which allows economic operators to transmit information electronically, while complying with the requirements set out in EU legislation and national regulations.

[8] See https://ksiegowosc.infor.pl/obrot-gospodarczy/dzialalnosc-gospodarcza/6846913,ecmr-w-polsce-i-europie-harmonogram-wdrozenia-elektroniczne-listy-przewozowe-opoznione-ponad-2-lata.htm [accessed: 08.05.2025].

[9] Towards Papersless Freight Transport: EU a step forward with eFTI Regulation implementation, https://transport.ec.europa.eu/newevents/news/towards-paperless-freight-transport-eu-takes-step-forward-efti-regulation-implementation-2025-01-09en [accessed: 08.05.2025].

[10] International Maritime Committee prepared CMI Rules 1990 For Electronic Bill of Lading, applied on the basis of the will of the parties.

[11] In particular, the BOLERO system developed using, among other solutions, CMI Rules 1990, which came into use in 1999. It is also based on the autonomy of the parties' will. It is based on an adhesion contract and users' accession to the terms and conditions offered under it.

[12] Convention on Carriage of Cargo by Sea on All or Part of the Route 2009, 5 countries have acceded to it, 20 countries are required to accede to the Convention for it to come into force – Status: United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) [hereinafter: the Rotterdam Rules], https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules/status [accessed: 15.05.2025].

[13] It is not uncommon to find that such a digital dataset can hardly be considered a bill of lading at all.

Rules[14] (Article 14(3)) allow electronic signatures on bills of lading, as long as this does not contradict the law of the country in which the bill of lading was issued. The decisive factor will therefore be domestic law [Kindred 1991-1992, 271].

3. COMMODITY DOCUMENT AS A NEGOTIABLE INSTRUMENT – UNCITRAL WORK

The norms of the Rotterdam Rules, however, served alongside other international instruments[15] as a model in the work on a new negotiable transport document that could be used in all modes of transport, This was undertaken by UNCITRAL at the initiative of China. It was recognized that the possibilities of commercial transactions associated with giving the transport document the character of a security paper make such a solution desirable in modern trade not only in maritime transport. China's interest in undertaking work on the development of such a document was connected with the intention to facilitate multimodal transport, including, in particular, the stage of railroad transport on Eurasian territory. The railroad bill of lading is not a security and, like a bill of lading, cannot be used, as the proposal in particular points out, to agree and finance documentary letters of credit. It also limits the ability of banks and other institutions to provide financial services, which entails increased financial pressure on the part of importers, as well as the risk of receiving payment on the part of exporters.[16]

China's initiative was approved by UNCITRAL. It was decided to include both non-negotiable and negotiable multimodal transport documents (NMTD) in further work. In the course of further work, the name was changed to negotiable cargo document (NCD). The proposed regulation covers both paper documents and their digital form (negotiable electronic cargo record – NECR). 1. In particular, the regulations cover issues related to their issuance and content, as well as the resulting rights and obligations of carriers or transport operators, their evidentiary functions, transfer rules, and the status of negotiable documents. The issue of electronic commodity documents was considered particularly timely to support new types of supply chains and logistics models being created in response to the market disruption caused by the COVID -19 pandemic.

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[14] UNCITRAL Convention on the Carriage of Goods by Sea, 1978.

[15] Also: the 1980 Convention on Multimodal Transport, the Berne Convention concerning International Carriage by Rail (COTIF) together with the Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) forming Annex B to the COTIF Convention, the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, the Agreement on International Goods Transport by Rail (SMGS).

[16] United Nations Commission on International Trade Law…, para. 1-3.

In the work of preparing a convention to regulate a new negotiable commodity document (NCD) that could also be used in agreements that do not involve shipping, it was decided to take into account the relevant work of other international organizations.[17]

For the proposed convention, its material scope is important. The document under development is to be used in multimodal transport, and as already mentioned, each branch of transport has its own regulations, both concerning transport documents and the rights and obligations of the parties to a given contract of carriage, including liability for damage caused in the carriage of cargo. The problem remaining so far outside the norms of the Convention is liability for damage, as to which it is impossible to determine the place of its infliction (stage of carriage).

This raises the question of how much, if at all, the new legal instrument is intended to mesh with the current convention regulations. The subject matter of the proposed convention is completely separated from them. It is not intended by its drafters to apply any convention or domestic law to the regulation and control of transport projects.[18]

The object of its norms is to introduce, primarily with a view to the documentary letter of credit [Dragun-Gertner 2005, 402-403],[19] a new type of document that is a security, and its provisions apply only to this type of document (NCDs and NECRs). Thus, it does not apply to any of the transport documents used for the carriage of cargo under existing conventions, such as bills of lading or bills of lading, unless there is an explicit indication in their content that the document will also act as an NCD or NECR under the norms of the proposed convention.

The provisions of the proposed convention also do not affect the rights and obligations of the parties to a contract of carriage or the consignee of cargo

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[17] Intergovermental Organization for International Carriage by Rail (OTIF), the Organization for Cooperation between Railways (OSJD), the International Rail Transport Committee (CIT), the Economic Commission for Europe (UNECE), the Federation of Freight Forwarders Associations (FIATA), the International Chamber of Commerce (ICC).

[18] United Nations Commission on International Trade Law Working Group VI (Negotiable Cargo Documents) Forty fifth session Vienna, 9-13 December 2024 , A/CN.9/WG.VI/WP.106, para. 10-13.

[19] This is also today, from the banks' perspective, the primary role of bills of lading. The change in the way shipments are documented due to the practice of multi-branch shipments has resulted in a weakening of banks' confidence in the previous role of bills of lading as an important security for account coverage. The evidentiary function associated with them of cargo receipt and cargo condition has been weakened in these shipments. When bills of lading are issued by shippers acting as carriers or their agents, banks, for their security, either reject such bills of lading as not constituting proof that the cargo was on board the ship or require additional confirmation that the goods were loaded on the ship. Bills of lading are nowadays treated by banks merely as one of the documents of a letter of credit. Those opening it do not see themselves as purchasers of the bill of lading, but as verifying that it meets the terms of the letter of credit.

as defined by existing conventions or national laws. It will also not interfere with the liability regimes adopted to date, and the carrier/transport operator will be liable for cargo damage in accordance with the law governing the contract.

In the work on the proposed convention, there is an assumption that the holder of a negotiable cargo document or negotiable electronic cargo record would acquire all rights under the contract of carriage, and that any entitlement to such rights granted to the consignor or consignee (where applicable) would lapse. Such a mechanism would function as an assignment of the shipper's rights to the holder. The consignor's consent to the assignment of all rights under the contract of carriage to the holder would be implied when the consignor asks the transport operator to issue a negotiable freight document or negotiable electronic freight record.[20]

At the stage of the preliminary draft convention[21] it was further indicated, among other things, that:[22] a) regulation of the negotiability of the new document will be based on the "dual track" rule, i.e. the designation of the negotiable goods document (NCD) exclusively for use under the documentary letter of credit, and it will function independently of other transport documents (TDs). However, should it be prejudged that the NCD is also to be used for transport and customs purposes, it will be necessary to modify existing regulations or prepare separate new regulations. What remains to be decided is whether it would be a physically separate document alongside the TD, or whether either an appropriate annotation in the body of the TD would also bind to it the function of a transferable document, or whether the NCD would replace the traditional TD; b) with a view to practical considerations, the convention should apply to all forms of negotiable documents, including bearer documents, which are a particularly attractive form of securities for commercial operations in circulation, bearing in mind also the practice of issuing more than one original document.

4. SPECIFIC PROBLEMS RELATED TO THE TRANSFERABILITY OF THE DESIGNED GOODS DOCUMENTS

Experience on the negotiability of a transport document that has the status of a security has been gained in shipping, where such a document has been used for 200 years and is widely accepted in national legal orders as well.

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[20] United Nations Commission on International Trade Law Working Group VI…, para. 11.

[21] In developing it, the following were taken into account: Convention on Multimodal Transport of Goods 1980 (did not enter into force), The Rotterdam Rules 2008, the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, the Convention, Convention COTIF/CIM and Agreement SMGS-A/CN.9/1061, chapter III.A.

[22] United Nations Commission on International Trade Law…, para. 24-27.

A prerequisite for the success and effectiveness of the legislative work undertaken by UNCITRAL on the NCD as a new type of security to be used also in non-maritime cargo shipments will be its recognition as such a document under the relevant regulatory standards of domestic legislation.

Related to the digitization of the document (NECR), as we have already noted in the context of road transport, is the creation of a technological base for the transmission of the information that makes up the digitized documents, which would operate on a global scale [Orru' 2020, 136]. Thus, it is worth noting at this point that the eFTI platforms created in EU countries for the implementation of the 2008 Additional Protocol to the CMR Convention can also be used for the needs of other modes of transport. Both this protocol (Articles 1-5) and other international legal instruments related to the dematerialization of documentation[23] was included in the substantive norms of the draft convention relating to the digital version of the document (NECR).

In this case, for precautionary reasons, the assumption was made that since the new convention is to be applied in parallel with existing shipping conventions, this should be taken into account in its provisions, and when formulating its content in the section on NECR, it should not be closed to the digital environment.

In addition, one of the sensitive issues related to the use of digital transaction documentation in trading is ensuring the uniqueness of electronic records intended to perform an equivalent function to marketable securities and safeguarding their authenticity.

The problem is uniqueness and integrity throughout the chain of contracts, certainty about the authorship of the record and the identity of subsequent holders, prevention of forgery or duplicate transfers of the electronic record [Orru'2020, 136].

The security of data creation, transmission, processing, and transfer processes is therefore of particular importance to all participants in economic transactions and supply chains [Pieriegud 2016, 27].

In the draft convention under discussion, it was decided to draw on the UNCITRAL Model Law on the Use and Cross-Border Recognition of Identity Management and Trust Services (MLIdM).[24] This model law was developed in view of the need to create a legal and technological framework for the growing number of commercial transactions conducted on line at an

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[23] UNCITRAL Model law on electronic transferable records (MLETR), The Rotterdam Rules, Uniform Customs and Practice for Documentary Credits (Supplement for Electronic Presentation) ("e-UCP") and The United States Uniform Commercial Code (UCC).

[24] *UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services*, United Nations, Vienna 2023.

accelerating pace, which has particularly intensified during the COVID-19 pandemic. These transactions are based on trust, and at its core is the ability to reliably identify an entity (digital identity), especially in the absence of prior interpersonal relationships.[25]

There also remains the important issue of transferring the rights from the records contained in the digital information to the next authorized person, with the effect of ensuring the acquisition of a negotiable security to order by indenture [Dragun-Gertner 2007, 404; Zużewicz-Wiewiórowska and Wiewiórowski 2014, 45; Koziński 2006, 145-48]. The method adopted must ensure that the rights and obligations represented by such a digital document are detached from the underlying legal relationship [Orru' 2020, 136]. It must be a method that is acceptable to all concerned, so that they can rely on it in relations related to transportation, cargo trade, or banking [Dragun-Gertner 2004, 112].

In the framework of bonded relationships, where the electronic information register has been accepted as the equivalent of a bill of lading, as in the case of the BOLERO B/L, it was considered that this could be achieved through two ways: either by assignment or novation. Assignment, due to the accompanying formal requirements of the various legal systems, was not considered the best solution, as it would be difficult to implement in an electronic message transfer. It was therefore suggested that the BOLERO system should be based on novation [Dragun-Gertner 2007, 157-58]. However, there can be no direct transfer of rights (as in the case of an indorsement), but a new contract, with content corresponding to the original contract, which is concluded between the new parties.[26]

In the Rotterdam Rules, the method used in any given case is left to verification based on the Convention's indicated criteria set forth in Article 9(1) of the Convention.[27]

Also in the assumptions of the proposed convention, it is assumed that regardless of the solutions that would be agreed and applied at the international level, it will be necessary to distinguish those that should be left to domestic law, and among them is mentioned reliability standards. It is also stressed that legislative intervention in this regard should be balanced, and the necessary margin of freedom for the choices made in market practice as to the technologies used should be left, especially given the rapid pace of technological

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[25] Guide to enactment of the *UNCITRAL Model Law on the Use…*, p. 23-24.

[26] Hence, it is rightly pointed out that BOLERO B/L are electronic contracts of carriage rather than bills of lading.

[27] Article 51(4): When a negotiable electronic transport record is issued (b)The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in Article 9(1).

development.[28] The digital technologies currently in use are highly diverse. Their applications are extremely broad. By supporting the functioning of enterprises, they will play a key role in their development, determining their level of innovation [Pieriegud 2016, 28, 33; Bartczak 2023, 71].[29]

The requirement for an electronic signature was deemed obsolete in the context of NECR electronic goods records. Preference was given to other options that will reflect developments in methods of identification and authentication in the digital world.[30]

The latest technology being tried out with the intention of using it for electronic transport records is blockchain, which is used for cryptocurrency trading, but is currently attracting interest in the banking and shipping sectors because of the great opportunities it offers for logistics operations and in the execution of documentary letters of credit. Blockchain technology is considered one of the most significant digital technologies for the global economy [Bartczak 2023, 22].

Roughly speaking, the system relies on the fact that the chain of blocks created by successive transactions, in which they are recorded, cannot be changed. This chain, used for recording financial transactions, is not centralized and is open and transparent. The records of its tokens can include not only monetary sums, but also property rights, such as symbolic possession and title to cargo, as in bills of lading. However, in order to make full use of this system, this technology must be improved and adapted to fulfill the role that traditional bills of lading, which are securities, have so far played in the trade [Orru' 2020, 138-40].

CONCLUSION

UNCITRAL's work on the Convention on Transferable Commodity Documents is expected to be completed as early as 2025, so it will soon be possible to assess what solutions have been adopted for the problems posed in the preliminary draft.

The way in which they are resolved will determine whether the legal framework, which has been eagerly awaited for many years, will be created for the acceptance of digital, dematerialized commodity documents in trade,

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[28] United Nations Commission on International Trade Law…, para. 34.

[29] The statement that digitization itself is one way to ensure reliability is too vague, although it must be agreed that virtualization, cloud computing, and software-defined networks have a significant impact here. Cloud computing is a type of platform that operates on the basis of a data center, allowing users to access specific resources located on a server, which can be used, among other things, in e-commerce.

[30] United Nations Commission on International Trade Law…, para. 36.

which have the status of negotiable securities meeting the criteria of uniqueness, for which either an internationally unified system for transferring the rights embodied in them will be created or, more likely, the criteria for the security and reliability of the circulation of such documents will be unified so that the purchaser indisputably obtains the rights represented by them. Experience shows that uniform technological infrastructure will be essential for the new international legislative instrument to be fully successful.

Undoubtedly, the assumption adopted in UNCITRAL's work on the new convention not to interfere with the conventional regimes of rights and obligations of parties to transport contracts in force in individual branches of transport should be assessed positively, as these are deeply rooted in the relations between entities involved in transport relations.

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GUARANTEES FOR EMPLOYEES APPOINTED TO PERFORM BASIC MILITARY SERVICE, TERRITORIAL MILITARY SERVICE, AND THEIR SPOUSES

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Abstract. The 2022 Homeland Defense Act contains many legal regulations establishing legal solutions aimed at creating conditions for employees to serve their homeland in active service without fear of losing their jobs and, consequently, their livelihoods. The most important guarantees requiring closer analysis include, first and foremost, the protection of the permanence of employment of a soldier called up for basic service and his or her working spouse. The analysis will focus in particular on the subjective and objective scope of protection, as well as the legal measures implementing such protection. An important role should also be attributed to the provisions establishing unpaid leave for the duration of training as part of voluntary basic military service and the related protection against termination of employment during the period of such leave. The provisions providing for the inclusion of the period of active military service in the length of service and the right to re-employment after completion of service will also be analyzed.

Keywords: employment; protection of employment stability; consent; termination of employment; unpaid leave; length of service.

PRELIMINARY REMARKS

Due to the broad scope of the subject matter, this study focuses on issues related to labor law guarantees provided for soldiers called up for basic and territorial military service, in particular on the issue of special protection of the contractual employment relationship of a soldier called up for service and his or her spouse, unpaid leave, and the right to return to work after completing service. The subject of this study is the special protection of the employment relationship based on an employment contract. Therefore, the special protection of soldiers called up for basic military service or territorial military service and their spouses employed based on non-contractual employment relationships is outside the scope of this article.

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1. THE RIGHTS OF EMPLOYEES CALLED UP FOR NON-PROFESSIONAL MILITARY SERVICE

The legislator has linked certain types of non-professional military service to legal mechanisms in the field of labor law, to create guarantees for performing service, including fundamental service, without fear of negative consequences for the employee and their spouse in the sphere of employment relationships. It primarily concerns stabilizing the employment relationship of an employee called up for service and guaranteeing their return to work after completion of service.

In light of the Act of March 23, 2022, on the defense of the homeland.[1] The list of these guarantees includes, above all: a) protection of the continuity of employment of a soldier called up for basic service, b) protection of the continuity of employment of the spouse of a soldier called up for basic military service, c) unpaid leave for the duration of training as part of voluntary basic military service and for the duration of rotational territorial military service, d) counting the period of active military service towards the length of service, e) military service to the length of service, f) exemption from work at the request of an employee called up for active military service, g) right to re-employment after completion of service.

2. GUARANTEES OF PROTECTION OF THE PERMANENCE OF THE EMPLOYMENT RELATIONSHIP OF AN EMPLOYEE CALLED UP FOR BASIC MILITARY SERVICE OR TERRITORIAL MILITARY SERVICE

2.1. Concept, purpose of special employment protection for soldiers, and its subjective scope

The protection of the employment relationship of a person called up for basic military service or territorial military service, established in Article 303 of the 2022 Act on the Defense of the Homeland, should be classified as a special protection of the permanence of the employment relationship.[2] This concept most accurately reflects its special nature, resulting from the employee finding themselves in a unique (exceptional) situation that exposes them to termination of employment, during which standard legal measures of protection against dismissal are insufficient [Kisielewicz 2011, 110]. Special protection of the stability of the employment relationship is usually understood as a set of legal measures and guarantees in the form of prohibitions on

[1] Journal of Laws of 2025, item 825 as amended.

[2] Dral 2017, 704 and the literature and case law cited therein.

terminating, changing, or dissolving the employment relationship, or special restrictions on the employer's ability to perform these actions, such as the employer's obligation to obtain the consent of a specific entity to terminate, change, or dissolve the employment relationship [Gersdorf 2013, 235]. The application of a specific mechanism of special protection of the stability of the employment relationship to an employee depends on the occurrence of the grounds for protection during the term of the employment relationship. Special protection, therefore, applies only to categories of employees strictly defined by law. In the case of soldiers performing basic military service or territorial military service, the purpose of protection is therefore to maintain the employment relationship during the period of service and, consequently, to ensure social security after the end of service.

In general, special protection of the stability of the employment relationship fulfills the protective function of labor law. In this case, the axiology of protection derives from the need to protect important social values [Marciniak 2024, 101-102; Sobczyk 2013, 94]. The social situation of performing non-professional military service for the homeland and in the interest of society does not raise any doubts in labor law doctrine as to the axiological basis of protection [Niedbała 2010, 349].

Pursuant to Article 303 of the Act on the Defense of the Homeland, the employment relationship with a person called up for basic military service or territorial military service may only be terminated with the consent of the employee. The protection prerequisite is conscription for basic military service or territorial military service.

In light of the aforementioned provision, the termination of an employment relationship by an employer therefore requires the consent of the employee. The legal measure of special protection in the form of the requirement to obtain consent is of a decisive nature [Dral 2021, 129; Gołaś 2016, 31-32], as it prohibits the employer from exercising the right to terminate the employment relationship without obtaining the consent of the entity specified by law to perform actions resulting in the termination of the employment relationship.[3] The requirement to obtain consent does not therefore suspend the employer's right to perform these actions, but limits the employer's freedom to make decisions in these matters. The employer may perform these actions provided that they obtain the consent of the entity specified by law [Salwa 1997, 12].

The legal nature of consent is controversial in labor law doctrine [Matey 1975, 173ff]. Given the diverse nature of the entities authorized to give consent [Dral 2017, 746-48], it seems that the most universal solution is to assume that consent is a legal event specific to labor law, taking the

[3] This concept is also used in case law, see Supreme Court judgment of June 6, 201209, ref. no. III PK 72/09, Lex no. 602059.

form of a legal condition. The consent of the relevant entity, in this case the employee themselves, waives the special protection of the permanence of the employment relationship at the stage of decision-making by the employer [Piątkowski 2010, 144].

The mechanism of consent by the interested party to terminate the employment relationship, as applied by the legislator, can be described as "self-protection" of the permanence of the employment relationship. It should be noted that the solution adopted in the Homeland Defense Act has not yet been applied in Polish labor law [Szubert 1980, 126].

To sum up, in practice, we are dealing with relative protection, which can only be waived with the employee's consent to terminate the employment relationship. It means that it is solely up to the will of the employee called up for basic or territorial military service whether the employer will be able to terminate the employment relationship. The provision clearly states that the legislator has left it solely to the employee called up for service to assess whether, in a given situation, consenting to the termination of the employment relationship is in his or her interest. However, it should be noted that in certain situations, e.g., where there is a fundamental objective reason justifying the termination of the employment contract, failure to consent to the termination of the employment relationship may be assessed from the point of view of abuse of subjective rights (Article 8 of the Labor Code).

When defining the scope of protection, the legislator used the general concept of an employment relationship. It raises the question of what types of employment relationships are covered by the protection. Pursuant to Article 2 of the Labor Code, an employee, i.e., a person in an employment relationship, is a person employed based on an employment contract, appointment, nomination, election, or cooperative employment contract. The use of the general concept of an employment relationship, therefore, indicates that the legislator intends to cover persons performing military service who are in all types of employment relationships covered by this concept, i.e., those employed based on an employment contract, appointment, nomination, election, or cooperative employment contract. Contrary to this indication, however, the legislator focuses on the contractual employment relationship in the subsequent provisions of Article 303. According to the provisions of the Labor Code, a contractual employment relationship may be established based on a trial period contract, a fixed-term contract, or an indefinite-term contract. It follows from the analyzed provision that protection is only granted to employees employed based on an indefinite-term contract and a fixed-term contract concluded for a period longer than 12 months. In light of the above, the consent of an employee appointed to basic or territorial service is not required to terminate an employment relationship based on a trial period contract or a fixed-term contract shorter than 12 months. However, if the

employer intends to terminate a fixed-term employment contract concluded for a period longer than 12 months, the employer is obliged to obtain the consent of the employee appointed to service for such termination. As a rule, the permanence of employment relationships established based on fixed-term contracts is protected only during the term of these contracts, i.e., until the expiry of the term for which they were concluded. Therefore, the provision in question does not protect against the termination of a fixed-term employment contract for a period longer than 12 months upon the expiry of the term for which it was concluded. Pursuant to the provisions of Article 30(1)(4), the termination of such a contract takes place upon the expiry of the term for which it was concluded, without the need for the employer to take any legal action [Wagner 1980, 91]. The Supreme Court's case law confirms this position on the special protection of employment relationships of employees hired under fixed-term employment contracts.[4]

Pursuant to Article 22(1) of the Labor Code, the performance of work of a specific type for an employer and under their management, as well as at a place and time designated by the employer, constitutes employment based on an employment relationship, regardless of the name of the contract concluded by the parties. It follows that in some instances, special protection will cover persons with whom a civil law contract was concluded initially, e.g., a contract of mandate or a contract for specific work. It should be added that in the light of the provision in question, protection is independent of the length of time for which the employee is employed and whether he or she remains in one or more employment relationships.

2.2. Scope of protection

The scope of protection specified in Article 303(1) of the Act covers protection against termination of *an* "employment relationship." In light of the views expressed in the literature on the protection of the employment relationship of councilors, deputies, and senators, in the case of provisions establishing protection against the "termination" of a generally defined employment relationship, it should be assumed that the scope of protection includes protection against dismissal and protection against the effects of dismissal in the form of termination of the employment relationship, if the termination would take place after the grounds for protection arose, protection against termination with notice, and protection against termination without notice [Marciniak 2024, 104; Niedbała 2010, 356-57].

In light of Article 303(1), it should therefore be assumed that in the case of protection of a contractual employment relationship, the scope

[4] See resolution of October 30, 1990, ref. no. III PZP 16/90.

of protection covers protection against unilateral legal actions taken by the employer, such as termination, termination before the grounds for protection arise, and termination without notice for reasons not attributable to the employee, as specified in Article 53 of the Labor Code.[5]

Exceptional protection against definitive termination of employment is closely linked to protection against termination of working conditions and pay [Florek 1976, 133]. A guarantee of maintaining the employment relationship is only possible if the guarantees cover both protection against termination of the employment relationship and against unilateral changes to its terms. The purpose of this interpretation is to prevent circumvention of protection against definitive termination. The discussed Article 303(1) does not explicitly establish specific protection against termination of employment conditions and remuneration. However, in light of the above comments and Article 42(1) of the Labor Code, it should be assumed that the scope of protection provided for in Article 303(1) of the Act also includes protection against termination of employment conditions and remuneration. Pursuant to Article 42(1) of the Labor Code, the provisions on termination of an employment contract apply accordingly to the termination of terms and conditions of employment.

The protection in question is not absolute, as it is excluded in the cases specified in the Act.

First of all, apart from the above-mentioned cases of employment under fixed-term contracts, the employee's consent is not required for termination of employment without notice due to the employee's fault. These situations are specified in Article 52(1) of the Labor Code.[6]

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[5] Article 53 of the Labor Code: "§ 2. An employer may terminate an employment contract without notice: 1) if the employee's inability to work due to illness lasts: a) longer than 3 months – if the employee has been employed by the employer for less than 6 months, b) longer than the total period of receiving remuneration and allowance for this reason and receiving rehabilitation benefits for the first 3 months – if the employee has been employed by the employer for at least 6 months or if the inability to work was caused by an accident at work or an occupational disease; 2) in the event of a justified absence from work for reasons other than those listed in point 1, lasting longer than 1 month. § 2. Termination of an employment contract without notice may not take place in the event of an employee's absence from work due to childcare – during the period of receiving benefits for this reason, and in the event of an employee's isolation due to an infectious disease – during the period of receiving remuneration and benefits for this reason."

[6] Art. 52(1) of the Labor Code: "The employer may terminate the employment contract without notice due to the employee's fault in the event of: 1) a serious breach of the employee's basic duties; 2) the employee committing a crime during the term of the employment contract which makes it impossible to continue employing him in his position, if the crime is obvious or has been established by a final judgment; 3) the employee's culpable loss of the qualifications necessary to perform the work in his position."

The employee's consent is also waived in the event of the employer's bankruptcy or liquidation. In light of the Supreme Court's case law, the liquidation of a branch that is not an independent employer does not constitute the liquidation of the employer and therefore does not remove the protection.[7] Similarly, it should be assumed that in the event of the liquidation of an employer, in connection with which all or part of the workplace run by the employer is transferred to another employer who continues the activity or undertakes a similar activity. As emphasized by the Supreme Court in its judgment of April 21, 2025,[8] in such a situation, employees continue to be protected against termination or dissolution of their employment contract under specific provisions. The liquidation of an employer must, in essence, involve the loss of its legal existence. In turn, in its decision of March 5, 2025,[9] the Supreme Court indicated that the liquidation of an employer, as a condition precluding the protection of employees against termination or dissolution of an employment contract, comes into play at the moment the liquidation is ordered, unless such a decision is invalid or apparent. In light of the Supreme Court's judgment of May 11, 2017,[10] the mere removal of a natural person from the business register cannot be equated with the liquidation of the employer. This decision has administrative and legal effects, and notification of the entrepreneur that they have ceased their business activity is sufficient grounds for its issuance. The decision to remove a person from the register is declaratory in nature. It does not constitute the abolition of the legal personality of the person making the notification. It is also possible that the person ceased to conduct business activity, losing the status of an entrepreneur, long before reporting this fact to the business register, or that they actually continue such activity, employing workers for this purpose, despite having previously been removed from the business register.[11] In order to speak of the liquidation of an employer, formal and legal actions aimed at abolishing the legal existence of the employer (e.g., removal from the business register, removal from the National Court Register) must be accompanied by a complete factual cessation of the employer's business activity.

Interpretation problems also concern the grounds for revoking protection in the form of the employer's bankruptcy, which is not defined by the provisions in question or by the provisions of the Labor Code. Guidance in this regard can be found in the Act of February 28, 2003, Bankruptcy

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[7] See Supreme Court judgment of April 27, 2022, ref.no. I PSKP 51/21, Lex no. 3431711.

[8] Judgment of the Supreme Court of April 1, 2025, ref. no. III PSKP 3/25, Lex no. 3851149; judgment of the Supreme Court of March 6, 2024, ref. no. I PSKP 6/23, OSNP 2025, No. 1, item 2.

[9] Ref. no. II PSK 120/24, Lex no. 3844534.

[10] Ref. no. II UK 213/16, Lex no. 2312025.

[11] Judgment of the Court of Appeal in Gdańsk of January 18, 2017, ref. no. III AUa 1489/16, Lex no. 2284901.

and Restructuring Law.[12] According to the Supreme Court judgment of April 4, 2007,[13] the provision of Article 41[1](1) of the Labor Code does not apply to bankruptcy with the possibility of entering into an arrangement.[14] It should be assumed that this interpretation also applies to bankruptcy referred to in Article 303 of the Homeland Defense Act.

2.3. Ineffectiveness of termination of employment before conscription into regular military service or territorial military service

Pursuant to Article 303(3) of the Act, if the period of notice of termination of employment given by the employer or the employee expires after the date of the employee's call-up for basic military service or territorial military service, the notice of termination becomes ineffective. The ineffectiveness of the notice of termination means that it does not produce the legal effect intended by the employer in the form of termination of the employment relationship. In this case, it is automatic ineffectiveness, resulting from the force of law. In this situation, the employment relationship may only be terminated if the employee so requests. The provision does not specify which types of employment contracts are affected by the ineffectiveness of termination. It should be assumed that the ineffectiveness by operation of law covers the termination of any employment contract made before conscription into basic military service or territorial military service.

3. PROTECTION OF THE EMPLOYMENT RELATIONSHIP OF THE SPOUSE OF A SOLDIER PERFORMING COMPULSORY BASIC MILITARY SERVICE

During the period of compulsory basic military service, the employer may terminate the employment relationship with the spouse of a soldier only due to the employee's fault and in the event of the employer's bankruptcy or liquidation.[15]

According to the content of the cited provision, protection is granted to the spouse of a soldier. Determining the subjective scope of protection, therefore, requires establishing who the legislator understands by the term "spouse." According to the Constitution of the Republic of Poland, marriage is a union between a man and a woman. In the light of Article 1(1) of the

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[12] Journal of Laws No. 60, item 535 as amended.

[13] Ref. no. III PK 1/07, OSNP 2008, No. 11-12, item 164.

[14] Article 267 et seq. of the Act of February 28, 2003, the Bankruptcy and Restructuring Law, Journal of Laws No. 60, item 535 as amended.

[15] Article 18, Journal of Laws No. 78, item 483 as amended.

Family and Guardianship Code,[16] marriage occurs when a man and a woman, both present, make a declaration before the registrar that they are entering into marriage.

A marriage is also concluded when a man and a woman, entering into a marriage subject to the internal law of a church or other religious association, declare their intention to simultaneously enter into a marriage subject to Polish law in the presence of a clergyman, and the registrar then draws up a marriage certificate.

In turn, the Family and Guardianship Code, in Section II entitled "Rights and obligations of spouses," in Article 14, refers to husband and wife. In subsequent provisions, including Articles 15, 18, and 22, it defines husband and wife as spouses, i.e., persons in a *formal* marital relationship. Spouses are therefore persons who have entered into marriage: husband (man) or wife (woman).

In light of the above findings, it should be assumed that the protection established in Article 303(3) of the Homeland Defense Act does not apply to persons who are in informal relationships with soldiers performing compulsory basic military service, i.e., in relationships that are not formally registered as marriage, such as cohabitation.

The employment relationship of the spouse of a soldier performing compulsory basic military service is protected by a prohibition on termination of employment. The basic feature identifying the prohibition is that, with a few exceptions strictly defined by law, the employer's right to terminate, dissolve, or change the terms and conditions of employment and pay is suspended [Florek and Zieliński 2004, 104; Kisielewicz 2014, 110]. The protection afforded to the spouse is therefore implemented by means of the strongest legal measure of special protection provided for by Polish labor law.

When defining the scope of protection, concerning the basis for establishing an employment relationship, the legislator, as in the case of soldiers performing basic military service, extended protection to spouses of soldiers in a broadly understood employment relationship, regardless of the basis for its establishment. It means that, formally, the protection covers spouses of soldiers performing work based on all types of employment relationships that may cease as a result of termination by the employer.

In the case of a contractual employment relationship, protection covers employment relationships established based on fixed-term contracts, such as trial periods and fixed-term contracts, as well as indefinite-term contracts. However, it should be assumed that the guarantees of protection do not apply to the termination of an employment relationship upon the expiry of the term for which the fixed-term contract was concluded. The scope

[16] Journal of Laws of 2023, item 2809.

of protection in the case of a contractual employment relationship covers termination, termination before the grounds for protection arise, termination with notice, and termination without notice for reasons not attributable to the employee, as provided for in Article 53 of the Labor Code. Furthermore, in accordance with earlier comments on the protection of soldiers, it should be assumed that the scope of protection also covers termination of working conditions and pay.

The protection of spouses performing basic military service is excluded in cases where the termination is solely due to the fault of the employee, i.e., for reasons specified in Article 52 of the Labor Code, and in the event of the employer's bankruptcy or liquidation.

4. UNPAID LEAVE

4.1. Unpaid leave for training as part of the voluntary basic military service

In order to ensure the smooth running of military service, the Homeland Defense Act provides for unpaid leave granted for the duration of training as part of voluntary basic military service and for the duration of territorial military service on a rotational basis. Pursuant to Article 304 of the Act, an employer is obliged to grant unpaid leave for the duration of training to a person who is in an employment relationship and undergoing basic or specialist training (Article 143(2) of the Act). The granting of leave by the employer is mandatory. The leave is linked to the special protection of the permanence of the employment relationship. Pursuant to the aforementioned provision, from the date of informing the employer about the start date of basic training, until its completion and during the period of specialist training, as well as for a period of 12 months from the date of its completion, the employer may not terminate or give notice of termination of the employment relationship with the person undergoing such training. The provisions of Article 303(1) and (3) of the Act apply accordingly in this case, which means that the employment relationship with a person called up for basic military service or territorial military service may only be terminated with their consent. Furthermore, if the period of notice of termination of the employment relationship given by the employer or the employee expires after the start date of the training, the notice of termination becomes ineffective. In this case, the employment relationship with an employee on unpaid leave may only be terminated at their request.

The protection granted during unpaid leave granted for the duration of training as part of voluntary basic military service and for the duration of territorial military service on a rotational basis does not apply

to employment contracts concluded for a trial period or for a fixed term not exceeding 24 months, as well as in the event of the employer's bankruptcy or liquidation and in the situations specified in Article 52 of the Act of June 26, 1974 – Labor Code. In summary, protection is therefore excluded if the employer may terminate the employment contract without notice due to the employee's fault, and in the event of the employer's bankruptcy or liquidation. In these cases, the employment relationship is terminated on general terms and does not require the consent of the person on leave.

The legislator also excluded protection in the situation referred to in Article 1(1) of the Act of March 13, 2003, on special rules for terminating employment relationships with employees for reasons not related to the employees,[17] i.e., in the case of collective redundancies.

4.2. Unpaid leave for the duration of rotational territorial military service

An employer shall grant an employee called up for rotational territorial military service, except for service performed on a one-off basis during or on a day off from work, unpaid leave for the duration of such service. Leave is granted upon request, and in the case of a call for immediate appearance, based on a notification from the head of the military recruitment center. During unpaid leave, the employee retains all rights arising from the employment relationship, except for the right to remuneration. These provisions apply mutatis mutandis to reserve soldiers

4.3. Leave of absence at the request of an employee called up for active military service

Pursuant to Article 311 of the Homeland Defense Act, at the request of an employee called up for active military service, except for professional military service, and serving in the reserves, the employer is obliged to grant him leave from work without the right to remuneration for 2 days. This right does not apply in the case of an immediate call-up.

At the request of an employee who has performed territorial military service on a rotational basis, on a one-off basis, continuously for a period of at least 30 days, the employer is obliged to grant him/her leave from work for 1 day after completing this service, without the right to remuneration.

In the above cases, however, the employer may, at its own expense, pay the employee remuneration for the period of leave from work. The right to remuneration in such situations could also result from a collective labor agreement or remuneration regulations.

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[17] Journal of Laws of 2025, item 570.

5. RULES FOR COUNTING THE PERIOD OF ACTIVE MILITARY SERVICE TOWARDS THE LENGTH OF SERVICE

Article 312 of the Homeland Defense Act specifies the rules for counting the period of military service towards the length of service on which employee entitlements depend, e.g., the right to vacation, seniority allowance, jubilee award, and severance pay for reasons not attributable to the employee.

Under current law, for the purposes of acquiring the right to employee benefits and entitlements arising from an employment relationship, the provisions of the Labor Code and other acts use two types of seniority, namely company seniority and general seniority.

The concept of company seniority means that only periods of employment with a given employer are included in the period of employment on which the acquisition of a given entitlement arising from the employment relationship depends, e.g., death benefits [Florek 1980, 77ff]. The structure of general length of service, on the other hand, means that all periods of employment with all employers are included in the period of employment, e.g., vacation time [ibid.].

As follows from the aforementioned Article 312, the legislator differentiates the rules for including the period of service in the length of service depending on whether the employee took up employment with the employer who employed him before his call-up for basic military service or whether the employee took up employment with another employer.

An employee who, within 30 days of being discharged from active military service, excluding professional military service and basic military service, took up employment with the employer with whom they were employed on the date of their call-up for such service, the period of military service shall be included in the period of employment with that employer in respect of all rights arising from the employment relationship. In this case, the period of active military service shall be included in both the length of service and the general length of service.

According to Article 313 of the Act, an employee who, within 30 days of being discharged from active military service, excluding professional military service, took up employment for the first time or with an employer other than the one with whom he or she was employed on the date of being called up for such service, the period of military service shall be included in the period of employment required to acquire or retain rights arising from the employment relationship, except for rights exclusively granted to employees of the employer with whom they took up employment. Therefore, if an employee takes up their first job after leaving the service or with another employer, the period of service is, as a rule, included in the

total length of service if this is required to acquire rights arising from the employment relationship. An exception applies to entitlements to so-called company benefits, i.e., those granted by a given employer (such entitlements may result, for example, from a collective labor agreement, remuneration regulations, or a collective agreement), which most often depend solely on the length of service at the company. In this case, the period of service is not included in the length of service at the company.

A necessary condition for counting the period of military service towards seniority is to meet the 30-day deadline for taking up employment. The deadlines for taking up employment are considered to have been met if the employee was unable to take up employment for reasons justifying their absence from work.

An employee who took up employment after 30 days from the date of discharge from active military service, except for professional military service, the period of such service shall be included in the period of employment required to acquire or retain rights arising from the employment relationship, except for rights exclusively granted to employees of the employer with whom they have taken up employment.

The above provisions apply if specific provisions do not provide for more favorable rights. More favorable rules may result from another law or, for example, a collective bargaining agreement.

The application of the above provisions does not result in the loss of unemployment benefits specified in the provisions of the Act of March 20, 2025, on the labor market and employment services.[18]

In the case of Territorial Defense Force soldiers, only the period of rotational territorial military service is included in the period of employment required to acquire or retain rights arising from the employment relationship. As follows from the provision, this period is included in both the general and the company's length of service.

6. OBLIGATION TO RE-EMPLOY AN EMPLOYEE CALLED UP FOR COMPULSORY BASIC MILITARY SERVICE IN THEIR PREVIOUS POSITION OR AN EQUIVALENT POSITION

An employer who employed an employee on the date of conscription for compulsory basic military service is obliged to employ him in his previous position or in an equivalent position in terms of the type of work and remuneration, if, within 30 days of his discharge from service, the employee reports to that establishment in order to take up work. Failure to meet the

[18] Journal of Laws, item 620.

30-day deadline shall result in the termination of the employment relationship, unless there were reasons justifying the absence from work. Suppose an employee has obtained other or higher professional qualifications during basic military service. In that case, the employer is obliged, at the employee's request, to employ him or her, as far as possible, in a position that corresponds to the qualifications acquired in the Armed Forces (Article 315 of the Act).

It follows from the above provision that the legislator prefers to employ an employee returning after completing their service in the position they held before their call-up. An alternative, which provides the employer with some flexibility, is to employ them in a position that is equivalent in terms of work type and remuneration. The provision specifies two conditions for a position to be considered equivalent. First of all, when assessing whether a position is equivalent, the type of work must be taken into account. In light of current views, a position should be considered equivalent if it involves the same type of work and provides the employee with their previous professional status [Wratny 2013, 410-11]. Equal pay, in turn, means that the position guarantees the employee the same level of remuneration and promotion opportunities as before.[19]

If an employee has obtained other or higher professional qualifications during their basic military service. In that case, the employer is obliged, at the employee's request, to employ them, as far as possible, in a position that corresponds to the qualifications acquired in the Armed Forces. As follows from the cited provision, the employer is bound by the employee's request, provided that they can do so. If the employer does not have such a possibility, they may refuse to comply with the request.

After completing basic military service, an employee has the right to return to the employer who employed him at the time of his call-up for service. However, the employee is obliged to report to the workplace within 30 days. Failure by the employee to report to the workplace within the 30-day deadline for reporting to the workplace to resume work will result in the termination of the employment relationship, unless the employee can prove that there were reasons justifying their absence from work, e.g., inability to work due to illness, the need to care for a child, or other family member. Once the reason for the absence has ceased to exist, the employee should immediately report their readiness to start work. The provision in question, therefore, establishes legal readiness to start work. Such readiness occurs when an employee informs the employer of their willingness to resume work, but is actually unable to do so for reasons justifying their absence.[20]

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[19] See Wratny 2013, 410-11 and the literature cited therein.

[20] See Supreme Court Resolution of May 28, 1976, ref. no. V PZP 12/76, OSNCP 1976, No. 9, item 187.

According to Article 315(1), the employee should report to the workplace in order to resume work. It seems that the term "workplace" in this case is synonymous with "employer." It is confirmed, among other things, by the wording of Article 74 of the Labor Code concerning the right of an employee on leave to return to work in order to perform an elected function.

An employee's declaration of reporting for actual work or, in legal terms, when there are grounds justifying its actual commencement, results in the resumption of the employment relationship. It should be assumed that from that moment on, the employee is entitled to benefits under the employment relationship [Wratny 2013, 108].

CONCLUSION

A review of the legal regulations establishing legal solutions aimed at creating conditions for employees to perform basic military service and service in Territorial Defense Forces units for the benefit of their homeland gives grounds to conclude that they are comprehensively capable of fulfilling their role. The provisions discussed have been formulated in a reasonably precise manner, which is a significant advantage and facilitates their application in practice.

However, there are some doubts regarding the employee's consent to the termination of employment, which may lead to a situation where protection is used in a manner contrary to the socio-economic purpose of this right or the principles of social coexistence. The legislator also does not clearly indicate whether the consent is prior and in what form it should be expressed.

The different levels of binding force of the protection measures applied in the case of a soldier (consent) and his or her spouse (prohibition) may also raise concerns.

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A FEW REMARKS ON POLAND'S ACCESSION TO THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

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Abstract. The European Public Prosecutor's Office (the EPPO) is a new independent body of the European Union, established by Council Regulation (EU) 2017/1939 for investigating, prosecuting and bringing to judgement crimes against the financial interests of the EU. The establishment of the European Public Prosecutor's Office via enhanced cooperation was due to a lack of unanimity among the EU Member States. In the first years of the EPPO's operation, Poland was a non-participating EU Member State. After the parliamentary elections in 2023, there was a clear change in the Polish government's attitude towards the European Public Prosecutor's Office, which resulted in steps being taken towards joining this institution. Since March 2024, Poland has been participating in the European Public Prosecutor's Office. The accession process required numerous measures to be taken at both national and EU level. This article presents the relations between Poland and the European Public Prosecutor's Office before and after joining, and discusses activities related to the accession process.

Keywords: European Public Prosecutor's Office; the EPPO; European cooperation in criminal matters; Poland as participating EU Member State; the financial interests of the EU.

INTRODUCTION

The European Public Prosecutor's Office (the EPPO) is a new independent public prosecution office of the EU, established with , for investigating, prosecuting and bringing to judgement crimes against the financial interests of the EU. The EPPO was established by Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, and began its operations on 1 June 2021. The work on the creation of the European Public Prosecutor's Office took many years, but for a long time the real chances of its establishment were minimal.

The idea of a European Public Prosecutor's Office was first included in the *Corpus Juris* project (1997) [Namysłowska 1999]. The concept of creating this body aroused considerable interest and became the subject

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of lively scientific and political discourse. The deliberations with , concerned all issues related to the EPPO: the purposefulness of its establishment, its competences, structure, principles of functioning, and rules of cooperation with Member States and EU institutions [Dudzik 2022, 60]. However, the most important factor for the establishment of the EPPO was the adoption of the Treaty of Lisbon, which provided the legal basis for the creation of this body. Pursuant to Article 86(1) of the TFEU,[1] "in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust." A further part of this provision sets out the procedure for establishing the EPPO, also providing for the option of using enhanced cooperation in this area, and indicates in a very general way the competences of the new body [Dudzik 2022, 60]. On 17 July 2013, the Commission published a proposed regulation regarding the establishment of the EPPO,[2] which sparked a renewed debate on the establishment of this institution. Many countries expressed their reservations through the so-called yellow card procedure [Tomczyk 2018, 186-88]. The Commission did not take the comments into account and decided to proceed with the proposal. In the course of subsequent legislative work, which lasted several years, certain modifications were made, but this did not result in all Member States approving the idea of establishing a European Public Prosecutor's Office. For this reason, the establishment of the European Public Prosecutor's Office was only possible via enhanced cooperation.

On 3 April 2017, sixteen Member States (Belgium, Bulgaria, the Czech Republic, Croatia, Cyprus, Germany, Greece, Finland, France, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Spain) gave notice of their intention to engage in enhanced cooperation to establish the EPPO. Shortly after, on 12 October 2017, the Council adopted Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (hereinafter Regulation 2017/1939).[3] By that time, four more countries had joined enhanced cooperation (Austria, Estonia, Italy and Latvia) with two more (the Netherlands and Malta) joining after the adoption of the regulation. Therefore, when it commenced operations on 1 June 2021, the European Public Prosecutor's Office was composed of 22 EU Member States, while the following countries remained outside

[1] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2016 OJ C 202/01.

[2] European Commission, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, Brussels, 17 July 2013, COM(2013) 534 final.

[3] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), 2017 OJ L 283/1.

it: Poland, Hungary, Sweden, Denmark and Ireland.[4] Since 2024, the group of countries participating in the European Public Prosecutor's Office's enhanced cooperation has expanded to include two more countries, as Poland and Sweden joined the European Public Prosecutor's Office this year.

1. POLAND AS A NON-PARTICIPATING EU MEMBER STATE

In the first years of the European Public Prosecutor's Office's operation, Poland remained outside it as a country not participating in enhanced cooperation. This meant that Poland was not bound by the provisions of Regulation 2017/1939, but as a Member State of the European Union, it was obliged to cooperate with the European Public Prosecutor's Office. The obligation of loyal cooperation stems from Article 4(3) TEU. Article 325 TFEU also stipulates that both the EU and its Member States are obliged to counter all activities affecting the financial interests of the Union, and that Member States are obliged to take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests [Dudzik 2022, 64-65].

Initially, cooperation between Poland and the EPPO was not going well. According to the Polish government, there was no legal possibility of cooperation with the European Public Prosecutor's Office, as the provisions of the Code of Criminal Procedure regulated cooperation between Polish judicial authorities and the authorities of European Union Member States, and the European Public Prosecutor's Office is a body of the European Union, not a Member State.[5] For this reason, Article 615a was introduced into the Code of Criminal Procedure,[6] and since then, real and effective cooperation between Poland and the EPPO has begun.

2. POLAND AS A PARTICIPATING EU MEMBER STATE

The 2023 parliamentary elections were a turning point in the approach to Poland's participation in the European Public Prosecutor's Office. Poland's accession to the European Public Prosecutor's Office was one of the election slogans of the Civic Platform (point 26 in the so-called 100 concrete measures for the first 100 days of government: "We will prepare Poland to join the European Public Prosecutor's Office in order to more effectively

[4] Denmark and Ireland benefit from an opt-out clause in the area of EU freedom, security and justice.

[5] See more: Dudzik 2022.

[6] Act of 27 October 2022 amending the Act – Code of Criminal Procedure and the Act – Law on the Public Prosecutor's Office, Journal of Laws item 2582.

prosecute financial fraud, corruption, money laundering and cross-border VAT fraud"). Krisztina Karsai is undoubtedly right in saying that participation in the EPPO primarily appears as a political rather than a professional issue in Member States [Karsai 2020, 7]. It is therefore reasonable to conclude that Poland's decision to join the EPPO, as well as its earlier refusal, regardless of the arguments put forward, were primarily politically motivated.[7]

Poland's accession to the European Public Prosecutor's Office was one of the priorities of the new Minister of Justice, Prosecutor General Adam Bodnar. Therefore, on his first day in office (13 December 2023), he signed a request to send the relevant notification to the European Commission and the European Council, thus initiating the procedure for Poland's accession to the EPPO. On 27 December 2023, the Council of Ministers adopted this request at its meeting. On 5 January 2024, Poland notified the President of the European Commission and the Council of the European Union of its intention to join enhanced cooperation on the establishment of the EPPO. Following an analysis of the notification, on 29 February 2024 the Commission issued Decision 2024/807[8] confirming Poland's participation in the EPPO. Poland became part of the European Public Prosecutor's Office on 20 March 2024, i.e. on the date of entry into force of Decision 2024/807.[9]

The next stage in Poland's accession to the EPPO was the selection, through competitions, of candidates for the position of Polish European Prosecutor[10] and candidates for Polish delegated European prosecutors.[11] Three candidates were selected from among those who applied for the position of European Prosecutor: Agnieszka Adamowicz from the Regional Prosecutor's Office in Lublin, Grażyna Stronikowska from the National Prosecutor's Office and Paweł Wąsik from the Regional Prosecutor's Office in Poznań. In accordance with Article 16(2) and (3) of Regulation 2017/1939, the candidates nominated by Poland were assessed by a selection panel, and then on 12 December 2024, the Council of the EU, by a simple majority, selected and appointed Grażyna Stronikowska to the position of European Public Prosecutor for a six-year term.

Twelve candidates for Polish Delegated European Prosecutors, nominated by Poland, were presented to the College of the European Public Prosecutor's

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[7] See more: Dudzik 2022, 62-64.

[8] Commission Decision (EU) 2024/807 of 29 February 2024 confirming Poland's participation in cooperation on the establishment of the European Public Prosecutor's Office, OJ EU L of 29.2.2024

[9] Article 3 of Decision 2024/807

[10] See https://www.gov.pl/web/sprawiedliwosc/minister-sprawiedliwosci--prokurator-generalny-oglasza-nabor-kandydatow-na-urzad-prokuratora-europejskiego [accessed: 14.06.2025].

[11] See https://www.gov.pl/web/sprawiedliwosc/ogloszenie-o-naborze-kandydatow-na-urzad-delegowanego-prokuratora-europejskiego [accessed: 14.04.2025].

Office through the European Chief Prosecutor.[12] In addition, the selection panel for candidates for the position of Delegated European Prosecutor drew up a reserve list of four candidates in case the College of the European Public Prosecutor's Office rejected the previously proposed candidates. On 16 December 2024, at the request of European Chief Prosecutor Laura Kövesi, the European Prosecutor's Office decided to appoint eight European Delegated Prosecutors in Poland for a renewable five-year term (Article 17(1) of Regulation 2017/1939).[13] This was only the first stage in the appointment of Polish delegated European prosecutors, as according to the Minister of Justice, there will ultimately be 20-22 of them,[14] although it is sometimes suggested that there will be 24. There are also statements that there will ultimately be between 16 and 26,[15] or even thirty. Initially, eight delegated European prosecutors performed their duties in Poland: three at the Office of the Delegated European Prosecutor at the Regional Prosecutor's Office in Warsaw[16] and five at the Office of the Delegated European Prosecutor at the Regional Prosecutor's Office in Katowice.[17] In October 2025, another eight candidates for delegated European prosecutors were selected.[18] In accordance with the Regulation of the Minister of Justice of 25 March 2025 on the establishment of offices of the delegated European Public Prosecutor and the determination of their seats and areas of jurisdiction, four offices are ultimately to operate: the two indicated above, as well as in Lublin and Gdańsk.[19]

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[12] See https://www.gov.pl/web/sprawiedliwosc/lista-wylonionych-kandydatow-na-urzad-delegowanego-prokuratora-europejskiego-oraz-lista-rezerwowa-kandydatow-na-urzad-delegowanego-prokuratora-europejskiego [accessed: 15.06.2025].

[13] The following prosecutors were appointed: Katarzyna Furczyk, Magdalena Guga, Tomasz, Michał Jandziak, Łukasz Klimas, Bolesław Laszczak, Agnieszka Marcińczyk, Małgorzata Turlewicz, Przemysław Walat. Decision of the European Prosecutor's Office of 16 December 2024 on the appointment of delegated European prosecutors in the Republic of Poland: https://www.eppo.europa.eu/en/documents/documents?page=2 [accessed: 15.06.2025].

[14] See https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/9810650,bodnar-okolo-20-prokuratorow-bedzie-delegowanych-do-prokuratury-europ.html [accessed: 15.06.2025].

[15] Statement by Adam Bodnar on 31 March 2025, https://www.gov.pl/web/pr-warszawa/otwarcie-biura-delegatury-prokuratury-europejskiej-przy-prokuraturze-regionalnej-w-warszawie [accessed: 15.06.2025].

[16] Magdalena Guga, Łukasz Klimas, Małgorzata Turlewicz.

[17] Katarzyna Furczyk, Tomasz Jandziak, Bolesław Laszczak, Agnieszka Marcińczyk, Przemysław Walat.

[18] Michał Choroba, Joanna Garus, Jolanta Piwowarska, Małgorzata Szczęsna (Warsaw Office), Agnieszka Kępka (Lublin Office), Anna Wolska-Bagińska (Gdańsk Office), Jacek Bilewicz and Joanna Pawlik-Czyniewska, https://www.gov.pl/web/prokuratura-krajowa/wyniki-konkursu-wylaniajacego-prokuratorow-na-kandydatow-na-urzad-delegowanego-prokuratora-europejskiego [accessed: 15.11.2025].

[19] Regulation of the Minister of Justice of 25 March 2025 on the establishment of offices of the delegated European Public Prosecutor and the determination of their seats and areas of jurisdiction, Journal of Laws, item 376.

Poland's accession to the European Public Prosecutor's Office necessitated legislative changes. Although Regulation 2017/1939, which regulates the status and activities of the European Public Prosecutor's Office, is directly applicable, certain issues required regulation in national law. Thus, on 12 December 2024, a government bill was submitted to the Sejm , which was passed by the Sejm on 24 January 2025.[20] Pursuant to the aforementioned Act, four legal acts were amended: the Act of 28 January 2026 – Law on the Public Prosecutor's Office,[21] the Act of 6 June 1997 – Code of Criminal Procedure,[22] the Act of 18 December 1998 – on court and prosecutor's office employees[23] and the Act of 27 August 2004 on healthcare services financed from public funds.[24] It is worth noting that the need to introduce appropriate changes had already been recognised in the literature [Dudka 2024, 50-55; Głogowska 2024, 218-22; Stronikowska 2024, 34-39]. Considering the enormous change associated with the introduction of a new procedural body into the Polish criminal process and the systemic changes in the structure of the public prosecutor's office, it is reasonable to conclude that the scope of the changes is relatively small. This is due to the fact that the provisions establishing the European Public Prosecutor's Office are contained in a regulation that is directly applicable.

CONCLUSIONS

Poland's path to the European Public Prosecutor's Office was not straightforward. Initially, Poland decided not to participate in the creation of this new institution. It was only after three years of the European Public Prosecutor's Office's operation that the situation changed. Regardless of all the arguments for and against the decision to join the European Public Prosecutor's Office, it must be said that it was revolutionary. A completely new European body with unique status and powers appeared in the Polish system of legal protection authorities. Therefore, it was necessary for Poland to take a number of administrative, organisational and legal steps. The legislative changes, preceded by an analysis of doctrinal views and the experiences of other countries, seem to be entirely justified. However, it is worth waiting for a more detailed assessment of them, observing their application in practice.

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[20] Act of 24 January 2025 amending certain acts in connection with the accession of the Republic of Poland to enhanced cooperation in the field of the European Public Prosecutor's Office, Journal of Laws, item 304.

[21] Journal of Laws of 2024, item 390.

[22] Journal of Laws of 2025, item 46.

[23] Journal of Laws of 2018, item 577.

[24] Journal of Laws of 2004, item 146 as amended.

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NO OBJECTION BY THE TRADEMARK OWNER TO PARALLEL IMPORTS OF A MEDICINE – COMMENTS IN LIGHT OF THE SUPREME COURT RULING IN THE BENALAPRIL CASE

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Abstract. Parallel import of repackaged medicinal products have been a constant subject of CJEU case law since the 1970s. One might therefore assume that all relevant issues have already been clarified and that the interpretation of the legal basis of this economic phenomenon is no longer in doubt. However, even such a seemingly simple institution as the obligation to notify the intention to market a repackaged medicinal product can, in the practice and theory of industrial property law, give rise to disputes and lead to completely different rulings by the highest courts of the Member States. An example of this is the recent judgment of the Polish Supreme Court in the *Benalapril* case. The interpretation of the above-mentioned premise adopted in this judgment differs to a significant extent, as regards the determination of the consequences of the trade mark owner's failure to oppose the notification, from the decisions of the courts of other Member States. The interpretation adopted also needs to be scrupulously assessed in the light of the CJEU case law, which has adopted interpretative guidelines suggesting a different solution to the legal issue that has arisen.

Keywords: free movement of goods; parallel trade; exhaustion of IP rights; repackaging; consistent interpretation

INTRODUCTORY REMARKS

Parallel import of medicinal products is a prime example of the implementation of the principle of free movement of goods.[1] It consists in a parallel importer purchasing a medicinal product in a Member State of the European Economic Area (European Union plus Iceland, Liechtenstein

[1] The rules on parallel imports were established in the course of interpreting the current Articles 34-36 of the Treaty on the Functioning of the European Union of 25 March 1957, OJ EU 2010 No. C 83 [hereinafter: TFEU]. For more on this subject, see the European Commission document "Commission Communication of 30 December 2003 on parallel imports of proprietary medicinal products for which marketing authorisations have already been granted", COM(2003) 839.

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and Norway) a medicinal product that has been legally placed on the market there by the responsible entity (usually also the owner of the trademark appearing on the packaging) in order to subsequently sell that product in another EEA Member State.[2] The economic justification for parallel imports is the price differences for specific products in the countries of export and import, which make the whole venture economically viable. The price differences for pharmaceuticals in individual national markets are due to many factors, among which the pricing policy of pharmaceutical companies plays a significant role [Skubisz 2007, 419-52].

Pharmaceutical manufacturers, primarily in order to pursue their economic interests, take measures to counteract parallel imports of pharmaceuticals.[3] One of the methods of blocking parallel imports, quite commonly used in commercial practice, is to challenge the legality of the importer's actions as infringing intellectual property rights, primarily trademarks commonly used to identify medicines in commerce.[4]

Allegations of trademark infringement, as a means of blocking parallel imports, are in practice the most common tool for protecting the economic interests of manufacturers. Such allegations have by far the widest scope of application, in the sense that they can be used in virtually every case of parallel importation. In most cases of parallel importation of medicines, the parallel importer repackages the product in order to market it in the importing country. Due to the differences in the conditions for marketing medicines that persist in individual Member States, it is extremely rare for a parallel imported medicine to be placed on the market in the importing country

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[2] In this way, parallel imports of medicinal products constitute a direct implementation of the Cassis de Dijon formula, as defined in the EU acquis, which is the thesis adopted in the grounds for one of the fundamental judgments of the CJEU establishing the interpretation of the current Articles 34-36 TFEU (judgment of 20 February 1979 in Case 120-78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42).

[3] Such actions take place despite the fact that parallel imports of medicinal products are beneficial from the point of view of patients and the budget of the importing country. The social benefits result from lower drug prices for patients and, consequently, increased availability. The economic benefits include savings for patients and the state budget, as well as the direct impact of parallel imports on the realisation of the EU (and, more broadly, EEA) pharmaceutical market. In view of these benefits, the national legislation of EU Member States contains regulations supporting parallel imports of medicinal products in various ways. A classic example is German law, which stipulates that a certain percentage of medicinal products placed on the German market must come from parallel imports. Polish law, specifically the Pharmaceutical Law Act of 6 September 2001, also contributes to an increase in parallel imports by introducing a simplified procedure for granting parallel import licences.

[4] There is no doubt that medicinal products are identified in trade by trademarks rather than by the name of the active substance or other INN markings. This applies to identification by entities holding marketing authorisations (i.e. usually manufacturers) and, consequently, also by subsequent participants in the market, i.e. doctors, pharmacists and, ultimately, patients.

in an unchanged form, i.e. without repackaging.[5] The need for a parallel importer to take such measures, consisting in broadly understood repackaging and undoubtedly constituting an interference with the original packaging of the product imposed by law,[6] opens the door to opposition from the manufacturer on the grounds of a more or less hypothetical infringement of the function of the trademark affixed to the product packaging.

Against the backdrop of parallel imports of medicines, there is therefore a conflict between two important principles: the Treaty principle of free movement of goods, on which the functioning of the EU internal market is based, and the principle of intellectual property protection,[7] implemented in EU law through secondary legislation.[8] In the case law of the Court of Justice of the EU, numerous attempts have been made to balance these two principles in relation to parallel imports of repackaged medicines,[9] with the aim of ensuring that the conflicting interests of market participants are respected and that the public interest, expressed, for example, in the right of patients to access medicines, is taken into account.[10] These attempts have led to the formulation of conditions for the admissibility of parallel imports of repackaged medicinal products, which are currently identified in parallel import practice and legal doctrine as the "BMS conditions."[11]

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5 In this regard, it suffices to refer to the provisions regulating the obligation to label medicines – both in terms of information on the packaging and information in the leaflet – in the language of the Member State concerned. For this reason alone, a medicine originating, for example, from the German market cannot be sold in the territory of the Republic of Poland without modification. This stems from provisions of Polish pharmaceutical law.

6 For the concept of "repackaging" in relation to parallel imports, see Dudzik 2022, 408-14.

7 The principle of free movement of goods may be restricted in exceptional cases to the extent justified by the protection of rights constituting a specific subject of industrial property. At the same time, the protection of industrial property rights must not lead to a disguised restriction on trade between Member States (see Articles 34-36 TFEU and the judgment of the Court of Justice in *Hoffmann-La Roche*, point 14, and the judgments of 12 October 1999 in the *Upjohn* case, points 37-38, and of 12 April 2002 in the *Boehringer* case, points 14-15, texts of the above-mentioned judgments in Polish in: Skubisz 2008, point 18, 20, 22 and 24).

8 Trademark Directive and EUTR.

9 Starting with the ECJ judgment of 23 May 1978 in Case 102/77 *Hoffmann-LaRoche & Co. AG* v *Centrafarm Vertriebsgesellschaft Pharmazetischer Erzeugnisse mbH*., ECR 1978, p. 01139; text in Polish in: Skubisz 2008, 303, point 18.

10 Recently, on the issue of the necessity to take into account the public interest, see the judgment of the Supreme Court of Lithuania of 10 January 2024, ref. no. e3K-3-46-313/2024 (available at https://www.lat.lt/byloje-spresta-del-lygiagretaus-vaistu-importuotojo-teises-perpakuoti-iskitos-es-valstybes-i-lietuva-importuojamus-to-paties-gamintojo-vaistus/1578). Importantly, this judgment was issued on the basis of facts almost identical to those in the *Benalapril* case. However, the Lithuanian Supreme Court adopted a diametrically different legal assessment of parallel imports and conclusions compared to the judgment of the Polish Supreme Court.

11 The name comes from the designation of the party to the proceedings before the ECJ in which the judgment establishing the current content of these premises was issued, i.e. the judgment in the Bristol-Myers Squibb case. The conditions for parallel imports of medicines within

One of these conditions is prior notification by the importer to the trademark owner of their intention to market a repackaged product from parallel import, combined with the obligation to send a sample of the repackaged product at the request of the trademark owner.[12] The subject of this statement is an assessment of the legal consequences of the trademark owner's failure to object to the notification in the context of a subsequent allegation of trademark infringement. This issue will be analysed in the light of the position of the Supreme Court in its judgment of 6 May 2022 in the Benalapril case.[13]

1. FACTS OF THE BENALAPRIL CASE

In the case in question, a parallel importer purchased a medicinal product labelled "Berlipril" on the Lithuanian market. Acting on the basis of a parallel import licence, it marketed this product on the Polish market after repackaging it in new outer packaging and changing its name to "Benalapril". The name change, referred to in practice as rebranding, resulted from the fact that the parallel imported medicinal product was marketed in Poland under this name by the manufacturer and owner of both trademarks – Berlipril and Benalapril. The name change was therefore justified by the need to inform patients about the identity of the imported medicine (Berlipril) and the medicine already on the Polish market (Benalapril).

In fulfilling its notification obligation, the parallel importer informed the owner of the Benalapril trademark of its intention to import the medicinal product from Lithuania to Poland. In addition, the importer attached

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the European Union, in the context of possible restrictions arising from industrial property rights, have been regulated in detail in the case law of the Court of Justice of the European Union. They were originally developed on the basis of the current Articles 34-36 TFEU (cf. the above-mentioned judgment of the CJEU in Case 102/77 *Hoffmann-LaRoche*). The Court then transferred the interpretation developed in this way in its entirety to the provisions of subsequent directives harmonising trademark law. According to this case law, opposition by the proprietor of a trade mark to the offering and marketing of parallel imported and repackaged medicinal products in packaging bearing the registered trade mark constitutes a disguised restriction on trade between Member States and is therefore not permissible if five specific conditions (BMS conditions) are cumulatively met: a) raising objections concerning infringement of the trade mark protection right would create a risk of artificial partitioning of the markets between Member States; b) repackaging does not affect the original condition of the product; c) the appearance of the repackaged product does not damage the reputation of the trademark and its owner; d) the new packaging contains information about the repackager and the name of the manufacturer; e) before placing the repackaged goods on the market, the importer informed the owner and, at the owner's request, provided him with samples of the packaging. The grounds for BMS are discussed in: Skubisz 2017, 108-1094.

[12] With regard to the origin of this condition and its interpretation in CJEU case law, see: Stothers 2007, 109.

[13] Polish Supreme Court ruling of 6 May 2022, ref. no. II CSKP 457/22, OSNC 2023, No. 2, item 17.

a sample of the repackaged product to the notification. In the notification, the importer clearly indicated that the imported medicine was to be marketed in Poland under the name "Benalapril" and not under the name "Berlipril" as on the Lithuanian market. Furthermore, this circumstance was obvious in light of the markings on the repackaged sample attached to the notification, as well as the decision of the competent authority granting the parallel import licence for the medicinal product under a specific name.

In response to the notification, the trademark owner objected to the planned marketing of the imported medicinal product. He indicated only two grounds for opposition: a) there was no need to repackage the product in new outer packaging, as it was sufficient to apply new self-adhesive labels to the original packaging; b) no information about the manufacturer was provided on the sample packaging. In response to the notification, the trademark owner did not object to the change of the trade name of the medicine.

It was only in the lawsuit against the importer that the trademark owner raised the objection for the first time that "changing the name of the medicine to Benalapril is not objectively necessary to ensure that the Imported Medicinal Product has actual access to the market." At the same time, however, it should be emphasised that even with this objection, the owner did not object to the continued use of the Benalapril trademark in combination with the Berlipril trademark on the packaging of the imported product. Moreover, the trademark owner admitted that this was necessary in order to inform patients that the parallel imported medicinal product was identical to the medicinal product offered on the Polish market. Subsequently, during the proceedings before the court of first instance, the trademark owner amended the statement of claim by adding a new claim concerning the prohibition of changing the trademark (product name).

2. SUBSEQUENT RULINGS IN THE CASE

The court of first instance found that the trademark owner did not object to the replacement of the trademark in response to the notification. However, in the court's opinion, the fact that the claimant did not raise an objection to the replacement of the trademark on a parallel imported product in response to the notification did not deprive him of the possibility of subsequently bringing claims based on that objection. Consequently, a judgment was issued holding the importer liable for trademark infringement consisting in the unauthorised rebranding of the product.

The defendant appealed against the judgment of the court of first instance. In its judgment of 25 October 2019, the court of second instance held that the claim based on the allegation of trademark substitution was

not justified. The court found that in a situation where the trademark owner's objection, raised in response to the notification, did not concern the replacement of the trademark at all, but only the repackaging of the medicine in new outer packaging and the placement of information about the manufacturer on the new packaging, this issue could not be the subject of subsequent claims by the trademark owner. In justifying this position, the court of second instance pointed out that, pursuant to Article 296(2)(1) of the Industrial Property Law Act, infringement of a trademark protection right consists in the unlawful use in trade of a sign identical to a registered trademark in relation to identical goods. The basic prerequisite for infringement of a trademark right specified in Article 296(2) of the Industrial Property Law is the unlawful nature of the use of the mark in trade. The use of a trademark will not be unlawful if the right holder consents to its use or if the law permits a specific manner of use of another person's trademark. The Benalapril trademark is used by the claimant in Poland as the name of a medicinal product. The defendant notified its intention to use this mark also as the name of a parallel imported medicinal product, and the claimant did not object to the use of the name itself at that time, but objected to the repackaging of the medicine. The failure of the trademark owner to object to specific actions of the parallel importer within a reasonable time period constitutes de facto confirmation by the right holder that all conditions for the admissibility (legality) of commencing and conducting parallel imports of the medicinal product in question have been met. If the proprietor of the trademark subsequently claims that any of the BMS conditions have not been met, they should indicate the factual circumstances that occurred between the expiry of the reasonable period for filing an objection and the actual filing of the objection, which would justify a change in the proprietor's position. Otherwise, the holder's actions must be considered arbitrary, undermining the principle of legal certainty.[14]

Furthermore, the Court of Appeal stated that it agreed with the appellant that the objection must raise an interpretation of the relevant provisions, as resulting from the contested judgment, which boils down to a conclusion that it is permissible to raise any allegations in the action which, in the opinion of the trademark owner, justify claims against the parallel importer, regardless of whether these allegations were raised at the notification stage. This would mean admitting allegations which the defendant had no opportunity to assess at the notification stage, i.e. before the product was placed on the market in Poland. Consequently, this would deprive the parallel importer of the opportunity to adapt its planned activities (e. g. in the appearance

[14] Judgment of the Regional Court in Warsaw of 24 July 2017, ref. no. XXII GWzt 2/17, p. 55 of the grounds.

of the packaging) to the objections raised by the right holder, which, hypothetically speaking, could be assessed by the importer as justified.[15]

The decision of the court of second instance was challenged by the Supreme Court. In the grounds for its judgment of 6 May 2022, the Supreme Court adopted an interpretation according to which the notification of the intention to repackage, which is one of the criteria of the BMS test, is the obligation of the parallel importer and is primarily intended to protect the trademark owner. The Supreme Court then stated *expressis verbis* that "in the context of the findings of fact made in the case, it is difficult to see any reasons why the plaintiff's failure to specifically notify the defendant of its intention to protect the trademark would lead to the plaintiff being denied judicial protection on the grounds of abuse of subjective rights. As a rule, entities whose rights are infringed are not required to warn potential infringers about the consequences of unlawful actions, and the possibility of exercising protective claims is not dependent on prior notification of the infringer of the intention to seek protection or on opposition to the announced (notified) infringement within a specified period."[16]

The Supreme Court's ruling raises serious concerns as to its compatibility with EU law. It does not take into account in any way the case law of the CJEU, which defines the functions of the obligation to notify the intention to import in parallel, as well as the legal nature and scope of the obligations incumbent on the parallel importer and the trademark owner as the notified entity. This is clear from the cited excerpts from the judgment, as the Supreme Court did not refer to the case law of the CJEU at all. On this basis alone, it is possible to argue that the ruling in question is flawed. By disregarding the case law of the CJEU, the Supreme Court failed to fulfil its obligation to interpret national law in accordance with EU law. It is impossible to assess the decision of the national court, which concerns an issue regulated in principle exclusively by Community case law, without referring to that case law in any way.

At the same time, the Supreme Court's judgment is inconsistent with the earlier case law of Polish courts and the case law of national courts of Member States.[17] Consequently, in the light of the Supreme Court's judgment in question, a fundamental doubt arises as to the basis for its legal assessment of the effects of the trademark owner's failure to object to the notified marketing of a medicinal product under a changed trademark.

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[15] Judgment of the Court of Appeal in Warsaw of 25 October 2019, ref. no. VII AGa 1191/18, p. 56 of the justification.

[16] Ref. no. II CSKP 457/22, 13.

[17] See the judgment of the Regional Court in Warsaw of 9 August 2016, ref. no. XXII GWzt 78/16.

3. THE EFFECTS OF THE LACK OF OPPOSITION BY THE TRADEMARK OWNER IN THE LIGHT OF CJEU CASE LAW AND THE CASE LAW OF THE COURTS OF THE MEMBER STATES

When assessing this issue, it should be emphasised at the outset that there is as yet no CJEU judgment which categorically states that the scope of the objections raised by the trademark owner in response to the notification defines in any way the objections and claims of a possible lawsuit. On the other hand, there is also no ruling which would imply that the proprietor has complete freedom in shaping the scope of these objections, regardless of his response to the parallel importer's notification.

However, it is reasonable to assume that, in the light of the case law of the CJEU, there are more arguments in favour of the thesis that the prerequisite for the notification obligation should be interpreted in such a way that the manner in which the trademark owner responds to the notification (the scope of the objections raised in the opposition to the notification) is relevant to the assessment of the validity of the subsequent allegations in the lawsuit. Thus, referring to the specific issue that arose in the Benalapril dispute, it is correct to conclude that it is not permissible for the trademark owner to oppose the marketing of a parallel imported medicinal product in packaging bearing the trademark used by the trademark owner in the country of importation where the parallel importer has notified the trademark owner of its intention to replace the trademark under which the product was sold by the trademark owner in the country of export with the trademark used by the trademark owner in the country of import for the same medicinal product, and the latter did not object to such a change of trademarks in response to the notification. However, the absence of objection by the trademark owner should be understood as both a situation in which the trademark owner does not object at all to the notified intention to import a parallel medicinal product, as well as even more so a situation in which he did raise an objection, but the allegations contained in the objection did not cover the replacement of the trademark on the parallel imported product.

In justifying the validity of such an interpretation of EU law, reference should be made first and foremost to arguments concerning the function of the notification obligation and the distribution of obligations between the parties to the notification resulting from that function.

Further considerations should therefore begin with the statement that, according to established CJEU case law, a parallel importer is obliged to notify the trademark owner of its intention to market a parallel imported medicinal product in the country of importation and to provide, at the request of the trademark owner, a sample of the repackaged product. The Court has held that a parallel importer must comply with the notification obligation in order

to place repackaged medicinal products on the market in packaging bearing a protected trademark. If the parallel importer fails to comply with this obligation, the trademark owner may oppose the marketing of repackaged medicinal products.[18] The Court also held that failure to comply with the notification obligation constitutes an infringement of the trademark per se.

However, in the light of the case law of the CJEU, the position implicitly adopted by the Supreme Court that the notification of the intention to engage in parallel importation is intended solely to protect the proprietor of the trademark is incorrect. In the aforementioned judgment in Case C-143/00, the Court confirmed that the purpose of the notification obligation is to protect the legitimate interests of the trademark owner. However, in the same judgment, the Court also pointed out that "[…] the fulfilment of that obligation does not pose any practical problems for parallel importers, provided that the proprietor responds to the notification within a reasonable time. The proper functioning of the notification system therefore presupposes that both parties concerned make genuine efforts to respect each other's legitimate interests."[19] It is therefore clear from the above excerpt from the CJEU judgment that a correctly interpreted notification obligation presupposes mutual respect for the legitimate interests of both parties – the trademark owner and the parallel importer. On this basis, it can be assumed that the thesis of a completely unilateral nature of the obligation imposed on the parallel importer is not justified.[20] Consequently, the interpretation of the Supreme Court in this respect already departs from the case law of the CJEU.

Moving on, it is necessary to determine what constitutes the legitimate interest of the parallel importer, in relation to which the Court finds that the trademark owner has an obligation to respect. In this context, it should be assumed that since the purpose of the notification obligation is to enable the trade mark proprietor to carry out a preventive assessment of the legality of parallel imports on the basis of the information provided by the parallel importer, the parallel importer may reasonably assume that, in the event of proper notification, such an assessment is actually carried out by the trade mark proprietor. Consequently, the parallel importer may reasonably expect that if the trademark owner accepts the objections, he will be informed of those objections in the form of an opposition to parallel importation. This is important because in such a case, taking into account the legitimate

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18 Judgment of the CJEU of 23 April 2002 in case C-143/00, *Boehringer Ingelheim and others*, ECR 2002, p. I-3759, point 63; text in Polish in: Skubisz 2008, para. 24.

19 Ibid., para. 62 of the grounds.

20 The Court confirmed this in subsequent case law (judgment of the CJEU in Case C-276/05 – *The Wellcome Foundation Ltd.,* ECLI:EU:C:2008:756, para. 34); similarly, Advocate General E. Sharpstone in his Opinion of 6 April 2006 in Case C-348/04 Boehringer II, ECLI:EU:C:2006:235, paras 67-80.

objections of the trademark owner, the parallel importer may abandon its intention to market the parallel imported product or modify the appearance of the repackaged product, including the use of the relevant trademark.

It should also be noted that in the absence of a response from the trademark owner, the basic purpose of the notification obligation, i.e. the preventive assessment of the legality of parallel imports and, consequently, the prevention of the marketing of parallel imports that do not meet the conditions for admissibility, cannot be achieved. It should also be obvious that the preventive assessment of notified parallel imports is not an end in itself. It is merely a means to achieve the proper objective, i.e. to prevent the marketing of products that infringe the trademark right. This objective cannot be achieved at all if the trademark owner does not raise any objections to the notified parallel imports or raises objections other than those which subsequently form the basis of his claims.

In view of the above, it should be confirmed that, firstly, the procedure for notifying the intention to import parallel imports is based on the principle of mutual respect for the legitimate interests of both parties. Secondly, the notification of parallel imports presupposes the existence of two interrelated obligations. The first obligation is imposed on the parallel importer. It concerns the notification of parallel imports and the presentation of a sample of the product at the request of the trademark owner. The second obligation is imposed on the trademark owner. It concerns informing the parallel importer of the objections to the notified parallel imports.

The position that the trademark owner has such an obligation stems from the case law of the CJEU. This can be inferred from the Court's position on the time limit within which the trademark owner should present its objections to the notified parallel import. In its judgment in Case C-143/00 Boehringer I, the Court stated that "[…] finally, the Court has not yet ruled on the time limit available to the proprietor to take action against the intended repackaging of a medicinal product bearing his trade mark. In that regard, there is no doubt that, although in the light of the objective pursued by the notification obligation it is reasonable for the proprietor to have a reasonable period of time to take action against the intended repackaging, the interests of the parallel importer in being able to place the medicinal product on the market as soon as possible, after obtaining the necessary authorisation from the competent authority. In the present case, it is for the national court to determine, in the light of all the relevant circumstances of the case, whether the proprietor of the trade mark had sufficient time to take action against the intended repackaging."[21] On that basis, the Court

[21] Judgment of the CJEU of 23 April 2002 in Case C-143/00, *Boehringer Ingelheim and Others*, paras 66-67.

set a period of 15 working days as a reasonable period for the trade mark proprietor to respond.

Applying the interpretation *a maiori ad minus*, it should be assumed that since the Court indicated, even if only approximately, the deadline for the owner of the trademark to respond to the notification, it also established the existence of an obligation on the part of the trademark owner to provide such a response – the obligation to present objections. Otherwise, the Court's position on the deadline would be irrelevant.

In view of the above, an attempt can be made to assess the legal consequences of the trademark owner's failure to fulfil the obligation to present objections to the notified intention of parallel importation. In this context, it should be noted that the specific conditions for the admissibility of parallel imports (BMS conditions) serve to determine whether there is an infringement of the trade mark right within the meaning of Articles 10 and 15 of Directive 2015/2436.

Article 5 of Directive 2008/95 clearly states that the general condition for trademark infringement is the unlawful nature of the actions of a third party, i.e. actions taken without the consent of the trademark owner. In view of the above comments on the nature and scope of the obligations of the importer and the trademark owner, it should be assumed that if the latter does not object to the notified parallel import, it is reasonable to assume that the subsequent marketing of the parallel imported product in the notified form is undertaken with the consent of the trademark owner. Thus, the general prerequisite for trademark infringement – the unlawful nature of the third party's actions – is not met.[22]

This interpretation is confirmed by the case law of the national courts of the Member States. This follows in particular from the judgment of the German Federal Court of Justice in Aspirin II case.[23] In that judgment, it was expressly held that the proprietor of a trade mark cannot effectively bring an action for an injunction against a parallel importer if he has not raised an objection within a reasonable time to the parallel importer's activities notified to him or has raised an objection only to certain aspects of those activities, and then justifies his claim in a different way in the

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[22] The same applies to a situation where the proprietor of a trade mark has lodged an objection to the notified intention to import parallel goods, but has not indicated in the objection the ground on which it subsequently bases its claims against the parallel importer. In this case, the purpose of the notification of parallel import is not fulfilled to the same extent as in the absence of an opposition.

[23] Judgment of the Federal Court of Justice (BGH) of 12 July 2007 in case I ZR 147/04 *Aspirin II*, available at https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=38148&pos=0&anz=1, together with the case law cited therein.

statement of claim. This follows in particular from recital 27 of the grounds for the judgment, in which the German BGH stated as follows: Like any legal relationship, this legal obligation is subject to the principles of good faith (see BGH, judgment of 19 June 1986 – I ZR 65/84, GRUR 1987, 54, 55 = WRP 1986, 672 – Obligation of the warned party to provide information; judgment of 19 October 1989 – I ZR 63/88, GRUR 1990, 381 = WRP 1990, 276 – obligation of the warned party to respond). The purpose of prior notification is to quickly clarify between the parties whether the manner in which the imported medicinal product is to be marketed, as announced by the parallel importer, raises objections on the part of the trademark owner, as a result of which the parallel importer can rely to a certain extent on the trademark owner's response. If the latter does not object to the intended repackaging in the form notified or only objects to it from a certain point of view, the parallel importer may rely on the fact that the trademark owner will not bring any future claims against him based on the trademark from the factual or legal point of view to which he has not yet objected. If the trademark owner nevertheless asserts a claim, citing a circumstance to which he did not object within a reasonable time after prior notification, he is acting in bad faith (para. 242 BGB), because in doing so he contradicts his own behaviour in response to the prior notification (see BGHZ 94, 344, 354; 154, 230, 238).

In view of the above ruling of the BGH, it is reasonable to take the position that, firstly, the procedure for notifying the intention to import parallel imports is based on the principle of mutual respect for the legitimate interests of both parties. Secondly, the notification of parallel imports presupposes the existence of two interrelated obligations. The first obligation is imposed on the parallel importer. It concerns the notification of parallel imports and the presentation of a sample of the product at the request of the trademark owner. The second obligation is imposed on the trademark owner. It concerns informing the parallel importer of the actual allegations concerning the notified parallel imports. The notification obligation creates a special legal relationship between the trademark owner and the importer, which includes a reasonable expectation on the part of the latter that the absence of objection or limited objection to the notified intention on the part of the former means consent to the notified actions or no objection to other aspects of the notified action (i.e. those aspects that have not been explicitly objected to by the trademark owner).[24]

[24] In this respect, the position of the BGH is largely identical to the interpretation adopted in the case under analysis by the Court of Appeal in Warsaw in its judgment ref. no. VII AGa 1191/18.

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EXPERT EVIDENCE IN THE CASE LAW OF *AD HOC* INTERNATIONAL CRIMINAL TRIBUNALS AND THE INTERNATIONAL CRIMINAL COURT

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Abstract. In criminal proceedings before international tribunals, expert evidence is particularly important for the efficient and effective prosecution of perpetrators of crimes under international law. Expert testimonies, a source of specialized knowledge, represent a significant portion of the evidence collected. The case law of international criminal tribunals confirms that expert testimonies are indispensable for establishing the truth and conducting fair criminal proceedings. Experts are appointed from diverse and broad fields, often specializing in unusual areas of expertise not typically used in criminal proceedings before national courts. This study presents the case law of *ad hoc* International Criminal Tribunals and the International Criminal Court regarding expert evidence, in particular, decisions defining the procedural standing of an expert and the scope of their opinion. Judicature regarding the evidentiary value of findings contained in expert testimonies prepared for international criminal proceedings will also be presented.

Keywords: scientific evidence; admissibility of evidence; international criminal proceedings; forensic science.

INTRODUCTION

Expert evidence, along with witness testimony and the accused's explanations, plays a significant role not only in domestic court proceedings but also in international criminal proceedings [Kremens 2010, 217]. There is no doubt that the effective prosecution and efficient sentencing of perpetrators of crimes under international law is also possible through the use of scientific knowledge. Expert testimonies provide international criminal tribunals with information beyond everyday experience and knowledge, which is essential to achieving their objectives [Klinkner 2009, 104]. An analysis of the case law of international criminal tribunals confirms that expert testimonies are essential for establishing the truth and conducting fair international criminal proceedings.

It should be emphasized that gathering evidence in cases involving war crimes, crimes against humanity, or genocide is a challenging task. The effectiveness

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of the actions undertaken is undoubtedly influenced by a number of factors related to the specific nature of crimes under international law, in particular, their mass scale, the lapse of time between the commission of the crime and the conduct of criminal proceedings, ongoing military operations during the proceedings, and the trauma experienced by victims and witnesses [Fournet 2022, 2]. Finally, it is important to mention significant aspects distinguishing the taking of expert evidence before international criminal tribunals from domestic proceedings. First, the proceedings are based on a model combining solutions from various criminal procedure systems, drawing on legal traditions existing in continental law and solutions adopted under common law [Kuczyńska 2019, 1689; Sobański and Kremens 2024, 699]. Secondly, gathering evidence is usually difficult due to ongoing warfare and requires the cooperation of many countries to prevent a significant portion of the evidence from being distorted or destroyed [Klinkner 2013, 4683].

Experts have been frequently called upon in proceedings before the so-called *ad hoc* tribunals (the International Criminal Tribunal for the former Yugoslavia (ICTY)[1] and the International Criminal Tribunal for Rwanda (ICTR),[2] as well as in proceedings before the International Criminal Court (ICC).[3] Giving an opinion for the aforementioned tribunals covered a wide range of topics. The experts conducted research both in areas known and used in domestic criminal proceedings, as well as in areas of specialization resulting from the specific nature of international justice. Consequently, the judicial output of criminal tribunals in relation to the issues analyzed encompassed a number of important rules and specifics, the discussion of which seems justified for a more comprehensive understanding of the status and practical functioning of expert evidence.

Considering the above, this study attempts to present the position of ad hoc International Criminal Tribunals and the International Criminal Court on selected issues relating to the procedural position of experts in international criminal proceedings. It was deemed necessary to take into account the judicatures defining the concept of an expert and specifying the qualifications needed to be an expert in a specific field of opinion-giving and relating to the status of the so-called investigator. The purpose of further discussion is to address

[1] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, UN Doc. S.C. Res 808, 22.2.1993 (ICTY).

[2] International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, UN Doc. S.C. Res. 955, 8.11.1994 (ICTR).

[3] International Criminal Court (ICC), https://www.icc-cpi.int/about/the-court [accessed: 01.09.2025].

the issue of expert testimonies, particularly their scope. Rulings concerning the evidentiary value of findings contained in expert testimonies prepared for the purposes of international criminal proceedings will also be presented.

1. THE CONCEPT OF AN EXPERT AND THEIR QUALIFICATIONS

In international criminal proceedings, the concept of an expert is not defined by the Statutes[4] or the Rules of Procedure and Evidence[5] of *ad hoc* tribunals. The ICC Statute[6] and the Rules of Procedure and Evidence[7] also do not provide a more precise definition of the meaning of this source of evidence. Therefore, it is the judicature, and in particular the rulings of *ad hoc* tribunals, that have defined the requirements for individuals who are expected to provide opinions on significant issues raised before the tribunal.

Both the ICTY and the ICTR recognize that an expert is a person "particularly equipped with knowledge in a given field, which makes them qualified to give expert testimony."[8] Furthermore, the assessment of whether a person is an expert, meaning that they possess scientific knowledge or technical understanding beyond the experience and expertise of the person describing the facts, is left to the Adjudicating Chamber in a given case.[9] In the Bagosora case, the tribunal stated that "expert evidence is admissible when the expert's specialized knowledge, based on the evidence on which their opinion is based, can contribute to the Chamber's understanding of the evidence in question."[10] In the Simba case, it was emphasized that experts are appointed to clarify for judges specific technical issues that require specialized knowledge in a given field.[11]

The rulings of *ad hoc* international criminal tribunals provide evidence necessary to determine whether a person possesses sufficient qualifications to perform the function of an expert. The following characteristics of an

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[4] Statute of the International Criminal Tribunal for the former Yugoslavia, SC, 3217th meeting, U.N. Doc. S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda, SC, 3453rd meeting, U.N. Doc. S/RES/955 (1994).

[5] Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, IT/32/Rev.38; Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, ITR/3/Rev.15.

[6] Rome Statute of the International Criminal Court of 17.07.1998, Journal of Laws 2003, No. 8, item 708.

[7] Rules of Procedure and Evidence of the International Criminal Court, ICC-PIDS-LT-02-002/13.

[8] Prosecutor v. Delalić (IT-96-21-T), Decision on the Motion by the Prosecution to Allow the Investigators to Follow the Trial During the Testimonies of Witnesses, 20.03.1997, § 10.

[9] Prosecutor v. Delalić (IT-96-21-T), Decision on the Motion by the Prosecution to Allow the Investigators to Follow the Trial During the Testimonies of Witnesses, 20.03.1997, § 10.

[10] Prosecutor v. Bagosora (ICTR-96-7-T), § 8.

[11] Prosecutor v. Simba (ICTR-01-76-T), § 6.

expert should be noted: specialized knowledge, impartiality, and the usefulness of their opinion for resolving the case.

The Rwandan tribunal emphasized the particular importance of specialist knowledge in the Bizimungu[12] case, ruling on the competence of anthropology expert Sebahire Deo Mbonyikebe. The Adjudicating Chamber found that he possessed sufficient qualifications to perform expert duties based on his education (a doctorate in sociological and cultural anthropology) and experience in the field, which he gained as a lecturer at the National University of Butare and the University of Kinshasa. The tribunal also considered his academic achievements, particularly his publications and research for the World Bank and USAID, which concerned the situation in Rwanda [Kremens 2010, 223].

The need to maintain another characteristic – impartiality – was highlighted in the Akayesu case, in which the ICTR ruled that a person seeking to become an expert must maintain impartiality with respect to the case in which they are providing an opinion.[13] According to the Adjudication Chamber, the person appointed to serve as an expert by the accused's defense attorneys – Ferdinand Nahimana – cannot be considered impartial to the case, as he is a defendant in another case before the ICTR. The *ad hoc* tribunal's position on this matter is significant given the adoption of the Anglo-Saxon expert-witness model in international criminal proceedings, in which experts typically testify in favor of the party appointing the expert. In turn, in the Katanga and Ngudjolo Chui case, the tribunal recalled that the role of an expert is to assist the Adjudicating Chamber in establishing the facts in a neutral and impartial manner, and their task in the ongoing proceedings is not to support any party.[14] This position in the case law has also been confirmed by the doctrine. It was emphasized that the criterion of impartiality should be applied to the context of the given case and to the specific individual [Kaluzhna and Shunevych 2022, 57-58; Bélohlávek and Hótowá 2011, 129].

The third of the above-mentioned characteristics is the significance of the expert testimony for the resolution of the case, emphasizing the importance of the circumstances of whether the expert testimony will be helpful to the Adjudicating Chamber in its decision [Kuczyńska 2019, 1699]. An interpretation of this concept can be noted in the Kordić[15] case and the Bizimungu[16]

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[12] Prosecutor v. Bizimungu (ICTR-99-50-T) Oral Decision on Qualification of Prosecution Expert Sebahire Deo Mbonyikebe, 02.05.2005.

[13] Prosecutor v. Akayesu (ICTR-96-4-T), Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9.03.1998.

[14] Prosecutor v. Katanga and Ngudjolo Chui (ICC-01/04-01/07-1515), 31.03.2009.

[15] Prosecutor v. Kordić (ICTY-95-14/2-T), Transcripts, 28.01.2000, § 13274.

[16] Prosecutor v. Bizimungu (ICTR-99-50-T) Oral Decision on Qualification of Prosecution Expert Sebahire Deo Mbonyikebe 02.05.2005.

case. Both the ICTY and the ICTR ruled that the expert's role is to assist the tribunal in understanding the context in which the events occurred.

In the context of the observations made, it is also worth noting the ICTY's position regarding the granting of expert status to so-called investigators. This issue was noted by the tribunal in the Delalić case. The prosecution, in relation to investigators, i.e. employees employed in the Office of the Prosecutor who perform activities related to the proper collection of evidence or conducting forensic interviews of witnesses and suspects at the stage of preparatory proceedings, sought to give them the status of *quasi* experts. The Adjudicating Chamber clearly held that a witness whose testimony is limited to analyzing documents or confirming their authenticity cannot be recognized as an expert. This would only be possible if the investigator possessed the skills or knowledge that could be used when testifying.[17]

The International Criminal Court also commented on the concept of an expert and their qualifications. It should be noted that, as a rule, an expert providing expert testimonies before the ICC is not summoned by the parties to the proceedings, but is an expert appointed from a list (the Adjudicating Chamber may also authorize the appointment of an expert from outside the list). The Court maintains a list of experts available at all times to all bodies of the Court and to all participants in the proceedings. Inclusion on the list requires meeting numerous requirements, in particular: an expert must possess specialized knowledge in a specific scientific discipline, possess relevant experience, be fluent in English or French, possess appropriate education in a given area of specialization, demonstrate high ethical qualifications and maintain high standards of professional and personal integrity, and strictly adhere to confidentiality [Girdwoyń 2011, 83]. Furthermore, they must demonstrate the usefulness of their expertise in ICC proceedings.

With this in mind, the Court in the Lubanga case determined that the list of experts should include a broad range of experts with verified competences who are committed to upholding the interests of justice. The list should also be equitable geographically and gender-wise – the ICC supports applications for inclusion on the list by women.[18] The need to include experts with knowledge and experience in trauma, particularly trauma related to crimes involving sexual violence against children, the elderly, and persons with disabilities, was also emphasized.[19] In the aforementioned case, the Tribunal concluded that when evaluating an expert's opinion, the following

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[17] Prosecutor v. Delalić (IT-96-21-T), Decision on the Motion by the Prosecution to Allow the Investigators to Follow the Trial During the Testimonies of Witnesses, 20.03.1997, § 2.

[18] Prosecutor v. Lubanga (ICC-01/04-01/06-1069) Decision on the procedures to be adopted for instructing expert witnesses, 10.12.2007, § 24.

[19] Prosecutor v. Lubanga (ICC-01/04-01/06-1069) Decision on the procedures to be adopted for instructing expert witnesses, 10.12.2007, § 24.

factors require consideration: the expert's competence in the given field, the methodology used, the consistency of the opinion's conclusions with other evidence, and the expert's overall credibility.[20]

The same case also addressed the procedure for appointing experts and presenting their opinions. The Tribunal stated that, to save time and costs, a single impartial and qualified expert should be appointed, who will have access to the versions of events presented by both parties to the proceedings. It is important that both parties appoint an expert to avoid later disputes regarding their qualifications and impartiality. In such a situation, the expert presents a single opinion, considering the issues raised by the parties and the Tribunal judges, and subjecting them to analysis and evaluation. A party must obtain the Chamber's permission to appoint an expert, and the Adjudicating Chamber may appoint an expert *proprio motu*.[21]

It should be noted that the case law of international criminal tribunals has quite effectively filled the gap in defining the concept of an expert, remaining consistent with both continental and Anglo-Saxon law. The case law also emphasizes the fundamental characteristics that allow a person to act as an expert, namely: possessing specialized knowledge in a specific area of expertise, demonstrating impartiality, as well as demonstrating that the content of the expert testimony is significant to the resolution of the case.

2. SCOPE OF AN EXPERT TESTIMONY

When discussing the issue of expert evidence in international criminal proceedings, it is worth noting the direction set by tribunals regarding the scope of an expert testimony, i.e., defining the issues that an opinion may address and specifying those that should not be included in the opinion. According to the case law of both the ICTR and the ICTY, experts are subject to limitations on matters that are reserved exclusively for the court and which the court is obligated to resolve independently, i.e. the ultimate issue. In this regard, the Adjudicating Chamber's position in the Kordić case[22] should be cited, where it was emphasized that it is inadmissible for an expert to adjudicate the phenomenal form of the act committed by the accused. The expert testimony submitted by the prosecution, which analyzed the political and military aspects of the conflict in Bosnia and Herzegovina, referred to the accused's position within the Central Bosnian government, and the conclusions of the expert's opinion included a statement regarding

[20] Prosecutor v. Lubanga (ICC-01/04-01/06-2842), 14.03.2012, § 112.

[21] Prosecutor v. Lubanga (ICC-01/04-01/06-1069) Decision on the procedures to be adopted for instructing expert witnesses, 10.12.2007, § 14-23.

[22] Prosecutor v. Kordić (ICTY-95-14/2-T), Transcripts, 28.01.2000.

his having committed the acts charged in the form of directing the commission of a prohibited act. The Court ultimately disallowed this opinion, ruling that the expert had gone too far in his interpretations, raising issues for the Adjudicating Chamber to decide [Kremens 2010, 236].

Another example relating to the definition of the scope of expert testimony is the tribunal's decision in the Kunarac case,[23] in which the Court stated that an expert should not address the issue of witness credibility. The Adjudicating Chamber admitted evidence from experts specializing in forensic medicine, neuropsychiatry, and psychology to examine the written statements submitted by the witnesses. In the cited case, it was also emphasized that only the Chamber has the authority to assess the credibility of a witness, and that assessing the statements of a person who provided four conflicting statements is not the responsibility of psychoanalytic experts. Consequently, the ICTY found that an opinion on the discussed issues was inadmissible [Kremens 2010, 237].

It is also worth mentioning the tribunal's statement in the Bizimungu case, which indicated that it is inadmissible for an expert in sexual crimes to raise the issue of the perpetrator's guilt, as this is a final issue, and therefore a matter for the Adjudicating Chamber to decide.[24]

3. EVIDENTIARY VALUE OF FINDINGS CONTAINED IN EXPERT TESTIMONIES

The literature emphasizes that the use of expert testimonies is primarily dictated by the specific nature of adjudication before international tribunals and the complexity of the issues under consideration [Knoop. 2019, 33]. The need to use evidence based on scientific knowledge arises primarily in determining the type of crimes under international law committed, the *modus operandi* of the perpetrators, to corroborate witness statements, or to clarify the cultural, social, and historical context of the crimes committed [Fournet 2022, 3-4; Klinkner 2008, 447-66].

Expert testimonies in such cases are based on research from a wide variety of fields. Expert testimonies typical of criminal proceedings are issued, such as medical-forensic, psychological, psychiatric, DNA, and firearms testing. Expert testimonies are also issued in areas specific to cases handled by the international justice system. These include opinions on ethnic profiling of the population living in a given area, history, linguistics, sociology, and cultural issues in a given country.

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[23] Prosecutor v. Kunarac (ICTY-9623&23/1-T) Order on Defense Experts, 20.03.2000.

[24] Prosecutor v. Bizimungu (ICTR-99-50-T) Decision on the Admissibility of the Expert Testimony of dr Binaifer Nowrojee, 02.05.2005.

An example of a procedure in which expert evidence was used in the majority of cases is the ICTY trial, where expert testimonies were required, primarily in the fields of forensic medicine, forensic archaeology, forensic anthropology, and forensic pathology. Thanks to scientific research in these fields, it was possible to determine the perpetrators' criminal modus operandi, determine the causes of death of the victims, examine traces of torture, and utilize the pattern of burial of victims in mass graves, combined with their relocation to conceal the crime of genocide [Siekiera 2024, 131]. The expert testimonies allowed the location of mass graves and the connection between various burial sites. In particular, they confirmed the pattern of exhumations planned by the perpetrators to conceal the victims' bodies and thus complicate the criminal proceedings [Klinkner 2008, 447-66].

It is worth citing the cases of Krstić[25] [Klinkner 2013, 4688], Mladić[26] [Fournet 2022, 4]; Fournet 2017, 4; Szpak 2012, 79-91], and Karadzić[27] [Klinkner 2016, 498-504], in which the Yugoslav tribunal, thanks to expert testimonies, was able to rule that the crime of genocide had occurred regarding the mass executions of Bosnian Muslims. It was determined that the victims did not die in combat, but in planned and carried out mass executions. The expert examinations allowed the Adjudicating Chamber to determine that the purpose of the action was the intention to physically destroy Bosnian Muslims as an ethnic group. The evidentiary value of the expert testimonies contributed to refuting the defense's claims that the victims died in combat. After examining the mass graves and performing autopsies, the experts indicated that many people had been killed by shots to the back of the head, and emphasized the civilian clothing of the victims and the lack of military uniforms and equipment. Moreover, the identified victims were of varying ages, some were disabled, and blindfolds and handcuffs were found on the bodies.[28] The rulings of the Yugoslavian tribunal clearly emphasized that the expert evidence used should be considered credible and convincing in proving the crime of genocide.

Among the proceedings conducted, the Akayesu[29] case is worth mentioning, in which understanding the context of the events against which the crime of genocide occurred proved essential. During the trial, the Rwandan tribunal reviewed expert testimonies that addressed the social situation in Rwanda in 1994 and the historical background of the conflict between the Hutu and Tutsi tribes. Expert testimonies on the cultural context

[25] Prosecutor v. Krstić (IT-98-33-T).
[26] Prosecutor v. Mladić (IT-09-92-T).
[27] Prosecutor v. Karadźić (IT-95-5/18).
[28] Prosecutor v. Popowić (IT-05-88-T).
[29] Prosecutor v. Akayesu (ICTR-96-4-T), 2.09.1998.

and studies demonstrating changes in the demographic makeup of the population in a given area were also considered in trials before the ICTY.[30]

In the Lubanga[31] case, in turn, to prove the war crimes of recruiting child soldiers under 15 years of age and their use in military operations, the ICC relied on expert testimonies, which included radiological and pediatric examinations to assess their age. In the same case, the tribunal appointed expert psychologists to assess the credibility of the testimony of witnesses who were children at the time of the accused's acts and the impact of trauma on their statements.

The International Criminal Court in the Ntaganda[32] case accepted evidence obtained through exhumation in the Democratic Republic of the Congo. Expert testimonies from forensic medicine, forensic archaeology, forensic anthropology, DNA testing, and forensic pathology were considered to provide additional corroboration of the evidence gathered, emphasizing the importance of conducting reliable testing. The assessment of the probative value of DNA testing in the Ongwen[33] case is also noteworthy. The Adjudicating Chamber found DNA testing admissible and reliable in this case, confirming, among other things, crimes against bodily integrity and sexual freedom. The Court clearly found that DNA testing conducted by Professor Kloosterman, analyzing the relationship between Dominic Ongwen and the twelve children, showed that in eleven cases, the probability that Ongwen was the biological father was 99.99%. Therefore, the Chamber concluded that the scientific expertise provided the evidence necessary to establish cases of forced pregnancies and demonstrated their connection to sexual violence used as a weapon of war [Fournet 2022, 8-10].

CONCLUSIONS

Conducting fair criminal proceedings before international tribunals, as in domestic criminal trials, requires the collection of credible evidence, which is not an easy task given the specific nature of this type of adjudication. The international justice system must address the many challenges inherent to the nature of acts such as war crimes, crimes against humanity, and genocide. The case law of *ad hoc* criminal tribunals and the ICC confirms that the use of expert evidence represents a significant part of the evidence gathered in a given case. These tribunals' pronouncements not only clarified the procedural position of experts and the competencies necessary

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30 Prosecutor v. Milošević (IT-02-54-T) 16.06.2004; Prosecutor v. Kupreškić (IT-95-16-T), 14.01.2000.

31 Prosecutor v. Lubanga (ICC-01/04-01/06-2842), 14.03.2012.

32 Prosecutor v. Ntaganda (ICC-01/04-02/06-2359), 8.07.2019.

33 Prosecutor v. Ongwen (ICC-02/04-01/15-1762-RED), 04.02.2021.

to provide a meaningful opinion, but also analyzed the application of scientific research to a wide range of issues encountered in trials. Opinions prepared in trials before the Rwandan Tribunal, the Yugoslav Tribunal, and the International Criminal Court helped to prove the nature and manner of acts committed, as well as their cultural, historical, and social context. It is crucial that in every case before international criminal tribunals, the reliability of the scientific methodology employed, the credibility of the experts, and their objectivity and impartiality be considered.

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LEGAL RESPONSES TO DAESH RETURNEES: KOSOVO AND TUNISIA IN COMPARATIVE PERSPECTIVE

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Abstract. This article explores the legal and institutional responses to individuals returning from territories previously controlled by the so-called Islamic State (Daesh), with a particular focus on women and children. It examines the intersection of international humanitarian law, international human rights law, and United Nations Security Council resolutions (notably 2178 and 2396), highlighting the normative and procedural dilemmas faced by states in balancing national security with international legal obligations. Through a comparative analysis of Kosovo and Tunisia – two states with distinct legal architectures and geopolitical alignments – the study identifies key inconsistencies in the classification, prosecution, and reintegration of returnees. Drawing on primary fieldwork conducted between 2019 and 2024, including interviews, court observations, and case studies, the article assesses legal frameworks, evidentiary challenges, and the role of informal justice mechanisms. It finds that current national approaches are fragmented and often lack gender sensitivity, procedural safeguards, and child protection measures. The study proposes a typology of national legal responses – punitive, preventive, and restorative – and offers recommendations for international harmonization, regional cooperation, and the development of rights-based, reintegrative legal models. Ultimately, the article argues for a paradigm shift from securitization to accountability and reintegration in the governance of Daesh returnees.

Keywords: Kosovo; Tunisia; Daesh returnees; returnee governance; international humanitarian law.

INTRODUCTION

The global campaign against the so-called Islamic State (Daesh) has generated not only geopolitical repercussions but also acute legal and policy dilemmas, particularly regarding the treatment of individuals who travelled to, or were born in, Daesh-controlled territories between 2013 and 2019. As the physical caliphate collapsed, states across Europe, the Middle East, and North Africa were confronted with an urgent question: how to classify, prosecute, or reintegrate the thousands of men, women, and children associated

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– voluntarily or involuntarily – with a transnational terrorist entity? Despite multiple international resolutions and counter-terrorism strategies, the legal governance of "returnees" remains highly fragmented, shaped by intersecting legal systems (international humanitarian law, international human rights law, and national security legislation), as well as by state-specific institutional capacities, political will, and cultural contexts. The central hypothesis of this study is that the unresolved tension between securitization and legal protection is producing both normative incoherence and juridical dilemmas – particularly with regard to gender, childhood, and citizenship. While scholarly and policy attention has focused disproportionately on male foreign terrorist fighters (FTFs), the feminization and infantilization of returnee categories have introduced legal complexities that existing frameworks are ill-equipped to handle. These include statelessness, citizenship revocation, administrative detention of women, and the repatriation of children born in conflict zones. Moreover, many of the states most affected by the returnee phenomenon – such as Iraq, Tunisia, or Kosovo – operate in post-conflict or transitional contexts where legal pluralism, emergency powers, and institutional fragmentation further obscure the path toward rights-compliant accountability and sustainable reintegration.

The term "Daesh returnee" refers in this study to any individual who travelled to, or was born in, territory once controlled by Daesh (primarily in Syria and Iraq) and later returned – or is seeking return – to their country of nationality, residence, or origin. This includes: a) adult male fighters; b) female spouses or affiliates (including those serving in auxiliary roles); c) children, including those born in conflict zones or brought there by their parents.

The legal classification of such individuals is neither uniform nor consistent. International humanitarian law distinguishes between combatants, civilians, and persons hors de combat, while international human rights law imposes obligations regardless of conduct, particularly in relation to due process, non-refoulement, and protection of the child. However, national counter-terrorism frameworks often adopt security-based presumptions of guilt, particularly where returnees cannot provide documentary proof of non-involvement or victimhood.

This study interrogates the legal frameworks and institutional responses to Daesh returnees through a comparative and multidisciplinary lens. It asks: 1) How do international legal norms (IHL, IHRL, UNSC Resolutions) regulate the treatment of returnees? 2) How do national legal systems – particularly in Kosovo and Tunisia – operationalize these norms through prosecution, detention, and reintegration? 3) What are the legal and normative gaps that emerge when these frameworks intersect with issues such as gender, statelessness, and legal pluralism?

The cases of Kosovo and Tunisia were selected due to their contrasting legal architectures and geopolitical positioning. Kosovo offers a unique lens as a post-conflict state under strong international supervision and alignment with EU standards, while Tunisia reflects a North African model combining security exceptionalism with fragile rule-of-law institutions and a strong legacy of authoritarianism. The aim of this study is to critically examine the normative landscape that governs the legal treatment of returnees from Daesh-controlled territories and their children. It seeks to identify the inconsistencies and legal dilemmas that emerge across various levels of legal authority, from international frameworks to national judicial systems. Particular attention is paid to the challenges faced by two distinct state contexts: Kosovo, a post-conflict and EU-aligned state with a hybrid legal system shaped by international influence, and Tunisia, a post-authoritarian, security-centric state navigating legal reform amidst institutional fragility. The study also proposes a typology of national legal responses, distinguishing between punitive, preventive, and restorative approaches to returnee governance. Methodologically, the study adopts a qualitative, comparative, and interdisciplinary approach. It is grounded in international legal analysis, including treaty law, soft law instruments, and relevant United Nations Security Council resolutions. A comprehensive desk review of national legal frameworks and jurisprudence in Kosovo and Tunisia forms the foundation for the comparative analysis. What more, the research is informed by extensive primary fieldwork conducted between 2019 and 2024 in both countries. This includes semi-structured interviews with judicial actors, security professionals, civil society representatives, and family members of returnees. In Kosovo, the study draws on direct observation of court proceedings related to returnees and terrorism-related offences. Case study analyses focus in particular on women and children returning to communities in Prishtina, Kaçanik, and Tunis. The research also incorporates an in-depth review of local reintegration program materials and rehabilitation strategies, allowing for a nuanced understanding of institutional capacity, policy design, and the lived realities of those affected by returnee policies.

1. INTERNATIONAL LEGAL FRAMEWORKS – RETURNEES FROM DAESH TERRITORY

The issue of returnees from territories once controlled by the so-called Islamic State (Daesh) reveals profound tensions at the intersection of international legal regimes – namely International Humanitarian Law (IHL), International Human Rights Law (IHRL), and international counter-terrorism instruments adopted by the United Nations Security Council (UNSC). Each framework imposes distinct, sometimes contradictory, obligations

on states grappling with the security risks, humanitarian responsibilities, and political sensitivities involved in the repatriation, prosecution, and reintegration of former combatants, affiliates, and family members.

International Humanitarian Law (IHL), codified most comprehensively in the Geneva Conventions of 1949 and their Additional Protocols,[1] applies in situations of armed conflict. It governs the conduct of hostilities, the status of persons, and the treatment of those who are hors de combat. Daesh, as a non-state armed group engaged in protracted armed conflict against multiple state and non-state actors, arguably fell within the scope of Common Article 3 of the Geneva Conventions and Additional Protocol II[2] – relating to non-international armed conflicts (NIACs) [Tamanini 2012].

The classification of Daesh affiliates under IHL remains contested. While active fighters and individuals directly participating in hostilities may be considered unlawful combatants or de facto fighters – thus lawful targets of military operations – they are not entitled to prisoner-of-war status. In contrast, civilians, including women and children not directly participating in hostilities, are protected under IHL from collective punishment, arbitrary detention, and reprisals [Melzer 2008]. However, this distinction is blurred by the internal structure of Daesh, which often conscripted women into roles of surveillance (e.g., al-Hisbah) and mobilized children into combat and propaganda units. Simultaneously, IHRL remains applicable at all times, including during conflict and states of emergency, subject to lawful derogations. Relevant human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR),[3] the Convention Against Torture (CAT),[4] and the Convention on the Rights of the Child (CRC)[5] impose non-derogable obligations on states concerning detention conditions, due process, and the protection of children's rights, including the right to nationality, family life, and education.[6] The refusal to repatriate children from detention camps such as al-Hol and Roj, or the indefinite detention

[1] Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977, United Nations Treaty Series, vol. 75, p. 31 et seq.; vol. 1125, p. 3 et seq.

[2] Common Article 3 of the Geneva Conventions of 12 August 1949, and Additional Protocol II relating to the Protection of Victims of Non-International Armed Conflicts, adopted 8 June 1977, United Nations Treaty Series, vol. 1125, p. 609.

[3] International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966, entered into force 23 March 1976, United Nations Treaty Series, vol. 999, p. 171.

[4] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted 10 December 1984, entered into force 26 June 1987, United Nations Treaty Series, vol. 1465, p. 85.

[5] Convention on the Rights of the Child (CRC), adopted 20 November 1989, entered into force 2 September 1990, United Nations Treaty Series, vol. 1577, p. 3.

[6] United Nations General Assembly, Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, United Nations Treaty Series, vol. 1577, p. 3.

of women without charge, stands in direct violation of these instruments unless narrowly justified and proportionately applied.

The Security Council, invoking Chapter VII of the UN Charter,[7] has passed legally binding resolutions to address the evolving threat posed by foreign terrorist fighters (FTFs). Resolution 2178 (2014)[8] obliges member states to prevent the recruitment, organization, travel, and financing of individuals joining terrorist groups abroad, including through criminalization of travel for terrorist purposes. Crucially, it also urges states to implement strategies for rehabilitation and reintegration of returning individuals [Gherbaoui 2025].

Resolution 2396 (2017)[9] further elaborates state obligations by calling for improved border control, biometric data collection, and international cooperation, while also urging the development of tailored prosecution, rehabilitation, and reintegration (PRR) programs for returnees. Yet, these resolutions remain vague on procedural safeguards, the differential treatment of women and children, and the criteria for lawful detention or surveillance upon return. Their ambiguity enables divergent national interpretations, contributing to a fragmented international response.

Kosovo, despite not being a UN member, aligned its domestic legislation with the UNSC resolutions by criminalizing participation in foreign wars (Article 146 of the Criminal Code)[10] and launching coordinated repatriation operations in 2019. However, gaps remain in legal safeguards and in the institutional design of reintegration programs, particularly concerning women returning with ambiguous legal status and children born abroad without documentation or verified parentage.[11]

1.1. Legal Classification of Returnees: Combatants, Civilians, Victims, or Hybrids?

Determining the legal status of returnees is not merely a theoretical exercise; it defines their treatment under international and domestic law, shapes their access to justice and reparations, and structures the scope of state

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[7] Charter of the United Nations, signed 26 June 1945 in San Francisco, entered into force 24 October 1945, United Nations Treaty Series, vol. 1, p. XVI.

[8] United Nations Security Council, Resolution 2178 (2014), adopted on 24 September 2014, UN Doc. S/RES/2178 (2014).

[9] United Nations Security Council, Resolution 2396 (2017), adopted on 21 December 2017, UN Doc. S/RES/2396 (2017).

[10] Republic of Kosovo, Criminal Code, Law No. 04/L-082, entered into force on 1 January 2013, Article 146 [Participation in Foreign Armed Conflicts].

[11] See M. El Ghamari, Deradicalisation Challenges and Strategies in Kosovo: A Case Study Analysis of Women Returning from Da'esh Territory, Routledge [in press].

obligations. Yet, international law offers no clear typology to account for the diverse trajectories of Daesh affiliates. Most male returnees are automatically suspected of involvement in combat or material support, triggering prosecution under anti-terrorism legislation. However, women and children complicate this binary. Women were often cast in multiple, overlapping roles: as caregivers, propagandists, enforcers of morality, or unwilling spouses. The UN Office of Counter-Terrorism (UNOCT) notes that "the assumption of women's passivity in conflict zones has been replaced by an equally dangerous presumption of their guilt" [Ingram, Coleman,. Doctor, et al. 2022, 1-19; Rothermel 2023].

The Rome Statute of the International Criminal Court provides categories of criminal responsibility (e.g., direct perpetration, aiding and abetting, command responsibility), but does not explicitly deal with cases of ideological coercion, forced marriage, or cultural indoctrination. Domestic courts face evidentiary and normative dilemmas: should a woman who traveled willingly to Syria but later sought to escape Daesh control be considered a perpetrator, a passive supporter, or a victim of trafficking? Moreover, courts in Iraq have prosecuted hundreds of foreign women (mostly from Central Asia and the MENA region) under broad anti-terrorism laws, often with trials lasting under 30 minutes and based solely on confession or spousal association [Al-Fatlawi 2020]. In Tunisia, returnees face administrative restrictions and preventive surveillance without formal indictment, raising significant due process concerns [Rasovic-Noruzi 2023]. This ambiguity is further deepened in cases involving children. Boys aged 9-17 have been prosecuted in Iraq and Syria for "terrorist affiliation," often with no legal representation. Such practices violate international standards for juvenile justice, including the *Beijing Rules* and the CRC, which recognize children associated with armed groups primarily as victims of recruitment and exploitation.

1.2. The legal and ethical challenge of children born in conflict zones

The status of children born to Daesh-affiliated parents – estimated to number in the tens of thousands globally – constitutes a critical legal vacuum in contemporary international law. These children, many born in camps like al-Hol (Syria) or in prison facilities in Iraq, frequently lack official birth registration, recognized citizenship, or legal guardianship.

Article 7 of the CRC guarantees a child's right to be registered at birth and to acquire a nationality. However, many children face de facto statelessness due to the unwillingness of states to acknowledge or accept lineage claims from parents linked to Daesh. In some countries, such as France and the United Kingdom, citizenship revocation policies extend to children by proxy, despite the absence of individual culpability [Parker 2021].

Also, in family reunification cases, the issue of legal guardianship becomes legally entangled. Children whose mothers are detained or prosecuted face removal from maternal custody, especially in states like Germany and Poland, where child protection authorities assert their mandates independently of criminal justice processes. Yet international law – particularly General Comment No. 6 (2005) of the CRC – emphasizes family unity and child-specific best interest assessments before any separation decisions are made.[12] Furthermore, children face grave risks in detention settings. Reports from Save the Children (2023)[13] and the International Committee of the Red Cross (2022) document systemic exposure to disease, malnutrition, and psychological trauma in camps such as al-Hol and Roj. These conditions violate the right to health (Article 24 of the CRC), education (Article 28), and protection from inhuman treatment (Article 37).[14] States that fail to repatriate these children or provide consular support are thus complicit in ongoing rights violations. The principle of non-discrimination (Article 2 of the CRC) mandates that no child should be treated punitively based on the actions of their parents – a standard often ignored in current securitized repatriation practices.

The legal frameworks governing the treatment of Daesh returnees are fragmented, normatively underdeveloped, and operationally inconsistent. While IHL and IHRL offer foundational principles, their applicability to contemporary transnational terrorism and hybrid conflict actors is increasingly strained. The UNSC resolutions provide a degree of normative coherence but leave substantial room for discretion and legal divergence. In this matter, legal classification becomes not only a technical issue but a deeply political and moral one. Women and children affiliated with Daesh represent the most legally ambiguous categories – challenging conventional distinctions between victimhood and agency, between security threat and rights-holder. Without coordinated legal strategies grounded in human rights, transitional justice, and rehabilitative principles, the international community risks perpetuating statelessness, intergenerational trauma, and legal injustice under the banner of national security.

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[12] Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC/GC/2005/6, 1 September 2005.

[13] Save the Children, Children Abandoned by Their Governments Are 'Wasting Away' in Syrian Camps – Save the Children, https://www.savethechildren.net/news/children-abandoned-their-governments-are-%E2%80%98wasting-away%E2%80%99-syrian-camps-%E2%80%93-save-children [accessed: 04.08.2025].

[14] International Committee of the Red Cross (ICRC), Children in Armed Conflict: Legal and Humanitarian Dimensions, Geneva: ICRC, 2022.

2. COMPARATIVE NATIONAL LEGAL APPROACHES – KOSOVO AND TUNISIA IN RESPONSE TO DAESH RETURNEES

2.1. Legal responses within post-conflict and EU-associated contexts in Kosovo

Kosovo presents a particularly instructive case study in the legal and institutional handling of returnees from Daesh territory. As a non-EU but European Union-associated post-conflict state, Kosovo operates within a unique hybrid legal framework shaped by both its 2008 declaration of independence and its reliance on international technical assistance, particularly in the field of justice and security sector reform. Its approach to returnees is also influenced by its aspiration to align with European Union counter-terrorism standards, including those articulated by the European Commission, the Global Counterterrorism Forum (GCTF), and UN Security Council Resolutions 2178 and 2396.

Kosovo was among the first countries in the Western Balkans to criminalize participation in foreign conflicts. Article 146 of the Kosovo Criminal Code (as amended in 2015) punishes participation in foreign armed conflicts with imprisonment of up to 15 years. The provision applies regardless of the individual's role in the conflict, whether as a combatant, recruiter, propagandist, or in a support role.[15] This law was developed as a preemptive response to the wave of foreign fighters leaving Kosovo for Syria and Iraq between 2012 and 2015, with estimates indicating that over 400 individuals had departed to join Daesh and other jihadist groups. It was implemented in tandem with surveillance operations, arrests, and public awareness campaigns under the slogan "Don't Join the War in Syria and Iraq!" coordinated by the Ministry of Internal Affairs and the Kosovo Intelligence Agency (KIA) [Qehaja, Florian, and Prezelj 2017]. However, the law's breadth raised due process concerns. Individuals returning from Daesh territory – particularly women and children – were often arrested upon arrival at the airport or placed in preventive detention without transparent evidentiary standards. Kosovo's judiciary struggled to differentiate between varying levels of involvement and voluntariness, especially among female returnees who had married Daesh fighters abroad or had been born in Syria or Iraq.

Kosovo launched a coordinated repatriation mission in April 2019, bringing back 110 citizens from Syria – 32 women, 74 children, and 4 men. The initiative was praised for its logistical organization and political boldness but raised significant legal and operational challenges. All adult males were prosecuted; women were placed under house arrest, and children

[15] Republic of Kosovo, Criminal Code of the Republic of Kosovo, Law No. 04/L-082, Article 146, adopted in 2012, entered into force 1 January 2013, Pristina: Assembly of Kosovo.

were transferred to the care of social services.[16].Institutionally, Kosovo has implemented a whole-of-society reintegration model under the framework of its *Strategy on Prevention of Violent Extremism and Radicalisation Leading to Terrorism (2015-2020)* and its successor strategy for 2020-2025. These policies emphasize multi-agency collaboration among law enforcement, intelligence, religious communities, health services, and civil society actors. Reintegration measures include: 1) psychosocial assessment and support provided by the Ministry of Labour and Social Welfare; 2) educational reintegration facilitated through local schools and NGOs; 3) Religious counseling through the Islamic Community of Kosovo; 4) case-by-case monitoring by probation officers and municipal authorities [Kambovski, Georgieva, and Trajanovski 2021].

Yet, critics argue that the legal framework remains underdeveloped in terms of defining the status of women returnees and safeguarding children's rights under international conventions. In practice, the legal category of "returnee" has become securitized, often precluding individualized legal assessments based on evidence of criminal activity or victimhood. While the Kosovo judiciary has processed dozens of terrorism-related cases since 2015, many lacked sufficient differentiation between levels of involvement or agency [Kusari 2024].

2.2. Transitional and hybrid legal frameworks in Tunesia

Tunisia represents a second, contrasting model – one situated at the intersection of post-authoritarian legal reform, counter-terrorism pressures, and institutional fragility. As the leading Arab country in terms of the number of foreign fighters per capita, Tunisia faced both internal and external pressure to adopt strong legal measures against Daesh affiliates. However, unlike Kosovo, its response has been fragmented, heavily securitized, and shaped by legacy emergency powers inherited from the Ben Ali regime.

Tunisia criminalized terrorist activities under its *Counter-Terrorism and Money Laundering Law* of 2015, which replaced the earlier 2003 legislation. Article 33 criminalizes joining terrorist organizations abroad, while Article 13 allows for the extension of pre-trial detention to up to 15 months in terrorism-related cases. These provisions have been used extensively to prosecute returning fighters – over 800 individuals have been investigated or arrested as of 2024 [Kerrou 2017].

However, the legal process is often opaque. Many returnees are held under preemptive administrative detention or released under "judicial control" (supervised release) without formal indictment. Moreover, judicial discretion has

[16] Government of Kosovo, Official Statement on the Repatriation of Citizens from Syria, 2019, Ministry of Internal Affairs.

allowed for inconsistencies in rulings between different judges and regional courts, particularly with respect to women and minors. Women returnees are frequently placed under surveillance but rarely prosecuted unless clear evidence of combatant activity or propaganda work exists [Ghali 2021]. In addition, Tunisia has prolonged the use of emergency laws under *Decree 78-50*, which grants the executive branch wide-ranging powers to restrict movement, impose house arrest, and limit freedom of assembly. These laws have been applied selectively against returnees but have also been criticized for eroding civil liberties and failing to meet international human rights standards[17].

Unlike Kosovo, Tunisia lacks a national rehabilitation and reintegration program for returnees. The security apparatus – comprising the Ministry of Interior, the National Guard, and the Intelligence Services – remains the principal actor in the management of returnees. Civil society actors and local municipalities are rarely consulted, and the judiciary remains under pressure from political actors and public opinion, particularly following terrorist incidents such as the 2015 Bardo Museum and Sousse beach attacks.

Children of returnees, especially those born in Libya, Syria, or Iraq, face legal marginalization. The Tunisian state has repatriated only a limited number of children (fewer than 40 as of 2023), many of whom remain in de facto detention with their mothers in Libyan prisons or in Syrian camps. The lack of a national legal framework for child repatriation constitutes a breach of Tunisia's obligations under the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child (ACRWC) [Nduwayo 2021].

Furthermore, women returning to Tunisia are frequently subjected to informal surveillance and community ostracization. While not legally criminalized, their legal and social rehabilitation is hindered by a lack of support services and a stigmatizing media discourse that portrays them as vectors of extremism and instability [Zimbler 2024].

The cases of Kosovo and Tunisia illustrate two diverging approaches to the legal governance of returnees from Daesh territories. Kosovo, as a post-conflict, EU-aligned polity, has sought to develop a structured legal and institutional response based on criminal prosecution and inter-agency reintegration, albeit with challenges in gender sensitivity and child protection. Tunisia, conversely, relies heavily on executive discretion and emergency legislation, with minimal investment in reintegration and significant gaps in judicial transparency and rights-based safeguards. Both states reflect the broader dilemmas facing transitional or fragile democracies in balancing national security with human rights obligations. The legal categories assigned

[17] United Nations Digital Library, Record No. 626830, https://digitallibrary.un.org/record/626830/?v=pdf [accessed: 04.08.2025].

to returnees – whether as perpetrators, suspects, or victims – remain deeply contingent on political will, institutional capacity, and international pressure. The failure to adopt gender-sensitive and child-centered legal frameworks not only undermines compliance with international law but also exacerbates long-term risks of marginalization, recidivism, and societal fragmentation.

3. LEGAL GAPS AND NORMATIVE DILEMMAS IN THE GOVERNANCE OF DAESH RETURNEES

3.1. Between security and rights

The treatment of individuals returning from Daesh-controlled territories exposes a profound tension between national security imperatives and international legal obligations. Despite the growing corpus of international humanitarian law (IHL) and international human rights law (IHRL), the implementation of these norms at the domestic level remains fragmented, reactive, and often inconsistent with core legal principles.

One of the most salient dilemmas is the misalignment between IHL/IHRL frameworks and national counter-terrorism regimes. Many states – particularly those in post-conflict or transitional settings – have adopted sweeping anti-terrorism laws that lack definitional precision and procedural safeguards. In Kosovo, the 2015 amendment to the Criminal Code (Article 146) criminalizes participation in foreign conflicts without differentiating between voluntary combatants and individuals who were coerced, trafficked, or born into conflict zones.[18] Tunisia's 2015 *Counter-Terrorism and Money Laundering Law* similarly enables the extension of pre-trial detention for up to 15 months and grants wide prosecutorial discretion under vague legal standards.[19] While these frameworks aim to deter and incapacitate threats, they frequently fall short of human rights standards – particularly with respect to the presumption of innocence, non-discrimination, and proportionality. The deployment of security measures often precedes, and in some cases circumvents, proper legal classification or judicial oversight. This is especially problematic in the case of women and children returnees, who are frequently subjected to generalized suspicion rather than individualized legal assessment.

The application of preventive and administrative detention without formal indictment has become a widespread practice in countries such as Tunisia, Iraq, and to a lesser extent, Kosovo. In Tunisia, returnees are often placed

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[18] Criminal Code of the Republic of Kosovo (Code No. 04/L-082), adopted 20 April 2012, entered into force 1 January 2013, https://www.refworld.org/legal/legislation/natlegbod/2012/en/123445 [accessed: 04.08.2025].

[19] Tunisia, Loi n° 2015-26 du 7 août 2015, relative à la lutte contre le terrorisme et le blanchiment d'argent, Journal Officiel de la République Tunisienne, 2015.

under *contrôle judiciaire* (judicial supervision) for months or years without being formally charged, based on discretionary decisions by magistrates operating under political and societal pressure [Ghali 2021]. In Iraq, trials for foreign women suspected of Daesh affiliation routinely last less than an hour and are often based on minimal evidence – typically marital or familial association [Al-Fatlawi 2020].

These practices contravene fair trial guarantees under the International Covenant on Civil and Political Rights (ICCPR), particularly Articles 9 and 14, which guarantee liberty, procedural fairness, and the right to a defense. Additionally, they undermine the legitimacy of counter-terrorism jurisprudence by conflating proximity with culpability. Further complicating matters is the challenge of prosecuting crimes committed in extraterritorial conflict zones. Many national jurisdictions lack the legal or practical capacity to collect admissible evidence from Syria or Iraq. Intelligence materials obtained by non-state actors (e.g., the Syrian Democratic Forces or Iraqi militias) are often used in court despite questionable provenance or legality. Meanwhile, digital traces – such as social media posts, metadata, and travel patterns – are increasingly used as circumstantial evidence of guilt, despite the absence of corroborative testimony or contextual analysis [Bibi and Entenmann 2016]. These evidentiary dilemmas reflect deeper structural issues in the architecture of global justice and highlight the urgent need for harmonized legal mechanisms for cross-border data sharing, mutual legal assistance, and battlefield evidence authentication.

The lack of clarity in classifying returnees – especially women – has led to the proliferation of what may be termed "securitized typologies." Returnees are frequently categorized as either "combatants," "affiliates," or "victims," with insufficient attention to the nuance and ambiguity of their experiences. Women who traveled to Daesh-held areas for familial or ideological reasons but later attempted to escape are often treated as complicit actors. This blanket classification undermines gender-sensitive legal analysis and ignores the documented use of coercion, manipulation, and gender-based violence by Daesh leadership [Ní Aoláin and Campbell 2025].

In summary, the fusion of juridical ambiguity, procedural deficits, and securitized typologies constitutes a multi-layered legal dilemma that challenges the integrity of national and international legal systems alike.

3.2. Vulnerabilities at the margins

A second critical set of dilemmas concerns the rights and status of particularly vulnerable categories: stateless individuals, children born in conflict zones, and women subjected to customary or religious justice systems. These populations occupy legal margins, where normative gaps

intersect with institutional weaknesses and discriminatory cultural practices. The revocation of citizenship as a counter-terrorism measure – often exercised without judicial review – has emerged as a major legal and ethical controversy. Countries such as the United Kingdom, France, and Belgium have utilized administrative powers to strip individuals of their nationality based on security assessments, frequently targeting those with dual or foreign-born status [Parker 2021]. In many cases, this has resulted in de facto statelessness, particularly among women and children born to Daesh-affiliated parents in Syria or Iraq. Such measures contravene the 1961 Convention on the Reduction of Statelessness, which prohibits the deprivation of nationality that would result in statelessness except under narrowly defined circumstances. Furthermore, these policies violate Article 15 of the Universal Declaration of Human Rights, which affirms that "everyone has the right to a nationality" and that "no one shall be arbitrarily deprived" of it. Children from my perspective are especially affected. Many were born in camps like al-Hol or Roj, without birth certificates or recognized parentage. As a result, they remain in legal limbo – unable to access basic services, education, or repatriation. The principle of the best interests of the child (Article 3 of the Convention on the Rights of the Child)[20] is frequently subordinated to national security narratives, despite the CRC's clear emphasis on rehabilitation, reintegration, and protection from collective punishment.[21]

In both post-conflict and fragile state contexts, legal pluralism often fills the institutional void left by absent or dysfunctional state systems. Community-based justice mechanisms—including fatwas, tribal mediation, and reconciliation rituals – have been employed in countries such as Iraq, Tunisia, and Kosovo to address the reintegration of returnees. While such systems can provide localized and culturally resonant responses to complex reintegration challenges, they also pose risks of discrimination, exclusion, and procedural irregularity. In Tunisia, for example, certain local religious authorities have issued non-binding fatwas concerning the moral rehabilitation of returnees. In parts of Iraq, tribal councils have facilitated reintegration through compensatory arrangements (*diyya*) or community oaths. In Kosovo, customary mediations have played a role in facilitating family acceptance and reducing stigma for returnee women. However, these mechanisms often operate outside formal legal oversight and may reinforce patriarchal hierarchies. Women are rarely represented in decision-making bodies and may be subjected to informal forms of surveillance or punishment that contradict international legal standards. The lack of procedural safeguards,

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[20] United Nations, Convention on the Rights of the Child, 20 November 1989, United Nations Treaty Series, vol. 1577, p. 3, Article 3.

[21] Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC/GC/2005/6, 1 September 2005.

such as the right to legal counsel, transparency, and appeal, further weakens the credibility of these parallel systems. In effect, legal pluralism can be both a resource and a risk. Where it complements state-based transitional justice mechanisms, it may contribute to social cohesion and non-retributive reintegration. Where it replaces or undermines formal institutions, it can perpetuate inequality and legal uncertainty.

CONCLUSIONS

The legal governance of individuals returning from Daesh-controlled territories constitutes one of the most complex and contested challenges at the intersection of international law, national security, and transitional justice. This study has argued that the current landscape is marked by a profound normative and operational fragmentation: international legal frameworks prescribe protections rooted in human dignity and accountability, yet national legal responses frequently deviate – prioritizing risk aversion, emergency powers, and political expediency. Throughout this academic paper, the analysis has illuminated the limits of prevailing legal categories, particularly in the treatment of women and children. The paradigm of "foreign terrorist fighter" (FTF) – originally shaped around adult male combatants – has proven ill-suited to address the multiplicity of roles, degrees of agency, and experiences of coercion among women and children affiliated with Daesh. In many jurisdictions, this has led to overbroad criminalization, administrative detention, and the erosion of due process standards, often without the evidentiary rigor or individualized assessment required under international law.

The international legal frameworks – primarily International Humanitarian Law (IHL), International Human Rights Law (IHRL), and binding UN Security Council Resolutions 2178 (2014) and 2396 (2017) – offer important normative guidance. However, as demonstrated in Chapter 2, these instruments remain under-implemented, under-interpreted, and vulnerable to politicization. Crucially, they lack enforceable mechanisms for ensuring the rights of children born in conflict zones, stateless individuals, and female returnees whose roles and responsibilities remain legally ambiguous. This legal ambiguity facilitates a reversal of the burden of proof, whereby mere presence in a conflict zone is equated with criminal liability.

Chapters three and four, through the comparative examination of Kosovo and Tunisia, have shown that national legal systems respond to these gaps in strikingly divergent ways. Kosovo, under the influence of EU approximation and international technical assistance, has developed a hybrid model that combines criminal prosecution with case-based reintegration. Yet, even here, procedural guarantees for women and safeguards for children remain inconsistently applied, and societal reintegration is constrained by stigma

and municipal disparities in capacity. Tunisia, by contrast, exhibits a security-heavy model, rooted in discretionary emergency laws, opaque judicial processes, and the absence of a comprehensive reintegration framework. Both cases reflect the politicization of returnee governance, shaped not only by legal norms but also by media narratives, donor agendas, and domestic electoral pressures. Across both cases, and indeed across the broader MENA and European regions, two particularly vulnerable categories stand out: children and stateless individuals. As documented, tens of thousands of children remain in camps in northeast Syria, Iraq, or Libya, many of them undocumented, unaccompanied, or born to foreign nationals. Their legal personhood is suspended in a juridical vacuum, where neither the jus sanguinis nor jus soli principles offer clear pathways to nationality. The failure to repatriate, register, or protect these children not only contravenes international obligations under the Convention on the Rights of the Child but constitutes an ongoing breach of their fundamental rights to legal identity, family life, and freedom from inhumane treatment.

In addition, the resurgence of legal pluralism in transitional or weakly governed spaces poses a double-edged challenge. Customary, tribal, and religious mechanisms – such as family tribunals, local fatwas, or reconciliation rituals – can provide culturally resonant frameworks for community-based reintegration. Yet, in the absence of judicial oversight, they risk reinforcing patriarchal hierarchies, denying procedural rights, and excluding women and children from access to justice. Legal pluralism, if unregulated, may thus exacerbate legal uncertainty rather than remedy it.

In light of these findings, the overarching conclusion of this study is that a securitization-first model is neither sustainable nor normatively justifiable. A shift is urgently needed toward a rights-based, legally coherent, and context-sensitive paradigm. Such a model must reconcile three imperatives: 1) security – through credible and proportionate risk assessment mechanisms, not collective suspicion or guilt by association; 2) legality – through strict adherence to due process, fair trial guarantees, and individualized legal assessment grounded in evidence; 3) reintegration and accountability – through restorative justice measures, gender-sensitive legal frameworks, and child-centered rehabilitation pathways.

The governance of returnees from Daesh territory will remain a defining test for international law, not only because of the crimes committed, but because of the stakes it poses for the normative integrity of legal systems. The legitimacy of counter-terrorism law will increasingly depend on its capacity to integrate human rights, due process, and post-conflict reconciliation. The alternative – continued reliance on opaque legal categories, extrajudicial measures, and indefinite marginalization – risks reproducing the very grievances and vulnerabilities that feed cycles of radicalization. Presented

article has laid a foundation for further empirical, normative, and comparative research. Future work should expand the geographical scope, incorporate survivor and returnee narratives, and explore the intersection of legal governance with digital surveillance, algorithmic profiling, and media discourses. In the post-Daesh era, the question is no longer whether returnees pose a threat, but whether states will respond in ways that affirm the rule of law, uphold human dignity, and confront violence with justice.

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ITALIAN, EUROPEAN AND INTERNATIONAL CONSTITUTIONAL VIEWS BETWEEN THE PARLIAMENTARY IMPERATIVE MANDATE, ITS PROHIBITION AND THE PHENOMENON OF 'TRANSFUGHISMO'*

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Abstract. The age-old issue of the so-called "transfughismo" has sometimes particularly incisive consequences on the dynamics of democracy as well as on opposition-majority relations. "Transfughismo" is the defecting of parliamentarians, once elected in a certain parliamentary group, who then switch to another parliamentary group, usually in support of the Government. The impact of this so-called "change of uniform" undoubtedly concerns aspects of political nature, nevertheless the origin of the problem is purely constitutional. Most of the Charters, both in Europe and outside its borders, provide for the prohibition of the imperative mandate: they consider the parliamentarian to represent the entire nation. The comparative debate is leading constitutionalists and institutions to reflect on the reintroduction of the imperative mandate, that is the obligation of the deputy or senator to strictly comply with the indications of the Party or parliamentary group, under penalty of forfeiture of the positions they hold in the Parliament, including the role of parliamentarian tout court. The elected, with the introduction of the imperative mandate (as is already provided for in some Constitutions, i.e., the Portuguese one), does not represent the nation but the party that nominated him. This paper examines numerous European, American and Asian constitutions, scrutinizing their similarities and differences, thus reflecting on which path could be most consistent with the most recent law amendments, the material constitution's change and the voters' actual expectations. Particular attention will be given to the institutions of *the Popular recall*, the *Abberufungsrecht*, the *Amtsenthebungsrecht* and the *Impeachment*.

Keywords: imperative mandate; prohibition; parliamentary mobility; Portuguese Constitution; popular recall; Impeachment.

* The passages originally in a different language will also be in English for a better understanding of the text by the reader, with some necessary exceptions.

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1. INTRODUCTION: THE PROBLEM OF "TRANSFUGHISMO"

"A parliamentarian who abandons the party or violates its voting discipline to the point of being expelled from it [Curreri 2004, 7][1] – breaks that unitary relation that binds him to the voters who voted for him by reason of that political affiliation. Its representation loses its representativeness.

The problem of the so-called "transfughismo" or "parliamentary defection"[2] is as ancient as it is geographically widespread [Curreri 2004, 77]. The so-called "change of uniform" is a widespread phenomenon in the parliamentary halls, where the frequent switching of the members from one party formation to another, usually, from an opposition to a majority group, is witnessed.

While appraising this phenomenon, it is compelling to scrutinize the imperative mandate and its prohibition present in many Charters, whereas in some residual constitutional provisions there are interesting exceptions to such a prohibition.

One must therefore ask oneself – borrowing Bonacci's metaphor [Bonacci 1967, 194] – whether the parliamentarian should really be assimilated to a public means of transport's driver to which the passenger-voters, who with their vote purchased the ticket must not turn to when the driver decides to divert the route, change destination or even abandon the vehicle.

2. IMPERATIVE MANDATE AND PROHIBITION THEREOF

The *punctum dolens* is the imperative mandate and its inadmissibility within the Italian constitutional system like many other legal systems, be they – like most – bicameral, or unicameral (such as the Hungarian Országgyűlésl within the EU and, outside it, the Ukrainian Verkhovna Rada).

Article 67 of the Constitution of the Italian Republic[3] states: "Each Member of Parliament represents the Nation and carries out his duties without a binding mandate."[4] Numerous Constitutions of the Old Continent are

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[1] Along the same lines see Arce 2004, 161: "The elected person who abandons the party for which he was elected retains representation, but loses his representativeness, that is, his loyalty towards the voters."

[2] In this regard there is a vast scientific literature, for example see: Zano. 2001; Bartolini 1997; Fracanzani 2000; Scarciglia 2005.

[3] Constitution of the Italian Republic of 27 December 1947, GURI, Serie Generale, n. 298, 27.12.1947.

[4] The prohibition of the imperative mandate was already provided for in Article 41 of the Albertine Statute of 4 March 1948: "The Deputies represent the Nation in general, and not only the provinces in which they were elected. No imperative mandate can be given to them by the Electors."

similar in content.[5] The same provision is found for Italian regional councilors, generally in Article 1(5), law No. 108 of 17 February 1968[6] ("Regional councilors represent the entire Region without imperative mandate"), as well as in the individual regional statutes, unlike Article 189 The Treaty on the Functioning of the European Union[7] which defines the European parliamentarians: "Representatives of the peoples of the States brought together in the Community," introducing a bond of a territorial and not a general nature in relation to the whole of Europe.

The judges of the Constitutional Court have clarified, as well as the English, German and Spanish constitutional jurisprudence [Curreri 2004, 15ff], what is meant by the prohibition of imperative mandate as conceived by the Constituent Assembly. The judgment of the Italian Constitutional Court of March 7, 1964, No. 14,[8] in rejecting the objection of unconstitu-

[5] To name a few: Federal Constitutional Law of the Republic of Austria of 1 October 1920, StGB1, No. 450/1920: "In the exercise of their functions, the members of the National Council and the members of the Federal Council shall not be bound by any mandate" (Article 56); Constitutional Act of the Kingdom of Denmark of 5 June 1953, Gesetz Nr. 169 vom 5. Juni 1953: "The members of the Folketing are bound solely by their convictions and not by an imperative mandate of the electors" (Article 56); Constitution of the Republic of France of 28 September 1958, Journal Officiel le 5 octobre 1958, Imprimerie nationale, 1958 (p. 1-23): "The imperative mandate is null and void" (Article 27); Constitution of the Federal Republic of Germany of 23 May 1949, Federal Law Gazette, p. 1, BGBl III 100-1: "(The deputies of the Bundestag) are the representatives of the whole people, they are not bound by mandates or instructions and are subject only to their conscience" (Article 38); Constitution of the Republic of Greece of 7 June 1975, Official Gazette A 111/1975: "Members have the unrestricted right to express their opinion and to vote according to their conscience" (Article 60); Constitution of the Grand Duchy of Luxembourg of 17 October 1868, Official Gazette of the Grand Duchy of Luxembourg of 22 October 1868, A23: "Deputies shall vote without the constraint of mandate and may only look to the interests of the Grand Duchy" (Article 50); The Constitution of the Kingdom of the Netherlands of 24 August 1815, consolidated version of 22 February 2023, Stb. 2023, 62: "Members shall vote without a mandatory mandate" (Article 67); Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No.78, item 483 as amended: "The deputies represent the nation. They are not bound by instructions from the voters" (Article 104); Constitution of the Republic of Romania or 21 November 1991, Official Gazette of Romania, Part I, No. 233 of 21 November 1991, republished in the Official Gazette of Romania, Part I, No. 758 of 29 October 2003: "In the exercise of their mandate, deputies and senators shall be at the service of the people. Any imperative mandate shall be null and void" (Article 66); Constitution of the Realm of Spain of 6 December 1978, BOE n. 311, of 29/12/1978. BOE-A-1978-31229: "The members of the Cortes General shall not be bound by any imperative mandate" (Article 67).

[6] Law No. 108 of 7 February 1968 on the election of the Regional Councils of the Regions with normal statute, GURI No. 61 of 06.04.1968.

[7] The Treaty on the Functioning of the European Union of 13 December 2007, OJ EU 26.10.2012, C 326/47.

[8] Judgement of the Italian Constitutional Court of 7 March 1964, No. 14, GURI, 1st Special Series – Constitutional Court, No. 67 of 14.03.1964, ECLI:IT:COST:1964:14.

tionality of Law No. 1643 of 6 December 1962, establishes that: "Article 67 of the Constitution, placed among the rules that pertain to the order of the Chambers and not among those that govern the formation of laws, does not explain effectiveness for the purposes of the validity of resolutions, but is aimed at ensuring the freedom of members of Parliament. The prohibition of imperative mandate means that the parliamentarian is free to vote according to the guidelines of his party but is also free to escape it." The Member or Senator may free himself not only from the particular interests of his electors but also from those of the parties on whose lists he has been elected, in order to better pursue the general and supreme interests of the Community. There is political representation but not a legal one, be it direct or indirect, of a civil nature, or of an organic type in an administrative key: a political representation of the member of Parliament as separated from the representativeness relegated to the socio-political sphere.

"Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a deliberative assembly of one nation, with one interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good" [Burke 1996, 64-70]: with his speech to the voters of Bristol on November 3, 1774, the philosopher and politician Burke, advocating the defense of the principles of representative democracy against the idea that elected officials should act exclusively in defense of their voters, formulated the theory of the "free mandate", accepted in the Declaration of Louis XVI of June 23, 1789 which banned the imperative mandate, and was then transfused into the French Constitution of 1791, as a clear break with *the Ancien Régime*[9] and in line with illustrious scholars such as Montesquieu, Saint Girons, Rossi and Moreau [Scarciglia 2005, 68].

The theory of the imperative mandate's prohibition has been absorbed into most European and non-European constitutions. As Diez-Picazo has acutely observed [Díez-Picazo y Ponce de León 1991, 138], it is the ethical and cultural basis of a people that must curb the phenomenon of "transfughismo". The elected person who has voluntarily resigned or been expelled from

[9] Robespierre too, in the Discourse on the Constitution of 10.05.1793, ideologically adhered to the maintenance of the institution of the imperative mandate. For Robespierre – who recalls Clemenceau's speech to the Chamber of Deputies on 26.06.1881 [Philipon 1882, 23]: "Tous mandats son impératif. Un mandat non impératif n'est pas un mandat") – imperativeness was considered an essential characteristic of the elective mandate, with the consequence that such an adjective was considered pleonastic. The binding nature of the legislative mandate derives from the Rousseauian approach of the *Contrat social* and is substantiated in the phrase *mandate contractuel* which indicates the obligations assumed by the candidates towards the parties that proposed their inclusion in a list.

the party and its parliamentary group would have the moral, albeit not legal, obligation to renounce his mandate out of fairness towards those who voted for him because of this political affiliation. It is, therefore, to be considered ethically and politically inappropriate, as well as legally legitimate, the permanence in office of the elected regardless of their political-party events.

Because *de facto* but actually, also *de jure*, as we will shortly see, the parliamentarian occupies – as the jurisprudence of the *Bundesverfassungsgericht* has lucidly highlighted[10] – the double position of representative of the people in its entirety and of exponent of a specific party organization.

That *Parteienstaat* ("Party State"), in relation to which Kelsen – at the antipodes of Rousseau – hoped for a control of the deputies by the groups of voters who formed the parties, since the main cause of the negative transformation of parliamentary institutions was constituted by the irresponsibility of the elected towards the voters [Kelsen 1998].

Italian voters, protected by Articles 21, 48 and 49 of the Italian Constitution, can, of course, have the freedom to change political opinion at any time, but can holders of elected public offices linked to party movements freely and without any obstacle do the same?

Manifold authors have express their thoughts on this regard and they can be summarized as follows: party switching weakens the party system; it undermines governability; negatively affects the representativeness of the decisions taken; it favors political corruption aimed at altering the electoral results and, therefore, in the relations between the majority and the opposition, sometimes benefiting the former, other times the latter; it is to the body politic what fever is to the human body; the exercise of political power without contextual assumption of responsibility constitutes a worm that over time can erode political representation and, with it, the foundations of the current mechanism of democratic participation [De Esteban 1990, 13ff; Ornaghi 1998, 12; Mannino 2001, 69ff].

3. PARLIAMENTARY REPRESENTATION

The legal level of representation cannot be separated from the sociological and political level of representativeness: a parliamentarian is actually unique and at the same time assumes the role of a member of the institutions and a member of a specific party that has welcomed him or her on its lists. A deputy and a senator are elected as they are proposed by a political formation

[10] Judgement of the German Federal Constitutional Tribunal of 23 October 1952, n. 1, BVerfG 2,2; judgement of the German Federal Constitutional Tribunal of 17 August 1956, n. 14, BVerfG 5,85, both declared the political movements *Sozialistische Reichspartei* and *Kommunisten* unconstitutional, establishing the correct relationship between Article 21 GG on the role of parties and Article 38 GG on the Bundestag and on the prohibition of imperative mandate.

admitted to the electoral competition. The member of one of the branches of Parliament represents the nation (political representation) but also in an inseparable and essential way the party that allowed his/her election (representativeness). The relation that must link the moment of political representation to that of party representativeness could be legal representation, with more or less different variations, to ensure that the deputy who decides to change party and, therefore, as his/her institutional sprout, the parliamentary group,[11] is the recipient of duly regulated disciplinary, political or institutional consequences. The need to resize, mitigate or even abolish the prohibition of the imperative mandate is increasingly compelling, especially in consideration of the increasingly stronger bond of the elected to the party, and even more so if to be included in "blocked lists." It is appropriate to ask ourselves how unified the role of the party is with that of the elected, following his inclusion in the electoral lists (especially if "blocked") and, to what extent the voter who make the preference (where provided) does so because of the desire that his "favorite" realize the program of the party that has "co-opted" him in the list of candidates.

If the party is separated from the elected-candidate, an "impenetrable oligarchy" will be created [Pitkin 1967, 195]. This is contrasted with the logic of representative democracy, as Petroni says, "to maintain that it is normal for dozens of parliamentarians to join a side against which they had presented themselves" [Petroni 2000, 5].

It is not in line with the material constitution [Giulimondi 2016] to continue to theorize the absolute freedom of the parliamentary mandate as a fundamental principle of political representation while completely ignoring the role exercised by the parties. It is thanks to the latter "that today it is possible to combine national representation and imperative mandate, overcoming their presumed mutual incompatibility. Although in the past, in order

[11] For a study on parliamentary groups including an examination of their legal nature, powers, relationship with parties and internal regulations, see Heidar and Koole 2000; without affecting the constitutional principle of the prohibition of imperative mandate, the new Italian regulatory rules ("Organic reform of the Senate's Rules") approved by the Senate of the Republic with resolution 20.12.2017, GURI, General Series, No. 15, 19.01.2018, in any case provide for tools aimed at discouraging party switching. Article 13(1-bis), Reg. Sen., indeed provides that "Vice Presidents and Secretaries who become part of a Parliamentary Group other than the one to which they belonged at the time of election shall lose their office;" a similar provision has been inserted, in relation to the Bureau of the Standing Committees, in Article 27(3-bis), Reg. Sen., according to which "the members of the Presidency office who become part of a Group other than the one to which they belonged at the time of the election lose their office." As has been pointed out by the first commentators on the reform in question [Giupponi 2018, 4], the choice to remove the President of the Senate, second office of the state and substitute for the President of the Republic pursuant to Article 86, Constitution of the Italian Republic, from such provisions, certainly seems understandable. Less clear, however, appears the choice to exclude the Police Commissioner (and not the Secretaries) from this automatic forfeiture, since both figures seem to play (albeit in different ways) a particularly delicate role within the parliamentary organization.

to represent the general interest, the elected person had to enjoy a free mandate, without being subject to any form of constraint or responsibility towards the voters, today, he/she must be bound to the voters to the extent that the voters, through the parties, do not give him specific and rigid instructions but a general political mandate for implementation, even partial, of the political program prepared by the party. The binding nature of the mandate received does not contrast, but rather enhances the representative function carried out by the elected representative" [Curreri 2004, 81ff].

Paucis verbis, in modern democracies the voter does not only vote for a party, as an abstract entity, but also chooses the candidate called upon to carry out the program and *Weltanschauung* of the party itself. The elected is such, as a candidate for the party and voted for by the voters. He/She, therefore, does not represent him/herself, but the party together with the voters who voted for that party. If, therefore, his/her political representation derives from having been nominated by the party and voted for by the voters, the decision to abandon the former entails in itself an interruption of the representative relationship between the elected and the portion of the electoral body that voted for him.

The freedom of the parliamentarian must therefore be used "inside" and not "against" the party, allowing the representation of positions divergent from the majority's official one, thus reviving its internal dialectic [Ridola 1988, 133ff].

On the contrary, political irresponsibility is often a consequence of legal irresponsibility, as those who have broken with their party and know that the possibility of a re-candidacy is significantly reduced can become a loose cannon, who offers his/her services for personal purposes without having to answer to anyone: "It is precisely respect for internal democracy that would oblige the dissident parliamentarian on the constitutional level to fight his/her battles within the group and party and to accept its decisions, rather than abandon it while retaining the seat" [Bastida, Punset, and De Otto 1980, 308].

There are two logical-legal outcomes of what has been said so far.

The first, the urgency for state legislation to introduces a basic discipline that pushes the parties towards a common regulation based on general and clear principles and rules of tangible democracy within them.[12]

Secondly, a reshaping of the institution of the imperative mandate and a rethinking of its prohibition, even at the constitutional level, in the same way as the examples that some European and non-European legal systems offer us.

An indispensable premise is the need to maintain the prohibition of the imperative mandate, which is certainly not a "constitutional fossil" [Bobbio 1976, 60], in all those cases in which the decisions of the assembly pertain

[12] For an overview of doctrinal positions *in subiecta materia*, see Santoro 2003.

to the freedom and dignity of the person, to questions of conscience or of an ethical nature, hypotheses regulated in parliamentary regulations and possibly expandable.

4. PORTUGUESE CONSTITUTION AND OTHER CONSTITUTIONS

As previously anticipated, along the way to a possible reformulation of Article 67 of the Italian Constitution and the introduction into our legal system of instruments aimed at redefining the prohibition of the imperative mandate, we are rescued by the prescriptions of *Grundnormen* born within systems that are significantly different from each other (Bangladesh, India, Panama, Portugal and, initially also South Africa[13]), as well as legal institutions, such as the American, Andean and Japanese *Popular Recall* and the Swiss *Abberufungsrecht*, capable of expressing useful food-for-thought for a drastic downsizing of the phenomenon of "transfughismo."

Article 70 of the Constitution of Bangladesh[14] unequivocally spells out the imperative mandate for the members of Parliament: "A person elected as a member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he – (a) resigns from that party; or (b) votes in Parliament against that party; but shall not thereby be disqualified for subsequent election as a member of Parliament." Amendment 52 adopted in 1985 and supplementing the Indian Constitution,[15] Articles 150

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[13] Interim Constitution of South Africa of 22 December 1993, Gazette 1994-01-28, No. 15466, act No. 200 of 1993, provided for the loss of his/her seat by anyone who ceased to belong to the party that had nominated him/her in the elections or designated him/her as a senator (Articles 43.b, 133. b, 48 and 51.b); the Constitution of the Republic of South Africa of 8 May 1996, amended 11 October 1996, No. 108 of 1996, G17678, maintained only the dismissal by the party of the senator designated by it as a delegate to the Provincial Assembly (Articles 62.4. c,d).

[14] The Constitution of the People's Republic of Bangladesh of 4 November 1972, P.O. No. 76 of 1972.

[15] The Constitution of India of 26 November 1949, The Gazette of India extraordinary Nov. 26, 1949, 1949-2597 – Fifty-second Amendment, Bill No. 22 of 15th February 1985: "(2) A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule." 4. Amendment of Article 190. In Article 190 of the Constitution, in sub-clause (a) of clause (3), for the words, brackets and figures "clause (1) of article 191," the words, brackets and figures "clause (1) or clause (2) of Article 191" shall be substituted. 5. Amendment of Article 191. In Article 191 of the Constitution, (a) for the brackets, figure and words "(2) For the purposes of this article," the words "Explanation. For the purposes of this clause" shall be substituted; (b) the following clause shall be inserted at the end, namely: "(2) A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule." 6. Addition of Tenth Schedule. After the Ninth Schedule to the Constitution, the following Schedule shall be added, namely: 6 Tenth Schedule (Articles 102(2) and 191(2)) Provisions as to disqualification on ground of defection. 1. Interpretation. In this Schedule, unless the

context otherwise requires, (a) "House" means either House of Parliament or the Legislative Assembly or, as the case may be, either House of the Legislature of a State; (b) "legislature party", in relation to a member of a House belonging to any political party in accordance with the provisions of paragrap. 2 or paragrap. 3 or, as the case may be, paragrap. 4, means the group consisting of all the members of that House for the time being belonging to that political party in accordance with the said provisions; (c) "original political party", in relation to a member of a House, means the political party to which he belongs for the purposes of sub-paragraph (1) of paragrap. 2; (d) "paragraph" means a paragraph of this Schedule. 2. Disqualification on ground of defection. (1) Subject to the provisions of paragraphs 3, 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House-(a) if he has voluntarily given up his membership of such political party; or(b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorized by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention. Explanation. For the purposes of this sub-paragraph, (a) an elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member; (b) a nominated member of a House shall (i) where he is a member of any political party on the date of his nomination as such member, be deemed to belong to such political party; (ii) in any other case, be deemed to belong to the political party of which he becomes, or, as the case may be, first becomes, a member before the expiry of six months from the date on which he takes his seat after complying with the requirements of Article 99 or, as the case may be, Article 188. (2) An elected member of a House who has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the House if he joins any political party after such election. (3) A nominated member of a House shall be disqualified for being a member of the House if he joins any political party after the expiry of six months from the date on which he takes his seat after complying with the requirements of Article 99 or, as the case may be, Article 188. (4) Notwithstanding anything contained in the foregoing provisions of this paragraph, a person who, on the commencement of the Constitution (Fifty-second Amendment) Act, 1985, is a member of a House (whether elected or nominated as such) shall, (i) where he was a member of a political party immediately before such commencement, be deemed for the purposes of sub-paragraph (1) of this paragraph, to have been elected as a member of such House as a candidate set up by such political party; (ii) in any other case, be deemed to be an elected member of the House who has been elected as such otherwise than as a candidate set up by any political party for the purposes of sub-paragraph (2) of this paragraph or, as the case may be, deemed to be a nominated member of the House for the purposes of sub-paragraph (3) of this paragrap. 3. Disqualification on ground of defection not to apply in case of split. Where a member of a House makes a claim that he and any other members of his legislature party constitute the group representing as faction which has arisen as a result of a split in his original political party and such group consists of not less than one-third of the members of such legislature party, (a) he shall not be disqualified under sub-paragraph (1) of paragrap. 2 on the ground (i) that he has voluntarily given up his membership of his original political party; or(ii) that he has voted or abstained from voting in such House contrary to any direction issued by such party or by any person or authority authorized by it in that behalf without obtaining the prior permission of such party, person or authority and such voting or abstention has not been condoned by such party, person or authority

within fifteen days from the date of such voting or abstention; and(b) from the time of such split, such faction shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragrap. 2 and to be his original political party for the purposes of this paragrap. 4. Disqualification on ground of defection not to apply in case of merger. (1) A member of a House shall not be disqualified under sub-paragraph (1) of paragrap. 2 where his original political party merges with another political party and he claims that he and any other members of his original political party (a) have become members of such other political party or, as the case may be, of a new political party formed by such merger; or(b) have not accepted the merger and opted to function as a separate group, and from the time of such merger, such other political party or new political party or group, as the case may be, shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragrap. 2 and to be his original political party for the purposes of this sub-paragraph. (2) For the purposes of sub-paragraph (1) of this paragraph, the merger of the original political party of a member of a House shall be deemed to have taken place if, and only if, not less than two-thirds of the members of the legislature party concerned have agreed to such merger. 5. Exemption. Notwithstanding anything contained in this Schedule, a person who has been elected to the office of the Speaker or the Deputy Speaker of the House of the People or the Deputy Chairman of the Council of States or the Chairman or the Deputy Chairman of the Legislative Council of a State or the Speaker or the Deputy Speaker of the Legislative Assembly of a State, shall not be disqualified under this Schedule, (a) if he, by reason of his election to such office, voluntarily gives up the membership of the political party to which he belonged immediately before such election and does not, so long as he continues to hold such office thereafter, rejoin that political party or become a member of another political party; or(b) if he, having given up by reason of his election to such office his membership of the political party to which he belonged immediately before such election, rejoins such political party after he ceases to hold such office. 6. Decision on questions as to disqualification on ground of defection. (1) If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final: Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision shall be final. (2) All proceedings under sub-paragraph (1) of this paragraph in relation to any question as to disqualification of a member of a House under this Schedule shall be deemed to be proceedings in Parliament within the meaning of Article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of Article 212.7. Bar of jurisdiction of courts. Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule. 8. Rules. (1) Subject to the provisions of sub-paragraph (2) of this paragraph, the Chairman or the Speaker of a House may make rules for giving effect to the provisions of this Schedule, and in particular, and without prejudice to the generality of the foregoing, such rules may provide for (a) the maintenance of registers or other records as to the political parties, if any, to which different members of the House belong; (b) the report which the leader of a legislature party in relation to a member of a House shall furnish with regard to any condonation of the nature referred to in clause (b) of sub-paragraph (1) of paragrap. 2 in respect of such member, the time within which and the authority to whom such report shall be furnished; (c) the reports, which a political party shall furnish with regard to admission to such political party of any members of the House

and 151 of the Panamanian Constitution[16] and Article 160 of the Constitution of Portugal[17] reflect the same rationale with diametrically opposed legislative

and the officer of the House to whom such reports shall be furnished; and(d) the procedure for deciding any question referred to in sub-paragraph (1) of paragrap. 6 including the procedure for any inquiry which may be made for the purpose of deciding such question. (2) The rules made by the Chairman or the Speaker of a House under sub-paragraph (1) of this paragraph shall be laid as soon as may be after they are made before the House for a total period of thirty days which may be comprised in one session or in two or more successive sessions and shall take effect upon the expiry of the said period of thirty days unless they are sooner approved with or without modifications or disapproved by the House and where they are so approved, they shall take effect on such approval in the form in which they were laid or in such modified form, as the case may be, and where they are so disapproved, they shall be of no effect. (3) The Chairman or the Speaker of a House may, without prejudice to the provisions of Article 105 or, as the case may be, Article 194, and to any other power which he may have under this Constitution direct that any willful contravention by any person of the rules made under this paragraph may be dealt with in the same manner as a breach of privilege of the House."

16 Article 150, Constitution of the Republic of Panama: October 11, 1972 (as Amended to July 27, 2004) "Members shall act in the interest of the nation and shall represent in the National Assembly their respective political parties and their constituency voters;" Article 151: "Political parties may terminate the mandate of principal or alternate Assembly members they have nominated under the following conditions and formalities: 1. The reasons for the termination of the mandate and the applicable procedure must have been established in the party bye-laws; 2. The reasons must refer to grave violations of the by-laws and of the ideological, political or general platform of the party, and must have been approved by means of a written resolution issued by the Electoral Tribunal prior to the date of nomination; 3. The sentencing of the principal or alternate member for premeditated offense to five years or more in prison by enforceable decision of a court of law is also a cause for termination of the mandate; 4. The person concerned shall have the right to be heard by his/her Party and defend himself/herself in two different instances; 5. The Party's decision to terminate the mandate shall be subject to an appeal which can only be heard by the Electoral Tribunal and which shall have suspending effect; 6. For the application of the termination procedure, the parties may establish consultation mechanism with voters in the respective constituency prior to initiating the process. Political parties may also, by summary procedure, terminate the mandate of principal and alternate members who have left their party. The constituency voters may request the Electoral Tribunal to terminate the mandate of independent principal and alternate members they have elected, provided they fulfill the requirements and formalities established by law."

17 Article 160, Constitution of the Republic of Portugal of 2 April 1976, Diário da República n.º 86/1976, Série I de 1976-04-10: "((Loss and resignation of seat) 1. Members of the Assembly of the Republic shall lose their seat in the event that: a) They become subject to any of the disqualifications or incompatibilities provided for by law; b) They do not take up their seat in the Assembly, or they exceed the number of failures to attend laid down in the Rules of Procedure; c) They register as members of a party other than that for which they stood for election; d) They are convicted by a court of any of the special crimes for which political officeholders may be held liable, which they commit in the exercise of their functions and for which they are sentenced to such loss, or they are convicted of participating in organisations that are racist or display a fascist ideology. 2. Members of the Assembly of the Republic may resign their seat by means of a written declaration."

techniques. Last article brought us back to Europe, an isolated case among the legal systems of the Member States of the European Union, but thus not to be overlooked, as an important example also for our examination. Article 160(1), c) of the Portuguese Constitution, in sanctioning the loss of the mandate by deputies who "register as members of a party other than that for which they stood for election;"[18] establishes precisely that principle which can be deduced from what we dealt with previously: the new electoral disciplines in Italy and in the other States, the changing structure of the parties, the more stringent link between the elected and the party that expressed him/her, as well as the evolution of the Western democracies themselves towards majoritarian systems at the parliamentary level and presidential systems at the governmental level ("executive-power centrism" *versus* "legislative-power centrism"), highlight the absolute need to prevent continuous switching of parliamentarians from one group to another, from one side to another, precisely to avoid an invalidation of the executive's action and the majorities' policies that support it. *Last but not least*, the enhancement of the ethical aspect emerges here: voters will no longer be witnessers of the periodic "transhumance" of the deputies and senators that they elected for the party and had placed their hopes on, into ideologically distant territories. A further consequence of the removal from the Charters of the prohibition of the imperative mandate could be a greater incentive to go to the polls, given the conspicuous and general increase in the abstention of electoral bodies in recent decades.[19]

The Spanish attempt of contractual origin to curb "transfughismo" by virtue of the "Acuerdo sobre un código de conducta politica en relación con el transfuguismo en las corporaziones locales" of 7 July 1998,[20] renewed and supplemented on September 26, 2000[21] and May 23, 2006,[22] between the Minister of Public Administration and the representatives of the main Spanish political parties, constitutes a political way of dealing with the

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[18] Miranda and Canotilho [Miranda 1978, 404; Canotilho 1987, 564] have pointed out that there are other Portuguese constitutional provisions that do not allow a party imperative mandate to be considered *in force*, even in the absence of a prohibition of imperative mandate: Article 152, No. 3, Const. Port. which regulates the mandate in the general interest of the country; Article 154, c. 1, Const. Port. which provides for the inclusion of independent candidates in the party lists; Article 163, c), Const. Port. where the position of the independent candidate who leaves the party without defecting to another is valued.

[19] For a careful and precise analysis of the vote of Italians with detailed tables, see De Vidovich 2012-2013. It must be stressed a full-blown exception to the widespread and interstate increase in abstention in voting in the Polish presidential elections held on 18.05.2025 and 1.06.2025 with an interesting percentage of voters of 67.31% in the first round and 71.63% in the second round (data available on wybory.gov.pl).

[20] Available on www.losgenoveses.net.

[21] Available on web.psoe.es/politicamunicipal.

[22] Available on www.seap.minhap.gob.es.

problem and, as such, devoid of the binding force possessed by a constitutional norm with consequent tempered effects.

To the possible objection to the removal of the prohibition of the imperative mandate based on the totalitarian origins of the imperative mandate, one can respond without hesitation that the status of the deputy or senator and his/her "being dependent" on a political formation that got him/her elected is part of a multi-party-system and not a single party's one as in communist countries.[23]

In fact, there are instruments, outside the constitutional articles, that give voters the possibility of intervening in the event that their parliamentarian is found to be in breach of the "party and/or political mandate."

5. POPULAR RECALL

The most widespread is that of *popular recall*[24] – an institution of direct popular democracy such as the abrogative, confirmatory and consultative referendum, popular action and petition – used for the first time in the City of Los Angeles in the years 1903 and 1909 [Ronchi 2009, 18-20], then constitutionalized in fifteen states of the U.S.A. between 1908 and 1974[25]

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[23] A hypothesis of an imperative mandate in a country with real socialism can be found in Article 13.b, Czechoslovak Law No 125 of 29.2.1920 on the Electoral Tribunal (available on https://www.zakonyprolidi.cz/cs/1920-125), which conferred on that court the power to suspend first – and then to revoke (pursuant to Article 4) – the mandate of a Member of Parliament who, for futile or dishonorable reasons, had been expelled from the party on whose lists he had been elected, with his or her replacement by the first of the non-elected members on the list; it is advisable to read for an quick overview on this topic: Scarciglia 2005, 77-86; Curreri 2004, 109-11, 128-30.

[24] *Ex pluribus*, see Ronchi 2009, 1-43.

[25] The North American institution of *popular recall* has been introduced in the following Constitutions of some States of the United States as amended, with the exception of that of Louisiana where it is already provided for in the original version of the text: Article II(18), Constitution of the State of Oregon of 9 November 1857, as amended to 1908, Oregon Official Register of State, District, and County Officiers 1907, 110/907; Article II(15c), Constitution of the State of California of 7 May 1879, as amended to 1911, California Statutes of 1880; Article XXI(2), Constitution of the State of Colorado of 1 July 1876, as amended to 1912, Colorado General Assembly, "Constitution of the State of Colorado." (1877). Session Laws 1861-1900.1331; Article I(33), Constitution of the State of Washington of 1 October 1889, as amended to 1912, November 11, 1889.26 Stat. Proclamation, p. 10; Article VI(6), Constitution of the State of Idaho of 3 July 1890, as amended to 1912, Idaho Code 1890, Vol. I; Article II(9), Constitution of the State of Nevada of 14 September 1864, as amended to 1912, Section 3 to 187, inclusive, of chapter 595, Statutes of Nevada 2019, at p. 3767, title 56 of NRS; Article VIII(3), Constitution of the State of Arizona of 9 December 1911, as amended to 1912, Statutes of Arizona 2018, at p. 2278; Article II(8), Constitution of the State of Michigan of 1 April 1963, https://legislature.mi.gov/Laws/MCL?objectName=MCL-CONSTITUTION;

and taken up by the Japanese[26] Constitution and by some South American legal systems.[27]

The procedural prototype of *popular recall* is represented precisely by the one configured in Article 72 of the Constitution of Venezuela of 1999[28]: "All magistrates and other offices filled by popular vote are subject to revocation. Once half of the term of office to which an official has been elected, has elapsed, a number of voters constituting at least 20% of the voters registered in the pertinent circumscription may extend a petition for the calling of a referendum to revoke such official's mandate. When a number of voters equal to or greater than the number of those who elected the official vote in favor of revocation, provided that a number of voters equal to or greater than 25% of the total number of registered voters have voted in the revocation election, the official's mandate shall be deemed revoked, and immediate action shall be taken to fill the permanent vacancy in accordance with the provided for in this Constitution and by law. The revocation of the mandate for the collegiate bodies shall be performed in accordance with the law. During the term to which the official was elected, only one petition to recall may be filed."

Article X(26), Constitution of the State of Louisiana of 20 April 1974, 1975 Louisiana Register, Volume 1, January edition; Article IV(3), Constitution of the State of Kansas of 29 January 1861, as amended to 1914, https://sos.ks.gov/publications/kansas-constitution.html; Article III(10), Constitution of the State of North Dakota of 1 October 1889, as amended to 1920, https://ndlegis.gov/assembly/revised-codes-and-compiled-laws/1895/constitution-of-north-dakota.pdf; Article XIII(12), Constitution of the State of Wisconsin of 13 March 1848, as amended to 1926, https://archive.org/details/esrp1260851261/page/14/mode/2up; Article XI(8), Constitution of the State of Alaska of 24 April 1956, as amended to 1960, https://ltgov.alaska.gov/wp-content/uploads/PDF-Pocket-Constitution.pdf; Constitution of the State of Montana of 6 June 1972, as amended to 1976, https://courts.mt.gov/external/library/docs/72constit.pdf; Article VIII(6), Constitution of the State of Minnesota of 13 October 1957, as amended to 1974, https://www.revisor.mn.gov/constitution/.

[26] Article 15, Constitution of the Empire of Japan of 3 November 1946, The Official Gazettes, a Special Edition, 1946: "1. The people have the inalienable right to choose their representatives and officials and to dismiss them. 2. All representatives and officials are at the service of the whole community and not of any particular group of it"; Article 79(c. 1), Const. Jap.: "[…] The appointment of Supreme Court justices will be ratified by the people at the first general election of the House of Representatives following their appointment; and will again be submitted for ratification at the first general election of the House of Representatives after a 10-year term in office, and so on. In the cases mentioned in the preceding paragraph, when a majority of the voters indicate that they are in favor of the dismissal of a judge, he shall be dismissed […].

[27] Article 103, Constitution of the Republic of Colombia of 4 July 1991, Gaceta Constitucional No. 116 de 20 de julio de 1991; Articles 31, 139, n. 17, 191 and 198, Constitution of the Republic of Peru of 31 October 1993, Diario Oficial "El Peruano", 29 de diciembre de 1993; Articles 72, 197 and 233, Constitution of the Bolivarian Republic of Venezuela of 15 December 1999, Gaceta Oficial del jueves 30 de diciembre de 1999, n° 36.860.

[28] See ft. prev.

The *popular recall* is symmetrical to the elective public office, including the parliamentary one, the latter attributable to the State-Community, *id est* to the electoral body which, according to the different types of regulations, elects, chooses, indicates, appoints its own "representatives" to the parliamentary, magistrate and administrative institutions.

If the mentioned *nunci* depart from the received political and administrative mandate, the Community that insists on the territorial district concerned may request, through a reasoned collection of signatures (the number of which differs according to the legal system), the removal of the parliamentarian, official or magistrate who has exercised his or her office at least for a certain period of time. If the pre-established number of signatures is reached, a vote is held (in the form of a referendum) – varying the structural and functional quorum from legislation to legislation – thanks to which the voter can confirm or not the name whose revocation is requested, possibly – based on the Constitution or implementing legislation – indicating the name of the substitute in case the *petition* is accepted.

In some particularly detailed and guaranteeist regulations, an adversarial procedure is also provided, in compliance with rules similar to those of civil proceedings or administrative procedures and, in particular, of the adversarial principle, together with the provision, in the event of a dispute, of the possibility of appealing to the county court.

Similar to *the recall* is the Swiss cantonal *Abberufungsrecht*[29] (in French idiom *droit de révocation*), different from the *Amtsenthebungsrecht*[30] which

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[29] The Abberufungsrecht is provided for: in Article 57, Constitution of the Canton of Berna of 6 June 1993, BBI 1994 III 1883, I 40; nel &44, Constitution of the Canton of Lucerna of 17 June 2007, BBI 2008 5789, 1431; in Article 27(c. 2), Constitution of the Canton of Uri of 28 October 1984, BBI 1985 II 1343; in Article 28, Constitution of the Canton of Solothurn of 8 June 1986, BBI 1987 II 526; nel &44, Constitution of the Canton of Schaffhausen of 17 June 2002,BBl 2003 6877 3347; nel & 25, Constitution of the Canton of Thurgau of 16 March 1987, BBl 1989 III 1722 873; but not in the Federal Constitution of the Swiss Confederation of 18 April 1999, Fedlex RS 101, RU 1999 2556.

[30] Article 61, Constitution of the Federal Republic of Germany (see fn. 3): "(1) The Bundestag or the Bundesrat may impeach the Federal President before the Federal Constitutional Court for willful violation of this Basic Law or of any other federal law. The motion of impeachment must be supported by at least one quarter of the Members of the Bundestag or one quarter of the votes of the Bundesrat. The decision to impeach shall require a majority of two thirds of the Members of the Bundestag or of two thirds of the votes of the Bundesrat. The case for impeachment shall be presented before the Federal Constitutional Court by a person commissioned by the impeaching body. (2) If the Federal Constitutional Court finds the Federal President guilty of a willful violation of this Basic Law or of any other federal law, it may declare that he has forfeited his office. After the Federal President has been impeached, the Court may issue an interim order preventing him from exercising his functions"; Article 60(c. 6), Federal Constitutional law of the Republic of Austria (see fn. 3): "Before the expiration of the functional period the Federal President can be deposed by a people's referendum. The people's referendum is to be carried out if the Federal Assembly demands it. The Federal

is closer to US *impeachment*[31] or impeachment of the President of the Italian Republic.[32] The procedure followed is similar to what has been described above, even if the legal effects are considerably broader in scope due to the fact that the final purpose to be drawn on is the early dissolution of the Assembly: in this case, therefore, a qualified minority involves the entire electoral body which is called to the polls for a second time to confirm, or dissolve, before its natural expiry, the cantonal parliament.

The Italian legislator has also felt urged by this doctrinaire, legislative, constitutional and jurisprudential fervor, of European and international scope, to engage the highest value normative function in order to stop an *extra ordinem* excess of switching between the groups: "The litmus test of the unresolved contradictions of the parliamentary groups in the Italian legal system" [Merlini 2004, 14] is the enlargement of the "mixed" group which, born to accommodate those who have not been able to form one independently, has become a "Frankenstein" group, the *refugium peccatorum* of those who have left their group in disagreement with it and with the party that nominated them, completely distorting the prohibition of the imperative mandate.

As a result not only the Italian legislator – even surreptitiously through the amendment of the Senate of the Republic's rules[33] – but also the governments and assemblies of European and non-EU states are trying to provide a solution to the natural tension between the principle of parliamentary representation and the role of political parties with different formulas, taking into particular consideration Article 160 of the Constitution of Portugal,[34] which "could perform the function of coordinating constitutional provisions that are the expression of periods and conceptions differentiated over time, on the one hand the older – representative liberal model – on the other the modern – Party State" [Scarciglia 2005, 162].

Assembly is to be convoked for this purpose by the Federal Chancellor, if the National Council has passed such a motion. For a decision by the National Council the presence of at least one-half of the members and a majority of two-thirds of the votes cast is required. By such a decision by the National Council, the Federal President is prevented from the further exercise of his office. The rejection of the deposition by a people's referendum is taken to be a new election and has the consequence of a dissolution of the National Council. Also, in this case the entire functional period of the Federal President may not last more than twelve years."

31 Article II(IV), Constitution of the United States of America of 17 September 1787, https://constitution.congress.gov/constitution/: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

32 Article 90, Constitution of the Italian Republic (see fn. 1): "The President of the Republic is not responsible for the actions performed in the exercise of presidential duties, except in the case of high treason or violation of the Constitution. In such cases, the President may be impeached by Parliament in joint session, with an absolute majority of its members."

33 See fn. 9.

34 See fn. 14.

CONCLUSIONS

We can conclude with one reflection and one doubt.

The reflection is based on sovereignty of the People who exercise it in the forms and within the limits dictated by the Constitutional Charters, first and foremost of the 27 Member States of the European Union. The sovereignty conferred on the people is at the origin of all constitutional norms and is itself the first to be damaged whenever the conduct of a parliamentarian is in contrast with what is indicated by the electorate through its vote. Parties constitute intermediate bodies essential for the correct democratic dynamics of a legal system,[35] even if it is always and only the *voluntas civium* that is the primary source of legitimacy of the structural constitutional bodies of a state, starting with Parliament (unicameral or bicameral).

The doubt – necessary to create innovation (legal and normative) as Bertolt Brecht teaches us – on the other hand is substantiated in the following observation: what if it is not the parliamentarian who changes his/her political and programmatic line but the party to which he/she belongs that during the legislature, radically changes its position, behavior, posture and attitude with respect to its initial electoral program and ideal?

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[35] For an in-depth analysis of the role of parties, see Giulimondi 2020.

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JOINT RIGHTS DISSOLUTION IN ORDINARY LEGAL TRANSACTIONS IN THE CONTEXT OF TAX LEGISLATION

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Abstract. The tax law system provides for the taxation of numerous legal events (or their financial consequences), including special types of legal transactions aimed at dissolving joint ownership of property or property rights held by more than one entity. Within the scope of common civil law transactions, these include the dissolution of co-ownership, the division of an inheritance, and the division of joint property held by spouses. The law clearly defines the principles of the tax liability with regard to the first two categories of transactions, while extending this liability to the division of joint property of spouses is debatable. In this paper, the author presents issues that arise under the tax legislation related to the aforementioned transactions and suggests solutions.

Keywords: dissolution of joint ownership; division of the inheritance; division of the joint property of spouses; tax liability.

INTRODUCTION

This paper refers to the category of legal transactions in a broad sense, including both substantive and formal (procedural)[1] transactions involving the liquidation (total or partial) of a common property or property rights. The subject of the commonality may be a single item – in this case, co-ownership – a single property right other than ownership, such as perpetual usufruct or lease, or a set of items and/or rights, including a particular aggregate of them termed as property or assets [Gniewek 2007, 430-32]. Thus, these transactions are made by civil law entities remaining in a special legal and property relationship, such as joint ownership (commonality).

[1] Therefore, the sources of their regulation are not only the provisions of substantive civil law, namely the Act of 23 April 1964, the Civil Code, Journal of Laws of 2024, item 1061 [hereinafter: CC], and the Act of 25 February 1964, the Family and Guardianship Code, Journal of Laws of 2023, item 2809 [hereinafter: FGC], but also civil procedural law, namely the Act of 17 November 1964, the Code of Civil Procedure, Journal of Laws of 2024, item 1805 [hereinafter: CCP].

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In ordinary legal transactions, which consist of non-business legal transactions [Doliwa 2005, 5], especially concerning natural persons, three categories play a particularly important role: dissolution of co-ownership (joint ownership), division of inheritance and division of joint property of spouses. The present discussion will be narrowed down to the above three categories of legal transactions, while the question of division of property of partners of a civil partnership will be omitted due to its relation to business transactions.

The dissolution of co-ownership plays an exceptional role in the system of transactions due to its independent position and complete regulation, which does not allow for referral to other transactions [Swaczyna 2004; Kostański 2004; Świeczkowski 2013]. The material and legal aspects of co-ownership dissolution are regulated in Articles 210-221 CC, while procedural issues are regulated in Articles 606-608 and 617-625 CCP. It should also be noted that the dissolution refers to the basic model of joint ownership, i.e. joint ownership in fractional parts (where particular co-owners are entitled to shares indicated by a fraction). It is not applicable to joint ownership (i.e. shareless ownership, such as marital joint ownership), for which special regulations apply on a case-by-case basis.

In light of the aforementioned legislation, three main methods of dissolving co-ownership can be identified: 1) physical division of the common property, if it is not contrary to the provisions of the law or to the social and economic purpose of the property, or if it does not involve a substantial change in the property or a substantial decline in its value (Article 211 CC); if, at the same time, the value of the physically divided parts does not coincide with the value of the individual shares, this value may be compensated for by cash payments (Article 212(1) CC); 2) granting ownership of the common property to one co-owner with the obligation to repay the others (Article 212(2) CC); 3) sale of the common property pursuant to the provisions of the Code of Civil Procedure (Article 212(2) CC).

The literature also permits hybrid methods of dissolving co-ownership upon the unanimous request of the co-owners. Examples include applying a partial physical division or allocating part of the property to one of the co-owners and selling the remainder [Gniewek 2007, 480].

It should be added, as will be discussed later, that the aforementioned cash transactions involving surcharges and repayments are key to determine tax liability. The function of the above benefits is as follows: (a) a surcharge is due to a co-owner (subject of a joint right) obtaining, as a result of the dissolution of co-ownership, a benefit whose value is lower than the value of his share – from a co-owner (subject of a joint right) obtaining a benefit whose value exceeds his share; (b) a repayment is due to the co-owner (subject of the joint right) disposing of his share as a result of the dissolution of co-ownership – from the co-owner (subject of the joint right) to whom the disposal is made.

The division of inheritance involves the allocation of the inherited property among the co-heirs, and the principles and manner of this allocation are defined in Articles 1035 and 1037-1046 CC, as well as in Articles 627-628 and 680-689 CCP with regard to procedural aspects.[2] Unlike the regulation of the dissolution of co-ownership, the provisions relating to the division of inheritance are not exhaustive, as the legislator omitted the methods of dividing inherited property and its constituent elements. At the same time, Article 1035 CC provides for the appropriate application of the provisions on joint ownership in fractional parts in this respect.

A similar mechanism, although with significant modification, has been applied to the division of joint property of spouses, which is the final phase of the dissolution of a specific property rights – that is, a system of joint property ownership between spouses.[3] The legislator has devoted only a few provisions to this matter (Articles 46 and 58(3) FGC, and Article 566 CCP), using the method of referencing other legal norms in a rather characteristic way. In Article 46 FGC, the legislator provides for the appropriate application of the provisions on division of the inheritance. In doing so, they refer, among other things, to Article 1035 CC. As mentioned above, this article contains a reference to the provisions on the dissolution of joint ownership. As can be seen, the legislator has used a mechanism involving a double reference in this case [Smyczyński 2009, 513].

Thus, not only the transaction of dissolution of joint ownership (commonality), but also any of the other transactions may use any of the three methods of dissolution of commonality referred to hereinabove.

Referring to the remark made at the beginning of this paper, it should also be emphasised that each of the aforementioned transactions undertaken to liquidate joint ownership may take the form of either a substantive legal action (i.e. an agreement concluded by the parties to the legal relationship of joint ownership or commonality) or a procedural action, such as a court or arbitration court decision, a settlement concluded before a court or, having the legal force of a court settlement, a settlement concluded before an arbitration court after it has been recognised or declared enforceable by the court (Article 1212(1) CCP), or a settlement concluded before a mediator (after court approval – Article 183^{15}(1) CCP).

The tax consequences with regard to the individual transactions referred to hereinabove are not uniform. *Expressis verbis*, the dissolution of joint ownership is subject to both tax on civil law transactions and tax

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[2] This topic has been extensively analysed by: Kremis 2009, 639-825; Biernat 2007; Stempniak 2022, among others.

[3] More information on this subject can be found in: Ignaczewski and Skiepko 2021; Ciepła and Pytlewska 2022; Smyczyński 2009, 512-29.

on inheritance and donations, while the division of inheritance – only to the former. On the other hand, the act of division of joint property of spouses seems to be tax-neutral, although there is not a full consensus of views in the legal doctrine here. The question also arises as to whether the provisions relating to other taxes may apply to the analysed transactions.

1. TAXATION OF THE DISSOLUTION OF JOINT OWNERSHIP AND TAXATION OF THE DIVISION OF THE INHERITANCE UNDER THE TAX ON CIVIL LAW TRANSACTIONS

Legal regulations concerning the tax indicated in the title of this part of the paper[4] adopt a narrower approach to the subject of the tax obligation in relation to the analysed transactions, stipulating that agreements on division of inheritance and agreements on dissolution of joint ownership are subject to tax only in the part concerning repayments or surcharges[5] (Article 1(1)(f) TCLT). In other words, the tax only comes into play if the performance of a certain act is combined with a repayment or surcharge. In these cases, therefore, an obligation is imposed on all participants in the transaction: the benefit of one party consists in a contribution to the other party corresponding to the value of the share or a contribution in excess of the share, while the benefit of the other party takes the form of a repayment or surcharge, constituting equivalents for the aforementioned contributions. This allows us to classify this category of community liquidation transactions as bilaterally (multilaterally) obliging and at the same time chargeable transactions, which is in line with the concept of the tax under analysis [Goettel and Goettel 2007, 62-63; Michta and Pankrac 2013].

A characteristic feature of the analysed tax is the circumstance that the obligation under this title is connected with the very occurrence of a specific civil law event, regardless of whether this event entails a benefit to a given person or persons (it usually does) or not. While constructing the catalogue of events constituting the subject of taxation, the legislator used the method of enumerating them, i.e. the principle of *numerus clausus* [Ofiarski 2018, note 2 to Article 1; Wilk 2016, 136; Filipczyk 2015; Goettel and Goettel 2007, 60; Skwierczyńska and Szymańska 2015, 18; Gargul and Oleś 2024], but did not apply it in its entirety. He did so, pursuant to Article 1(1)(1) and (2)(2)(1) and (3) TCLT, only with regard to acts of substantive civil law (mainly contracts), listing in the catalogue, as mentioned hereinabove, agreements

[4] Act of 9 September 2000 on tax on civil law transactions, Journal of Laws of 2024, item 295 [hereinafter: TCLT].

[5] A judgment of the Provincial Administrative Court in Bydgoszcz of 18 December 2019, ref. no. I SA/Bd 601/19, Lex no. 2760300.

on division of inheritance and agreements on dissolution of joint ownership. However, in accordance with the conception of the subject of taxation adopted in the Act, it also covers procedural transactions. Goettel analyses this problem in more detail. Nevertheless, the scope of these transactions is no longer specified by means of an unambiguous criterion. According to the wording of Article 1(1)(3) TCLT, only those procedural transactions that produce the same effects as the substantive legal transactions covered by taxation and their amendments are subject to tax (i.e. those indicated in Article 1(1)(1) and (2) TCLT). Therefore, the subject matter covered herein concerns court and arbitration court rulings, as well as settlements on the dissolution of joint ownership and division of inheritance. These constitute an alternative mode of creating, modifying or abolishing a specific civil law relationship [Goettel 2020, 62].

Against the background of transactions dissolving joint ownership, an interesting view has been expressed in jurisprudence: the use of the name "Agreement on the Division of a Portion of the Inheritance and the Division of a Portion of the Property Included in the Marital Statutory Joint Ownership" in the notarial deed, i.e., a wording not included in the catalogue in Article 1(1)(1) TCLT, does not exempt this action from the scope of the tax in question concerning the division of inheritance with agreed-upon repayments or surcharges.[6] This no doubt accurate view has been approved by legal requirements [Ofiarski 2018].

The objective scope of the tax under review was further expanded, pursuant to Article 1(2)(3) TCLT (on the basis of being treated like inheritance division and joint ownership dissolution agreements, respectively) to comprise: 1) acquisition of ownership of common property or common property right or parts thereof by some of the existing co-owners for further co-ownership – in the part of repayments or surcharges, 2) separation of ownership of premises for consideration in favour of some or all co-owners.

The first case is classified as a mixed method of liquidating joint ownership in the doctrine [Gniewek 2007, 480], while the second case is a method of establishing separate ownership of premises [Ignatowicz and Stefaniuk 2012, 150]. The option to tax this method was accepted in jurisprudence before Article 1(2)(3) TCLT[7] took effect.

Regardless of the form of the act liquidating joint ownership, the presented formula of the law supports including only the dissolution of joint ownership and the division of inheritance in the tax, thus excluding other such acts from taxation, specifically the division of joint property of spouses.

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[6] A judgment of the Provincial Administrative Court in Gdansk of 14 November 2014, ref. no. I SA/Gd 910/14, Lex no. 1552596.

[7] A judgment of the Supreme Administrative Court of 17 November 2015, ref. no. II FSK 2288/13, Lex no. 1916697.

The tax obligation under this levy is imposed on the co-rights holder who, as a result of the dissolution of co-ownership or division of the inheritance, obtains a gain, in the form of the acquisition of a property or property right, over and above the share in the inheritance or co-ownership (Article 4(5) TCLT). This type of situation occurs primarily when there is an allocation of the property or right in its entirety to one of the co-owners as part of the aforementioned transactions, with the obligation to repay the shares held by the other co-owners, but also when there is a physical division of the property, combined (due to the impossibility of carrying out this operation according to the value of the shares) with repayments or surcharges [Biernacki 2009, 22]. This obligation, however, does not fall on the entity enjoying a monetary benefit in the form of a surcharge or repayment.

According to Article 6(1)(5) TCLT, the basis for taxation is the market value of the property or property right acquired over and above the value of the share in joint ownership or inheritance. Therefore, this basis is not the amount of the repayment or surcharge paid on this account, as agreed by the parties. This is because the amount due may not coincide with the market value of the property or property right acquired in excess of the share's value. Not only the jurisprudence,[8] but also the doctrine [Bogucki 2021b] has spoken to this effect. Such a situation may only occur in the event of a contractual dissolution of joint ownership since, in court proceedings, the court's decision on repayments or surcharges always takes into account the market value. In practice, the amount of the repayment or surcharge will be the reference point for determining the tax base when the method of determining it is not in doubt. Otherwise, the tax authority will determine it in accordance with the rules of Article 6(3) and (4) TCLT.

In turn, the tax rates have been differentiated depending on the type, representing the subject of the transaction, of the property, where the acquisition is made over and above the share in the inheritance or joint ownership. They have been set as a percentage of the value of the acquisition, at the rate of: 1) 2%, if the subject of the transaction is: ownership of real estate, ownership of chattels, perpetual usufruct rights and designated cooperative ownership title to an apartment; 2) 1%, if the subject of the transaction involves other property rights.

[8] For instance, in the judgments of the Supreme Administrative Court: of 1 December 2009, ref. no. II FSK 1054/08, Lex no. 582760; of 12 October 2016, ref. no. II FSK 2718/14, Lex no. 2149084; of 1 March 2018, ref. no. II FSK 437/16, Lex no. 2467934; and in the judgment of the Regional Administrative Court in Lodz of 22 March 2019, ref. no. I SA/Łd 844/18, Lex no. 2651927.

2. TAXATION OF DISSOLUTION OF CO-OWNERSHIP WITH INHERITANCE AND DONATION TAX

The category of the above-mentioned transactions is also of interest in the regulations governing the taxation of gratuitous acquisition of property and other property rights.[9] In this case (in contrast to the taxation of civil law transactions), the subject of the tax is not the legal act itself or any other civil law event, but the property gain obtained on their basis (Article 1(1) *in principio* IDT). Among the sources of acquisition, the Act includes, under Article 1(1)(4) IDT, only one act, namely: the gratuitous dissolution of co-ownership,[10] extending, under Article 1a, the application of the provisions of the Act to gratuitous: 1) acquisition of ownership of a common item (common property right) or part thereof by some of the existing co-owners for further co-ownership. 2) spin-off of ownership title to premises for some or all co-owners respectively.

This extension resembles the similar, taking into account the difference regarding the criterion of payment, legal solution provided for in Article 1(2)(3) TCLT [Bogucki 2021a; Borszowski 2022].

By contrast, the omission of a gratuitous inheritance division under Article 1(1)(4) of the Inheritance and Donation Tax Act is because the acquisition of inheritance by co-heirs (Article 1(1)(1) of the Act) is taxable. The division of the inheritance does not represent the acquisition of property rights by the co-heirs; this takes place, albeit not definitively, from the opening of the inheritance, i.e. the death of the testator [Piątowski 2009, 133]. However, it is a kind of concretisation of the aforementioned acquisition, i.e. the acquisition of exclusive rights to designated components of the inherited property by the individual heirs [Kremis 2009, 641]. Otherwise, if the tax burden were imposed on the inheritance division, it would result in the acquisition of a property right being taxed twice.

The question of what sort of dissolution of co-ownership is considered gratuitous under the provisions under review is of great interest. Certainly, the notion does not cover cases of dissolution where each co-owner obtains a benefit (in natural or monetary form) corresponding to the value of their share. As this type of action does not constitute a source of additional benefit in the form of the acquisition of a thing or property right, it does not comply with the concept of the analysed tax and will therefore be tax-neutral. According to the unanimous position of the judiciary and legal scholars[11]

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[9] Act on Inheritance and Donation Tax of July 28, 1983, Journal of Laws of 2024, item 1837 [hereinafter: IDT].

[10] It is extensively analysed by Babiarz 2010.

[11] A judgment of the Supreme Administrative Court of 23 June 2009, ref. no. II FSK 237/08,

[Czerski 2010, 201], this is undoubtedly the case in situations where there is a property gain exceeding the value of the share, while the beneficiary is not obliged to make a repayment or pay a surcharge. This type of impact will take place, in particular, in the case of a physical division of assets when the value of the parts separated from the parent assets (i.e. the new assets), do not match the value of the shares, or if the existing co-owners obtain parts with a lower value than their share value and waive the right to demand surcharges from co-owners who obtain parts with a value exceeding their share value. It will also occur if a common asset is allocated to one of the co-owners and the remaining co-owners relieve him of the obligation to repay the shares due to them. This line of reasoning is confirmed in Article 7(6) IDT, as will be discussed shortly [Biernacki 2009, 21].

The design of a gratuitous dissolution of co-ownership resembles, what is apparent especially in the case of granting ownership of a common item to one of the co-owners without the obligation of repayment, the design of a donation of a share, i.e. a type of legal transaction[12] other than a dissolution of co-ownership [Gniewek 2007, 477]. The interested parties will therefore be able to choose the type of transaction they want to use to attain the desirable effect.

It should also be noted that, among the numerous tax exemptions relating to all or only certain acquisitions, an exemption has been individually addressed to participants in a gratuitous dissolution of co-ownership if it takes place between persons classified in tax group I (Article 4(1)(15) IDT). However, this provision does not apply due to the prohibition arising from Article 35 FGC. It does not apply to the dissolution of the joint ownership of a designated asset belonging to spouses, as the transfer of such an asset may only take the form of a donation.[13]

The tax liability for the acquisition transaction under review is, as a general rule, borne by the acquirer (Article 5 IDT), and arises upon entering into a contract or an agreement or a court decision on the subject becoming final and legally binding (Article 6(1)(7) IDT).

The tax base is the value of the property or property rights in excess of the value of the share in co-ownership vested in the acquirer prior to its abolition (Article 7(6) IDT).[14] The amount of the tax is determined in ac-

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Lex no. 529255 and a judgment of the Regional Administrative Court in Warsaw of 9 June 2015, ref. no. III SA/Wa 3802/14, Lex no. 1730164.

[12] A judgment of the Supreme Court of 9 March 2009, ref. no. III CSK 307/08, Lex no. 492154.

[13] Rationale of the judgment of the Provincial Administrative Court in Warsaw of 29 June 2011, ref. no. III SAWa 3289/10, Lex no. 1087859.

[14] See, on how to determine this value – the judgment of the Provincial Administrative Court in Warsaw of 9 June 2015, ref. no. III SA/Wa 3802/14, Lex no. 1730164, and the judgment of the Supreme Administrative Court of 1 February 2018, ref. no. II FSK 131/16, Lex

cordance with the general rules (i.e. without providing for certain modifications in relation to the gratuitous dissolution of co-ownership) set out in Articles 9, 14, 15 and 17 IDT, setting this amount depending on the taxpayer's membership in a particular tax group and the amount of the excess of the tax base over the tax-free amount, with the possibility of adjustment due to price changes.

3. REMOVAL OF JOINT OWNERSHIP AND DIVISION OF THE INHERITANCE IN THE LIGHT OF OTHER TAX LEGISLATION

The question then arises as to whether the taxation of the activities mentioned in the title of this section is also applicable to other taxes, whereby, for understandable reasons, only the income tax payable by natural persons may be taken into consideration.[15] Doubts in this respect may arise from the fact that the provisions of the aforementioned Act, in contrast to the previously discussed tax regulations, do not explicitly indicate the given activity as a subject of taxation (in other words, among the sources of income subject to tax). Indirect indication may be found in the content of Article 2(1)(3) PIT, which excludes the application of this Act to revenue subject to the provisions of Act on Inheritance and Donation Tax, and therefore also to revenue from a gratuitous dissolution of joint ownership.

Therefore, is it possible that a chargeable transaction abolishing a joint ownership could represent the income tax base? A closer look at the relevant provisions suggests that the answer is affirmative.

Such a conclusion is prompted by the content of Article 10(1)(8)(a) of the Personal Income Tax Act, which deems the "disposal of a share in real property against payment" to be a source of revenue. The assessment of this acquisition scenario is relevant, inter alia, in the context of the method of dissolving joint ownership, whereby ownership of the property is granted to one of the co-owners, who is obliged to repay liabilities vis-à-vis the others (Article 212(2) CC). This mechanism involves the remaining co-owners disposing of their shares in the joint ownership for the benefit of one of the co-owners. Thus, what occurs here is the disposition of shares [Gniewek 2007, 478-79], or more specifically, the transaction of their disposal. The benefit of the acquirer of the shares (he becomes, as a consequence, the sole owner of the previously jointly owned property) is the due amount related to their repayment. The disposal in question is therefore for valuable consideration [Słomka 2021, 108], and thus falls within the hypothesis

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no. 2450530.

[15] Act of 26 July 1991 on personal income tax, Journal of Laws of 2025, item 163 [hereinafter: PIT].

of Article 10(1)(8)(a),[16] provided that the other conditions are met (in particular, the five-year period expires at the end of the calendar year in which the real property was acquired or constructed).

It is all the more surprising, therefore, to note the position adopted in certain administrative court decisions, which assumes that the disposal of a share for a repayment corresponding to its value, as part of the dissolution of co-ownership, does not generate income within the meaning of Article 10(1)(8) PIT. Consequently, it is argued that income would only be generated if the repayment exceeded the value of the share.[17] This point of view is probably the result of a misunderstanding of the term 'revenue' in the context of the aforementioned provision. Putting aside the validity of this solution in light of the principles of the legal system for the moment, the provision uses a normative concept of revenue, which does not necessarily reflect its economic sense. In other words, it does not consist of an increase in the value of the seller's assets. In this understanding, revenue constitutes an equivalent benefit to the asset that has been disposed of (ownership of a thing, other property rights or a share in co-ownership), which is usually in the form of a sale price. However, it can also take the form of a thing obtained on the basis of a swap agreement or another type of benefit. In the case of a sale, revenue is recognised directly under the terms of Article 19(1) PIT. This states that revenue is the value specified in the sales agreement, minus the sale costs (e.g. advertising, expert valuation, agent's fees, notary fees). After all, the exit of an asset from the seller's assets following a sale agreement, and the subsequent entry of a cash consideration corresponding to the value of that asset (i.e. the price), does not generate an increase in assets, i.e. income in economic terms. In other contracts of disposal, the peculiar equivalent of the price is, for example, the value of the things to be exchanged (in a swap agreement) or the value of another type of consideration. There are no obstacles to assessing the repayment of a share in the same way (in a contract for the removal of joint ownership or for the division of the inheritance). This means that in a contract of removal of co-ownership combined with repayment of a share, the same mechanism operates as in a contract of sale. Thus, the income from entering

[16] In its judgment of 28 January 2021 (ref. no. III SA/Wa 1225/20, Lex no. 3195773), the Provincial Administrative Court in Warsaw convincingly demonstrated that the dissolution of joint ownership combined with the repayment of a share represents one of the cases of disposal for consideration within the meaning of Article 10(1)(8) IDT.

[17] So, in particular, the judgments of the Supreme Administrative Court of: 28 July 2017, ref. no. II FSK 1432/16, Lex no. 2330363; 3 March 2020, ref. no. II FSK 1557/18, Lex no. 3007185; 7 May 2021, ref. no. II FSK 342/21, Lex no. 3265732; 10 December 2021, ref. no. II FSK 1115/21, Lex no. 3371818; 22 January 2022, ref. no. II FSK 58/20, Lex no. 3361100; and the judgment of the Provincial Administrative Court in Wrocław of 19 May 2022, ref. no. I SA/Wr 989/21, Lex no. 3356917.

into such an agreement will be a repayment that not only exceeds the value of the share, but also coincides with that value (in other words, equivalent to the value of the share). It is positive that this view has also been expressed, despite the line of case law presented in the jurisprudence above.[18]

The absence of harmonisation between the aforementioned provisions of the Income Tax Act is a matter that should be subject to criticism. Article 19(1) seems to narrow the scope of paid disposal transactions to sale agreements by mentioning only the price, although the literature is clear that, in light of the wording of Article 10(1)(8) PIT, other disposal agreements are also included [Małecki 2003; Bartosiewicz and Kubacki 2015].

However, the wording of Article 10(1)(8) gives rise to another interpretative question. It refers only to an interest in real estate. Therefore, the question arises as to whether the same treatment should be given to interests in other real estate-related rights listed in the provision, as well as to the ownership of movables. Such a possibility has been accepted in case law, for example in relation to cooperative ownership rights to premises,[19] or perpetual usufruct,[20] which would support an affirmative answer. It would be completely incomprehensible to limit the subject matter of the disposal action in terms of Article 10(1)(8) to a share in real property only [Goettel 2013, 446-47].

4. TAX IMPLICATIONS OF THE DIVISION OF JOINT PROPERTY OF SPOUSES

Although the above-mentioned activity is not encountered in the tax law system (apart from the exemption from taxation provided for in Article 2(1)(5) PIT, inter alia, revenue from the division of joint property of spouses), the legal formula of the said division, as indicated in Section 1 of this article, leads us to consider this issue. According to this, it is possible to apply the methods of dissolution of co-ownership (joint ownership) of property or other property rights (including their complexes), which are provided for with regard to joint ownership and inheritance, to such division on the basis

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[18] See the judgment of the Provincial Administrative Court in Warsaw of 28 January 2021 (cited above in footnote 13) and the judgment of the Provincial Administrative Court in Warsaw of 12 June 2019 (ref. no. III SA/Wa 2384/18, Lex no. 3079609, in which it was rightly assumed that dissolving co-ownership and receiving a repayment equivalent to the value of one's share gives rise to taxable income, as referred to in Article 10(1)(8) PIT. The same applies to the judgment of the Provincial Administrative Court in Wrocław of 16 April 2024 (ref. no. I SA/Wr 887/23, Lex no. 3712191).

[19] The Provincial Administrative Court in Warsaw made the following judgment on 8 October 2009 (ref. no. III SA/Wa 903/09, Lex no. 533780).

[20] The judgment of the Supreme Administrative Court of 23 November 2012, ref. no. II FSK 696/11, Lex no. 1227981.

of the reference contained in Article 46 FGC. Consequently, as part of the division of the spouses' joint property, the joint ownership or commonality of property rights may be dissolved by physical division of the asset, exclusive allocation to one of the spouses (including former or separated spouses), or sale to a third party. As these transactions are subject to inheritance and donation tax or tax on civil law transactions, could they also be subject to tax if the techniques used to liquidate the community are used to divide the spouses' common property?

According to the legal doctrine, it is not possible to indicate a uniform decision when assessing the division of the joint property of the spouses under tax law. This depends on the circumstances relating to the division, particularly the content of the division agreement (also a procedural act). If the agreement only covers some of the joint property, disregarding the rest, this type of operation should only be assessed as the termination of joint ownership (commonality), rather than the division of the property itself [Pietrasiewicz 2004, 146-47]. Accepting this line of reasoning would mean that the aforementioned operation would be subject to either civil law transaction tax (if repayments or additional payments were made as part of it) or inheritance and donation tax (if it was gratuitous).

The above position seems to be based on a misunderstanding, as it does not appear to take into account the possibility of a partial division of joint property of the spouses, which is permissible under the legislation (Article 1038(1) and (2) CC in connection with Article 46 FGC) and commonly accepted in the doctrine [Smyczyński 2009, 513]. In this case, we are also dealing with a type of legal transaction that is separate from the dissolution of joint ownership and the division of inheritance. Furthermore, the formulation of Article 1(1)(1)(f) TCLT suggests that the legislator only considers agreements relating to the division of inheritance and the dissolution of joint ownership. The implicit extension of this provision's hypothesis to agreements on the division of spouses' joint property would, in view of how the subject of taxation is shaped in the field of tax on civil law transactions based on the principle of *numerus clausus*, be an unacceptable interpretation.[21] Conversely, it is possible for a single act abolishing joint ownership (e.g. a court ruling) to involve the division of joint property and the dissolution of joint ownership of an asset to which the spouses are entitled on the basis of fractional joint ownership, with an obligation to pay

[21] This view is widely accepted in both literature (e.g. Waluga 2009; Bogucki 2021b; Goettel and Goettel 2007, 69-70; Goettel 2016, 298; Skwierczyńska and Szymańska 2015, 18) and judicial decisions, for instance, the judgment of the Supreme Administrative Court of 30 November 2001, ref. no. SA/Łd 251/00, Lex no. 53603, and the judgment of the Provincial Administrative Court in Warsaw of 23 August 2018, ref. no. VIII SA/Wa 280/18, Lex no. 2549134.

a repayment or surcharge. The tax obligation would then apply only to the latter transaction.[22]

The reasoning presented above applies not only to the tax on civil law transactions, but also to inheritance and donation tax.

Returning to the issue of the income tax consequences of dividing spouses' joint property, which was mentioned at the beginning of these considerations, it should be clarified that this division could be a source of potential income [Goettel 2016, 196; Sekita 2012, 17]. However, Article 2(1)(5) of the Personal Income Tax Act categorically resolves this issue, explicitly excluding the application of its provisions to such income. Ambiguity may only arise as to whether this exclusion also applies to income resulting from a specific operation related to the division of property, namely the reimbursement of expenses and outlays (Article 45 FGC). The possibility of the court ordering early reimbursement on the grounds of family welfare as an exception to the principle of reimbursement at the time of the division of property raises doubts. However, a purposive interpretation seems to support a broad understanding of the exemption in question, including the proceeds of the reimbursements [Goettel 2016, 201].

Taking the above considerations into account, it can be concluded that dividing the spouses' joint property has no impact on the three taxes examined in this document.

5. CONCURRENCE OF TAXES IN RELATION TO THE DISSOLUTION OF A COMMONALITY

The freedom of co-owners to take different transactions means that, in relation to a single transaction leading to the dissolution of co-ownership or division of the inheritance, different tax provisions may apply. For instance, such a situation will arise if a transaction involving several co-owners is aimed at the physical division of property and it is agreed that one of the co-owners will be charged with the obligation of surcharge due to the acquisition of more than their share, while the others will not. As is well known, the former is liable for civil law transaction tax and the latter for inheritance and donation tax. Another example relates to granting ownership of a common item to one of three co-owners while stipulating that he is only obliged to repay his share to one of the other co-owners. In other words, the acquirer of the common item obtains one share in exchange for payment and another share in exchange for payment. Once again, given the different acquisition scenarios, the two aforementioned taxes will apply.

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[22] Ref. no. VIII SA/Wa 280/18.

The basis of the concurrence of taxes on the grounds of the factual situation provided for by the provision of Article 10(1)(8) PIT analysed above is a different ratio legis. This provision states that, under certain conditions, the benefit from disposing of a share in exchange for payment – including following the dissolution of joint ownership – is considered taxable income. At the same time, the acquirer of the share (who is obliged under the terms of the transaction to repay the seller) will be charged tax on civil law transactions in respect of the repayment, due to obtaining a gain in excess of the value of their own share. Therefore, such a concurrence will not be possible with respect to Inheritance and Donation Tax due to the gratuitousness of the dissolution of joint ownership.

CONCLUSIONS

The diverse nature and non-uniform design of transactions aimed at dissolving a joint property portfolio mean they are subject to different tax regimes.

The fact that these transactions are subject to tax on civil law transactions is underpinned by a characteristic *ratio legis*. The legislator has applied this kind of procedure only to a specific category of operations connected with the obligation of repayment or surcharge, and only to the part concerning these operations. These operations are characterised as paid operations (i.e. payment of a cash consideration for the acquisition of a whole or part share), which is the main motive for taxation (i.e. of the operations themselves, rather than the acquisition based on them), with the aforementioned tax.

However, if these transactions are not linked to repayment or surcharge, they are considered transactions under a gratuitous title (free of charge). This means they are subject to inheritance and donation tax. It should also be noted that a taxable acquisition only occurs when the acquirer's assets increase (as a result of acquiring assets worth more than their entitlement).

Due to the nature of the dissolution of joint ownership and the division of the inheritance, they are generally not subject to personal income tax. In the case of transactions involving consideration (along with an obligation to repay or pay a surcharge), it is difficult to assess the revenue gain to each party to the transaction (whether acquiring the whole or part of a share, or receiving a repayment or surcharge) from a theoretical point of view. However, in this case, we are dealing with a specific exception, whereby the law treats such a gain as income subject to income tax. Gratuitous transactions, on the other hand, are excluded from tax by an express provision of the law, even though they may be a source of revenue.

Lastly, there is a type of transaction that dissolves joint property (the division of spouses' joint property), which is neutral from a tax and legal point of view. Interestingly, its construction refers to mechanisms that are characteristic of taxable transactions, which gives rise to certain doctrinal controversies. However, as a separate civil and legal event, it is either not subject to a specific tax (in relation to tax on civil law transactions and inheritance and donation tax), or it is excluded on *expressis verbis* basis from their scope (personal income tax).

It seems possible to find a solution to the debatable issues signalled in the study within the framework of interpreting the relevant provisions. This can be done without the need for *de lege ferenda* postulates.

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ARTIFICIAL INTELLIGENCE IN THE PUBLIC SPHERE: LEGAL AND SECURITY CULTURE IN THE EU

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Abstract. This article analyzes the impact of the development of artificial intelligence (AI) on the public sphere and its consequences for political, security, and legal culture. The paper describes how the advancement of AI forces a reinterpretation of existing legal, ethical, and philosophical assumptions. It focuses on the new European Union regulation concerning AI, which balances the need for innovation with the obligation to protect citizens' rights, highlighting AI's role in shaping international interactions and public policy. The article also addresses challenges related to disinformation, human rights, and the potential future risks associated with the use of AI.

Keywords: political culture; security culture; legal culture; artificial intelligence; digital law; EU security policy.

INTRODUCTION

The analysis of the impact of artificial intelligence (AI) on the public sphere is currently a popular topic of many academic reflections and serves as a starting point for research on the extent to which the existing reality is changing [Radanliev 2025]. From the perspective of security itself, AI has a wide range of different applications. In today's reality, there are many automated programs that form the foundation of daily life, which, despite their beneficial applications, raise many questions about who makes decisions and on what basis [Pham and Davies 2024]. These types of questions simultaneously present challenges and expand research areas within legal culture regarding the regulation of algorithms, and in terms of decision-maker accountability for political culture, as well as in the context of protection against abuses and cyber threats for security culture. Of course, a natural question arises: in which direction is the development of artificial intelligence heading, and which entities and fields are driving it the most?

The potential implications of technological development are nothing new in the history of humanity; every change has brought the need to rethink existing philosophical, ethical, and legal assumptions. It has also forced

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reinterpretations, sometimes even profound changes, in the political sphere, such as the invention of printing by Johannes Gutenberg in 1440, which led to, among other things, the Reformation. Almost six centuries later, the "digital revolution of print," including the widespread use of digital communicators, provided an impetus for many social and political movements and uprisings worldwide, such as the Arab Spring (2010-2012), the Black Lives Matter Movement (2013), and the Climate Strikes – Fridays for Future (2018). The dynamics of these transformations highlight the necessity to adapt legal culture to new challenges related to the regulation of digital content and the protection of civil rights, political culture to the growing role of social media in democratic processes, and security culture to the threats posed by disinformation, digital surveillance, and cyberattacks, which can destabilize social and political order.

Currently, revolutionary transformations are occurring in the way knowledge and information are perceived and managed. Knowledge, being a key resource in society, determines not only economic processes but also power structures, social relations, and legal systems. The greatest challenge is not the distant future dominated by advanced technologies, but the revolutionary changes that are already impacting everyday life [Hunter, Albert, Rutland, et al. 2024]. In Europe, where democracy and law have traditionally been seen as guarantees of freedom, there are increasing challenges related to the concentration of power. New centers of influence are emerging that go beyond traditional state structures. Power is increasingly intertwining, creating systems in which decisions are made based on data rather than democratic values or legal norms. Algorithms make decisions about granting loans, social benefits, or even job dismissals, often without transparent rules or the possibility of appeal [Purcell and Bonnefon 2023]. In this context, it is worth asking whether, alongside the changing surrounding reality, the nature of political culture, security culture, and legal culture, as well as the interrelationships between these areas, is also changing.

The content of the article aligns with the growing body of research on political, security, and legal cultures in the context of regulations concerning artificial intelligence. Among the key works in this field are: Christou, Meyer, and Fanni, who analyze the role of the European Union as a global leader in AI regulation [Christou, Meyer, and Fanni 2024], Bakiner, who examines pluralistic sociotechnical imaginaries in the context of the European Union's Artificial Intelligence Act [Bakiner 2023], and Kusche, who discusses the potential harms related to AI and their impact on fundamental rights and risk assessment [Kushe 2024].

The main objective of this paper is to characterize how AI is changing decision-making principles in the fields of politics, security, and law. The starting point here is to focus on the relationships between political

culture, security culture, and legal culture, and their mutual influence in the context of AI. By doing so, the aim is to provide answers to the question of how priorities and values reflect the approach of law to new technologies and their implications for the future of democratic societies.

One of the main methods used in this paper is content analysis, which will be employed to identify the key fragments essential for the selected definitions of political, legal, and security culture. The next method is contextualization, which involves placing individual elements of these definitions within the context of technological development, with particular emphasis on the EU regulation on artificial intelligence,[1] in order to better understand the interrelationships between values in the areas of politics, law, and security, and the dynamic process of digitization. The third method used in this paper is the comparative method, which in this study involves comparing different definitions and approaches to culture, facilitating the identification of similarities and differences, as well as the evolution of these concepts in the context of the technological revolution driven by AI.

These research tools enable capturing the multifaceted nature of the subject matter, which also supports interdisciplinary understanding of phenomena at the intersection of technical and social sciences, which will certainly continue due to the increasing dominance of AI. The intention of reflecting on the impact of technology on political, security, and legal culture may bring a new perspective to the current discussion taking place in both academic and journalistic circles.

1. CONCEPTUALIZATION OF POLITICAL CULTURE, SECURITY CULTURE, AND LEGAL CULTURE

Culture is a broad conceptual collection, which means that in many definitions, certain aspects are more strongly emphasized or highlighted than others. This leads to the fact that individual descriptions of the term can be presented in different ways. However, a common denominator in most definitions of culture is its portrayal as the totality of humanity's achievements [Szymczak 1995, 1015; Polański 2008, 387; Dereń and Polański 2008; Olechnicki and Załęcki 1997, 106], encompassing both material and immaterial aspects [Szymczak 1995, 1015; Polański 2008, 387; Olechnicki and Załęcki 1997, 106-107; Dereń and Polański 2008], i.e., spiritual, intellectual, and social. Many definitions also point to the process of transmitting

[1] *Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act)* [hereinafter: Regulation 2024/1689], https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401689 [accessed: 30.03.2025].

culture [Szymczak 1995, 1015; Szymczak 2000; Olechnicki and Załęcki 1997, 106-107; Blackburn 2004] from one generation to the next, as well as its role in shaping the perception of the world and social norms.

Thus, in all the aforementioned works, culture is presented as a civilization achievement, inseparably accompanying humanity. It is also a constitutive factor of human existence, through the process of inheritance from generation to generation, where specific values are adopted, shaping the identity of society.

There are also differences in defining the concept of culture, which most often arise from the use of different approaches and semantic scopes. There are perspectives that view culture broadly, as the entire civilizational framework [Szymczak 2000], or as a spiritual or intellectual nature [Blackburn 2004]. Other differences exist between emphasizing the dynamic nature of culture, highlighting the transmission of values and norms [Olechnicki and Załęcki 1997, 106-107], and the static nature of culture as a collection of goods and achievements [Szymczak 2000]. Differences can also be observed by comparing definitions that, on one hand, equate culture with civilization as the technical development of society [Żmigrodzki 2003], and on the other, with a system of values and models.

The common elements, as well as the differences highlighted in many definitions, cause that selected fragments of the term "culture" can be assigned to the areas of political culture, security culture, or legal culture. Communities adopt cultural values and meanings to communicate and understand the environment along with its institutions that regulate social practices. In this context, another term arises: political culture, which is related to the assimilation of values and patterns recognized by a given community. However, it is not the collection of values that is important, but their hierarchy [Antoszewski and Herbut 1999, 260]. Not all communities, however, have the same forms of political culture. In the case of significant socio-political, religious, or historical contrasts, conflicts within a social group are often more pronounced. Therefore, it can be assumed that more homogeneous political cultures tend to have significantly greater stability.

Political culture refers to the ideas, beliefs, values, traditions, and practices that form the foundation of a political system [Olechnicki and Załęcki 1997, 107]. It is also a space of values that result from long-standing historical processes, as well as social, political, economic, and many other factors. Therefore, each state, in comparison to others, is characterized by its own, unique political culture [Walicka 2008, 279]. From this perspective, it is also easier to understand the causes of certain differences between individual states in areas such as political values, differing interpretations of human rights, or security policies.

The above statements – relating to political culture – highlight the interdependence and interaction between the cultural environment and the

decision-making process. Political culture, therefore, represents the attitudes and orientations of members of a given society toward politics, which are composed of three factors: cognitive, affective, and evaluative. These include knowledge and interest in politics, the sense of influence and the degree of impact on political decisions, as well as the perceptions of the goals and functioning of the political system [Bankowicz 1999, 121; Antoszewski and Herbut 1999, 260].

The presence of elements such as attitudes, norms, and values in the descriptions of culture naturally leads to a correlation between them and social behaviors, particularly the level of civic engagement and awareness (Great Dictionary of the Polish Language). This, in turn, directly affects how citizens think about politics and indirectly influences the functioning of the state and its institutions [Olechnicki and Załęcki 1997, 106].

The second definitional area analyzed is security culture, the conceptualization of which also draws from broader cultural notions. A common element in both of these terms is certainly the factor that reinforces social and political experiences [ibid.]. Another important point is the repeated emphasis on the intergenerational transfer of knowledge, occurring both on an individual and institutional level [Szymczak 1995, 1015]. The concept of security culture has become a common term in the public sphere in recent years, undoubtedly due to numerous military and non-military events. Security culture focuses on aspects related to the protection of the state, society, and individuals from various threats [Misiuk, Itrich-Drabarek, and Dobrowolska-Opała 2021].

The third term is legal culture, whose definitions are also based on elements of the broader concept of culture. In this case, there are aspects that refer to norms and values related to adherence to the law [Olechnicki and Załęcki 1997, 106]. While this may not be a groundbreaking observation, it is important to note that law is most often derived from moral norms, which makes this factor correspond with the holistic view of culture.

Equally important elements of culture that form the foundations of law include intergenerational transmission, which in this case is seen as the process of legal education and socialization [Tokarczyk 2000, 61-64].

2. THE RELATIONSHIP BETWEEN POLITICAL CULTURE, SECURITY CULTURE, AND LEGAL CULTURE

Analyzing the definitional scope of these three cultures – political, security, and legal – it is clear that they are interconnected. To better understand the complexity of the nature of each of these cultures, it is essential to explore not only their changing nature due to digital progress but also their mutual influence on one another.

In this context, questions arise about the hierarchical and functional dependencies between these three concepts. In other words, which culture is dominant and encompasses a broad spectrum of norms, values, beliefs, and practices, and which one is a subset, thus focusing only on specific aspects related to a defined conceptual area? Another intriguing question that invites further consideration is which of these cultural categories determines and shapes the nature of the others?

According to many definitions, political culture plays a dominant role, as it encompasses the norms, values, and beliefs that shape the political system of a given society [Walicka 2008, 279]. It also defines the way power is exercised and the relationship between citizens and the state and its organs [Żmigrodzki and Sokół 1999, 165]. Assuming that politics forms the foundation of a state's functioning, it can be concluded that political culture has such a broad conceptual range that it includes both legal culture and security culture.

On the other hand, it must be noted that legal culture also shapes political culture. The values expressed in legal regulations indicate how citizens can or should perceive their duties in the public sphere. Therefore, a strong link exists between legal culture and political culture, leading to the conclusion that legal culture is an integral part of political culture.

On the other hand, law can be seen as a tool for implementing state policy. Specific provisions or regulations also reflect certain values, their hierarchy, and connections to selected areas of socio-political reality [Janowski 2012, 20-26]. Legal culture is conceptualized primarily in relation to society's relationship with the law. Therefore, it is assumed that many definitions emphasize knowledge, adherence to, and interpretation of the law in a social context [Chauvin, Stawecki, and Winczorek 2016, 45-47].

However, in terms of the mutual relationships between political and legal culture, it should be noted that any change in political culture, whether toward liberalism or authoritarianism, affects the shaping of legal culture. This, in turn, has a visible and often felt impact on civil rights or the functioning of the justice system.

Following this line of thought, a similar, analogous process can be observed, where political culture (shapes not only legal regulations) but also influences certain norms and principles in relation to security culture. In this context, it can be considered that security culture is a subset of state policy, as it involves actions related to protecting citizens, the state, and institutions from internal and external threats. At the same time, it largely relies on legal regulations, which provide the formal framework for its functioning. In summary, legal and political culture provide the foundations upon which the structure and direction of actions in the security sphere are built [Misiuk, Itrich-Drabarek, and Dobrowolska-Opała 2021, 128].

As we can see, the presented concept of the cultural triangle between the poles of politics, law, and security is complex and based on mutual interconnections. Political culture shapes the values and norms in society, which later contribute to the formation of the general security framework. In this regard, the model for the functioning of society and state institutions is shaped. This also influences the perception of actions aimed at ensuring a stable and predictable public space. Therefore, obligations, tasks, and rights regarding military and non-military threats are defined, creating the foundation for security culture.

3. AI REGULATION IN THE EUROPEAN UNION: BETWEEN POLITICAL CULTURE AND LEGAL CULTURE

In everyday life, various types of algorithms are used, ranging from large applications in industry or public spaces for facial recognition to smaller ones, such as those in smartphones for filtering spam in emails or personalizing content on social media. Artificial intelligence systems are also integral components of many physical products, such as toys, industrial machines, and medical devices. There is growing concern about the significant impact AI has on the health and safety of every user. A frequent public debate, which accompanies the introduction of new solutions and legal regulations – especially concerning new technologies – revolves around where the boundary should be drawn between innovation and the manner in which human rights or, alternatively, consumer protection in digital solutions will be ensured. This concern has become one of the primary reasons for the decision to regulate the functioning and application of the latest technologies in the public space, ensuring that they meet established safety standards [Crawford 2021, 45].

The EU Member States have approved an ambitious draft law regulating the use of artificial intelligence, which has been the subject of intense negotiations. The discussion on the legal boundaries of technology began in April 2021 when the European Commission, the administrative body of the European Union, introduced the legislative proposal.[2] By the end of 2022, the debate on the text became more urgent with the popularity of platforms such as ChatGPT.

This is the first framework regulation in the world to be established. The regulations are intended to ensure freedom and rights in the digital space. The ongoing discussion highlights that AI learns, evolves, and acquires

[2] *Proposal for a Regulation of the European Parliament and of the Council on Artificial Intelligence (Artificial Intelligence Act)*. COM(2021) 206 final, April 21, 2021, https://ec.europa.eu/info/files/proposal-regulation-european-parliament-and-council-artificial-intelligence-act_en [accessed: 30.03.2025].

capabilities with unpredictable outcomes. So, does artificial intelligence develop faster than regulations? The problem is that the law can regulate technological phenomena, but the digital revolution occurs faster than the introduction of new norms that try to tame the pace of digital innovation.

An analysis of this document indicates that it consists of several key principles. The first concerns the protection of human rights, meaning that today, technology should indeed serve human rights, currently supporting democracy and ensuring that we all participate in the digital space (Regulation 2024/1689, pt. 48). The second principle is freedom of choice, allowing people to protect themselves from illegal or harmful content and ensuring that when using technologies like AI, they can do so safely (Regulation 2024/1689, pt. 53). The next principle is, of course, security – we are today accustomed to cyberattacks, but also to issues of solidarity and inclusion, as digital technology should serve to connect people, not divide them (Regulation 2024/1689, pt. 76). Participation aspects ensure that through digital technology, we can participate in democratic processes, and of course, sustainable development, as this digital transformation goes hand in hand with ecological transformation (Regulation 2024/1689, Article 59). This declaration effectively creates the foundation by combining what already exists, such as European data protection and privacy laws, while creating a framework for reference. This document represents how the European Union commits to a digital transformation that is sustainable, secure, citizen-focused, and, above all, reflects the values and fundamental rights that are the foundation of the EU. The principles provide full support for the development and implementation of AI in Europe, respecting European values while simultaneously safeguarding fundamental human rights, such as undisturbed privacy, transparency, and good social and ecological conditions. These regulations aim to limit risks and impose obligations on providers and those who create AI-based systems, depending on the level of risk they may pose [Christou, Meyer, and Fanni 2024, 383-401].

An important feature of the AI Act is its interoperability, which can be understood as a condition for the effective implementation and application of this document in practice. It cannot function in isolation from other legal regulations, nor can it be in conflict with them. The premise of this regulation is its integration with the broader legal system of norms concerning new technologies, such as the General Data Protection Regulation (GDPR), product liability regulations, cybersecurity, and specific sectoral requirements. As a result, the AI Act establishes a broad legal framework that sets out principles for all systems that could, firstly, be considered as artificial intelligence systems, taking into account their impact on fundamental rights, security, and social trust, as well as defining requirements regarding transparency, accountability, and oversight of their application or, secondly, could be components of other products [Bakiner 2023, 558-82]. Therefore,

it should also be read, interpreted, and applied alongside other provisions, such as regulations concerning data protection (e.g., GDPR), product liability, cybersecurity, and sectoral standards, ensuring coherence and compliance with the existing legal order (Regulation 2024/1689, Article 59).

The message of the AI Act is to regulate digital development, which will have a long-term impact on political, security, and legal cultures. The regulation applies to both society and economic entities operating within the European market concept, as well as outside it. Its implementation affects all those functioning in the European economic space. This includes technology providers, developers, tools for building systems, as well as issues related to usage fees that may affect market value. Responsibility for the implementation of the system lies with the person or institution that purchases and introduces it. For example, a bank acquiring an employee evaluation tool, a school using a management system, or even society as a whole – all are subject to the same rules.

In this context, the political culture aspect strongly resonates, as political decision-makers, through the introduction of regulatory standards, aim to ensure the protection of citizens' rights and provide transparency and accountability in the application of AI [Kushe 2024, 1-14]. Equally important is ensuring a balance between innovation and the protection of the public interest. Governments also introduce control mechanisms to minimize the risks associated with the unpredictable development of AI. This is directly linked to the values defining the approach to risk management, which fits within the framework of security culture.

With the establishment of new regulatory frameworks at the European level, new obligations are introduced for AI providers and users, which could become a model for future regulations. It is worth noting that the very implementation will require adjusting the legal systems of EU member states and continuous evaluation to keep pace with the dynamic technological development. This, in turn, expands and develops the space of legal culture.

On the margins of these considerations, it is worth noting that the law may not keep up with the pace of technological development, which advances very quickly. This is a common issue, especially in the context of technological progress, when regulations quickly become outdated. Many legislative actions, like in the case of the European Union, foresee the creation of codes of conduct by associations of companies or industry sectors. This provides greater regulatory flexibility to keep pace with technological advancements, of course, with the appropriate institutional arrangement so that the state can approve these self-regulatory frameworks. This is one method of addressing this issue, but also an additional factor that enriches and develops legal culture.

The discussion of the European AI regulation (Regulation 2024/1689) as well as the technology itself in the cultural triangle, is a contribution to the ongoing public debate on how to harmonize the implementation of artificial intelligence with democratic and liberal values. Moreover, this issue pertains to the process of Europeanization, meaning that this regulation creates a reference point that could serve as inspiration for other political and economic entities.

The European Union operates in the international space according to the principles of integration or Europeanization, meaning that the hegemon sets the rules and knows what it wants to achieve for its interests, which in turn should strengthen Europe's position in promoting global principles. The integration process is carried out in relation to the 27 states, each of which has different positions, opinions, and varying strength and influence in the European Parliament. However, the foundation is that all have committed to adhering to common values such as the rule of law, democracy, and the protection of fundamental rights. In other words, they are building a common political, security, and legal culture based on unified rules regulating the application of new technologies, including artificial intelligence. As a result, it becomes possible to harmonize the approach to innovation, the protection of citizens' rights, and the management of risks associated with digitization.

On the other hand, Europeanization in the context of AI refers to the influence of EU regulations, norms, and values on member states as well as other entities, including countries outside the EU. As is often the case with European regulations, it will have a spreading effect on the rest of the world. This will allow for the assessment and analysis of the impact that this European initiative may have on the international stage. The AI Act has extraterritorial effects, meaning that it applies to organizations outside the EU, provided that the system is used within the EU. This means that systems designed in the United States, China, or elsewhere, if used within the EU, must comply with the regulation [Carver 2024].

The ambition of the authors of this document is for the regulations it contains to have an international character, standardizing the use of AI in accordance with fundamental human rights. The AI Act introduced based on the fundamental rights of the EU is the first global legislation on artificial intelligence and also aims to have an external effect, so that the European concept and European values, as well as respect for universal values, serve as a model for entities outside the EU. Many countries around the world are very interested in artificial intelligence and are also developing their own rules, which the European Union has decided to define, establishing principles that will be applied based on the risks associated with artificial intelligence in various systems.

4. RISK MANAGEMENT IN AI: BETWEEN THE CULTURE OF SECURITY AND THE CULTURE OF LAW

The threats and risks of certain harms generate preventive actions, which sometimes use innovative, pioneering solutions. In doing so, they initiate progress both in the development of technological knowledge and in fostering new perceptions, horizons of thought, and the shaping of new social attitudes, which in turn influences the emergence of new norms and regulations. This compulsion to codify and record expected behaviors affects not only the creation of new areas of legal culture but also of security culture. This confirms that culture is a dynamic, living, and evolutionary field, subject to continuous, uninterrupted change.

As is widely known, AI, despite its numerous advantages, also presents significant challenges and risks. Of course, systems deemed to pose unacceptable risk will be excluded from the market. However, in the case of systems considered to be risky but acceptable, a certification process for compliance will be required. This process will include audits conducted by independent, external entities, whose task will be to assess whether a given system meets the required standards. Only after receiving certification will these systems be allowed to enter the market (Regulation 2024/1689, pt. 67).

The AI Act categorizes artificial intelligence systems based on groups depending on the varying levels of risk assigned to systems within each group, according to the risk assessment previously established by the regulatory bodies of the European Union. It distinguishes four main categories: unacceptable risk (prohibited AI systems) (Regulation 2024/1689, Article 5), high risk (systems subject to strict regulation) (Regulation 2024/1689, Article 6), limited risk (systems requiring transparency), and minimal risk (systems not requiring special regulation) (Regulation 2024/1689, pt. 138). Therefore, despite the ban on practices that create acceptable risks to fundamental rights in terms of safety and health, there exists a higher-risk artificial intelligence system that will require specific requirements and obligations from various entities involved in the AI supply chain.

In other words, the first level is unacceptable risk, which has simply been prohibited. This pertains to everything related to social scoring, people's privacy, and other associated areas. The second level of risk is high or very high risk, and systems falling under this category will be subjected to compliance checks and tests before they are actually introduced to the market. Then, there is the third level, which also carries specific obligations for systems that have direct contact with people, requiring transparency and the identification and labeling of products generated by artificial intelligence. Finally, there is the fourth risk category, which is associated with what is called minimal risks, where the risk is relatively small and does not require any special regulations.

5. WHERE DOES THE EUROPEAN UNION DRAW THE BOUNDARIES OF AI?

In this section of the paper, we aim to more precisely identify several applications of artificial intelligence that are prohibited at the European level. This area of regulation is crucial from both a legal and security perspective, as it seeks to predict future threats, thereby enriching the framework of meaning of this concept. The introduction of systems such as chatbots, conversational AI, and other similar systems, which are highly popular in the development of artificial intelligence, can lead to serious potential risks associated with this technology.

According to the European Commission's proposal, AI systems posing an unacceptably high risk, which threaten human safety, will be prohibited. This includes systems that result in social exclusion. It will also be forbidden to categorize people based on their social behavior or personality traits (Regulation 2024/1689, pt. 46). European regulation expands the scope of prohibitions to include the coercive and discriminatory use of AI, such as: first, biometric identification systems in public spaces for monitoring leisure time or later identification; second, biometric categorization systems using physical and personal characteristics such as ethnic origin, citizenship, or political beliefs; and third, AI systems used by the police for predicting potential behaviors, profiling, location tracking, or monitoring activities. Additionally, systems for emotion recognition in workplaces and educational settings, as well as the unintended collection of facial images from the internet or recording behaviors to create databases for facial recognition, are also prohibited. Defining artificial intelligence is a critical element of the legislative spectrum, as its definition is essential (Regulation 2024/1689, pt. 44).

AI systems based on historical data analysis could lead to the reproduction of past patterns, rather than introducing innovative and fair solutions. As a result, there are several risks, such as the potential for bias, discrimination, and misinformation, which are real and existing threats. Many models currently being implemented carry with them social prejudices.

A controversial issue is remote biometric identification. This mainly concerns facial recognition and other types of identification used by the police and law enforcement agencies. Regulations have been introduced that prohibit real-time remote biometric identification, but there are broad exceptions for law enforcement, which may use this type of AI system in specific cases, such as during the search for a kidnapped child or a terrorist. So, while it is formally prohibited, there are practical ways to circumvent this rule. Nevertheless, a high global standard has been established in limiting the use of these technologies. The main goal here is to ensure that AI does not assess or evaluate citizens in their access to education or employment.

If individuals are assessed by AI, the human factor must be preserved so that a person's life path is not solely determined by machines.

In practice, these concerns are related to very practical issues, such as the possibility of discrimination by AI systems, lack of transparency regarding how they work, and the potential for privacy violations and improper processing of personal data. These are more practical, concrete concerns arising from the various applications of AI in different fields. Every regulation being discussed today addresses these concerns, rather than fears about superintelligence that could dominate humanity. There are many practical concerns related to AI due to the speed at which it is becoming widespread.

It should be noted that an agreement has been reached that in certain very specific areas, biometric identification may be used. Therefore, when someone goes missing, these systems are used to quickly identify certain movements and locate the missing person, or when there is a threat of a terrorist attack, to identify the perpetrators (Regulation 2024/1689, pt. 33).

The geographical and, above all, cultural context is particularly evident when using AI for social scoring, a common practice in China regarding its citizens, whereas in the EU, such actions are prohibited (with the exception of very specific cases for law enforcement, such as when it is necessary to apprehend a suspect in relation to, for example, identifying a kidnapping victim, human trafficking, or a minor, as well as preventing a terrorist attack). The same applies to crime prediction, meaning the use of AI to forecast whether a person will commit a crime. Similarly, bans are in place regarding the use of AI for emotion recognition in education and the workplace. This means that the application of artificial intelligence and the definition of its scope of operation are closely tied to deeply rooted factors in the areas of political, security, and legal culture.

6. DISINFORMATION AND AI

It is important to address the potential threats to freedom and democracy. Advanced disinformation campaigns are already being carried out, and they are sure to increase in the future. It is easy to generate deepfakes of politicians saying things they never said or create false information on a massive scale.

Disinformation affects different countries and societies in various ways. In countries with strong institutions (and therefore a much more deeply rooted political culture), such as the United Kingdom or the United States – although they may seem fragile at the moment – there is greater resilience to disinformation than in many other regions of the world where political, social, and media institutions are not trusted. The flip side of this problem is that

the more people realize they cannot trust any information, the more problematic the situation becomes. This has become a particularly significant challenge for human rights activists who document war crimes. They now bear a greater burden of proof – they must prove that a video depicting a war crime is authentic. This is a huge problem because people begin to function in a state of suspension, where they don't want to believe anything, and ultimately, they only believe the information that reinforces their pre-existing beliefs.

An interesting case is the conditional use of AI products with clear labeling as creations made by AI. Jessica Rosenworcel, Chair of the Federal Communications Commission (FCC), proposed a regulation requiring broadcasters to disclose the use of artificial intelligence in political advertisements [Rosenworcel 2024]. The proposal seeks input from consumers regarding methods for disclosing information and definitions of AI-generated content. It mandates the disclosure of information both on-air and in writing in political broadcasts and applies to candidate ads and broadcasts, including cable operators, satellite TV providers, and radio. This situation highlights the importance of regulating the use of artificial intelligence in the public sphere, particularly in the context of transparency and the protection of democratic processes, which in turn shapes the area of political culture. These rules are meant to prevent the development of artificial intelligence that could manipulate people subliminally, so essentially, these guidelines aim to prevent manipulation.

CONCLUSION

In conclusion, it can be stated that culture encompasses principles related to the political, security, and legal systems. Over time, however, the fundamental elements of culture are reinterpreted by external factors, such as technological progress, which contributes to the evolution of this concept and many of its derivative areas of meaning. The popularity of new technologies significantly impacts the surrounding reality, which is why, from this perspective, one can better understand or explain the ongoing processes in the public sphere.

The analysis carried out in this work confirms that technological progress, particularly the development of artificial intelligence, forces the reinterpretation of existing definitions and the revision of practices within these cultures, leading to their mutual permeation. The study also shows that if AI regulations are appropriately designed, they can strengthen civil rights and provide greater protection against abuses. However, the use of algorithms in public life remains a challenge in the fields of politics, security, ethics, and law, as it involves issues of transparency, discrimination resulting from algorithms, and the risk of violating privacy.

The dynamic pace of technological development presents challenges for legal regulations, while simultaneously affecting democratic institutions and social norms. EU regulations on AI aim to regulate its development in the political, legal, and security contexts, integrating technologies with respect for human rights and democratic values. In order to effectively integrate AI into the public sphere, it is necessary to continue the development and adaptation of legal regulations that will harmonize the implementation of innovation with fundamental human rights and democratic values. A valuable recommendation in this context is the promotion of widespread public education about the impact of AI on daily life and supporting research on mechanisms for controlling and balancing technological development. In the European context, it is important to focus on further integrating the principles of Europeanization, which can serve as a model for other regions when developing their own legislative frameworks.

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PROVIDING PUBLIC SERVICES TO CITIZENS VIA THE EPUAP PLATFORM

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Abstract. The provision of public services via the ePUAP platform contributes to the correct functioning of public administration in the digital sphere. A conducted study shows that an increasing part of society uses online public services, which increases citizens' trust towards e-administration and enhances the efficiency of communication between a public administration body and stakeholders. Moreover, the provision of e-administration services enables the society to strengthen their participation in administrative processes without visiting the office and contributes to reducing costs related to the functioning of public administration. Additionally, e-administration makes it possible to solve issues reported by citizens more quickly, which further increases citizens' confidence in public authorities.

Keywords: e-administration; e-services; computerisation; electronic platform for public administration services; information society.

INTRODUCTION

Public administration, as any other specific purpose organisation, needs to follow the rules of rational organisation of work in order to serve its function properly. The rules should ensure its efficiency. The efficiency of work in the context of public administration means that it works dynamically and flexibly, and at the same time efficiently, while such efficiency is measured both against financial criteria and the time needed to perform tasks [Leoński 2010, 51-52]. For this reason, citizens' expectations towards public administration itself are increasing as far as the use of electronic technologies by public administration bodies is concerned. The introduction of technical improvements in administration is possible and useful. Communication between a citizen and administration bodies is tending to improve as the latter become more friendly and open [Ganczar and Sytek 2021, 66].

E-government means the use of information and communication technologies (ICT) in public administration accompanied by changes of an organisational nature and by acquisition of new skills in order to improve

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the quality of public services provided, to enhance citizens' engagement in democratic processes, and to support the policy of the State [Werenowska 2018, 313]. It covers various stages that are identified on the basis of various criteria, such as: a) basic dissemination of information (one-way communication) is considered the most basic form as it serves only to provide information; b) two-way communication (request and response) covers an electronic mail system and the technologies used for transmitting information and data in the form of websites; c) services and financial transactions are online services and financial transactions that enable online self-service; d) integration (both vertical and horizontal) – at this stage, the government attempts to provide intergovernmental and intragovernmental integration; e) political participation – this stage means online voting, public forums and public opinion surveys conducted to achieve more direct and broader interactions with the government.[1]

The use of ICT transforms internal and external relations of the public sector through network operations and ICT with a view to optimising the provision of public services, voters' engagement, and management. It can be widely defined as a governmental policy in the area of ICT, in particular web-based internet applications, aimed at increasing access to information and their transmission, and providing services to stakeholders, such as citizens, business counterparties, public-sector employees, and other governments, agencies and entities [Ganczar and Haładyj 2015, 61]. The purpose of this paper is to analyse the impact of providing public services via the e-PUAP platform on the proper functioning of public administration in the digital space.

1. THE CONCEPT AND ESSENCE OF E-SERVICES

The term "e-service" refers to the provision, by electronic means, of services that are automated, require limited engagement of a real person, and cannot be performed without information technologies [Szewc 2012, 110]. One of the criteria used for the purpose of classifying electronic services is the type of recipient of the service, and based on this criterion it is possible to distinguish: electronic administration (e-government), electronic commerce (e-commerce), electronic banking (e-banking), electronic marketing (e-marketing), electronic insurance, and electronic accounting [Miłek and Nowak 2021, 49]. According to K. Batko and G. Billewicz, the services in question should display the following features: a) simplicity, understood as being easy to use and intuitive for a user; b) originality; c) individualisation and personalisation, which means that a service is tailored

[1] E-governance: concept and significance, https://egyankosh.ac.in/bitstream/123456789/25880/1/Unit-1.pdf, [accessed: 23.11.2024].

to the needs of users and their preferences, and makes them feel that it is targeted directly at them; d) mobility and extending traditional e-services in the form of websites by new distribution channels, namely solutions for mobile devices dedicated for satellite or digital TV; e) open code, which means that the source code of the service is accessible and may be modified on an ongoing basis by an online community working on its improvement; f) socialisation, understood as a possibility to form an online community around a specific service; g) an option to provide cloud computing or web solutions, which help reduce problems with operating system compatibility and data backup [Batko and Billewicz 2013, 49].

It should be emphasised that using information technologies in public administration in order to improve the quality of public services provided and to enhance citizens' engagement in democratic processes is also considered e-administration [Wolny 2013, 19]. According to Romaniuk, the main aspect of the functioning of e-administration is its universal accessibility, usually perceived as operating without any time limits. He further emphasises that this means that a public administration office is available to citizens 24/7. This illustrates the changing organisational circumstances, as contact with a public administration body is continuous. However, it should be highlighted that procedures can only be fully completed during working hours [Romaniuk 2019, 275]. In this manner, as rightly pointed out by Smarż and Świtał, problems such as the need to visit the office during its working hours, waiting in the queue and manual form filing are eliminated. A lower number of paper documents reduces processing time and administrative costs, providing significant added value. Additionally, digital tools make it possible to solve issues reported by citizens more quickly and precisely [Smarż and Świtał 2024, 302-303]. It should also be mentioned that entities authorised to provide e-administration services are public sector entities, including national government entities, local government entities, and other organisational units of the public sector [Wolny 2013, 29]. The list of such entities is set out in Article 2 of the Act on the Computerisation of Activities of Entities Performing Public Tasks, according to which the provisions of the Act apply to: 1) national government administration bodies, state control bodies and law protection bodies, courts, organisational units of public prosecutor's offices, as well as local government units and their bodies, 2) budgetary units and local government budgetary establishments, 3) special purpose funds, 4) independent public health establishments and companies conducting medical activity within the meaning of legal regulations on medical activity, 5) the Social Insurance Institution (ZUS), the Agricultural Social Insurance Fund (KRUS), 6) the National Health Fund (NFZ), 7) national or local government legal entities established under separate acts to perform public tasks, 8) universities, 9) the federation of entities

that form the system of higher education and science, 10) research institutes, 11) institutes belonging to the Łukasiewicz Research Network, 12) organisational units established by the Polish Academy of Sciences, 13) the Polish Accreditation Committee, 14) the Council of Scientific Excellence.[2]

According to the case-law of the Voivodship Administrative Court, "the wording of the provision in question indicates that the list is exhaustive. […] It should also be noted that in order to have access to the ePUAP as a service provider it is not enough to perform public tasks, but it is also necessary to enjoy the status of a public entity as strictly defined in Article 2(1) of the Act on Computerisation."[3]

2. THE EPUAP AS A PLATFORM PROVIDING ACCESS TO SERVICES

The ePUAP, a Polish electronic platform for public administration services, is a centrepiece of the Polish system of e-administration. Ensuring its uninterrupted and efficient functioning is of paramount importance for the proper functioning of public administration and the Polish State in the digital space. For citizens, it is important to have access to the largest possible number of electronic services made available by the state, covering the range of most important procedures used by them. From the perspective of a citizen, e-administration means intuitive and simple interactive forms pre-filled with data already possessed by the public administration. Nonetheless, one of the most significant challenges in building citizens' trust towards e-administration is to ensure the security of implemented solutions, which is of key importance in the context of the procedures used by citizens, taking into account the processing of data.[4] According to Article 3(13) of the Act on the Computerisation of Activities of Entities Performing Public Tasks, an electronic platform for public administration services should be understood as an IT system through which public institutions make their services available via a single access point on the Internet. Service providers are public administration officers and other entities responsible for public tasks commissioned or entrusted to them.[5] According to Świtał, the main objective of the ePUAP's functioning is to provide a single platform for government administration

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[2] The Act of 17 February 2005 on the Computerisation of Activities of Entities Performing Public Tasks, Journal of Laws of 2024, item 1557 as amended, Article 2(1).

[3] Judgment of the Voivodship Administrative Court in Warsaw of 26 March 2021, ref. no. VII SA/Wa 1959/20, Lex no. 3176288.

[4] See *Realizacja usług publicznych dla obywateli z wykorzystaniem platformy ePUAP. Informacje o wynikach kontroli NIK*, KAP.430.022.2020, Nr ewid. 200/2020/P/20/004/KAP, Warszawa 2021, p. 5.

[5] See https://epuap.gov.pl/wps/wcm/connect/epuap2/PL/Strefa+Klienta_Pomoc/Co+to+jest+ePUAP/ [accessed: 22.11.2024].

services, which ensures a safe, uniform and legally binding electronic channel through which public administration services are provided to all citizens, businesses, and public administration entities [Świtał 2022, 146]. It should be emphasised that for the purpose of providing electronic services, public entities may use the following ePUAP functions that guarantee non-repudiation of certifications or statements, i.e.: a) creation and handling of electronic documents by natural persons and legal entities, b) submission of electronic documents, c) data exchange between the ePUAP and other IT systems, d) identification of users and accountability with respect to their actions, e) verification of the electronic signature, f) creation of services provided by a public entity or a group of public entities cooperating with each other on the basis of two or more services, g) processing of electronic payments, h) actions related to the process of trusted profile validation, i) verification of the compliance of an electronic document with its model specified in the central repository of electronic document models, j) issuance of official confirmations of receipt, electronic confirmations of payment and electronic time stamps.[6]

The benefits for service users, as observed by Ganczar and Sytek, include: a) time saving and enhanced productivity, b) automation of public services, c) initial verification in terms of errors, d) possibility of providing complex public services, e) ensuring flexible access that enables better time management for businesses and citizens. This is of vital importance for small enterprises and independent professionals who can have more time for their clients during working hours and handle administrative procedures when it is more convenient for them. Also employees can run administrative errands outside their working hours, reducing losses to their employers related to their absence, f) transparency of public services – access to public services on the Internet via a single point enhances the easiness of searching and using such services, ensures better access for entities and citizens, and strengthens their participation in administrative processes and political matters [Ganczar and Sytek 2021, 135-36].

Not only does the ePUAP bring benefits related to providing services to citizens, but it also allows public administration offices to create their own services. Offices may add services to the system independently or use pre-made forms made available by other institutions. There is also a ready service portfolio available for the administration to provide services to residents. The portfolio includes, among other things, the electronic drop box or the trusted profile. The use of the ePUAP platform brings public administration the following advantages: simplified creation of the electronic office; streamlining and increasing the uptake of electronic access channel to public administration; access

[6] Regulation of the Minister of Digitalisation of 5 October 2016 on the Scope and Conditions of the Use of the Electronic Platform for Public Administration Services (ePUAP), Journal of Laws of 2023, item 2514 as amended, para. 10.

to free infrastructure for the exchange of data among public administration offices, as well as increased volume of public services that are available electronically [Michalczuk and Zalewska-Bochenko 2016, 392-93].

As emphasised by Świtał, key services for businesses include PIT and CIT settlements, motor vehicle tax settlements, VAT returns, stamp duty payments, reporting employees for health insurance, application for the postponement of health insurance contribution payments, requests for an advance individual or general tax ruling, statements on no tax arrears, registration of vehicles, and deregistration of vehicles. For the use of the ePUAP, an account and a trusted profile are required. The trusted profile enables citizens to communicate with public administration bodies and serves as an identification tool. Any electronic document may be signed with a trusted profile [Świtał 2023, 295-96].

It is also worth noting that according to a Voivodship Administrative Court judgment, "communication via the ePUAP (a national platform) or via a regional electronic platform for public services is based on the transmission of .xml documents […]. Submitting an .xml document through the ePUAP platform [...] differs essentially from sending documents via email. Each .xml file includes exactly one main file in which other documents may be included, such as appendices uploaded from the local driver of the service user. However, the fact that the main file is an .xml file has significant consequences. Signing it electronically with a single signature ensures the integrity of all documents and data containers included in the main file. Although it is possible to sign each document separately within the ePUAP, this is not recommended as the signature itself increases the weight of the file, which means that a higher number of signatures would decrease the capacity of the ePUAP system."[7]

3. EVALUATION OF PUBLIC ADMINISTRATION ELECTRONIC SERVICES BY POLES

"The process of e-service development is not always a decision of citizens themselves, but a choice of the state that provides specific services to the society. This requires changes in legislation. […] Such a transition in the provision of public services requires that business owners change their choices related to public services provision. This is to standardise the performance of public tasks and ensure easier and more efficient communication with a public administration office. The main aim of the computerisation of public administration is to ensure that public administration bodies can provide

[7] Judgment of the Voivodship Administrative Court in Warsaw of 23 May 2019, ref. no. III SA/Wa 2894/18, Lex no. 2681520.

services to citizens and other stakeholders electronically" [Smarż and Świtał 2024, 305-306]. In mid-2023, the Behavioral Analysis and Social Research Team at the Institute of Finance conducted a study on the digitalisation of public administration, which showed that the vast majority of adult Poles (69%) rated the digitalisation of public administration services in Poland positively. The frequency with which citizens use online public services varies. More than 40% of Poles used more than one type of such services. The most popular service among Poles was the submission of the PIT return via the website of the electronic Tax Office: 80% of Poles claimed to have used this service in mid-2023. The second most popular public service available online was the mObywatel app, with 71% of adult citizens claiming to have used it. A large share of adult Poles, namely 42%, used the electronic form for the Child-Raising Benefit (known as 500+), 37% used information services: "Check your penalty points", 35% reported the acquisition or sale of a vehicle online, and 35% used applications for family benefits other than the application for the Child-Raising Benefit (such as one-off childbirth allowance, Large Family card, Family Care Capital, parental allowance, school grant, maintenance allowance, family allowance). Less than one-third of citizens used the following services: Geoportal (31%), providing updated information to the labour office (29%), obtaining an excerpt from the register of lands and buildings (22%), creating/suspending/closing business activity (18%), submitting requests for direct payments for agricultural activity (Agency for Restructuring and Modernisation of Agriculture) (15%). Lower popularity of certain services may arise from the fact that they are dedicated to specific groups or types of activity. For example, the applications for the Child-Raising Benefit are submitted only by parents with minor children, while the requests for direct payments for agricultural activity (Agency for Restructuring and Modernisation of Agriculture) are submitted only by farmers.[8]

Twelve electronic public administration services were evaluated by Poles in the study. All of them were rated positively. The highest rates were achieved by the mObywatel app (85.3% of positive rates), the application for the Child-Raising Benefit (84.9% of positive rates), the "Check your penalty points" information service (84.9% of positive rates), submission of the PIT return via the electronic Tax Office (84% of positive rates) and applications for family benefits other than the Child-Raising Benefit (83.3% of positive rates). These were followed by services related to the identity card (80.9% of positive rates), Geoportal (79.7% of positive rates) and reporting the acquisition or sale of a vehicle (79.0% of positive rates). The third rank in terms of the share of positive rates went to services that are more

[8] See *Cyfrowe osiągnięcia i wyzwania. Cyfryzacja administracji publicznej, w tym skarbowej, środowiska pracy i płatności w oczach Polaków w 2023 r. Raport 1/2024*, Wydawnictwo Instytutu Finansów, Warszawa 2023, pp. 7 and 15.

specialised and less frequently used by respondents, such as: obtaining an excerpt from the register of land and buildings (72.2% of positive rates), creating/suspending/closing economic activity (70.9% of positive rates), providing updated information to the Labour Office (69.3% of positive rates), and submitting applications for direct payments for agricultural activity (Agency for Restructuring and Modernisation of Agriculture) (68.7% of positive rates). The shares of Poles who evaluate online public services covered by the study (rather or completely) negatively were very low. In the majority of cases, namely with respect to as many as nine services, less than 6% of rates were negative. Higher shares of negative rates were observed in the case of obtaining an excerpt from the register of land and buildings (9.3% of negative rates), providing updated information to the Labour Office (9.6% of negative rates) and submitting applications for direct payments for agricultural activity (Agency for Restructuring and Modernisation of Agriculture) (13.3% of negative rates).[9]

CONCLUSION

When summarising the above considerations, it is worth noting that the provision of public services via the ePUAP platform contributes to the correct functioning of public administration in the digital sphere. A conducted study shows that an increasing part of society uses online public services, which increases citizens' trust towards e-administration and enhances the efficiency of communication between a public administration body and stakeholders Moreover, the provision of e-administration services enables the society to strengthen their participation in administrative processes without visiting the office and contributes to reducing costs related to the functioning of public administration. Additionally, e-administration makes it possible to solve issues reported by citizens more quickly, which further increases citizens' confidence in public authorities.

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HOW DO IDEOLOGICAL AND CULTURAL PERSPECTIVES INFLUENCE PERCEPTIONS OF POWER LEGITIMACY? AN EMPIRICAL INQUIRY

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Abstract. This paper investigates the evolution of the concept of power legitimacy, focusing on the interplay between political, sociological, and legal perspectives. It highlights the distinctive contributions of Polish scholarly interpretations to the broader global academic dialogue, offering unique empirical insights. Through an empirical analysis conducted via a questionnaire among a diverse participant pool, the study probes the ideological aspects of power legitimacy. This approach integrates modern viewpoints with established theoretical frameworks, enriching our understanding of the complex nature of legitimacy. The objective is to deepen insights and foster scholarly discussion on how ideology, law, and societal acceptance converge to define legitimate power, thereby making a significant empirical contribution to the field.

Keywords: legitimacy; power; society; validity.

INTRODUCTION

In today's world, scepticism and pessimism challenge the efficacy of addressing global crises like ecological degradation, conflicts, institutional failures, economic turmoil, the COVID-19 pandemic, and climate change, eroding trust in self-governance and environmental management. This era of doubt, as noted by Eduardo Apodaka and Mikel Villarreal, sees traditional problem-solving and international cooperation methods as increasingly inadequate, with political dynamics dominated by distrust and life perceived as fraught with risks [Apodaka and Villarreal 2006, 3]. Such scepticism extends to political discourse, prompting a reassessment of expertise and a move towards critical reflection, highlighting the significance of legitimacy in authority and political power structures.

This paper delves into the evolution of power legitimacy across political science and sociology, employing philosophical, political, and legal perspectives to comprehend and reconcile its concept with societal acceptance. By incorporating insights from empirical research, the study navigates linguistic

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and cultural variances, contributing to a more nuanced understanding of legitimacy's role in modern governance.

The first hypothesis presented in this paper suggests that power's legitimacy fundamentally depends on its societal recognition and endorsement, aligning with political and sociological views. It posits that legitimacy is rooted in the collective belief systems of a community, emerging when the governed recognize an authority's legitimacy. This perspective contrasts with legalistic approaches that prioritize formal structures, highlighting the intricate interplay between societal acceptance and formal legitimacy in defining the legality of power.

The second hypothesis examines the evolution of power legitimacy, highlighting the shift from divine and natural law justifications to social contract theories and democratic consent. This transition reflects a critical re-evaluation of societal belief as the sole basis for legitimacy. The author outlines this historical development, emphasizing the significant impact of changes in philosophical thought, political ideology, and legal foundations. This evolution marks a move towards modern interpretations that prioritise legal reasoning, democratic consensus, and normative validity in understanding power legitimacy.

The empirical analysis was conducted through a detailed questionnaire distributed among a diverse group of participants from multiple countries, probing their views on the ideological dimensions of power legitimacy. The results revealed a complex interplay of cultural and historical (and in some cases personal factors) influencing perceptions of legitimacy, with significant emphasis on ethical and moral standards alongside legal-rational criteria. These findings support the hypotheses by illustrating the dynamic and multifaceted nature of legitimacy as perceived through various global perspectives. These hypotheses were formulated through an analysis of primary sources and a review of scholarly literature, aimed at exploring aspects of power legitimacy.

1. METHODS

This paper explores the historical and intrinsic aspects of power legitimacy, a subject deeply rooted in scholarly inquiry. It employs content analysis of foundational texts and a review of the current academic literature to shed light on contemporary discussions. The paper emphasises the need for comprehensive research into the origins, mechanisms, and impacts of power legitimacy, alongside the theoretical frameworks that explain its multifaceted nature. Distinguishing itself from traditional approaches, the author incorporated an empirical component through a questionnaire titled "The Notion of Legitimacy of Power," distributed among Political Science and International Relations students of various nationalities. This mixed-methods approach

integrates quantitative and qualitative data, enriching theoretical debates with practical insights. By analysing the responses from participants of diverse sociopolitical backgrounds, the study contributes to the discourse on power legitimacy, enhancing our understanding of its relevance today. The research bridges historical and theoretical insights with the perspectives of a younger generation, offering a more nuanced understanding of power legitimacy.

2. DISCUSSION

In this subsection of the paper, the notion of power legitimacy is primarily explored and interpreted from a historical perspective. Several scholars have highlighted that the notion of legitimacy possesses an ancient pedigree, evidenced by its employment in classical expressions such as *legitimum imperium* (legal imperial power) and *potestas legitima* (legal civil power), underscoring its long-standing presence in historical discourse [Coicaud 2002, xvi]. The concept of justice, as articulated by Plato in ancient Greece, along with Aristotle's reflections on the structural organization of the state, encompassed early deliberations on the issues of legitimacy.

St. Augustine's political theology in The City of God examines the exclusivity of legitimacy within the divine realm, linking it to divine peace and justice. Through the story of Marcus Attilius Regulus, a Roman general who honoured an oath at the cost of his life, Augustine contrasts pagan and Christian justice, questioning the legitimacy of Roman gods and advocating for a shift to Christian theology rooted in moral constancy [Saint Augustine 1994, n33]. Regulus's sacrifice serves as a critique of pagan legitimacy, emphasizing the ethical foundation of Christian justice.

The debate on authority's legitimacy has been central to political thought since Niccolò Machiavelli's The Prince (1525), which offered rulers guidance on securing their right to rule. Philosophers like Marsilius of Padua, John Locke, and Joseph de Maistre contributed varied perspectives. Marsilius advocated for legitimacy through public consent, while Locke expanded this to argue that all governments, including monarchies, derive legitimacy from the people. In contrast, de Maistre defended hereditary monarchy, positioning himself against Locke's views.

In the early 20th century, Max Weber introduced legitimacy as a key concept in understanding power and societal structures, emphasizing that power is considered legitimate when society perceives it as such [Beetham 1991, 8]. Weber identified distinct forms of legitimacy, with charismatic legitimacy being particularly significant due to the personal bond between a leader and their followers [Weber 1946, 79]. He also explored how administrative autonomy within feudal-like systems influenced power dynamics, where authority was

based on personal loyalty and social honour [ibid., 81]. Weber's theories have profoundly shaped the study of political authority and governance.

Weber's framework emphasizes the role of personal charisma, social honor, and administrative autonomy in shaping political authority, defining legitimacy as the belief in a system's appropriateness by its constituents. Critics such as Lipset (1963) and Merelman (1966) expanded this idea, but others, like Schaar (1969) and Pitkin (1972), argue that Weber's focus on societal belief overlooks the moral dimensions of legitimacy. Beetham (1991) further critiques Weber, suggesting that legitimacy can be manipulated through public perception and advocating for a deeper analysis based on legal standards, societal values, and consent. Beetham emphasizes that legitimacy arises from rule compliance, legal justification, and societal alignment, cautioning against the abuse of power beyond its legal scope [Beetham 1991, 3, 9-13].

Over the last fifty years, the discussion on political legitimacy has expanded, shaped by events such as decolonization in Africa and Asia and the post-World War II establishment of communist regimes in Central and Eastern Europe under Soviet influence. The collapse of these regimes and the end of the Cold War further complicated the concept, especially with the emergence of new nations from former Soviet and Yugoslav territories. Scholars like Lipset (1963) have broadened the scope of legitimacy to include political, administrative, and legal structures, while others, like d'Aspremont (2005), have explored its relevance in international organizations. This evolving discourse highlights the complexity and ongoing importance of legitimacy in global power structures.

Recent research has deepened the understanding of legitimacy, highlighting its role within societal norms and governance structures. Suchman (1995) defines legitimacy as social endorsement of actions within a framework of established norms, while Bukovansky (2009) emphasizes its centrality to sovereignty. Thakur (2010) connects legitimacy to the ability to uphold rights and obligations recognized by society, underscoring its link to the social contract. Biernat (2000) further expands on this by identifying three key criteria for political legitimacy: legal compliance, societal alignment, and explicit consent. Rapkin and Braatan (2009) explore international legitimacy, introducing the Family Resemblance Concept (FRC) to assess global perceptions of legitimacy through public opinion, offering a new empirical approach to understanding its complexities.

Bourdieu's approach views political legitimacy as the result of symbolic capital within societal power dynamics, where authority is recognized and internalized through shared norms and values [Bourdieu 1997]. He argues that legitimacy emerges when power aligns with societal beliefs, differentiating it from mere coercion. This symbolic capital, rooted in the habitus, transforms domination into accepted authority, making political dominance

appear natural within the social fabric. Bourdieu highlights that legitimacy is continuously negotiated, influenced by social structures, cultural norms, and public opinion, reflecting the dynamic and contested nature of political power [ibid., 170-72].

In his PhD thesis at King's College London, Ioannidis Christoforos delves into the concept of legitimacy at its most abstract level in the section titled "2.2. Tier 1: Legitimacy in Abstracto" [Christoforos 2019, 23-24]. Positioned at the pinnacle of a theoretical abstraction hierarchy, legitimacy is examined in its purest, context-detached form, rendering it a conceptually dense yet abstract notion. Christoforos adopts a methodological strategy akin to Hart's approach in defining "law," focusing on identifying commonalities across various uses of "legitimacy" to distil its core essence. This analytical process aims to uncover the fundamental attributes that constitute legitimacy, irrespective of specific applications or contexts.

Belhaj and Speidl critique and adapt Max Weber's notion of authority for Muslim contexts, particularly within Hungarian Muslim communities [Belhaj and Speidl 2017, 96-115]. They highlight the dynamic nature of religious affiliation and mosque attendance, noting that individuals often shift their allegiances due to disagreements with preached discourses. This fluidity in authority and religious affiliation exemplifies a broader trend of reconfiguration in Islamic authority, challenging Weber's concept of authority as merely the expectation of obedience within a specific group. Belhaj and Speidl's observations point to the need for a nuanced understanding of legitimacy and authority in Muslim contexts, reflecting the complex interplay between individual agency, religious identity, and community dynamics [ibid., 97].

Belhaj and Speidl delve into the process of legitimizing religious authority within Islam, drawing on F. Peter's [Peter 2006] work to argue that legitimacy is achieved through the authorization of Islamic practices and beliefs [Belhaj and Speidl 2017, 97]. This process is relational, depending on the audience's reaction, suggesting that perceived fragmentation of authority does not denote decay but rather the essential flexibility for its regeneration. This adaptability facilitates the structuring and restructuring of authority, underscoring the dynamic essence of the Islamic field of authority. Furthermore, they explore the changing dynamics of authority among Muslim immigrants in Europe, observing a transition from a minimal authority rooted in a basic moral economy among first-generation workers to a more intricate moral economy for later generations. Influenced by factors such as economic integration, the influence of Islamist associations, family reunion policies, and international funding, there is a noticeable enhancement in the role of imams within this evolving moral economy. This shift reflects a complexification of authority structures, supported autonomously and shaped by broader social and economic contexts.

3. RESULTS OF RESEARCH

This study collected data from an array of international undergraduate students primarily studying Political Science and International Relations, providing a fertile ground for analysing the concept of power legitimacy across varied demographic landscapes. The dataset, incorporated into this paper as Annex 1, includes 118 participants from 20 different countries, thereby offering a meaningful glimpse into the diverse interpretations of political authority and legitimacy shaped by distinct regional and demographic influences.

3.1. Geographic diversity and regional insights

The participant distribution underscores significant representation from countries like Azerbaijan and Zimbabwe, with 18 and 13 students respectively. This suggests a regional engagement with the study's themes, potentially driven by these specific regions' political climates and historical experiences with power structures. For instance, Azerbaijan's complex geopolitical position and Zimbabwe's history of colonial and post-colonial governance issues may influence students' perceptions of legitimacy in ways that differ markedly from participants in countries with more stable democratic histories.

Such geographic diversity is crucial for a comprehensive understanding of global perceptions of legitimacy. The inclusion of participants from both democratic and autocratic regimes provides a broader spectrum of experiences, enriching the analysis of how different governmental systems influence citizen perceptions of legitimacy. The varied political backgrounds allow for a comparison of how legitimacy is constructed in different political and cultural contexts, ranging from the democratic inclinations of the USA to the authoritarian leanings of Belarus and the conflict-ridden landscapes of Syria and Ukraine.

3.2. Demographic variables concerning age and gender

The author of this research paper emphasizes the significance of the age range of 16 to 24 among the participants, highlighting that this demographic is in a formative stage of developing political and ideological beliefs. This age group is particularly susceptible to the influences of digital globalization, which reshapes their perceptions of governance and legitimacy through a continuous influx of information and global narratives. By analysing their views, the study provides insights into the evolving dynamics of legitimacy in a digital age.

Additionally, the greater number of female participants from Ukraine is attributed to the fact that most males in this age group do not have the right to leave the country due to ongoing military mobilization. The author

conducted the study on site at a university in Warsaw, Poland, capturing this specific gender distribution which adds further layers to understanding power legitimacy. Notable differences, such as male dominance in Uzbekistan and female predominance in Ukraine, likely reflect broader societal and cultural dynamics that influence how legitimacy is perceived and discussed. For instance, the ongoing conflict in Ukraine may have catalysed more active political engagement among women, influencing their views on legitimate governance and power. This gender-based analysis not only sheds light on the differences in perceptions but also highlights the potential impact of societal roles and expectations on political views.

3.3. Implications for theoretical and practical understandings of legitimacy

The author of this research paper suggests that the diverse dataset allows for a multifaceted exploration of the concept of legitimacy, factoring in the influence of age, gender, and regional backgrounds. This comprehensive approach enriches the analysis, revealing how various demographic characteristics can significantly shape perceptions of political legitimacy across different contexts. It underscores the need to consider a wide range of demographic factors when analysing perceptions of legitimacy, as these factors can significantly shape and sometimes skew the understanding of what constitutes legitimate power.

For researchers and policymakers, this study serves as a reminder of the complexity inherent in global perceptions of legitimacy. It challenges the universality of any single model of legitimate governance and suggests that legitimacy is perceived through various prisms of cultural, regional, and demographic influences. The findings advocate for a more nuanced approach in international relations and political science research, promoting policies and theories that are sensitive to these diverse contexts.

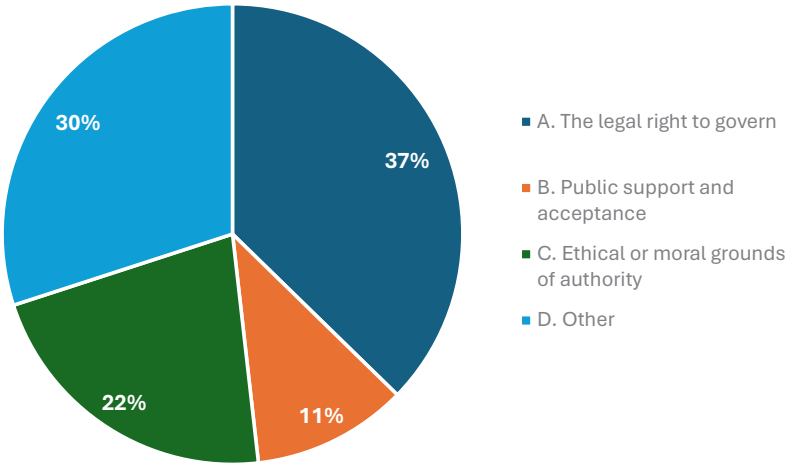
In summary, the author of this research paper believes that the analysis of this participant profile from a global survey illuminates the ways in which demographic characteristics influence perceptions of political legitimacy. This understanding is crucial for developing more effective and inclusive political theories and practices that acknowledge and address the diverse realities of global populations.

4. ANALYSIS OF RESPONSES

One of the questions asked participants to describe their understanding of the term “legitimacy” in the context of political power. This question focused on how legitimacy is perceived, formed, and evolves across various

cultural contexts and future scenarios. This approach aimed to capture a range of interpretations and insights on the concept of legitimacy, reflecting the diverse backgrounds and perspectives of the participants.

Chart 1. Distribution of Participant Responses on the Concept of Political Legitimacy



Source: Author's own elaboration based on research data.

The analysis of responses to this question, which probes the conceptual foundations of political legitimacy, yields a view of the varied interpretations held by the study's participants. The distribution of responses reflects a spectrum of perspectives, indicating a dialogue surrounding the essence of legitimate political power within the student body. This diversity indicates the rich array of cultural, regional, and personal influences that shape individual understandings of what constitutes legitimate authority, underlining the complexity and multiplicity inherent in the concept of political legitimacy.

The majority of participants, 37% of all respondents considered the legal right to govern as the cornerstone of political legitimacy. The range of the group, representing 37% of respondents, identifies the legal right to govern as the cornerstone of political legitimacy. This preference underscores a widespread acknowledgment of the importance of legal frameworks and constitutional authority in conferring legitimacy, suggesting a strong inclination toward a rule-of-law-based understanding of political power.

A smaller yet significant group, approximately 11% of survey participants, emphasised the critical role of public support and acceptance. This viewpoint highlights the democratic principle that legitimacy is derived from the consent of the governed, pointing to the intrinsic value of popular endorsement in legitimizing authority.

Reflecting a considerable focus on ethical considerations, about 22% of participants advocated for the primacy of moral and ethical grounds in establishing

legitimacy. This stance indicates a belief in the moral underpinnings of authority, suggesting that ethical integrity and adherence to moral principles are vital in legitimizing political power.

Remarkably, 30% of the respondents opted for "Other," indicating a diverse array of alternative viewpoints or supplementary factors that contribute to legitimacy not explicitly listed in the options provided. This diversity signals a multifaceted understanding of legitimacy, revealing an openness to broader, more inclusive interpretations that extend beyond conventional criteria. In this survey, 30% of the respondents who selected "Other" as their answer to the factors contributing to political legitimacy further elaborated on their choices. Their responses fell into seven distinct areas that they considered vital for establishing legitimacy beyond the conventional criteria.

Firstly, some respondents identified charismatic authority as critical, emphasizing the personal charisma and the leader's ability to inspire and mobilize followers as key elements of legitimacy. This perspective aligns with sociological theories that highlight the importance of charismatic leadership.

Secondly, historical tradition or legitimacy was noted, where the continuity of a regime or leader's authority derived from longstanding customs or traditional claims played a significant role in their perceived legitimacy.

Economic performance was another area highlighted by participants, suggesting that the ability of a government or leader to manage the economy effectively boosts their legitimacy by enhancing public approval.

Similarly, international recognition was seen as pivotal, with the argument that a government's legitimacy is partly influenced by its acceptance and support from the global community, reflecting the interconnected nature of modern politics.

Technocratic expertise was also a recurring theme. Respondents valued skilled and knowledgeable leadership, particularly in managing complex societal challenges, viewing this as a basis for political legitimacy.

Security and stability were deemed essential as well, with a focus on the leader's ability to ensure national security and maintain social order, which is considered foundational for legitimate governance.

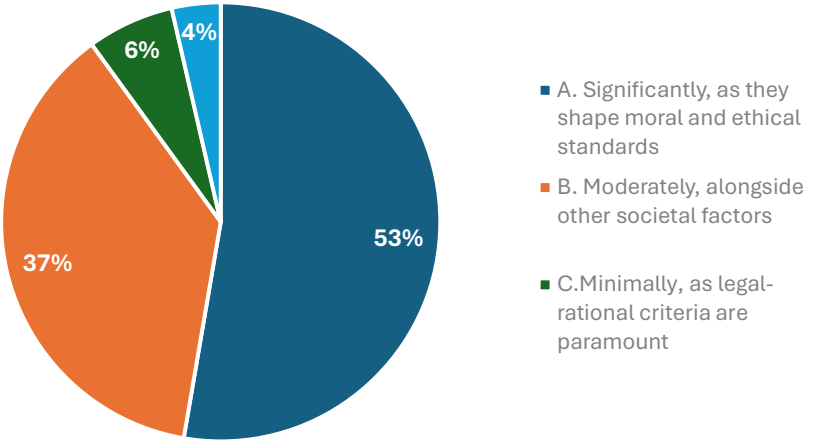
Lastly, a commitment to social justice and efforts to reduce inequality were highlighted. Participants viewed these efforts as critical indicators of a leader's dedication to the welfare and rights of all citizens, not just the privileged or majority groups. These diverse responses illustrate a multifaceted understanding of legitimacy, indicating that respondents recognize a broad spectrum of factors that can affirm or undermine the legitimacy of political power.

The author suggests that these findings reflect a complex and layered understanding of political legitimacy among the student participants. The varied distribution of responses illustrates the nuanced ways in which legitimacy

is conceptualized, transcending simple legalistic or democratic paradigms to include ethical considerations and alternative frameworks. A considerable proportion of students selecting "Other" suggests an appetite for a more expansive dialogue on legitimacy, one that incorporates a wider range of factors and perspectives. This analysis highlights the evolving nature of legitimacy in contemporary political thought, pointing to the need for ongoing exploration and discourse that accommodates the dynamic and diverse views on what constitutes legitimate political authority.

Furthermore, participants were asked to describe how cultural values influence perceptions of political legitimacy. This inquiry aimed to delve into the relationship between societal norms, traditions, and the acceptance of political authority, exploring how deeply ingrained cultural factors are and how they may shape the ways in which legitimacy is recognized and sustained across different regions and communities.

Chart 2. Participant Views on the Influence of Moral and Ethical Standards on Political Legitimacy



Source: Author's own elaboration based on research data.

Chart 2, related to the question assessing the influence of cultural values on perceptions of legitimacy provides an insightful snapshot of the participants' opinions. A majority of the respondents, approximately 53%, believe that cultural values significantly influence perceptions of legitimacy as they shape moral and ethical standards. This dominant view underscores the importance of cultural norms and values in defining and supporting the legitimacy of power, suggesting a deep interconnection between societal values and political authority.

Around 37% of participants consider the influence of cultural values to be moderate, existing alongside other societal factors. This perspective acknowledges the role of culture in shaping legitimacy perceptions but also points to a broader array of influences that collectively determine legitimacy.

A smaller group, about 6%, view the impact of cultural values as minimal, arguing that legal-rational criteria are paramount in establishing legitimacy. This response reflects a belief in the primacy of legal frameworks and rational-legal authority over subjective cultural norms in legitimizing power.

Lastly, roughly 4% of participants chose "Other," indicating that alternative views or nuanced perspectives are not fully captured by the main options provided. These participants, when discussing the influence of cultural values on perceptions of legitimacy provided further insights into two specific areas that were not captured by the main response options.

Firstly, some participants highlighted the role of religious beliefs in shaping their views on legitimacy. They pointed out that in regions where religion is deeply intertwined with daily life and governance, religious doctrines can significantly influence what is considered a legitimate authority. This could mean that for these respondents, a leader's or government's adherence to religious values and norms is a crucial factor in their legitimacy.

Secondly, a few respondents discussed the impact of historical narratives and national identity in shaping perceptions of legitimacy. These participants felt that the historical context of a country, including past conflicts, colonial history, or national movements, plays a significant role in shaping current standards of legitimacy. They argued that understanding these historical influences is essential to fully grasp why certain forms of governance are deemed legitimate or not within different cultural settings.

The author of this research believes these additional insights demonstrate the complexity of factors that contribute to the perception of political legitimacy, extending beyond straightforward legal or ethical considerations to include deeper, culturally specific underpinnings such as religion and history.

The author interprets that these findings highlight the perceived significant role of cultural values in legitimizing political power. The majority opinion aligns with the understanding that cultural norms and moral standards are foundational to societal perceptions of legitimacy, reflecting a deep-seated belief in the cultural underpinnings of political authority. Meanwhile, the significant minority acknowledging a moderate influence, and the few dissenting voices prioritizing legal-rational criteria, illustrate the complexity and diversity of views within the student body. This analysis suggests that while cultural values are broadly recognized as crucial to the legitimacy of power, there exists a spectrum of opinions regarding their relative importance, pointing to the multifaceted nature of legitimacy as a concept. Focusing on these facets allow the study to offer an insight into the academic conversation about legitimacy. It highlights the research's dedication to probing the ideological underpinnings of power legitimacy and addressing the complexity and changeability brought by cultural diversity and global connectivity. Consequently, the study resonates with the growing academic interest in the

adaptation of traditional legitimacy concepts amid changing social norms, technological progress, and global shifts. This approach provides valuable perspectives on the persistent yet flexible character of political legitimacy, contributing to a deeper understanding of its multifaceted nature.

This analysis, weaving together qualitative and quantitative insights, uncovers a layered and complex understanding of political legitimacy among the participants. It underscores the necessity for continuous dialogue and research that embraces the evolving perspectives and complexities of our time. The author claims the findings significantly contribute to the academic discourse on legitimacy, indicating that perceptions are influenced by a confluence of legal, ethical, cultural, and technological factors, and affirming the dynamic essence of legitimacy in the realm of contemporary political thought.

CONCLUSIONS

This scholarly endeavour underscores that legitimacy is not merely an auxiliary attribute for political structures but a fundamental prerequisite for their stability and survival. To navigate the challenges of maintaining hegemony within an ever-evolving societal context, political entities deploy a range of strategies aimed at reinforcing their legitimacy. These strategies span from the utilization of symbols and rituals that resonate with societal values to the strategic employment of propaganda and coercive measures under circumstances deemed necessary for communal stability. Such mechanisms highlight the adaptive measures power structures must undertake to sustain their legitimacy amidst shifting societal norms and expectations.

The critical discourse of the article points towards a dynamic understanding of power legitimacy. It emphasizes the necessity for political entities to continuously earn and reaffirm their legitimacy through actions that align with both societal expectations and normative principles of governance. This necessitates a delicate balance, where the exercise of power must be justified not only on the basis of societal belief and acceptance but also through adherence to established legal and ethical standards.

In summary, the conclusion drawn from this paper underscores that the quest for legitimacy within political power structures is an ongoing process, influenced by historical evolution, philosophical debates, legal interpretations, and contemporary challenges rooted in globalization and migration. Furthermore, this research calls for a deeper engagement with the ideological dimensions of legitimacy, encouraging future research to delve into the interconnections between legitimacy, societal acceptance, and normative validity. By doing so, it aims to foster a more nuanced comprehension of the mechanisms through which political power is legitimized, challenged, and maintained across different cultural and temporal contexts.

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Annex 1.

Table 1. Profile of the Questionnaire Participants
Source: Author's own elaboration.

No.	Country	Number of Students	Age Range	Gender Distribution
1.	The People's Democratic Republic of Algeria	2	21	Male
2.	The Republic of Azerbaijan	18	18-21	Mixed (4 Female, 14 Male)
3.	The Republic of Belarus	3	20	Female
4.	Democratic Republic of the Congo	3	18-20	Mixed (1 Female, 2 Male)
5.	The Republic of Kenya	5	20	Mixed (2 Female, 3 Male)
6.	The Republic of Liberia	2	23-24	Male
7.	Mongolia	10	17-20	Mixed (4 Female, 6 Male)
8.	The Federal Republic of Nigeria	5	19-23	Mixed (3 Female, 2 Male)
9.	The Islamic Republic of Pakistan	1	22	Male
10.	The Republic of Poland	1	18	Female
11.	The Russian Federation	1	20	Female
12.	The Syrian Arab Republic	1	24	Female
13.	The Republic of Tajikistan	7	17-20	Mixed (1 Female, 1 Male)
14.	The Republic of Tatarstan	3	18-20	Male
15.	The Republic of Turkey	10	18-22	Mixed (5 Female, 5 Male)
16.	Ukraine	9	16-20	Mixed (8 Female, 1 Male)
17.	The United States of America	1	19	Female
18.	The Republic of Uzbekistan	12	18-21	Mixed (2 Female, 10 Male)
19.	The Socialist Republic of Vietnam	3	21	Mixed (2 Female, 1 Male)
20.	The Republic of Zimbabwe	13	19-23	Mixed (3 Female, 10 Male)

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CONSTITUTIONAL REFERRAL AND DIALOG BETWEEN THE CONSTITUTIONAL AND ORDINARY COURTS IN GEORGIA*

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Abstract. Constitutional referral is an important procedural tool for the protection of the supremacy of the constitution and human rights, which originates from European law. The Institute of Constitutional referral ensures the growth of the efficiency of the ordinary courts' activities, the implementation of constitutional principles in justice and the establishment of a high standard of protection of human rights. The judicial system, which is represented in Georgia in the form of ordinary and constitutional courts, considers the institution of constitutional referral as one of the important forms of legal relations between these bodies. But does the practice of using constitutional referrals, its normative regulation, and legal activism determine the legal dialogue between the judicial authorities in Georgia? The purpose of this article is the assessment of the ordinary courts' involvement in the implementation of constitutional justice and the constitutional referrals' effectiveness. For this purpose, the article analyzes the role of ordinary courts in the process of safeguarding constitutional legality, the place of constitutional referral in the Georgian model of constitutional review, its normative characteristics and the standard of reasoning required for constitutional referrals. The article identifies corresponding shortcomings, the resolution of which should ensure the effectiveness of constitutional referrals in terms of guaranteeing a high standard of protection of fundamental rights and the establishment of constitutional legality.

Keywords: Constitutional Court; constitutional legality; constitutional review; constitutional referral.

INTRODUCTION

The review of constitutional referrals by ordinary courts constitutes one of the key powers [Zoidze 2007, 188] of the Constitutional Court under the Constitution of Georgia. This institution plays a particularly important role in ensuring the rule of law, introducing constitutional standards into the

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administration of justice, and enhancing internal judicial oversight within the system of ordinary courts. The examination of constitutional referrals also positively impacts the work of the Constitutional Court itself, as it enables the provision of a higher quality of constitutional legality. These circumstances should foster the development of a legal dialogue among the bodies of the judiciary [Davituri and Davitashvili 2021, 27]. However, in the Georgian legal context, the institution of constitutional referrals is characterized by numerous normative and practical shortcomings.

To assess the effectiveness of constitutional referrals by ordinary courts, the present article will analyze the legal aspects of the relationship between ordinary and constitutional courts in Georgia. It will examine the legal nature of constitutional referrals, their institutional and normative characteristics, and analyze the statistical and substantive features of constitutional referrals. This will allow for the identification of the challenges associated with this institution and the means to address them. To fully achieve these objectives, the research will employ analytical, teleological, and comparative legal methods. From a methodological perspective, the teleological method is employed in order to conduct a purposive assessment of the institutional nature of constitutional referral within the Georgian legal framework and to identify its specific characteristics. The normative features and practical application of constitutional referral are analyzed through the use of the analytical method. The comparative-law material presented in the paper is of a descriptive nature and aims to substantiate the arguments advanced and to emphasize the Georgian legal context.

1. CONSTITUTIONAL BOUNDARIES OF INTERACTION BETWEEN COURTS

In contemporary states, the constitutional court constitutes the highest constitutional authority, endowed with the status of a negative legislator [Garoupa and Ginsburg 2015, 141]. Its principal function lies in declaring acts inconsistent with the constitution as unconstitutional and, consequently, void [Robledo 2016, 283]. It possesses the power to annul a norm or its normative content [Javakhishvili 2017, 334], but not to enact legislation, thereby refraining from exercising the functions of a positive legislator [Brewer-Carias 2011, 31]. In both, the American and European models of constitutional review, it represents the sole specialized institution [Stone Sweet 2000, 61], within the system of state power entrusted with the exclusive competence to deliver the final interpretation of the constitution [Fruchtman 2019, 20]. This underscores the role of constitutional review as a mechanism safeguarding state authority from political influence [Ginsburg 2003, 25].

The Constitutional Court of Georgia, similarly to European constitutional tribunals [Sadurski 2014, 13], is a body of distinguished status and authority, based on the European, Kelsenian model [Comella 2009, 4] of constitutional review. It occupies a special position [Gegenava 2012, 12, 33] among the organs of state power and plays a significant role in the implementation of the principle of constitutional supremacy and the protection of fundamental rights [Kverenchkhiladze 2006, 41]. According to the Constitution of Georgia, the primary function of the Constitutional Court is to declare acts inconsistent with the constitution as unconstitutional.

In Western doctrine of constitutional review, the institutional relations between ordinary courts and constitutional courts are characterized by a conflicting nature [Garoupa and Ginsburg 2015, 144]. This arises from the competitive relationship between these two systems of judicial authority [Comella 2011, 273]. Consequently, there is no doubt about the necessity of clearly defining their constitutional mandates through precise criteria [Michelman 2011, 280]. The constitutional court, by its legal nature and specialized procedure, is a distinct body [Sadurski 2014, 120], separate from the system of ordinary courts [Vamberg 2005, 93]. The Constitution of Georgia also draws a clear boundary between these two systems within the judiciary, distinguishing the constitutional court as a body of constitutional review and ordinary courts as bodies of adjudication.[1]

Despite the complex nature of the relationship between the constitutional court and other organs of the judiciary [Gegenava 2012, 25], ensuring cooperation between them is of particular importance. Legal dialogue between these systems within the judiciary, alongside other positive factors, contributes to the consolidation of constitutional legality and the integration of constitutional values into the system of adjudication. This should be achieved through the appropriate legal mechanisms, among which one of the most important is the institution of constitutional referral by ordinary courts to the constitutional court regarding the constitutionality of norms.

2. CONSTITUTIONAL REFERRAL IN THE SYSTEM OF CONSTITUTIONAL ADJUDICATION

2.1. The Legal Nature of Constitutional Referral

The consideration by the Constitutional Court of constitutional referrals submitted by ordinary courts constitutes a form of constitutional review known as the concrete review[2] of norms [Kakhiani 2011, 206]. A constitutional

[1] Constitution of Georgia, 24 August 1995, Article 59.

[2] According to Professor Sadurski, the Constitutional Court considers such "concrete" cases under the model of "abstract" review [Sadurski 2014, 91].

referral allows for the safeguarding of the constitution against unconstitutional acts and contributes to the development of predictable and consistent practice within ordinary courts [Ginsburg 2003, 40]. The development of this institution promotes self-regulation within the system of ordinary courts and the protection of fundamental rights. However, it is generally considered an indirect mechanism [Arnold 2003, 110] for the protection of fundamental rights, entirely dependent on the initiative of ordinary courts, and incapable of ensuring the direct protection of such rights.

The institution of constitutional referral developed within the context of European law [Javakhishvili 2022, 84]. Its establishment in Spain was motivated by the view, that judges of ordinary courts should play a significant role in safeguarding the constitution, particularly with respect to initiating proceedings on the constitutionality of existing laws [Comella 2008, 29]. This institution continues to occupy a prominent position in Germany, where "Richtervorlage" forms one of the most common procedural bases in the practice of the Federal Constitutional Court [Hausmaninger 1997, 37]. Portugal presents an original model, in which ordinary court judges themselves assess the constitutionality of the applicable norm, while the parties retain the right to appeal the decision on constitutionality to the constitutional court [Comella 2009, 7]. Italy also offers a distinctive approach, allowing individuals to protect fundamental rights through ordinary courts before the constitutional court [Passaglia 2016, 253]. The French Constitution provides for the possibility of constitutional referral, albeit through a complex procedural framework [Paris 2016, 311-12]. Czech legislation enables judges to submit referrals to the constitutional court not only for the review of the constitutionality of a norm, but also to verify compliance with international treaties [Biagi 2020, 171].

The institution of constitutional referral in the European legal order, with rare exceptions,[3] constitutes a significant form of interaction between judicial bodies. Despite the diversity of existing models, this mechanism ensures the participation of ordinary courts in the maintenance of constitutional legality and facilitates the integration of constitutional values into the justice. It is perceived not merely as a technical procedural mechanism, but as an element of the constitutional right to a fair trial and as an essential means of protecting fundamental rights, without the proper realization of which the protection of fundamental rights can never attain the highest standard.

With the adoption of the 1995 Constitution, the foundation was laid for the Constitutional Court of Georgia, which exercises constitutional review through constitutional proceedings [Gegenava and Javakhishvili 2022, 121].

[3] Revised Report on Individual Access to Constitutional Justice, Adopted by the Commission at its 125th online Plenary Session, CDL-AD (2021)001, European Commission For Democracy Through Law (Venice Commission), Strasbourg, 11-12 December 2020, para. 44.

From the moment of its establishment, the Constitutional Court was vested with the authority to consider constitutional referrals submitted by ordinary courts, thereby defining the nature of the relationship between ordinary and constitutional courts. In assessing this relationship, it is important to examine the institutional characteristics of the constitutional referral, as well as its practical application and the standards of reasoning applied in its consideration.

2.2. Institutional Characteristics of Constitutional Referral

The legal basis for submitting a constitutional referral to the Constitutional Court is provided by the Constitution of Georgia and the Organic Law of Georgia "On the Constitutional Court of Georgia."[4] Pursuant to Article 60 of the Constitution of Georgia, which is substantially mirrored in the Organic Law, the Constitutional Court of Georgia considers, upon referral by an ordinary court, the constitutionality of the normative act that the ordinary court is required to apply in the course of adjudicating a specific case and which, based on reasonable grounds, may be inconsistent with the Constitution.[5] This institution aims to strengthen constitutional legality in the country and to ensure the implementation of the principles of constitutional supremacy and constitutional legality within the judicial process of ordinary courts [Javakhishvili 2024, 96].

According to the Constitution of Georgia, the "ordinary court" is authorized to submit referrals to the Constitutional Court, although the exact scope of this concept requires clarification. Established practice in constitutional proceedings provides that any court has the right to submit a constitutional referral to the Constitutional Court. Accordingly, a constitutional referral submitted by an ordinary court in which adjudication is carried out by a single judge is signed by that judge; however, the author of the referral is considered to be the court itself [Kakhiani 2011, 210]. In cases where adjudication is conducted by a panel of judges, the constitutional referral is submitted collectively, signed by the participating judges.[6] Therefore, the significance of a constitutional referral transcends the position of an individual judge and is regarded as emanating from the ordinary court as an institution [Shapiro 1981, 30]. Submission to the Constitutional Court may occur either on the initiative of the ordinary court itself or at the request

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[4] Organic Law of Georgia "On the Constitutional Court of Georgia", 31 January 1996.

[5] Constitution of Georgia, 24 August 1995, Article 60(4).

[6] However, according to recent practice, there are cases when a collegial composition of court refers a constitutional submission to the Constitutional Court, but the submission is signed by a single judge, which can be considered an exception to the rule based on the legislative definition.

of the parties [Sadurski 2014, 91], although the latter does not create a binding obligation for the court.

Considering the legislative regulation of a norm, it is relevant to address the question of whether the submission of a referral by ordinary courts to the Constitutional Court constitutes a right or an obligation of the judge. Doctrinal opinions on this issue differ: some scholars define the submission of a constitutional referral as a right of the ordinary court [Khetsuriani 2020, 64-65], while others consider it an obligation [Javakhishvili 2022, 84]. According to another view, submission becomes an obligation only if one of the parties to the judicial process requests it [Khmaladze 2000, 213]. Some authors, drawing on the example of Germany, argue that in the Federal Republic of Germany, any court is both authorized and obliged to verify the constitutionality of legal norms [Khubua and Traut 2001, 32], however, the judge must be convinced of the norm's unconstitutionality – mere suspicion is insufficient [Heun 2016, 65]. Identifying this issue is important, as the exercise of adjudication by a judge should be based on the presumption that the norms applied are in conformity with the Constitution [Vamberg 2005, 89].

Two models can be distinguished in the constitutional practice of European countries regarding the discretion to refer constitutional referrals to the constitutional court: one group of states grants courts the freedom to act when preparing a constitutional referral [Kovaličík 2023. 23]. The other group, however, clearly emphasizes the judge's obligation to refer the matter to the constitutional court when there is a doubt about the constitutionality of the applicable norm, thus directly linking the use of the referral mechanism to the judge's subjective assessment of the norm's constitutionality.[7] If the judge has no doubt concerning the constitutionality of the norm, the need for constitutional interpretation ceases to exist, and the judge proceeds with applying the contested norm. Despite this model-specific characteristic, in cases of doubt regarding the constitutionality of the applicable norm, referral to the constitutional court should be considered an obligation of the court based on the principle of the rule of law; otherwise, not only the institutional mandate of the constitutional court and the legal dialogue with ordinary courts, but also the supremacy of the constitution and the right to a fair trial would be undermined.

The interpretations of the Constitutional Court of Georgia are noteworthy, according to which, when resolving an issue, the focus should not be on a general argument regarding the norm, but rather on the judge's own assessment of the constitutionality of the norm to be applied: "In the event,

[7] Study on Individual Access to Constitutional Justice, Adopted by the Venice Commission at its 85th Plenary Session, CDL-AD(2010) 039rev, European Commission for Democracy Through Law (Venice Commission), Strasbourg, 17-18 December 2010, paras. 215-216.

that a judge concludes, that the norm to be applied in resolving a specific case may be inconsistent with the Constitution of Georgia,[8] the use of the constitutional referral mechanism constitutes not a discretionary power but an obligation."[9] Accordingly, if a judge does not submit a referral to the Constitutional Court, it is presumed that the judge did not have a reasonable belief regarding the potential unconstitutionality of the norm.[10] Given that the judicial system serves to ensure the effective implementation of the principle of constitutional supremacy, which in turn entails the reinforcement of the Constitution and the values enshrined therein,[11] the judge's obligation to submit a referral to the Constitutional Court derives directly from the principle of constitutional supremacy and the architecture of the judiciary.[12]

Regarding to the nature of the request, several points should be noted. First, the request for a review of constitutionality applies only to normative acts. It is noteworthy that, according to the practice of the Constitutional Court, not only normative acts, but also individual acts possessing normative content have fallen within the scope of constitutional review.[13] Accordingly, it is likely that such individual acts may become subject to constitutional referral in the future. Furthermore, the normative act whose constitutionality is requested to be reviewed, must be a norm that the ordinary court is required to apply in the adjudication of the case. Consequently, the Constitutional Court will not accept a constitutional referral, if the contested norm indicated therein does not constitute applicable law in the ordinary court for the ongoing case.[14] It is also necessary that the normative act has substantive significance for the resolution of the case – that is, there must be a reasonable assumption that, in the event of the norm being unconstitutional, the ordinary court would have reached a different decision in the case [Kakhiani 2011, 14].

The submission of a constitutional referral to the Constitutional Court by ordinary courts results in the suspension of proceedings in the ordinary court, until the Constitutional Court renders its decision. As in other countries, this suspension is a prerequisite for the acceptance of the constitutional referral into proceedings [Vamberg 2005, 89]. According to established practice, the continuation of proceedings prior to the issuance of the

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[8] It is a shareable view that a judge should refer a case to the Constitutional Court even when the norm allows for multiple interpretations. See Comella 2011, 274.

[9] Ruling No. 3/7/1286 of the Constitutional Court of Georgia, 15 December 2023, para. II-15.

[10] Ibid., para. II-16.

[11] Decision No. 3/4/1648 of the Constitutional Court of Georgia, 21 April 2022, para. II-10.

[12] Ruling No. 3/7/1286 of the Constitutional Court of Georgia, 15 December 2023, para. II-15.

[13] Ruling No. 1/7/436 of the Constitutional Court of Georgia, 09 November 2007; Decision No. 2/5/700 of the Constitutional Court of Georgia, 26 July 2018; Ruling No. 1/4/1691 of the Constitutional Court of Georgia, 22 February 2023.

[14] Recording Notice No. 3/2/1520 of the Constitutional Court of Georgia, 26 February 2021, para. II-17.

constitutional decision is possible if the norm deemed unconstitutional in the referral no longer constitutes applicable law in the suspended case.[15] This approach is based on the interest of ordinary courts in preventing the application of a norm, that is likely unconstitutional.[16]

It is also noteworthy to consider, whether an ordinary court may, without submitting a referral to the Constitutional Court, render a decision based directly on a constitutional norm. It is widely accepted, that they may rely on the direct effect of the Constitution only when no normative act regulates the matter in dispute and the relevant constitutional provision is formulated in a manner that allows its practical application [Khetsuriani 2020, 57-58]. It should be noted that the legislation of certain European countries explicitly prohibits ordinary courts, when adjudicating disputes, from applying legal norms that are incompatible with constitutional values and principles.[17]

2.3. Standard of Reasoning for Constitutional Referrals

Under Georgian legislation, a constitutional referral must be reasoned.[18] It should contain the evidence that, in the view of the author of the referral, supports the validity of the referral. A constitutional referral may concern the compliance of a norm with any provision of the Constitution, and in this respect, ordinary courts are not limited to Chapter II of the Constitution (Fundamental Rights) when providing reasoning.[19] The requirement to reason the referral is important, because it ensures both - the confidence of directly interested parties in the decision and the proper perception of the decision by society, which is of particular significance in a democratic society [Dixon 2023, 245]. The requirement to provide justification substantially exceeds the mere expression of the judge's doubt regarding the constitutionality of the norm [Autheman 2004, 16]. Accordingly, based on the practice of the Constitutional Court, it is important to assess and define the standard of reasoning for constitutional referrals.

For the assessment of the legal nature of constitutional referrals, the 2015 precedent-setting decision is of particular importance, as it established the basis for a new standard of reasoning. According to the Constitutional Court's interpretation in this case, insofar as ordinary courts act within the framework of a constitutional referral to protect public interest, they do

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15 Decision No. 3/4/1648 of the Constitutional Court of Georgia, 21 April 2022, paras. II-20-21.

16 Despite this risk, the legislation of certain European countries does not provide for the possibility of suspending judicial proceedings. Constitution of the Kingdom of Spain, 6 December 1978, Article 163.

17 Constitution of the Portuguese Republic, 25 April 1976, Article 204.

18 Organic Law of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Article 31(2).

19 Decision No. 3/4/641 of the Constitutional Court of Georgia, 29 September 2016, para. II-23.

not pursue the annulment of a norm as unconstitutional. Their objective is to safeguard the constitutional guarantees of the participants and institutions involved in the judicial process.[20] Furthermore, the Constitutional Court, on its own initiative, amended the constitutional provision indicated by the author of the referral and deemed it necessary to review the contested norm against another provision of the Constitution. Through this decision, the Constitutional Court emphasized the significance of public interest in the consideration of constitutional referrals, ensuring that a norm likely to be unconstitutional does not remain in force.[21]

In this decision, the Constitutional Court of Georgia considered it sufficient for the referral to merely indicate the constitutional issue, since it could not disregard the problem raised in the referral on the formal ground of incorrect identification of the constitutional provision. Otherwise, the constitutionality of the norm to be applied would remain in doubt.[22] Accordingly, the Constitutional Court of Georgia rejected a narrow, formalistic interpretation of the law, under which the author of the constitutional referral bears the obligation to identify the relevant constitutional provision. Nonetheless, the indication of an "incorrect" constitutional basis by the author of the referral highlights the issue of reasoning in constitutional referrals.

Proper reasoning of a constitutional referral is a mandatory legislative requirement, however, it is equally important to correctly perceive the scope of the Constitutional Court's competent mandate. In one referral submitted by the Supreme Court, the problem concerned the submission of the issue to an inappropriate body in relation to the required standard and the incorrect perception of the Constitutional Court's competence. Accordingly, even where a constitutional referral meets a high standard of reasoning, it could not be assessed by the Constitutional Court. According to the Court's assessment, in this case, the issue did not concern the misidentification of the law to be applied by the Supreme Court, but rather the author's incorrect understanding of the legally defined limits of the Constitutional Court's competence.[23] Consequently, the constitutional referral was deemed insufficient both in terms of the request and its reasoning and was not accepted into proceedings.

When considering a constitutional referral, the Constitutional Court may go beyond the reasoning provided in the referral and, in a sense, "fill in" gaps in the arguments. For instance, in one case, the Constitutional Court, using the teleological method of interpretation, extended the legal benefit, protected

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[20] Decision No. 3/1/608,609 of the Constitutional Court of Georgia, 29 September 2015, para. II-6.

[21] Ibid., II-9.

[22] Ibid., II-7-8.

[23] Ruling No. 3/3/ 685, 686, 687, 688, 689, 736, 737, 758, 793, 794, 820 of the Constitutional Court of Georgia, 29 September 2016, para. II-10.

by the contested norm to individuals, who were not granted the specific right to enjoy that benefit under the law. Through this decision, the Constitutional Court of Georgia entirely went beyond the grammatical formulation of the norm indicated in the referral and established a completely new regulatory arrangement.[24] This approach, though required to safeguard public interest, also raises questions about the reasoning behind constitutional referrals.

Finally, the issue of reasoning in constitutional referrals submitted by ordinary courts remains problematic, as evidenced by decisions issued by the Constitutional Court, both in the form of rulings and recording notice. For example, in one act, a constitutional referral was partially not accepted into proceedings, because the court had simply not provided any reasoning in support of its request.[25] Accordingly, multiple problems are identifiable in constitutional referrals submitted by ordinary courts, including the incorrect identification of constitutional norms, inadequate reasoning, failure to provide sufficient argumentation, and a misperception of the role of the Constitutional Court. These issues are directly related to the effectiveness and practical impact of constitutional referrals.

3. EFFECTIVENESS OF CONSTITUTIONAL REFERRALS

As previously noted, the review of constitutional referrals submitted by ordinary courts by the Constitutional Court constitutes a special means of safeguarding the supremacy of the Constitution [Javakhishvili 2022, 86], conferring practical force on constitutional values.[26] It serves as an important instrument for preventing the adjudication of cases by ordinary courts on the basis of an unconstitutional norm.[27] In reviewing the constitutionality of the contested normative act, the Constitutional Court takes into account not only the literal meaning of the norm but also its practical application, which includes the authoritative interpretation provided by the ordinary court.[28]

Georgian legislation imposes an obligation on judges of ordinary courts to provide reasoning for constitutional referrals. This entails the judge fully articulating their position regarding the compliance of the norm to be applied with the Constitution, using legal arguments, presenting evidence and circumstances relevant to the case, referencing national and international acts, and addressing all legal factors that enable a complete understanding of the

[24] Ruling No. 601 of the Constitutional Court of Georgia, 16 June 2014.

[25] recording notice No. 3/13/1715 of the Constitutional Court of Georgia, 04 November 2022, paras. II-4, II-10.

[26] Decision No. 3/4/1648 of the Constitutional Court of Georgia, 21 April 2022, para. II-11.

[27] However, there is a view in the doctrine that this institution is a weak tool for the Constitutional Court to exert legal influence over the ordinary courts. See Garoupa and Ginsburg 2015, 141.

[28] Decision No. 1/2/552 of the Constitutional Court of Georgia, 04 March 2015.

judge's position and its competent assessment. According to the practice of the Constitutional Court, while the Court will not refuse to consider a referral solely on the basis of insufficient reasoning, this does not relieve the judge of the obligation to provide proper reasoning. The obligation to justify a constitutional referral in European states is based on the principle, that the referral must clearly demonstrate to the constitutional court that resolving the constitutionality of the contested law is essential for the outcome of the case and that the referral is not of a random or arbitrary nature [Vamberg 2005, 89].

Constitutional referrals, submitted by ordinary courts, as previously noted, present multiple problems in terms of reasoning. These include the thematic brevity of referrals, inadequate quality of evidentiary arguments, reference to inconsistent constitutional grounds, and partial reasoning of the referral – deficiencies that are most commonly observed in the practice of constitutional proceedings. This situation necessitates the implementation of appropriate measures.

First and foremost, it is important to raise judges' awareness regarding constitutional issues, as well as, to provide them with institutional support and encouragement, so that concerns about case delays or the time required to prepare a referral, do not discourage them from submitting referrals. It is also crucial to develop informal formats that allow for direct interaction between ordinary and constitutional judges, which will foster a dialogue on constitutional legality. The combination of these measures should promote increased judicial activism regarding constitutional referrals and facilitate effective communication within the judicial system to ensure constitutional compliance.

The significance of a constitutional referral is fundamentally linked to the enhancement of its justification standard. In this regard, in addition to measures ensuring the involvement of ordinary courts, the stance of the constitutional court is also crucial. Regardless of the practice it has developed, it is important, that the court itself does not correct deficiencies in the referral's justification but establishes a clearer standard for justification. This approach prevents ordinary courts from avoiding the justification of norms and from making referrals on insignificant issues [Zoidze 2007, 159]. By doing so, the constitutional court promotes judges' self-monitoring and, consequently, the qualitative improvement of referral justifications, as well as the resolution of constitutional issues upon which ordinary courts will base their subsequent activities [Ginsburg and Garoup. 2011, 549].

Referrals by ordinary courts to the Constitutional Court depend on the initiative of the courts, which to some extent results in limited proactivity on the part of ordinary courts. In this context, a statistical analysis of constitutional referrals is particularly important: from 1997, when the first constitutional referral was registered, until January 2004, a total of 15 constitutional referrals

were submitted to the Constitutional Court.[29] Between 2004 and 2013, ordinary courts did not submit any constitutional referrals to the Constitutional Court. From 2014 to 2025, 74 constitutional referrals are being searched on the Constitutional Court's website.[30] Accordingly, over a span of 29 years, a total of approximately 90 constitutional referrals have been submitted to the Constitutional Court, which cannot be regarded as constituting a meaningful dialogue within the judicial system under this institutional framework.

The thematic aspect of constitutional referrals must also be taken into account. Despite several interesting referrals on which the Constitutional Court has issued significant decisions, the thematic scope of these referrals – most of which concern the compliance of norms applied in criminal cases with the Constitution – cannot be regarded as reflecting a diverse practice. As evidence, it can be noted, that of the constitutional referrals mentioned above, approximately 40 concern the constitutionality of only two articles of the Criminal Code.

The statistical and substantive analysis of constitutional referrals reveals that ordinary courts do not perceive the constitutional court as a competing institution – which is consistent with the legal nature of the constitutional court and is not unusual in the European constitutional discourse – but rather that the role of the constitutional court as the primary interpreter of constitutional issues is disregarded, and insufficient attention is given by ordinary courts to resolving constitutional matters. This undermines the involvement of the judicial system in strengthening constitutional legality and in ensuring the supremacy of the constitution.

It is widely argued, that ordinary courts should be considered not merely as implementers of the results of constitutional review, but as active participants in an institutional dialogue with the Constitutional Court [Mendes 2013, 145-48]. Unfortunately, this view does not correspond to the current legal reality in Georgia. Ordinary courts make use of constitutional practice only formally. While the work of judges in ordinary courts is primarily related to the application of existing legislation, its legal foundation is the Constitution of Georgia. Accordingly, their work cannot be viewed solely in technical terms or within the narrow framework of specialization, as it often involves values and interpretations closely connected to the Constitution [Rosenfeld 2019, 38-45].

In this regard, the low level of judicial activism is partly determined by certain normative factors. Specifically, under Georgian criminal procedural

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[29] See https://constcourt.ge/ka/judicial-acts?quantity=10&type%5B0%5D=278&type%5B1%5D=279&type%5B2%5D=281&dateTo=30-01-2004&competence%5B0%5D=368&page=1 [accessed: 19.11.2025].

[30] See https://www.constcourt.ge/ka/judicial-acts?quantity=10&type%5B0%5D=1829&page=1 [accessed: 19.11.2025].

legislation, a decision of the Constitutional Court is considered a newly discovered circumstance.[31] However, unlike criminal procedure, civil procedural legislation does not recognize a decision of the Constitutional Court as a newly discovered circumstance, which affects the protection of fundamental rights in this area in Georgia. Accordingly, it is important, on the one hand, to raise constitutional awareness and support ordinary courts in the implementation of constitutional decisions, and on the other hand, to adopt the necessary legislative amendments that recognize a constitutional court decision as a newly discovered circumstance and oblige ordinary courts to (re)examine cases on that basis.

Under Georgian legislation, a constitutional referral is essentially considered in the absence of the author of the referral and the body whose act is challenged in a specific case. The timeframe for examining a constitutional referral is nine months, with the possibility of a two-month extension. This period covers the time from the registration of the referral to its substantive consideration; however, no deadline is established for the issuance of a decision. As a result, the issuance of decisions on constitutional referrals is often unreasonably delayed.[32] Considering that the regulation of decision deadlines, as a rule, is uncommon in foreign constitutional practice,[33] it is important for the Constitutional Court of Georgia to take into account the interests of justice, the significance of its role as a body of constitutional control, and to issue decisions on constitutional referrals within reasonable timeframes. In this regard, it is advisable for the constitutional court to take into account the legal nature of the constitutional referral, the public interests associated with its consideration, and to ensure the possibility of examining constitutional referrals promptly and on an extraordinary basis. It is also important that clearer guidance regarding the priority consideration of referrals be established in legislation. The law may additionally specify concrete timeframes for rendering decisions on constitutional referrals.

Another procedural feature related to the timely adoption of decisions by the constitutional court concerns constitutional referrals: referrals from ordinary courts are considered by the plenary session (Plenum) of the constitutional court.[34] However, the court renders decisions on certain

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[31] Criminal Procedure Code of Georgia, 09 October 2009, Article 310 (D).

[32] For example, the Constitutional Submission No. 1543 of the Telavi District Court, dated October 23, 2020, was accepted for consideration by the Constitutional Court of Georgia on February 26, 2021, but the decision was issued only on July 12, 2024. See, Decision No. 3/4/1543 of the Constitutional Court of Georgia, 12 July 2024.

[33] Study on Individual Access to Constitutional Justice, CDL-AD (2010) 039rev, No.538/2009, European Commission for Democracy Through Law (Venice Commission), Strasbourg, 27 January 2011, 41.

[34] Organic Law of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Article 21.1.

competences (including individual constitutional claims) in a collegial session.[35] Given that the decisions of both the plenary and the collegial sessions carry equal legal force, and that a collegial session allows for a faster examination of cases, it is advisable to grant the collegial session the authority to consider constitutional referrals from ordinary courts. Moreover, for complex cases, Georgian legislation provides for the transfer of matters from the collegial session to the plenary, and this possibility would also apply to constitutional referrals.

The consideration of constitutional referrals from ordinary courts in Georgia is characterized by a procedural peculiarity whereby the referral is examined without the presence of its author.[36] However, it should be noted that the possibility of an oral hearing allows the parties to provide oral explanations, which can serve as a prerequisite for correcting deficiencies and perfecting the justification of the constitutional referral. Accordingly, involving the author of the referral and other interested parties in the proceedings, in addition to ensuring procedural transparency, will facilitate a high standard of justification for the referral and enable the constitutional court to examine the matter thoroughly, thereby contributing to the establishment of institutional dialogue between the judicial systems.

Taking all of the above into account – the statistical data, the lack of thematic diversity, and the practice of ordinary courts in applying constitutional jurisprudence – it can be concluded, that the institution of constitutional referrals is an ineffective mechanism for ensuring constitutional legality in Georgia. For the refinement of constitutional referrals, it is important to take into account the institutional, legislative, and procedural recommendations presented in this article, which will contribute to the institutional improvement of constitutional referrals: enhancing the standard of justification, addressing procedural challenges, increasing judicial activism, and ultimately establishing institutional dialogue between judicial systems. This, in turn, ensures the realization of the right to a fair trial and the implementation of the rule of law.

CONCLUSION

The institutional relationship between constitutional and ordinary courts, facilitated through legal mechanisms, is a hallmark of a modern democratic state. This type of interaction ensures, on the one hand, an increase in internal judicial oversight, the enhancement of the effectiveness of court decisions, and the participation of courts in strengthening constitutional

[35] The Constitutional Court of Georgia is composed of a plenary session (Plenum) of nine judges and two collegial panels, each consisting of four judges.

[36] Organic Law of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Article 42.1.

legality, and, on the other hand, the integration of constitutional decisions into the judicial process. This positively reflects on the image of both systems. However, the quality of the application of constitutional decisions by ordinary courts, the limited use of constitutional referrals, their thematic uniformity, and the problematic standard of reasoning in Georgia do not ensure a meaningful legal dialogue within the judicial system.

In this regard, it is important to implement institutional, legislative, and practical measures related to constitutional proceedings that enhance the effectiveness of constitutional referrals. Such measures would have a positive impact on the reputation of both constitutional and ordinary courts, strengthen constitutional legality, and facilitate the conduct of legal dialogue within the judicial system.

In light of the above, it is important to implement the institutional, legislative, and procedural measures presented in this article, including, among others, raising judges' awareness and providing institutional support, promoting systemic dialogue, controlling the admissibility of referrals, prioritizing the consideration of constitutional referrals and establishing the possibility for a referral to be reviewed by a constitutional court panel and decided through oral hearing. These recommendations will enhance the effectiveness of constitutional referrals, which will positively impact the image of both constitutional and ordinary courts, strengthen constitutional legality, and facilitate the conduct of legal dialogue within the judicial system. This, in turn, will contribute to the elevation of the standard of fundamental rights protection, the integration of constitutional principles into the administration of justice, the legal safeguarding of the constitution, and ultimately, the realization of the rule of law.

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DEREGULATION OF APPEAL PROCEDURE IN ADMINISTRATIVE PROCEEDINGS

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Abstract. The article contains an analysis and assessment of normative changes in Polish administrative proceedings made by the legislator as part of deregulatory measures. These measures covered, in particular, the area of appeal proceedings, where the standard of procedural protection is determined by the principle of two-instance proceedings. Legislative interference in the procedural system of legal protection requires particular caution to ensure that, under the guise of improving the procedural situation, the legal guarantees of individuals are not restricted. The amendment to the Code of Administrative Proceedings affects the scope of the adjudicative powers of the authorities of instance course, in particular the cassation competence of appeal authority, and is yet another legislative intervention in recent years in the construction of cassation decision of the second instance authority. The legislator's efforts focused on strengthening the impact of the factual and legal assessment made by the appeal authority in a decision repealing the contested decision and referring the case back to the first instance authority for reconsideration. The explicit articulation of the binding force of the instructions and guidelines of the appeal authority fulfils the idea of jurisdictional integrity in the course of administrative instances, but it is also another manifestation of the legislator's re-evaluation and new perspective on the principle of two-instance administrative proceedings.

Keywords: administrative proceedings; appeal procedure; cassation decision; deregulation.

INTRODUCTION

One of the areas that the Polish legislator has covered with deregulation efforts is administrative procedural law. The Act of 21 May 2025,[1] amending, among others, the Code of Administrative Proceedings,[2] introduces simplifications relating to business activity at the stages of starting and developing

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

[2] Act of 21 May 2025 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 [hereinafter: the Deregulation Act].

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such activity by an entrepreneur. The aim of the solutions proposed by the legislator is to "reduce the number of unnecessary and excessive regulatory requirements, which will consequently contribute to reducing costs for entrepreneurs. The result will be faster and more efficient administrative procedures, which will also be reflected in the efficiency of public administration. It is expected that the measures taken will provide a positive stimulus for entrepreneurs, significantly improving the conditions for starting and running a business."[3] However, it should be noted that the provisions of administrative procedural law are not only addressed to participants in economic activity. Administrative jurisdiction proceedings are a tool for enforcing broadly understood rights and obligations of individuals in the sphere of public law regulation. The provisions governing these proceedings establish a legal model for relations between individuals and public administration in the area of concretisation of administrative law norms by way of administrative acts. Procedural law also serves a protective function, both in relation to the interests of individuals and the public interest. It constitutes a coherent system of procedural guarantees reflecting the procedural values approved by the legislator. One such value is undoubtedly efficiency, but this must be considered in relation to the purpose of the proceedings, which is to properly determine the rights and obligations of individuals.

Deregulation measures in the area of administrative proceedings have also affected appeal procedure. In this case, the legislator interferes with the provisions creating the standard of procedural protection established by the principle of two-instance administrative proceedings. The amendment affects the scope of the adjudicative powers of the authorities of instance course, in particular the structure and effects of the cassation decision of the appeal authority. It is therefore worth analysing the content and significance of the changes made in this area under the banner of deregulation of administrative procedures. This will allow us to answer the question of whether the new solutions fulfil the legislator's assumptions and whether the possible simplification of proceedings will not violate the procedural guarantees of individuals in the area of the right to have a decision of a public administration authority reviewed in the course of instances.

[3] 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 2025, p. 1 [hereinafter: Explanatory statement 2025].

1. THE TWO-INSTANCE ADMINISTRATIVE PROCEEDINGS AS A PROCEDURAL PRINCIPLE

In formal aspect, the instance review is based on the assumption that a party to administrative proceedings may appeal against a decision issued by a first instance authority to a higher authority that is separate in terms of structure and competence. The essence of the appeal is expressed in the right to request that the case be examined and a decision issued by that authority, in accordance with the scope of its competence. This understanding of procedural instancy is considered a "natural" rule of lawful procedure before state authorities [Janowicz 1999, 94]. Article 78 of the Constitution of the Republic of Poland guarantees the parties the right to appeal against judgments and decisions issued in the first instance, leaving the matter of exceptions to this rule and the procedure for appealing to be regulated by a law. The subjective right resulting from the above provision covers all legal proceedings conducted in cases where an individual ruling is issued in the form of an act of applying the law by an entity exercising public authority, including jurisdictional administrative proceedings [Wyrzykowski and Ziółkowski 2012, 282-83]. "The constitutional standard in this area is exhausted by the possibility of reviewing only a previously uncontrolled decision in a case that has already been initiated."[4] The constitutional provision corresponds to Article 15 of the Code of Administrative Proceedings, which establishes the general principle of two-instance administrative proceedings. The current code formula for this principle was established by the 2017 amendment,[5] which added a clause stating that administrative proceedings are two-instance proceedings, "unless a specific provision provides otherwise".

The principle of two-instance administrative proceedings is defined in two aspects – substantive and formal. The substantive aspect of two-instance proceedings treats it as a procedural guarantee for a party to administrative proceedings, expressed in the possibility of requesting a re-examination of an individual case settled by a decision of the first instance authority [Borkowski 2003, 37]. The party of the proceedings therefore has the right to have the case under consideration examined twice on its merits by referring to its substance on the basis of complete evidence by the authorities of two instances. The formal aspect of the two-instance nature of the proceedings is expressed in the structure of the course of proceedings, which consists in the joint action of two administrative instances activated in succession and, in dynamic terms, assumes the transfer

[4] See judgment of the Constitutional Tribunal of 12 January 2010, ref. no. SK 2/09, in: Judgments of the Constitutional Tribunal 2010, series A, No. 1, item 1.

[5] Act of 7 April 2017 amending the Act the Code of Administrative Proceedings and some other acts, Journal of Laws item 935.

of powers to re-adjudicate the case to the second (higher) instance authority [Zimmermann 1986, 12]. The two-instance nature of administrative proceedings is a procedural rather than a structural principle, hence its fundamental meaning is expressed in its guarantee aspect, meaning the legally protected possibility that the same case will be settled twice [Dawidowicz 1989, 45]. From the point of view of compliance with the principle, it is therefore of secondary importance whether the decision will be reviewed by a higher authority or by the same authority that issued the contested decision, as is the case with a request for reconsideration referred to in Article 127(3) of the Code. "The two-instance nature of administrative proceedings protects the interests of the administration itself, allowing for the correction of errors made by lower-level authorities and facilitating the uniformity of the administrative apparatus. Above all, however, the two-instance nature of proceedings guarantees the rights and interests of the parties and other participants in the proceedings. Violation of the principle of two-instance administrative proceedings consequently undermines not only a specific organisational concept of the functioning of the state apparatus, but also the sphere of citizens' rights. Such a violation therefore has particularly serious consequences in the sphere of the rule of law."[6]

The two-instance nature of proceedings requires that decisions of administrative authorities be preceded by proceedings conducted by each authority that issued a decision, enabling the objectives for which the proceedings are conducted to be achieved. At the same time, however, it should be noted that appeal proceedings do not have to be concluded with a decision resolving the case on its merits. "In certain situations, the objectives of the proceedings are achieved by issuing a decision repealing the contested decision and referring the case back to the first instance authority for reconsideration" [Kmieciak 2011, 26].

The provision contained in Article 15 of the Code, according to which administrative proceedings are two-instance proceedings, unless a specific provision indicates otherwise, reflects a new approach to two-instance proceedings by the legislator, who recognised the existing structure of this principle as one of the causes of the dysfunction of administrative procedures. In order to meet the need to improve the administrative procedure, it was decided that the two-instance nature of proceedings should be understood as the right of a party to request that its case be examined twice on its merits, which cannot be done against its will, and that the legislator's obligation, pursuant to Article 78 of the Constitution, is only to guarantee the party the possibility of exercising this right as a constitutional subjective right of the individual.[7]

[6] See judgment of the Supreme Administrative Court of 12 November 1992, ref. no. V SA 721/92, in: Judgments of the Supreme Administrative Court 1992, No. 3, item 95.

[7] See Explanatory statement for the draft Act on amending the Code of Administrative

This assumption has resulted in new detailed regulations concerning appeal proceedings, which allow for a restriction of the principle of two-instance proceedings in its substantive aspect. These include: 1) he right of a party to request that the appeal authority conduct an evidentiary hearing to the extent necessary to resolve the case, pursuant to Articles 136(2-4) and 138(2b) of the Code, resulting in a restriction on the issuance of a cassation decision, as provided for in Article 138(2) of the Code; 2) the right to apply to an administrative court against a decision issued in the first instance by a minister or a municipal appeals collegium without the need to exhaust the remedy of requesting a reconsideration of the case, pursuant to Article 52(3) of the Law on proceedings before administrative courts;[8] 3) the right to waive the right to appeal against a non-final decision pursuant to Article 127a of the Code.

2. CASSATION DECISION OF THE APPEAL AUTHORITY

The new model of authority competence in appeal proceedings, introduced by the legislator in 2017, is conditioned – in accordance with the assumptions of the amendment to the Code – by a shortening of the duration of administrative procedures. One of the tools for achieving this goal was to eliminate the procedural dysfunction which, in the opinion of the legislator, was the abuse of cassation decisions by appeal authorities. A decision whereby the appeal authority repeals the contested decision of the first instance authority in its entirety and refers the case back to that authority for reconsideration should be an exception and should only occur in a situation where issuing a decision on the merits would violate the principle of two-instance proceedings, while assuming that the two-instance principle should be understood as the right of a party to request that its case be examined twice on its merits, which cannot be exercised against its will.[9] The essence of the principle of two-instance proceedings is therefore focused on its guarantee dimension in relation to the party to the proceedings. In this sense, the two-instance principle means the procedural right of a legitimate entity (party to the proceedings) to request an examination of the correctness of the first-instance decision, rather than to request a re-examination of a case previously decided by a first-instance authority [Chróścielewski 2015, 11].

The above assumptions formed the basis for the remodelling of the appeal procedure in terms of the explanatory and adjudicative competences

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Proceedings and some other acts, Sejm of the Republic of Poland, 8th Term, Sejm Paper No. 1183 of 28 December 2016, p. 20 and 59 [hereinafter: Explanatory statement 2017].

[8] Act of 30 August 2002, the Law on proceedings before administrative courts, Journal of Laws of 2024, item 935 as amended.

[9] See Explanatory statement 2017, p. 56-57.

of the second instance authority. The course and effects of the explanatory proceedings conducted by the appeal authority are determined by two factors: firstly, the scope of evidentiary activities in the appeal proceedings is determined by quality, i.e. the completeness and manner of gathering the evidence that formed the basis for the decision in the first instance, and secondly, the party to the proceedings has influenced the scope of the evidence-gathering proceedings in the second instance and, consequently, also the type of decision ending those proceedings.

The course of the explanatory proceedings before the appeal authority depends on the quality of the fact-finding proceedings conducted at first instance. In the course of the appeal proceedings, the appeal authority assesses the extent to which the evidence in the case was collected and examined in the proceedings before the first instance authority. If the evidence has been collected exhaustively by the first instance authority, the appeal authority limits itself to reassessing it. An appeal authority which finds that an administrative decision subject to review was issued in violation of procedural rules and, at the same time, determines that the evidence gathered by the first instance authority is incomplete, necessitating clarification of the case to an extent that has a significant impact on its resolution, may not use the possibility of supplementing the evidence on its own under Article 136(1) of the Code. In such circumstances, the appeal proceedings should be concluded with a cassation decision pursuant to Article 138(2) of the Code, unless the party has submitted a request in the appeal for an explanatory proceedings to be conducted to the extent necessary to resolve the case. This request allows the appeal authority to remedy significant procedural irregularities committed by the first instance authority and, as a consequence, leads to the issuance of a decision resolving the case on its merits, pursuant to Article 138(1) or 138(4) of the Code, unless there are grounds for the proceedings to be deemed irrelevant. Failure by a party to submit the application referred to in Article 136(2) of the Code means that it expresses its willingness to exercise the right, resulting from the principle of two-instance proceedings, to have the case examined twice on its merits and settled by two authorities of two different instances. The issuance of a substantive decision by the appeal authority in a situation where no explanatory proceedings were conducted in the first instance, or where they were not conducted in a significant part, or where they were conducted with a significant violation of procedural law, would lead to a violation of the principle of two-instance proceedings.

The current wording of Article 138(2) of the Code entitles the appeal authority to exercise its power to issue a cassation decision if two conditions are met cumulatively: firstly, in the opinion of the appeal authority, the decision of the first instance authority was issued in violation of the rules of procedure, and secondly, the scope of the case that needs to be clarified has

a significant impact on its resolution. A cassation decision should therefore be the result of a significant procedural defect, usually resulting from a violation of the rules of explanatory proceedings, although the occurrence of this defect in another area of procedural regulation cannot be ruled out [Sawuła 2011, 16]. There is no doubt that the issuance of a cassation decision should be preceded by a thorough analysis of the evidence gathered by the first instance authority in terms of its completeness. Only on this basis can the appeal authority determine which circumstances of the case have not been proven and, consequently, to what extent the evidence should be completed.[10]

The grounds for the cassation decision set out the consequences of the appeal authority's assessment of the scope and effects of the violation of procedural law in the first instance. The appeal authority, finding that the contested decision cannot become final in its current form, repeals it in its entirety and refers the case back to the first instance authority for reconsideration. At the same time, the appeal authority was required to indicate the circumstances to be taken into account when the case is reconsidered by the lower instance. The 2017 amendment to the Code additionally obliged the appeal authority to formulate guidelines on the interpretation of provisions that were misinterpreted by the first instance authority when issuing the contested decision, provided that these provisions are applicable to the case (Article 138(2a) of the Code). The legal nature of the instructions and guidelines formulated in the cassation decision by the appeal authority has been the subject of extensive analysis in doctrine and case law, and the practice of the authorities in this area has prompted the legislator to intervene legislatively as part of the process of deregulating legal procedures.

3. APPEAL PROCEDURE AS AN AREA OF DEREGULATION OF ADMINISTRATIVE PROCEDURAL LAW

The "deregulation" of administrative proceedings in the area of appeal procedures was carried out with regard to the instructions and guidelines of the appeal authority formulated in the cassation decision against the first instance authority. Under the new provision of Article 139a of the Code, the first instance authority was obliged to take into account the circumstances indicated by the appeal authority and bound by the guidelines of that authority set out in the decision repealing the contested decision in its entirety and referring the case for reconsideration, unless, upon reconsideration of the case, the legal provisions on the basis of which the first instance authority decided the case have changed. According to the explanations

[10] See judgment of the Supreme Administrative Court of 2 November 2000, ref. no. V SA 856/00, Legalis no. 60606.

provided by the drafters of the act amending the Code, the new legal solution is a response to the phenomenon of first instance authorities failing to comply with the guidelines of the appeal authority and introduces "an instrument that will lead to a firm obligation on the part of the first instance authority to comply with the content of the appeal authority's decision."[11]

A cassation decision is issued in the event of a violation of procedural law resulting in significant deficiencies in the determination of the circumstances that are to constitute the factual basis for the decision. The formulation of guidelines in this regard by the appeal authority in relation to the first instance authority guides the manner in which that authority acts when reconsidering the case. However, the legal nature of these guidelines must take into account the directives resulting from the principle of two-instance proceedings. The first instance authority, after the case has been referred back to it for reconsideration, therefore takes into account the guidelines of the appeal authority directing the explanatory and evidentiary activities, but independently determines the scope of the explanatory proceedings. This means that it cannot simplify the re-examination of the case by reducing it to the implementation of the instructions of the appeal authority. In this sense, the first-instance authority maintains the necessary independence when reconsidering and resolving the case. This applies primarily to the re-evaluation of the supplemented evidence and the established facts. The appeal authority cannot prejudge the outcome of the case by ordering that it be settled positively or negatively for the appealing party. The content of the decision in this type of case is determined exclusively by the first instance authority [Adamiak 2024, 16].

The guidelines for interpreting legal provisions, formulated in the cassation decision pursuant to Article 138(2a) of the Code, refer to cases of incorrect interpretation by the first instance authority of provisions which, in the opinion of the appeal authority, may be applicable in the case. The formulation of relevant guidelines in this regard is intended to reduce the risk of repeating interpretative errors when the case is re-examined after the facts have been correctly established by the first instance authority.[12] It is unclear whether the subject of interpretation should be limited to procedural law provisions that were incorrectly interpreted in proceedings before the first instance authority, or whether it should also include substantive provisions that constitute the legal basis for the decision resolving the case on its merits. On the one hand, it is assumed that the competence of the appeal authority "undoubtedly includes indicating the factors that must be taken into account when interpreting inexplicit concepts or defining the relationships between the substantive law provisions relevant to the case" [Kmieciak 2023,

[11] See Explanatory statement 2025, p. 10.

[12] See Explanatory statement 2017, p. 61.

812]. Nevertheless, it is accurate to note that "in a situation where the premise for issuing a cassation decision is a finding that the first instance decision was issued in violation of procedural rules, there should be no doubt that the scope of the guidelines indicated is limited to those and only those procedural rules whose violation has been found. The formulation by the appeal authority of guidelines on substantive law, which were misinterpreted in the grounds for the contested decision, is clearly premature, as they refer to facts that have not yet been established and it is not certain that these rules will be applied when the case is re-examined by the first instance authority" [Wróbel 2020, 728]. "Guidelines that constitute a type of legal assessment are an explanation of the essential content of legal provisions and how they apply in the case under consideration. This concept encompasses both criticism of how a legal norm was applied in the contested act and an explanation of why the application of that norm by the authority that issued the act was considered incorrect. Guidelines on interpretation must relate to a concrete provision in relation to a strictly defined decision taken in a specific case; moreover, they must be logically related to the content of the cassation decision in which they were formulated."[13]

In the legal situation preceding the amendment of the Code in 2025, the binding nature of the appeal authority's guidelines on the interpretation of the law was approved, recognising them as a measure aimed at restoring a lawful state of affairs, rather than a tool determining the outcome of a case. The interpretation of administrative law provisions is only one stage of its application, i.e. the process of determining the binding consequences of a legal norm. Thus, it does not yet determine what decision will be made in a specific case, and therefore the first instance authority retains its autonomy in this field [Chmielewski 2022, 39]. In the current practice of administrative courts, it has also been accepted that the appeal authority may impose a binding interpretation of a legal provision on the first instance authority, with the condition that the first instance authority is not absolutely bound by the guidelines of the appeal authority. This binding effect ceases to apply if, as a result of a re-examination of the case, the first instance authority determines that the provisions indicated by the appeal authority are not applicable as the legal basis for a new decision, or if the legal situation changes during the examination of the case between the instances.[14]

The Deregulation act *expressis verbis* states the binding nature of the instructions and guidelines. The drafter of the act explains that the new provision is intended to discipline first-instance authorities to follow the

[13] See judgment of the Supreme Administrative Court of 20 November 2020, ref. no. V SA 856/00, in: Central Database of Administrative Court Decisions [hereinafter: CDACD].

[14] See judgment of the Voivodship Administrative Court in Cracow of 19 October 2022, ref. no. I GSK 595/18, in: CDACD.

"recommendations" of the second-instance authority, which is to contribute to "not prolonging administrative proceedings."[15] The proposed new legal solution is therefore dictated by economic considerations and the speed of proceedings. The obligation of the first instance authority to comply with the instructions and guidelines set out in the cassation decision is secured by a specific procedural sanction. If a party to the proceedings challenges the new decision of the first instance authority issued after reconsideration of the case, the review will also cover the implementation of the instructions and guidelines. A breach of the obligation of the first instance authority will consist in deviating from the circumstances indicated by the appeal authority or specific guidelines on the interpretation of legal provisions. In the latter case, however, the first instance authority may depart from the guidelines if the legal provisions on the basis of which it settled the case have changed.

As a consequence of finding a breach of the obligation to take into account instructions and guidelines, the appeal authority may order the first instance authority to explain the reasons for the breach of this obligation and, if necessary, to take measures to prevent such a breach in the future. As explained by the drafters of the provision, "the appeal authority's order to determine the reasons for the breach of the obligation under Article 138(2) or 138(2a) of the Code will be conducted alongside (independently of) the appeal proceedings – the matter will be clarified exclusively between the first and second instance authorities."[16] It should be noted that an internal investigation and control procedure, conducted within the framework of authorities designated by the rules governing instance jurisdiction, has now been incorporated into the system of regulations on administrative jurisdictional proceedings. The internal nature of this procedure excludes the party to the administrative proceedings from it, even if it requested the appeal authority to initiate control activities in relation to the first instance authority. The ordering of explanatory measures referred to in Article 139a(2) of the Code cannot be done by an administrative act, but the systemic positioning of the new procedure raises questions about the scope of application of other provisions of the Code in this case, e.g. those establishing time limits for handling cases. While the procedure for investigating the causes may be limited to an exchange of letters between authorities, taking preventive measures may require legally authorised actions, such as holding an employee of the authority accountable for improper performance of legal duties.

To supplement the considerations on the scope of deregulation of appeal proceedings, it should be added that the self-regulatory powers of the first instance authority in terms of its adjudicative competences have also been made

[15] See Explanatory statement 2025, p. 11.
[16] Ibid.

more precise. Pursuant to the new wording of Article 132(1) of the Code, "if all parties have lodged an appeal and the public administration authority that issued the decision considers that the appeal should be upheld in its entirety, it may issue a new decision in which it repeals the contested decision in whole or in part and, to that extent, rules on the merits of the case, or repeals that decision and discontinues the proceedings in whole or in part". The amendment to the provision is, in fact, a clarifying one and is intended, in particular, to enable the first instance authority to repeal the contested decision in part, where the appeal is wholly justified but concerns only part of the decision.

CONCLUSIONS

The amendment to the Code of Administrative Procedure concerning appeal proceedings, introduced by the Deregulation act, is yet another legislative intervention in recent years in the structure of cassation decisions of second instance authorities. This time, the legislator's actions focused on strengthening the impact of the factual and legal assessment made by the appeal authority in a decision repealing the contested decision and referring the case back to the first instance authority for reconsideration. The unequivocal articulation of the binding force of the instructions and guidelines of the appeal authority fulfils the assumption of jurisdictional consistency in the course of administrative instances, but is also another manifestation of the revaluation of the principle of two-instance proceedings. According to the legislator, who places procedural efficiency first, the appeal proceedings are to consist in reviewing the correctness of the contested decision, rather than re-examining the entire case previously decided by the first instance authority.

A compromise between the legal force of the guidelines of the appeal authority contained in the cassation decision and the assumptions of a two-instance procedure has already been worked out in the case law of administrative courts, and the normative solutions proposed by the legislator in the Deregulation act are an expression of its acceptance. However, it is difficult to unequivocally assess the proposed construction of a sanction forcing the first instance authority to comply with the instructions and guidelines given to it. On the one hand, establishing an obligation to take into account the position of the appeal authority should be accompanied by sanctions for non-compliance. Nevertheless, the question may be raised as to whether the creation of an additional explanatory and control procedure, conducted in parallel with administrative proceedings, fulfils the underlying postulate of deregulation, which is to simplify regulations. Instead of "deregulation" what is taking place is rather "overregulation" in the form of creating a new institution of unclear nature and placing it within the system of jurisdictional administrative proceedings. It is also worth noting that, paradoxically,

it is the appeal authority that formulated the instructions regarding the circumstances of the case and the guidelines for interpreting the provisions that is bound by them. The sanction procedure, initiated pursuant to Article 139a(2) of the Code, appears to be aimed at confirming the accuracy of these instructions and guidelines.

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THE LEGALITY OF UNILATERAL MEASURES IN REACTION TO HUMAN RIGHTS VIOLATIONS COMMITTED BY A THIRD STATE AGAINST ITS NATIONALS*

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Abstract. Currently, there is no universal international mechanism that would allow the international community to effectively react to flagrant human rights violations that a State commits against its own nationals. That is why States, aware of the shortcomings of the international legal system, often decide to unilaterally react to flagrant human rights violations committed in third States against the nationals of those States. In general, States can use two unilateral tools to react to violations of international law: retorsions and countermeasures. The question this raises is, however, whether they can also be used to address human rights violations as described above. The current paper is aimed at addressing this issue. The paper starts with general definitions of retorsions and countermeasures, and then moves on to discuss their applicability to cases of violations of human rights in third States committed against the nationals of those States.

Keywords: countermeasures; *erga omnes* obligations; human rights; retorsions.

INTRODUCTION

According to Our World in Data distribution of the human rights index, in 2024, the worst human rights situation in the world existed in North Korea.[1] Among the long list of gross human rights violations committed by the North Korean regime against its own nationals, the most significant issues concerned arbitrary or unlawful killings; torture or cruel, inhuman, or degrading treatment or punishment; arbitrary arrest; punishment of family members for alleged offences by a relative; sexual violence and trafficking

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[1] See https://ourworldindata.org/grapher/human-rights-index-vdem [accessed: 15.05.2025].

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in persons.[2] Unfortunately, the case of North Korea is not isolated, as equally dreadful human rights situations exist in other states, such as Afghanistan, Eritrea, and Nicaragua, to name just a few.[3]

Beyond naming and shaming regimes responsible for human rights violations in reports prepared by international non-governmental[4] and intergovernmental organisations,[5] the international community should also have the ability to react to such situations by adopting concrete measures. Nevertheless, there is currently no universal international mechanism that would allow for, e.g., the adoption of sanctions against a State that commits flagrant human rights violations against its own nationals. Despite the fact that the United Nations (UN) Security Council has recognised in the past that gross breaches of human rights amount to threats to the peace, which could pave the way to adopt measures from Article 41 of the UN Charter, "UN practice so far does not reflect a sufficiently broad consensus to extend the notion of a threat to the peace to grave violations of human rights as such, in the absence of the risk of armed conflict" [Krisch 2012, 1287]. As long as regional organisations, such as the European Union (EU), have tools to address worldwide human rights violations, like the EU Global Human Rights Sanctions Regime,[6] the measures they employ will never have the legitimacy that is comparable to sanctions supported by the entire community of States. Thus, such a state of international law is far from satisfactory. The current situation promotes the impunity of perpetrators of human rights abuses and contributes to claims about the ineffectiveness of international law.

That is why States, aware of the shortcomings of the international legal system, often decide to unilaterally react to flagrant human rights violations committed by third States against their own nationals. In general, States can use two tools to react to violations of international law: retorsions and countermeasures. The question this raises is, however, whether they can also be used to address human rights violations as described above. The current paper aims to address this issue through the legal dogmatic method. It seeks to resolve doubts concerning the legality of unilateral measures adopted in response to flagrant human rights violations committed by third

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[2] US Department of State, 2023 Country Reports on Human Rights Practices: North Korea, https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/north-korea/ [accessed: 15.05.2025].

[3] See https://ourworldindata.org/grapher/human-rights-index-vdem.

[4] See e.g. Amnesty International, North Korea 2024, https://www.amnesty.org/en/location/asia-and-the-pacific/east-asia/north-korea/report-korea-democratic-peoples-republic-of/ [accessed: 15.05.2025].

[5] See e.g. Human Rights Council, Report of the Working Group on the Universal Periodic Review: Democratic People's Republic of Korea, A/HRC/58/11.

[6] Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ L 410I 7.12.2020, p. 13.

States. The analysis primarily focuses on the Articles on Responsibility of States for Internationally Wrongful Acts and the works of legal doctrine, in order to better understand divergent views in this regard.

The paper starts with general definitions of retorsions and countermeasures, and then moves on to discuss their applicability to cases of violations of human rights in third States committed against the nationals of those States. To highlight their use in order to address human rights violations in third States, in this paper, they will be referred to as third-party retorsions and third-party countermeasures, respectively.

1. GENERAL OVERVIEW

1.1. Countermeasures

Countermeasures are otherwise illegal measures taken against a State which is responsible for an internationally wrongful act.[7] The conditions of the legality of countermeasures were thoroughly discussed and established by the International Law Commission (ILC) during the works upon the Articles on Responsibility of States for Internationally Wrongful Acts.[8] The procedural conditions that define the legality of countermeasures are as follows: Firstly, a State must commit an internationally wrongful act to the detriment of another State [Siciliano. 1990, 7-8].[9] Secondly, before an injured State takes countermeasures, it must call upon the responsible State, giving it notice of its claim, in which it has to specify in particular the conduct that the responsible State should take to cease the wrongful act, if it is continuing, and the form of reparation [Cassese 2005, 302; Elagab 1986, 63].[10] If the responsible State does not cease the wrongful act or the dispute does not become pending before a court or tribunal which has the authority to make decisions binding on the parties (Article 52 (3) ARSIWA), and the injured State ultimately decides to resort to countermeasures, before taking any such steps, it must first notify the responsible State of such a decision and offer to negotiate with that State (Article 52 (1) ARSIWA). Thirdly, an injured State may take countermeasures

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[7] See International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 128, par. 1 [hereinafter: DARSIWA].

[8] International Law Commission, Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, vol. II (Part Two) [hereinafter: ARSIWA].

[9] See also Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports 2011, par. 164; Gabčikovo-Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997, I.C.J. Reports 1997, par. 83 [hereinafter: Gabčikovo-Nagymaros Project judgment].

[10] See also Article 43 ARSIWA; Gabčikovo-Nagymaros Project judgment, par. 84.

only against a State which is responsible for an internationally wrongful act [Ruys 2016, 34]. Fourthly, the aim of countermeasures may only be to induce the responsible State to comply with its obligations (Article 49 (1) ARSIWA; Gabčikovo-Nagymaros Project judgment, par. 87). Fifthly, countermeasures should be limited to "the non-performance for the time being of international obligations of the State taking the measures towards the responsible State" (Article 49(2) ARSIWA). That, in turn, means that countermeasures must be reversible in nature [ibid., 34].[11] Sixthly, countermeasures must be proportional "to the injury suffered, taking into account the gravity of the internationally wrongful act" and violated rights (Article 51 ARSIWA; Gabčikovo-Nagymaros Project judgment, par. 85-87). Finally, an injured State is obliged to terminate countermeasures as soon as the responsible State complies with its obligations in relation to the internationally wrongful act [ibid., 34; Gilas 2007, 23-24].[12]

However, this does not mean that a State may undertake any measures it wishes as long as it complies with these procedural requirements. Countermeasures cannot violate the injured State's duties stemming from the prohibition of the threat and use of force, fundamental human rights, *jus cogens* norms, as well as obligations of a humanitarian character prohibiting reprisals (Article 50(1) ARSIWA). Moreover, a State taking countermeasures is not relieved from fulfilling its obligations binding it "under any dispute settlement procedure applicable between it and the responsible State," as well as the duty "to respect the inviolability of diplomatic or consular agents, premises, archives and documents" (Article 50 (2) ARSIWA).

It is difficult to create a complete and comprehensive catalogue of measures which may be labelled as countermeasures. Such a qualification depends on the specific rights and obligations binding every State (also stemming from the bilateral treaties each State concludes), and needs to be assessed on a case-by-case basis. There is broad agreement that countermeasures may include different measures of, e.g., economic character (DARSIWA, p. 130, par. 6).

1.2. Retorsions

Retorsions are legal but unfriendly measures taken in reply to an unfriendly or illegal act[13]. In comparison to countermeasures, the regulation of retorsions under international law is far more controversial. In fact, it is submitted that "retorsions are, by definition, lawful, and hence unregulated acts that fall outside the scope of international law" [Hofer 2020, 414-15] or that

[11] See also Article 49(3) ARSIWA.

[12] See also Article 53 ARSIWA.

[13] See e.g. Cassese 2005, 310; Schachter 1982, 169; Zoller 1984, 5; Malanczuk 1985, 300-301; Ruys 2016, 24; Siciliano. 1990, 7-8; Villagrán Kramer 1997, 1771-772; Giegerich 2020, par. 4; Damrosch 1997, 54; Shaw 2008, 1128-129; Czapliński and Wyrozumska 2014, 836.

there is nothing like a "law of retorsions" under international law [Partsch 1986, 336]. Such claims may stem from the fact that retorsions "fall within the discretionary power of States" [ibid.]. Contrary to countermeasures, they can be taken "at any time and without any justification on the part of the state resorting to it" [Tzanakopoulos 2015, 627], and "need not be temporary and terminable" [Giegerich 2020, par. 8]. Retorsions do not have to be aimed at inducing the responsible State to comply with its obligations, but may also "have a punitive element, and retribution or deterrence" [ibid.].

As in the case of countermeasures, the catalogue of measures that may be qualified as retorsions is very broad. The most frequently discussed examples of retorsions include, but are not limited to, protest; measures of diplomatic character (e.g. summoning the ambassador, declaring diplomats or consular agents as *persona non grata*; downgrading diplomatic intercourse to the technical level; recalling the ambassador for consultations; breaking diplomatic relations) [ibid., par. 10; Białocerkiewicz 2007, 383]; measures of economic character ("economic embargoes outside the field of treaty obligations, non-admission of foreign vessels in national ports, termination of development aid, reduction of imports of certain goods") [Partsch 1986, 336]; or refusal to recognise certain situation [Giegerich 2020, par. 10].

In summary, States have several measures at their disposal which they may use to enforce international law outside international organisations. The nature of these measures may be economic, political, and diplomatic, among many other options. States are allowed to use these measures as long as they fall under the category of retorsions or countermeasures.

2. UNILATERAL MEASURES IMPOSED BY THIRD STATES IN THE CASE OF HUMAN RIGHTS VIOLATIONS

2.1. Third-party countermeasures

The legality of countermeasures adopted by third States in reaction to human rights violations committed by a State against its own nationals is a controversial and complex issue. It requires analysis of multiple factors connected both with the elements of countermeasures and general issues related to the enforcement of international law.

The possibility of the adoption of countermeasures in cases under review was briefly addressed but not decisively resolved by the ILC as a question relating to "measures taken by States other than an injured State" in Article 54 ARSIWA. This provision states as follows: "This chapter does not prejudice the right of any State, entitled under article 48, paragrap. 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured

State or of the beneficiaries of the obligation breached." According to Article 48(1) ARSIWA, referred to in Article 54, "[a]ny State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragrap. 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole."

Article 48(1)(b) is of special interest for the current study, as this provision was intended to give effect to the finding made by the International Court of Justice (ICJ) in the case concerning Barcelona Traction, Light and Power Company, Limited,[14] where the Court drew "an essential distinction" between obligations owed to particular States and those owed "towards the international community as a whole,"[15] meaning *erga omnes* obligations.

Taking all points into account, under ARSIWA, to address human rights violations committed by the third State against its nationals, a State could adopt countermeasures only if the third State violated *erga omnes* obligations, and only to "ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached." Theoretically, allowing the adoption of third-party countermeasures only in cases of violation of *erga omnes* obligations limits the possible scope of cases when such measures could be used, when compared to the fact that, in general, a directly injured State can take countermeasures in reaction to any internationally wrongful act committed to its detriment. On the other hand, however, there are disputes about both the legal character of "*erga omnes* obligations" [Kammerhofer 2024, par. 1; Tams 2005, 99-116], as well as the list of such duties. Probably the most often mentioned examples of *erga omnes* obligations are those indicated by the ICJ in the Barcelona Traction case: prohibition of aggression, prohibition of genocide, and "principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[16] However, there are also proposals of extending this list to all human rights, the right to development, environmental law [Tams 2005, 119; Ragazzi 2000, 135-63], the right to self-determination,[17] or more generally "rules of humanitarian law applicable in armed conflict […] fundamental to the respect of the human person and 'elementary considerations of humanity'."[18] Thus, ultimately, one could argue for the legality of third-party countermeasures in a quite broad range of situations.

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[14] Hereinafter: Barcelona Traction.

[15] Barcelona Traction, Light and Power Company, Limited, Judgment of 5 February 1970, I.C.J. Reports 1970, par. 33.

[16] Ibid., par. 34.

[17] East Timor (Portugal v. Australia), Judgment of 30 June 1995, I.C.J. Reports 1995, par. 29.

[18] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, par. 157.

The ILC itself was well aware of the vagueness of these conditions of third-party countermeasures, and in the commentary to Article 54 ARSIWA, the Commission observed that "[t]he current state of international law on countermeasures taken in the general or collective interest is uncertain" (DARSIWA, p. 139, par. 6). To that end, Article 54 "includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law" (ibid.). That means that Article 54 ARSIWA should not be treated as a declaration of the current state of international law, but rather a preview of the intended future development of international legal norms.

This uncertainty around the current state of international law is also visible in discussions of third-party countermeasures in the doctrine of law. Supporters of the legality of third-party countermeasures first claim, in connection with the ILC remarks, that if an *erga omnes* obligation is violated, the entire community is 'injured' by such a violation. In other words, "all States have a legal interest in the observance of some fundamental norms of international law" [Schachter 1982, 182-83] and should be allowed to adopt countermeasures in such a case. Secondly, "third-party countermeasures would contribute to strengthening the international rule of law, inasmuch as it would increase the cost of non-compliance with international law" [Ruys 2016, 47]. This refers especially to cases when there is no directly injured State (as in the cases under review here – when a State is committing widespread human rights violations against its own population), or where the State injured by the breach is not in a position to engage in countermeasures *vis-à-vis* a (more powerful) offending State. Thirdly, third-party countermeasures "constitute the decentralized forms of protection of a structurally collective interest. States are thus acting as organs of the international community, entrusted with the exercise of a function of public character" [Cannizzaro 2001, 914] which is even more important given the lack of any "developed institutional machinery capable of ascertaining and repressing […] offences to collective values" [ibid., 913] as mentioned earlier. Last but not least, Article 51 of the UN Charter allows for collective self-defence, and therefore supports forcible measures adopted by States not directly affected by an armed attack. If international law allows third-party action against one type of wrongful act, why shouldn't it allow third-party countermeasures in case of any other violation of international law [Akehurst 1970, 4]?

These claims should be juxtaposed with the following counterarguments: with regard to the first of the raised points, it was earlier noted that the notion of obligations *erga omnes* is vague and legally undefined, which could unduly extend the scope of cases where third-party countermeasures are adopted. Moreover, "the collective nature of the interests and values concerned

does not seem entirely consistent with the aim of individual response to 'ordinary' breaches, conceived as means of protection of rights and interests of the target state only" [Cannizzaro 2001, 913]. Opponents of third-party countermeasures also claim that leaving "the enforcement of collective interests at the mercy of individual States […], acting based on their own understanding of international legality, is a recipe for chaos and subjectivism, and […] escalation of disputes" [Ruys 2016, 47]. Notably, such a position, that third-party countermeasures reinforce existing global power asymmetries, is expressed by scholars representing the Global South or the Third World Approaches to International Law [Tzouvala 2023; Bâli 2023]. They claim that, due to these power asymmetries, some States are more vulnerable to third-party countermeasures, while the collateral costs of such measures remain relatively low for States imposing them. Additionally, they argue that target States are "unable to generate any leverage through the imposition of reciprocal sanctions against the powerful" [Bâli 2023].

Last but not least, it should also be observed that third-party countermeasures would be legal only if a customary norm was formed allowing for them. However, it is very difficult and complex to ascertain the existence of practice and *opinio juris* of States in this regard. The most serious concern seems to be the qualification of certain measures as countermeasures, since third-party countermeasures, just like the countermeasures adopted by a directly-injured State, must also fulfil the conditions of their legality discussed above. For instance, in 1985, when the government of South Africa declared a state of emergency in large parts of the country, the US Congress adopted the Comprehensive Anti-Apartheid Act, which immediately suspended the landing rights of South African Airlines on United States territory. Such a measure was contrary to the terms of the 1947 United States of America and the Union of South Africa Agreement relating to air services between their respective territories (DARSIWA, p. 138). The USA claimed that they implemented this measure "to encourage that [South African] government to adopt reforms leading to the establishment of a non-racial democracy."[19] *Prima facie*, this case fulfils the conditions of countermeasures, as the USA violated international law in reaction to the breach of fundamental human rights by South Africa. However, there is no information available regarding whether the USA met any of the conditions of countermeasures enlisted above, e.g. whether they notified South Africa about the decision to suspend landing rights of South African Airlines on United States territory despite the binding agreement and offered to negotiate.[20] Thus, it is impossible

[19] Department of Transportation, *Termination of Air Carrier Operations between the United States and South Africa*, "International Legal Materials" 26, no. 1, p. 105.

[20] The case described here concerns a situation that occurred in 1985, while ARSIWA was adopted by the ILC in 2001. However, similar conditions of legality were also formed

to determine with certainty whether the suspension of landing rights amounted to countermeasures or whether it was simply an illegal act. Moreover, scholars have also raised a number of other issues which hamper the identification of a customary norm allowing for third-party countermeasures, such as the fact that States and international organisations generally refrain from explicitly qualifying their actions as "retorsions", "countermeasures by injured States" or "third-party countermeasures" [Ruys 2016, 46-47].

Taking all the claims into account, it seems that the arguments against the legality of third-party countermeasures are more convincing. If a customary norm was not formed, there is indeed no legal ground to apply third-party countermeasures. Violation of *erga omnes* obligations is too vague a condition for the use of third-party countermeasures, given especially the concerns about the legal character and examples of such duties. It is also questionable how the third State could fulfil the general requirements set out for countermeasures, including especially that of proportionality. Finally, the application of third-party countermeasures could run against the international rule of law and be a source of abuse by more powerful States.

2.2. Third-party retorsions

It was stated above that retorsions amount to unfriendly, but legal acts. Needless to say, there is no legal definition of what "unfriendly act" means. In the doctrine of law, "unfriendly acts" are defined as "disadvantageous to another State" [Weber 1982, 252], "unwelcome" [Crawford 2013, 677] or those which inflict "disregard or discourtesy on another subject of international law without violating any legal norm" [Richter 2013, par. 1]. In general, it may be stated that the adjective "unfriendly" can refer to very different attitudes: from being unkind, through lack of sympathy, ending up with hostile conduct. Even more important from the perspective of this study is that labelling an act as unfriendly is very subjective and always "depends on the perception and excitability of the target State" [ibid.]. Thus, a State may regard as unfriendly not only acts which directly affect it, but also any violation of international law, committed to the detriment of any State or even non-state actor (like some groups of nationals of one State), which touches, e.g., the values most appreciated by the reacting State. If a democratic State is a zealous advocate of human rights, it can perceive gross violations of human rights committed in another State as disadvantageous to the cause it supports and show its dislike through the adoption of retorsions.

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in relation to reprisals, which term preceded the use of the notion of 'countermeasures' [Schachter 1982, 170; Tomuschat 1973, 186-87; Wengler 1977, 21]. Moreover, it is claimed that provisions of ARSIWA largely constitute part of customary international law [Hofbauer and Janig 2022, 320].

These observations are consistent with the views presented by scholars who explicitly recognise that third States can undertake retorsions against other States' acts, even if they are not directly injured by them [Schachter 1982, 183; Wengler 1977, 19-20; Akehurst 1970, 14-15]. However, one should differentiate between two situations: retorsions can be a reaction to both conduct which is merely unfriendly, but in line with international law, as well as unfriendly and illegal conduct. Theoretically, every State can always take actions such as declaring a diplomatic representative *persona non grata* or cancelling a state visit, without providing any reasons for such conduct. However, it would be very hard (if not impossible) to find an example when, in reaction to a merely unfriendly act adopted by one State against another, third States have employed retorsions in solidarity with the latter against the former. In practice, States show much more restraint and in the overwhelming majority of cases adopt retorsions only when legal norms were violated, especially those such as the prohibition of aggression or human rights. Some authors even claim that third-party retorsions may be undertaken solely in cases of violation of international law, or more specifically, only in cases of violation of *erga omnes* obligations [Schachter 1982, 183; Karl 1986, 321-22]. Since the verification of the second part of this view may be hampered by the unclear legal character of *erga omnes* obligations, one may conclude by saying that when adopting third-party retorsions, States generally exercise self-restraint and rather react only to "violations that are well substantiated and important" [Schachter 1982, 183], including when basic human rights and fundamental international legal norms were breached.[21]

A clear case of the application of third-party retorsions in reaction to the violation of human rights occurred after the 2012 massacre involving governmental forces in the Syrian town of Houla, which left more than 100 people dead (nearly half of them children). Following a wave of international condemnation, a number of States (including the United States, Australia, Great Britain, France, Germany, Italy, Spain, Bulgaria and Canada) declared high-ranking Syrian diplomatic representatives *personae non gratae* and expelled them from their respective territories.[22] Another example may be the response to the assassination of journalist Jamal Khashoggi in the Saudi consulate in Istanbul in 2018. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions established that the murder of Khashoggi

[21] In this respect, see Global Magnitsky Human Rights Accountability Act, https://ofac.treasury.gov/media/5721/download?inline [accessed: 29.10.2025] and similar acts adopted by other States, including the USA and Canada. However, the exact legal character of the measures envisaged in these acts depends on the specific legal obligations that States adopting this legislation have toward foreign States. Thus, in some cases, the adopted measures may amount to a violation of international law.

[22] *U.S., allies expel Syrian diplomats after massacre*, https://edition.cnn.com/2012/05/29/world/meast/syria-unrest/index.html?hpt=hp_t1 [accessed: 15.05.2025].

amounted to a violation of international human rights binding on Saudi Arabia (including the right to life, possibly also the prohibition of torture).[23] In reaction to Khashoggi's murder, the UK, France, and the Netherlands withdrew from participation in a major economic forum in Saudi Arabia, while Germany and Denmark halted arms sales to the State.[24]

Summing up, third States are allowed to adopt retorsions in cases of violation of human rights. Such a finding derives from the fact that retorsions consist of legal measures which are a reply to an unfriendly act. Thus, States can determine that a violation of human rights in a third State also amounts to such an unfriendly act and adopt retorsions.

CONCLUSIONS

One of the major shortcomings of the current state of international legal regulations is the lack of a universal mechanism allowing for the adoption of enforcement measures against States violating the human rights of their own citizens. For this reason, the present paper aimed to find out whether, given this situation, States can unilaterally address such human rights violations by adopting countermeasures or retorsions. The analysis showed that third-party countermeasures are not currently allowed under international law. However, one should note some recent developments, such as the proposal to include the topic "Identification and Legal Consequences of Obligations Erga Omnes in International Law" in the long-term programme of the ILC's work. Under this topic, ILC member Masahiko Asada proposed that the Commission also consider the question of third-party countermeasures as a consequence of *erga omnes* obligations.[25] Thus, the ILC could contribute in the future to a gradual crystallisation of the limits and conditions of third-party countermeasures. If to add to this the broad range of measures adopted by third States against Russia after the escalation of the armed conflict in Ukraine in February 2022, despite "the persistent ambiguity in sanctions

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[23] Human Rights Council, Annexe to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi, A/HRC/41/CRP.1, par. 222, 232.

[24] *UK and US pull out of Saudi event over alleged murder of Jamal Khashoggi*, https://www.theguardian.com/world/2018/oct/18/liam-fox-pulls-out-of-saudi-event-over-alleged-of-jamal-khashoggi; *Dänemark stoppt Waffenlieferungen an Saudi-Arabien wegen Fall Khashoggi*, https://web.archive.org/web/20181122143651/https://www.zeit.de/news/2018-11/22/daenemark-stoppt-waffenlieferungen-an-saudi-arabien-wegen-fall-khashoggi-20181122-doc-1b10bj [accessed: 15.05.2025].

[25] International Law Commission, Report of the International Law Commission Seventy-sixth session (28 April–30 May 2025), Annexe III, p. 182, par. 50.

practice and the absence of clear *opinio juris*" [Hofer 2025, 290], ultimately, all these developments may lead to the formation of a customary norm.

Above all, States can use third-party retorsions to react to human rights violations. To this end, it is sufficient that a State recognises flagrant breaches of human rights committed by a third State against its own citizens as an unfriendly act against the latter's interests and replies with unfriendly but legal measures of its own.

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MAIN REASONS FOR THE RULING OF THE PROVINCIAL ADMINISTRATIVE COURT

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Abstract. The article discusses the essence and function of the main reasons for the decision of the provincial administrative court, also known as oral grounds of the decision. The text analyses their role in the process of issuing and announcing the judgment, the procedural, communicative and legal consequences of their submission after the announcement of the operative part of the judgment. Issues related to the procedural significance of the main reasons for the decision, shaping their content by voting and the conditions for communicating them at the court session were discussed. Arguments were also presented in favor of the thesis that the court is not bound by the oral grounds of the judgment when preparing the written reasoning.

Keywords: reasoning; main reasons for the decision; oral reasons for the judgment.

INTRODUCTION

The administration of justice by administrative courts is undoubtedly the domain of state activity that is supposed to guarantee the protection of the rights and freedoms of individuals in their relations with public authorities [Trzciński 2008, 127-39]. By issuing a judgment, an administrative court decides an administrative case, i.e., it decides whether a party was right to accuse an authority of violating the law. Administrative courts exercise judicial power in a fundamentally different way from ordinary courts and military courts. Although an administrative court judgment resolves a dispute arising based on law, it does not do so by directly shaping the content of the relationship between public authorities and individuals. In the request initiating administrative court proceedings, the party does not request the proper shaping of the administrative-legal relationship between it and the public authority, but rather a review of whether this relationship has been shaped in accordance with the law. The essence of the administration of justice by administrative courts is therefore to verify whether, in its relations with individuals, another segment of power – the executive power – is complying

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with the constitutionally proclaimed requirement to act based on and within the limits of the law [Kobak 2024, 28-29].

1. ORAL GROUNDS FOR THE JUDGMENT IN THE CONTEXT OF ITS ISSUANCE AND ANNOUNCEMENT

An administrative court judgment has a dual nature: on the one hand, it is an emanation of judicial power, an expression of an authoritative decision determining the consequences of a formulated assessment on the legality of public administration, and on the other, it is the result of the implementation of a *sui generis* public service that the state provides to individuals as part of the realization of the fundamental principle of a democratic state governed by the rule of law. The development and maintenance of the state as a common good require an efficient judicial system based on democratic values, capable of fairly resolving legal disputes.

The announcement of the provincial administrative court's judgment is the first moment when the parties learn how the court has decided the administrative case. The ceremonial nature of this procedural act is intended to lend it a solemnity commensurate with the majesty of state authority, which *ratione imperii* imposes on the parties its assessment of the legality of the public administration action challenged by the complaint. The reading of the judgment takes place in an atmosphere of solemnity and dignity of the court, which is intended to reflect the supremacy of the state in the administration of justice. However, it should be realized that the judicial power, like other state powers, is representative in nature and is exercised on behalf of and for the benefit of the Nation. The administration of justice by administrative courts is therefore not autotelic, but remains closely linked to the servant function of the state, which directs all its actions towards the realization of the common good. From the perspective of the constitutional function assigned to administrative courts, the issuance and announcement of a judgment is the administration of justice through the official and solemn documentation and disclosure of the results of the legality review of the contested action of the public administration. From the individual's point of view, the issuance and announcement of a judgment is the realization of the constitutional right to a court, which is to guarantee protection when their rights and freedoms in relation to the state are violated. For the individual, the issuance and announcement of a judgment is therefore important primarily in the context of the representative and service function that the administrative court is to perform for them. The fact that this court also operates within the framework of state authority is of secondary importance, as it does not in itself guarantee the correctness of the decision, but only its respect in legal transactions. The individual, therefore, expects the administrative

court, within the scope of its jurisdiction, to hear their case and issue a fair judgment in an open, impartial, and independent manner, without undue delay. The right to an administrative court is therefore not limited to the mere issuance of a judgment, but also to the fact that the decision contained therein is fair and thus ends the dispute in a manner consistent with the law.

According to accepted assumptions, the announcement of the judgment only fulfills that element of the right to a court that relates to obtaining a decision in an administrative court case. However, based on the content of the judgment read out, it is not possible to determine whether the decision contained therein is fair. The moment when a party learns of the content of the decision may, of course, evoke positive or negative emotions. However, these will always be solely the result of compensating for the tension caused by expectations regarding the final decision of the court on the merits of the complaint. In other words, at the moment the judgment is announced, the party may be satisfied with the court's decision because it is in line with its expectations, and not because it is fair. Attributing justice to a judgment requires an assessment, which is, by definition, the result of a rationalization process. However, it is only possible to rationalize an administrative court judgment once the court has disclosed the reasons for its decision as stated in the operative part of the judgment. The reasons for the decision should be understood as the premises that legitimize it, i.e., the elements of fact and law that, in the final syllogism, made it possible to decide whether the controlled action of the public administration violates the law to an extent that justifies harmful judicial interference by the court [Wojciechowski 2015; Morawski 2000, 151ff]. In the standard formula, the factual grounds for an administrative court judgment refer to a specific past event consisting of an action by a public administration body (the factual basis of the judgment). In turn, the legal grounds consist of legal norms constituting the basis for the review of the contested action of the public administration and legal norms determining the formula of the decision appropriate to the results of this review (legal basis of the judgment).

The possibility of rationalizing an administrative court ruling and formulating an assessment of the fairness of the decision contained therein arises when the presiding judge or rapporteur presents the main reasons for the decision, as defined in case law[1] and literature [Dauter-Kozłowska and Dauter 2023; Chróścielewski 2018; Federczyk 2013; Polanowski 2018; Bartosiewicz 2023, 42-43; Kowalski 2018, 27] also as "oral grounds for the judgment." It is at this point that a kind of conversion of the court's adjudicative activity from the formula *ratione imperii* to *imperio rationis* takes

[1] Judgments of the Supreme Administrative Court: of November 6, 2024, ref. no. I GSK 1063/24, of June 11, 2024, ref. no. III OSK 1459/23, of May 25, 2021, ref. no. II OSK 2456/18, of November 22, 2016, ref. no. II GSK 1048/15; of February 8, 2008, ref. no. II OSK 2039/06.

place. Stating the fundamental reasons for the decision implies that the judgment of the administrative court becomes intersubjective (cognizable) and discursive. It is not merely an act of power *sic volo sic iubeo* (I want it, I command it), but becomes a decision whose premises are transparent, verifiable, and subject to evaluation.

The content of Article 139(3) of the Act of August 30, 2002, Law on proceedings before administrative courts[2] clearly states that the oral presentation of the main reasons for the decision takes place after the judgment has been announced. It is therefore a procedurally autonomous act in the sense that it does not fall within the scope of the pronouncement of the judgment, although without it the pronouncement cannot be made [Adamiak 2020]. For this reason, it is so important that, when presenting the facts of the case, the reporting judge should limit himself to stating the relevant facts and allegations of the complaint (Article 106(1) LPAC), excluding their legal assessment. It is unacceptable for an administrative court or individual members of the adjudicating panel to conduct and publish (even partially) an assessment of the case during a legal hearing, as this reveals the grounds for the judgment before it is made and announced. Both the announcement of the judgment and the oral reasons for the decision are made at a public hearing, which is not, however, a trial. The trial is closed by the presiding judge when the case has been sufficiently clarified (Article 113(1) in conjunction with Article 133(1) LPAC). The oral reasons for the decision are given by the reporting judge, although, pursuant to Article 139(3) LPAC, this may also be done by the presiding judge.[3] Unlike in criminal and civil proceedings, the obligation to state the main reasons for the decision is not waived, even if neither the parties nor the public are present at the pronouncement of the judgment.

2. VOTING ON THE MAIN REASONS FOR THE DECISION

Pursuant to the provisions of Article 137(1) LPAC, the judges' deliberation "includes discussion, voting on the ruling to be made and the main reasons for the decision, as well as writing down the operative part of the judgment." As follows from the above, the fundamental reasons for the decision are the subject of judicial deliberation and are put to a vote on the same terms as the ruling itself. Their publication after the judgment has been announced cannot, therefore, be regarded as a presentation of the personal views of the judge-rapporteur [Dauter 2009]. The oral grounds for the

[2] Journal of Laws of 2024, item 935 as amended [hereinafter: LPAC].

[3] Under criminal procedure, any member of the adjudicating panel may give oral reasons for the judgment – see Article 418(3) of the Act of June 6, 1997, the Code of Criminal Procedure, Journal of Laws of 2025, item 46 as amended.

decision reveal the arguments that, in the court's opinion, were decisive for the decision in the case. They should therefore be agreed upon during the discussion or vote. The result of the vote on the main reasons for the decision does not have to be unanimous. It should be assumed that in a situation where the judges unanimously accepted the content of the decision, it is unacceptable to submit a dissenting opinion solely on the grounds of its reasoning[4] (which does not preclude the lack of acclamation during the vote itself). A situation in which a dissenting opinion on the decision has been submitted may be problematic. It is not clear whether a judge submitting *a dissenting opinion* should vote on the fundamental reasons for the decision with which he or she disagrees. However, excluding him or her from the vote could lead to a *sui generis* procedural stalemate in which the other judges would take different positions on the fundamental reasons for the decision. The content of the fundamental reasons for the decision should be agreed to the extent that it is possible to vote on them by a majority, regardless of any dissenting opinion on the decision itself. A judge who has submitted a dissenting opinion on the decision will not share the reasons on which it is based. In such a situation, it seems understandable to vote against the main reasons for the judgment. However, it should be realized that voting on the main reasons for the decision is not a re-vote on the decision itself. It takes place when the content of the judgment has already been decided. The role of the adjudicating panel is to agree on what arguments should be presented to those present in the courtroom in order to demonstrate its correctness (fairness, accuracy, etc.). For this reason, it cannot be ruled out that, despite the submission of a dissenting opinion, the fundamental reasons for the decision will be accepted unanimously. In this configuration, the judge who has submitted a dissenting opinion will be guided by responsibility and pragmatism, expressing his or her position on how to convey the reasons for the judgment to the parties, even though he or she disagrees with it. Submitting a dissenting opinion does not mean that the judge does not participate in the judgment, and the responsibility for announcing it and giving oral reasons is not waived. The only ruling in the case is the one that was voted on during the deliberations, and each of the judges participating in its issuance is responsible for ensuring that the reasons given after its announcement legitimize it to the highest possible degree. The dissenting opinion prepared pursuant to Article 137(2) LPAC[5] is not a competing (alternative) decision in an administrative court case issued by the

[4] Article 137(2) LPAC allows for the submission of a dissenting opinion only from the justification.

[5] And para. 55(6) of the Internal Rules of Procedure of Provincial Administrative Courts – Regulation of the President of the Republic of Poland of August 5, 2015, Journal of Laws of 2024, item 779.

member of the adjudicating panel who submitted it. It is merely a procedural form of disclosure of arguments intended to demonstrate the incorrectness of the judgment issued, a place for substantive debate with the decision contained therein. For these reasons, the active participation of the judge who submitted the dissenting opinion in agreeing on the fundamental reasons for the ruling seems not so much desirable as necessary.

3. CONTENT OF THE ESSENTIAL GROUNDS FOR THE DECISION

The semantic construction of this concept is of fundamental importance for determining the scope of the substantive reasons for the administrative court's judgment. It should be noted that the legislator does not require an explanation of what the court has done, as this is clear from the content of the judgment. The statement of the essential reasons for the decision is intended to reveal why the court made the decision contained in the judgment, and not to translate its content into another language. The reason for the decision is its cause, the rationale that justifies it, and demonstrates its accuracy. This approach to the issue in question determines that the oral grounds for the decision should demonstrate that the administrative court has correctly performed its constitutional function. When stating the main reasons for the decision, the judge should construct his argument in such a way as to demonstrate that the review of the legality of the contested public administration action was carried out in accordance with the normative paradigm.

In its oral reasoning, the court should not refer to the facts of the case, as these have already been presented to the parties in the report after the case was called for hearing. Referring to the facts of the case only makes sense if individual elements are correlated with the court's review. The judge presenting the oral grounds may refer to specific facts, either in the context of assessing the validity of the allegations or positions of the parties presented in the course of the proceedings, or in relation to the violations of law found. Regardless of the configuration, reference to specific facts should always relate to the result of the court's review, as reflected in the judgment. By definition, reference to the facts of the case will be more specific when the complaint is found to be well-founded. In such a situation, the main reasons for the decision will be associated with specific violations of the law that justified its acceptance. Depending on the subject matter of the appeal, the oral grounds should make it possible to determine which provisions were violated, what the violation consisted of, and why it is so significant (if such a gradation is provided for in the provisions of the Code of Administrative Procedure) that the court could not dismiss the complaint. It is methodologically correct to present the main reasons for the decision in such a way that the violations of law that are decisive, i.e., that independently determine

the necessity to uphold the complaint, are referred to first. Violations of law that are of an accessory nature, i.e., cannot be classified as grounds for upholding the complaint, may be stated in the final part of the grounds, although it does not seem wrong if they are omitted. The main reasons for the decision to uphold the complaint can only be those violations of law that justify such action. Other violations of law that the court points out "incidentally" do not constitute grounds for upholding the complaint and therefore are not the reason for the decision issued. For similar reasons, it must be assumed that the oral grounds for a judgment upholding the complaint should, as a rule, not include those allegations of the complaint which the court did not share. An allegation that has been negatively verified by the court cannot be a reason for upholding the complaint. The presentation of the grounds for upholding the complaint should focus more on the violations of law that justify such a decision than on the positions of the parties. Of course, it is left to the discretion of the court to decide whether and to what extent to refer to the allegations and positions of the parties to the proceedings. It is because the court's scope of action integrates the obligation to present the most important reasons for a judgment negatively assessing the contested activity of public administration with the function of persuasion, which cannot be fully achieved without referring to the positions of the parties that, in their opinion, were relevant to the case. However, it cannot be overlooked that if the complaint is upheld, the provincial administrative court draws up the grounds for the judgment ex officio and may fully address those allegations and positions of the parties to the proceedings which did not affect the content of the judgment. When presenting the main reasons for the decision, it may be indicated that detailed references to the allegations and positions of the parties will be included in the written justification.

If the complaint is dismissed, the oral grounds for the judgment are of a different nature. In such a procedural arrangement, the court does not, by definition, have precise coordinates shaping the content of the decision. The structure of the statement revealing the fundamental reasons for the ruling should focus more on the allegations of the complaint. While a ruling upholding the complaint is closely correlated with the very defectiveness of the contested public administration action, a judgment dismissing the complaint – at least in the perception of the entity that filed it – much more clearly expresses the groundlessness of the allegations made therein. It is justified insofar as, in the case of dismissal of the complaint, it is generally difficult to give the fundamental reasons for the decision. In the court's opinion, the entirety of the normative conditions of the contested public administration action, both at the systemic and procedural and substantive levels, does not raise any objections. Therefore, it is not possible to identify

any clear points of reference that could be considered fundamental to the decision formulated in the operative part of the judgment. If a complaint lodged with a provincial administrative court is drafted in a manner that does not allow for the identification of specific violations of the law, but rather expresses a general sense of dissatisfaction or injustice, the oral grounds should refer in general terms to those elements of the authority's action which, in accordance with the accepted standard of review, demonstrate its compliance with the law. In this regard, the experience and intuition of the judges of the adjudicating panel undoubtedly have a significant role to play, as they allow them to ascertain (especially during the hearing) whether the complainant disagrees with the factual findings made by the authority, is questioning the correctness of its actions in another area, or considers the decision itself to be unfair. In the oral grounds, emphasis should be placed on those issues that the party considers important. If, on the other hand, the complaint contains allegations and specifies the violations of law attributed to the authority, the oral grounds for the decision should primarily explain why the court did not share them. It applies both to a situation where the authority did not act as described in the complaint – its activity was different – and to a situation where the authority did act as alleged in the complaint, but there are no grounds for assuming that this was unlawful.

If the complaint is dismissed, the essential reasons for the decision play another important procedural role. They may convince the parties that it is not advisable to lodge a cassation complaint and, in the foreground, that there is no need to submit a request for a statement of reasons for the judgment. From the court's perspective, this possibility is undoubtedly an "advantage."

The legislator has profiled the scope of the oral grounds for the decision by giving them the characteristic of "fundamentality." Despite different initial intuitions, it is not at all easy to define the meaning of the term "fundamental reasons for the decision." A specific violation of the law that obliged the court to uphold the complaint can be treated as a reason for the decision. On this assumption, only the most serious, fundamental violations that are "sufficient" to uphold the complaint will be considered essential reasons for the decision. It would give the court room for a particular kind of assessment, based on which it would select from among the violations of law giving rise to the complaint, i.e., those that are the reason for the decision, those which, in its opinion, are the most serious. The only criterion for selecting the reason for the decision, which would be disclosed in the oral grounds, would be the gravity of the violation of the law, understood as the intensity of its correlation with the normatively determined grounds for upholding the complaint (the provisions of the Code of Administrative Procedure). However, this understanding of the fundamental reasons for the decision

would not work in the event of the complaint being dismissed. It is impossible to select the arguments that "most" justify the dismissal of the complaint.

In the second approach, the "fundamentality" of the reasons for the decision can be referred to not to the violation of the law, but to the argumentation itself, which is intended to demonstrate that violation. On this assumption, when presenting the oral grounds for the judgment, the provincial administrative court should disclose all violations of the law that justify the adopted direction of the decision (if the complaint is upheld), except that the argumentation itself legitimizing each of the assessments of the illegality of the authority's action should be limited to key issues. In the same way, the court would present the main reasons for dismissing the complaint, but only in relation to the allegations raised in the complaint. This understanding of the "fundamentality" of the reasons for the decision correlates with the conclusions presented in the doctrine that the oral grounds for the judgment are a kind of summary of the written justification [Hyżorek 2020, 72], the so-called "weakened justification" [Wróblewski 1988, 297-298].

The need to rationalize the actions of the provincial administrative court is sufficient to assume that none of the presented approaches to the "essentiality" of oral grounds for a judgment should have exclusivity in the process of applying Article 139(3) LPAC. It seems reasonable to assume that the essential reasons for the decision disclosed after the judgment has been announced do not have to cover every violation of law found by the court that gave rise to the complaint, just as it does not have to refer to each of the allegations raised in the complaint. Nor is it necessary to always present, in the oral grounds, a complete legal argumentation of the court's assessments as to the merits of the complaint. The content of the main reasons for the decision should be the result of the court's consideration of how best to demonstrate the correctness of the judgment in the circumstances of the specific case. The conditions for achieving this objective cannot be confined to any matrix concept that sets out a rigid framework for the operation of a provincial administrative court.

4. THE MAIN REASONS FOR THE DECISION IN TERMS OF COMMUNICATION

Presenting the main reasons for the decision is undoubtedly a process of communication. It requires the creation of a message, its transmission, reception, and interpretation [Adams and Galanes 2008, 63ff]. Optimizing the impact of the judicial act of presenting the grounds for a judgment requires taking into account some complex factors, which are often situational in nature and require *ad hoc* adaptation.

The judge delivering the main reasons for the decision cannot be merely an issuer of information; he or she is a representative of state authority who communicates directly with the individual to convey the reasons behind a particular decision in a dispute to which that individual is a party. This directness of interaction between the court and the persons present in the courtroom during the delivery of the oral reasons means that the subject of reception is not only what the court communicates, but also how it does so. There is therefore no doubt that, in functional terms, the presentation of the grounds for a judgment cannot be limited solely to the disclosure of information, without reference to all the factors that determine its proper reception [Rzeszutko 2003, *passim*; Gmerek 2019, *passim*; Najda, Rutkowska, and Rutkowski 2021, *passim*].

Undoubtedly, the starting point for the correct presentation of the main reasons for the decision is their prior proper preparation. Before announcing the judgment, the reporting judge should prepare to present the oral grounds for the decision. It should be remembered that communication during the announcement of the judgment and the presentation of the oral grounds for the decision is symbolic in nature. The symbol that reaches those present at the hearing is not only words, but also gestures, sounds, objects, and actions [Świerczyńska-Głownia 2019, 15-16]. Several factors influence the overall perception and assessment of the administrative court's actions, including the examination and resolution of specific cases. A positive perception of the court's actions is conditioned by complex feelings, shaped by nuances that are often only slightly or not at all related to its substantive activities. A judge presenting the oral grounds for a decision should speak without haste, clearly, calmly, and in a manner that reveals a focus on the audience. It is necessary to use language whose level of complexity is adequate to the audience's perception capabilities. A party appearing on its own should not be explained legal complexities that it is unable to understand. The message sent by the judge presenting the main reasons for the decision should enable the audience to familiarize themselves with the reasons behind the decision, regardless of whether the party agrees with them or not. The dignity of the administrative court, built up by the aura of the courtroom, the official attire of the judges, and the state emblem, should be consistent with the formula for communicating the main reasons for the decision. Therefore, the judge presenting the oral grounds for the judgment should speak with dignity, with respect for those present, without impatience, adapting the dynamics and style of speech to the perceptual potential of the audience. It cannot be overlooked that the image of the court is influenced by the behavior of all judges, not just the one presenting the main reasons for the decision. The other judges should express concentration and commitment at that time.

A special kind of communication process takes place when the reasons for a decision that is of wider public interest are presented, as evidenced by the presence of a large audience or media. In such a situation, the purpose of the oral reasons – apart from those already mentioned above – is to present the court's position on socially sensitive issues, even if they were not strongly related to the decision itself. Omitting them will certainly not be well received by the public and will additionally create a sense of the court being "detached" from "ordinary people." In any case, it is necessary to sense and understand the need that has arisen in the public sphere to disclose the reasons that guided the administrative court in deciding cases that attract public attention.

5. BINDING FORCE OF THE FUNDAMENTAL REASONS FOR THE DECISION

One must agree with the views formulated in the doctrine that the oral grounds for the judgment constitute an announcement, an introduction to the reasoning that the court will present in its written justification [Rzucidło 2020, 50-52]. Therefore, by definition, there should be consistency between the written justification and the oral grounds for the decision. An important issue, which the legislator has not explicitly resolved, is whether the lack of such consistency should be classified as a violation of the law that could have a significant impact on the outcome of the case. On the one hand, it must be taken into account that if, when issuing a judgment, judges vote on the main reasons for the decision and then, after the judgment has been issued, these reasons are changed, it cannot be ruled out that the result of the vote on these "new" reasons would be different. On the other hand, however, it cannot be ignored that the reasoning for the judgment, which gives reasons for the decision other than those disclosed in the oral grounds (as a rule)[6] is signed by all members of the adjudicating panel, and therefore it is reached by consensus, which allows us to assume that the judges would have voted in favor of these new grounds for the decision.

As can be seen from the above, in an idealized paradigmatic approach, the justification of a provincial administrative court's judgment does not create post-factual reasons to rationalize the decision expressed in its content. The opposite assumption would mean that at the time of issuing the judgment, the court acts to some extent without reflection, relying on unidentifiable criteria for examining and deciding the case or on *sui generis* intuition [Patryk

[6] This refers to the situation of submitting a dissenting opinion from the justification referred to in Article 137(2) LPAC and para. 55(5) and (6) of the Internal Rules of Procedure of Provincial Administrative Courts.

2023, *passim*; Brożek 2024, 27-76]. However, it must also be admitted that after issuing the judgment and stating the main reasons for the decision, the provincial administrative court changed its mind as to the reasons (arguments) that should be disclosed in the justification in order to rationalize the judgment properly. In this scenario, at the time of issuing the judgment, the court has reasons for the decision it has made. However, at the time of drafting the justification, it concludes that other arguments better demonstrate the correctness of the decision that it did not initially consider or did not attribute fundamental importance to. It is an important issue because it relates to the effects of inconsistency between the essential reasons (oral grounds) for the decision and the written justification of the judgment. On the other hand, *de lege lata,* it has little practical value in the absence of procedural tools allowing for the recording of the oral grounds for the judgment of the provincial administrative court and, consequently, for their comparison with the content of its written justification. Despite this inconvenience, the issue is worth considering.

Pursuant to Article 144 LPAC, the court is bound by the judgment issued from "the moment of its announcement."[7] The moment the judgment is announced, a binding effect arises, which in procedural terms means that it is not possible to interfere with its content and the legal effects it produces outside the procedures provided for this purpose. There is no doubt that the announcement of the judgment marks the initial moment of binding by its content. However, it is not so obvious whether it determines the scope of this binding effect. The question is whether, at the moment of pronouncement of the judgment, the scope of the binding effect becomes "stable," i.e., it is not modified as a result of an action after the pronouncement, such as the oral presentation of the main reasons for the decision. The answer to this question is affirmative. The binding nature of the judgment does not extend to the main reasons for the decision given after its announcement [Piątek 2024, 170; Romańska 2010, 32]. As follows from Article 139(3) LPAC, the announcement of the judgment consists in reading out its operative part, and only after this announcement does the reporting judge give the main reasons for the decision orally. The announcement of the judgment and the giving of the main reasons for the decision are two autonomous procedural acts. The court is bound by the judgment issued at the moment of its announcement, and therefore even before the main reasons for the decision contained therein are given. The scope of the provincial administrative court's binding nature of the judgment cannot, therefore, include the main reasons for the decision given after its announcement. The above conclusions are confirmed by the content of Article 137(2), last sentence, LPAC in conjunction with para. 55(5) and (6) of the Internal Rules of Procedure

[7] Or signing the sentence when it was issued in a closed session.

of Provincial Administrative Courts. It follows from the above provisions that a judge may submit a dissenting opinion to the justification. It should be assumed that he cannot submit a dissenting opinion to the justification at the stage of signing the judgment, although there are also opposing views in this regard [Dauter 2018]. Accepting the position that a judge may submit a dissenting opinion at the stage of signing the judgment would be equivalent to accepting that the "justification" is the fundamental grounds for the decision put to the vote. A dissenting opinion would therefore include arguments that not only have not yet been communicated to the parties after the judgment has been announced, but above all have not been recorded in the procedural form appropriate for the reasoning of the judgment.

Furthermore, submitting a dissenting opinion from the justification – the fundamental reasons for the decision – would mean that they are binding on the part of the panel that voted for them, which would be contrary to Article 144 LPAC. If this were not the case, an unacceptable situation could arise in which the arguments in the dissenting opinion would coincide in substance with the arguments in the justification of the judgment, because during its preparation, the reasons for the decision would be modified. For reasons that need no explanation, such an arrangement is unacceptable. The above conclusions are confirmed by para. 55(6) of the Internal Rules of Procedure of Provincial Administrative Courts, which states that the time limit for drafting a dissenting opinion separate from the justification begins at the moment of its signing and the inclusion of an appropriate note next to the signature. The provisions of the aforementioned rules do not provide for a separate deadline for preparing a separate opinion to the justification in the event of its submission at the time of signing the judgment.

During deliberations, judges may not be unanimous as to the fundamental reasons for the decision, but at this stage, they do not have the procedural instruments to reveal this by submitting a dissenting opinion.

In summary, a dissenting opinion to the justification of a judgment concerns only the justification that has already been drafted and submitted for signature to the other members of the adjudicating panel. There is no procedural isomorphism between the substantive grounds for the decision and the written justification of the judgment – they are not equivalent and synonymous procedural acts. The substantive grounds for the decision given orally are not binding within the meaning of Article 144 LPAC. Assuming the hypothetical correctness of the opposite assumption, it should be assumed that in each case of inconsistency between the written justification of the judgment and the main reasons for the decision contained therein, there would be a violation of Article 144 in conjunction with Article 139(3) LPAC. When considering the validity of a cassation appeal based on these provisions, the Supreme Administrative Court would have to decide whether their violation

could have had a significant impact on the outcome of the case within the meaning of Article 174(2) LPAC. The scope of verification in relation to such an objection would have to be limited solely to establishing inconsistency between the written justification and the fundamental reasons for the decision given after the announcement. However, it could not refer to the substantive "competitiveness" of the reasons disclosed in the justification and the oral grounds. In other words, when examining a cassation objection alleging inconsistency between the oral grounds of the judgment and its written justification, the Supreme Administrative Court would not be entitled to compare the substantive strength of the arguments rationalizing the judgment issued, given in both of these sources. Within the limits of this allegation, the Supreme Administrative Court would not be able to consider which of the arguments – those given in the oral grounds or those disclosed in the written justification – correctly (better) rationalize the judgment issued. In such a situation, the Supreme Administrative Court would rule beyond the limits of the cassation appeal. On the one hand, it would verify the legal assessments formulated by the provincial administrative court without any objections questioning their validity, referring only to the mere fact of the potential inconsistency of the oral grounds with the written justification.

On the other hand, by assessing the merits of the decision revealed in the oral grounds, it would refer to legal assessments whose source does not have the proper legitimacy. It cannot be overlooked that the formal opening of the possibility of lodging a cassation appeal against a judgment of a provincial administrative court takes place only when its written justification has been drawn up and delivered. The effectiveness of cassation allegations is assessed by the Supreme Administrative Court from the perspective of the content of the written justification of the judgment, excluding those cases in which the formal correctness of the judgment itself is questioned.[8] However, it is not possible to formulate effective cassation allegations questioning the correctness of the oral grounds for the judgment. Their positive verification by the Supreme Administrative Court is excluded by definition.

For the reasons set out above, the admissibility of raising a cassation objection pointing to an inconsistency between the written justification of the judgment and the oral grounds for the decision seems debatable. Its positive verification, *per se*, cannot determine the necessity to overturn the judgment of the provincial administrative court within the framework of appellate review. This is because it is an issue that requires a different field of analysis.

[8] The judgments of the Supreme Administrative Court of June 11, 2024, ref. no. III OSK 1459/23, and November 6, 2024, ref. no. I GSK 1063/24, explicitly state that the basis for formulating the grounds for a cassation appeal is a written statement of reasons, not oral grounds. The issue of inconsistency between the two sources does not affect the procedural rights of the parties.

It does not concern whether the inconsistency between the oral grounds for the judgment and its written justification translates into a defect in the decision, but whether this defect must result in the cassation appeal being upheld.

Next, attention should be drawn to the difficulties in establishing a normative basis for an allegation of inconsistency between the written justification of the judgment and the fundamental reasons for the decision. There is no legal provision that *explicitly* requires this. As stated above, the provincial administrative court is not bound by the oral grounds for the decision pursuant to Article 144 LPAC. The obligation to include them in the written justification of the judgment cannot be derived from the provisions of Article 141(4) LPAC. The only legal basis that could be considered as the structural substrate for such an objection is Article 137(1) in conjunction with Article 139(3) LPAC, which requires that the main reasons for the decision be put to a vote and then made public orally after the judgment has been announced. Interpreting the aforementioned provisions concerning constitutional axiology, it would be possible to create directives under which the provincial administrative court, as a public authority, should act in a manner that inspires trust and is therefore obliged not to deviate from the reasons for the decision contained in the judgment adopted at the time of its announcement. However, such a solution is questionable, as it would constitute a functional and purposeful supplement to the content of Article 144 LPAC, which the legislator did not envisage at the stage of drafting the law. It should also be added that it would only appear to have a protective value. In the absence of the parties and the public at the hearing at which the judgment is announced, it would be virtually impossible to verify the consistency of the fundamental reasons for the decision with the arguments in the grounds for the judgment. In such a situation, the only mechanism that could indirectly protect the interests of the parties would be a dissenting opinion submitted by a judge who disagrees with the new reasoning of the decision.

CONCLUSION

The above comments confirm that there are no convincing arguments in favor of the thesis that the oral grounds for the decision bind the provincial administrative court. Of course, the model procedural arrangement should be that the oral grounds for the decision are consistent with the written justification prepared subsequently. Assuming that the basic function of the justification is to rationalize the judgment, i.e., to present arguments demonstrating its correctness, it cannot be ruled out that after stating the main reasons for the decision, the court will change the arguments in the written justification that are supposed to legitimize the decision. The ideal assumption is that the departure from the oral grounds for the judgment

is always the result of the court's desire to issue a decision that best fulfills the constitutional right to a fair judgment resolving the individual's case. It is therefore, by definition, an expression of the court's search for a formula to rationalize the effects of the legality review of public administration activities revealed in the judgment, the effects of the legality control of public administration, which will best demonstrate their validity. The admissibility of departing from the oral grounds for the judgment should therefore be profiled not in terms of a violation of the law, but in terms of the fulfillment of the guarantee function of the constitutional right to a court.

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LEGAL SAFETY GUARANTEES FOR INDIVIDUALS IN POLISH ADMINISTRATIVE PROCEEDINGS – SELECTED ISSUES

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Abstract. This article discusses the issue of legal certainty guarantees for individuals in Polish administrative proceedings. We begin by looking at legal certainty guarantees for individuals in general terms. We present the general assumptions and views of the science accompanying the subject matter. This issue is further developed and detailed in the discussion of guarantees of legal security of individuals in Polish administrative proceedings. We show that the Polish legal system contains normative regulations, also in the form of principles, which are crucial for the implementation of the guarantees in question. We are guided by the assumption that such principles, even if they are extremely valid and sound just and proud, must be followed by specific legal provisions. This is to ensure that the postulates and principles are actually implemented, thus preventing them from becoming mere facades. Next, we present selected issues related to the legal security of individuals in the Polish Code of Administrative Procedure. We discuss the institution of waiver of the right of appeal and administrative mediation. Finally, we present the results of our own research on administrative mediation conducted on a research group of ten municipalities. We also present statistical data on administrative court mediation. We also propose some solutions of a *de lege ferenda* nature.

Keywords: law; administrative law; public law; legal security; administrative process; administrative mediation; legislation.

INTRODUCTION

In this text, we address the issue of legal certainty guarantees for individuals in Polish administrative proceedings. Clearly, this is a research area that is as broad as it is scientifically interesting, hence the necessary caveat, also mentioned in the title, that it concerns only selected issues. We adopt the

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traditional formula of presenting certain general views first. This is the purpose of the introductory section on legal security guarantees for individuals in general. In it, we explain, among other things, the general assumptions and views of the science accompanying the subject matter. This issue is further developed and detailed in the discussion of guarantees of legal security of individuals in the Polish administrative process. This is, an initial example – we show that the Polish legal system contains normative regulations, also in the form of principles, which are key to the implementation of the guarantees in question. We are guided by the basic assumption that such principles expressed in the regulations of a given legal system, even if they are extremely valid and sound just and proud, must be followed by specific legal provisions. This is to ensure that the postulates and principles are actually implemented, thus preventing them from becoming mere facades. Next, moving down the ladder of generality, we provide further examples by presenting selected problems in the field of legal security of individuals in the Polish Code of Administrative Procedure.[1] Here, we use a quantifier of a kind of exposure of legal institutions in the system. On the one hand, we show the institution of waiving the right to appeal, which in our opinion is not sufficiently highlighted, and on the other hand, we highlight administrative mediation, which is strongly promoted through many popularisation projects. Finally, we present the results of our own research on administrative mediation conducted on a research group of ten municipalities in the Lublin region. We also present statistical data on administrative court mediation, which, in our opinion, confirm the disturbing conclusions of the initial research. We also propose certain solutions of *a de lege ferenda* nature and consider the legitimacy of certain solutions in their current form.

1. ABOUT LEGAL SECURITY GUARANTEES FOR INDIVIDUALS IN GENERAL

In both Polish and foreign literature on the subject, considerations on the guarantees of legal security of individuals have been given due attention. Therefore, bearing in mind the main objectives of this text, which are primarily to present the results of our own research and to reflect on what these results may indicate and what should be done with them, we will only outline this topic. We refer to the recognised achievements in this field. Jadwiga Potrzeszcz, among others, discusses them in an extremely interesting and comprehensive manner, concluding that "when attempting to precisely define the concept of legal security, it is necessary to distinguish between:

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

1) the idea of legal security, which has its source in natural law (in the sense of , the law of reason), which encompasses all legal security demands at the highest level and represents a state of ideal harmony between the means leading to the achievement of legal security, and 2) the realisation of this idea by means of legal measures, which are inherently imperfect."[2] The author adds that "legal security in the latter sense can be understood in two ways: 1) legal security in the objective sense as a state achieved by means of positive law, in which the basic goods of human life and interests are secured at an appropriate level, and 2) legal security in the subjective sense (in other words, a sense of legal security)" [Potrzeszcz 2013, 277-78].

It is also worth noting that this issue is the subject of the case law of the Constitutional Tribunal. It is pointed out there that "one of the fundamental principles governing relations between the citizen and the state is the principle of protecting the citizen's trust in the state and the law it enacts" and further "the principle of citizens' trust in the state and the law it enacts is based on legal certainty, i.e. a set of characteristics of the law which guarantee legal security to individuals; they enable them to decide on their conduct based on full knowledge of the premises for the actions of state authorities and the legal consequences which their actions may entail. The individual should be able to determine both the consequences of particular behaviours and events under the legal status in force at a given moment and expect that the legislator will not change them arbitrarily. The legal security of the individual associated with legal certainty thus enables the predictability of the actions of state authorities and the projection of one's own actions."[3]Therefore, considerations on legal security in relation to individuals focus on issues concerning values associated with the individual, i.e. human beings ("human life and interests"), together with the mechanism for their proper guarantee ("adequate protection"). The wording used to describe this level is key: adequate, appropriate. Based on the case law of the Constitutional Tribunal, this can be compared to "legal certainty", predictability understood in such a way that, firstly, the individual functions in an environment in which there are , certain legal norms constituting the first pillar of this protection (formal aspect), and secondly, the individual can actually benefit from these legal norms (real aspect).

It can therefore be concluded that the principle of legal certainty, embedded in the idea of a democratic state governed by the rule of law, constituting an essential element of the rule of law, is axiologically rooted in the very dignity of the human person, while functionally linked to the principle of protection of trust in the state and the law it enacts. Therefore, the legal security

[2] See Potrzeszcz 2013, 277-78, as well as the literature cited therein.

[3] Judgment of the Constitutional Tribunal of 14 June 2000, ref. no. P.3/2000, Journal of Laws of 2000, No. 50, item 600.

of the individual requires, among other things, that the law be consistent, clear and understandable, and that it provide opportunities for real action and, for example, the use of legal remedies to resolve situations in which citizens find themselves. From the point of view of the citizen as the addressee of a legal norm, as Antoni Kość aptly points out , "legal security must be, above all, security of orientation. [...] As the addressee of a legal norm, a citizen must know how to behave in order to comply with the requirements of the law in specific life situations and social arrangements, and what behaviour they are entitled to expect from the other party. In other words, they must know what their rights and obligations are and what legal consequences they must expect from their behaviour" [Kość 2005, 191]. Individual guarantees are therefore legal measures that ensure the effective protection of the rights and interests of entitled entities. This is a very important issue. It seems that sometimes in scientific and popular scientific discourse, which secondarily shapes law-making practice, higher values do not always and fully translate into the tools for their implementation. Therefore, legal systems may face situations where, on the one hand, there are regulations assuring their recipients that certain values will be respected and placed on a kind of axiological pedestal, and on the other hand, there is a lack of measurable, real tools for their implementation. Or such tools prove to be insufficient or inappropriate. Then, in our opinion, we can discuss a certain facade of law; the facade or appearance of legal norms. We can also encounter a term that we find extremely appealing, "legislative placebo" [Stępień and Zomerski 2025, 1-32]. This problem has significant practical implications and is certainly worth addressing, as will be discussed later in this text.

2. GUARANTEES OF LEGAL SECURITY FOR INDIVIDUALS IN THE POLISH ADMINISTRATIVE PROCESS

In this part of the text, "descending the ladder of generality", in view of the above hypothesis that it is desirable in a legal system for individuals to have legal means (tools) that are real and therefore ensure effective protection of rights, we will analyse how this aspect is formalised in the Code of Administrative Procedure. We will analyse the principles expressed in this legal act that are key to this issue. As emphasised in the literature, "the basic principle of state administration should be understood as a legal rule according to which the state administration is to act", and "it should be – due to its 'fundamental' nature – derived from the fundamental assumptions of the socio-economic and political system defined by law" [Dawidowicz 1965, 201]. In other words, as Leszek Leszczyński points out, a "rule of law" can be treated as a kind of "legal norm characterised by particular axiological importance, consisting in the protection of values fundamental to the entire legal

system or a given branch of law" [Leszczyński 2016, 12-13]. The purpose of the creation and functioning of rules of law in legal systems is indicated as "legal principles can also serve to reveal the common ideological and doctrinal foundations on which normative decisions of one kind or another are based, not only of individual legal institutions, but also of groups of these institutions within a particular field of law, or even within the entire legal system" [Wronkowska, Zieliński, and Ziembiński 1974, 49]. Ensuring legal certainty for individuals is therefore one of the overriding objectives that should be pursued by legislation. In the Code of Administrative Procedure, these guarantees can be found in a number of general principles. The following principles can be considered particularly relevant to the issue at hand: objective truth (Article 7 CAP), trust in public authorities and established practice in resolving cases (Article 8 CAP), active participation of the parties in the proceedings (Article 10 CAP) but above all the principle of speed and simplicity of proceedings (Article 12 CAP). Of course, this list is not exhaustive, subjective and general. However, it is not our intention to repeat many different considerations on specific principles contained in multiple monographs, commentaries or articles [Kmieciak, Wegner, and Wojtuń 2023]. This does not diminish the importance of this topic, which fits into the context outlined in the previous part of the text, namely the context of the significance versus the facade of law. It is particularly important in the area of public law, especially in our Polish administrative procedural law. After all, as Zbigniew Kmieciak aptly points out, "already in the first publications devoted to the codification of administrative procedure, which was repeated in Poland in 1960, it was pointed out that the aforementioned principles (general principles, author's note) are not intended to be merely instructional recommendations for practice or guidelines for good administration, i.e. guidelines of an organisational, non-legal nature […]; from the outset, the authors of the code treated them as legal norms, the violation of which must be considered a violation of the rule of law" [Kmieciak 2014, 128]. Principles, which by their very nature are general in nature, should be able to have a real impact on the legal and factual situation of their recipients, whether directly or indirectly through lower-level regulations. We are therefore no longer discussing regulations that improve the comfort of ongoing administrative proceedings, such as their efficiency and speed [Olszanowski 2019, 115-29], but rather their possibility or lack thereof in essence. In our opinion, this is important from the perspective of the functioning of public administration *in the broad sense*, its efficiency and the realisation of the individual's right to good administration [Dolnicki 2020, 9-25]. It is also worth noting that "the issue of the scope of application of the general principles set out in Articles 6-16 CAP is controversial and debatable […] The doctrine presents different views on the binding force of general principles in the

proceedings indicated" [Majewska 2016, 147]. However, this remains outside the scope of our discussion, which is focused on the issues indicated above.

At the end of this section, however, we must attempt to explain to the reader what is meant by the concept of legal certainty. The Polish Language Dictionary contains an extremely interesting statement that a guarantee should be understood as "a promise that something will happen or that something is true." Applying this to the issue we are analyzing, we could say that the guarantee (or guarantees) of legal certainty for an individual, as it relates to the Polish administrative process, is a kind of "assurance" that this individual can feel secure in a legal sense. Of course, this implies a number of further questions, which are also extremely interesting, but to which we will not find answers – let alone a broad and satisfactory justification. For example, who would be the guarantor? Probably the state and the law, represented by the so-called rational legislator. Next, what does it mean to "feel safe"? The feeling of security, including legal security, may vary from person to person. We can therefore generalize that what is meant here is a situation in which the aforementioned guarantee is given that something we call legal security will apply. The literature on the subject explains that "legal security is certainty considered from the point of view of the protection of individual rights" [Wojciechowski 2014, 10-11]. In conclusion, we believe that guarantees of legal security for individuals – whether under administrative law or any other law – are a desirable value. One could say that they are a directional value, i.e., one that should be pursued. This means that individuals will know what legal solution they can expect in their situation. At the same time, that individual will be able to apply specific mechanisms provided for by law that will contribute to the realization of that value. These mechanisms are secondary to the "safeguards" themselves and can be compared to procedural rights. In other words, in a situation where the legal security of an individual, understood as a certain value related to certainty, stability, predictability, or even justice, is, in the opinion of the individual, violated, they may use their procedural rights to first demonstrate and then eliminate this violation.

3. SELECTED ISSUES RELATED TO THE LEGAL SECURITY OF INDIVIDUALS IN THE ADMINISTRATIVE PROCEDURE CODE

In conclusion, it can be reasonably argued that a number of principles, a kind of general rules of administrative procedure, constitute the titular guarantees of legal security of the individual. However, we are convinced that principles, even if they are extremely valid and sound just and proud, must be followed by legal institutions that will enable these principles and guarantees to be realised [Exeler 2019, 218-19]. If this is not the case,

we are likely to end up with superficial solutions. After all, and this is a deliberately exaggerated example, both the Soviet Union and the Third Reich had legalised principles of just law. What we want to convey is that guarantees of legal security for individuals in the legal system must, on the one hand, be guaranteed by general regulations (i.e. principles of law), but also by specific solutions that exemplify and implement these principles. Solutions that take the form of legal provisions regulating the functioning of various institutions.

Moving on to the next part of our text, we begin with the above assumption. On the one hand, we have a certain value in the form of a guarantee of legal security for the individual, which the aforementioned rational legislator should strive for, and on the other hand, certain rules or, in other words, solutions that contribute to this value. This can be described differently: solutions that make it possible for this value to materialize and be realized in some way. This materialization can be carried out in stages. It seems to us that this is the case in the Polish administrative process. The implementation of the postulate of legal security of the individual is served, on the one hand, by certain rules of a principled and general nature and, secondarily, by a number of procedural rules that we can assign to a lower order. In simple terms, this is a three-stage relationship: goal (value, legal security) – general principles – procedural rights. And this is the approach we take. Thus, at the risk of being accused of oversimplification, we will treat all three stages together for the purposes of this article. Our aim is to outline certain solutions that are interesting from our authorial perspective. This does not, of course, detract from what we have described above, namely the legitimacy and purposefulness of distinguishing between all these elements, especially in the field of administrative law theory. To justify this approach, we will begin with a brief reminder of the general principles of Polish administrative law. Since we have already attempted to explain the first element (purpose), the natural consequence is now the action we are taking.

Emanuel Iserzon, currently regarded as a classic of Polish administrative thought, when discussing the essence of general principles in the administrative process, emphasized that these are not "just declarations, recommendations, or desiderata. They are not a program. They are legal norms, binding norms – the foundation of the entire structure. They are norms whose observance is a prerequisite for the legality of individual rulings. These norms are subject to sanctions; their violation or disregard results in the proceedings being considered significantly flawed" [Iserzon 1968, 212].

This is of significant importance for the entire structure of administrative law and, in a way, justifies why we have proposed such a combined and simplified approach. Despite the fact that general principles are overarching, directional, and, on the one hand, directive, it is generally accepted that they

also apply directly. Thus, they should be treated like other rules applicable in the administrative procedural law system. This was perfectly captured by the Supreme Administrative Court,[4] which ruled that the general principles of administrative proceedings are an integral part of the provisions governing administrative procedure and are binding on authorities on an equal footing with other provisions of that procedure. Therefore, since we apply the general principles directly (just like the provisions), despite their superior nature in relation to other principles contained in the CAP provisions, it is reasonable to treat them collectively and assume that they serve the overriding objective, i.e., the legal security of the individual. We do not wish to dwell on the subject of general principles, as it has been covered extensively in the literature, which discusses their intricacies in great detail. We are focusing on a slightly different task.

That is why it is time to return to the subject of the title, i.e. the Polish administrative process, because it is in this area that we want to show these examples. At the same time, we would like to draw attention to a socially interesting problem. It boils down to the hypothesis that legal institutions that we can call "non-primary" play a very important guarantee role. And vice versa. Legal institutions of a "prominent" nature may, despite extensive regulation and significance in the linguistic sphere, prove to be completely useless. This is a somewhat perverse reference to an old Polish saying, or folk wisdom, that "all that glitters is not gold".

Therefore, we must make a very important clarification. The reader may (rightly) ask: but what do certain processes have to do with guaranteeing the legal security of the individual? And even more so in the Polish administrative process? Well, in our opinion, they do. As we indicated at the beginning, we do not want to repeat the considerations from the already extensive discussion on general principles or procedural rights serving to implement the postulate of legal security of the individual. We want to outline a certain problem that is of significant importance for legal science, and in the popular science layer, it fits into the aforementioned proverb about gold. Thus, without prejudice to the multitude of legal institutions that are of primary importance for the protection of individuals, we focus on outlining a somewhat perverse relationship that is also of such great importance. It is the problem of facadism in law. More precisely, the potential problem of facadism in solutions affecting the legal security of individuals.

As an example of a legal institution in the Polish administrative process that could be classified in the first group (i.e. not highlighted) but which is of significant importance for the guarantee of legal certainty (here: procedural security implementing a number of general principles), we can cite the institution

[4] Judgment of the Supreme Administrative Court of 7 November 2015, ref. no. II OSK 553/14.

of waiver of the right to appeal, expressed in Article 127a CAP. This provision was added to the Code and has been in force since 1 June 2017. It currently reads as follows: "**§ 1.** Before the expiry of the time limit for lodging an appeal, a party may waive its right to appeal to the public administration body which issued the decision. **§ 2. On** the date of delivery to the public administration body of a statement of waiver of the right to appeal by the last party to the proceedings, the decision becomes final and binding." This is a very important regulation with significant practical implications, translating into the realisation of legal guarantees for individuals. Despite doubts that arose in case law, mainly concerning the possibility of withdrawing a statement of waiver[5] and the period from which such a waiver may be made,[6] after these doubts were unequivocally dispelled by the Supreme Administrative Court, this institution is functioning perfectly. If a decision satisfactory to the party is issued, or if not satisfactory, then at least accepted by the party (which is, after all, the main objective of general principles, such as the principle of persuasion), it can significantly speed up the proceedings. It can therefore significantly reduce the time needed to benefit from the decision. It should be recalled that before 2017, i.e. before implementation, we were dealing with a pathological situation. Even in a situation where the decision was expected by the party, as a rule, it had to wait. A typical situation is one in which a party receives a decision on the determination of development conditions – it has a formally confirmed idea for its dream home, but the decision must still become final. The party must wait another 14 days. Even if it is the only party to the proceedings. This was a curiosity which, thanks to the appropriate actions of the legislator, has been efficiently eliminated. As we have already pointed out, the current regulation is widely used in legal transactions, contributing to the realisation of the guarantee of legal certainty for individuals.

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[5] See the judgment of the Supreme Administrative Court of 1 March 2023, ref. no. II OSK 56/22, CBOSA. The judgment states that the withdrawal of the statement referred to in Article 127a(1) CAP should take place within 14 days from the date of delivery of the decision to that party, and the appeal should also be submitted within that period. However, if there is only one party to the proceedings, its effective waiver of the right to lodge an appeal under Article 127a(1) CAP has the effect that the decision becomes final and binding immediately. Consequently, that party is not entitled to withdraw (within 14 days) the statement it has previously made.

[6] See the judgment of the Supreme Administrative Court of 5 July 2023, ref. no. III OSK 2396/21. The thesis indicates that a party may effectively waive its right to appeal or request a re-examination of the case after the decision has been delivered to it, but this rule cannot be understood in the manner in which it is interpreted by the court of first instance, which considers that such a statement may be submitted by a party only on the day following the day on which on which the decision was delivered to it. The position that such a procedural action may also be taken by a party on the day of delivery of the decision to it, and the only condition is that the statement must be chronologically subsequent to the delivery of the decision to the party, and therefore the statement cannot be submitted in relation to a decision that has been drawn up but not yet delivered to the party.

In this area, it is possible to outline some desirable directions for future action by the legislator, and thus propose some conclusions *de lege ferenda*. These include, *by analogy* with the institution in question, extending the possibility of waiving the right to appeal against a complaint (i.e. in the case of appealing against decisions) but also the possibility of waiving the right to appeal by the second instance authority (i.e. cassation appeal by the second instance authority). In our opinion, these measures would also contribute to streamlining the process and therefore to strengthening individual guarantees.

The choice of this legal institution as an example may raise some doubts, so the reader deserves an explanation. Let us remember that this is an illustration of a process, a situation in which an institution that may be described as inconspicuous is of great importance to the individual. In our opinion, this is exactly the case here. Although, at first glance, waiving the right to appeal may seem far removed from the realization of the guarantee of legal certainty for the individual, in our opinion, it does fulfill this assumption. It should be noted that one of the elements of the very rich and comprehensive concept of legal certainty for individuals and its guarantees is that administrative proceedings should enable the party to conduct the process in a quick, efficient, simple, understandable, and voluntary manner. At a time when this institution did not exist in legal practice, the implementation of the above was difficult. As we have shown in the example, the party could not expedite its case, even though there was no chance that anyone would threaten it (because it was the only participant with the rights of a party). The necessity to wait was absurd. The wise legislative solution illustrated by this example shows us how sometimes simple legal institutions can contribute to the implementation of proposals of great importance. This example also shows the praxeologically expected direction of activity for the future.

As a second example, from the group of "exposed" institutions which, however, do not bring the desired effect and therefore do not give effect to the legal guarantees of the individual's right to , we would like to point to the institution of mediation in the Code of Administrative Procedure. We put forward the hypothesis, which we will attempt to justify at least in part, that this is a facade institution, a dead letter. Of course, this may be considered too far-reaching, especially by supporters of administrative mediation. We respect this approach, but we believe that this issue requires considerable reflection, including through the formulation of bold hypotheses.

As in the case of the institution of waiver of the right to appeal, mediation was added to the Code of Administrative Procedure in 2017, during the so-called major reform of the Code. Mediation was placed in Section II CAP. "Proceedings", in Chapter 5a, entitled "Mediation". Article 96(a) CAP states, among other things, that mediation may be conducted during the proceedings if the nature of the case allows it. Mediation is voluntary. The purpose

of mediation is to clarify and consider the factual and legal circumstances of the case and to reach an agreement on its resolution within the limits of applicable law, including by issuing a decision or concluding a settlement (paras 1, 2, and 3). The provision of § 1 b) of the article in question, which appeared in the Polish legal system on July 13, 2025, should be considered particularly interesting. It proves, contrary to the hypothesis expressed, the development of the institution of mediation in Poland. In it, the legislator imposed very important obligations on the shoulders of public administration employees. Its content indicates that every administrative case should be examined in terms of the possible use of mediation. The provision reads as follows: A public administration body is required to prepare and record in the case file a note containing information on whether: 1) the nature of the case allows for mediation, and 2) there are circumstances for waiving the notification of the possibility of mediation, even though the nature of the case allows for mediation. This solution does not correspond to what we obtain as research results, as discussed below. It should also be noted, in the context of the "stages" mentioned earlier (goal-general principles-procedural solutions), that mediation is rooted in the principle expressed in Article 13 CAP. This provision, which establishes the principle of amicable settlement of disputes, stipulates that public administration bodies, in cases where the nature of the case allows it, shall strive to settle disputes amicably and to determine the rights and obligations that are the subject of proceedings within their jurisdiction, in particular by taking the following actions: 1) encouraging the parties to reach a settlement in cases involving parties with conflicting interests; 2) necessary to conduct mediation. Public administration bodies shall take all measures justified at a given stage of the proceedings to enable mediation or the conclusion of a settlement, and in particular shall provide explanations about the possibilities and benefits of amicable settlement of the case.

4. OWN RESEARCH ON ADMINISTRATIVE MEDIATION

We found it particularly interesting to verify the research hypothesis that "administrative mediation regulated in the Polish Code of Administrative Procedure is a dead institution." The year of publication of this text marks seven years since the implementation of this institution into the Polish administrative law system. It seems cautious to say that this has not been a "lucky seven" for this institution. At the beginning of our research, on 23 April 2024, we sent an email to ten randomly selected municipalities in the Lublin region (both rural and urban municipalities to ensure relative diversity of the research group) with the following question: "Dear Sirs, acting pursuant to the Act on Access to Public Information, I kindly ask you to provide information on whether, in the years 2021-2023, the municipal

authorities participated in administrative mediation referred to in Chapter 5a CAP. If so, please indicate the number of such proceedings broken down by year. The information obtained will be used for research purposes aimed at changes in the Code of Administrative Procedure. Please reply to the e-mail address from which this request was sent." To expand on the hypothesis outlined above, it should be noted that the aim of this study was to verify the research question of whether, in recent years, administrative mediation has been an active institution used to conduct administrative proceedings in municipalities. We assumed the hypothesis as above, i.e. that administrative mediation is a "dead" institution, a facade, and despite extensive regulation in the Code of Administrative Procedure, it does not fulfil its guarantee role. The results of the study verify the hypothesis positively. Of course, there may be comments about the need to expand the research, and of course, the research can be expanded for the sake of greater representativeness. Nevertheless, the results obtained so far send a serious warning to legislators that administrative mediation is a dead institution and, therefore, one could venture to say that it is unnecessary.

The research results lead to the following conclusions:

Municipality	Date of response	Number of proceedings
Milanów	26.04.2024	0
Puławy	30.04.2024	0
Biłgoraj	30.04.2024	0
Nałęczów	02.05.2024	0
Dębowa Kłoda	06.05.2024	0
Bychawa	06.05.2024	0
Włodawa	06.05.2024	0
Lublin	07.05.2024	0
Biała Podlaska	10.05.2024	0
Zamość	17.05.2024	0

Not a single administrative mediation procedure has been conducted in any (!) municipality over the last three years. Two municipalities failed to respond within the deadline, doing so only after receiving a reminder. It is significant that both urban and rural municipalities do not find practical application for administrative mediation. Therefore, it can undoubtedly be stated on the basis of the above that administrative mediation in local government units at the municipal level is not used and is therefore a dead institution. Of course, in response to possible objections, it should be noted that further research is necessary, including on a research group other than local government units. This is a task for the legislator. The results we have obtained provide a basis for such in-depth research and clearly signal a problem we have in the legislation.

Of course, we humbly accept any objections that may arise regarding the questionable applicability of this research. It may well be that in other regions of Poland, administrative mediation is extremely popular and is used in hundreds of administrative cases. Although we have not found such results in the literature, we do not rule them out entirely. The study has a different purpose. It should provide an impetus for in-depth analysis, which, in our opinion, is lacking. On the one hand, as a state acting through its legislature, we are developing the institution of mediation by requiring that every administrative case be examined from this perspective and that information about this fact be included in the files. On the other hand, this small study, conducted with private funds, shows that over the course of several years, in various municipalities (both small and large), this institution simply does not function. In our opinion, this gives pause for thought.

This problem is further corroborated by statistical data published by the Supreme Administrative Court. These data concern the area of administrative court mediation, not administrative mediation, but they nevertheless show conclusions consistent with those previously made. As a natural "extension" of the administrative process, the administrative court process is based in many areas on similar assumptions, and therefore some of the problems are common to both administrative and administrative court proceedings. It is therefore worth analysing both together. Following Jan Zimmermann, we believe that administrative court proceedings concern "in essence all administrative proceedings, they are their sure, contractual continuation and instrument of control, and on the other hand, being their extension, they take over many of their features, adding their own" [Zimmermann 2017, 249] . As indicated by the Supreme Administrative Court in its annual report for 2023, "the purpose of mediation is to enable the parties to a dispute, with the assistance of a mediator, to reach an agreement without going to court." The institution of mediation is regulated by Articles 115-118 of the Act of 30 August 2002 – Law on proceedings before administrative courts. Despite the amendment of the mediation procedure, as in previous years, this institution has not found wider application in administrative justice. In 2023, one request for mediation was submitted, mediation proceedings were initiated and the case was resolved. This can be explained by the speed and efficiency of ordinary proceedings. The current duration of 6-12 months for the examination of most cases means that conducting any mediation proceedings would not contribute to speeding up the proceedings, which is one of the key advantages of mediation. Detailed data on the impact and number of cases settled in mediation proceedings in 2011-2023 are presented in the table below.[7]

[7] See Naczelny Sąd Administracyjny, *Informacja o działalności sądów administracyjnych w 2023 roku*, Warszawa 2024, p. 19.

Year	2011	2012	2013	2014	2015	2016	2017	2018	2019	20	2021	2022	2023
Proceedings initiated in cases	23	25	8	10	8	8	1	6	1	3	8	1	1
Case resolved	8	4	5	4	1	0	0	1	1	2	1	1	1

The report uses very accurate and concise wording to state that the institution of mediation "has not found wider application", which also applies, *by analogy*, to mediation under the Code of Administrative Procedure. There too, as we have indicated above, mediation has not found wider application. In summary, mediation has failed in both areas of proceedings. Regardless of how we describe this phenomenon – whether more diplomatically, using phrases such as "failure to gain application or popularity", or stating that it is a dead institution – we see a problem that should prompt the legislator to take action. In our opinion, it seems reasonable to consider abolishing this institution first. Due to the fact that, based on the results of empirical research, the institution and the regulations governing it remain dead at present, the legislator should abolish it. However, this is a final and minimalist solution. Nevertheless, it is strongly justified. If something does not work in the long term – and this is the case here – should we not proceed as above in order to achieve clarity of law and reduce unnecessary regulations in legal transactions? Secondly, it is also reasonable to consider the possibility of pursuing a more effective education policy aimed at raising awareness of the advantages of mediation. It seems that administrative mediation is not very widespread. Nevertheless, from the perspective of participants in legal transactions, voluntary forms of dispute resolution are optimal because they always give the parties the opportunity to work out a mutually acceptable solution. However, this raises at least three fundamental questions. Did it make sense to implement an institution typical of private law into the field of administrative law, and are there any areas where there is room for mediation [Kokoszkiewicz 2017, 89-10]? Are the multiple educational activities that have taken place over the years insufficient and is there a need to intensify them? Therefore, would such an action not be essentially an attempt to "convince the unconvinced"? The example of the right to waive an appeal shows that there is no need for promotional campaigns to convince participants in legal transactions of the need for a particular legal institution. Finally, from the perspective of procedural efficiency, which was highlighted by the Supreme Administrative Court, does it make sense to maintain this institution when administrative and administrative court cases are handled efficiently?

CONCLUSION

Summarising the content presented so far, we believe that we can first refer, in a somewhat popular scientific manner, to the message conveyed by William Shakespeare's "The Merchant of Venice", which is also rooted in Polish culture. It is contained in the statement "all that glitters is not gold". We can apply this conclusion, this statement, to legal systems, and in particular to Polish administrative law. It reveals institutions which, despite their significant axiological value, remain nothing more than slogans. Meanwhile, the legal security of individuals, which is closely linked to the highest values, is a special good. It is a good that the state has a duty to protect. This should be achieved through the presence of appropriate regulations in the legal system.

The key here is to understand the word "appropriate" correctly. There is no uniform and simple rule that can be applied to the entire legal system of a given country and which would allow for obtaining this "appropriate" law. There is therefore a need for a methodical approach in this area, limited to selected, partial areas. The Polish administrative process is an excellent area of this type. It reveals the presence of a number of general principles that are axiological in nature, which should be assessed positively. However, their application is debatable, which has led to certain discrepancies in doctrine. To put it simply, we can ask whether they should (and can) be applied directly or not. Although this is beyond the scope of this text, it may be difficult to answer this question in the affirmative. What we mean to say is that while the presence of general regulations in a given legal act – such as the general principles discussed here – is justified, specific regulations enabling the effective implementation of these principles should constitute a separate legal entity. In other words, being rooted in higher-order rules, they should specify them and enable their effective application in practice, which serves the measurable implementation of the values expressed in the principles. We express our concern that, if this is not the case, there is a considerable risk that the norms contained in the principles will be merely a facade (legislative placebo). Meanwhile, such facades are extremely undesirable in a legal system, leading to its weakening and, in extreme cases, even paralysis.

Among the proposals *de lege ferenda*, we see a need to revise the current content of the Code of Administrative Procedure, although this is not an exhaustive list. There is certainly a need for a broad, holistic approach to the area of administrative law, if only because of the close interconnection between its various institutions, which leads to mutual interactions. A model example here is the interface between administrative and administrative judicial control. Such a revision requires comprehensive research and, consequently, the elimination of unnecessary and obsolete institutions that do not serve the state and the law. At the same time, there is a need to simplify, speed

up and reduce the cost of procedures where this is reasonable and ensures respect for the principles of justice. We have shown examples of both types of measures on the basis of our own research and reflections on it. As we have pointed out several times, we do not presume to claim the right to indicate the only correct solutions. Such solutions can only arise as a result of thorough and long-term reflection, preceded by representative research. However, it seems that certain signals, which are relatively easy to observe, should prompt those responsible for the law to reflect, including critical reflection. Perhaps, in our search for complex solutions and in conducting extensive research, we are missing the point presented in the so-called dead horse theory.

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THE PUNITIVE MEASURE OF DEMOTION AFTER AMENDMENTS TO THE CRIMINAL CODE INTRODUCED ON 7 JULY 2022

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Abstract. Demotion is considered to be one of traditional measures of repressive nature imposed on soldiers. This punitive measure is an important element of the punishment system in Polish military criminal law. This article is aimed at determining whether the amendment of the Criminal Code of 7 July 2022 fulfilled all the goals intended by its drafters. The author of this article intends to reconstruct and provide a critical analysis of the currently applicable model of ordering the punitive measure of demotion. A number of research methods were applied to conduct the assumed research. Most of the paper uses the formal dogmatic method earmarked at analyzing the legal provisions currently in force. Additionally, the paper uses the method of axiological analysis of the law. That method was used to determine socially relevant values, which the legislature brought to the forefront while enacting the amendments. The historical legal method was used as an auxiliary tool, to a small extent, while analyzing the legal provisions previously in force.

Keywords: punitive measures; military service; demotion; military rank.

INTRODUCTION

Demotion is considered to be one of traditional measures of repressive nature imposed on soldiers. The measure can be viewed as kind of "infamy affecting also the aspects of the service associated with honour, dignity, prestige" [Stefański 2022, 232]. As held by the Supreme Court: "Demotion is not 'a monetary penalty' but a measure involving a repression mechanism, which evokes honour-related penalties traditionally imposed on soldiers. The *ratio legis* behind this punitive measure is to protect the authority arising from the fact of holding a military rank, without which proper functioning of the army would be impossible as it has an inherent hierarchical structure."[1]

[1] Judgment of the Supreme Court of 16 April 2019, ref. no. VI KA 5/19, Lex no. 2677119.

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The Act of 7 July 2022 amending the Criminal Code act and some other acts[2] entered into force on 1 October 2023. The amending act broadened the scope of application of the punitive measure of demotion. This article is aimed at determining whether the amending act fulfilled all the goals intended by its drafters. The author of this article intends to reconstruct and provide a critical analysis of the currently applicable model of ordering the punitive measure of demotion. A number of research methods were applied to conduct the assumed research. Most of the paper uses the formal dogmatic method earmarked at analyzing the legal provisions currently in force. Additionally, the paper uses the method of axiological analysis of the law. That method was used to determine socially relevant values, which the legislature brought to the forefront while enacting the amendments. The historical legal method was used as an auxiliary tool, to a small extent, while analyzing the legal provisions previously in force.

1. *RATIO LEGIS* BEHIND THE AMENDMENTS INTRODUCED

Placing the legal provisions concerning demotion in the military part of the Criminal Code resulted in that courts of general jurisdiction could not apply that measure in cases of reservists and veterans who committed a criminal offence while not being active soldiers. Thus, the result of placing demotion in the general part of the Criminal Code makes it possible to apply that measure also to reservists and veterans. Broadening the scope of application of the punitive measure of demotion was intended by the drafters to stress that high ethical standards and principles of criminal liability should apply equally to all soldiers, both the ones who are on active duty, and those who are reservists or veterans. As indicated in the draft act: "In the current legal regime, it is impossible to impose that measure on reservists and veterans if, at the time of committing the offence, they were not soldiers (on active duty). It is an erroneous solution since letting a person who, after completing their military service, breached their still binding military oath and the duty of loyalty keep the military rank held is obviously contrary to the principles of community life and social co-existence. It is so as it shows the state's passive acceptance of glaring and ostentatious violation of legal norms by a person who should be characterized by exceptional law-abiding attitude and integrity. After one becomes a reservist or veteran, the vocational skills become irrelevant as the profession is no longer actively pursued, but the ethical and moral qualifications never cease to be of importance. Therefore, the draft act provides for broadening the scope of potential application of the punitive measure at issue and consequently it will be possible to apply demotion

[2] Journal of Laws item 2600 as amended.

not only to a person who, at the time of committing a criminal offence, was an active soldier, but also to reservists and veterans. This will ensure axiological coherence of criminal law as in the current legal regime there is a lack of equal treatment in that respect and unjustifiably preferential treatment of reservists and veterans."[3]

2. GENERAL CHARACTERISTICS OF PUNITIVE MEASURES

Punitive measures are a significant tool of the state's criminal policy. Jurisprudence asserts that transformations in the system of punitive measures introduced quite frequently in recent years confirm the increasing role of that form of the state's reaction to a crime. As stated by Damian Szeleszczuk: "One may predict that their significance will even increase in the future. They have become very flexible tools, by means of which the legislature shapes the criminal policy, especially where there is a need to make adjustments to it and steer it in a more repressive and generally preventive direction" [Szeleszczuk 2022b, 33]. Punitive measures may fulfill a wide range of functions: repressive (e.g. making a judgment public, deprivation of public rights), preventive (e.g. prohibition on entering a mass event; prohibition on entering gambling centres and on participation in gambling; order to temporarily leave the premises occupied jointly with the injured person; vehicle driving ban) and compensatory (e.g. monetary compensation) [Ziółkowska 2023, 271]. As a result of the amending act discussed here, the punitive measure of demotion was placed in the general part of the Criminal Code[4] in the list of punitive measures set out in Article 39 of the act concerned. As aptly noted by Marek Siwek: "the composition of that list indicates a variety of punitive measures and *ipso facto* the possibility of application in case of a perpetrator's violation of the legal order in various fields" [Siwek 2010, 106]. The above mentioned punitive measures may be divided into measures for a term (e.g. deprivation of public rights; prohibition on occupying a specific position; prohibition on pursuing a specific profession or carrying on a specific business; ban to contact certain people; ban to approach certain people) and one-off punitive measures (e.g. demotion, monetary compensation, making a judgment public).[5] In the light of the currently applicable Criminal Code, it is possible to order punitive measures: individually, collectively; using security instruments or using probation instruments [Ziółkowska 2023, 271]. In line with settled

[3] Draft act – Sejm Print No. 2024 Sejm of the IX Term, https://orka.sejm.gov.pl/Druki9ka.nsf/0/2851BC6F8739C593C12587F10042EF6E/%24File/2024.pdf [accessed: 22.03.2025].

[4] Act of 6 June 1997, the Criminal Code, Journal of Laws of 2025, item 383 [hereinafter: CC].

[5] Judgments of the Supreme Court: of 30 September 2020, ref. no. IV KK 274/20, Lex no. 3126178; of 3 March 2022, ref. no. IV KK 7/22, Lex no. 3408495.

court rulings and opinions of jurisprudence [Kala and Klubińska 2024, 83] measures which are not for a term, i.e. compensatory measures, monetary compensation, making a judgment public, demotion and forfeiture, cannot be combined.[6] Combining solely punitive measures which are for a term is justified mainly by the nature of such penal measures, but also by the need to rationalize to a certain extent the execution of the punitive measures ordered [Kosierb 2015, 141].

3. RANGE OF PERSONS WHO MAY BE SUBJECTED TO DEMOTION

Pursuant to Article 43bb CC a court may order demotion with regard to a person who at the time of committing the offence was a soldier, reservist or veteran. Only a person holding a military rank higher than 'a private' may be subjected to demotion [Kozłowska-Kalisz 2025]. That is because that punitive measure consists in one's losing the military rank held and returning to the rank of a private. The amending act broadened the range of persons who may be subjected to demotion. Under previous legal provisions, that measure could be applied only to soldiers on active duty. At present, demotion may also be ordered when *tempore criminis* the perpetrator was a reservist or a veteran [Karnat 2023]. The professional literature of the subject provides that "it is inadmissible to subject to demotion a person who at the moment of committing the criminal offence was not a soldier, reservist or veteran. Obtaining a higher military rank in the period between committing the criminal offence and ruling does not prevent a court from ordering that punitive measure" [Szeleszczuk 2024, 264]. Nevertheless, differentiating between soldiers on active duty and reservists may give rise to certain doubts. Pursuant to Article 115(17) CC a soldier is person who is on active duty, except for territorial military service provided on a call. On the other hand, pursuant to Article 130(1)(3) of the Homeland Defence,[7] active military service consists in providing: recruit military service; territorial military service; service in active reserve on the days of such service and while participating in military training as part of passive reserve; professional military service; service in case of mobilization and at the time of war. Thus, a reservist while providing service in active reserve on the days of such service and while participating in military training as part of passive reserve has the status of a soldier. Such regulation of Article 43 bb CC may give rise to justifiable doubts in terms

[6] See: Judgment of the Court of Appeal in Białymstok of 17 October 2013, ref. no. II AKa 123/13, Lex no. 1391845; judgment of the Supreme Court of 24 March 2011, ref. no. IV KK 27/11, Lex no. 794513.

[7] Act of 11 March 2022, the Homeland Defence, Journal of Laws of 2024, item 248 as amended [hereinafter: HDA].

of interpretation, and consequently raise concerns as to the jurisdiction of courts of general jurisdiction and military courts. Ewa Płocha aptly states that adequately formulated Article 43bb CC should cover soldiers, reservists not on active duty (passive reserve) and veterans [Płocha 2024].

It is worth mentioning that the amending act discussed here introduced also another change consisting in replacement of the phrase "the moment of committing the offence" with the phrase "the time of committing the criminal offence" with a view to adjusting that phrase to the terminology present in the Criminal Code. As stated in the justification of the draft act: "Under Article 6(1) CC, a criminal offence is considered to be committed at the time when the perpetrator acted or omitted to act as he was obliged. The Criminal Code does not define "the moment of committing the criminal offence," which results in inability to apply the provision on demotion on the basis of linguistic interpretation, and the application becomes possible only after rectifying the error of the legislature and applying the *analogia legis* interpretation. The legislature should, however, where possible, strive at excluding the necessity to apply such interpretation and enact precise legal provisions. Otherwise, theoretical discrepancies may arise in terms of determining the scope of meaning of the term set out in the act as it is not defined in Article 6(1) CC e.g. whether or not it determines only a point in time when the perpetrator begins or ends the conduct instead of referring to a time period mentioned in Article 6(1) CC, which defines the term "the time of committing the criminal offence."[8]

4. PREREQUISITES FOR ORDERING DEMOTION

In the light of Article 43ba(2) CC, a court may order demotion in case of conviction of an intentional crime if the type, method and circumstances of its commission allow the court to deem the perpetrator to have lost the characteristics required to hold a military rank. As noted by D. Szeleszczuk: the fact of having lost the characteristics required to hold a military rank has to result from an assessment of the type of offence, as well as the method and circumstances of its commission. Such assessment should be comprehensive and should take into account all the components (the type of the offence, the method and circumstances of its commission). It cannot be based solely on some factors which are decisive as to losing the characteristics required to hold a military rank [Szeleszczuk 2022a, 127]. It is specified in the justification of the draft amending act that providing professional military service inseparably entails not only high professional qualifications, satisfaction of applicable physical and mental requirements, but also social respect,

[8] Draft act…, p. 13.

specific ethical standards and appropriate ethical approach.[9] A similar view is presented by the Supreme Court in its rulings. In one of the rulings, it was held that: "The circumstance of 'excellent military service' is not a sufficient reason to decide that there are no grounds to order demotion. In order to decide whether it is advisable to order such measure or not, one must look at the type of the offence, the method and circumstances of its commission indicating that the perpetrator has lost the qualifications required to hold a military rank. The Supreme Court is of the view that as the accused, together with civilians, committed crimes related to management of public funds, showing considerable involvement in the criminal joint conduct, and his conduct was aimed at obtaining a proprietary gain, then it should be assumed that he has lost the ethical and moral values, as well as the prestige and social acceptance to such an extent that he should not hold the rank of an officer, even in reserve."[10] According to the Supreme Court: "having good opinions as to one's work or having been subjected to other punitive measures cannot effectively withhold ordering demotion as a punitive measure. That is because such measure removes from the military community soldiers who held a specific military rank but who by their actions contravened the principles of military service construed as 'a social mission of exceptional significance and particularly dignified nature'."[11] In another ruling, the Supreme Court ruled that: "The circumstance that the crime committed by a soldier does not violate the military and service-related interests but concerns a private or personal aspect of life does not prevent a court from ordering an additional penalty in the form of demotion."[12] What is also important in terms of the capability to hold a rank and provide military service is the wording of Article 83(1) HDA. In line with that provision a person who satisfies the following requirements may be called to provide military service (and at same time to obtain the first military rank – a private): has Polish citizenship; has unblemished reputation; has physical and mental capacity to provide military service; is at least 18 years old; has not been convicted of an intentional crime; is not assigned to substitute service; is not exempt from the duty to provide active military service in case of mobilization and at the time of war; has not been assigned, on an organizational and mobilization basis, to serve in a militarized unit and has the education required for a given military rank. Pursuant to Article 140(12)(1-3) HDA soldiers on active duty may be awarded at the time of peace a higher military rank if

[9] Ibid., p. 12.

[10] Judgment of the Supreme Court of 17 October 2006, ref. no. WA 28/06, OSNwSK 2006, No. 1, item 1964.

[11] Judgment of the Supreme Court of 25 August 2005, ref. no. WA 20/05, OSNwSK 2005, No. 1, item 1566.

[12] Resolution of the Supreme Court of 20 August 1970, ref. no. RNw 42/70, OSNKW 1970, No. 11, item 136.

they satisfy jointly the following requirements: have obtained positive results in military training; have obtained evaluation at least at the very good level in an opinion as to their work; have completed a military course or training if it is required for the military rank that they are to be awarded.

The legislature, while transferring on an editorial basis the wording of normative demotion from the military part to the general part, decided to delete, in the prerequisites for ordering that measure, the phrase "especially in the case of acting with a view to obtaining a proprietary gain". That phrase constitutes "a typical contextual particle, the function of which is to make the preceding text more specific. At the same time, it contains certain preferential content exemplifying designations forming a set of situations proving the loss of characteristics required to hold a military rank" [Szeleszczuk 2023, 109-10]. The legislature resigned from that phrase, taking into account the remarks made repeatedly by the jurisprudence. The professional literature of the subject indicated that the punitive measure of demotion is ordered solely in the case of committing an intentional crime which causes considerable social harm and in the case of which the circumstances, motives of the perpetrator and the method of commission are particularly reprehensible. This being the case, putting emphasis on acting with a view to obtaining gains would be "seriously exaggerated" [Marek 2010, 683; Hoc 2010, 1337; Kutzmann 2019]. As indicated in the justification of the draft act, the court's putting emphasis on situations where that punitive measure may especially be applied "results in unjustifiable stress on specific categories of crimes and omitting other crimes which may be even more deserving of penalty (e.g. murder or rape)."[13]

The punitive measure in the form of demotion has a facultative nature and its application is at the discretion of the court [Karnat 2023]. As indicated in the justification of the draft, a court at its own discretion will be able to "determine whether *in concerto* ordering such punitive measure is not too severe for the perpetrator. It will be possible for the criminal reaction to take into account special circumstances justifying not ordering it."[14] According to the Supreme Court: "demotion cannot be ordered in separation from the significance of the crime committed by the soldier – the type of the crime, the extent of social harm caused, the method of action, and the personality aspects of the accused. It should be ordered in the case of conviction of a crime that is an act causing considerable social harm if the method of its commission, the circumstances and motives of the perpetrator are particularly reprehensible and it is sufficient to determine that the perpetrator has lost the characteristics required to hold a military rank."[15]

[13] Draft act…, p. 13.

[14] Ibid.

[15] Judgment of the Supreme Court of 19 April 2021, ref. no. I KA 2/20, Lex no. 3232219.

5. CONSEQUENCES OF ORDERING DEMOTION

Pursuant to Article 43ba(1) CC demotion entails in its essence the loss of the military rank held and return to the rank of a private[16]. In that respect there is no need to specify in more detail the consequences of demotion in the operative part of a criminal judgment [Filipczak 2025, 140]. Demotion to a certain extent overlaps, in terms of contents, with the punitive measure of deprivation of public rights. That is because deprivation of public rights causes further reaching consequences then demotion, therefore somehow it "encompasses" demotion and, as a consequence, also results in the loss of the military rank held and return to the rank of a private [Budyn-Kulik 2015, 112]. The Supreme Court also held that in the case of ordering deprivation of public rights the order of demotion is non-applicable as these punitive measures have the same consequences.[17]

Under Article 237 of the Executive Criminal Code[18] in case of ordering with regard to a soldier expulsion from professional military service or demotion a court orders the execution of the measure imposed by an appropriate commander and notifies a military body competent for staff-related matters about the wording of the ruling. A court competent for issuing the order concerned is the court which issued a judgment in the first instance [Płocha 2024]. The act does not specify precisely which body will perform the role of the "appropriate commander" [Postulski 2017, 1078]. In line with a resolution of the Supreme Court of 1971, the term "appropriate commander" means a superior having disciplinary authority of a commander of a regiment (of equivalent level).[19] On the other hand, in the case of a soldier who is not subject to disciplinary authority of such commander, "the appropriate commander" shall be construed as an adequately higher disciplinary superior. The professional literature of the subject indicates continued relevance of the above mentioned resolution [Dąbkiewicz 2020]. As noted by Piotr Karlik, a court, while ruling on the execution of the demotion ordered, should send to the appropriate commander, together with an instruction, an official copy of the ruling or an official copy of an excerpt from the ruling. As regards the issue of notifying the military body competent for staff-related matters, it will be sufficient to send short information in that respect [Karlik 2023, 700]. Pursuant to Article 71(2)(2)(d) HDA, information about demotion ordered on a final and non-appealable basis is collected and processed in military records. The records are kept by the Minister of National Defence with assistance of competent authorities.

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16 More about military ranks see: Articles 134 and 135 HDA.

17 Judgment of the Supreme Court of 8 July 1983, ref. no. Rw 548/83, OSNKW 1984, No. 1, item 18.

18 Act of 6 June 1997, the Executive Criminal Code, Journal of Laws of 2024, item 706 as amended.

19 Resolution of the Supreme Court of 1 February 1971, ref. no. U 3/70, OSNKW 1971, No. 6, item 93.

Pursuant to Article 128(1)(5) HDA a soldier who provides military service is exempt from military service, except for professional military service, compulsory recruit military service, and service provided in case of mobilization and at the time of war, in the case of having lost the military rank or demotion. Under Article 226(11) HDA a professional soldier is exempt from professional military service as a result of having lost the military rank or demotion. On the other hand, pursuant to Article 229(2) and (3) HDA, exempting from professional military service in case of ordering demotion occurs by operation of law as from the date when the ruling becomes final and non-appealable. Should this be the case, the commander of the military unit in which the professional soldier provides service confirms the fact of exempting the soldier from professional military service by way of a personal order issued for record-keeping purposes.

In line with Article 142(2) HDA, if a judgment of court ordering the punitive measure of deprivation of public rights or demotion becomes final and non-appealable, the soldier loses the military rank held, at the same time keeping the military rank of a private (a mariner). It is an exception from the rule provided by Article 135(5) HDA, according to which military ranks are life-long. Under Article 142(3) HDA if a final and non-appealable court judgment in which the punitive measure of deprivation of public rights or demotion was applied is reversed, the soldier regains the formerly held military rank. In the light of Article 142(4) and (5) HDA, a soldier may be re-awarded a military rank for exceptional achievements at work or exceptional services for the benefit of the Republic of Poland. The Minister of the National Defence decides on the restitution of the military rank by way of an administrative decision.

Pursuant to Article 10 of the Act of 10 December 1993 on Retirement Benefits for Professional Soldiers and their Families,[20] the right to retirement benefits under the act is not vested in a soldier who has been convicted by way of a final and non-appealable court judgment of a crime specified in Article 130 CC or with regard to whom the punitive measure of deprivation of public rights or demotion has been ordered for a crime committed before release from service. As specified in the justification of a draft act: "Since, while ordering the punitive measure of demotion, it is deemed that the perpetrator has lost the characteristics required to hold a military rank, it is not justifiable for such person to have the right to retirement benefits conditional upon holding such military rank and their retirement benefits should be solely determined on the basis of generally applicable rules."[21]

[20] Journal of Laws of 2025, item 305.

[21] Draft act…, p. 12.

CONCLUSION

The amending act discussed in this article fulfills all the goals intended by its drafters and deserves praise. Demotion was given the status of a generally applicable punitive measure. Placing demotion in the general part of the Criminal Code resulted in the possibility of ordering that measure also with regard to reservists and veterans. That changed the previous situation of inequality and unjustifiably preferential treatment of reservists and veterans.

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A GLOSS ON THE CASE OF THE WILLS AND INHERITANCE OF IGNACY JAN PADEREWSKI

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Abstract. On June 29, 1941, Ignacy Jan Paderewski (1860-1941), an outstanding pianist, composer, and politician of international renown, ended his life at the Buckingham Hotel in New York. His life and work have already been the subject of extensive historiography, comprising around a thousand publications at the beginning of the 21st century. However, among these numerous Paderewian studies, it is difficult to find works that deal with the Master's wills and his considerable estate. This gloss is devoted to explaining certain issues concerning the last two wills of Ignacy J. Paderewski from 1929 and 1930, as well as the case of his half-siblings, Józef and Maria, the heirs to his estate. It is based on archival materials stored in the State Archives in Bydgoszcz, in particular documents and materials from the inheritance proceedings that took place in Bydgoszcz between 1947 and 1952, as well as the minutes of Józef Paderewski's rehabilitation hearing of May 23, 1946.

Keywords: last will; inheritance; Ignacy Jan Paderewski; documents; testator.

INTRODUCTION

On June 29, 1941, Ignacy Jan Paderewski (1860-1941), an outstanding pianist, composer, and politician of international renown, ended his life at the Buckingham Hotel in New York. His life and work have already been the subject of extensive historiography, comprising around a thousand publications at the beginning of the 21st century [Janczewska-Sołomko 2001, 214-49]. However, among these numerous Paderewian studies, it is difficult to find works that deal with the Master's wills and his considerable estate. This gloss is devoted to explaining certain issues concerning the last two wills of Ignacy J. Paderewski from 1929 and 1930, as well as the case of his half-siblings, Józef and Maria, the heirs to his estate. It is based on archival materials stored in the State Archives in Bydgoszcz, in particular documents and materials from the inheritance proceedings that took place in Bydgoszcz between 1947 and 1952, as well as the minutes of Józef Paderewski's rehabilitation hearing of May 23, 1946.

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As mentioned above, only a few researchers and journalists have dealt with the issue of Paderewski's wills and his legacy, and even they have not been immune to various mistakes and errors. Among those who have researched these issues are Małgorzata Perkowska-Waszek and Maciej Kledzik. The former, in her study *Za kulisami wielkiej kariery. Paderewski w dziennikach i listach Sylwina i Anieli Strakaczów 1936-1937* ["Behind the scenes of a great career. Paderewski in the diaries and letters of Sylwin and Aniela Strakacz 1936-1937"], Kraków 1994 (introduction and commentary) and in an essay published on the Internet entitled *Testament Ignacego Jana Paderewskiego – fakty i mity* ["The Will of Ignacy Jan Paderewski – Facts and Myths"], she presented her thoughts on the wills of 1929 and 1930 and the heirs to the estate. However, she did not avoid simplifications and errors. In these studies, she sharply criticizes the Swiss writer Simone Giron de Pourtalès, author of the controversial book *Tajemnica testamentu Paderewskiego* ["The Mystery of Paderewski's Will" 1996], which is an attempt to explain the matter of I. J. Paderewski's will and inheritance from 1930.

In turn, historian M. Kledzik, in his essay *Spadek po Ignacym Janie Paderewskim* ["The Legacy of Ignacy Jan Paderewski"], published in a small commemorative anthology entitled *Służyć będę aż do śmierci. Prezydent Ignacy Jan Paderewski* ["I Will Serve Until Death: President Ignacy Jan Paderewski"] (2018), emphasizes that as a result of "communist manipulation," squandering and endangering the fortune of this great Pole. Earlier, in 1991, Kledzik published three long articles in the Krakow-based magazine *Przekrój* entitled "What Remains of Paderewski?" [Kledzik 1991a; Idem 1991b; Idem 1991c].

In them, he described the struggle for the artist's inheritance. J. Jasieński argued with him, rightly pointing out, among other things, that "Paderewski's vast fortune was fragmented after his death and largely seized by people from his immediate circle" [Jasieński 1991; Lachs 1991]. It is worth noting here that the weekly magazine *Przekrój* was probably the first in Poland to publish, on May 8, 1949, correspondence from its own reporters, J. Górski and K. Szturemski, concerning the search for Paderewski's will from 1930 and its opening on April 1, 1949, at the Palais de Justice in Paris [Górski and Szturemski 1949]. In April 1957, Jerzy Kuliński commented on Paderewski's will and inheritance in the Bydgoszcz-based *Ilustrowany Kurier Polski* newspaper, publishing two of three articles from the series *Na spadkowej szachownicy* ["On the inheritance chessboard"] [Kuliński 1957a].[1] His goal was to remove various speculations, ambiguities, and understatements, and to arrive at the whole truth, which, as he emphasizes, "in no way detracts from the memory of this great Pole." Kuliński's articles, based on

[1] The third article in the series has not been published for unknown reasons.

solid sources (documents and materials from the inheritance proceedings in Bydgoszcz), influenced later research on the issue. In 1991, articles on Paderewski's will and inheritance from 1930 appeared in daily newspapers.

And so, in early 1991, the Bydgoszcz-based *Ilustrowany Kurier Polski* published an interesting article entitled *Tajemnica testamentu Paderewskiego* ["The Mystery of Paderewski's Will"][2] by Krzysztof Sidorkiewicz, a judge at the District Court in Bydgoszcz, who used documents from the inheritance proceedings in Bydgoszcz in 1947-1952. At the end of 1991, the same author returned to the subject of Paderewski's will in an article entitled "The Decimated Archive."[3] In it, he drew attention to the removal of the judge presiding over the inheritance case in the Bydgoszcz court and the destruction of court documents that were inconvenient for the authorities. The findings contained in Sidorkiewicz's articles were later referred to by the editors of *Przekrój* and *Życie Warszawy*.

1. IGNACY PADEREWSKI'S LAST TESTAMENTS

Ignacy Jan Paderewski, an outstanding pianist, also proved to be an extremely meticulous man when it came to financial matters. He often drew up wills in which he meticulously listed the assets and liabilities of his estate. He usually deposited these documents in banks, the first one in *Bank Handlowy* in Warsaw, and the last one in Morgan Bank in Paris. It should be emphasized here that Ignacy J. Paderewski was also known for his extensive philanthropic activities. Among the wills he drew up, the last two, from 1929 and 1930, deserve special attention. The 1930 will was a key document in the subsequent inheritance proceedings that took place after Paderewski's death in the 1940s and 1950s near Bydgoszcz.

I will begin with the will from 1929. On September 22 of that year, Paderewski fell seriously ill while staying at his Swiss country estate in Riond-Bosson. The doctors who were called diagnosed acute appendicitis and, given the danger of perforation and peritonitis, demanded immediate surgery. In this situation, Paderewski, a man of almost seventy, probably considering the risks involved in the operation, ordered his trusted notary and attorney Ernest Gonvers from nearby Morges to be brought immediately to Riond-Bosson to draw up a will. As he was unavailable, Marcel Gonvers, Ernest's son, also a notary working with his father, went to Paderewski. Paderewski and the notary worked late into the night to write his last will and testament. On September 23, 1929, Paderewski said goodbye to his wife Helena and his sister Antonina, married name Wilkowska, as well as his household staff,

[2] "IKP", no 3, from 4-6 I 1991.

[3] "IKP", no 243, form 17 XII 1991.

including Helena Lübke, Helena Paderewska's secretary, and went to a clinic in Lausanne, where he successfully underwent an appendectomy. According to the accounts of his household staff, Paderewski left no documents behind when he left Riond-Bosson. H. Lübke also did not find any. It is not known whether the notary Marcel Gonvers took the will with him when he left for Morges. After some time, he stated that his role was limited to signing the will in Polish and that he was never given the document [Giron de Pourtales 1996, 30-31; Landau 1935]. Although this will has not been found, the Gonvers confirmed before Swiss courts that it had been drawn up in 1929 [Giron de Pourtales 1996].

And one more important issue. At the end of November 1947, Monsignor Zygmunt Kaczyński, a friend of Paderewski, appearing as a witness in the case of the inheritance of I. J. Paderewski in the United States of America, testified under oath at the Municipal Court in Warsaw that during Christmas 1930 or 1931, he was at Paderewski's estate in Riond-Bosson. Paderewski fell seriously ill at that time and summoned a lawyer from Morges. He could not remember whether it was a notary or a legal advisor. Here, Father Kaczyński's memory failed him. As mentioned above, Paderewski fell seriously ill in September 1929, and the lawyer who was brought in was Marcel Gonvers. The rest of the witness's testimony was more important. "In the presence of myself and Henryk Opieński," he testified, "Paderewski signed his will. It contained the contents of his previous will and additions to it. In this will, Ignacy Jan Paderewski bequeathed all his real estate in Riond-Bosson, Morges, Switzerland, together with the facilities located there at the time: Morges, Switzerland, together with the equipment located there at the time: the library, his own memoirs, numerous memorabilia, all (movable and immovable) livestock and dead stock, without exception" [Kukliński 1947b; Lachs 1991].[4]

Father Kaczyński then listed a number of bequests to the Warsaw Conservatory of Music and many individuals. At the end of his testimony, he could not remember "whether the will was drawn up in official or private form." He also could not remember whether he had signed the will at that time. However, there is no doubt that Paderewski wrote down his last will and testament at that time. It should be noted that, according to the explanation of the Consular Agency of the Republic of Poland in Geneva on December 1, 1947, "the will drawn up in 1929 by the late I. J. Paderewski before notary Marcel Gonvers was initially deposited with his father, also a notary. After some time, people stopped talking about this will, and what happened to it remains a mystery to this day. The local office has no authority to summon notary M. Gonvers and request a copy of the will. Only

[4] APB, District Court in Bydgoszcz, 132-3/415, Letter from the Magistrate's Court (S. Gr.) in Bydgoszcz of 28 August 1948, card. 5; ibid., Minutes from the hearing of witness Monsignor Zygmunt Kaczyński at the Municipal Court in Warsaw on 29 November 1947, card. 65-66.

the prosecutor of the Republic and Canton of Geneva can take such action as a result of a complaint" [emphasis added – J.K.].[5]

Indeed, the Municipal Court in Bydgoszcz (recognizing the fact that the will had been drawn up) finally requested, at the end of March 1948, through official channels via the Ministry of Foreign Affairs, that the Public Prosecutor of the Swiss Republic ascertain "who currently holds the will of the late Ignacy Paderewski, and arrange for the will to be handed over and sent to the local court." In the event that the execution of the Court's request fell within the jurisdiction of another authority of the Swiss Republic, the Court requested that the letter be forwarded to that authority. At the same time, the Court requested "an explanation of the formal and substantive basis on which the Court of Peace in Morges issued a decision in 1941 stating that the sole heir of Ignacy Paderewski was his sister Antonia Paderewska Wilkońska."[6]

In his letter, the Municipal Court informed the Prosecutor about the fact that Paderewski had drawn up a will in 1929 and about the significance of Father Kaczyński's testimony in this case. The will was deposited, wrote the municipal judge, with a local notary, M. Gonvers, for safekeeping. The further fate of the document is unknown, apart from the "circumstantial evidence that Paderewski's former attorney, Henry Vallotton, collected it from the aforementioned notary in 1940." The court requested clarification "whether and to what extent it is true that, in connection with the search for Paderewski's will, criminal proceedings were or are being conducted against the notary in Morges, M. Gonvers, and with what result." However, these questions from the Municipal Court remained unanswered.[7] He continued to maintain extensive correspondence with Polish diplomatic and consular missions in Paris, Bern, and New York, sending them, among other things, requests for Józef Paderewski's power of attorney and issuing requisition notices to the relevant Swiss courts.[8] And so, at the end of December 1948, the Municipal Court in Bydgoszcz requested that three witnesses be examined under oath through judicial assistance. They were to testify on several circumstances, including, among others, "whether the witnesses are aware of any will that Ignacy Paderewski may have drawn up; when the will was drawn up; where the witnesses obtained information about the will."[9]

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[5] APB, District Court in Bydgoszcz, 1373/415, Letter from the Consulate General of the Republic of Poland in New York to S. Gr. in Bydgoszcz dated 12 February 1948, card. 64.

[6] Ibid., District Court in Bydgoszcz, 1373/415, Letter from the Consulate General of the Republic of Poland in New York, card. 64; ibid., 1373/416, Letter from Judge S. Gr. to the President of the Court of Appeal in Bydgoszcz dated 11 August 1949, card. 142-144.

[7] Ibid., 1373/415, Letter from S. Gr. in Bydgoszcz to the Prosecutor of the Swiss Republic in Bern dated 31 March1948, card. 121ff.

[8] Ibid., card. 122.

[9] Ibid., 1373/416, Letter from the Ministry of Foreign Affairs in Warsaw to S. Gr. in Bydgoszcz dated 4 December 1948 regarding requisitioning, card. 43-44 secret; ibid., Letter from the

Unfortunately, the files do not provide answers to these important questions. It is also unclear whether the appropriate court in Switzerland was found to deal with the Polish court's requisition order.

The will drawn up in 1929 during a serious illness, in haste, probably did not satisfy Paderewski and required additions and changes. It is therefore not surprising that by mid-1930 another will was ready, which Paderewski signed himself and personally deposited on September 30 of that year at Morgan Bank in Paris [distinction – J.K.]. The fact that this was another will is evidenced by a new amended provision concerning Paderewski's estate in Riond-Bosson. In 1929, the testator bequeathed this estate, I repeat, to the Polish Academy of Arts and Sciences in Krakow. In 1930, in accordance with Paderewski's last will, this estate, his long-time residence in Switzerland, which was, however, consuming "enormous amounts of money," "had to be liquidated as soon as possible" [emphasis added by J.K.]. At the same time, Paderewski requested that the movable property located in Riond-Bosson, i.e., furniture, silverware, sculptures, paintings, Chinese art artifacts, and the cellar (wine) not be sold, because "all these movable properties have a different purpose."[10]

In light of the above, it must be concluded that Ignacy J. Paderewski drew up two separate wills: one in 1929 and another in 1930. M. Perkowska-Waszek approached this issue differently, assuming that I. Paderewski deposited the will written in 1929 at Morgan Bank in Paris in 1930, where it was "found" in 1949. However, she did not explain where the completely different entries in these two documents concerning the property in Riond-Bosson came from. "It is, of course, irrelevant," she concludes, "whether the document drawn up in 1929 was the same document that was deposited in Paris in 1930, as each subsequent will was to cancel all previous ones..." However, for the Municipal Court in Bydgoszcz, the 1929 will was not a matter of no consequence, and it searched for it intensively, appealing to the Swiss courts [Perkowska-Waszek 1994a].

After Ignacy J. Paderewski's death on September 29, 1941, in New York, the issue of the artist and politician's inheritance became relevant. There was speculation as to whether he had made a will and where he had deposited it. Antonina Wilkońska, the natural heir to her brother Ignacy's estate, stated that she had not found his will. She testified in court that her brother had left behind neither a wife nor any half-siblings. According to her, Józef, Ignacy Paderewski's half-brother, and Maria, his half-sister, had died [Giron de Pourtales 1996, 190] more on this below. Sylwin Strakacz (1892-1973),

Ministry of Foreign Affairs in Warsaw to S. Gr. in Bydgoszcz, secret, urgent, card. 103-104; ibid., "Proclamation on the execution of requisitioning", card. 46.

[10] APB, District Court in Bydgoszcz, 1373/416, I.J. Paderewski's will, photocopy, p. VII.

the artist's personal secretary from 1919, Polish delegate to the League of Nations during World War II, and Polish consul general in Geneva and then in New York, was probably aware of the will. This is confirmed by Paderewski's handwritten note in French on the envelope containing his will from 1930, found in 1949. The testator wrote:[11]

Valid will belonging to Ignacy Jan Paderewski. In the event of the depositary's death, please hand it over to Mr. Sylwin Strakacz, who will come forward to collect it.

I. J. Paderewski
September 30, 1930

In a *postscript*, Paderewski added:

If Mr. Sylwin Strakacz is unable to collect this document within two months of Paderewski's death, the envelope should be returned to the depositary's heirs: Mrs. Helena Paderewska, his wife, or his sister Antonina Wilkońska; both residing in Riond-Bosson sur Morges, Switzerland.[12]

I.J.P.

By virtue of the will, which will be discussed later, Paderewski "established and appointed" Sylwin Strakacz as "the principal executor of my last will and testament"[13] [emphasis added – J.K.]. The principal executor of the will must have known beyond any doubt where Paderewski had deposited the document and been familiar with its contents. It followed from this that the testator had appointed as his heirs: Helena Paderewska (1856-1934), his wife, or Antonina Wilkowska (1858-1941), his sister.

In the event of the death of my beloved wife, I hereby appoint and designate my sister Antonina Wilkowska, née Paderewska, as my sole heir – Paderewski stated – subject to and conditional upon respecting and fulfilling my last will in full.[14]

The question arises as to whether she actually fulfilled her brother's last will. It should be noted here that Paderewski's wife Helena died in 1934, and Antonina, his sister, was an 83-year-old woman who was completely under Strakacz's influence. In this situation, the main executor of the testator's last will, a "strange man," had ample opportunity to take action aimed at seizing Ignacy J. Paderewski's inheritance. According to Joseph Blum, Paderewski's New York legal advisor, Strakacz had been acting according

[11] APB, District Court in Bydgoszcz, 1373/417, photocopy of the envelope containing the will.
[12] Ibid., 1373/416, I.J. Paderewski's will, photocopy, p. XII.
[13] Ibid., p. IX.
[14] Ibid., p. XIX.

to a clear plan for a long time, deliberately seeking to seize the entire estate of the late Ignacy Jan Paderewski for himself [Giron de Pourtales 1996, 293]. Years ago, M. Perkowska-Waszek came to Strakacz's defense, seeing him as a defender of Paderewski's legacy [Perkowska-Waszek 1994a].

It is significant that Strakacz remained silent for a number of years, effectively concealing the existence of the will and its location. It was not until November 1948, when testifying in the New York Surrogate Court (a court dealing with inheritance matters), that he confessed that the will, in which he was appointed as its executor, had been kept at Morgan Bank in Paris since 1930 [Giron de Pourtales 1996, 141]. A little earlier, in October of that year, the Bank confirmed in a letter to American lawyer J. Paderewski Wolter J. Bayer, following a telegram from Strakacz, that since June 29, 1941, it had a large sealed envelope in its safe, which had been deposited on September 30, 1930, under number 3966. During the war, this sealed envelope was not opened by the German occupation authorities [ibid., 141-42].

2. THE TESTATOR'S HALF-SIBLINGS AND THE ATTEMPTS AT CONCEALING THEIR EXISTENCE

It is characteristic that some of Paderewski's household members, especially A. Wilkońska and S. Strakacz, who arrived with him in New York in the fall of 1940, remained silent or tried to hide the existence of his half-siblings. This matter requires further clarification, especially since some of the facts differ from reality. First, however, a word about the Paderewski family tree, prepared by I. Paderewski in 1947 for the probate court in Bydgoszcz. Jan Paderewski, a professional farmer and tenant of estates, was born "around 1836-1840" and died in 1894 in Zhytomyr. He was married twice. From his first marriage to Poliksena Nowicka, he had children: Antonina Paderewska, married name Wilkowska, born in 1858. She died childless in October 1941 in America. Her husband died before World War II. The Wilkońskis had one son, who died several decades ago as a student at the gymnasium in Nezhin in the Chernihiv Governorate. One third of Wilkońska's estate was claimed by Sylwin Strakacz, Ignacy Jan Paderewski's former personal secretary, who informed Józef Paderewski that Wilkońska had bequeathed her share of the estate to him in her will and that the American judicial authorities had already recognized him as the heir. Ignacy Jan Paderewski was born in 1860 in Kuryłówka, Podolia Province, to this couple. He died on June 29, 1941, in New York. In 1880, he married Antonina Korsak, who died a year after the wedding. They had one son, Alfred, who died in Switzerland at the age of 20. Ignacy Jan Paderewski married for the second time in 1899

to Helena Baroness Rozen. She died in 1934. There were no children from this marriage.[15]

Jan Paderewski's second marriage to Anna Tańkowska, who died in 1897 in Zhytomyr, produced the following offspring: 1) Józef Paderewski, born on April 1, 1871, according to the Gregorian calendar, in Sudyłków in the Volhynia Governorate, retired secondary school teacher, residing in Bydgoszcz at 23 Kościuszki Street; 2) Stanisław Paderewski, born in Sudyłków, Volhynia, in 1873, mining engineer, single, who died as a Polish legionnaire at Krzywopłoty in 1914; 3) Maria Paderewska, born in 1876 in Sudyłków, unmarried, private teacher, residing in Zhytomyr in the USSR.[16]

Józef, Paderewski's half-brother, had been presumed dead in Riond-Boson since 1939. The news of his death came from Poland from an unknown source. It was confirmed by money transfers sent to Józef by Wilkowska via a Swiss bank, as well as returned letters with a note that the addressee had left and did not leave an address [Perkowska-Waszek 1994b, 28]. In fact, after occupying Bydgoszcz in September 1939, the Germans evicted Józef Paderewski, along with many other Polish residents of Bydgoszcz, from his apartment on Paderewski Street. He found new, extremely modest accommodation at 23 Kościuszki Street, where he lived until the end of World War II and in the early post-war years with his cousin Stanisława Tańkowska, whom he married in 1957.[17] It is surprising that I. J. Paderewski, A. Wilkońska, and S. Strakacz, based on dubious, unverified information, declared Józef dead without waiting for official confirmation. What is more, in 1948, already in the United States of America, they ordered and participated in a memorial mass in his intention [Perkowska-Waszek 1994b, 28]. It is worth noting the artist's completely different reaction to the death of his other half-brother Stanisław, a mining engineer who, I repeat, died as a Polish legionnaire at Krzywopłoty in 1914. He believed that the news of his brother's death in battle might be false. According to Perkowska-Waszek, the artist even left a bequest for him in his will of 1930 [Perkowska-Waszek 1994a]. I did not find this entry in the document because it simply was not there. It is also important to note that immediately after the war, Strakacz, the main executor of Paderewski's will, did not attempt to determine what really happened to Józef Paderewski, whether he actually died or was killed in 1939, and what his fate was thereafter. Meanwhile, as early as 1945, it was possible to establish without much difficulty that Józef

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[15] APB, District Court in Bydgoszcz, 1373/415, Letter from Józef Paderewski to the Municipal Court in Łódź dated 30 January 1947, card. 2-4: See also Protocol submitted on 16 June 1948 by I. Paderewski in S. Gr. concerning the ancestry of the Paderewski family, 1373/415, card. 32-35.

[16] Ibid.

[17] "Dziennik Bydgoski", no 26-27 from May 2022, p. 12-14.

Paderewski was alive, that he had survived the war and German occupation in Bydgoszcz, and that he lived in that city at 23 Kościuszki Street. All it took was a single letter to the mayor of Bydgoszcz or to the education or population registry departments under his authority to obtain reliable information. It was also possible to contact the editorial office of Ziemia Pomorska, the first post-war newspaper published in "free" Bydgoszcz, on this matter.[18] I believe that Strakacz deliberately refrained from making any effort to obtain accurate information about Józef Paderewski, as this could have complicated his plans regarding Ignacy Paderewski's inheritance. It is also worth mentioning that the residents of Bydgoszcz knew Ignacy J. Paderewski not only by name. The news of the artist's death in New York in 1941 quickly reached them, and probably Józef Paderewski as well.

3. JÓZEF PADEREWSKI AND THE TRIAL CONCERNING HIS VINDICATION

The fact that Józef Paderewski was alive and living with his relative Stanisława Tańkowska in Bydgoszcz was clearly confirmed by their application to the Municipal Court in Bydgoszcz in August 1945 for rehabilitation. All Poles who, during the German occupation of Polish territory, were incorporated into the first or second group of the German national list [Romaniuk 1993][19] (Deutsche Volksliste DVL) had to undergo this process. In March 1946, proceedings were initiated to rehabilitate J. Paderewski and S. Tańkowska, and on May 23 of that year, a hearing was held before the Municipal Court in Bydgoszcz. During this hearing, J. Paderewski testified that in 1943, threatened with deportation to a concentration camp, or at best to the General Government, which posed a threat to his life, he declared his affiliation with the Ukrainian nationality, which was privileged by the occupier, that is, with the organization "Ukrainian Community." As a result, he received a "Ukrainian list," which meant that he was effectively incorporated into the second group of the DVL. Therefore, after the end of World War II, he had to undergo a rehabilitation process. He also testified that in 1943 he was arrested by the Gestapo and placed in former Polish barracks on Gdańska Street in Bydgoszcz, where he waited for transport to the camp. Miraculously, as he said, he managed to escape from there. Living under constant pressure of losing his life, he registered as a member of the aforementioned

[18] APB, Records of the City of Bydgoszcz, 484, Announcement in Ziemia Pomorska, the Municipal Court building, regarding the initiation of rehabilitation proceedings for J. Paderewski, March 1946, card. 19.

[19] APB, Records of the City of Bydgoszcz, 484, Minutes from the rehabilitation hearing of 23 May 1946, card. 18-22.

Ukrainian nationality.[20] However, he remained Polish, as numerous witnesses emphasized during the trial. These included Wanda Rolbieska, director of the Municipal Girls' Humanities Gymnasium in Bydgoszcz, where Józef Paderewski taught mathematics from 1926 to 1938, Irena Schmidtowa, a pharmacist and former student of Paderewski, Olgierd Gintyłło, a local government official, and others. All the witnesses emphasized that Józef Paderewski and Stanisława Tańkowska were "100% Polish" and "highly valued Poles." They unanimously testified that during the occupation, Paderewski secretly taught Poles mathematics and physics, often free of charge.[21]

After hearing the case on May 23, 1946, the Municipal Court in Bydgoszcz ruled that the applicants, Józef Paderewski and Stanisława Tańkowska, were "rehabilitated and possessed full civil rights, and ordered the release of their property from seizure, supervision, and administration" [emphasis added – J.K.]. In its justification, the Municipal Court stated: "Taking into account the advanced age of the applicants and their exemplary behavior during the occupation, the Court has come to the conclusion that the applicants deserve full rehabilitation and therefore ruled as stated in the operative part of the decision"[22] [emphasis added – J.K.]. The news of the rehabilitation of J. Paderewski and S. Tańkowska appeared the very next day, on May 24, 1946, in *Ziemia Pomorsk*a.[23] In mid-June 1946, the news also appeared in the French Polish community newspaper *Narodowiec*. Helena Lübke, Helena Paderewska's former secretary, who was living in France between 1945 and 1948, read the news and immediately passed it on to S. Strakacz and Andrzej Moszczyński, Ignacy J. Paderewski's former plenipotentiary. She asked him to find Józef Paderewski's address in Poland and provide him with financial support. "She also asked Moszczyński to sell her ring, which she had left in Warsaw, for this purpose" [Perkowska-Waszek 1994a; Idem 1994b, 29]. It turned out that simply determining Paderewski's address in Bydgoszcz required extraordinary efforts on the part of Strakacz and his associates. However, more important is the content of *Narodowiec* and how it was later interpreted by Perkowska-Waszek. The author uncritically accepted the findings of the Polish-American newspaper and came to the following conclusion: "In fact, [Józef Paderewski] was arrested by the Gestapo, sent to a camp, escaped from transport, and went into hiding" [emphasis added – J.K.].[24] In light of what has been said above about Józef Paderewski during the occupation, this conclusion must be rejected outright.

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[20] Ibid., card. 19-20.

[21] Ibid., card. 22-23.

[22] Ibid., card. 23.

[23] *Ignacy Paderewski's brother rehabilitated by the Court in Bydgoszcz. A well-known professor of physics took in a Ukrainian ethnic group living in poverty*, "Pomeranian Land", no. 139 from 24 May 1946, p. 3.

[24] Ibid.

There remains the matter of Maria Paderewska, Józef Paderewski's sister and Ignacy J. Paderewski's half-sister. Her existence, like that of J. Paderewski, was ignored by Wilkońska and Strakacz, who even claimed that she was "definitely dead." Meanwhile, she lived in Zhytomyr at 24 Podolska Street (USSR) in a house that Ignacy J. Paderewski had bought for her. There is no doubt that Ignacy was keenly interested in the fate of his half-sister, who remained in the Soviet Union. He did not have to search for her, but he appealed to Minister Maxim Litvinov, without success, to allow Maria Paderewska to leave the USSR and return to Poland [Jędruszczak 1974, 72; Perkowska-Waszek 1994b, 29].

This raises questions about family relations and the relationship between the Paderewski siblings. According to Perkowska-Waszek, these relations "were not easy," and Ignacy "harbored certain childhood resentments toward his half-siblings." This is evidenced by his private letters, and it is particularly telling that he left them only one-off monetary bequests in his will [Jędruszczak 1974, 72; Perkowska-Waszek 1994b, 29]. It is a pity that the author did not treat these letters more extensively and did not deal with these "resentments" in greater detail. In any case, the Paderewski brothers, Ignacy and Józef, met in Poland and often wrote letters to each other. Józef Paderewski burned their large collection after the outbreak of World War II, fearing that they would fall into German hands during a search.[25] A letter from Ignacy to his "Dear Józio" dated January 3, 1934, has been preserved. Ignacy was concerned about Józef's poor health. In addition, he was 'outraged' by the announcement of "the repayment of some debt that I do not want to know about." "If you want me to have no hard feelings towards you," wrote Ignacy, "try to forget about this trifle and do not write to me about any debt" [emphasis added by J.K.]. The letter ends with the warmest wishes from Ignacy and Antonina and a "warm brotherly handshake.[26] Ignacy Paderewski undoubtedly remained in constant contact with his half-siblings and supported them financially. I believe that they shared a strong emotional bond.

4. ANTONINA WILKOŃSKA OF THE PADEREWSKIS AS THE ONLY INHERITOR OF THE WILL?

On July 30, 1941, Wilkońska, Ignacy J. Paderewski's sister, recognized by the Court of Peace in Morges, without providing legal grounds, as the sole heir to her brother's estate [Giron de Pourtales 1996], signed in the

[25] Memorial Plaques Programme, "Bydgoszcz Daily", no. 26-27, February-May 2022, p. 14.

[26] Leon Wyczółkowski Regional Museum in Bydgoszcz, MOB HIA-2109, Letter from I.J. Paderewski to his brother Józef dated 3 January 1934.

presence of a lawyer and notary T. Bayer, a request to the Probate Court to appoint Strakacz as the administrator of her brother's estate. At the same time, she swore an oath that she had conducted a thorough search for the deceased's will, but had found no trace of it and had no information regarding the existence of a will. She also stated that her brother had left no other relatives. At the same time, in a short application to the Court, also signed in the presence of Bayer, Wilkońska waived her appointment as administrator of the estate and requested that Strakacz be appointed as administrator of the estate without providing security. On the same day, Strakacz made a solemn promise in advance as the administrator of the estate. On August 23, 1941, Wilkońska again swore to Bayer that she was the only surviving relative and repeated her request to appoint Strakacz as the administrator of the estate in her place. At the same time, Wilkońska confirmed the contents of her will of July 30, 1941. Strakacz filed the will and codicil with the Westchester County Probate Court in White Plains, stating that Wilkońska had her permanent residence in Riond-Bosson, Switzerland, and that her estate did not exceed $20,000. In this way, he obtained confirmation of the will by this court, which was not familiar with the inheritance files of Ignacy Paderewski. A few days later, Strakacz submitted a provisional account of the estate's debts under oath, amounting to $4,782.09, and stated that the deceased owned property in San Luis, California, in the United States, approximately 2,544 acres, valued for tax purposes in 1940 at $26,725. He did not mention the existence of real estate in Switzerland and Brazil. On August 28, 1941, the Probate Court appointed Strakacz as the administrator of the estate. However, it required him to provide security.[27] Strakacz managed the estate until mid-November 1948. His seven years of activity in this area and various machinations related to the estate deserve a separate study. On September 24, 1941, Wilkońska signed and submitted a letter to the Probate Court, in which she provided details about Ignacy J. Paderewski's family. According to her, Józef Paderewski, a mathematics teacher in Bydgoszcz, died in that city in September 1939, unmarried. Maria Paderewska, on the other hand, lived unmarried in Zhytomyr before the Bolshevik Revolution in 1917. Neither she nor Józef Paderewski, "despite intensive searches, could find her, nor did they receive any news from her. They therefore became convinced that M. Paderewska was dead" [Giron de Pourtales 1996].

It is significant that, at the same time as signing the application to appoint Strakacz as administrator of the estate, Wilkońska also signed her will, typed in English, in the presence of Bayer. This will, probably drafted by Strakacz rather than the 82-year-old Wilkońska, stated that Strakacz had "worked closely" with Ignacy J. Paderewski and A. Wilkońska for over

[27] APB, District Court in Bydgoszcz, 1373/416, Memo from the Consulate General of the Republic of Poland in New York, sent on 7 October 1948 to attorney L. Wirski (copy), card. 28-29.

twenty years and had given "countless proofs" of his devotion and attachment. Strakacz was considered, it was written, not only a member of the household, but a member of the family. Wilkońska expressed in her will her decision to adopt Strakacz and stated that she had instructed her lawyer, Bayer, to initiate the appropriate proceedings for this purpose [ibid.].[28] Importantly, the following was written in the will: "Fifth: All remnants, remains, and leftovers of my immovable and personal property that I will possess or to which I will be entitled in any way or over which I will have power of disposal at the time of my death, I give, bequeath, and transfer to Sylwin Strakacz" [Kukliński 1957b] [emphasis added – J.K.].

An analysis of Wilkońska's will leads to the conclusion that, in the event of her death, Strakacz became the sole heir. The testator died on October 6, 1941, in Pelham Manor near New York, a few months after the death of Ignacy J. Paderewski. Shortly thereafter, without going into legal details, Strakacz came into possession of a large estate, estimated at over half a million dollars [Kukliński 1957a].

The news that Józef and Maria Paderewski, Ignacy's half-siblings and natural heirs, were alive was of groundbreaking significance for the case of Ignacy J. Paderewski's estate. As I have shown, Wilkońska and Strakacz had kept silent about the existence of Józef and Maria Paderewski since 1939, not to say that they had concealed it. The former, a former secondary school teacher in Bydgoszcz, survived the war and German occupation, as mentioned above, with the support of many Bydgoszcz residents. His sister Maria lived in Zhytomyr in the Soviet Union. In 1945, J. Paderewski applied to the Municipal Court in Bydgoszcz for rehabilitation, and in January 1947 for confirmation of Józef and Maria Paderewski's rights to the inheritance of their half-brother Ignacy Jan Paderewski. At the end of 1946, Strakacz contacted Józef Paderewski to inform him about the status of the inheritance and his intentions and plans. He also informed him about the possibility of receiving money from the inheritance through the courts after submitting the necessary documents. He invited him to come to the United States and collaborate on projects. One of these projects was the creation of the Ignacy J. Paderewski Foundation using the assets left behind by Paderewski. However, Józef Paderewski refused [Perkowska-Waszek 1994a; Giron de Pourtales 1996; Kledzik 2020, 124]. Further correspondence with Strakacz was conducted by Paderewski's attorney, Wirski. He assured Strakacz that, as the curator of the estate, he would "seek, through the Polish consular authorities and the Polish Ministry of Foreign Affairs, to settle the estate as quickly as possible by selling the movable and immovable property and transferring all capital and funds remaining after the deceased to the probate court in Bydgoszcz" [Kledzik 1991a,

[28] Ibid., k. 28-30.

7]. As Kledzik rightly points out, Wirski's intention was clear – the post-war authorities in Poland wanted to quickly take over the inheritance [ibid.].

On January 30, 1947, Józef Paderewski requested the Municipal Court in Łódź, as the competent authority pursuant to the decree on inheritance proceedings of November 8, 1946[29] to conduct inheritance proceedings after his half-brother Ignacy Jan, who died on June 29, 1941, in New York, to appoint the Municipal Court in Bydgoszcz to conduct the inheritance proceedings. In the justification for his request, he emphasized that the deceased had left no will and no relatives in the descending or ascending line. He stated that only the siblings of the deceased, i.e. himself and his sister Maria, who lived in Zhytomyr in the Soviet Union, were entitled to the inheritance. Józef Paderewski substantiated his entitlement to the inheritance with his family tree, which I have already quoted above.[30] In the justification for his request, he also pointed out that he was an elderly person (over 75 years old), in poor health, and that he had to travel to Łódź to submit the relevant requests and declarations and to communicate with the court. He also wanted the competent court to appoint a long-time friend of the family, attorney Ludwik Wirski, residing in Bydgoszcz, as the curator of the estate, "in whom I have complete trust," he wrote. The inheritance was to be reclaimed through the Ministry of Justice via the Polish Consulate General in Bern or the Polish Embassy in the United States of America.[31] On April 15, 1947, after reviewing J. Paderewski's application, the District Court in Łódź, taking into account the fact that the competent court for conducting inheritance proceedings is the Municipal Court in Łódź, where the Supreme Court is located[32] and taking into account the advanced age of the petitioner and the difficulty of contacting Łódź, decided to appoint the Municipal Court (since 1951, the District Court) in Bydgoszcz to conduct the inheritance proceedings after the deceased.[33] In this court, the presiding judge was the experienced Kazimierz Smierzchalski, and Józef Paderewski's representative and curator of the estate of the late Ignacy J. Paderewski was appointed by the court, in accordance with J. Paderewski's request, as attorney L. Wirski (1872-1961) as the attorney for Józef Paderewski and also as the curator of the estate of the late Ignacy [Kutta 2021, 15-61]. The case was complicated, and there was a danger that dishonest estate administrators: Strakacz in the United States of America and Henry Vallotton in Switzerland, could use legal machinations to seize the

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29 Journal of Laws No. 63.

30 APB, District Court in Bydgoszcz, 1373/456, Paderewski's letter to the Municipal Court in Łódź dated 30 January 1947, card. 2.

31 Ibid., card. 2-4.

32 Article 2 of the Decree of November 8, 1946, on inheritance proceedings, Journal of Laws, item 346.

33 APB, 1373/415, Decision of the District Court in Łódź, 15 April 1947.

estate or seriously deplete it.[34] There was also a legitimate concern that some properties, for example in Brazil, would be lost due to the statute of limitations. In this situation, the assistance of the Ministry of Foreign Affairs in Warsaw, especially the Legal and Treaty Department headed by international law specialist Manfred Lachs (1914-1993), became indispensable. He considered caring for Paderewski's estate to be "a patriotic duty." Everything had to be done to carry out the will of the Great Pole. According to Lachs, the inheritance matters "were in the wrong hands and in too many hands: the incompetent embassy in Bern, the office in New York that did not recognize any control, and lawyers who decided to maximize profits and drag out the proceedings. According to Lachs, the value of the inheritance was "significantly lower than in 1930, when Paderewski drew up his will." He made no secret of the fact that the inheritance matter "could have been settled more quickly and efficiently had it not been for the harmful activities of lawyers and uncontrolled institutions, and had everything in Warsaw at that time gone according to plan" [Lachs 1992].

Unfortunately, Prof. Lachs's concise commentary does not provide answers to the questions that arise. The issue of the "harmful activities" of the Ministry of Foreign Affairs in Warsaw, its departments, especially the Legal and Treaty Department, and its offices in New York and Bern, requires a more in-depth response. It would be worth knowing "what did not go according to plan" for the director of this department of the Ministry of Foreign Affairs.

5. THE 'DISCOVERY' OF PADEREWSKI'S TESTAMENT IN MORGAN BANK IN PARIS

The end of 1948 brought a final resolution to the question of the existence of Paderewski's will. In October of that year, Morgan Bank in Paris confirmed that it had a large sealed envelope in its vault, deposited at the bank on September 30, 1930, as I have already noted, under number 39661 [Giron de Pourtales 1996, 141]. In turn, Strakacz, testifying on November 7, 1948, in the Probate Court in New York, said that the will in which he was appointed as its executor had been held at Morgan Bank in Paris since September 30, 1930 [ibid.]. This envelope probably contained Paderewski's will, which had been sought for years. Strakacz's testimony clearly indicated that he knew the contents of this document. By not revealing the existence of the will and its location, he created opportunities for legal manipulation and actions aimed at taking over the great pianist's inheritance or reducing its value. This is evidenced by the actions of Strakacz and Vallotton.

[34] For more information on these estate administrators and their legal machinations, see: Giron de Pourtales 1996.

In March 1949, the envelope was opened at Morgan Bank's headquarters in Paris. It turned out that it contained another envelope of similar size, bearing the inscriptions mentioned above.[35] After fulfilling the conditions specified by law, the envelope was opened on April 1, 1949, at the Palais de Justice on Place Vendôme in Paris. It contained a twenty-page handwritten will bearing Paderewski's own, certified signature.[36] After the traditional introduction, the testator carefully calculated his assets and included detailed provisions.[37] Without going into the details of these provisions and regulations, it should be emphasized that Paderewski requested that all the money realized, which after paying taxes and costs should amount to US$650,000, be placed in certain 5% securities or foreign municipal bonds, American ones if possible, drawing on the income for life annuities and administrative costs, travel, and expenses, so that the executors of the will would not incur any losses. "I consider this money to be the property of the Nation, and therefore I ask," wrote Paderewski, "that it be transferred to Jagiellonian University" [J.K.]. The testator specified in detail how the University was to allocate these funds.[38]

6. SYLWIN STRAKACZ'S BATTLE FOR THE INHERITANCE WITH COMMUNIST WARSAW

Of course, the discovery and disclosure of Paderewski's will in 1949 paved the way for the Municipal Court, which became the District Court in Bydgoszcz in 1951, to quickly conclude the inheritance proceedings. However, as it turned out, it took another three years. During this time, there was a battle over Paderewski's estate between Strakacz, who, according to the will, was the executor of his last will and testament, and "then" communist Warsaw. Naturally, the latter dominated this battle, having the power of the state and its institutions at its disposal. It should be emphasized that the Ministry of Justice and the Ministry of Foreign Affairs (the majority

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35 APB, District Court in Bydgoszcz, 1373/416, Minutes from the opening of the envelope (in French) dated 5 May 1949, card. 204-207; ibid., Letter from the Ministry of Justice. Department of Judicial Supervision to S.Gr. in Bydgoszcz dated 6 April 1950, card. 177; A report on the opening ceremony of the envelope stored on 1 April 1949 was published in "Przekrój", no. 213, 8 V 1949.

36 APB, District Court in Bydgoszcz, 1373/416, The original will of Ignacy Jan Paderewski and the envelope containing this will were entrusted to Robert Paweł Chardon, lawyer and notary public from Paris. The court in Bydgoszcz received photocopies of the will – 20 pages (I-XX) from the Ministry of Foreign Affairs on 4 March 1952, which also confirmed that these photocopies were consistent with the photocopy in its possession and certified as consistent with the original by notary R. P. Chardon.

37 Ibid.

38 Ibid., card. XVff.

of Paderewski's estate was located outside Poland) interfered in the inheritance proceedings from the very beginning and exerted undue legal pressure on the Bydgoszcz court. This is evidenced, among other things, by a multipage "top secret" memo from Professor Manfred Lachs, Director of the Legal and Treaty Office of the Ministry of Foreign Affairs, to Minister Stanisław Skrzeszewski, dated May 15, 1952. In this memo, Lachs reported: "1) In the situation that has arisen, Judge Smierzchalski will be removed from the case in question, 2) another judge has been appointed to hear the case, who will issue a decision in accordance with the agreed arrangements. The decision will be issued around May 23 [emphasis added – J. K.]. 3) Due to the fact that Judge Smierzchalski issued a decision contrary to the agreed guidelines […] and due to the fact that Judge Smierzchalski is likely to be acting in bad faith, as well as under outside influence, Director Czajkowski (1906-1980) referred Smierzchalski's case to the security authorities with a suggestion to place Smierzchalski under close observation" [Sidorkiewicz 1991].[39]

According to this "top secret" memo, Judge Smierzchalski was removed from the case. He was replaced by Józef Majorowicz (1916-2005), a judge at the Provincial Court in Bydgoszcz. Judge Smierzchalski was removed because he refused to issue a ruling previously agreed upon by the authorities. What is more, according to Lachs' memo, he had already issued a ruling contrary to the agreed guidelines. I have not found Judge Smierzchalski's rulings on the inheritance case in the available materials. In any case, he remained in the Non-Contentious Division of the District Court in Bydgoszcz, where he held the position of chairman. It can be assumed that, according to Judge Czajkowski's report, he was under surveillance by Security Service officers.

Some senior officials from the Ministry of Justice and the Ministry of Foreign Affairs not only resorted to unlawful legal pressure, but also personally removed documents from court files that were inconvenient for the case in question. For example, Kazimierz Czajkowski, deputy director of the Judicial Supervision Department of the Ministry of Justice, tore several pages from the files and threw them into the trash in the presence of Judge Józef Majorowicz. The following documents stored in the archives of the Ministry of Foreign Affairs, the aforementioned note and its copy dated May 15, 1952, also disappeared.[40]

Sylwin Strakacz, subjected to various kinds of pressure, renounced his rights to the inheritance of Antonina Wilkońska [Giron de Pourtales 1996; Perkowska-Waszek 1994a] on July 7, 1950, and thus also to that of Ignacy J. Paderewski.

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[39] Regional Commission for the Investigation of Crimes against the Polish Nation – Institute of National Remembrance in Bydgoszcz, ref. no. IPN Bg 949/8. Motion to issue a decision refusing to initiate an investigation in case Ko 381/91, pp. 1-2 (copy dated 9 February 1995).

[40] OKBZ p NP – IPN in Bydgoszcz, ref. no. IPN By 949/8, card. 4.

7. LEGAL DECISION OF THE DISTRICT COURT IN BYDGOSZCZ CONCERNING THE INHERITANCE AND ITS EXECUTION

On May 23, 1952, the District Court in Bydgoszcz decided in an open session chaired by Judge Józef Majorowicz that: 1) The inheritance rights of Ignacy Jan Paderewski, who died on June 29, 1941, passed to his sister Antonina Wilkowska, née Paderewska; 2) The inheritance rights of Antonina Wilkońska, who died on October 6, 1941, in Pelham Manor, New York, passed to her brother Józef Paderewski.

In his justification of the decision, Judge Józef Majorowicz emphasized that, based on the wills known to the Court, it had to be concluded that after the death of Ignacy J. Paderewski, the inheritance rights passed to his sister Antonina Wilkowska, and after her death, due to the fact that Sylwin Strakacz had transferred his inheritance rights to Józef Paderewski on the basis of a settlement, the inheritance rights passed to Józef Paderewski [Giron de Pourtales 1996].[41] In the following years, the Bydgoszcz District Court dealt with the implementation of the provisions of Ignacy Jan Paderewski's will of 1930.

The final decision of the District Court in Bydgoszcz regarding the estate of Ignacy Jan Paderewski did not bring the matter to a definitive conclusion. On January 11, 1957, five years later, the case files were once again submitted to the Non-Contentious Division of the District Court in Bydgoszcz. Referring to this fact, the head of the division, Smierzchalski, stated to the editors of *Ilustrowany Kurier Polski* [Kuliński 1957b, 3]:

"Apart from the fact that once the decision confirming the inheritance rights, issued by the judge of the Provincial Court in Bydgoszcz, becomes final, Majorowicz, the role of the court effectively ends, I must say with full responsibility that I absolutely disagree with its content, as it constitutes a clear violation of the principles of the rule of law. I believe that the case is unclear and obscure. For these reasons, bearing in mind judicial independence and the preservation of the rule of law, I would not like to get involved in such a case. The decision I mentioned above is incompatible with both the law and my judicial conscience."

The author was unable to publish part of an article from the series "On the downward chessboard," which was intended to clarify the ambiguities and understatements of this murky and obscure matter.

The case of Ignacy J. Paderewski's estate returned to the press once again in 1991. Historian Kledzik, who had been working on this case for a number of years, submitted a report to the GKBZ p NP on November 19, 1991 – IPN in Warsaw, reporting the disappearance from the archives of the Ministry

[41] APB, District Court in Bydgoszcz, 1373/456, Decision of the District Court in Bydgoszcz of 23 May 1952.

of Foreign Affairs of important documents dated May 15, 1952, related to the takeover by the State Treasury of the estate bequeathed by Paderewski to the Polish Nation (a memo and a copy of Lachs's "top secret" document for Minister Skrzeszewski).[42] In connection with this report, the Main Commission for the Investigation of Crimes against the Polish Nation – IPN instructed OKBZ p NP -IPN in Bydgoszcz in a letter dated November 22, 1991[43] to "consider whether, in the light of the available materials, it can be concluded the distribution of Ignacy Paderewski's estate meets the criteria for a crime under Article 2b of the Act of April 6, 1984," as amended by the Act of April 4, 1991, on the Main Commission for the Investigation of Crimes against the Polish Nation – IPN (case Ko 381/91). Without going into the legal details of the case, it was established on the basis of documentation collected by the OKBZ p NP and the District Court in Bydgoszcz that it does not appear that the manner in which the estate was distributed by the authorities during the Stalinist period bore the hallmarks of a crime within the meaning of the Act on the GKBZ p NP – IPN. Although it was established that not all the provisions and instructions contained in Ignacy Paderewski's will were carried out, there is no evidence that the inheritance in question was criminally squandered.[44] A motion was adopted to transfer case Ko 381/91 to the Provincial Prosecutor in Bydgoszcz, together with "a motion to issue a decision refusing to initiate preparatory proceedings."[45] During my research, I was unable to obtain the materials of the Provincial Prosecutor and his findings in the above case. I also did not find the decision of the GKBZ p NP on Kledzik's report. In any case, Kledzik maintained his thesis concerning "communist manipulations, which ended in the squandering and plundering of the property of a great Pole – pianist, composer, and politician." [Kledzik 2020, 123].

FINAL THOUGHTS

Although much has been written about Ignacy J. Paderewski's will and inheritance, there is still no monograph revealing the whole truth on this matter. The following issues undoubtedly require further research:

1. The value of Paderewski's estate and the value of the estate actually transferred to the Polish Nation, as requested by the testator;
2. The actions of the estate administrators: Sylwin Strakacz, Paderewski's long-time secretary, and Henry Vallotton, a lawyer in Lausanne and administrator of Paderewski's Swiss estate;

[42] OKBZ p NP – IPN in Bydgoszcz, ref. no. IPN By 949/8, Application for a decision refusing to initiate an investigation dated 9 February 1995 (copy), card. 1-2.

[43] Ibid.

[44] Ibid., card. 4.

[45] Ibid.

3. The protection of Paderewski's legacy by the Polish government-in-exile;
4. The actions of the communist authorities in Poland aimed at taking over Paderewski's estate.

These research questions should be addressed by historians, especially legal historians.

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THE EUROPEAN STANDARD OF PROTECTION OF MEDICAL DATA

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Abstract. The aim of the study is to interpret the normative structure of the European standard for the protection of medical data as shaped in the case law and practice of the European Court of Human Rights. Adopting a dogmatic-legal approach, the author analyses the following cases: *Z v. Finland*, *I v. Finland*; *Mockutė v. Lithuania*; *P. and S. v. Poland*, *M.S. v. Sweden*; *Konovalova v. Russia*; *Frâncu v. Romania*; and *Y.G. v. Russia* in order to identify its elements. This analysis concludes that the standard for medical data limits the permissible extent of State Parties' interference with individuals' right to privacy concerning the collection, processing, and storage of their health information. It also designates the State Parties to the Convention as the entities responsible for both positive and negative obligations, while recognizing every individual as the rights holder.

Keywords: human rights law; case law of the European Court of Human Rights, medical data protection.

1. INTRODUCTORY REMARKS

Information concerning an individual's health constitutes one of the four primary categories of "personal data" that require protection in connection with the application of biology and medicine, as enumerated by the European Court of Human Rights. The other three categories are related to gender identity and sexual orientation, biometric data, and genetic data. In the case law of the European Court of Human Rights, the concept of "personal data" is interpreted in line with the definition given in the Council of Europe's Convention no. 108 on the Protection of Individuals with regard to the Automatic Processing of Personal Data, adopted on January 28, 1981. This definition covers any information relating to an identified or identifiable individual including both data that directly identifies a person and information that, when combined with other elements, could lead to their identification.

Health-related data constitute a core aspect of private life [Wnukiewicz-Kozłowska 2020; Mulder 2019] and their protection is crucial. As the Court

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states in *I v. Finland*: "Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of private life of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community. The domestic law must therefore afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention."[1]

The Court has assessed the standard ensuring such protection in various cases, including those concerning individuals infected with HIV, such as *Z v. Finland* and *I v. Finland*;[2] mental health conditions, as in *Mockutė v. Lithuania*;[3] women's rights in the context of abortion, as in *P. and S. v. Poland*[4] and *M.S. v. Sweden*;[5] the right to privacy during childbirth, as in *Konovalova v. Russia*;[6] the refusal to grant a private hearing in cases concerning release from detention on health grounds, as in *Frâncu v. Romania*;[7] and the accessibility of medical databases, as in *Y.G. v. Russia*.[8] Their analysis aligns with this study's objective: to determine the elements of the European standard for medical data protection and identify instances where it is violated. This analysis encompasses both the objective and subjective components of the standard in question. The objective component corresponds to its normative structure, which comprises three elements: the identification of the right-holder, the designation of the duty-bearer, and the definition of the object of protection [Drzewicki 1988, 155-78; Etzioni 2010, 187-97; Hunt 1996; Jasudowicz 2005, 105-28; Michalska 1976; Wronkowska 1973; Łasak 2013]. These elements find their legal foundation in the European Convention on Human Rights.[9] The subjective component of the standard pertains to the specific circumstances of the case under consideration. The examination of both components is situated within the dogmatic paradigm of public international law scholarship. The primary research method employed in this study is the logical-linguistic approach, developed through formal-logical

[1] I v. Finland, App no. 20511/03 ECtHR, Judgment of 17 July 2008.
[2] Z v. Finland, App no. 22009/93 ECtHR, Judgment of 25 February 1997.
[3] Mockutė v. Lithuania, App no. 66490/09 ECtHR, Judgment of 27 February 2018.
[4] P. and S. v. Poland, App no. 57375/08 ECtHR, Judgment of 30 October 2012.
[5] M.S. v. Sweden, App no. 74/1996/693/885 ECtHR, Judgment of 27 August 1997.
[6] Konovalova v. Russia, App no. 37873/04 ECtHR, Judgment of 9 October 2009.
[7] Frâncu v. Romania, App no. 69356/13 ECtHR, Judgment of 13 October 2020.
[8] Y.G. v. Russia, App no. 8647/12 ECtHR, Judgment of 30 August 2022.
[9] Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005.

and linguistic analysis [Wróblewski 1973; Izdebski 2021, 25-38]. The formal-logical analysis of the case-law of the European Court of Human Rights is complemented by a functional analysis, which is particularly suited to exploring the relationship between law – as the source of the objective component of the identified standards – and the socio-cultural context, which informs their subjective dimension [Borucka-Arctowa 1982, 49-70].

2. THE EUROPEAN STANDARD OF PROTECTION OF MEDICAL DATA IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

In *Z v. Finland*,[10] the Court held that the disclosure of sensitive health information constituted a violation of Article 8 of the Convention. The case concerned a woman whose HIV-positive status was revealed in an appellate court ruling from December 10, 1993, which upheld her ex-husband's conviction for rape and attempted murder. Despite an order that the case files remain confidential for ten years, the ruling was published in the media, exposing her personal health information. After unsuccessful attempts to extend the confidentiality period, the applicant turned to the European Court of Human Rights, arguing that her rights under Articles 8 and 13 of the Convention had been violated. The Court found that the appellate court's disclosure of her medical data was unjustified. Moreover, it concluded that the ten-year confidentiality period was insufficient to protect her interests, as making her health data public even after that period could lead to further violations of her rights under the Convention.

In the case of *I v. Finland*[11], the European Court of Human Rights found a violation of Article 8 of the European Convention on Human Rights due to the failure of national authorities to ensure an adequate level of protection against unauthorized access to the medical records of a nurse diagnosed with HIV [Råman 2008]. While employed at the Eye Diseases Clinic, the applicant was also a patient at the Infectious Diseases Clinic – both situated within the same hospital – where she received her HIV diagnosis. Suspecting that hospital staff had accessed her medical records without authorization through an unsecured registry, the applicant requested an investigation to identify those responsible. However, due to the absence of access logs, it was impossible to establish who had accessed the records. She subsequently initiated civil proceedings against the authority responsible for maintaining the medical records registry, seeking compensation for material and non-material damages resulting from the failure to safeguard her personal health

[10] Z v. Finland, App no. 22009/93 ECtHR, Judgment of 25 February 1997.
[11] I v. Finland, App no. 20511/03 ECtHR, Judgment of 17 July 2008.

data. The national courts, however, dismissed her claim, citing an absence of sufficient factual evidence. The applicant then brought her case before the European Court of Human Rights, asserting that the lack of safeguards constituted a violation of Article 8. The applicant was unable to pursue her rights effectively through the civil action initiated, as she could not establish a causal link between the deficiencies in access security rules and the dissemination of information regarding her medical condition. Shortcomings in the hospital's record-keeping, overlooked at the time, imposed undue burden of proof on the applicant. It is evident that had the hospital exercised greater control over access to medical records – by restricting access to healthcare professionals directly involved in her treatment or by maintaining a register of all individuals who accessed the records – the applicant would not have been placed at a disadvantage before the domestic courts. What is decisive is that the hospital's record-keeping system was clearly not in compliance with the legal requirements set forth in Article 26 of the Personal Files Act, a fact to which the domestic courts failed to attribute due weight.

In *Mockutė v. Lithuania*,[12] the Court examined interference in private life involving the public disclosure of sensitive information in a documentary about the alleged links between the Ojas Meditation Centre in Vilnius and the Osho sect. The programme featured interviews with the applicant's mother, sister, and physician, which – when combined with the disclosed data – enabled her to be identified, despite a pseudonym being used. Prior to the documentary airing, the applicant had undergone psychiatric treatment following multiple hospitalizations between 1992 and 2002. During this period, she obtained a law degree, completed postgraduate studies in the United States, and worked in both the private and public sectors, including a role at the Ministry of Economy in Vilnius. Following a series of personal hardships – including a car accident, a job transition, and her father's cancer diagnosis – she experienced a psychological crisis that led to her involuntary hospitalization at Vilnius Psychiatric Hospital. It was during this hospitalization that her case was featured in the documentary.

After the broadcast, the applicant published an open letter on the Ojas Meditation Centre's website in response to the programme. She subsequently initiated civil proceedings, alleging that Vilnius Psychiatric Hospital had unlawfully deprived her of liberty, violated her right to private life and freedom of religion, infringed upon her bodily integrity, denied her adequate information regarding her diagnosis, treatment, and prognosis, and failed to provide appropriate medical care. The first-instance court ruled in her favour, finding that her detention had been unlawful and that her rights to private life and freedom of religion had been violated. However, the appellate court overturned this decision.

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[12] Mockutė v. Lithuania, App no. 66490/09 ECtHR, Judgment of 27 February 2018.

The applicant then brought her case before the European Court of Human Rights, alleging that the disclosure of her personal data by a physician at Vilnius Psychiatric Hospital constituted a violation of Article 8, and that the restrictions imposed on her meditation practices amounted to a violation of Article 9. The Court ruled in her favour, concurring with the findings of the first-instance court. It held that the disclosure of the applicant's private medical data violated her right to respect for private life under Article 8 and that the interference with her religious practices was unjustified, thus constituting a violation of Article 9.

In *P. and S. v. Poland*[13] the European Court of Human Rights addressed multiple violations experienced by a minor and her mother in their efforts to access the right to a legal abortion following a rape. Despite meeting the statutory requirements for abortion under Polish law, the applicants encountered systemic obstruction from medical professionals in Lublin and Warsaw. The head of the hospital in Lublin not only refused to perform the procedure but also, without the applicant's consent, arranged for her to meet with a Catholic priest, K.P., in an attempt to dissuade her from terminating the pregnancy. Seeking medical assistance in Warsaw, the applicants were subjected to further interference. While awaiting the procedure, P. received text messages from K.P. and unidentified individuals informing her that prayers were being offered on her behalf. The priest, accompanied by an anti-abortion activist, visited her at the hospital, while an unidentified woman sought to pressure her into continuing the pregnancy. These events led the applicants to leave the hospital. However, anti-abortion activists obstructed their departure by blocking their access to a taxi and notifying the police. Following police intervention, P. was placed in a juvenile shelter, where she was denied access to her mobile phone and again visited by K.P. She was subsequently transferred back to the hospital in Lublin, while the Lublin Family and Juvenile Court initiated proceedings to revoke S.'s parental rights. These proceedings were later discontinued due to lack of legal grounds. Intervention by the Ministry of Health ultimately facilitated the applicant's transfer to a hospital in Gdańsk, where the abortion was performed. However, the Catholic Information Agency obtained and disseminated details of the procedure online. The case had already attracted national attention due to the actions of Jana Bożego Hospital, subjecting P. to harassment by medical professionals, clergy, journalists, and anti-abortion activists. The unauthorized disclosure of her personal data was facilitated by institutions entrusted with assisting her in exercising her legal right to abortion following a rape. Several criminal proceedings ensued: 1) against P. for allegedly engaging in unlawful sexual activity with a minor under 15; b) against P.'s parents and members of the

[13] P. and S. v. Poland, App no. 57375/08 ECtHR, Judgment of 30 October 2012.

Federation for Women and Family Planning for allegedly coercing her into an abortion; c) against individuals who pressured P. to continue the pregnancy; d) against police officers for detaining P. pursuant to the order for her placement in a juvenile shelter; e) against those responsible for the unauthorized disclosure of her confidential information.

All proceedings were ultimately discontinued, prompting the applicants to file a complaint before the European Court of Human Rights, alleging violations of Articles 8, 5, and 6 of the Convention.

The Court found a violation of Article 8, highlighting the discrepancy between the theoretical right to a legal abortion under Polish law and the systemic barriers impeding its practical enforcement. It further condemned the unauthorized disclosure of the applicant's medical information, underscoring the legal protections for patient confidentiality under Polish law and the explicit prohibition of healthcare professionals divulging such information.

With respect to Article 5(1), the Court ruled that P.'s detention was unlawful, as its primary purpose was to separate her from her parents – particularly S. – and obstruct access to abortion rather than to ensure educational supervision, as required under Article 5(1(d)) of the Convention.

Finally, the Court found a violation of Article 3, emphasizing that the applicant's young age, vulnerability, and personal circumstances were not adequately considered. The suffering she endured as a minor rape victim seeking a legal abortion underlined the State's failure to fulfil its positive obligations under the Convention.

In *M.S. v. Sweden*,[14] the European Court of Human Rights examined the conditions under which medical data may be lawfully processed between public institutions for the purposes of legal proceedings. The applicant, M.S., had suffered from spondylolisthesis since the age of fourteen. Following a workplace accident that resulted in a spinal injury and rendered her incapable of resuming her profession, she applied for compensation under occupational accident insurance regulations. Upon reviewing copies of her case file, requested by her legal representative, she discovered that her medical records – including information regarding a prior abortion – had been transferred by the hospital where she had received treatment to the competent insurance authority without her prior consent.

After an unsuccessful outcome in the compensation proceedings, the applicant lodged a complaint with the Court, alleging violations of Articles 6(1), 8, and 13 of the Convention. However, the Court dismissed her claims, ruling that Article 6(1) was inapplicable and that no violations of Articles 8 or 13 had occurred. In its reasoning concerning the transmission of medical data, the Court underscored that: in deciding whether to accept the applicant's

[14] M.S. v. Sweden, App no. 74/1996/693/885 ECtHR, Judgment of 27 August 1997.

compensation claim, the authority had a legitimate need to compare the information provided by the applicant with the data held by the clinic. In the absence of objective information from an independent source, it would have been difficult to establish the validity of the claim. Accordingly, the transfer of medical data between public institutions in this case was deemed a justified example of the processing of medical information for the purposes of ongoing legal proceedings.

In *Konovalova v. Russia*,[15] the Court analysed the provision of medical services in the presence of medical students through the lens of Article 8 of the Convention. On April 23, 1999, the applicant was admitted to the gynaecology department of the S.M. Kirov Military Medical Academy Hospital due to labour contractions. Upon arrival, she was provided with a brochure informing patients that their hospitalization was linked to the educational process of medical students. Following several days of monitoring and treatment, the applicant gave birth to her daughter on April 25, 1999. The newborn was subsequently transferred to the neonatal ward due to mild symptoms of oxygen deprivation. The delivery was attended by fourth-year medical students, who had been briefed on the course of treatment and the applicant's medical condition.

On August 10, 1999, the claimant filed a complaint against the hospital, alleging that the planned participation of medical students in the delivery had resulted in a delay in the birth. In response, the hospital asserted that the presence of students had no impact on the medical staff's conduct and that the treatment met applicable medical standards.

A year later, on July 27, 2000, the applicant initiated civil proceedings against the hospital before the Vyborg District Court of Saint Petersburg, seeking compensation for non-pecuniary damage. On November 22, 2003, the court dismissed her claim, and this decision was upheld on appeal on May 24, 2004. After exhausting domestic remedies, the applicant filed a complaint with the European Court of Human Rights on August 2, 2004, alleging violations of Articles 8 and 3 of the Convention.

The applicant's first allegation pertained to the presence of medical students during childbirth without her informed consent. The second allegation concerned the alleged deliberate postponement of the delivery to coincide with scheduled academic training hours. In its judgment, the Court upheld the first claim, concluding that the applicant's inability to exercise autonomy over the presence of students during such a highly personal medical procedure constituted a violation of her right to private life under Article 8 of the Convention. Conversely, the Court found no evidentiary basis for the second claim and accordingly dismissed it as unsubstantiated.

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[15] Konovalova v. Russia, App no. 37873/04 ECtHR, Judgment of 9 October 2009.

In *Frâncu v. Romania*,[16] the European Court of Human Rights held that the denial of a private hearing in connection with the applicant's motion for release from pretrial detention on medical grounds constituted a violation of the right to respect for private life under Article 8 of the European Convention on Human Rights [Goffin 2021]. The applicant had been placed in pretrial detention following allegations of irregularities in the public procurement process. In appealing the detention order, he sought release on health grounds and requested that the hearing be conducted in camera. He argued that the public disclosure of his medical information would constitute an unwarranted intrusion upon his right to private life and that the presence of the media and public could further compromise the presumption of innocence. The Court of Appeal denied the request for a closed hearing, reasoning that the applicant's case did not fall within the exceptions recognized under Romanian law. It affirmed the pretrial detention order, a decision that was subsequently the subject of satirical media coverage. The European Court of Human Rights found that this decision violated Article 8 of the Convention, explaining with respect to the asserted public interest in a corruption case involving an elected official, the Court determined that, even assuming the applicant's public status could be considered in evaluating the proportionality of his request for a private hearing, it was evident that the Court of Appeal failed to conduct an individualized proportionality assessment. Furthermore, the disclosure of the applicant's medical records bore no relevance to the substantive merits of the allegations against him.

In its judgment in *Y.G. v. Russia*,[17] the Court addressed the unlawful dissemination of medical data for commercial purposes. The applicant's personal data Goffin – including his full name, date and place of birth, nationality, residential address, a note regarding a prior criminal conviction, and information regarding his HIV and hepatitis C status – were recorded in a registry that was subsequently sold as part of the database of the Moscow Department of Internal Affairs at the Savelovsky Center.

The applicant submitted a request to the Information Center of the Moscow Department of Internal Affairs, seeking clarification as to why his health-related information had been included in this database. Upon receiving a response stating that the registry did not belong to the Department, he filed a complaint with the Investigative Committee of the Russian Federation, alleging violations of his right to privacy and abuse of power, asserting that state officials must have been responsible for disclosing the data to third parties. The case was referred to the prosecutor's office, which declined to initiate an investigation. The applicant then resubmitted his complaint to the

[16] Frâncu v. Romania, App no. 69356/13 ECtHR, Judgment of 13 October 2020.
[17] Y.G. v. Russia, App no. 8647/12 ECtHR, Judgment of 30 August 2022.

Investigative Committee, which concluded that his submission did not contain sufficient information to establish that an offence had been committed. This position was ultimately upheld by the Moscow Court. The existence of the database at the Savelovsky Center was also the subject of press reports and a separate inquiry conducted by the Ministry of Internal Affairs.

Before the European Court of Human Rights, the applicant alleged violations of Articles 8 and 13 of the Convention, contending that the State authorities had unlawfully collected, stored and processed his health data, failed to ensure the confidentiality of his medical information, and neglected to conduct an effective investigation into its disclosure. The Court upheld the applicant's claim concerning the violation of Article 8, finding that the domestic authorities had failed in their positive obligation to ensure an adequate level of protection for the right to respect for private life. The decisive factor in establishing the violation was that state authorities had not prevented the unlawful dissemination of the applicant's health data, nor had they clarified the circumstances of the breach.

As the Court emphasized: "The protection of personal data, particularly medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a person but also to preserve his or her confidence in the medical profession and in the health services in general. The domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention. The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned."

3. FINAL REMARKS

The standard for the protection of medical data has been developed in the Court's jurisprudence, notably in *Z v. Finland* and *I v. Finland*, which concerned individuals living with HIV; *Mockutė v. Lithuania*, which addressed the disclosure of mental health data; *P. and S. v. Poland* and *M.S. v. Sweden*, which pertained to the rights of women who had undergone an abortion; *Konovalova v. Russia*, concerning privacy rights during childbirth; *Frâncu v. Romania*, regarding the refusal to hold a private hearing in proceedings related to a request for release from detention on health grounds; and *Y.G. v. Russia*, which involved the unlawful disclosure of medical database records. While the subjective element of this standard is determined by the above-mentioned factual situations of the cases analysed, its objective element is determined by Article

8 of the European Convention on Human Rights. The standard for the protection of medical data delineates the permissible extent of State Parties' interference in the right to respect for private life concerning the collection, processing, and storage of individuals' health information, and designates the State Parties to the Convention as the entities responsible for both positive and negative obligations, while recognizing every individual as the rights holder. In assessing whether these limits have been exceeded, the Court considers whether the interference in question is lawful, pursues a legitimate aim, and is necessary in a democratic society. Accordingly, the Court examines compliance with the principles of minimizing the quantity of collected and recorded data, ensuring the accuracy and timely updating of such data, restricting data retention to the period strictly necessary for achieving the intended purpose, processing data in accordance with the purpose for which they were collected, and maintaining transparency in data processing procedures. The Court found violations of the standard for the protection of medical data in circumstances where: a) information concerning an individual's HIV status was disclosed in an appellate court ruling, b) the authorities failed to ensure an adequate level of protection against unauthorized access to the medical records of a nurse living with HIV, c) mental health data were disclosed in a television documentary in a manner that allowed the applicant to be identified, d) public service employees breached their obligation to protect medical data by disclosing information concerning a minor rape victim and her mother, e) the applicant's right to respect for private life was infringed by the presence of medical students during childbirth without her consent, f) a request for a private hearing in proceedings concerning release from detention on health grounds was denied, g) the authorities failed to discharge their positive obligation to ensure an adequate level of protection of the right to respect for private life by preventing the unlawful disclosure of the applicant's health data and by failing to clarify the circumstances of such a breach.

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THE SCOPE OF ACTIVITIES OF MUNICIPALITIES IN THE REPUBLIC OF POLAND

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Abstract. The municipality plays a very important role in the structure of the state as it is the basic territorial unit formed by the local community of residents. It is a fundamental public institution which also serves as the basic unit that carries out public tasks. This study is an analysis of the current legal provisions regarding the tasks assigned to the municipal government. The basic issues regarding the catalog of tasks performed by the municipality for the community of local government residents are discussed.

Keywords: public tasks; own tasks; delegated tasks; municipal government; local government autonomy.

INTRODUCTION

Municipal self-government is the basic form of state organization. It is widely recognized as the decisive form of public participation in the process of exercising and building democratic power. It is a grassroots form of citizen participation in government and an expression of unity and local identity. The essence of local government, and in particular municipal government, is independent decision-making on its own affairs. In the case of local government, it is reasonable to clearly and precisely define the limits of its activities, competences, and tasks that fall within the specified area. It is also important to eliminate any conflicts of competence that could potentially arise. Provisions of general law should regulate the above issues at every level. In the case of the Polish legal system, the Constitution itself contains a catalog of provisions and refers to the institution of local government. In this way, the constitutional legislator emphasized the essence and importance of local government in Poland.

From the perspective of the functioning of municipal self-government, it is important to define by law the scope of its activities, indicating the powers and tasks to be performed by the municipality and its subordinate units.

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This study analyzes the current legal provisions regarding the functioning of the municipality as a local government unit, with particular reference to the statutory list of tasks. The research aims to demonstrate and determine the legitimacy of the current list of municipal tasks. It is important to find an answer to the question of whether the scope of matters carried out by the municipality is appropriately defined and selected, whether the current regulations governing the scope of tasks are complete, and whether the interests of individual local communities are adequately satisfied and protected.

The author's intention is primarily to attempt to draw conclusions *de lege lata* and *de lege ferenda* in the context of the issue under discussion, which will allow an assessment of the validity of the current catalog of tasks performed by the municipality, or will provide a basis for a different assessment, indicating the need for reform in this area.

1. PUBLIC TASKS

The basic duty of a municipality is to meet the needs of the local community. As a unit of local government, the municipality was established primarily to perform public tasks which, in turn, are intended to serve the local community. The raison d'être of local government is to perform public tasks that serve to materialize the common good.

According to the Constitution of the Republic of Poland, all residents of basic territorial units constitute a local community by virtue of law. Local government, through appropriately appointed bodies within a specific territorial unit, participates in the exercise of public authority. Local government performs a significant part of its public tasks within the framework of laws on its own behalf and on its own responsibility.[1] The fundamental issue is to determine the position of local government in the process of participating in and exercising public authority as well as to define the concept of public tasks.

The exercise of public authority by local government is directly connected with its position in the state structure. In constitutional terms, the leading position is one that does not approve of the natural law justification of the right to local government, according to which it is a primary entity preceding the state [Skoczylas and Piątek 2016]. The constitution refers to the municipality as a co-created local government community whose functioning is closely linked to the functioning of a certain group of people within a specific territory in connection with their residence there.[2] It is within the

[1] Constitution of the Republic of Poland of April 2, 1997, Journal of Laws No. 78, item 483 as amended [hereinafter: the Constitution], Article 16.

[2] Judgment of the Constitutional Tribunal of December 9, 2008, ref. no. K 61/07, OTK-A 2008, No. 10, item 74.

community that integration takes place and common needs or goals are defined. Furthermore, there is a view in academia that takes a corporate approach to the community, according to which each local government unit forms a corporation, i.e. an association of persons whose purpose is to carry out common tasks. Due to the fact that these matters concern specific public tasks, this corporation is of a public law nature [Kisiel 2005, 45].

However, the functioning of the community cannot take place in isolation from the broadly understood concept of statehood. In this case, priority is given to the state, which sets the directions for the development and functioning of the community as a whole. Nevertheless, the exercise of power is only one of the methods of performing public tasks [Fundowicz 1999, 64-71]. This state of affairs is an element of local government, the basis of which is the performance of some tasks belonging to the state. The exercise of public authority by municipal self-government is inextricably linked to administrative authority, the scope and form of which are defined by statutory provisions. In one of its judgments, the Constitutional Tribunal pointed out that Article 16(2) of the Constitution clearly indicates the statutory framework within which local government should operate in each case.[3]

The exercise of public authority by a municipality is both a right and an obligation of local government, from which there can be no derogation. Bearing in mind that, from a formal point of view, local government exists by the will of the state, the public authority it exercises cannot be opposed to the authority of government bodies. Despite the existing difficulties in distinguishing between the competences and tasks of all public authorities, they should complement each other.

In addition to the above considerations, it should be pointed out that the participation of local government in the exercise of public authority consists in the performance of a significant part of public tasks originating in statutory provisions. At the same time, the difference between a public task and a competence should be emphasized. Competence is directly related to a specific local government body, while a task concerns the entire local government unit. Furthermore, there is a view that a task is a specific goal pursued by the local government, while competence is a set of rights and obligations of a body, including legal forms of action, i.e. forms of task implementation [Zimmermann 2022, 190].

As a consequence of the above, all entities, including municipalities, which occur to varying degrees in the structure of the state and, at least in part, have a public element, are empowered to exercise public authority and, to varying degrees, act as public entities – state entities.

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[3] Judgment of the Constitutional Tribunal of November 28, 2013, ref. no. K 17/12, OTK-A 2013, No. 8, item 125.

The Constitution contains a provision which defines the scope of public authority exercised by all local governments, including municipalities. The constitutional legislator used the formulation of an essential part of public tasks that is addressed to the legislator. It requires the latter to transfer a significant scope of tasks to local governments for implementation. This shows that the intention of the constitutional legislator is to assign a significant number of public tasks to local government units. Local government cannot therefore be treated by the ordinary legislator as an insignificant element of the legal system, but as a significant component of the structure exercising public authority [Skoczylas and Piątek 2016]. Contrary to this is the weighing up of local government and not burdening it with excessive responsibilities. Local government units, in parallel with being entrusted with public tasks, should be adequately secured in organizational and material terms [Gromek 2022, 28].

The performance of public tasks by local government depends on its units being equipped with the resources necessary for the proper performance of public tasks [Skoczylas and Piątek 2016]. The exercise of a significant part of public authority on its own behalf and on its own responsibility establishes the principle of local government autonomy. Nonetheless, this is not absolute. In reality, it consists in equipping local government with a specific range of its own tasks appertaining to meeting the needs of residents and tasks assigned to it by law. Local government units perform their tasks independently, expressing the will of residents.[4]

It should be emphasized once again that the independence of local government is not absolute. In practice, it consists in providing local government with a specific range of its own tasks in regard to meeting the needs of residents and tasks assigned to it by law [Tuleja 2023, 79]. Local government units carry out their tasks independently, expressing the will of their residents [Banaszak 2012, 139].

The admissibility of interference by state executive authorities has been limited to supervisory procedures based on the criterion of legality. Any interference in the sphere of autonomy of local government units must comply with the principle of proportionality [Skoczylas and Piątek 2016].

Recognizing the essence of local government in one of its rulings, the Constitutional Tribunal stated: "The essence of local government is that certain areas of affairs, separated from the scope of state authority, are entrusted to these communities for independent resolution. The tasks assigned

[4] Judgments of the Constitutional Tribunal of: May 26, 2015, ref. no. K 2/13 OTK-A 2015, No. 5, item 65; November 28, 2013, ref. no. K 17/12, OTK-A 2013, No. 8, item 125; September 26, 2013, ref. no. K 22/12, OTK-A 2013, No. 7, item 95; December 18, 2008, ref. no. K 19/07, OTK-A 2008, No. 10, item 182; July 18, 2006, ref. no. U 5/04, OTK-A 2006, No. 7, item 80.

to local government bodies are part of the tasks of public administration and are carried out by local government bodies subordinate to the community and representing its interests."[5]

Continuing the analysis of this issue, it is also appropriate to refer to the concept of a public task performed by a municipality. Polish legislation does not provide a legal definition of this concept, but it is used in a broad context. Taking into account the above considerations, it is accurate to say that every task performed by a municipality is a public task. At the same time, taking into account constitutional and statutory norms, any action legally provided for and imposed by law on local government, the purpose of which is to satisfy the collective needs of a given local community, can be considered a public task performed by local government.

In academic literature, one may encounter a formulation referring to the concept of a task, indicating that a task is understood as a state of affairs to be achieved or maintained by an acting entity, but not determined by it, only assigned from outside. Additionally, if the concept of "task" is used in this way in legal provisions, it becomes a legal obligation. Tasks are normative, general objectives to be achieved by local government in its activities, or specific courses of action, taking into account the scope of matters falling within the remit of local government. In summary, it should be assumed that "task" in its legal and juridical sense should refer to a goal [Góralczyk 1986, 39].

2. OWN TASKS

The discussion so far has focused on issues concerning the systematization of local government positions in the public sphere, the concept of public tasks, and the position of local government in the state structure. At the same time, research conducted to date has revealed an area of local government activity that pertains to meeting the needs and interests of the community that co-creates it. At the same time, the conducted analyses have shown a close link between the activities undertaken by central state authorities and those carried out by local governments. The basis for the tasks performed by local government is their statutory authorization and the definition of the scope of the anticipated task. This means that every action taken at the local level requires a statutory delegation. The rest of this paper will focus exclusively on issues regarding municipal government.

Pursuant to Article 166(1) of the Constitution, tasks serving to satisfy the needs of the local community performed by a local government unit

[5] Judgment of the Constitutional Tribunal of November 30, 1999, ref. no. TS 104/99, OTK 2000, No. 1, item 21.

are defined as its own tasks. In addition, if justified by the needs of the state, other public tasks, referred to as commissioned tasks, may be delegated by statutory provisions. In addition, Article 6(1) and (2) of the Act on Municipal Self-Government[6] explicitly states that the scope of a municipality's activities includes all public matters of local importance, i.e. those defined as own tasks.

The above establishes the principle of presumption in favor of the municipality's competence to perform all public tasks at the local level, which is enshrined in the constitutional principles of local government participation in the exercise of public authority through the performance of its assigned public tasks, on its own behalf and on its own responsibility, in addition to the decentralization of public authority ensured by the territorial system. From this principle, it can be concluded that the municipal government has the authority to deal with all local public affairs in an authoritative manner as well as through non-authoritative forms of action, in terms of substance, i.e. tasks that other entities are not statutorily authorized to perform, and in terms of territory, which means that this power exists within the territory of the local government unit. The essence of administrative authority is the ability to decide unilaterally on the content of an administrative-legal relationship, to determine the powers and obligations of the administered entity, and to apply sanctions [Młotkowska 2023, 92].

These provisions are supplemented by Article 7(1) MSG, which states that meeting the collective needs of the community is one of the municipality's own tasks. However, pursuant to Article 8(1) of the same Act, statutory provisions may impose on the municipal government obligations delegated from the scope of government administration. The above is referred to in the literature as task dualism [Czarny 2023, 547]. With regard to both its own tasks and those delegated to it, the legislator is obliged to be guided by the criteria of subsidiarity, effectiveness, and the common good, which should be clearly indicated in the explanatory memorandum to the draft act and in the regulatory impact assessment.[7]

In accordance with the principle of presumption of competence, the municipality performs public tasks of local importance, but only those whose performance is not reserved for other entities. The tasks of municipalities do not have a uniform legal character. The Act on Municipal Self-Government divided them into own tasks: optional (Article 7(1)) and mandatory (Article 7(2)) delegated: from the scope of government administration, i.e.

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

[7] Judgment of the Constitutional Tribunal of November 20, 2019, ref. no. K 4/17, OTK 2019, item 21.

transferred by acts (Article 8(1)); by way of administrative agreement, i.e. performed on the basis of agreements (Article 8(2)); entrusted from the scope of local government by other local government units (Article 8(2a)) [Dobosz 2022a, 251].

When defining the scope of mandatory tasks, the legislator indicated that specific legal acts will determine which tasks will be mandatory tasks performed within the framework of municipal self-government. Under the current legal framework, mandatory tasks include those related to maintaining cleanliness and order in municipalities, including the development of a waste management system within the municipal government.[8] Another mandatory task of the municipality is to provide a very broad and demanding range of social assistance services.[9] Another issue characterized as a mandatory task of the municipality is the organization of the education system in local government.[10] The current legal situation indicates that the municipality is obliged to organize and conduct cultural activities within the local government, which consists in creating, promoting, and protecting culture.[11]

It should be noted here that the fact that a task is specified in the law does not in itself make it mandatory for the municipality. There are numerous cases where a law specifies the possibility for a municipality to undertake certain tasks, as well as their standards, but leaves the decision on whether to undertake them to the discretion of the municipality. This means that the law must therefore additionally contain a specific provision that the task in question is mandatory, rather than merely mentioning it as an option. Nevertheless, when the legislator decides to devote a separate act to a specific task of the municipality, it usually establishes the scope of mandatory tasks. In such a case, optionality may be limited to the manner of performing the task, e.g. the choice of the organizational form in which it will be performed [Płażek 2023, 97].

Moving on to the next scope of tasks recognized in the subject as own tasks – optional tasks – it is worth noting that the legislator, when defining the catalog of these tasks, used the phrase "in particular," which clearly means that we are dealing with a statutory open catalog of tasks. The catalog of tasks contained in Article 7(1) MSG is very differently assessed in conceptual terms. Some argue that it does not contain any concept, but is merely a collection of successive legislative decisions taken solely on the basis

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[8] Act of September 13, 1996 on maintaining cleanliness and order in municipalities, Journal of Laws of 2025, item 733 as amended.

[9] Act of March 12, 2004 on social assistance, Journal of Laws of 2024, item 1283 as amended.

[10] Act of September 7, 1991 on the education system, Journal of Laws of 2024, item 750 as amended.

[11] Act of October 25,1991 on organizing and conducting cultural activities, Journal of Laws of 2024, item 87 as amended.

of whether a given task can be performed independently by the municipality [Kornberger-Sokołowska 2017, 214; Ruczkowski 2017, 312].

Nonetheless, there are also other voices saying that although there are no tasks that are inherently incumbent on the municipality, it is possible to see a certain consistency in the existing ones, consisting in the existence of permanent areas of activity which the legislator assigns to municipalities.

If we trace the evolution of paragrap. 1 over the thirty-odd years of its existence, we can observe its considerable stability and the fact that the list of tasks within the sphere in question has remained unchanged. The changes consist mainly of additions to existing tasks and are always made with clear respect for the principle of subsidiarity. The catalog does not therefore appear to be a collection of random legislative decisions, but rather a consistent and consistently maintained concept of the scope of the municipality's own tasks [Augustyniak and Moll 2021, 192].

Under the current legal framework, the list of tasks has been defined as follows, taking into account issues in regard to spatial planning, real estate management, environmental and nature protection, in addition to water management; municipal roads; municipal water and sewage management; maintenance of cleanliness and order, sanitary facilities, landfills and municipal waste disposal, supply of electricity, heat and gas; telecommunications; local public transport; health care; social assistance, including care centers and institutions; family support and foster care; municipal housing; public education; culture, including municipal libraries and other cultural institutions, as well as the protection and care of historical monuments; physical culture and tourism, including recreational areas and sports facilities; municipal green areas and tree planting; municipal cemeteries; public order and safety of citizens, in addition to fire and flood protection, including the equipment and maintenance of the municipal flood protection warehouse; maintenance of municipal public facilities and administrative buildings; pro-family policy, including social, medical, and legal care for pregnant women; senior citizen policy; supporting and promoting the idea of local government, including creating conditions for the operation and development of auxiliary units as well as implementing programs to stimulate civic activity; cooperation with local and regional communities of other countries (Article 7(1) MSG).

The list of matters that a municipality may deal with contained in the Act is only illustrative, as indicated by the phrase "in particular." The wording of the quoted provision indicates that these are to be activities aimed at benefiting the general population constituting the local community [Moll 2010, 115].

The above list covers a very wide range of tasks that the legislator has assigned to the municipal government in terms of its own tasks. In principle,

this may mean that, in systemic terms, the municipality, as a public entity operating closest to the citizen, is best aware of the needs of the local community and is in a position to take the most appropriate measures to meet them.

Mandatory tasks are non-transferable, require constant implementation and cannot be treated as optional, regardless of the complexity of the administrative reality, including the cost-effectiveness of the task or its attractiveness. Therefore, one must agree with S. Nitecki's statement that: "The Local Government Act, in Article 7(2), stipulates that laws determine which of the municipality's own tasks are mandatory. Therefore, it must be clear from the law that a given task of the municipality is a mandatory task." The position of K. Płonka-Bielenin should also be approved, namely that: "If the legislator defines a specific task as mandatory, then the municipality is obliged to perform it, and the citizen is entitled to a specific claim in this respect" [Płonka-Bielenin 2007, 145-70].

3. ASSIGNED TASKS

Parallel to the scope discussed above are tasks assigned within the framework of which the legislator, through statutory provisions, may impose on the municipality the obligation to perform tasks in the field of government administration, as well as in the field of organizing and conducting general elections and referendums. In addition, the municipality may also perform tasks in the field of government administration on the basis of an agreement with the authorities of that administration (Article 8 MSG).

The doctrine indicates that the criterion by which tasks delegated to municipalities can be distinguished from other public tasks performed by municipalities is that they are performed by all basic local government units according to identical rules and in a formalized manner. The difference between delegated tasks and own tasks seems to lie in the fact that they do not "serve to satisfy the needs of the local community, but rather […] the legitimate needs of the state" [Wiktorowska 2002, 136].

The performance of delegated tasks by a municipality means that it has the character of a local government community and an executive unit of government administration. Thanks to the commissioning of government administration tasks to municipalities, there is no need to create separate government administration bodies at the level of the basic local government unit [Boć and Miemiec 2005, 205].

Tasks of this type are not local or regional in nature, as is the case with own tasks. They are not assigned to local government bodies to meet the needs of the local community, but are typically state tasks, in other words, they concern the functioning of the state and not only the local

community. This does not mean, however, that they are irrelevant to the local community. Local governments perform tasks assigned to them on the basis of a mandate contained in the act. This means that the legislator, guided by the need to perform a certain category of tasks as effectively as possible, has transferred the responsibility for their implementation to a specific municipality. The introduction of a statutory requirement to assign other public tasks serves at the same time to limit the discretion in their transfer. Nevertheless, tasks of this kind are mandatory. It is emphasized that the issue of the connection with "legitimate needs of the state" will be subject to review by the Constitutional Tribunal [Lipowicz 1998, 99].

The transfer of tasks from the government administration to local government does not transform them into the local government's own tasks in the Polish legal system. Thus, we can see that the constitutional legislator, as well as the ordinary legislator, implement the concept of dualism of tasks of local government [Dobosz 2022b, 277].

Currently, the area of delegated tasks includes tasks appertaining to the protection of cultural property and the care of military graves and cemeteries; tasks arising from water law and environmental management; activities including tasks in the field of public roads; combating infectious diseases; state border protection; family and welfare matters, as well as pension and insurance matters; population registration; civil status; identity cards; business registration; exclusion of land from agricultural production, including the imposition of penalties for the unauthorized exclusion of land from production; planning of population evacuation and other civil defense activities; preventing and counteracting drug addiction.

Moving on to the last issue concerning the performance of public tasks by the municipal government, it is worth noting the differences between own tasks and delegated tasks. T. Bigo points out that the purpose of dividing public tasks into own and delegated tasks boils down to supervision. In the area of delegated tasks, the municipality is subject to strong state supervision, which is similar to official supervision in a hierarchical system of government authorities. On the other hand, when performing its own tasks, the municipality makes decisions at its own discretion [Bigo 1990, 193]. J. Zimmermann sees differences in the form of the competence clause for their implementation, responsibility for the performance of both types of tasks, financial resources for their implementation, procedural differences, and judicial protection [Zimmermann 2022, 191].

Nevertheless, some representatives of the doctrine present an alternative view, pointing to the absence of differences. J. Panejko recognizes that both government and local government administration deal with state affairs. The type and number of these affairs do not affect the legal concept of local government [Panejko 1990, 94]. A different position in this regard

is presented by Z. Niewiadomski, who emphasizes that despite the division of public tasks into own and delegated tasks in the Constitution, the differences between the various categories of tasks are blurred in ordinary legislation. As a result, the practical significance of the division of local government tasks boils down to the way they are financed. Own tasks are financed from the local government's own resources, while delegated tasks are financed from the resources of the delegating entity [Niewiadomski 2011, 143-44].

It should be recognized that it is precisely the factor of financing individual tasks that constitutes the most clear distinction between them. Own tasks are financed from own revenues and subsidies, while delegated tasks are financed from grants provided by the delegating entity. The second clear factor determining the division of public tasks is the standardization of their implementation within the framework of commissioned tasks in relation to all municipalities, while own tasks are performed with a greater degree of local government autonomy [Augustyniak and Moll 2021, 188].

The differences indicated result from adopted conventions and not from objective conditions. In each case, tasks are performed on one's own behalf and on one's own responsibility, even in the case of commissioned tasks. In view of the above, there is a growing view in doctrine that it is not advisable to maintain such a division, while at the same time pointing to the abandonment of the existing division into own and delegated tasks and its replacement by a precise description of tasks and the manner of their performance in statutes.[12]

CONCLUSIONS

An analysis of the current legislation and case law concerning the performance of public tasks has shown that a significant proportion of such tasks have been delegated to local government. Local government plays a very important role in the exercise of power. The autonomy of local government guarantees its independence, but in certain circumstances it does not exempt municipalities from complying with specific rules resulting from their participation in the broadly understood process of public administration. In such cases, municipalities retain their independence while performing tasks that have been delegated to the unit that is closest to citizens in the state structure.

Activities aimed at meeting the needs of the local community are not uniform in nature. They have been systematically divided into own tasks: optional and mandatory. The second group of tasks is commissioned tasks: in the

[12] More in Ruczkowski 2017, 323; Kornberger-Sokołowska 2017, 220.

field of government administration, i.e. those transferred by law or by administrative agreement, and those entrusted within the scope of local government by other local government units. In the context of the statutory systematization of the division of tasks, the prevailing view in doctrine is that of task dualism.

The analysis of the provisions has identified specific areas that are covered by legal regulations, which also define the tasks to be performed by the municipal government. The catalog covering the above set of public tasks is open-ended. In this way, the legislator has secured itself and made it possible to introduce changes in this area, depending on the needs of local communities or the vision of the state's development in a specific direction. Nonetheless, over the more than thirty years of the statutory catalog of tasks, its significant stability can be observed. The changes consist mostly in supplementing existing tasks.

The permanence of the division into own and delegated tasks in the context of a single entity that performs them remains a debatable issue. It is reasonable to analyze this issue because the municipality performs individual tasks independently, regardless of whether they are its own tasks or those delegated by the government administration. A consistent point is the need to meet the needs and interests of the citizens who make up a specific local community.

Taking the above into account, it should be recognized that the municipal government properly performs and completes the tasks incumbent upon it, both those which it creates independently and those that are based on the implementation of specific instructions issued by the government administration.

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THE OBLIGATION OF THE MINISTER RESPONSIBLE FOR SCHOOL EDUCATION TO COOPERATE WITH RELIGIOUS ASSOCIATIONS IN THE ORGANIZATION OF RELIGIOUS EDUCATION IN PUBLIC SCHOOLS: A COMPARATIVE ANALYSIS OF THE LEGAL SYSTEMS OF POLAND AND HUNGARY

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Abstract. The article constitutes an in-depth legal and comparative analysis of the duties and competences of the Minister of Education in Poland and Hungary in the field of religious instruction in public schools. The structure of the article is composed of several key sections: The authors emphasize the importance of cooperation between the state and religious associations in implementing religion-related educational functions. The discuss constitutional frameworks and international agreements, particularly the Concordat between the Holy See and the Republic of Poland, which define and limit the Minister's authority in matters of religious instruction. The authors analyze statutory provisions governing the Minister's responsibilities, including the legal requirement to act "in agreement" with churches and religious associations. Particular attention is given to practical applications of these legal norms and the differences between the Polish and Hungarian legal systems. *De lege ferenda* conclusions present the main findings of the comparative analysis and puts forward *de lege ferenda* recommendations for legislative reforms.

Keywords: cooperation between the State and the Church; teaching religion; the minister of education; "in agreement"; the right of parents to bring up.

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INTRODUCTION

On 26 July 2024, the Polish Minister of Education[1] issued a regulation amending the Regulation on the Conditions and Procedures for Organizing Religious Education in Public Kindergartens and Schools.[2] This regulation introduced amendments to the Regulation of the Minister of National Education of 14 April 1992 on the Conditions and Procedures for Organizing Religious Education in Public Kindergartens and Schools.[3] This amendment introduced, among others, a minimum number of students required to establish a religion class group, the possibility of forming interdepartmental and interclass groups, and the inclusion of students with special educational needs statements.

The Regulation of 26 July 2024 was issued pursuant to Article 12(2) of the Act of 7 September 1991 on the Education System.[4] Under this provision, the minister responsible for education and upbringing (i.e. the Minister of Education), in agreement with the authorities of the Roman Catholic Church, the Polish Autocephalous Orthodox Church, and other churches and religious associations, shall issue regulations specifying the conditions and procedures for organizing religious education in schools.

The exercise of the minister's obligation to act "in agreement with" the aforementioned entities in issuing the regulation has been subject to markedly divergent interpretations, not only by political circles but above all by the entities referred to in the cited provision of the Act on the Education System.

The aim of this article is therefore to delineate the scope of competence of the public authority – namely the Minister of Education – in relation to the conditions and procedures for organizing religious education in public kindergartens and schools. Given the value of comparative legal research, this aim will be pursued by two authors specializing in Polish and Hungarian law. Such an approach enables not only an analysis of the legal basis of the

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[1] In the Act of 4 September 1997 on Departments of Government Administration (Journal of Laws of 2024, items 1370 and 1907), one of the departments is "Education and Upbringing." Pursuant to Article 20(1), this department shall be responsible for: 1) the education, instruction, upbringing and physical culture of children and young people, except for matters reserved to the competence of other public-administration bodies; 2) the organisation of children's and youth organisations, including the funding system for State-implemented tasks carried out by such organisations;3) the provision of material assistance to children and young people; 4) international cooperation in respect of children and young people. The head of this department is the Minister of Education (Barbara Nowacka has held this office since 13 December 2023), and the government administration office servicing the minister responsible for the "Education and Upbringing" department is the Ministry of National Education.

[2] Journal of Laws of 2024, item 1158.

[3] Journal of Laws of 2020, item 983.

[4] Journal of Laws of 2024, item 750.

minister's actions and an assessment of their compliance with the principle of legality, but also the formulation of *de lege ferenda* proposals based on an analysis of the *de lege lata* state of the law in these countries.

The choice of these two countries for comparative legal analysis of the issue in question is deliberate and justified. Both countries share not only common historical experiences but also embarked on systemic transformation in the same year (1989). Of particular interest is the implementation at both the constitutional and sub-constitutional levels of international standards[5] concerning the respect for freedom of conscience and religion (including religious education in public schools, as guaranteed by Article 53 of the Constitution of the Republic of Poland and Article VII of the Fundamental Law of Hungary (which however does not explicitly refer to religious education in public schools) and the rights of parents to raise their children in accordance with their own beliefs (Articles 48 and 53 of the Constitution of the Republic of Poland). Also relevant to the religious education in public schools are the principles governing the relationship between the state and churches and other religious associations as set out in the constitutions of both countries (Article 25 of the Constitution of the Republic of Poland and Article VII (3) of the Fundamental Law of Hungary [Schanda 2011, 515-20],[6] to which paragraph (4) adds that the State and churches can cooperate in order to fulfil community goals, and religious communities that participate in such cooperations are considered to be established churches that benefit from specific privileges in fulfilling these goals) and the principle of legality, according to which public authorities act on the basis of and within the limits of the law (Article 7 of the Constitution of the Republic of Poland), and, in the case of the minister, in particular, Chapter VI of the Constitution of the Republic of Poland. This confirms that the issue addressed in the title, beyond its purely denominational character, also holds significant constitutional importance, which is of considerable relevance especially when assessing provisions of constitutional rank.

It should be noted that the aforementioned Regulation of 26 July 2024 was challenged before the Constitutional Tribunal by an application of the First

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[5] The reference here is primarily to the incorporation into the Hungarian and Polish constitutions of the European Convention on Human Rights, which had been signed and ratified prior to their adoption. Hungary signed the Convention on 6 November 1990 and ratified it on 5 November 1992; its provisions were incorporated into the Hungarian legal order by Act XXXI of 1993, which entered into force on 7 April 1993. Poland signed the European Convention on Human Rights on 26 November 1991 and ratified it on 19 January 1993, the same day on which it entered into force in respect of Poland. As of 1 May 1993, Poland recognised the jurisdiction of the European Court of Human Rights in Strasbourg. The provisions of the Convention have been reflected in the constitutions of both States.

[6] The separation of churches and the State was already prescribed in the Constitution that preceded the 2011 Fundamental Law.

President of the Supreme Court dated 26 August 2024,[7] and has already been adjudicated by the Polish Constitutional Tribunal.[8] The challenge was based,[9] inter alia, on the grounds that the provisions of the Regulation interfere with constitutionally protected and socially significant values, as well as the need to ensure that children receive moral and religious education in accordance with the beliefs of their parents, and on the grounds of the protection of the work of religious education teachers.[10]

It goes without saying that "the state is responsible, especially through public education system, to provide objective, full and balanced information on ideological issues" [Schanda 2018, 20]. This condition imposed on public education also implies, by its very nature, the teaching of religious education, as the teaching of the worldview of each denomination. At the same time, states must also take into account the fact that the negative side of freedom of conscience and religion (i.e. the possibility for a person not to belong to any religion) is also protected. Thus, religious education within public schools must be organized in such a way as to provide a coherent curriculum of religious education, but also to guarantee the right of choice as to whether or not a student wishes to receive religious education [ibid., 59].

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[7] Application of the First President of the Supreme Court dated 26 August 2024 concerning the review of the constitutionality of the regulation amending the regulation on the conditions and manner of organising religious education in public preschools and schools, case no. BSA III.4011.1.2024, https://www.sn.pl/sites/Serwis_WWW/SiteAssets/Lists/Wydarzenia/AllItems/Wniosek%20Pierwszego%20Prezesa%20S%C4%85du%20Najwy%C5%BCszego%20do%20Trybuna%C5%82u%20Konstytucyjnego%20z%20dnia%2026%20sierpnia%202024%20r.%20BSA%20III.4011.1.2024.pdf [accessed: 22.05.2025].

[8] It should be noted that three regulations issued by the Minister of Education, Barbara Nowacka, concerning religious education have been challenged before the Constitutional Tribunal. In addition to the regulation that forms the basis of the present analysis, the challenges pertain to: (1) the inclusion of grades in religion and ethics in the calculation of students' grade point average; and (2) the organization, as of 1 September 2025, of religion or ethics classes in the amount of one hour per week, scheduled directly before or after a student's compulsory educational activities. As of the time of writing (early May 2025), these matters have not yet been adjudicated by the Constitutional Tribunal.

[9] This refers to the judgment of the Constitutional Tribunal of 27 November 2024. Previously, following the application submitted by the First President of the Supreme Court, the Tribunal issued an interim measure suspending the application of the contested regulation. Consequently, as of 1 September 2024 (the beginning of the school year in Poland), para. 2(1) of the Regulation of the Minister of National Education on the conditions and manner of organising religious education in public preschools and schools (Journal of Laws of 2020, item 983) continues to apply in its previous wording.

[10] Case no. BSA III.4011.1.2024.

1. CONSTITUTIONAL AND CONCORDAT-BASED FOUNDATIONS OF THE MINISTER'S COMPETENCE REGARDING RELIGIOUS EDUCATION IN PUBLIC SCHOOLS

As indicated in the introduction, religious education in public schools in both Poland and Hungary is grounded in normative acts occupying the highest position in the hierarchy of legal sources – namely, the constitutions. Poland and Hungary are not exceptions in this regard within Europe: religion is taught in public schools in 23 European countries, and its presence is regarded as a standard feature of European educational systems [Tomasik 2010, 47-57].

The Polish Constitutional Tribunal, in its judgment of 27 November 2024, consistent with its earlier rulings on religious education in public schools, emphasized that a minister authorized to issue regulations on religious education must do so in compliance with constitutional and concordat-based norms governing this matter, and not merely with the provisions of the Act of 7 September 1991 on the Education System – the statutory basis for such delegation. This process of constitutionalization is of paramount importance,[11] inter alia, due to the obligation of public authorities to act on the basis of and within the limits of the law, as enshrined in Article 7 of the Constitution of the Republic of Poland, which articulates the principle of legality: "Public authorities shall act on the basis of and within the limits of the law" [Szymanek 2012, 53-84].

Of particular importance in this context is the position adopted by the Constitutional Tribunal in its judgment of 20 April 2020 (case no. K 3/17), in which it stated: "A consequence of the principle of a democratic state governed by the rule of law, as explicitly articulated in the Constitution, is the principle of legality – also referred to as the principle of formal legality – set out in Article 7 of the Constitution ('Public authorities shall act on the basis of and within the limits of the law'), which the Constitutional Tribunal, in its jurisprudence, has regarded – alongside its material dimension – as the essence of the principle of a democratic state governed by the rule of law."[12] Furthermore, according to the Tribunal's position expressed

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[11] The adoption of the Constitution of the Republic of Poland on 2 April 1997 strengthened the position of religion as a subject in public education primarily because, pursuant to Article 8 thereof, "The Constitution shall be the supreme law of the Republic of Poland."

[12] Judgment of the Constitutional Tribunal of 20 April 2020, case no. U 2/20, OTK ZU A/2020, item 61. In the further reasoning, the Constitutional Tribunal emphasized that "it holds the view that a consequence of formal rule of law is the obligation to define clearly and precisely, in legal provisions, the competences of public authorities, to base the actions of such authorities on the legal grounds set forth therein, and the prohibition of presuming the competences of public authorities in case of interpretative doubts (see the judgment of the Constitutional

in other rulings, "the principle of legality constitutes the core of the principle of the rule of law, whereby the competences of public authorities must be clearly and precisely defined in legal provisions, and any actions taken by such authorities must have a basis in those provisions; in cases of interpretative doubt, the competence of public authorities cannot be presumed."[13]

As highlighted in the introduction to this analysis, the constitutional principles regulating the relationship between the state and churches are crucial for assessing the competence of the minister responsible for education and upbringing in matters concerning religious education in public schools. Among these principles, particular importance is attached to the principle of cooperation for the good of the individual and the common good [Rodak 2014; Piszko 2018]. Article 25(3) of the Constitution of the Republic of Poland provides that the relationship between the state and churches and other religious associations shall be based on the principles of respecting their autonomy and mutual independence, each in its own sphere, as well as cooperation for the good of the individual and the common good [Borecki 2022, 137-49; Garlicki 2016].

As rightly observed by Marcin Olszówka, "At the constitutional level, the only area of cooperation explicitly indicated by the constitution-maker is the implementation of the right to religious education in public schools, recognized as a human right (thus not merely a programmatic provision). It is worth noting that religious education as such – i.e., in terms of its content, form, and the doctrinal and moral requirements imposed on religious education teachers (catechists) – remains a strictly religious activity (*sensu stricto*), whereas, as an element of public education, it constitutes an area of cooperation between the State and religious associations performing religious functions sensu largo. In every instance, a necessary condition for undertaking such cooperation is the consent of both parties – secular and religious – who jointly recognize that a given undertaking serves to achieve constitutionally defined objectives" [Olszówka 2016]. The significance of these provisions can hardly be overstated, as evidenced, inter alia, by the application submitted by the First President of the Supreme Court to the Constitutional Tribunal on 26 August 2024.[14]

In this application, the First President of the Supreme Court rightly identified Article 53(3), in conjunction with Article 48(1) of the Constitution

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Tribunal of 14 June 2006, case no. K 53/05, OTK ZU No. 6/A/2006, item 66). There is no doubt that public authorities are to be understood as encompassing all branches of power in the constitutional sense – legislative, executive, and judicial (see the judgment of the Constitutional Tribunal of 4 December 2001, case no. SK 18/00, OTK ZU No. 8/2001, item 256)."

[13] See the judgments of the Constitutional Tribunal: of 24 October 2017, case no. K 3/17, OTK ZU A/2017, item 68, and of 14 June 2006, case no. K 53/05, OTK ZU No. 6/A/2006, item 66.

[14] Case no. BSA III.4011.1.2024.

of the Republic of Poland, as the relevant constitutional review standards in relation to the allegation that the Regulation of the Minister of Education of 26 July 2024, amending the regulation on the conditions and procedures for organizing religious education in public kindergartens and schools, infringes these provisions [Maroń 2024, 21-46; Ożóg 2015, 90; Borecki 2007, 35-42]. The first of these articles confirms that "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." In turn, Article 48 guarantees that "1. Parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as his freedom of conscience and belief and also his convictions. 2. Limitation or deprivation of parental rights may be effected only in the instances specified by statute and only on the basis of a final court judgment." These provisions have been the subject of consistent commentary by the Constitutional Tribunal and extensive discussion in Polish legal scholarship [Bem 2010; Brzozowski 2010; Mączyński 2012; Nowak 2017, 55-83; Łętowska, Grochowski, Namysłowska, et al. 2013, 4-9; Matusiak-Frącczak 2010; Borecki 2018, 33-46; Idem 2010, 33-46; Maroń 2024, 21-46; Więcek 2013, 185-212]. Nevertheless, their implementation continues to encounter difficulties, and the legislative activity of ministers of education often stands in opposition to one of the fundamental rights of parents and children – namely, the right of parents to raise their children and the right of children to be brought up in accordance with the parents' convictions. This right of parents and children entails a corresponding obligation on the part of the state, particularly since, pursuant to Article 53(4) of the Constitution of the Republic of Poland: "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" [Borecki and Pietrzak 2010, 18-31].[15] The Polish Constitutional Tribunal, in one of its judgments, affirmed that "the State cannot evade the obligation to ensure that religious education is provided in such a manner and place that it corresponds to the will of the parents. The State is not relieved of this obligation even when, as a result of its own negligence, religious education – due to a lack of other options – begins to be organized by a church institution on its own premises."[16] It was therefore rightly noted by Wojciech Góralski

[15] Therefore, the provisions implementing these constitutional principles regarding religious education in schools should indicate that it is schools – not Churches or other religious associations – that are responsible for organizing religious instruction, and that such instruction is conducted on the premises of public schools and within the framework of the public education system.

[16] Judgment of the Constitutional Tribunal of 30 January 1991, case no. K 11/90.

and Witold Adamczewski that, if the State's support in the realization of parental rights and duties is to be effective, it should be expressed through the organization of religious education in schools under state supervision [Góralski and Adamczewski 1994, 73].

Moreover, it should be emphasized that religious education is the only subject taught in public schools that enjoys constitutional status. Even the teaching of the Polish language or history does not hold such a rank [Janiga and Mezglewski 2001, 131; Mezglewski 2009a, 102-103; Sobczyk 2008, 222; Idem 2010, 207-23; Idem 2013]. It is worth recalling the position of A. Mezglewski, which we share, that "Since religious education is a subject of instruction, it is therefore a subject like any other. Any other interpretation would imply an impermissible discrimination" [Mezglewski 2009b; Zieliński 2009, 504].[17] This means that the Polish constitution-maker adopted the principle of equal treatment of religion as a school subject. *A contrario*, any potential differences in the legal status of religion as a subject in public education must derive solely from its specific character [Mezglewski 2009b]. Sub-constitutional regulations develop and complement these constitutional guarantees, as discussed further below.

The constitutional guarantees regarding the right of parents to raise their children in accordance with their own convictions – as well as the provision of religious education in public schools – were previously affirmed in a ratified international agreement: the Concordat between the Holy See and the Republic of Poland, signed in 1993 and ratified by statute.[18] This is reflected in Article 12 of the Concordat, which provides: "Recognizing the right of parents to the religious upbringing of their children, as well as the principle of tolerance, the State guarantees that public primary and secondary schools and kindergartens administered by state and local government authorities shall, in accordance with the wishes of those concerned, organize religious education within the framework of the regular school and kindergarten schedule" [Borecki 2022, 137-49]. From the provisions of this international agreement thus derive key principles relevant to the subject under analysis: recognition of the right of parents to the religious upbringing of their children; the teaching of religion in schools in accordance with the wishes of those concerned; the inclusion of kindergartens as well as primary and secondary schools administered by state and local government

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[17] T.J. Zieliński notes that the religion of a denominational community with a legally regulated status may be present in schools solely in the form of a school subject, which "appears to be an expression of the lawmaker's precise constitutional vision."

[18] Journal of Laws of 1998, No. 51, item 318. Thanks to the 1993 Concordat (ratified in 1998), religious education as a subject within public education was established in the Polish legal system through a bilateral international agreement, constituting a source of universally binding law.

authorities within the guarantee of religious education; and the delineation of competences between state authorities and church authorities in relation to religious education, curricula, and teachers [Sobczyk 2013; Krukowski 1995, 196-97; Góralski and Pieńdyk 2000, 37-41].

It should be noted that these principles, due to the bilateral nature of the agreement, apply specifically to members of the Roman Catholic Church. However, the constitutional principle of equal rights of churches and other religious associations (Article 25(1) of the Constitution of the Republic of Poland) imposes an obligation on public authorities to extend equivalent guarantees to members of other religious denominations who seek religious education in public schools [Krukowski 1996, 40-49]. It is important to emphasize that the provisions of the Concordat contain no quantitative restrictions regarding the organization of religious instruction. This may imply that an educational institution is obligated to organize religious classes regardless of the number of students requesting it [Borecki 2008, 67-78].

Furthermore, apart from the provisions of the Constitution and the Concordat – which directly address the teaching of religion in public schools and the rights of parents and children in this regard – the activity of the Minister of Education in this area is also linked to constitutional guarantees regarding the right to work. This was emphasized by the First President of the Supreme Court in the aforementioned application to the Constitutional Tribunal. Indeed, Article 24 of the Constitution of the Republic of Poland provides that: „Work shall be protected by the Republic of Poland. The State shall exercise supervision over the conditions of work," and Article 65(5) provides that: "Public authorities shall pursue policies aiming at full, productive employment by implementing programmes to combat unemployment, including the organization of and support for occupational advice and training, as well as public works and economic intervention" [Przeklasa and Przeklasa 2023, 31-46]. Therefore, the implementation of the solutions adopted in the Regulation of the Minister of Education of 26 July 2024 "will lead, due to the mere one-month *vacatio legis*, to an unforeseen reduction in the demand for the work of religious education teachers in educational institutions, which – in light of the lack of opportunities for these teachers to obtain qualifications for teaching other subjects – constitutes a real threat of sudden job loss, thereby violating: the principle of citizens' trust in the state and its laws, the principle of the protection of work, and the State's obligation to pursue a policy of full and productive employment."[19]

Although the Fundamental Law of Hungary does not contain an explicit provision on teaching of religion, Article XVI(2) and (3) emphasise that "(2) Parents shall have the right to choose the upbringing to be given to their

[19] Case no. BSA III.4011.1.2024.

children. (3) Parents shall be obliged to take care of their minor children. This obligation shall include the provisions of schooling for their children."[20] According to some scholars, paragraph (2) of Article XVI also protects the "family's ideological integrity," thereby ensuring that parents may raise their children in accordance with their religious beliefs [Schanda 2018, 12]. In addition, the provision protects the religious integrity of the family [Schanda and Krúdy 2023, 92]. It is also crucial to underline that paragraph (1) of the same Article imposes obligations on the State, stating – inter alia – that: "Hungary […] shall ensure an upbringing […] in accordance with the values based on the constitutional identity and Christian culture of our country" [Schanda 2018, 12].[21] Under this provision, religious education cannot be provided against the wishes of the parent or child, at the same time, the State "must ensure" education based on Christian values it this is in accordance with the will of the parents [Benkő 2022, 221]. However, Gábor Schweitzer argued in a written interview that in paragraph (3) "[t]he framers of the Fundamental Law provided little guidance regarding the constitutional significance of Christian culture" [Rixer, Schanda, Schweitzer, et al. 2021, 314].

More detailed provisions concerning religious education in public schools are found in statutory and lower-level regulations. Most notably, Act No. CXC of 2011 on National Public Education provides, already in Section 3(3), that: "[…] in state and municipal educational institutions, knowledge, religious and philosophical information must be imparted in an objective and multifaceted manner, respecting the religious and philosophical convictions of the child, student, parent and teacher throughout the entire educational process, and allowing the child or student to participate in optional religious education and religious and ethics education."[22] It must be noted that this provision was introduced in its current form in 2013. Following this amendment, two main models of religious instruction exist in public schools: (i) optional denominational religious education classes, and (ii) religious and ethics education, which may be chosen by parents in place of general ethics classes in grades 1 to 8 (starting from the 2013/14 school year, the core curriculum in state primary schools has included ethics education or, alternatively, religion and ethics classes) [Mitták 2012, 27-29].

Subsequently, Title 23 of the Act regulates in detail both the operation of ecclesiastical and private educational institutions[23] and the specific

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[20] Article XVI(2) and (3) of the Fundamental Law of Hungary, https://njt.hu/jogszabaly/en/2011-4301-02-00 [accessed: 18.06.2025].

[21] Article XVI (1) of the Fundamental Law of Hungary.

[22] Section 3(3) of Act No CXC of 2011 on National Public Education. Published in Hungarian Gazette on 29 December 2011, https://njt.hu/jogszabaly/2011-190-00-00.82#CI [accessed: 18.06.2025].

[23] At this point, one has to point out that religious education in ecclesiastical educational

rules governing the religious and ethics education in state educational institutions. Under Section 35, religious education organized at the request of a parent or student – and which is not part of the compulsory curriculum – is to be provided by a legal ecclesiastical person, while ethics classes may be replaced by religious and ethics classes organized by an established church or internal ecclesiastical legal entity.[24] The provision also emphasizes that the educational institution must cooperate closely with the persons providing the optional religious or religious and ethics instruction. The 2013 amendment also introduced Section 35/B, which sets out in detail the obligations related to the provision of optional religious and religious and ethics classes. Specifically, legal ecclesiastical persons, established churches, or internal ecclesiastical legal entities that offer these classes are required to: (i) determine the content (the *curricula*) of the given subject; (ii) organize the enrollment procedure for religious education and – in cooperation with the state educational institution – for religion and ethics education; (iii) hire and supervise the necessary personnel; and (iv) monitor the classes and their delivery.[25]

Finally, a 2019 amendment added Section 35/A, which expressly provides that: "[i]n grades 1 to 8 of public schools, ethics lessons or the religious and ethics lessons organized by an established church or an internal ecclesiastical legal entity form part of the compulsory curricular activities."[26]

In this context, it is also necessary to mention Government Decree No. 110/2012 (VI.4.) on the issuance, adoption, and implementation of the National Core Curriculum, which in point I.2.1. prescribes that: "the teaching of ethics is compulsory in primary grades 1-8. The content of religious and ethics education is determined by the ecclesiastical legal person."[27] Furthermore, the Decree sets the minimum numbers of religious and ethics lessons at two for each of the eight grades.

On the basis of the above-mentioned legal provisions, it can be concluded that the teaching of religion in public (state) educational institutions in Hungary takes two main forms: (i) optional denominational religious classes and (ii) religious and ethics education, which may be chosen in place of ethics classes. In both cases, the classes are optional (religious and ethics education may also be considered optional, insofar as it constitutes an

institutions is subject to somewhat different provisions from those in state educational institutions, which, for reasons of scope and subject of research, we do not wish to examine in more depth in the present paper.

24 Section 35 of Act No CXC of 2011 on National Public Education.

25 Section 35/B of Act No CXC of 2011 on National Public Education.

26 Section 35/A of Act No CXC of 2011 on National Public Education.

27 Point I.2.1. of Government Decree No 110/2012 (VI.4.) on the issuance, introduction and implementation of the National Core Curriculum, https://njt.hu/jogszabaly/2012-110-20-22 [accessed: 18.06.2025].

alternative to standard ethics classes) and are conducted by members of a church. It is crucial to emphasize that the right to choose between ethics classes and religious and ethics classes belongs to the parent, and this choice represents a concrete manifestation of the parental right to direct the education and upbringing of their children [Lápossy 2022, 7] as it was pointed out by also the Constitutional Court.[28]

In conclusion, this part of the analysis demonstrates that a review of constitutional provisions, constitutional court case law in both Poland and Hungary, and the views of legal scholars leads to the conclusion that constitutional and concordat-based norms – both formal and substantive – play a decisive role in defining the scope of competence of the minister responsible for education and upbringing.

The first group, comprising formal provisions, establishes the legal basis and limits of ministerial authority. Notably, Article 7 of the Constitution of the Republic of Poland, which enshrines the principle of legality governing the actions of public authorities, is of central importance in this regard [Zubik and Sokolewicz 2016; Skrzydło 2013; Borecki 2009, 51-62; Januchowski 2007, 49-67]. The second group consists of substantive constitutional guarantees, including: freedom of conscience and religion, the right of parents to raise their children in accordance with their own convictions, the principles governing state–church relations, and the right to work and its protection. Given the hierarchical structure of the legal system and the supremacy of the Constitution, the importance of these provisions in the legislative and administrative process cannot be overstated. In the Polish legal system, this framework serves to protect freedom of conscience and religion, as well as individual beliefs and their manifestation, against arbitrary interference by the executive branch.

In Hungary the Fundamental Law guarantees the right of the parents *to choose the upringing to be given to their children,* thereby ensuring that they may raise them in accordance with their religious convictions. According to statutory provisions, religion may appear in public schools in two ways: (i) through optional denominational religious classes, and (ii) through religious and ethics education, offered as an alternative to general ethics classes. While optional denominational religious education lies outside the compulsory curriculum and is delivered by a legal ecclesiastical person, religious and ethics education forms an integral part of the National Core Curriculum and is organized by an established church or internal

[28] Decision 9/2021. (III.17.) AB of the Constitutional Court of Hungary. Reasoning [67]. Published in Hungarian Gazette on 17 March 2021, https://public.mkab.hu/dev/dontesek.nsf/0/479d386749f786f1c1258477005b4aa3/$FILE/9_2021%20AB%20hat%C3%A1rozat.pdf [accessed: 18.06.2025].

ecclesiastical legal entity. In this context, it is essential to analyse the position and competencies of the minister responsible for public education, particularly in relation to religious and ethics education. Since these classes are incorporated into the National Core Curriculum, it is precisely here that the minister's regulatory and supervisory powers become relevant.

2. THE BASIS AND LIMITS OF THE COMPETENCE OF THE MINISTER OF EDUCATION CONCERNING RELIGIOUS EDUCATION

In Poland, although the teaching of religion in public schools is grounded in both constitutional and concordat-based principles, in practice the Minister of Education (i.e. the minister responsible for matters of education and upbringing)[29] plays a key role in shaping the educational environment for children and adolescents, as well as in the operation of public schools. The minister's tasks are precisely defined by statutory acts and implementing regulations, and the competences related to the organization of religious education in public schools generally encompass three fundamental areas.

Firstly, pursuant to statutory delegation (in particular, under the Act on the Education System), the minister responsible for education and upbringing is authorized to issue executive regulations to statutes [Piszko 2018; Pilich 2015]. The key legal act regulating the practical details of religious education is the Regulation of the Minister of National Education of 14 April 1992 on the Conditions and Methods of Organizing the Teaching of Religion in Public Preschools and Schools.[30]

This regulation, amended multiple times, sets out provisions concerning, inter alia: the procedure for declaring participation in religion or ethics classes, the organization of inter-class groups, the number of hours allocated for religious instruction in the weekly schedule, the principles of assessment and the inclusion of religion grades in the overall average, and the funding of religious education from public funds [Maziarz 2011, 128-32]. The minister may amend these provisions to reflect changing social and educational realities, while taking into account both the welfare of students and the constitutional guarantees of freedom of religion [Stanisz and Walencik 2024, 361-79; Zieliński 2023a, 69-90].

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[29] Act of 4 September 1997 on Government Administration Departments, Journal of Laws of 2024, item 1370 as amended.

[30] Regulation of the Minister of National Education of 14 April 1992 on the conditions and manner of organizing religious education in public schools, Journal of Laws No. 36, item 155; Journal of Laws of 1993, No. 83, item 390; Journal of Laws of 1999, No. 67, item 753; Journal of Laws of 2014, item 478; Journal of Laws of 2017, item 1147; Journal of Laws of 2024, item 1158; Journal of Laws of 2025, item 66.

Secondly, the minister responsible for education and upbringing consults with churches and other religious associations regarding the principles of religious education. In the case of the Catholic Church, this obligation arises from the Act of 17 May 1989 on the Relationship between the State and the Catholic Church in the Republic of Poland, as well as the Concordat between the Holy See and the Republic of Poland (signed on 28 July 1993 and ratified on 23 February 1998). Within this framework, the minister consults with the Polish Episcopal Conference on matters such as: the qualifications of religious education teachers, the curricula for religious education, textbooks and other teaching materials. Similar consultations take place with other churches and religious associations possessing a legally regulated status [Goliszek 2020, 177-95].

Thirdly, the minister exercises administrative supervision over the education system. This includes ensuring that religious education classes are organized in accordance with the applicable legal provisions – specifically, that they are conducted at the request of parents or adult students, and in a manner that does not infringe on the rights of non-participants. Furthermore, the minister may: initiate inspections and issue guidelines to regional education authorities (Polish: *kuratoria oświaty*) in cases where irregularities or legal violations are identified [Pilich 2022].

Turning to the key normative acts from the perspective of achieving the objective of this scientific article, Articles 12(2) and 13(3) of the Act of 7 September 1991 on the Education System contain statutory delegations empowering the minister responsible for education and upbringing to issue regulations specifying the conditions and methods by which schools are to fulfil the tasks set forth in the Act [Piszko 2018; Pilich 2015].

Both of these provisions serve as the direct legal basis for the minister's actions regarding the organization of religious education in public schools. Notably, the legislature requires the minister to act "in consultation" with the authorities of churches and other religious associations when adopting a regulation that defines the conditions and methods by which schools fulfill tasks related to religious education [Pilich 2022].

From Article 12(2) of the Act of 7 September 1991 on the Education System, it follows that: "2. The minister responsible for education and upbringing, in consultation with the authorities of the Catholic Church, the Polish Autocephalous Orthodox Church, and other churches and religious associations, shall specify by way of regulation the conditions and methods by which schools perform the tasks referred to in paragrap. 1." Meanwhile, Article 13(3) provides the following delegation: "The minister responsible for education and upbringing shall specify by way of regulation the conditions and methods by which schools and educational institutions perform the tasks referred to in paragraphs 1 and 2, in particular the minimum number of students required to organize the various forms of education listed

in paragrap. 2." These provisions thus clearly delineate the scope of the minister's competence, providing the formal legal foundation for regulatory action concerning the teaching of religion in schools [Piszko 2018; Pilich 2015].

It should be noted – especially for the benefit of non-Polish-speaking readers – that in Poland, regulations (Polish: *rozporządzenia*) are the only type of normative acts issued by executive authorities that constitute a source of universally binding law. Such regulations are strictly linked to statutes, must be issued on the basis of a specific statutory delegation, and are intended to implement the statute.[31] Due to the hierarchical structure of the Polish legal system, regulations must comply with higher-ranking normative acts – namely, the Constitution, ratified international agreements, and statutes. Consequently, reference in this study to the provisions of the Constitution, the Concordat, and the Education Act is not incidental but essential to understanding the legal framework governing religious education [Ochendowski 1993, 137-46; Spryszak 2019, 47-60; Brzozowski 2013, 65-82].

A key aspect of the minister of education's duties is the obligation to formulate regulations concerning religious education – in accordance with constitutional and concordat standards – "in in agreement" with the authorities of the Catholic Church, the Polish Autocephalous Orthodox Church, and other churches and religious associations.

As emphasized by the Constitutional Tribunal in its judgment of 27 November 2024, "churches and religious associations have been recognized by the legislator as special entities actively participating in public life. The rationale behind the requirement that the minister of education act in consultation with the authorities of the Catholic Church, the Polish Autocephalous Orthodox Church, and other churches and religious associations when specifying by regulation the conditions and methods by which schools organize the teaching of religion is to uphold the constitutional principle of cooperation between the state and churches and other religious associations for the good of the individual and the common good (see Article 25(3) of the Constitution)" [Zieliński 2023b, 40-50; Szymanek 2012, 5-32].

The statutory expression "in agreement with," as used in Article 12 of the Act on the Education System, is not unique in Polish legislative practice. In its judgment of 17 March 1998, the Constitutional Tribunal observed that: "Expressions such as 'in consultation with,' 'in agreement with,' 'with the consent of,' 'with the participation of,' or 'after seeking the opinion of' appear quite frequently in legal provisions empowering a legislative body to make law. They express interdependencies between different entities, one of which is the lawmaking authority." Furthermore, the Tribunal emphasized that

[31] See Article 92 of the Constitution of the Republic of Poland, Journal of Laws No. 78, item 483; of 2001, No. 28, item 319; of 2006, No. 200, item 1471; of 2009, No. 114, item 946.

such phrases may represent a form of democratization of the law-making process, especially where non-state entities, such as religious associations, are involved. Consequently, law-making conducted "in consultation with" or "in agreement with" must entail genuine cooperation beyond the internal mechanisms of public administration.[32]

It is difficult to contest the view that the statutory expression "in agreement with" imposes on the Minister of Education the obligation to engage religious associations in a substantive and participatory rule-making process. This is evidenced by the requirement that representatives of the relevant churches and religious associations co-sign the ministerial regulation, thereby confirming their active involvement in shaping the legal framework governing religious education. This procedural obligation also finds a basis in Article 2(3) of the Act of 8 August 1996 on the Council of Ministers, which stipulates that the Council of Ministers determines the organization and procedure of its work in its rules of procedure.[33] According to para. 145 of Resolution No. 190 of the Council of Ministers of 29 October 2013 (Rules of Procedure of the Council of Ministers), when a regulation is issued jointly or in agreement with another authority, it must be forwarded to the cooperating authority for signature after it is signed by the issuing authority. In this way, Polish sub-statutory law institutionalizes the procedure for regulations that require joint or agreed-upon issuance.[34]

As an aside, it is worth noting that Article 18(1) of the Act of 17 May 1989 on the Relationship between the State and the Catholic Church in the Republic of Poland affirms the state's recognition of the Church's role in religious education: "The State recognizes the right of the Church to teach religion and to provide religious upbringing to children and young people, in accordance with the choice made by their parents or legal guardians" [Górowska and Rydlewski 1992, 138-40].[35]

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[32] Judgment of the Constitutional Tribunal of March 17, 1998, case file ref. U 23/97.

[33] Act of August 8, 1996 on the Council of Ministers, Journal of Laws of 2024, item 1050, 1473.

[34] Announcement of the Prime Minister dated September 4, 2024, on the publication of the consolidated text of the resolution of the Council of Ministers – Rules of Procedure of the Council of Ministers, Official Journal of the Republic of Poland (Monitor Polski) 2024, item 806.

[35] This provision is of crucial importance for shaping the status of religion as a subject in public education in Poland. As confirmed by the Constitutional Tribunal (Judgment of the Constitutional Tribunal of January 30, 1991, case no. K 11/90): "It must therefore be stated that the possibility of teaching religion, referred to in the Instruction of August 3, 1990, was established by the Act of May 17, 1989, on the relationship between the State and the Catholic Church, and not only by the aforementioned Instruction of the Ministry of National Education. This refers to the Instruction of the Minister of National Education dated August 3, 1990, regarding the reintroduction of religion to schools in the 1990/1991 school year."

In Hungary, responsibility for public education rests with the Ministry of the Interior. However, prior to 2022, this competence was held by the Ministry of Human Resources, and the relevant legal acts on educational curricula were issued by the Minister of Human Resources. Of central relevance is Ministry of Human Resources Decree No. 20/2012 (VIII.31.) on the operation of educational institutions and the naming of public educational institutions. The relevant provisions on religious and ethics education are contained in Title 74/A of the Decree. Under these provisions, religious and ethics education is organised essentially at local level, in close cooperation between the education institution and local representatives of the churches. Thus, in organising religious and ethics education the local specificities have to be considered, as well as the material and personal resources of the local representatives of the churches [Mitták 2014, 27]. However, the agreement concluded at local level (between the educational institution and the church providing the education) must comply with national laws governing ecclesiastical matters [Mitták 2012, 27-29; Idem 2014, 27].[36] The literature divides the relevant legislation, that has to be taken into account when concluding an agreement, into two categories: state law on the one hand and agreements between the state and churches on the other [Mitták 2012, 27-29].

The first category includes, among others, Act No CCVI of 2011 on the right to freedom of conscience and religion and on the legal status of churches, religious associations and religious communities,[37] which provides in its Section 19/A (3) that the costs of religious education shall be provided by the state on the basis of an agreement with the church.[38] Among these bilateral agreements (which thus form the second of the above mentioned two categories of legislation), the Concordat between Hungary and the Holy See (that was concluded before the introduction of the above analysed legislation on religious education),[39] the agreement between Hungary and the Hungarian Reformed Church[40] and the agreement between Hungary and the

[36] At the same time, religious and ethics education raises not only questions of ecclesiastical matters; for example, recent Hungarian literature discusses in detail the labor law status of teachers of these subjects [Szlepák 2025, 39].

[37] For an overview of creation of the Act and its future see Zalahegyi 2019, 64-71.

[38] This aspect was highlighted in the case law of the Constitutional Court of Hungary as well in Decision 6/2013. (III.1.) AB of the Constitutional Court. Reasoning [166]. Published in Hungarian Gazette on 1 March 2013, https://public.mkab.hu/dev/dontesek.nsf/0/e57ce6378e537151c1257ada00524f50/$FILE/6_2013%20AB_ENG_v.pdf [accessed: 18.06.2025].

[39] Act No LXX of 1999 on the proclamation of the Agreement between the Holy See and the Republic of Hungary on the financing of public service and other particular religious activities undertaken in Hungary by the Catholic Church and on some issues of property ownership, signed in Vatican City on 20 June 1997. Published in Hungarian Gazette on 5 July 1999, https://njt.hu/jogszabaly/1999-70-00-00 [accessed: 18.06.2025].

[40] Government Decision 1821/2017 (XI. 9.) on the renewal of the Agreement between the Government of Hungary and the Hungarian Reformed Church and the tasks related

Hungarian Evangelical Church[41] can be mentioned. Whilst the Concordat is an international treaty, other agreements between different churches and Hungary are internal provisions, based on which churches can establish contractual relationship with public administrations [Schanda 2018, 16]. Of particular interest – especially in light of the comparative focus of this study – is the fact that these agreements were not concluded by the minister competent in matters of education, but rather by the Government of Hungary. Nevertheless, the agreements contain substantive provisions concerning the promotion of education and training [Köbel 2021, 247-55].

It is worth noting that both the agreement with the Reformed Church and the agreement with the Evangelical Church include provisions for state support for textbooks used in the teaching of religious and ethics education. Specifically, the state provides funding equivalent to the cost of producing ethics textbooks listed in the national textbook catalogue. As the minister responsible for education oversees the textbook supply system, the allocation of subsidies for religious and ethics textbooks is also subject to indirect ministerial influence.

As evidenced by the legal framework discussed above, the former Ministry of Human Resources – which was at that time responsible for educational affairs – established the legal and administrative conditions for the organization of religious and ethics education by adopting the relevant 2012 Decree. However, the actual implementation of religious education is governed by individual agreements between educational institutions and local representatives of churches. This localized approach allows for the flexible organization of religious education, tailored to the needs of the local population, the material and human resources available at each educational institution, and the structure of the school timetable [Mitták 2012, 27-29].

In summary, in both Poland and Hungary, the minister responsible for education is legally obligated to establish the organizational framework for the provision of religious education. This must be done with respect for freedom of conscience and religion, as well as in accordance with the rights of parents to raise their children in line with their personal convictions.

In Poland, the constitutional and concordatory principle of cooperation between the state and churches is further codified at the statutory level. It requires that, when issuing regulations concerning the conditions and modalities for organizing religious education in public preschools and schools,

thereto. Published in Hungarian Gazette on 9 November 2017, https://net.jogtar.hu/jogszabaly?docid=A17H1821.KOR&txtreferer=00000001.txt [accessed: 18.06.2025].

[41] Government Decision 1212/2020 (V. 12.) on the Agreement between the Government of Hungary and the Hungarian Evangelical Church and the tasks related thereto. Published in Hungarian Gazette on 12 May 2020, https://njt.hu/jogszabaly/2020-1212-30-22 [accessed: 18.06.2025].

the Minister of Education must act "in agreement" with the authorities of the Roman Catholic Church, the Polish Autocephalous Orthodox Church, and other churches and religious associations. As a result, any regulation issued without the required agreement may be deemed by the Constitutional Tribunal to be inconsistent with the statutory delegation and constitutional provisions that establish and protect this cooperation.

In Hungary, by contrast, the minister responsible for education is primarily tasked with defining the general legal framework for optional religious education and religious and ethics education. However, the minister is not authorized to intervene in the substantive content or implementation of such education. Under the Act on National Public Education, the responsibility for organizing religious instruction – including curriculum development, educational oversight, and the selection of textbooks – rests with legal ecclesiastical persons, recognized churches, or, as applicable, internal ecclesiastical legal entities.

Moreover, religious education in Hungary is conducted on the basis of agreements concluded between educational institutions and the local representatives of the relevant churches. While these agreements must align with the regulatory framework established by the minister, the minister does not possess the authority to intervene in their content or execution.

CONCLUSION

On the basis of the foregoing analysis and the comparison between two – seemingly similar – legal systems, it becomes evident that Poland and Hungary differ significantly in how the minister responsible for education gives effect to constitutional freedoms, individual rights, and the principles governing relations between the state and religious communities, particularly in the area of religious instruction in public preschools and schools. While both jurisdictions adhere to international standards – notably those articulated at the European level – regarding freedom of conscience and religion, the right of parents to raise their children in accordance with their own convictions, the corresponding rights of children, and the right to work, the practical implementation of these rights diverges. The same is true for their constitutional standards, which – although broadly similar due to shared historical, cultural, religious, and legal traditions – are nonetheless not identical [Wójtowicz 2010, 9-22; Warchałowski 2002, 189; Borecki 2022, 137-49; Tomaszek 2018, 191-93; Pernal 1992, 77-85; Wiśniewski 1991, 15-26; Borecki 2016, 9-24].

It appears that the primary challenge in applying the standards governing the organisation of religious instruction in public preschools and schools

lies in their execution by the executive authorities empowered, under a statutory delegation, to discharge specific tasks in this sphere.

In Poland, frequent political turnover contributes to ideologically driven rather than strictly legalistic approaches to the relationship between the state and religious institutions. A particularly telling example is the Regulation of the Minister of Education of 24 July 2024, which reflects a fulfillment of electoral promises concerning the redefinition of state–church relations. Implementation of constitutional, concordatory, and statutory norms encounters difficulties not only in substantive terms, but also on the formal plane – as evidenced by the statutory obligation for the Polish Minister of Education to act "in agreement" with the authorities of the Roman Catholic Church, the Polish Autocephalous Orthodox Church, and other churches and religious associations when issuing regulations on religious instruction.

This raises the question of whether *de lege ferenda* proposals can be formulated in the Polish context. A case for radical change appears unconvincing, as the model of religious education in Poland's public schools is systemically coherent and rests upon legal acts drawn from four of the five constitutionally recognized sources of universally binding law: the Constitution, ratified international agreements (particularly the 1993 Concordat), statutes, and executive regulations. Substantial reforms would therefore *de facto* and *de iure* require amendments to the Constitution – Poland's supreme law (Article 8) – and renegotiation of the 1993 Concordat. Nonetheless, in view of demographic shifts, evolving attitudes of parents and pupils toward religious education, and the need to protect the employment of teachers of religion, it is recommended that any necessary adjustments – also supported by church representatives – be introduced by the Minister of Education, in accordance with the statutory delegation laid down in Articles 12 and 13 of the Act on the Education System, and with full respect for constitutional provisions and concordatory obligations – *in genere*, "in agreement."

Finally, it should be noted that the latest amendments to the regulation have had a positive impact on the Roman Catholic Church, which has begun offering additional, voluntary catechetical classes in parish facilities. Furthermore, a citizens' legislative initiative has been launched, seeking to reform the regulation of religious and ethics instruction at the statutory level.[42]

In Hungary, the state's explicit support for Christian values is reflected in the structure of public education. Here, religious and ethics instruction is based on agreements between individual educational institutions and local representatives of the churches. Thus, the agreement of the minister responsible for education is not determinative in the organization of such classes.

[42] See https://www.prawo.pl/oswiata/obowiazkowe-lekcje-religii-projekt,531845.html [accessed: 22.05.2025].

However, since both individual institutions and public education as a whole fall under the authority of the minister (see Section 77(1) of Act No CXC of 2011 on National Public Education), these agreements necessarily operate within the framework set by the minister. In this way, ministerial–ecclesiastical cooperation is maintained through the decentralized model of local institutional agreements. Taking all this into account, our *de lege ferenda* proposals are primarily procedural in nature. In our view a relaxation of the formality of the procedure of opting for religious and ethics education and for the modification of the choice (at present, if a parent wishes to change his or her choice regarding the religious and ethics education, the parent must notify the school principal and the representative of the church in writing by 20 May of each school year[43]) could be considered.

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[43] Section 182/B (7) of Ministry of Human Resources Decree No 20/2012. (VIII.31.). Published in Official Gazette on 31 August 2012, https://njt.hu/jogszabaly/2012-20-20-5H.35#CI [accessed: 18.06.2025].

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TERRITORIAL AUTONOMY AS A DETERMINANT OF LOCAL GOVERNMENT – AN OVERVIEW OF THE ISSUE

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Abstract. It has been exactly 25 years since local government was introduced at all three levels of the fundamental territorial division, which raises the question of the correctness of the solutions adopted in the context of territorial autonomy. At the municipal level, local government is authentic, with all its attributes, including the territorial autonomy of that level. Nevertheless, is this also the case with higher-level units, i.e., counties and provinces? Here, the answer is not so obvious. "Territorial autonomy" does not have a strictly defined legal content. It is a general and relative concept, which is difficult, if not impossible, to define. One thing is sure, however: this concept embodies an idea that shapes the legal system governing the organizational and territorial structure of the state. It concerns the division of power between the center and the regions, taking into account the processes of centralization and decentralization. It seems that the concept of "territorial autonomy" can be explained by considering the relationship between the interests of the "territory" and the interests of the state as a whole. The main conclusion of these considerations is the assumption that territorial autonomy exists when the interests of individual territorial units acquire the characteristics of an independent legal entity, i.e., legal provisions create a particular permanent sphere of activity for local authorities that is free from the domination of the interests of the state as a whole. It is a normative construct based on the assumption that, in addition to national tasks that are uniformly implemented throughout the country, the legislator defines tasks that are independently shaped and implemented by local authorities and are specific to their jurisdiction. This, in turn, is part of the essence of local government. This reasoning allows us to accept the fundamental thesis of the considerations undertaken on the determining role of territorial autonomy in the concept of local government.

Keywords: public administration; administrative law; local government; territorial autonomy.

INTRODUCTORY REMARKS

The system of local government is a consequence of the territorial organization of the state, which is one of the most important issues in its functioning. It forms the basis for the territorial management of the state and is linked

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to the adoption of a specific concept of administration at both the national and local levels. Currently, there is no doubt that autonomy is a prerequisite for effective local government in Poland. Moreover, it can be argued that territorial autonomy is the main condition for effective local government, as it allows public tasks to be identified with a specific area as its public interest. It requires a properly structured territorial system.

According to the Constitution of the Republic of Poland,[1] the territorial system is to ensure the decentralization of public authority (Article 15(1)) while maintaining the executive role of the Council of Ministers (Article 10(2)). These principles are reflected in the dualism of public administration, which involves the coexistence of centralized and decentralized systems within the territorial structure. The primary tool of the centralized system is currently the administration, referred to as government – central and local, which constitutes the executive apparatus of the Council of Ministers. For the decentralized system, the executive apparatus is the local government administration, based on the bodies of individual local government units. Their functioning encompasses public tasks that reflect the public interest specific to a given local government unit. This leads to the conclusion that local government is an integral part of local management.

The above assumptions allow us to formulate the fundamental thesis that territorial autonomy is a necessary condition for local government. This thesis is confirmed beyond any doubt by the essence of local government – after all, autonomy is inherent in local government. It should be emphasized here that while local government is one of the means of territorial autonomy, perhaps the most important one, the mere fact of introducing local government does not allow us to draw far-reaching conclusions about territorial autonomy. What is decisive here is the legal structure of local government emerging from the applicable legislation, or more precisely, the shape of the individual elements defining the limits of the autonomy of individual territorial units and the legal mechanisms for protecting that autonomy.

"Territorial autonomy" does not have a strictly defined legal content. It is a general and relative concept, which is difficult, if not impossible, to define. One thing is sure, however: this concept embodies an idea that shapes the legal system governing the organizational and territorial structure of the state. It concerns the division of power between the center and the regions. Further attempts to define "territorial autonomy" in concrete terms encounter severe difficulties.

However, it is critical to identify the elements that determine the final structure of territorial autonomy. It is also necessary to determine the shape of these elements and the mutual connections and relationships between

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

them. It therefore seems that the success of the process of "territorial" autonomization depends on the cumulative definition and resolution of issues such as: the general division of functions between the "center" and the "territory"; the structure of territorial division; the status of individual levels of the territorial structure; the precise division of tasks, competences, and responsibilities between government and local government administration; legal guarantees of the independence of territorial bodies and units; material safeguards for the implementation of the tasks of territorial bodies.

The process of territorial autonomy in Poland was complex and protracted. Despite many reforms carried out under the banner of decentralization and democratization, the first visible step towards territorial autonomy was the Act of July 20, 1983, on the system of national councils and local government,[2] and its amendment of 1988. It should be noted that the legislators at that time, while introducing many new elements of autonomy for the so-called territory, took the position of generally continuing the existing model of functioning of territorial units (in force since 1950).

A breakthrough moment came on March 8, 1990, with the adoption of the Local Government Act,[3] which clearly expressed the intention to establish the autonomy of basic territorial units. This autonomy was guaranteed by the institution of local government, which was the basic form of public life organization in the commune and found its constitutional basis in Article 164(1). Subsequent normative acts resulting from the political reform introduced in 1999, i.e., the Act of June 5, 1998, on county self-government[4] and the Act of the same date on provincial self-government,[5] introduced local government at the remaining levels of the fundamental territorial division of the state. While the 1990 Act was a turning point in the autonomization of the territory, the real breakthrough came only in 1999, when the contemporary three-tier Polish model of local government emerged. Only systemic solutions that assume autonomy at all levels of the basic division are effective, thus creating an internally coherent system. Each of the units of the basic division has a specific role to play in the implementation of the public interest. It has been 25 years since the introduction of local government at all three levels of the fundamental territorial division, which raises the question of the correctness of the solutions adopted in the context of territorial autonomy.

It seems that the concept of "territorial autonomy" can be clarified, to the extent necessary for the present considerations, by taking into account the relationship between the interests of the "territory" and the interests of the state as a whole.

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[2] Original text: Journal of Laws of 1983, No. 41, item 185.
[3] Original text: Journal of Laws of 1990, No. 16, item 95.
[4] Original text: Journal of Laws of 1998, No. 91, item 578.
[5] Original text: Journal of Laws of 1998, No. 91, item 576.

1. PUBLIC INTEREST AS A FACTOR IDENTIFYING TERRITORIAL AUTONOMY

The category of public interest is multifaceted and both internally complex and diverse. It is tough, if not impossible, to define it. There is no absolute, fixed, and permanent definition of this concept, because there is no fixed, permanent, and unchanging object of definition. M. Wyrzykowski made an interesting synthesis of views on this subject. The author states that attempts to construct a concise definition of this concept lack real, lasting foundations [Wyrzykowski 1986, 44], although they deserve recognition. As he points out, these are attempts to define the inviolable boundaries of the public interest as a common good in given social and political conditions. The research methodology requires the use of both positive and negative designations of the concept in question. Thus, these attempts limit the possibilities of its abuse [ibid., 47]. The public interest requires constant redefinition, constant determination in a never-ending process through many channels of discussion (mass media, doctrine, legislation, jurisprudence, etc.), as it is a constantly changing composition and balance of different values of a given society at a specific time and place [Friedmann 1962, cited in: Wyrzykowski 1986, 45]. The concept of public interest is essentially relative. Its content depends on constantly changing social conditions [Lang 1972, 135]. This variability is, among other things, a result of the local context. Different content will be appropriate for defining the national interest, and a different one for the local interest.

In the national interest, the basis of social conditions will be the nation, while in the local context, it will be specific communities. These communities are closely linked to the individual units of the fundamental territorial division of the state[6] for which they constitute the basis of the political system. Although the activities of individual units of the basic division relate to the interests of the same residents, it should be remembered that these residents, as communities at different levels, have different needs. Therefore, different interests can be attributed to the municipality, the county, and the province as territorial communities. Moreover, the interests of each of these units will have a corresponding territorial dimension, different from the interests of the state as a whole.

Generally speaking, there are two possible solutions here. Firstly, legal provisions may, to a certain extent, recognize and take into account the systemic distinctiveness of the interests of individual units and the interests of the state as a whole. As a result, this gives local authorities the freedom and independence to articulate and, most importantly, carry out tasks related to the development of the area and the satisfaction of the needs of their

[6] On the subject of territorial division, see, for example, Niemczuk 2013, 204ff.

communities. Secondly, legal regulations may give rise to a system of state management in which local arrangements are only dependent elements of the national system. It would mean that the interests of individual entities are derived from objectives shaped at the central level. In this case, the various functions of local authorities would, in fact, be the implementation of the national interest.

There is no doubt that the concept of "territorial autonomy" discussed here should be linked to the first solution presented above. However, the question arises as to what method of legal regulation should be used so that, on the one hand, it allows for the realization of the separate interests of individual territorial units and, on the other hand, takes into account the unquestionable need for the existence and possibility of realizing the general interest of society, obviously within a strictly and rationally defined scope. It seems that the normative construction of the idea of territorial autonomy should be integrated into a general scheme, according to which there are: firstly, objectives set at the central level, recognized as national priorities and uniformly implemented throughout the country; secondly, objectives set at the central level, but of a more general nature, thus creating the possibility of adapting them to local conditions during the implementation phase; thirdly, objectives independently shaped and implemented by local authorities.

It leads to the fundamental conclusion that territorial autonomy exists when the interests of individual territorial units acquire the characteristics of an independent legal entity, i.e., legal provisions create a specific permanent sphere of activity for local authorities that is free from the domination of national interests. This is a normative construct based on the assumption that, in addition to national tasks that are uniformly implemented throughout the country, the legislator defines tasks that are independently shaped and implemented by local authorities and are specific to their jurisdiction. Moreover, the proposal to make the concept of territorial autonomy a constitutional principle seems justified. It should be added that the independence referred to here cannot be absolute and should be subject to the supervision of central authorities, but only based on the criterion of legality. Autonomy is not federalism.

2. PUBLIC TASKS AS A FACTOR IN IDENTIFYING TERRITORIAL AUTONOMY

A further problem is the scope of activity of local authorities. The complexity of this problem precludes the possibility of formulating a relatively specific a priori assumption. The rationality of the legislator and its actual intentions to empower the territory must be of decisive importance here. However, it should be assumed that the general guideline for the legislator

should be to take an interest in all tasks related to the socio-economic development of territorial units and the satisfaction of the collective needs of residents. It would involve observing the principle that all public matters expressing the interests of the "territory" should be the responsibility of local authorities at various levels, depending on the nature of these matters, their degree of detail, or their territorial scope.

Territorial autonomy is also – or rather, above all – the ability to carry out tasks that constitute the interests of the area. It goes without saying that the balance between the tasks set and the instruments by which they are to be carried out ultimately determines the appropriate legal structure of territorial autonomy.

Public tasks are based on law and serve the public interest. As M. Stahl rightly points out, public tasks are tasks of the state, which it performs independently through its bodies or transfers to other public administration entities [Stahl 2011. 32]. The mere transfer of tasks by the state to another entity does not affect its state character. The public nature of these tasks determines the direction of actions aimed at achieving the common good, rather than individual good, at achieving the public interest [Leoński 1998, 80]. It is essential to select the appropriate instruments for their implementation in the process of distribution.

M. Elżanowski introduces a new term here, i.e., "spatial scope of implementation of tasks and competences" [Elżanowski 1977, 31-32]. According to this author, it is somewhat similar to the concept of "local jurisdiction" commonly used in legal and judicial language. However, as he emphasizes, these concepts should not be equated. Other elements are also important here. Local jurisdiction is essentially a procedural concept. It is mainly used to assess the correctness of court or administrative rulings. On the other hand, the "spatial scope of tasks and competences" is a concept from administrative science. Its content indicates the relationship between the totality of the competences and tasks of an authority of a given level and the size and shape of the territory in which they are to be performed.

It seems that the fundamental issue determining the autonomy of individual units of the territorial system is the structure of the sphere of activity of the authorities of these units, which is determined by the scope of their tasks. Here, there is a fundamental division between own and delegated tasks. The former seem straightforward, but doubts arise concerning the latter. It is since delegated tasks are closely linked to the center of the state, while their territorial implementation is only of an executive nature. Funds provided by the government administration finance the implementation of delegated tasks. As Z. Gilowska notes, local government units do not have the option of refusing to perform them, including due to a lack of financial resources or setting them at an insufficient level, or due to the untimely

transfer of these resources [Gilowska 1999, 88]. Therefore, they can only carry out financial tasks to the extent possible and then assert their rights to receive appropriate funds from the state budget [Olejniczak-Szałowska 2000, 10]. The implementation of delegated tasks is therefore closely linked to the state budget and the government administration that manages it.

E. Olejniczak-Szałowska notes that there is no uniform view in Polish literature on the issue of the independence of local government units in the performance of delegated tasks [ibid., 5]. In this regard, it can be assumed that, concerning their own tasks, these units are not subject to anyone's will and can act at their own discretion within the limits of their competencies. Concerning delegated tasks, however, they are limited by the will of the delegating party, as the nature of the delegation requires that the limits of the delegating party's authority be observed. These tasks are not the responsibility of local government, but rather those of government administration. In this respect, therefore, the principle that a specific entity performs them on its own behalf and on its own responsibility does not apply [Agopszowicz 1999, 67 and 77; Boć 2000, 185; Miemiec and Miemiec 1991, 17]. The tasks entrusted to a local government unit are "foreign" to it in the sense that they originate from another administrative entity, namely the state. This unit performs these tasks with financial resources provided by the government administration, on behalf of that administration, and therefore not entirely independently. Moreover, delegated tasks serve the interests of the state as a whole, while one's own tasks remain closely linked to a specific area and its individual interests. For example, issuing identity cards does not serve the needs of the municipality or its residents, but is part of the national population registration system, and is therefore a delegated task carried out uniformly throughout the country.[7] On the other hand, the performance of one's own tasks in the field of social assistance is closely related to the needs of the community of a given local unit. The scope and extent of the assistance provided will therefore depend on the needs of the residents and the economic capabilities of individual units.[8]

These circumstances lead to the conclusion that delegated tasks are not a key element in shaping the territorial autonomy of the state's basic territorial units. The above reasoning leads to the conclusion that the boundaries of autonomy of individual territorial units are determined solely by the scope of their own tasks. This, in turn, raises the issue of the criteria for dividing tasks into own and delegated ones, but a broader analysis of this issue goes beyond the scope of this study.

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[7] Article 8(2) of the Act of August 6, 2010 on identity cards, Journal of Laws of 2022, item 671 as amended.

[8] Article 17 of the Act of March 12, 2004 on social assistance, Journal of Laws of 2025, item 1214.

CONCLUSION

Finally, there is a fundamental issue – the legal personality of individual territorial units. Each unit of the fundamental territorial division of the state has all the attributes of a legal person. Legal personality should be considered a fundamental element determining the autonomy of each of these units. It ensures separation from the state apparatus, gives them the possibility to act on their own behalf, and thus to bear sole responsibility. It also opens up the possibility of judicial protection. Finally, legal personality is a guarantee of their self-government.

It seems that the following elements are at the forefront of determining the territorial autonomy of individual local government units: 1) legal personality, 2) scope of own tasks, 3) scope and nature of legal instruments for the implementation of tasks, 4) scope and nature of state supervision, and 5) economic efficiency. However, it should be emphasized that these are only the most important, selected elements. The scope of this study does not allow for a broader treatment of this issue, limiting itself to merely pointing them out.

Another feature of territorial autonomy is undoubtedly the democratic manner of appointing and dismissing local government bodies, as well as their functioning. Territorial autonomy will only make sense if it is based on the assumption that local authorities are the true representatives of the will and needs of society. This, in turn, is linked to another element of territorial autonomy – social control.

Bearing in mind the symbolic 25 years that have passed since the introduction of the three-tier model of local government, it is reasonable to question the correctness of the solutions adopted in the context of territorial autonomy. There is no doubt today that local governments can be said to enjoy territorial autonomy. At the basic level, local government is authentic, and territorial autonomy is clearly defined at this level. However, is this also the case with higher-level units, i.e., counties and provinces? Here, the answer is not so obvious. Instead, legitimate questions arise: Do these units have their own public interest? Can we talk about the specific tasks of these units? Does territorial autonomy characterize these units? Moreover, is the local government in these units authentic? The answers to these questions seem to be the key to determining the success of the decentralization process in Poland from the perspective of more than a quarter of a century. A complete analysis in this area goes beyond the scope of a single study. These considerations are therefore limited to raising the issue and constitute a contribution to further findings and discussions, which, as a rule, should be considered necessary.

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ARTIFICIAL INTELLIGENCE DEVELOPMENT AND SAFETY COMMITTEE AS A NEW OVERSIGHT BODY – CONSIDERATIONS IN LIGHT OF THE ARTIFICIAL INTELLIGENCE SYSTEMS BILL

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Abstract. The purpose of the paper is to discuss and analyze the regulations concerning the establishment of a new Polish supervisory authority, i.e. the Artificial Intelligence Development and Safety Commission included in the draft of AI Systems Act. The research intention, on the other hand, is to answer the question of whether it is necessary to establish a new supervisory authority for the implementation of the AIA and, if so, whether the adopted solution meets the independence criteria set out in Article 70(1) of the AIA. The considerations presented in the study allowed us to give, in principle, a positive answer to this question. The study used a comparative legal method.

Keywords: artificial intelligence act; surveillance authority; market surveillance authority; EU Member States; Commission for the Development and Safety of Artificial Intelligence

INTRODUCTORY REMARKS

The purpose of this paper is to discuss and analyze the regulations concerning the establishment of a new Polish supervisory authority, i.e. the Commission for the Development and Safety of Artificial Intelligence.[1] The regulations concerning the new supervisory authority are included in the draft Act on Artificial Intelligence Systems.[2] As indicated in its Explanatory Memorandum,[3] the purpose of the Act is to create a system for the supervision of artificial intelligence systems[4] in Poland, consistent

[1] Hereinafter: KRiBSI.
[2] Draft Act of 10 February 2025 on Artificial Intelligence Systems [hereinafter: usAI], https://legislacja.rcl.gov.pl/projekt/12390551/katalog/13087901 [accessed: 21.03.2025].
[3] Justification for the draft act on AI systems [hereinafter: Justification 2024], https://legislacja.rcl.gov.pl/projekt/12390551/katalog/13087901 [accessed: 21.03.2025].
[4] Hereinafter: AI systems.

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with the legal framework established in the Act on Artificial Intelligence[5] (Justification 2024). Indeed, according to Article 70(1) of the AIA, each European Union (EU) Member State shall establish or designate at least one notifying authority and at least one market surveillance authority as competent national authorities. Article 70(1) of the AIA leaves EU Member States the choice to designate a market surveillance authority to act as a single point of contact. Accordingly, an EU Member State may either appoint a new supervisory authority, or grant additional tasks to an existing authority to act as a contact point. This raises the question of whether it is necessary to establish a new supervisory authority in Poland or whether the function of the contact point could be assigned to an existing authority. The Justification indicates that the proposed regulations (and thus also concerning the establishment of a new supervisory authority) are aimed at fulfilling Poland's obligations under the AIA, concerning, inter alia, the identification of the competent national authorities, i.e. the market surveillance authority, the notifying authority responsible for the development and application of the procedures necessary for the assessment, designation and notification of conformity assessment bodies of AI systems, their monitoring (Justification 2024, 2).

In view of the above, the research intention undertaken in this study is to answer the question whether it is necessary to establish a new supervisory authority to implement the AIA and, if so, whether the adopted solution meets the independence criteria set out in its Article 70(1). Therefore, at the outset, the AIA regulations concerning the designation of competent national authorities, the arguments cited in the justification of the draft usAI, justifying the establishment of a new supervisory authority in Poland, the regulations of the draft act concerning the tasks and the systemic position of the KRiBSI, and then examples of solutions in selected EU Member States (i.e. Spain, Italy, Austria) concerning the fulfilment of the obligations to designate competent national authorities are cited. This will allow relating the solution planned in Poland to the requirements set out in the AIA, as well as to the adopted or planned solutions concerning this matter in selected EU countries. The choice of EU member states was dictated by the different solutions adopted in them, which makes it possible to analyze the Polish solution in the broadest comparative legal context. The study uses the comparative law method.

[5] Regulation of the European Parliament and of the Council laying down harmonized 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), Journal of Laws EU L 2024 No. 1689, p. 1 [hereinafter: AIA].

1. DESIGNATION OF NATIONAL COMPETENT AUTHORITIES AND SINGLE POINTS OF CONTACT FOR THE IMPLEMENTATION OF OBLIGATIONS RELATED TO THE APPLICATION OF THE AIA

Obligations are imposed on EU Member States in relation to the application and enforcement of the AIA. One of these is to designate at least one notifying authority and at least one market surveillance authority as competent national authorities. At the same time, a great deal of discretion is left to EU Member States. Indeed, they can designate any public entity to carry out the tasks of the national competent authorities, according to their specific national organizational characteristics and needs. In contrast, each Member State should designate a market surveillance authority to act as a single point of contact (Recital 153 of the AIA).

The following types of authorities can be distinguished in the AIA.[6]

Firstly, a market surveillance authority, which means a national authority carrying out activities and measures in accordance with Regulation (EU) 2019/1020[7] (Article 26(1)(26) of the AIA).

Secondly, the notifying authority, which is the national authority that is responsible for the development and application of the procedures necessary for the assessment, designation and notification of conformity assessment bodies and for their monitoring (Article 26(1)(19) of the AIA). Each EU Member State is required to designate or establish at least one such body (Article 28(1) of the AIA). Both the notifying authority and the market surveillance authority are competent national authorities within the meaning of Article 3(48) of the AIA.

These authorities are guaranteed independence in the AIA. Indeed, they are to exercise their powers independently, impartially and free from *bias* in order to protect the objectivity of their actions and tasks, ensuring the application and implementation of the AIA. Also, their members are obliged to refrain from any activity that is incompatible with the nature of their duties. Authorities should also be guaranteed adequate technical, financial, human resources (sufficient staff with knowledge of AI technologies, data and data processing methods, personal data protection, cyber security, fundamental rights, health and safety risks and knowledge of applicable standards and legal requirements), as well as the necessary infrastructure to carry out their tasks effectively (Article 70(1)(3) of the AIA).

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[6] Overview of all AI Act National Implementation Plans, https://artificialintelligenceact.eu/national-implementation-plans/ [accessed: 21.03.2025].

[7] Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and product conformity and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011, OJ EU L 169/1, pp. 1-44.

Thirdly, states should provide the Commission with, inter alia, the details of these authorities, information on their tasks and, by 2 August 2025, also make public how to contact them (Article 70(2) of the AIA).

2. RATIONALE FOR THE ESTABLISHMENT OF A NEW AI MARKET SUPERVISORY AUTHORITY IN POLAND

As indicated earlier, EU Member States have a relatively high degree of freedom to choose the organizational arrangement for the application and monitoring of the AIA, as they can appoint any public entity to perform the tasks of the competent national authorities. The Polish legislator has chosen to appoint a new supervisory authority. However, the EU Member States have chosen different solutions, as evidenced by the examples of other EU Member States cited later in the study (i.e. Spain, Italy, Austria).

In relation to the research intention undertaken in this study, it is necessary at the outset to cite the reasoning behind the establishment of the new supervisory authority as set out in the Justification. It indicates that, in order to achieve the objectives set out in the AIA, it is necessary for EU Member States to adopt national legislation to apply and comply with the regulation. This includes giving the necessary powers to national market surveillance authorities or creating such authorities so as to enable them to effectively eliminate AI systems from the market that do not comply with the requirements laid down in the AIA (Justification 2024, 1). In addition, the draft u.s.AI is intended to enable the objectives set out in Article 1(2)(g) of the AIA regarding the use of AI systems in EU countries to be achieved, which is to be manifested in the promotion of innovation in AI (Justification 2024, 2-3).

Accordingly, the proposed law defines the organization and manner of national supervision of the market for AI systems and general-purpose AI models and "focuses on establishing the role of state authorities in this area and establishing control and supervision measures. […] The growing role of artificial intelligence systems and the scale of the risks that their misuse may cause make it necessary to designate an authority to meet these challenges. In view of the needs to ensure an adequate level of protection of fundamental human rights, citizens' rights and consumers' rights, the competences of supervisory authorities should also grow" (Justification 2024, 4). The Justification to the bill indicates that the most effective solution for the implementation of the obligations imposed on Poland in the AIA is the establishment of a new expert supervisory body for the AI sector, following the model of solutions applied in Spain or created in Italy. Its establishment is also supported by the small number of AI specialists, which could create a risk of failing to meet the requirements under the AIA and lead to harmful competition between authorities in Poland, including

competition for highly specialized experts in this field. Another argument in favor of the establishment of a new supervisory authority is the interest of the financial sector public bodies, because: "the alternative solution to the establishment of a new body, i.e. assuming the distribution of competences among already existing public entities, would in fact require the financing of the costs arising from ensuring that all the above competences are fulfilled in the staff of each of these institutions simultaneously, which could be regarded as surplus and unfavorable from the point of view of the Polish taxpayer" (Justification 2024, 5-6).

The model that was used for the construction of the KRiBSI was modelled on the organization of supervision under which the Financial Supervision Commission[8] operates, which combines integrated supervision with an expert approach. In this sense, integrated supervision is: firstly, the combination of "the various supervisory institutions into a single whole, so that by working together within this whole they enhance their effectiveness" and secondly, an approach for the achievement of a specific objective, which is to ensure the right relationship between safety in the effectiveness of the AI market players (Justification 2024, 7-8). In order to guarantee the independence of the KRiBSI, the Office providing its service is also to be independent. In organizing it, it was modelled on the Office of the KNF, which is an office serving a supervisory authority independent of government.[9]

The Commission is also supposed to foster cooperation between regulators as a forum for the exchange of information on AI issues "which will overlap with consumer protection, security of goods and services, protection of personal data, financial services, etc.". Hence, instead of setting up an additional, informal panel to collaborate between regulators, it was decided to coordinate the participation of these entities in a single body so as to ensure effective oversight of the use of AI systems' (Justification 2024, 7-8). The section on the principles of control uses the solutions applied, inter alia, in the Act of 5 July 2018 on the national cyber-security system,[10] which will allow KRiBSI to build on existing practice relating to the conduct of inspections, thus enabling rapid implementation of the new obligations (Justification 2024, 13).

The issue of AI systems is so important and complex that it would make sense to set up a new supervisory authority, as long as, its independence is fully realized.

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[8] Act of 21 July 2006 on the supervision of the financial market, Journal of Laws of 2024, item 135 as amended [hereinafter: KNF].

[9] Regulatory Impact Assessment (15.10.2024) [hereinafter: Regulatory Impact Assessment], https://legislacja.rcl.gov.pl/projekt/12390551/katalog/13087895#13087895 [accessed: 14.12.2025], 4.

[10] Journal of Laws of 2024, item 1077 as amended.

3. COMMITTEE ON THE DEVELOPMENT AND SECURITY OF ARTIFICIAL INTELLIGENCE – LEGAL POSITION AND TASKS

The scope of the proposed law is quite broad, as it defines the organization and manner of supervision of the market of AI systems and general-purpose AI models in the dimension defined in the AIA, proceedings for violation of its provisions, conditions and procedure for accreditation and notification of conformity assessment bodies, manner of reporting serious incidents occurring in connection with the use of AI systems, principles of imposing administrative fines for violation of the provisions of Article 5 of the AIA, types of activities supporting the development of AI systems (Article 1(1-6) of the usAI). Due to the volumetric framework of this study, it focuses on the analysis of the regulations included in Chapter 2 of the proposed Act entitled "Organization of the supervision of artificial intelligence", with particular attention to the tasks of KRiBSI.

The KRiBSI Office is a state legal entity that provides services to KRiBSI and the Social Council for Artificial Intelligence.[11] Of importance is Article 5(1-2) of the usAI, which states that the Commission is the market surveillance authority for AI systems and acts as the single point of contact referred to in Article 70(2) of the AIA. The tasks of the Commission are specified in Article 9(1) of the usAI, and include, among others, monitoring compliance with the provisions of the AIA and the usAI, excluding tasks concerning the issuance of post-inspection recommendations by the Chairman, taking action to ensure the proper functioning of the EU internal market referred to in Article 26(2) of the Treaty on the Functioning of the European Union[12] to the extent specified in Article 1 and Article 2 of the AIA, taking action to counteract threats to the security of AI systems, including receiving reports of serious incidents occurring in connection with the use of AI systems, participating in the development and assessment of draft legal acts in the field of AI, issuing resolutions and decisions in cases of infringement of the provisions of the AIA and Act; performing the tasks and competences of the market surveillance authority, specified in the usAI; developing and issuing publications, implementing educational programs popularizing knowledge about AI and conducting information activities; exchanging information on the supervision of AI systems within the competence of the market surveillance authority with the market authorities of the EU Member States, third countries, EU agencies and international organizations.

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[11] Draft Act of 10 February 2025…, Article 28(1-2).

[12] Treaty on the Functioning of the European Union of 13 December 2007, OJ C 202, 7.6.2016, pp. 47-360.

Even a cursory analysis of the above sample tasks of the Commission allows us to conclude that it is very broad. There is also a visible inconsistency in terminology, as the provision uses both the concepts of "artificial intelligence system" and "artificial intelligence", which may give rise to interpretation problems. This is important because the AI contains a legal definition of "AI system" (Article 4(1) of the AIA), but the concept of "artificial intelligence" has not been defined. It is true that the term "AI" also appears in the AIA (e.g. when defining the subject of the regulation in Article 2(1), or in its recitals, e.g. 1, 4, 12), but it can be considered that it is of a general and not legal nature. This conclusion may be supported by the definition of "AI system" in the AIA, while the definition of "AI" is not defined, as well as the content of, for example, recital 12, which indicates that: "The concept of 'AI system' in this Regulation should be clearly defined and closely linked to the work of international organizations dealing with AI […]." This recital clearly distinguishes the concept of "AI system" from the more general term "AI".

The usAI also includes other tasks of the Commission. These include, among others: 1) expressing individual opinions and explanations of significant importance for the application of provisions in matters covered by the scope of the Commission's activities (Article 11(1) of the usAI); 2) presenting proposals for legislative actions to the minister responsible for computerization (Article 10(2)(1) of the usAI); 3) publishing in the Public Information Bulletin annual information containing examples of good practices in the implementation and use of AI in enterprises within the meaning of the Act of 6 March 2018, the Entrepreneurs' Law[13] and in public finance sector entities referred to in the Act of 27 August 2009 on public finances;[14] 4) issuing *ex officio* or upon request explanations in the scope of the application of the AIA provisions and the Act (Article 13 of the usAI); 5) conducting inspections of the activities of entities obliged to comply with the provisions of the AIA and usAI, the purpose of which is to determine the compliance of the entities' activities with the provisions of this and the usAI. The Commission also cooperates with other entities, in the scope of matters included in Article 5(3) of the usAI, including, among others, the KNF, the President of the Office of Competition and Consumer Protection, the President of the Office for Personal Data Protection. The Social Council for Artificial Intelligence also operates at the Commission, which is its advisory and consultative body (Article 25(1) of the usAI). Referring to the issue of the Commission's independence, it can be analyzed using the criteria applied to the KNF, i.e. the

[13] Journal of Laws of 2024, item 236 as amended.

[14] Journal of Laws of 2024, item 1530 as amended.

body supervising the proper functioning of financial institutions.[15] The application of these criteria is justified by the adoption of a similar model in the case of the KRiBSI, based on which the supervision exercised by the KNF operates. The literature indicates that this supervision should be independent in such dimensions as organizational, financial, programmatic and methodological. The first of them, the organizational dimension, means that the supervisory body should have such a position in the structure of public administration that prevents influencing the decisions made by it by issuing acts of internal law. Another aspect, financial, is manifested in equipping the supervisory body with financial resources enabling its stable, effective functioning and further development [Wajda 2009, 136-46]. The programmatic dimension is the sovereignty of the supervisory body in determining the subject and scope of supervisory activities. The methodological dimension consists in equipping the supervisory body with the possibility of freely deciding on the "choice of methodology, methods and techniques of action – so that they are always adapted to the maximum extent to the needs of implementing supervisory tasks" [ibid.]. The following table compares the fulfillment of the above independence criteria by the regulations of Article 70(1)(3) of the AIA and of the usAI.

Table. Independence criteria and their fulfillment by the regulations of Article 70(1)(3) of the AIA and of the usAI

Criterion/ Legal Act	AIA	usAI
organizational	The competent national authorities shall exercise their powers independently, impartially and without prejudice, and their members shall refrain from any action incompatible with the nature of their duties (Article 70(1)).	Restrictions on the Chairman of the Committee, his Deputy regarding holding other positions, performing other gainful or non-gainful activities that are incompatible with their duties. Prohibitions concerning, among others, membership of a political party, trade union, conducting public activities that are incompatible with the dignity of their position, undertaking activities that could result in a conflict of interests (Article 20). Requirements concerning the Chairman (e.g. significant professional achievements and experience), the method of his election (appointment and dismissal by the Sejm with consent for the 5th term), statutory reasons for dismissing him from this function before the end of the term (Articles 16-17).

[15] See also Schulz 2024,Article 3; Wojciechowski 2025, Article 3; Smykla 2007, 48; Jurkowska-Zajdler 2012, 143-54.

financial	Adequate technical, financial and human resources, infrastructure necessary for the effective performance of tasks (including a sufficient number of employees whose competences and expertise include in-depth knowledge of issues including AI technology, data and data processing methods, personal data protection (Article 70(3)).	KRiBSI conducts independent financial management based on a financial plan and covers the costs of financing the tasks specified in the Act and the costs of operations in accordance with the provisions of the Act on Public Finances from its own funds and revenues, and has specific sources of revenue (Articles 32-35). The Chairman of the Commission may invite, among others, persons with specialist knowledge to participate in the meeting of the Commission (Article 6(3-4)). A member of the Social Council of the Council for AI may not conduct public activities that are incompatible with the activity in the Council; perform activities that could result in a conflict of interests. For participation in the work of the Council, its members are not entitled to remuneration (Article 25). A person who meets the requirements regarding knowledge specified in the draft Act may be a member of the aforementioned Council (Article 25).
programmatic	For the purposes of the AIA, each EU Member State shall establish or designate at least one notifying authority and at least one market surveillance authority as the national competent authorities. Their members shall refrain from any activities incompatible with the nature of their duties. Such activities and tasks may be carried out by one or more designated authorities in accordance with the organizational needs of the Member State, provided that these principles are respected (Article 70(1)).	The usAI specifies the organization and method of exercising supervision over the market of AI systems and general purpose AI models within the scope covered by the provisions of the AIA, the procedure for infringement of the provisions of this Act, the conditions and procedure for accreditation and notification of conformity assessment bodies; the method of reporting serious incidents occurring in connection with the use of AI systems, the principles of imposing administrative fines for infringement of the provisions of Article 5 of the AIA, the types of activities supporting the development of AI systems (Article 1).
methodological	-	The Commission may conduct inspections of the activities of entities obliged to comply with the provisions of the AAI and the usAI (Article 38).

Source: own study based on the cited legal acts.

The analysis of the regulations included in the table above regarding the extent to which the AIA regulations and the usAI project meet each of the four independence criteria of the competent national authority, i.e. KBiRSI, leads to the following conclusions.

First, the requirements for two independence criteria, i.e. organizational and financial, are clearly specified. The AIA explicitly states that these bodies are to act independently and impartially, as well as the requirement to equip national authorities with the necessary financial resources and funds, as well as employees with specialist knowledge. The usAI project includes regulations that are to guarantee such independence, including, among others, those concerning restrictions on undertaking commercial activities or those that give rise to a conflict of interest by the Chairman of the Commission. In terms of financing the KRiBSI Office, it has been ensured financial autonomy, indicating, among others, the sources of revenue. On the other hand, the requirements regarding the requirement to have expert knowledge are implemented through the requirements regarding the Chairman of the KRiBSI, members of the Social Council for AI (they do not receive remuneration for their functions and at the same time cannot conduct activities that create a risk of a conflict of interest). Persons with specialist knowledge may be invited to the Commission meeting in an advisory capacity, and they do not receive remuneration for participating in its work. One may wonder whether in this situation the requirement to provide employees with specialist knowledge is sufficiently met, since in the usAI project these persons may be invited to the KRiBSI meetings, or are members of the advisory and consultative body, and in both cases they do not receive remuneration for their activity on behalf of the supervisory body.

Secondly, the program criterion is defined in the AIA in a general manner, because the choice of its implementation is left to the EU Member States. However, it is clarified in Article 1 of the usAI, by indicating the subject matter scope of the proposed act.

Thirdly, the methodological criterion is difficult to indicate in the AIA, due to the freedom of the state to establish a new supervisory authority or to assign tasks from the AIA to an existing supervisory authority acting as a contact point. In the case of the AI Act, the provisions on the control of the activities of entities obliged to comply with the provisions of the AIA and AI Act have been clearly clarified.

4. SOLUTIONS CONCERNING THE ESTABLISHMENT OF A PUBLIC ENTITY TO PERFORM THE TASKS SPECIFIED IN THE AIA APPLIED IN SELECTED EU COUNTRIES

As previously indicated, the AIA specifies that EU Member States may designate any public entity to perform the tasks of the competent national authorities. This may be an existing supervisory authority acting as a contact point or a newly established supervisory authority. For the purposes of comparing the solutions adopted in other EU countries, Spain, Austria

and Italy were selected. The choice of these countries was dictated by the desire to show the different solutions adopted in them, which will allow to show the model proposed in Poland against the background of other solutions used in the EU.

In Spain, in 2023, a new supervisory authority was established, which is the main body responsible for the implementation and enforcement of AIA (Regulatory Impact Assessment, 708) [*Agencia Española de Supervisión de la Inteligencia Artificial*].[16] It is a public law entity that has public legal personality, its own assets and management autonomy, with management powers, with the right to exercise administrative powers in order to implement programs that correspond to public policies developed by the Agency. Its tasks include, among others, monitoring, consulting, training for public and private law entities in order to properly implement all national and European regulations regarding the proper use and development of AI systems. In addition, it is to perform control, verification, sanctioning and other functions required by European law on AI.[17] The Agency is subordinate to the Ministry of Economy and Digital Transformation, and is headquartered in La Coruña (Regulatory Impact Assessment, 7-8). Also in Hungary, an entity has been established to be responsible for implementing the AIA (*Magyar Mesterséges Intelligencia Tanácsot*).[18]

In Austria, the Artificial Intelligence Service Office (KI-Servicestelle[19]) was established in 2024 at the Austrian Telecommunications Authority, which is, among other things, a contact point and supports the implementation of AIA. In the same year, the Advisory Council for AI (*Beirat für Künstliche Intelligenz*, *KI-Beirat*) was established, which is to advise the federal government and the AI Service Office on the implementation of AIA (Regulatory Impact Assessment, 8)[20]. This council is to, among other things, provide advice to members of the Federal Government dealing with AI matters on current developments in the field of AI (technical, ethical and social aspects), monitor the technological development of AI in the EU and beyond and assess the opportunities and challenges associated

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[16] Real Decreto 729/2023, of 22 days ago, after the implementation of the State Agency for the Supervision of Artificial Intelligence, https://www.boe.es/eli/es/rd/2023/08/22/729/con [accessed: 21.03.2025].

[17] Ibid.

[18] *1301/2024. (IX. 30.) Corm. Határozat a mesterséges intelligenciáról szóló európai parliamenti és tanácsi rendelet végrehajtásához szükséges intézkedésekről*, https://njt.hu/jogszabaly/2024-1301-30-22 [accessed: 21.03.2025].

[19] More information: https://www.rtr.at/rtr/service/ki-servicestelle/ki-servicestelle.de.html [accessed: 19.03.2025].

[20] *Bundesgesetz über die Einrichtung einer Kommunikationsbehörde Austria* [hereinafter: *KommAustria-Gesetz*], https://www.ris.bka.gv.at/NormDokument.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20001213&Paragraf=20c [accessed: 21.03.2025], Article 20c(6).

with it (*KommAustria-Gesetz*, Article 20c(6)). In the Implementation Plan 2024 for the Federal Government's AI Strategy, the Austrian Federal Chancellery, Section VII – Digitalisation and E-Government (*Bundeskanzleramt*, *Sektion VII – Digitalisierung und E-Government*) was designated as responsible for preparing the implementation of AIA into the national order (Regulatory Impact Assessment, 8).[21] This is to happen quickly, in an innovation-friendly manner and in a manner that promotes practical implementation of the AIA into the national legal order, in order to develop AI technologies in accordance with fundamental rights and human dignity in Austria.[22]

In Italy, a draft law on AI is being prepared and has been submitted to the Senate by the government. Its purpose is to regulate the use and development of AI in the country (AS 1146-3)[23]. In Article 18(1) of this draft called *Autorità nazionali per l'intelligenza artificiale* specifies that, in order to ensure the application and implementation of national and EU rules on AI, two national authorities for AI will be designated, namely the Agency for Digital Italy (*Agenzia per l'Italia digitale*, AgID) and the National Cybersecurity Agency (*Agenzia per la cybersecurity nazionale*, ACN). AgID is to be responsible for promoting innovation and the development of AI, for defining procedures and performing functions and tasks related to the notification, assessment, accreditation and monitoring of entities responsible for verifying the compliance of AI systems, in accordance with national and EU rules. The ACN is to be responsible, among other things, for supervision, including control and sanctioning actions, of AI systems, in accordance with the provisions national and EU. Finland and Luxembourg have also prepared draft legal acts implementing the AIA, in which the tasks of the supervisory authority are divided between existing bodies[24] (Regulatory Impact Assessment, 8-9).

The examples cited above show that the countries analyzed use different solutions, not always choosing to create a new supervisory authority (e.g. Italy, Spain, Hungary), but using already existing entities (e.g. Austria, Finland, Luxembourg).

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[21] *Strategie der Bundesregierung für Künstliche Intelligenz – Umsetzungsplan*, https://www.digitalaustria.gv.at/dam/jcr:4132e710-187c-42e9-9329-a1449ddf484f/KI-Umsetzungsplan%202024-mit%20CCBY4.0.pdf [accessed: 21.03.2025], p. 82.

[22] Ibid.

[23] AI Act and AS 1146 -3, https://www.dataismimperiali.com/2024/10/17/ai-act-and-as-1146-3/ [accessed: 21.03.2025]. See also *Comunicato alla presidenza il 20 maggio 2024. Disposizioni e delega al Governo in materia di intelligenza artificiale*, https://www.senato.it/japp/bgt/showdoc/19/DDLPRES/0/1418921/index.html?part= [accessed: 21.03.2025].

[24] Legislatura 19ª – Disegno di legge n. 1146, https://www.senato.it/japp/bgt/showdoc/19/DDLPRES/0/1418921/index.html?part=ddlpres_ddlpres1-articolato_articolato1 [accessed: 21.03.2025].

FINAL CONCLUSIONS

The analysis conducted in this paper regarding the justification for establishing a new supervisory authority for the AI market in Poland allows us to formulate the following conclusions.

The establishment of a new supervisory authority for the AI market can be considered justified, provided that the requirements for its operation specified in Article 70(1)(3) of the AIA are guaranteed in practice. The comparison of these requirements with the regulations of the usAI regulations concerning the organizational, financial, programmatic and methodological criteria conducted in the study allows us to state that – as a rule – they should be implemented (unless the regulations of the draft act are significantly modified in the course of the further legislative process).

It should be emphasized that the AIA clearly specifies the requirements for two criteria of independence, i.e. organizational and financial, by indicating that national authorities are to act independently and impartially, and also be equipped with the necessary financial resources, resources and employees with specialist knowledge. In the case of the Polish supervisory authority, the relatively small participation of experts in the work of the Commission may raise some concerns, which – considering the adopted organizational model of the new supervisory authority combining "integrated supervision with an expert approach" – may in practice weaken its expert action. The scope of the Commission's tasks is very broad and is often associated with having specialist knowledge regarding the functioning of AI systems. In Austria, for example, an advisory body was established, and the implementation of AIA was entrusted to existing government administration bodies. This did not require the establishment of a new supervisory authority. Countries that have chosen the solution used in Poland and have already established a new body (e.g. Spain) or are in the process of establishing it (e.g. Italy) have also equipped the new entities with many tasks of a diverse nature, from control tasks to information and education tasks.

It can be considered that the solution used in Poland, i.e. the establishment of the KRiBSI, deserves a positive assessment, taking into account the comments submitted earlier. It is important to bear in mind that the matter regulated in the AIA, as well as the practical aspects of the functioning of AI systems, are so complex that they require an integrated approach, which can be ensured by a separate supervisory body. This is also confirmed by the practice of EU countries that decide on such a solution.

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TOWARDS A CONCEPT OF UNIVERSAL HARM – WAR ETHICS FROM SAINT AUGUSTINE TO MODERN INTERNATIONAL LAW

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"Si se hominem meminit, multo magis dolebit iustorum necessitatem sibi exstitisse bellorum."

It is difficult to consider a war just, given the suffering it entails.
戦争が伴う苦しみを考えると、それを正義と見なすのは難しい。
Важко вважати війну справедливою, з огляду на страждання, які вона спричиняє.
من الصعب اعتبار الحرب عادلة نظرًا للمعاناة التي تنطوي عليها.

Saint Augustine, City of God, XIX, 7

Abstract. This article advances "universal harm" as a legalethical category for acts that disrupt both the social order and the cosmic/ecological order on which life depends. Bridging intellectual history (Augustine, Aquinas, Vitoria, Grotius) and contemporary doctrine, the author shows how modern warfare – especially nuclear weapons and depleteduranium (DU) munitions – exceeds traditional humanitarianlaw frames by inflicting longlived, transboundary and intergenerational damage. A comparative analysis of jurisprudence (e.g., *Shimoda* on the atomic bombings; *Overseas Hibakusha*; Italian case law granting administrative indemnities to soldiers exposed to DU) and international instruments (UN/UNEP, EU, Earth Charter) reveals a persistent recognition gap: the law mitigates consequences but rarely recognizes or repairs universal harm, partly due to narrow causality tests and a fragmented application of the precautionary principle. Conceptually, the paper situates war within a wider "diffused war" topology that entangles states, private actors, ecosystems, and future generations, weakening the rule of law. Normatively, it calls for (i) codifying universal harm as a ground of *erga omnes* state responsibility, (ii) adopting treatylevel moratoria/bans on DU and other ecocide-risk weapons, (iii) shifting from ex post compensation toward restorative obligations (ecosystem remediation, health protection), and (iv) integrating constitutional, humanrights, and environmental law around a biospherecentred precautionary standard. The result is a peaceoriented legal agenda that aligns security with the stability of biospheric processes and the dignity of present and future life.

Keywords: universal harm; depleted uranium; precautionary principle; erga omnes obligations; humanitarian law; ecocide; biosphere.

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INTRODUCTION

Since its emergence, humanity has exerted a significant impact on ecosystems and the biosphere. However, the development of technological society, the outbreak of world wars, and the use of increasingly invasive technologies in the realm of life and within ecosystems raise serious doubts about the ability of human beings to direct their organizational and operational efforts in a way that is in symbiosis with the biosphere, its regularities, and its processes.

The importance of granting binding force to international law aimed at mitigating climate change – underscored by the recent advisory opinion of the International Court of Justice on the obligations of States in this regard[1] – thus brings to light the issue of the necessary coherence between international norms and those adopted at the national level and by international organizations for their implementation.

However, such coherence cannot be conceived solely within a purely legal perspective, as is the case in the most widely recognized current studies [Peczenik 1989]. It must be considered in light of the ecological conditions in which we live and of the human factor which, through its actions, endangers those very conditions. The tension between the factual dimension and the form of legal relations cannot be resolved either through a purely discursive approach, following Habermas [1992] or by assuming the autonomy of technology, as suggested by Ellul [(1954), 1964].

The attempt to ground law in an ecological ethics – one that reflects the multiple moral approaches to our relationship with nature, as envisaged by Luhmann [(1986), 1989] – also encounters serious difficulties, especially in the face of the urgent need to develop a legal framework consistent with that relationship.

In this context, we find it increasingly useful to approach the issue in terms of ecology of the biosphere, understood as the capacity to listen

[1] International Court of Justice, Advisory Opinion on the Obligations of States in Respect of Climate Change, 23 July 2025, Press release No. 2025/36. See at least the last part of the judgment in which the Court asserts as follows: "a breach by a State of any obligations identified in response to question (a) constitutes an internationally wrongful act entailing the responsibility of that State. The responsible State is under a continuing duty to perform the obligation breached. The legal consequences resulting from the commission of an internationally wrongful act may include the obligations of: (a) cessation of the wrongful actions or omissions, if they are continuing; (b) providing assurances and guarantees of non-repetition of wrongful actions or omissions, if circumstances so require; and (c) full reparation to injured States in the form of restitution, compensation and satisfaction, provided that the general conditions of the law of State responsibility are met, including that a sufficiently direct and certain causal nexus can be shown between the wrongful act and injury.

to nature. This approach allows us to overcome the fundamental limitation of Western metaphysics, highlighted by Heidegger [1953], which privileges the assertion of discourse over the experience of listening.

From this perspective, the issue of the link between pollution, climate change, and military activities – even when military technologies are adapted for peaceful purposes – cannot be overlooked in the search for a legal framework consistent with the Earth's limited capacity to absorb anthropogenic impacts and with the need to protect the fundamental values of the human person and their communities.

In this brief study, we will examine the difficulties related to proving the damage inflicted on the climate and the natural balances in which we live – damage that directly affects life, the rule of law, individual freedom, and property. Within this framework, the notion of a concept of *universal harm* appears complex, yet increasingly necessary.

1. HARM AS A DISRUPTION TO THE COSMIC AND SOCIAL ORDER

The study of ancient cultures and of ethical and political systems suggests a profound convergence between the concept of harm and the institutional forms devised for its reparation [Madden 2005]. In particular, harm was often associated with the disruption of both the cosmic order and the social order [Bussami 2015, 82-83].

In our view, these two lines of inquiry tend to converge. The development of moral principles and the concept of justice seems to emerge at the point of intersection between these two dimensions.

With modernity, there has been a gradual separation between the sphere of law, politics, and justice on the one hand, and that of the moral and cosmic order on the other. Nevertheless, in many indigenous legal systems, harm continues to be understood as a rupture in the cosmic balance, revealing a historical continuity in the conception of justice and reparation.

In parallel, contemporary legal systems have evolved in a direction that has led to a growing convergence in the concepts and institutions related to harm and compensation. On the one hand, this homogeneity can be attributed to the global influence of European legal traditions rooted in Roman law; on the other, it could be argued that it reflects the persistence of a shared consciousness of harm – one capable of transcending cultural differences and historical transformations.

Such a consciousness might justify the need to reconsider the question of cosmic order, reconstructing the ontology of law starting from an awareness of human existence within a cosmic, physical, geological, and biological system, structured by relationships and regularities.

Regardless of scientific observations – such as the regularities of the biosphere identified by Vernadsky [(1926): 1989], the implications of their transformations studied by Barnosky [2012], the Gaia hypothesis formulated by Lovelock [1979] and Margulis [1998], or the theory of symbiotic evolution advanced by the latter, what clearly emerges is the urgent need to rethink humanity's place within nature.

The development of society, with its expanding technological capabilities, has forcefully revived the problem of the disruption of the cosmic order. This disruption manifests itself especially through the harm caused by organized activities that profoundly undermine the relationships between humanity and the universal order – social and legal – which is also reflected in ethics, as highlighted by the evolution of philosophical thought [MacIntyre 1967].

2. THE LIMITS OF WAR AND UNIVERSAL HARM BETWEEN ETHICS, PHILOSOPHY, AND LAW

Among the organized activities capable of generating universal harm, war represents the most significant phenomenon. Already in the Hellenistic world, and later in late antiquity and the long transition from the Middle Ages to the modern era, war was perceived as an event capable of breaking the cosmic balance. Universal ethics, understood as a reflection of that order and its rationality, therefore imposed a series of limitations on the use of war, recognizing the need to subject it to precise rules. In particular, the authority to declare war was reserved to States, while wars of mere conquest, excessive cruelty, and actions directed against civilians were considered inadmissible.

In the Christian West, this reflection was developed above all by Saint Augustine, in his *Epistles* and in *The City of God*, where he affirms: a) that war must be a necessity, not a pretext[2]; b) that it is difficult to consider a war just, given the suffering it entails;[3] c) that agreements must be respected even during war, both with regard to enemies, allies, and society;[4] d) that war can never be a pretext, but must be a necessity: and therefore, it is necessity that defines the aims and actions of war;[5] e) that one must show clemency toward the vanquished.[6]

It is important to remember that Saint Augustine's approach to the limitation of war developed within the context of the Roman Empire, which made extensive use of war to maintain and expand its territory and its control over diverse populations [Pope 1940].

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[2] Saint Augustine, Epistola 189, Ad Bonifacium.
[3] Saint Augustine, De Civitate Dei, XIX, 7.
[4] Saint Augustine, Epistola 189, Ad Bonifacium.
[5] Saint Augustine, Epistola 189, Ad Bonifacium.
[6] Epistola 189, Ad Bonifacium.

This perspective is revisited, in a different historical context, by Saint Thomas Aquinas [II-II, q. 40, art. 1], who affirms that war is not always a sin, but only when it originates from greed or injustice. To this end, Thomas Aquinas establishes that: a) war must be declared by someone who has the authority to care for the public good; b) it must be waged for a just cause, that is, to remedy an injustice; c) it must be conducted with the right intention, aimed at promoting good or avoiding evil.

Here again, Thomas confirms what was affirmed by Saint Augustine, emphasizing the continuity of his thought with that of the Bishop of Hippo: "As Augustine states in the Liber Quaestionum, those armed conflicts are considered just which aim to punish an injustice suffered, when a nation or a city ought to be sanctioned for having failed to punish a wrongful act committed by its own members, or for having refused to return what was unjustly taken."[7] Furthermore: "Therefore, as Augustine states in his letter to Boniface (*Ep.* ad Bonif. clxxxix), peace is not pursued in order to wage war, but rather war is undertaken as a means to restore peace."[8]

The positions of Saint Augustine and Saint Thomas are important because, while addressing the problem of war from a predominantly ethical perspective, they remain in continuity with classical thought, also encompassing the legal dimension of war and justice. This continuity allows war to be linked not only to the disruption of the social and cosmic order, but also to the production of a universal harm – a concept we intend to develop in this contribution.

A fundamental step in this direction was taken by Francisco de Vitoria, who, by introducing the concept of universal rights applicable to all peoples – including indigenous populations – established a general legal limit to acts of war, grounding his reasoning in the *ius gentium*. His reflections on the immunity of non-combatants, the illegality of killing innocents, and the legal and moral constraints imposed on warfare – based on common human dignity and the rights to life, property, and social order – carry both theoretical and practical significance. As has been noted, they even raise the issue of rules of engagement. This perspective, both universal and dynamic, remains fully relevant today [Ruston 1999].

Grotius's approach [(1625), 2005] would later complete this vision by strongly emphasizing—on solid historical grounds – the role of law and treaties in the regulation of conflicts. He underscores that even war must be subject to legal and moral limits in order to protect humanity.[9]

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[7] Saint Thomas, Summa Theologiae, ST II–II 40.1, *corpus.*

[8] Saint Thomas, Summa Theologiae, ST II–II, q.40, a.1, *corpus*

[9] (*De iure belli ac pacis*) *The Rights of War and Peace*, Book II, Chap. I, II, I: "As for the causes of war, some are just, some unjust. Just causes are defense, recovery of property, and punishment."

These principles would form the foundation for the subsequent development of humanitarian law, as reflected in the Hague and Geneva Conventions.[10] Their evolution, from antiquity to the contemporary era, confirms the perception of war not only as a legal fact, but as a phenomenon capable of generating universal harm to the social and moral order.[11]

Thus, a line of continuity can be seen in the thought of Saint Augustine, Saint Thomas Aquinas, and Grotius, who conceive war as a possible instrument of punishment, while being fully aware of its extreme danger and of the need to impose legal and moral constraints.[12]

Between the second half of the 19th century and the early 20th, the development of the Hague Conventions (1899 and 1907) and the Geneva Conventions (beginning in 1864), which contributed to the formation of the corpus of contemporary international humanitarian law, made it clear that the use of weapons could no longer be regarded solely as a matter between warring states, but had assumed a universal dimension.

This evolution challenges the conception of war as the continuation of politics by other means, as theorized by Carl von Clausewitz [1832; 1989]. Indeed, while the suffering caused by conflicts raises concerns of a universal nature, war continues to be accepted as a phenomenon intrinsic to social life.

This ambiguity stems from the fact that humanitarian law, although a branch of international law, has had as its primary objective of mitigation of the human consequences of war, rather than its prevention. Its provisions and warnings regarding the risks associated with wars waged by technologically advanced societies – including in terms of communication – nonetheless served a deterrent function. However, this did not prevent the outbreak of the First World War, nor its escalation, which further undermined the global political and social order, exacerbated by the difficulties in enforcing the norms already in place.

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[10] *The Rights of War and Peace*, Book III,f.e. Ch. XII: "there is no manner of Justice, that a whole Kingdom should be laid waste, for the driving away of a few Cattle, or the burning of some Houses.." (but a thorough reading of XII and XIII Chater may really help understanding the relation between reason, good sense and moderation in this ambit).

[11] Prolegomena to the first edition of *De Iure Belli ac Pacis* (1625): "The great truth is that everything is insecure as soon as we abandon laws."

[12] Grotius, *The Rights…*, Book II, Ch. XX, XI, I: "Kings, and those who are invested with a Power equal to that of Kings, have a Right to exact Punishments, not only for Injuries committed against themselves, or their Subjects, but likewise, for those which do not peculiarly concern them, but which are, in any Persons whatsoever, grievous Violations of the Law of Nature or Nations."

3. INTERNATIONAL LAW, POLITICAL SOCIETY, AND PROTECTION FROM UNIVERSAL HARM

From this perspective, it becomes essential to reflect on the relationship between international law, political society, and the need to protect humanity from harm on a universal scale.

Among the consequences of this tragic course of events are the emergence and expansion of authoritarian states and, as the twentieth century progressed, the rise of totalitarian logic – favored by the evolution of techniques of social control and propaganda, which became even more effective through technological advancement. The unfolding of these transformations eventually led to the Second World War, revealing how the organizational and technological capacities of contemporary societies showing that the organizational and technological capacities of contemporary societies not only enabled the subjugation of entire groups of people but also facilitated the perpetration of large-scale crimes, such as genocide. In fact, such episodes had already occurred at the beginning of the twentieth century, as demonstrated by the persecution and genocide of the Herero and Nama peoples. In this regard, Rachel Anderson has argued that recognizing the claims advanced by the Herero would have implications far beyond the borders of Namibia, restoring a voice to colonized, annihilated, and silenced masses in Africa and throughout the world. Therefore – she concludes – international law must acknowledge this voice, even if the states directly involved continue to refuse to do so. In this sense, the universality of the harm inflicted is also affirmed [Anderson 2005].

As shown also by the research of Benjamin Madley [2005], there is a continuity between the extermination practices adopted in Africa and the techniques of elimination developed in Eastern Europe during the Nazi regime.

4. BETWEEN THE EXISTENCE AND RECOGNITION OF UNIVERSAL HARM

The technological and organizational capacities of States, consolidated in the 19th century, made possible – within the framework of the vast scientific progress of the first half of the 20th century – the development of an unprecedented offensive potential, both in terms of the destructiveness of weapons and of industrial military capacity, which culminated, in the following century, with the advent of nuclear weapons.[13]

[13] As emerges from the records of the inquiry conducted by the United States Atomic Energy Commission, including the testimony of Oppenheimer himself, "On the one hand, he is said to have suffered great remorse, along with other nuclear scientists, at having brought the

Ellul [1964, 427], on the other hand, who deeply analyzed the development of technological society, emphasized that the autonomy of technological systems fundamentally and irreversibly increases our dependence on them – even in relation to our spiritual expressions.[14] For this reason, reflecting on weapons – or the technologies that result in mass destruction – requires an objective understanding of what the effects of such devices and the related processes produce in terms of the very possibility of our own existence. Only in this way can the concept of universal harm lead to a critical questioning of the very technical processes that drive the proliferation of such weapons [Ellul 1964, 99, 425].[15]

The effects of this weapon – particularly those caused by radiation – have raised the issue of a type of harm whose scope transcends the context of warfare, affecting not only those who suffered it directly, but also future generations. This scenario thus poses the question of how to define and frame, in legal terms, the concept of universal harm, including in relation to the international responsibility of States.

The risk that harm resulting from war could lead to the destruction of all human civilization emerges implicitly in the rescript of the Japanese Emperor dated August 15, 1945, which announced the acceptance of unconditional surrender, referring to the threat posed by new weapons and the need to preserve the Empire. This was an element that influenced the negotiations regarding the Emperor's position in the postwar period.

The content of this document, drafted under extraordinary circumstances involving confrontation between the Emperor and the government – particularly with the military leadership – reveals a specific concern about weapons of mass destruction, likely related to the imperial prerogatives that saw him as the guarantor of the balance between Heaven and Earth.

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atomic bomb into the world; and he recounts in his hearing his profound doubts about creating a vastly more destructive weapon. Yet, not just once, but twice in the course of the hearing, he said that this fearsome device (or, rather, Edward Teiler's new notion for making it) was too "technically sweet" not to proceed with. His fellow scientists explain this as the voice of the purely intellectual, purely scientific part of the man. Well, if scientists as sensitive as Oppenheimer can indeed wall off their moral sensibilities so completely and successfully, then technology is an even more fearsome monster than most of us realize" (1971).

[14] "With the final integration of the instinctive and the spiritual by means of these human techniques, the edifice of the technical society will be completed". In it, our desires and our protests will be harmless products of that very construction. "And the supreme luxury of the society of technical necessity will be to grant the bonus of useless revolt and of an acquiescent smile."

[15] Even though the same author warns that "The complete separation of thought and action affected by technique produces in a new guise a phenomenon which we have already discussed as it appears in other areas: the lack of spiritual efficacy of even the best ideas."

Rather than addressing the responsibilities for crimes committed during the war, the document appears to reflect an attempt to confront the problem of new weaponry within a broader framework, one that included a reflection on the continuity of political order and the relationship between the government and the imperial role:

"The enemy has begun to employ a new and most cruel bomb, the power of which to do damage is indeed incalculable, taking the toll of many innocent lives. Should we continue to fight, it would not only result in an ultimate collapse and obliteration of the Japanese nation, but also it would lead to the total extinction of human civilization. Such being the case, how are We to save the millions of Our subjects; or to atone Ourselves before the hallowed spirits of Our Imperial Ancestors? This is the reason why We have ordered the acceptance of the provisions of the Joint Declaration of the Powers" [Emperor Shōwa 1945].

With the founding of the United Nations, an attempt was made to establish a new international order based on the renunciation of war, with open membership to all peace-loving nations. However, the very principle on which the UN was built – and in particular, the system of collective security entrusted to the permanent members of the Security Council – was quickly undermined by the onset of the Cold War, due in part to the systematic use of the veto power by the major powers.

The emergence of nuclear deterrence and the logic of Mutual Assured Destruction (MAD) [Jeervis 2002, 40-42][16] prevented the outbreak of direct conflict between the major powers. However, they also exposed the limitations of collective security, encouraging nuclear proliferation and the spread of geopolitical tensions through indirect conflicts and proxy wars. All of this, however, highlights the catastrophic nature of the potential harm – even from the perspective of the culture of coexistence and the legal principles associated with it [Ifft 2017, 71].[17]

In this context, the concept of proxy war has become a recurring strategy through which major powers have influenced the course of conflicts without directly engaging in combat. This approach, encouraged by the logic of the Cold War and nuclear deterrence, characterized several conflicts of the 20th century, such as the Korean War (1950-1953), the Vietnam War (1955-1975), and the war in Afghanistan (1979-1989), in which the United States and the

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[16] The literature on this topic generally highlights the paradoxical nature of this approach, precisely because of the destruction it can cause.

[17] "...because nuclear weapons can inflict 'uncontestable costs,' they do offer a capability that in many respects is ideal as a deterrent, especially when incorporated into a strategy of retaliation. No matter what an opponent does, including an all-out nuclear assault, a few remaining nuclear weapons can carry out retaliatory threats that can inflict catastrophic levels of damage."

Soviet Union supported opposing factions without confronting each other directly on the battlefield.

In the 21st century, proxy wars have taken on an even more complex form, due to the development of asymmetric warfare and cyber warfare, which, according to Rid, are nothing more than three historically constitutive aspects of war itself: sabotage, espionage, and subversion [Rid 2011, 15].[18] These elements add to the significant material, human, and biospheric damage caused by actual hostilities, a permanent threat to freedom, the security of contracts, property, and the dignity of life. In other words, the catastrophic aspects of such phenomena continue to reveal the enduring nature of a sphere of relations in which human beings are deprived of the respect for certain fundamental values.

The conflicts in Syria, Yemen, and Ukraine are emblematic examples of this evolution, in which non-state actors, such as armed groups and private military companies [Bassiouni 2008], have further blurred the boundaries between conventional and irregular warfare [Regan 2002].

Moreover, the study of proxy war highlights the extent of suffering and destruction associated with it, which by its very nature tends to multiply hostilities and, consequently, the harm produced [Fox 2019, 55].[19]

The conflicts we have discussed show how war today tends to unfold according to a logic of progressive expansion, involving a multiplicity of actors within increasingly broad and structured topological frameworks that endanger human life, the stability of ecosystems, and even the very existence of law. This characteristic may be defined as diffused war, which manifests within societies and through them, ultimately affecting the relationship between humanity, the biota, and the biosphere, as well as the ability of law

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[18] "But all known political cyber offenses, criminal or not, are neither common crime nor common war. Their purpose is subverting, spying, or sabotaging. In all three cases, Clausewitz's three criteria are jumbled. These activities need not be violent to be effective. They need not be instrumental to work, as subversion may often be an expression of collective passion and espionage may be an outcome of opportunity rather than strategy. And finally: aggressors engaging in subversion, espionage or sabotage do act politically; but in sharp contrast to warfare, they are likely to have a permanent or at least temporary interest in avoiding attribution."

[19] "Modern proxy conflict is dominated by death and destruction; however, it just so happens that the death and destruction affect the proxy to almost an equal degree as that of the enemy. More to the point, in recent year's proxy warfare has resulted a drastic increase in the number, duration, and lethality of sieges across the globe.35 Sieges, like those in Mosul and Marawi, from an American perspective, or Donetsk airport and Debal'tseve from a Russian perspective, illustrate the close bond between fighting through proxies and the increased risk for the principal's proxy. The resultant effect is that the character of proxy warfare increases the cost and risk for the proxy force and its government, therefore creating the conditions that can accelerate divergence in the relationship between the partners."

to develop a universal presence. Within this difficulty lies one of the manifestations of universal harm – namely, the weakening of law.

Although the Geneva Conventions and other international norms regulate armed conflicts, the issue of the intrinsic illegality of war has not yet been adequately addressed. The problem is, in fact, linked to numerous paradoxical situations that deserve to be considered together. For example, the very aim of minimizing human suffering calls into question the principles of humanitarian law in a way that is paradoxical enough to warrant deeper reflection [Stephens and Lewis 2005, 85].[20] This is especially true when considered in relation to the danger to human life and health, as well as to ecosystems, resulting from military activities – particularly in the era of technological society [Falk 1973].[21] A possible starting point could be the development of a new ethics grounded in our relationship with life as a cosmic phenomenon – an approach that would call upon the law to care for this very dimension. Therefore, the multiplication of war-related phenomena, together with the complexity of weaponry and the intensity of its use, should be adequately considered in terms of their real danger and universal harm.

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[20] "What has been contended in this review is that there should be recognition of the limits of the existing law and, especially in the current paradigm of fighting a global war on terrorism, a sustained assessment of the efficacy of the existing structure. It is a mutual goal of the humanitarian and military camps that victory in warfare should be achieved swiftly and with the least amount of suffering. It has been contended that the existing principles of distinction and proportionality do not always secure these laudable goals especially in the new 'battle-space' in which we find ourselves, and that new concepts dealing with 'effects-based operations' may promise a better alternative."

[21] As for the war in Indochina, the author, among various references, points out that "Perhaps the crudest tool the United States is using to destroy the ecology in Indochina is the 'Rome plow'. This is a heavily armored caterpillar bulldozer with a 2.5 ton blade. The Rome Plow can cut a swath through the heaviest forest. It has been used to clear several hundred yards on each side of all main roads in South Vietnam. In mid-1971 five land clearing companies were at work, each with some thirty plows, mowing down Vietnamese forests. By then some 800,000 acres had been cleared and the clearing was continuing at a rate of about 2,000 acres (3 square miles) daily." In this regard, he refers to the war crimes perpetrated against the primeval forests during the German occupation, involving logging operations that far exceeded the forests' capacity to regenerate.

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CRIMINAL AND DISCIPLINARY PROCEEDINGS AGAINST WŁADYSŁAW SIŁA-NOWICKI BEFORE THE COURTS OF THE PEOPLE'S REPUBLIC OF POLAND (1959-1984)

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Abstract. This article aims to present a fragment of the biography of Władysław Siła-Nowicki, a lawyer and defence counsel in political trials during the period of the People's Republic of Poland. He practised law from 1959 to 1984. During this period, his uncompromising courtroom stance led to repeated disciplinary penalties, criminal proceedings, and temporary deprivation of his right to practise law. Thanks to his courage and willingness to make sacrifices in defence of his clients, he earned public recognition and respect. The article is also intended as a contribution to broader reflections on the status of the legal profession under a communist state.

Keywords: Władysław Siła-Nowicki; lawyer; People's Republic of Poland; judiciary; disciplinary and criminal proceedings.

INTRODUCTORY REMARKS

Among the documents of Władysław Siła-Nowicki, now preserved in the Archives of Modern Records in Warsaw, there is a short note he wrote in the early 1990s. He recorded the conviction that the idea of Christian democracy requires honest, Christian, and cultured treatment even of political opponents, as well as of people with differing political views.[1] Siła-Nowicki had become associated with Christian democracy during the Second World War and remained faithful to its principles throughout his life. He also applied them in his professional practice as a lawyer and defence counsel in political trials. For him, the central value was the human being, and thus he saw his duty as fighting for justice for others. He committed himself wholeheartedly to defending his clients, believing that a lawyer should defend anyone

[1] The Central Archives of Modern Records (Polish: Archiwum Akt Nowych) [hereinafter: CAMR], ref. no. 58, note, undated, place not indicated, Archive of W. Siła-Nowicki, place not indicated.

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who entrusted their case to him. Because of his conduct in the courtroom, he was repeatedly subjected to disciplinary measures, criminal proceedings were brought against him, and he was deprived of the right to practise law several times. His appearances in political trials earned him a reputation as a courageous, uncompromising, and selflessly devoted defence counsel.

The article focuses on a specific period of Siła-Nowicki's life, namely his professional activity between 1959 and 1984. The first chronological marker relates to his entry on the Warsaw Bar Association's list of lawyers on 5 March 1959. In 1984, however, Siła-Nowicki was deprived of the right to practise law. The official pretext was his reaching retirement age the year before. The then minister of justice, Sylwester Zawadzki, refused to grant him permission to establish an individual legal practice. Upon leaving the profession in 1984, Siła-Nowicki addressed an open letter to General Wojciech Jaruzelski, in which he criticised the political situation in the country and pointed to numerous examples of law-breaking by public officials [Rzeczkowska 2018, 403-19].

Siła-Nowicki belonged to a small group of defence lawyers who consistently spoke up for the rights of defendants in political trials. In such trials, the point was not to prove someone's guilt within the framework of judicial proceedings but to carry out political instructions through the courts [Pleskot 2020]. The attitude of the judiciary towards defence lawyers in political cases, as Siła-Nowicki's close associate and student Piotr Andrzejewski observed, was exceptional: "we constituted a threat to the proper functioning of the justice system. The authorities feared Siła-Nowicki so much that they issued a special regulation: a lawyer who reached the age of seventy was required to cease practising law" [Dłużewska 2017, 40]. He was removed from the list of the Warsaw Bar Association No. 24 pursuant to Article 19 of the Law on the Bar of 26 May 1982.[2] Adopted during martial law but drafted earlier following the National Bar Congress in Poznań (3-4 January 1981), this law was widely regarded by lawyers as a measure aimed at eliminating defence lawyers active in political cases [Rościszewski 2012, 19]. Siła-Nowicki was probably the first person against whom the new provisions were applied. After his removal, he attempted to set up an individual legal practice, but this required the approval of the minister of justice. By a decision of 19 January 1984, the minister refused to grant such permission [Rościszewski, Olszewski, Grabiński, et al. 1994, 205].[3]

This article describes the circumstances surrounding the initiation of disciplinary proceedings against Siła-Nowicki, their course, and the arguments used by the parties involved. Particularly valuable are the remarks of the judiciary, disciplinary bodies, as well as of Siła-Nowicki himself, regarding the

[2] Act of 26 May 1982, the Law on the Legal Profession, Journal of Laws, No. 16, item 124.

[3] Archive of the Institute of National Remembrance in Warsaw, file no. 0204/20, registration questionnaire, code name 'Stefan'; extract from Protocol No. 16 of the meeting of the District Bar Council, 1 December 1983, vol. 11, fol. 142.

status of a lawyer and defence counsel in political trials before the courts of the People's Republic of Poland. During the period under discussion, the status of the legal profession was defined by the Act on the Structure of the Bar of 27 June 1950 (subsequently amended) and later by the Act of 19 December 1960.[4] Both statutes introduced new disciplinary organs into the Bar's structure. The existing disciplinary courts were replaced by disciplinary commissions (Provincial Disciplinary Commissions and Higher Disciplinary Commissions). The scope of supervision exercised by the minister of justice was also expanded, granting him, as Marcin Zaborski has written, the position of overseer and hegemon [Zaborski 2018, 128].

1. THE TRIAL OF JEHOVAH'S WITNESSES IN BIAŁYSTOK

In October 1959, Siła-Nowicki appeared as defence counsel in a trial against Jehovah's Witnesses before the Provincial Court in Białystok. The charges concerned the distribution of religious literature without the required state permit (debit). Reflecting on his practice, Siła-Nowicki recalled: "I also handled many cases of members of the Jehovah's Witnesses, who were prosecuted at that time in Poland for refusing military service and for their openly negative attitude towards the materialist worldview. Being myself a believing and practising Catholic, I defended them with full conviction that they were people of high moral standing and that everyone has the right to praise God according to their own beliefs, in keeping with the age-old tradition of religious tolerance."[5]

Jehovah's Witnesses had been under particular surveillance by the communist security apparatus since 1946. Informants reported that they agitated for boycotting elections. In 1950, the activities of the Association of Jehovah's Witnesses in Poland were banned, and many of its members were arrested. Contrary to expectations, the post-1956 liberalisation did not result in the legalisation of the community, which Jehovah's Witnesses demanded, along with exemption from military service. A new wave of repression followed in 1958, with cases of prolonged detention without court verdict. In 1960, the Security Service liquidated eight clandestine printing houses belonging to Jehovah's Witnesses. These actions were aimed less at eradicating the denomination than at subordinating it to the official system of recognised religious associations in the People's Republic of Poland [Jasiński 2020; Rzędowski 2004].

The October session of the Provincial Court in Białystok was attended by Captain Jan Ciosek, a functionary of the Provincial Office of Public

[4] Act of 27 June 1950 on the Organisation of the Legal Profession, Journal of Laws No. 30, item 275; Act of 19 December 1963 on the Organisation of the Legal Profession, Journal of Laws No. 57, item 309.

[5] CAMR, file no. 95, memorandum, no date or place, W. Siła-Nowicki Archive, n.d.

Security. He drafted a note from the proceedings which later served as the basis for initiating disciplinary action against Siła-Nowicki. He accused the lawyer of criticising Jan Jantas, head of the Provincial Office for the Control of Press, Publications and Performances in Białystok, who appeared as an expert witness in the trial. According to Ciosek, Siła-Nowicki declared that Jantas, as an expert, wrote absurdities and 'nonsense' that did not deserve consideration and should in no way constitute material evidence against the accused.[6] In fact, Siła-Nowicki's remarks referred to the legal status of Jehovah's Witnesses. He argued that their activity was lawful under the 1952 Constitution of the People's Republic of Poland, yet the Office for Religious Affairs refused to legalise their organisation. He recalled the early 1950s, when many Jehovah's Witnesses had been arrested and accused of espionage, and how most were later released and rehabilitated after 1956. He also referred to the period of Nazi occupation, when many members of the group had been persecuted and murdered by German authorities. Ciosek's report further noted: "In the course of his statements, he [Siła-Nowicki] claimed that Jehovah's Witnesses had been exterminated by Hitler during the occupation, and that, at that time in Białystok, a new Hitlerite cell had been formed, whose task was to annihilate Jehovah's Witnesses, who did not act hostilely towards the authorities but pursued a peaceful path. He added that, at that time, there were no cases of a Jehovah's Witness being prosecuted for hooliganism, theft, or brawling. These people, he continued, followed the proper peaceful path, and no Hitlerite cell would be able to annihilate them. During these remarks, Presiding Judge Skubowski repeatedly admonished him to watch his words, but he paid no attention and continued speaking, while those present in the courtroom burst out laughing."[7]

This note caused considerable difficulties for Siła-Nowicki. On 23 March 1960, the District Prosecutor's Office in Białystok charged him with having "behaved indecently on 12 October 1959 before the Provincial Court in Białystok by criticising evidence in the case with raised voice and inappropriate words, thereby committing an act under Article 128 of the Penal Code."[8] Nearly two months later, the charges and legal classification were revised. In the new decision of 5 May 1960, Siła-Nowicki was accused of publicly insulting the Department for Religious Affairs of the Presidium of the Provincial National Council (PNC) during his defence speech in the Białystok court, claiming that the department employed 'Hitlerite methods.' This act

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[6] CAMR, file no. 95, memorandum, no date or place, W. Siła-Nowicki Archive, n.d.

[7] Ibid.

[8] Ibid. "Anyone who, in a public place or during official duties, insults the authorities, an office, the army, or the navy, or their units, shall be liable to imprisonment for up to two years or a fine" – Article 127 of the Presidential Decree of 11 July 1932, the Penal Code, Journal of Laws No. 60, item 57.

was classified under Article 127 of the Penal Code.[9] In fact, during the trial, Siła-Nowicki had critically assessed the opinion issued by the Office for the Control of Press, Publications, and Performances and had made no statements regarding the Department for Religious Affairs. However, his explanations during the trial were disregarded by the adjudicating panel.[10]

By a verdict of the District Court in Białystok of 12 November 1960, Siła-Nowicki was found guilty of the alleged offences. Judge Henryk Cygan sentenced him to a fine of PLN 4,000 or 80 days' imprisonment should the fine not be paid. The court's decision was based solely on the testimony of five witnesses, whose examination took place three months after the incident. On 30 May 1961, the Białystok Provincial Court overturned this verdict. The case did not conclude with the appellate court's decision, as Deputy Minister of Justice Kazimierz Zawadzki, in an extraordinary appeal on 28 July 1961, petitioned for the annulment of the verdict and the reassignment of the case to a different panel. The appeal justification stated that: "Although witnesses at the trial did not confirm that the accused had directed an abusive statement specifically at the Office for Religious Affairs, there was no doubt based on their testimony that such a statement was made against the Presidium of the Provincial National Council. … The precise wording of the accused's statement by the witnesses was deemed irrelevant, as its meaning, containing an insult to a public office, was sufficiently clear."[11]

In November 1961, the Supreme Court decided to leave the minister of justice's extraordinary appeal unconsidered. One of the judges, Mikołaj Mokrawiec, submitted a dissenting opinion, noting that he fully agreed with the reasoning of the first-instance court.[12]

Although Siła-Nowicki ultimately prevailed in court, this did not end his troubles. On 25 November 1961, disciplinary proceedings were initiated against him. On that day, Deputy Disciplinary Prosecutor L. Koprowski, charged him: "[…] with having abused freedom of speech during his defence by referring to expert witness J. Jantas, Head of the Provincial Office for the Control of Press, Publications and Performances at the PNC Presidium in Białystok, as 'nonsense.' Additionally, in his defence speech, he allegedly employed improper expressions, creating the impression among the courtroom audience that the PNC Presidium in Białystok applied inappropriate, Hitlerite-like methods against Jehovah's Witnesses. As a result, the presiding judge admonished him not to abuse freedom of speech in defending the

[9] Ibid.

[10] CAMR, file no. 95, judgment of the District Court for the city of Białystok, 12 November 1960; untitled memorandum, W. Siła-Nowicki Archive, n.d.

[11] CAMR, file no. 95, extraordinary review by the Minister of Justice to the Supreme Court, Warsaw, 28 July 1961, W. Siła-Nowicki Archive, n.d.

[12] Ibid.

accused, thereby violating his duties as a lawyer and committing a disciplinary offence."[13]

On 3 February 1962, the Provincial Disciplinary Commission of the Warsaw Bar Association issued a decision in Siła-Nowicki's case, acquitting him of the charges.[14] Dissatisfied with this outcome, the disciplinary prosecutor of the Warsaw Bar Council filed an appeal on 22 September 1962 to the Higher Disciplinary Commission for lawyers in Warsaw, seeking the annulment of the acquittal and the imposition of an appropriate disciplinary penalty.[15] Once again, the disciplinary decision was favourable to Siła-Nowicki. The Higher Disciplinary Commission upheld the appealed decision, stating that, based on the final outcome of the trial in case K. 94/59, the analysis and assessment of the expert opinion by the accused were substantively correct, as the Provincial Court, contrary to the expert's opinion, acquitted both defendants.[16] The commission further referenced the District Court verdict in Białystok, which had ruled in favour of the two Jehovah's Witnesses defended by Siła-Nowicki, thus validating the lawyer's arguments while rejecting the reasoning of the expert, the Head of the Provincial Office for the Control of Press, Publications, and Performances in Białystok.

The disciplinary proceedings against Siła-Nowicki were subsequently referred to the Supreme Court due to an appeal filed by the minister of justice. The minister requested the annulment of the decisions issued by both Disciplinary Commissions, arguing that: "Contrary to the conclusions reached by the commissions, the accused had exceeded the limits of freedom of speech necessary for the factual defence of the Jehovah's Witnesses in Białystok, and therefore committed a disciplinary offence for which an appropriate sanction should be imposed."[17]

On 24 August 1963, the Supreme Court issued a ruling instructing the Warsaw Bar Association Disciplinary Commission to reconsider the case.[18] Siła-Nowicki described his impressions from the Supreme Court hearing in a letter to his daughter Maria: "I returned from the court at 5 p.m. after losing my disciplinary case: one round for the minister – considering that

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[13] CAMR, file no. 95, protocol of the presentation of charges, W. Siła-Nowicki Archive, n.d.

[14] CAMR, file no. 95, decision of the Provincial Disciplinary Commission of the Warsaw Bar Association, Warsaw, 3 February 1962, W. Siła-Nowicki Archive, n.d.

[15] CAMR, file no. 95, appeal of the Disciplinary Commissioner of the Bar Council in Warsaw to the Higher Disciplinary Commission for Advocates in Warsaw, Warsaw, 22 September 1962, W. Siła-Nowicki Archive, n.d.

[16] CAMR, file no. 95, decision of the Higher Disciplinary Commission for Advocates, Warsaw, 1 December 1962, W. Siła-Nowicki Archive, n.d.

[17] CAMR, file no. 95, review by the Minister of Justice to the Supreme Court, Warsaw, 20 March 1963, W. Siła-Nowicki Archive, n.d.

[18] CAMR, file no. 95, judgment of the Supreme Court, 24 August 1963, W. Siła-Nowicki Archive, n.d.

he had already been knocked out several times, he deserved it – the minister is a human being, after all… They deliberated only an hour and ten minutes. Lawyer Koziołkiewicz defended me very well – apparently I did too, or so it seems to me. Now everything will be reviewed disciplinarily from the beginning. If I manage to convince the case rapporteur and he outlines possible motives, I hope we will win again. In any case: 'brothers, the time for battle has come' (again)."[19]

The Warsaw Bar Association Disciplinary Commission convened on 4 January 1964 to review Siła-Nowicki's case. In accordance with the Supreme Court's instructions, Judge Wincenty Skubowski, from the District Court in Białystok, was examined as a witness. In the justification of the acquittal, it was noted that the witness did not understand the meaning of the speech, could not reconstruct its content, and therefore such evidence was insufficient and could not serve as a basis for judgment.[20] Determined to pursue the matter, Minister of Justice Zawadzki again filed an extraordinary appeal to the Supreme Court, contesting the factual assessment that had justified Siła-Nowicki's acquittal. He also argued that the proceedings before the Provincial Disciplinary Commission had been conducted without proper adherence to the Supreme Court's guidance, or only partially and formally in accordance with it. Furthermore, the minister criticised the commission for superficially adopting one of the Supreme Court's alternative positions favourable to the accused, without explaining why the alternative unfavourable to the accused was excluded.[21] Nevertheless, he recognised the need for a swift conclusion to the proceedings, given their excessive duration,[22] and requested that the decision of the Disciplinary Commission be annulled and the case referred to the Provincial Disciplinary Commission in Katowice. In January 1965, the minister amended the conclusion of the extraordinary appeal, requesting that the appealed decision be annulled and the case referred to the Dean of the Warsaw Bar Council for the imposition of a disciplinary penalty.[23] Finally, on 12 June 1965, the Supreme Court issued a verdict that concluded the more than six-year-long criminal and disciplinary proceedings against Siła-Nowicki, initiated by the note

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[19] Excerpt from a letter from W. Siła-Nowicki to Maria Nowicka-Marusczyk, in: W. Siła-Nowicki, Wspomnienia i dokumenty, M. Nowicka-Marusczyk (ed.), vol. 2, Wrocław 2002, p. 13.

[20] CAMR, file no. 95, judgment of the Supreme Court, 24 August 1963, n.d.; decision of the Provincial Disciplinary Commission of the Warsaw Bar Association, Warsaw, 4 January 1964, W. Siła-Nowicki Archive, n.d.

[21] CAMR, file no. 95, extraordinary review by the Minister of Justice to the Supreme Court, Warsaw, 10 October 1964, W. Siła-Nowicki Archive, n.d.

[22] Ibid.

[23] CAMR, file no. 95, request of the Minister of Justice to the Supreme Court, Warsaw, 11 January 1965, W. Siła-Nowicki Archive, n.d.

of police officer Ciosek in Białystok. The Supreme Court left the minister of justice's appeal unconsidered.[24]

2. THE CASE OF LECH ZIELKE

On 31 December 1965, another disciplinary case against Siła-Nowicki began. It was initiated by the disciplinary prosecutor of the Warsaw Bar Council based on a report from the Provincial Prosecutor's Office in Białystok. This time, he was accused of "filing, on 26 October 1965 in Ełk before the District Court, an unjustified motion to disqualify all judges of the court while representing his client, Lech Zielke, thus committing an act contrary to the principles of professional dignity."[25]

As with the previous case, the proceedings extended over several years and went through successive instances in disciplinary proceedings. Siła-Nowicki was acquitted by the Warsaw Provincial Disciplinary Commission, which stated that he had acted in the interest of justice and to ensure the proper adjudication of the case.[26] The Higher Disciplinary Commission for Lawyers, which reviewed the case at the disciplinary prosecutor's request, adopted the same position, holding that Siła-Nowicki's motion to disqualify the judges was legally permissible, formally correct, and submitted at the explicit request of his client, whose interests he represented. In a letter to Maria and Konrad Marusczyk, Siła-Nowicki wrote: "I was annoyed by the disciplinary prosecutor: a so-called decent person, and indeed, I do not know why he committed this mischief – which he did not even hide, saying to Lis [Witold Lis-Olszewski represented Siła-Nowicki before the Higher Disciplinary Commission] and to me that he would have preferred to be on the opposite side. … Ah, these 'decent' ones… It is good that the disciplinary commissions still represent some honesty and reason – in addition, the case had quite serious general significance, not only personally for me."[27]

General Prosecutor Henryk Cieślik disagreed with the Higher Disciplinary Commission and submitted an extraordinary appeal to the Supreme Court. In the prosecutor's view, the role and rights of a lawyer in proceedings differed from those advocated by Siła-Nowicki. The prosecutor regarded a lawyer as a "component of the judiciary," who "should act according to legal

[24] CAMR, file no. 95, judgment of the Supreme Court in Warsaw, Warsaw, 12 June 1965, W. Siła-Nowicki Archive, n.d.

[25] CAMR, file no. 95, judgment of the Supreme Court in Warsaw, Warsaw, 12 June 1965, W. Siła-Nowicki Archive, n.d.

[26] CAMR, file no. 293, decision of the Provincial Disciplinary Commission of the Warsaw Bar Association, Warsaw, 5 November 1966, W. Siła-Nowicki Archive, n.d.

[27] Excerpt from a letter from W. Siła-Nowicki to Maria and Konrad Marusczyk, Warsaw, 8 October 1967, in: W. Siła-Nowicki, Wspomnienia i dokumenty…, vol. 2, p. 26.

provisions and exercise procedural rights based on factual necessity." In contrast, client wishes, according to the general prosecutor, should be assessed "not only in terms of law but also in relation to the factual needs, the good of the justice system, and the principles of professional dignity." Ultimately, he accused Siła-Nowicki of challenging judicial independence and causing delays in the adjudication of the case.[28]

Siła-Nowicki also expressed his views on the rights and duties of a lawyer in court proceedings. In March 1969, he addressed a letter to the Supreme Bar Council, requesting that the disciplinary prosecutor take a formal position on the matter. He argued that his motion to disqualify the entire bench did not concern him personally alone, but that its consequences could have broader implications for the status of lawyers before criminal courts. He emphasized that the motion to disqualify a court is a statutory right of a lawyer and does not violate either the dignity of the judge or the authority of the court. He wrote: "This matter is of fundamental importance to ensuring that lawyers can properly and fully fulfil their duties before the Criminal Court. It should also be clarified that a motion to disqualify a judge, usually and unjustifiably treated by courts as an affront to the dignity of the judge or even the authority of the court, is a normal procedural measure provided for in the Code of Criminal Procedure, which does not violate anyone's authority or dignity, and that both courts and all other state authorities violate the rule of law when they obstruct a citizen – including a lawyer – from exercising rights guaranteed to them by law."[29]

On 15 March 1969, the Supreme Court addressed the disciplinary case. It decided to leave the extraordinary appeal filed by the general prosecutor without consideration, rejecting the argument that Siła-Nowicki had violated the dignity of a lawyer or judicial independence.[30]

3. THE CASE OF NINA KARSOV

While the disciplinary proceedings regarding the disqualification of the court bench were ongoing, in November 1967, another criminal and disciplinary case was initiated against Siła-Nowicki, triggered by a search of his apartment. The case continued until January 1970 and was particularly burdensome because it resulted in the suspension of Siła-Nowicki's professional

[28] CAMR, file no. 293, extraordinary review by the General Prosecutor, Warsaw, 30 March 1968, W. Siła-Nowicki Archive, n.d.

[29] CAMR, file no. 293, request of W. Siła-Nowicki to the Supreme Bar Council in Warsaw, addressed to the Disciplinary Commissioner, Advocate Tadeusz Sarnowski, Warsaw, March 1969, W. Siła-Nowicki Archive, n.d.

[30] CAMR, file no. 21, judgment of the Supreme Court, 15 March 1969, Władysław Siła-Nowicki Archive, n.d.

rights. At that time, he continued to represent Jehovah's Witnesses in court cases and, most importantly, took on the case of Nina Karsov, a graduate of the Faculty of Polish Philology at the University of Warsaw. Together with Szymon Szechter, Karsov was collecting information on political trials in the 1960s, including those of Jacek Kuroń, Karol Modzelewski, Ludwik Hass, Kazimierz Badowski, Romuald Śmiech, Cezary Ketling-Szemley, and January Grzędziński, as well as on the student, literary, and legal communities and the Polish United Workers' Party. Their research served as source material for the diary they had been compiling since mid-1965. In August 1966, Karsov was arrested and imprisoned at Mokotów. The investigation against Szechter was conducted on bail due to his disability (he was blind) [Rokicki 2006, 179-80].[31] The search of Siła-Nowicki's apartment was undoubtedly linked to his representation of Karsov and Szechter, as authorities suspected that he had assisted Szechter in preparing a text critical of the political situation in communist Poland, possibly in the form of a letter to the English philosopher and political activist Bertrand Russell.[32]

The November search, carried out by officers of the Citizens' Militia Investigative Bureau, lasted several hours. A substantial number of documents were seized, including religious materials and documents related to the activities of the Catholic Church.[33] From the mid-1960s, Siła-Nowicki had been a member of an Informational Team under Primate Stefan Wyszyński. During each meeting, participants received documents from the primate, which were then distributed to other individuals interested in the situation of the Catholic Church in communist Poland. According to participant Wiesław Chrzanowski, the transmission of correspondence concerning Church-state relations was a key aspect of the team's work.[34] He recalled the search of Siła-Nowicki's apartment, during which one of the documents received from the primate was found. This document later became the basis for criminal charges against Siła-Nowicki. Chrzanowski explained: "At each Informational Team meeting, the participants received files of texts patiently typed by nuns. These manuscripts were not yet considered a violation of censorship laws but under pressure from the authorities, the Supreme Court later issued a contrary ruling. The documents were subsequently distributed among the intelligentsia. One document discovered during the late-1960s search concerned directives from Colonel Morawski, head of the Ministry of Interior's Department for

[31] The course of the case was described by its protagonists, Nina Karsov and Szymon Szechter. More on this topic see Karsov and Szechter 1987.

[32] CAMR, file no. 21, protocol of the review, Warsaw, 20 November 1967, W. Siła-Nowicki Archive, n.d.

[33] W. Siła-Nowicki, Wspomnienia i dokumenty…, vol. 2, p. 27.

[34] Pół wieku polityki. Z Wiesławem Chrzanowskim rozmawiali Piotr Mierecki i Bogusław Kiernicki, Warszawa 1997, p. 262.

religious affairs.[35] This document, sent anonymously to the Episcopate, contained instructions on monitoring priests for the purpose of later blackmail, including a series of provocations, deceptions, and fraud."[36]

Chrzanowski noted that the document in question was a copy of instructions issued by the Office for Religious Affairs on 13 September 1960, signed by Jerzy Sztachelski, the head of the office. It outlined the Polish People's Republic's religious policy, including limiting Church activities, dismantling its administrative units, imposing high taxes, and charging high rents for Church-owned properties.[37]

On 11 December 1967, the Warsaw Provincial Prosecutor's Office formally charged Siła-Nowicki under Articles 23 and 24 of the Small Penal Code.[38] He was accused of drafting a document with the characteristics of an official state organ document regarding state-Church relations, containing false and defamatory information about the Polish People's Republic, and of possessing such documents, including the open letter of Jacek Kuroń and Karol Modzelewski.[39] On 23 December, the disciplinary prosecutor of the Warsaw Bar Council filed a motion for the temporary suspension of Siła-Nowicki from professional practice due to the ongoing investigation. The prosecutor acted on instructions from the Bar Council, which decided in a vote of seven in favour, four against, and three abstentions to request the suspension.[40]

Siła-Nowicki reacted strongly to the prosecutor's motion. In a letter to the Provincial Disciplinary Commission, he accused him of failing to provide substantive justification for the suspension and of acting for political motives. He compared the prosecutor's actions to the functioning of the justice system during the Stalinist period, when lawyers were administratively

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35 It concerns Department IV of the Ministry of Internal Affairs.

36 Ibid., pp. 262, 266.

37 CAMR, file no. 21, copy of the instruction of the Office for Religious Affairs, 13 September 1960, W. Siła-Nowicki Archive, n.d.

38 Decree of 13 June 1946 on particularly dangerous crimes during the reconstruction of the State, Journal of Laws No. 30, item 192, Article 23: "§ 1. Anyone who disseminates, or for the purpose of dissemination prepares, stores, or transports writings, printed matter, or images that incite the commission of a crime, glorify a crime, contain material to be kept secret from state authorities, or contain false information capable of causing substantial harm to the interests of the Polish State or undermining the authority of its supreme organs, shall be liable to imprisonment for no less than three years. § 2. If the act referred to in the preceding paragraph has caused great harm to the State, the perpetrator shall be liable to imprisonment for no less than five years or to life imprisonment."

Article 24: "§ 1. Anyone who stores writings, printed matter, or images referred to in Article 23 shall be liable to imprisonment for up to five years. § 2. No crime is committed by anyone who stores such items for purposes justified by their profession."

39 This concerns the 'Open Letter to the Party' [List otwarty do partii] from 1965. CAMR, file no. 21, decision to bring charges, Warsaw, 11 December 1967, W. Siła-Nowicki Archive, n.d.

40 W. Siła-Nowicki, Wspomnienia i dokumenty…, vol. 2, p. 27.

removed from practice. He argued: "The suspension from professional duties of a lawyer defending in a political trial, on grounds related to the defence itself, without proof of guilt, and even at the preparatory stage of criminal proceedings before the filing of an indictment, must be regarded as a relapse into the worst traditions of the Stalinist era, a period of errors and distortions, when administrative measures were used to eliminate any defence counsel who dared to oppose the prevailing views of the time."[41]

On 6 January 1968, Siła-Nowicki also provided oral explanations before the commission, criticizing his colleagues in the Warsaw Bar Council for seeking his suspension rather than defending him. He declared that this episode would remain in the history of the bar as one of its most disgraceful chapters.[42] He described as shameful the convergence, in his case, between the position of the Public Prosecutor's Office and that of the Bar Council, which submitted a motion for his suspension instead of coming to his defence.[43]

Perhaps under the influence of the lawyer's argumentation, the Provincial Disciplinary Commission did not uphold the motion of the disciplinary officer.[44] However, its decision was appealed by both the Regional Prosecutor's Office and the disciplinary officer.[45] On 16 March 1968, a session of the Higher Disciplinary Commission was held. Siła-Nowicki and Witold Lis-Olszewski, who was also suspended from his duties as a lawyer on that occasion, were defended before the commission by as many as five lawyers. In his defence speech, one of them explained why he had decided to stand in defence of the accused: "If I undertook this defence, it is not primarily about colleagues Siła-Nowicki and Lis-Olszewski. For me, this is the matter of the bar, of the lawyer's freedom and independence, of freedom from fear and the threat of disciplinary reprisals, especially in so-called political trials. A lawyer who, in defending before the court, fears disciplinary action, suspension, or the director of the bar, the dean, the disciplinary prosecutor, the judge, or the minister, ceases to be a lawyer, ceases to be an independent and autonomous participant in the justice system, and becomes a feeble and redundant assistant to a corrupt 'justice system.'"[46]

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41 CAMR, file no. 95, statement of W. Siła-Nowicki, Warsaw, 6 January 1968, W. Siła-Nowicki Archive, n.d..

42 CAMR, file no. 98, oral explanations of Advocate W. Siła-Nowicki at the meeting of the Disciplinary Commission on 6 January 1968, W. Siła-Nowicki Archive, n.d.

43 Ibid.

44 CAMR, file no. 98, decision of the Provincial Disciplinary Commission of the Warsaw Bar Association, Warsaw, 6 January 1968, W. Siła-Nowicki Archive, n.d.

45 CAMR, file no. 98, appeal of the Disciplinary Commissioner of the Bar Council in Warsaw to the Higher Disciplinary Commission, Warsaw, 24 January 1968, W. Siła-Nowicki Archive, n.d.

46 CAMR, file no. 98, typescript of the address by an advocate [personal details missing], no date or place, W. Siła-Nowicki Archive, n.d.

Despite the strong defence and numerous arguments presented, taking into account appeals from the provincial prosecutor and the disciplinary prosecutor, the Higher Disciplinary Commission temporarily suspended Siła-Nowicki from professional practice. In a letter to Maria and Konrad Marusczyk, Irena Siła-Nowicka wrote: "So we are already on the threshold of what we had been expecting since 6 January – temporary suspension from duties. Naturally, at this moment, Dad and I (especially Dad) are stunned, as we were hit hard! Even though we did not expect much from these commissions. Dad is deeply impressed by the six outstanding speeches (his seventh). They were full of pearls… one could equally have recited *Sir Thaddeus* [Poland's national epic – translator's note] or *Eugene Onegin*, and it would not have changed their opinion. Since yesterday, phones, friends, activity, excitement. Dad, like a film actress, receives flowers (white, as a sign of innocence…), but once the wave subsides, we will be left with our not problems but troubles. And what can a common man do?"[47]

In addition to the temporary suspension from professional duties, the decision deprived Siła-Nowicki of his livelihood. Over the following two years, he worked occasionally, assisting in drafting legal documents, while his wife, Irena, at the request of Maria Bokszczanin, was transcribing the letters of Henryk Sienkiewicz, which were being prepared for publication under the supervision of Professor Krzyżanowski.[48] In April 1968, the authorities also suspended other lawyers involved in political trials, including Aniela Steinsbergowa, a collaborator of Siła-Nowicki.[49] In connection with the November search, Siła-Nowicki was repeatedly interrogated by Franciszek Orłowicz, an inspector at the Ministry of Interior's Investigative Bureau. The questioning concerned, among other matters, the open letter by Kuroń and Modzelewski, as well as the instructions from the Office for Religious Affairs dated 13 September 1960, which had been found in Siła-Nowicki's apartment.[50]

In July 1968, the Warsaw Provincial Prosecutor's Office discontinued the investigation under Article 23 of the Small Penal Code due to lack of evidence. In the same month, the Prosecutor's Office filed charges under Article 24 of the Small Penal Code with the Warsaw District Court. At the end

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47 Excerpt from a letter from I. Siła-Nowicka to Maria and Konrad Marusczyk, 17 March 1968, in: W. Siła-Nowicki, Wspomnienia i dokumenty…, vol. 2, p. 30.

48 Ibid.

49 CAMR, file no. 58, note, no place or date, W. Siła-Nowicki Archive, n.d.

50 CAMR, file no. 21, interrogation protocol of W. Siła-Nowicki, prepared by Franciszek Orłowicz, Inspector of the Investigative Bureau of the Ministry of Internal Affairs, Warsaw, 21-22 December 1967; interrogation protocol of W. Siła-Nowicki, prepared by Franciszek Orłowicz, Inspector of the Investigative Bureau of the Ministry of Internal Affairs, Warsaw, 18 January 1968; interrogation protocol of W. Siła-Nowicki, prepared by Franciszek Orłowicz, Inspector of the Investigative Bureau of the Ministry of Internal Affairs, Warsaw, 19 January 1968, Władysław Siła-Nowicki Archive, n.d.

of August, Siła-Nowicki submitted a request to the Provincial Disciplinary Commission to lift his temporary suspension from professional practice. On 7 September 1968, the commission granted this request.[51] However, three days later, Deputy Minister of Justice Kazimierz Zawadzki suspended Siła-Nowicki again, declaring the commission's decision to lift the suspension unjustified. In effect, the deputy minister annulled the commission's decision, an action beyond his legal authority, and imposed suspension without waiting for a possible appeal to the Higher Disciplinary Commission by the disciplinary prosecutor or the Prosecutor's Office.[52]

Siła-Nowicki hoped for a favourable outcome from the Warsaw District Court, which convened on 30 September 1968. On the eve of the trial, he wrote to his daughter Maria: "What interests both of you most now – my trial tomorrow: objectively, it is so favourable that I should win it with minimal honesty from the judges. On the other hand, the presiding judge is such a… [here he refers to a series of widely recognized pejorative terms], and the conditions are so vile, and people's capacity for corruption so developed – regarding the litigants – that one must consider the possibility of losing. But in court, one never really knows, so I will not be surprised either by loss or victory."[53]

Siła-Nowicki was aware that the authorities sought to permanently deprive him of his ability to practice law. Any conviction would automatically result in his removal from the bar. In the same letter to Maria, he wrote: "With all probability, it is not about actual imprisonment (which would be quite something considering my past… with a possible five-year sentence! ha ha ha…) but about any conviction that would allow my elimination from the bar. Suspension of six months to two years is very suitable for this nefarious purpose. Acquittal on two charges and discontinuation under Article 49 of the Code of Criminal Procedure for the other two would be a compromise solution somewhat favourable to me. The only correct solution is acquittal – of course, the proper and very difficult to achieve one."[54]

The District Court ultimately found Siła-Nowicki guilty of possessing documents containing "false information regarding socio-political relations in the Polish People's Republic, particularly state-Church relations, potentially harmful to the interests of the Polish state …"[55] The court determined that

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[51] CAMR, file no. 21, from a note sent in March 1970 to the Chair of the Parliamentary Committee on the Administration of Justice, W. Siła-Nowicki Archive, n.d.

[52] Ibid., CAMR, file no. 21, note, no date or place, W. Siła-Nowicki Archive, n.d.

[53] CAMR, file no. 21, note, no date or place, W. Siła-Nowicki Archive, n.d. Excerpt from a letter from W. Siła-Nowicki to Maria Nowicka-Marusczyk, 24 September 1968; excerpt from a letter from W. Siła-Nowicki to Maria Nowicka-Marusczyk, 24 September 1968, in: W. Siła-Nowicki, Wspomnienia i dokumenty…, vol. 2, p. 34.

[54] Ibid.

[55] CAMR, file no. 21, judgment of the District Court for the capital city of Warsaw, Warsaw, 30 September 1968, W. Siła-Nowicki Archive, n.d.

the lawyer had held documents classified as state secrets, including an article entitled *What is Socialism?*, a study on the principles of religious freedom in Poland, and an open letter by Jacek Kuroń and Karol Modzelewski. He was sentenced to six months in prison, suspended for two years. This outcome represented the worst-case scenario he had anticipated. The verdict was not unanimous; one judge submitted a dissenting opinion advocating acquittal.[56]

Both the prosecution and the defence appealed the District Court's decision. On 4 April 1969, the Warsaw Provincial Court upheld the sentence.[57] Siła-Nowicki had anticipated such a ruling, given his conflict with the presiding judge. His motion for the judge's recusal was dismissed. He noted in his correspondence: "The scheduled April date for my trial appears pessimistic, given that the judge, with whom I had previously been in dispute and about whom I filed a written complaint (one such judge only in all of communist Poland!), refuses to recuse himself. Once my motion is ultimately denied, my defence and I will leave the courtroom with heads held high and the verdict in our pocket – in this case, a synonym for the nearest and inevitable outcome."[58]

Due to procedural irregularities, the Supreme Court considered filing an extraordinary appeal. However, this was deemed unnecessary as the sentence was nullified under the Amnesty Act of 21 July 1969, thus rendering the conviction legally void. Meanwhile, Deputy Minister Zawadzki petitioned the Warsaw Bar Council to strike Siła-Nowicki from the list of advocates. This petition was left unaddressed due to the amnesty. In the subsequent disciplinary proceedings before the Disciplinary Commission of the Warsaw Bar Council, Siła-Nowicki was acquitted on 11 October 1969. This decision was appealed by the prosecution.[59]

In this context, Siła-Nowicki petitioned the Higher Disciplinary Commission to request that the minister of justice lift his temporary suspension. The commission refused by decision dated 24 November 1969.[60] Critically assessing this ruling, Siła-Nowicki submitted a letter to the National Bar Council on 13 December 1969, sharply criticizing the commission's decision. In his letter, he wrote: "If the Disciplinary Commission – the only body formally empowered to defend the rights of an advocate – does not exercise its powers even in such a blatant case, where an advocate suspended for one year and eight months has been acquitted in the first instance, this indicates

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[56] CAMR, file no. 21, judgment of the District Court for the capital city of Warsaw, Warsaw, 30 September 1968, W. Siła-Nowicki Archive, n.d.

[57] CAMR, file no. 21, note, no date or place, W. Siła-Nowicki Archive, n.d.; excerpt from a letter from W. Siła-Nowicki to Maria Nowicka-Marusczyk, 24 September 1968.

[58] Excerpt from a letter from W. Siła-Nowicki to Maria and Konrad Marusczyk, Warsaw, 1–2 March 1969, in: W. Siła-Nowicki, Wspomnienia i dokumenty…, vol. 2, p. 35.

[59] CAMR, file no. 21, from a note sent in March 1970 to the Chair of the Parliamentary Committee on the Administration of Justice, W. Siła-Nowicki Archive, n.d.

[60] Ibid.

a misapprehension of its duties and that it functions more as an auxiliary, overzealous punitive organ than as a corporate body of justice."

He concluded the document by noting: "today, in the name of various but equally short-term political objectives, people – my case being not the only one – are deprived of the possibility of practising a profession with particularly demanding duties in a socialist state."[61] These passages were subsequently evaluated both at the provincial level and by the Higher Disciplinary Commissions. Despite a request for recusal, the Higher Disciplinary Commission re-examined the case, overturning the acquittal and imposing on 10 January 1970 a disciplinary suspension of one year and nine months.[62] By this time, the act for which Siła-Nowicki had been accused was no longer a criminal or disciplinary offense. He described the ruling in a letter to Maria and Konrad Marusczyk as: "… a masterpiece of bureaucratic caution… issued after a six-hour deliberation. The 'Most Honourable Prosecutor' demanded either a five-year disbarment or expulsion from the bar. The absence of his defence counsel was recorded as a demonstration undermining the authority of the Higher Disciplinary Commission. As a Polish proverb goes: 'The dog knows it has eaten the fish.'"[63]

Additionally, the Presidium of the National Bar Council determined that Siła-Nowicki's 13 December 1969 letter contained elements of insult and defamation and recommended initiating a separate disciplinary proceeding.[64] Siła-Nowicki responded, asserting that his letter had neither insulted nor defamed anyone; it was a sharp but justified critique of the Higher Commission's 24 November 1969 decision. He explained with surprise that, in his view, the lawyers to whom the document referred had not felt insulted or defamed by his words; however, the Presidium of the Supreme Bar Council reacted negatively to his statement, despite the fact that the petition in question made no reference to it. Consequently, in January 1970, a new disciplinary case was initiated against Siła-Nowicki. On 18 February, having reviewed the disciplinary records, Deputy Minister Zawadzki suspended him once more from practising law.[65] In his justification, he ignored Siła-Nowicki's explanations, merely asserting that, 'given the alleged serious disciplinary violations, it was appropriate to prevent him from practising law until the disciplinary proceedings were legally concluded.[66]

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[61] Ibid.

[62] Ibid.

[63] Excerpt from a letter from W. Siła-Nowicki to Maria Nowicka-Marusczyk, 13 January 1970, in: W. Siła-Nowicki, Wspomnienia i dokumenty…, vol. 2, p. 43.

[64] CAMR, file no. 21, from a note sent in March 1970 to the Chair of the Parliamentary Committee on the Administration of Justice, W. Siła-Nowicki Archive, n.d.

[65] CAMR, file no. 238, decision of the Minister of Justice, Warsaw, 18 February 1970, W. Siła-Nowicki Archive, n.d.

[66] Ibid. CAMR, file no. 21, from a note sent in March 1970 to the Chair of the Parliamentary Committee on the Administration of Justice, W. Siła-Nowicki Archive, n.d.

In March 1970, Siła-Nowicki met with former first president of the Supreme Court Jan Wasilkowski. This meeting followed a discussion with the chairman of the Parliamentary Committee on the Judiciary on 6 March. Together with two other suspended lawyers, Aniela Steinsbergowa and Jan Olszewski, Siła-Nowicki sent a letter to the committee chairman, complaining about Deputy Minister Zawadzki's abuse of authority in suspending lawyers based on trivial or unfounded allegations.[67] Under the 1963 Bar Act, a lawyer could be suspended only in exceptional circumstances if required by the public interest.[68] The lawyers characterized the minister's actions as a form of discrimination linked to their defence of political cases, including those of Modzelewski and Kuroń (Steinsbergowa, Olszewski) as well as Karsov and Janusz Szpotański (Siła-Nowicki).[69] During the same period, they also met with the former first president of the Supreme Court, who promised to intervene with the minister of justice regarding Siła-Nowicki's suspension.[70]

Independently of these efforts, the disciplinary prosecutor of the Warsaw Bar Council filed charges with the Provincial Disciplinary Commission against Siła-Nowicki, accusing him of insulting and defaming Bar Council authorities and members through his 13 December 1969 letter.[71] On 6 June 1970, the commission found him guilty of the alleged disciplinary violations and imposed a three-month suspension, counting the prior temporary suspension towards this period.[72] It deemed the following sentence from his letter defamatory: "today, in the name of various but equally short-term political objectives, people – my case being not the only one – are deprived of the possibility of practising a profession …" (sic!)[73] The commission argued that this statement could undermine trust in Bar Council authorities, including disciplinary commissions, by suggesting that these bodies were not impartial or independent and could revoke lawyers' right to practice for political purposes, regardless of guilt.[74] Siła-Nowicki appealed this decision;[75] however,

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67 CAMR, file no. 21, letter from A. Steinsbergowa, J. Olszewski, and W. Siła-Nowicki to the Chair of the Parliamentary Committee on the Administration of Justice, 13 March 1970, n.d.

68 Ibid. Article 99 of the Act of 19 December 1963 on the Organisation of the Bar (Journal of Laws No. 57, item 309).

69 Ibid.

70 Excerpt from a letter from W. Siła-Nowicki to M. Nowicka-Marusczyk, Warsaw, 10 March 1970, in: W. Siła-Nowicki, Wspomnienia i dokumenty…, vol. 2, p. 45. Fragment listu W. Siła-Nowickiego do Marii i Konrada Maruszczyków, Warszawa 13 April 1970, in: W. Siła-Nowicki, Wspomnienia i dokumenty…, vol. 2, p. 47.

71 CAMR, file no. 238, indictment, Warsaw, 11 March 1970, W. Siła-Nowicki Archive, n.d.

72 CAMR, file no. 238, decision of the Provincial Disciplinary Commission of the Bar Association in Warsaw, Warsaw, 6 June 1970, W. Siła-Nowicki Archive, n.d.

73 Ibid.

74 Ibid.

75 CAMR, file no. 238, appeal, Warsaw, 2 July 1970, W. Siła-Nowicki Archive, n.d.

the Higher Disciplinary Commission upheld the ruling in September 1970.[76] Only the minister of justice's decision on 13 July 1970 enabled Siła-Nowicki to return to professional practice.[77] In November, the minister notified the Bar Council that he would no longer pursue his 27 May 1969 request to remove Siła-Nowicki from the list of practising lawyers.[78]

4. THE RADOM TRIALS

In 1976, Siła-Nowicki became actively involved in providing legal assistance to repressed workers from Radom factories. As an advocate, he participated in at least a dozen proceedings held at the Radom District Court. In February 1977, the disciplinary prosecutor of the Warsaw Bar Council accused him of abusing freedom of speech and violating the dignity of the legal profession during the trial of Zofia Sadowska.[79] The indictment stated: "On 15 October 1976, before the District Court in Radom, while defending Zofia Sadowska, the advocate abused his professional duties by asserting – beyond the substantive need and freedom of speech – that the defendant's presence in the building of the Radom Provincial Committee of the Polish United Workers' Party on 25 June 1976 was her right and duty guaranteed by the Constitution and that the defendant was a genuine representative of the working class, whereas those issuing statements about the current situation were not, and that the worst events were those which occurred in Radom after 25 June 1976."[80]

The Provincial Disciplinary Commission convened on 7 May 1977 and decided to acquit Siła-Nowicki. However, both the disciplinary prosecutor and the provincial prosecutor lodged appeals, alleging that the commission had drawn incorrect conclusions from the evidence and had evaluated it incompletely. Furthermore, the indictment was expanded to include charges that his statements were anti-state in character. The Higher Disciplinary Commission upheld the acquittal. In its reasoning, it expressed a remarkably courageous and assertive position regarding advocate immunity. According to the commission: "This immunity must be interpreted as broadly as possible, as freedom of speech in the practice of law is the

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[76] CAMR, file no. 238, decision of the Higher Disciplinary Commission for Advocates, Warsaw, 5 September 1970, W. Siła-Nowicki Archive, n.d.

[77] CAMR, file no. 238, decision of the Minister of Justice, Warsaw, 13 July 1970, W. Siła-Nowicki Archive, n.d.

[78] CAMR, file no. 238, excerpt from the minutes of meeting no. 17 of the Bar Council in Warsaw, 5 November 1970, W. Siła-Nowicki Archive, n.d.

[79] Notification to the Bar Council in Warsaw, Warsaw, 19 January 1977, in: W. Siła-Nowicki, Wspomnienia i dokumenty…, vol. 2, p. 107.

[80] Ibid.

most effective guarantee for ensuring the rule of law in adversarial proceedings, which are an inherent part of the democratic principles underpinning the socialist system. Consequently, advocates have the right to analyse the social context and causes in any case they handle, even if their expressed opinions are subjective (and therefore potentially objectively incorrect), as long as they remain within the bounds of defence or representation."[81]

The commission emphasized the advocate's right to subjective assessment and the possibility of error: "The right to exercise subjective judgment and the concomitant possibility of error extends to the expression of political opinions connected with specific matters, as well as to the critique of individual representatives of the authorities. Notwithstanding this, any criticism directed at the fundamental principles of the socialist system is strictly impermissible, irrespective of the fact that such critique could never be justified as falling within the legitimate bounds of defence. Nonetheless, it may constitute a basis for consideration by the Bar Councils in assessing compliance with the professional obligations incumbent upon advocates in the Polish People's Republic."[82]

In conclusion, the commission found no grounds to determine that Siła-Nowicki, in his speech, had criticized the socialist system. On the contrary, his critical remarks regarding the conduct of certain militia officers could contribute to improving the rule of law in Radom, which was considered to be in the broadly understood interest of the Polish state.[83]

The Higher Disciplinary Commission's ruling did not conclude the disciplinary proceedings. The general prosecutor appealed, and on 28 May 1978, filed a special appeal with the Supreme Court, alleging factual errors in the basis of the two rulings and requesting a retrial. By judgment of 11 December 1978, the Supreme Court overturned the contested decision and referred the case back to the Warsaw Provincial Disciplinary Commission. It once again acquitted Siła-Nowicki on 4 December 1979, and the Higher Disciplinary Commission confirmed this decision on 14 June 1980.[84]

The disciplinary proceedings concerning Siła-Nowicki, which originated from the Radom trials, continued until mid-1980. In the course of one such proceeding, he came into contact with Judge Józef Dziowgo, who, in 1978, had presided over the judicial panel adjudicating Siła-Nowicki's disciplinary case before the Supreme Court. Notably, 28 years earlier, in 1949, Lt. Col.

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[81] CAMR, file no. 246, decision of the Provincial Disciplinary Commission for Advocates, Warsaw, 24 September 1977; copy of the decision of the Higher Disciplinary Commission for Advocates, Warsaw, 24 September 1977, W. Siła-Nowicki Archive, n.d.

[82] Ibid.

[83] Ibid.

[84] CAMR, file no. 246, decision of the Higher Disciplinary Commission for Advocates, Warsaw, 14 June 1980, W. Siła-Nowicki Archive, n.d.

Dziowgo had presided over the Military Supreme Court panel that, on 4 February, confirmed Siła-Nowicki's death sentence.[85] Anticipating his participation, Siła-Nowicki filed a motion to recuse him, which he justified during the hearing. His words visibly agitated the judge. Siła-Nowicki later recalled: "I was, of course, aware in advance that Dziowgo would sit on the adjudicating panel in my case, and I was prepared to recuse him without hesitation. Accordingly, when the hearing began, I submitted a motion for his recusal and commenced, in a relatively composed manner, to justify that motion. In his role as presiding judge, he committed a professional error. Once he realised the nature of my motion, he should have interrupted me immediately, declared that the court would recess briefly on jurisprudential grounds, withdrawn, and after five or fifteen minutes – having already recused himself in the deliberation room – introduced a newly composed panel to the courtroom to announce the decision granting my motion, thereby closing the matter. However, unlike an advocate – and, to some extent, also unlike a prosecutor – a judge in the courtroom never feels threatened, for he embodies authority there; he may admit or reject motions at will and enjoys considerable discretion. Thus, Judge Dziowgo did not feel threatened in the slightest. Moreover, he made another error: he assumed that a lawyer appearing before the court as the accused or defendant is in a weaker position than a lawyer pleading as a member of the bar. This assumption is mistaken, not least because the accused is afforded greater latitude than the defence counsel. Thus, convinced that he had nothing to fear, Judge Dziowgo, instead of interrupting me, leaving the courtroom, and not reappearing, chose to listen. And once he began listening, it became increasingly difficult to stop me, while I spoke in terms ever more incriminating. Finally, when I declared: 'I must admit that I have often wondered, and still wonder, how it is that individuals who committed such egregious errors, with such tragic consequences, continue to pronounce judgments in the supreme judicial instance of the People's Republic of Poland' – he cut me off, his face crimson, exclaiming: 'I interrupt you! I interrupt you at this point; these words must be recorded in the minutes with utmost accuracy. At this, I resumed from the beginning, now in a loud voice. Dziowgo interjected: 'But there was something about astonishment there', 'I shall return to that at once, Your Honour,' I replied, and thundered on: 'I have wondered, and I continue to wonder, how it is that individuals who committed such egregious and tragically consequential errors continue to deliver judgments in the supreme judicial instance of our state. But I claim the right to demand that I not be judged by a man who unjustly sentenced me to death, branding me repeatedly a bandit, a murderer, a criminal, as well as the instigator

[85] More on this topic in: Rzeczkowska 2021, 394-95.

and ringleader of criminal activity.' There were approximately thirty lawyers present at the hearing, and the matter quickly became widely discussed."[86]

The Radom case was the last instance of disciplinary proceedings brought against Siła-Nowicki in his capacity as an advocate prior to 1980. Although the disciplinary trials and proceedings before the criminal courts demanded great effort from him, they also earned him respect among ordinary people, whom he continued to assist despite his own difficulties, as well as recognition from some of his professional colleagues, who acknowledged his attempts to defend the standing of the advocate before the courts of the People's Republic of Poland. An examination of the course of the disciplinary and criminal proceedings initiated against Siła-Nowicki suggests that their purpose was to obstruct his professional activity and ultimately to eliminate him from the bar. The charges brought against him were illusory and trivial, based on weak premises. His ordeals further reveal the extent of the influence exerted over the bar by the minister of justice and the Public Prosecutor's Office. One is compelled to conclude that Minister Zawadzki harboured a particular dislike for Siła-Nowicki, repeatedly appealing against the decisions of disciplinary commissions that were favourable to the advocate. The general prosecutor also played an important role in disciplinary proceedings within the bar. Although he represented a different legal corporation, whose members confronted advocates in the courtroom, this did not prevent him from pronouncing on the status and role of the advocate in the trial process. Political defence lawyers likewise found little understanding among certain representatives of the bar itself. The case of Siła-Nowicki illustrates that the leadership of the Bar Council, by aligning itself with the position of the prosecutor, acted against members of the profession and, instead of serving as a body supporting advocates, became an instrument of repression.

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ANNULMENT OF MARRIAGE AFTER ITS DISSOLUTION

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Abstract. This article analyzes the legal grounds for annulment of marriage after its dissolution. Despite its vital social consequences, this issue has received little attention from the academic community. In the Polish legal system, a marriage cannot generally be annulled after its dissolution, except for two cases. The first is close kinship (incest), and the second is bigamy. These two exceptions will be discussed in this article, both in the context of substantive and procedural law. Interpretive doubts concerning annulment regulations and the proposal to amend the provisions of the Family and Guardianship Code will also be addressed.

Keywords: annulment of marriage; bigamy; kinship; prosecutor; dissolution of marriage; adoption.

INTRODUCTION

The subject matter of this article is a relatively narrow issue that has not received sufficient attention in the literature. On the contrary, the solution introduced by the legislator in Article 18 of the Polish Family and Guardianship Code (FGC) has been adopted in a rather heedless manner in the legal doctrine and has not been amended in more than 50 years. Meanwhile, political and economic relationships have undergone profound change during that period, and social expectations have clearly shifted towards a simpler and faster process for annulment of marriage.

This article will attempt to justify the view that the legal framework prescribing the grounds for the annulment of marriage following its termination warrants amendment. Above all, there is a need for new legal regulations that would permit the annulment of marriage between individuals in an adoptive relationship after the marriage has been dissolved.

A comprehensive and well-founded analysis of the matter necessitates an initial discussion of several systemic issues concerning the annulment and dissolution of marriage.

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1. IMPERMISSIBILITY OF ANNULMENT OF MARRIAGE AFTER ITS DISSOLUTION

A marriage cannot be annulled for reasons other than those provided for by the legislator. These are: marital impediments, defects in the declaration of intent, and invalid agency. The catalogue of legal grounds for annulment is closed, and a marriage cannot be declared null and void for reasons other than those prescribed in the FGC [Domański 2024a; Pietrzykowski 2023a].

Marital impediments include underage marriage, complete legal incapacitation, mental illness or intellectual disability, bigamy, close kinship and affinity, and adoption ties (Articles 10-15 FGC) [cf. Gromek 2021b, 970-78]. Defects in the declaration of intent are indicated in Article 15^1 FGC, which states that a marriage may be annulled if one party's declaration of intent was made in a state of mental incapacitation that prevented that party from consciously exercising his/her will or understanding the nature of the marriage commitment, if one of the parties has been deceived regarding the other party's identity, if one party was forced into the marriage by the other party or a third party. In turn, invalid agency can constitute the grounds for annulment if the parties were married by proxy without a court's permission or if the power of attorney was invalid or was effectively revoked (Article 16 FGC). A marriage is dissolved upon the death of a spouse, judicial declaration of presumptive death of a missing spouse, or through divorce. It is also terminated by a court's judgement declaring the marriage null and void [Pawliczak 2024]. The Polish legal framework relies on the *numerus clasus* principle, which implies that a marriage can be voided based solely on specific, legally defined grounds [Załucki 2023].

Article 18 FGC states that a marriage cannot be declared null and void after it has been terminated. There are only two exceptions to the above rule. A marriage can be annulled on grounds of close kinship (incest) and bigamy. The legal doctrine rightly states that dissolution of marriage constitutes a negative substantive prerequisite for the annulment of marriage [Domański 2024b]. In view of the above, once a marriage is dissolved, no party has standing to bring an action for the annulment of that marriage [ibid.]. The provisions of Article 18 FGC were introduced mainly for pragmatic reasons. In the absence of such regulations, a marriage could be voided after dissolution, irrespective of the legal basis for the action. It should also be noted that dissolution of marriage is effective *ex nunc* (prospectively), whereas annulment has *ex tunct* (retroactive) effects [Pietrzykowski 2023b].

In view of the provisions of Article 18 FGC, a court should deny any annulment petition if the marriage in question has already been dissolved through divorce. If a marriage is dissolved upon the death of either spouse or judicial declaration of presumptive death of a missing spouse, a petition

can be denied only if either of these events occurred before the petition was filed [Domański 2024c].

According to the literature, when interpreting legal provisions, certain ambiguity may arise if a marriage is dissolved after the annulment decision has been issued, but before this decision becomes legally effective. The above could occur, for instance, if two legal proceedings aiming to declare the marriage void and to end the marriage through divorce are initiated concurrently, and if the divorce becomes legally effective after the annulment decision has been issued, but before this decision takes effect. Since a marriage cannot be voided after its dissolution, the legal consequences of a valid annulment decision cannot take effect once the marriage has ended. Therefore, a marriage should be dissolved after the court's annulment ruling has come into effect. If either spouse dies after the annulment decision has been issued, but before it became legally effective, the ambiguity surrounding the first sentence of Article 18 FGC is resolved due to the provisions of Article 19 FGC. However, it should be noted that the court becomes bound by its judgement as of the moment of its pronouncement; therefore, once rendered, a court's decision cannot be revoked or modified. A court's judgement can be modified only through an appeal to a higher-instance court [Idem 2024d].

2. EXCEPTIONS TO THE IMPERMISSIBILITY OF ANNULMENT OF MARRIAGE AFTER ITS DISSOLUTION

2.1. Annulment of Marriage on Grounds of Close Kinship

As previously noted, the legislator has introduced two exceptions to the general rule stating that a marriage may not be voided after its dissolution. The first exception applies to marriages contracted between close relatives, while the second applies to cases where in which one of the spouses was already legally married to another person at the time of the marriage.

According to the literature, these exceptions are rooted in the fundamental provisions of the Polish legal framework that are protected by the conflict-of-law rule, namely the principle of monogamy and prohibition of marriage between close relatives [Stawarska-Rippel 2023a; Domański 2024e]. In addition, incestuous and bigamous marriages are generally regarded as socially unacceptable and are penalized under criminal law. Legal regulations preventing the annulment of such marriages would also generate serious problems in the context of succession law [Zielonacki 2013; Stawarska-Rippel 2023a; Domański 2024e], as well as in matters concerning disability or unemployment benefits [Winiarz 1985, 204].

Close kinship constitutes one of marital impediments. Marriages between direct-line relatives and siblings are explicitly prohibited by the law

[Borysiak 2014a]. Therefore, kinship is an absolute and permanent impediment to marriage [Gromek 2021a, 913]. The prohibition of marriage between siblings applies to both natural siblings and step-siblings, as well as to the adoptee, adopter's children and other persons he/she adopted [Prucnal-Wójcik 2024a]. It is generally recognized that prohibition of incestuous and bigamous marriages has special significance in Polish culture and traditions which have been largely shaped by Christianity. These marital impediments are also grounded in ethical considerations, social customs, and genetic health concerns [Pietrzykowski 2023c].

Consanguinity is a relationship that is based on shared ancestry and descent [Gromek 2021a, 912]. Parents and their children can be bound by the following types of kinship: a) a child is the biological offspring of legally married parents, b) a child born out of wedlock is recognized by its biological father, c) the identity of a child's biological father is established through court proceedings, d) a child born out of wedlock is legitimized through the subsequent marriage of its parents (*legitimatio per subsequens matrimonium*), e) the identity of a child's biological mother is established through court proceedings [Kasprzyk and Skubiszewski 2017, 190]. There are two degrees of kinship: direct (lineal) and indirect (collateral). A direct-line kinship is a relationship between individuals where one is the direct ancestor or descendant of the other. In turn, an indirect kinship is a relationship between individuals who share a common ancestor but are not in a direct line of descent (Article 61^7(1) FGC). The degree of kinship is established by counting the number of births separating two individuals in a direct or collateral line (Article 61^7(1) FGC).

The doctrine raises interpretative doubts as to whether the provisions of Article 14 FGC apply only to kinship through adoption or also to biological (natural) kinship. According to Pietrzykowski, these provisions regulate only kinship through adoption. In turn, Gajda has argued that the cited article applies to both types of kinship because it does not contain any provisions that clearly limit its applicability to kinship through adoption [Gajda 2014, 173]. Other jurists have also observed that due to the *ratio legis* of Article 14(1) and the underlying genetic factors, the prohibition of marriage between direct-line relatives and siblings applies not only to kinship that has been legally recognized based on civil status records or a valid court decision, but also to biological kinship [Borysiak 2014b and the literature cited therein]. However, to ascertain the degree of kinship, the registrar or the court is guided solely by civil status records or a court's decision amending the content of these records, and they cannot independently ascertain the degree of biological kinship in a manner that is inconsistent with the formal evidence [Borysiak 2014c; Piasecki 2011a]. Despite the above, Pietrzykowski rightly remarked that this point of view is internally inconsistent [Pietrzykowski 2023d]. Since the degree of kinship between spouses seeking an annulment

of their marriage cannot be independently ascertained by the court, it should be assumed that Article 14(1) applies only to kinship through adoption. If a spouse petitions for annulment under Article 14 on the basis of kinship but cannot furnish civil status records or a relevant court judgement, three alternative solutions can be considered: 1) the court may uphold the claim if, during the annulment proceedings, kinship between the spouses is confirmed through an event such as the legal acknowledgement of paternity or maternity, 2) annulment proceedings may be suspended if legal action seeking to establish paternity or maternity is initiated concurrently, 3) the claim may be dismissed if legal action seeking to establish paternity or maternity is not initiated during annulment proceedings [Gromek 2021a, 913].

While an incestuous marriage cannot be convalidated, a putative incestuous marriage (between direct-line relatives who denied paternity or whose acknowledgement of paternity was voided) cannot be annulled [Gajda 2014, 174]. Therefore, a marriage between relatives cannot be annulled after its dissolution if it becomes evident, with retroactive effect, that the kinship impediment did not exist (kinship ceased after the marriage was contracted [Borysiak 2014d].

3.2. Annulment of Bigamous Marriage

In the Polish legal system, a bigamous marriage can be annulled after its dissolution. According to Article 13(1) FGC, a person who is legally married may not enter into another marriage. This provision applies to the institution of marriage stipulated in Article 1(1) and Article 1(2) FGC [Haak and Haak-Trzuskawska 2022]. Bigamy is an absolute impediment to marriage [Bagan-Kurluta 2023].

However, Pietrzykowski has argued that a bigamous marriage could be convalidated [Pietrzykowski 2023e]. The FGC clearly states that a bigamous marriage cannot be annulled solely because one of the spouses remained in the previous marriage if that prior marriage was dissolved or voided, unless it ended due to the death of the person who entered into the second marriage while still remaining in the first marriage (Article 13(3) FGC). According to the judicature, Article 18 FGC does not create grounds for voiding a bigamous marriage which, due to the dissolution of the previous marriage, ceased to be bigamous and could not be annulled pursuant to Article 13(3) FGC [Stawarska-Rippel 2023a and the literature cited therein]. The doctrine states that convalidation of a bigamous marriage could be supported by the fact that its annulment is an instrument of civil, rather than criminal law, and has been designed to prevent polygamy and its socially and legally undesirable effects. Therefore, the reason for voiding the second marriage disappears when the first marriage is terminated or annulled.

As a result, the marriage is no longer bigamous and should receive the same legal protection as any other valid marriage [Nazar 2011].

According to jurisdiction, in annulment cases where one of the spouses remains in a previous marriage (Article 13(2) FGC), the marriage cannot be declared void if it is documented by a marriage certificate (Articles 25 and 49 of the Act on Civil Status Records), regardless of whether the certificate was issued by the registrar as part of standard proceedings or pursuant to a decision of another state institution as part of a procedure stipulated by special regulations.[1] In annulment cases, the status of the first marriage should be ascertained upon the conclusion of the hearing, rather than at the time the case was brought to court.[2] A bigamous marriage can also be voided when it ended upon the death of both bigamous spouses.[3] In this case, the action for annulment of a bigamous marriage can be brought only against a guardian appointed for each of the deceased spouses.[4]

The legislator addressed the ambiguity concerning the concurrent institution of two proceedings aiming to dissolve the first marriage through divorce and void the second bigamous marriage by stating that a final divorce judgment is also enforceable against third parties; therefore, if proceedings for the dissolution of the first marriage by divorce and for the annulment of the second bigamous marriage are instituted concurrently, the annulment claim will be dismissed if the divorce judgment relating to the previous marriage attains legal finality first.[5] On grounds of public interest, the court should examine the existing circumstances to determine whether the annulment case should be suspended until the court's makes a final decision in divorce proceedings because that decision could constitute grounds for dismissing the annulment claim.[6] As has been rightly emphasized, in certain cases, the public interest may not support the suspension of proceedings.[7]

In practice, a bigamous marriage is usually annulled after its dissolution following the death of the bigamous spouse, upon a petition filed either by the surviving spouse or by the deceased spouse's children from the first marriage [Pietrzykowski 2023f].

Some jurists have expressed doubt regarding the mutual relationship between Article 18 and Article 13(3) FGC. According to Piasecki, when the first marriage and the bigamous marriage are dissolved simultaneously, the provisions of Article 18, which state that a bigamous marriage can be voided

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1 Supreme Court's Judgement of 18 October 1982, ref. no. I CR 338/82, Legalis no. 23373.
2 Supreme Court's Judgement of 4 December 1951, ref. no. C 423/51, Legalis no. 683921.
3 Supreme Court's Judgement of 12 March 1961, ref. no. 2 CR 1127/60, Legalis no. 109467.
4 Ibid.
5 Supreme Court's Judgement of 4 December 1951, ref. no. C 423/51, Legalis no. 683921.
6 Supreme Court's Judgement of 29 March 1957, ref. no. 4 CR 101/57, Legalis no. 610422.
7 Ibid.

even if the first marriage has ended, should take precedence. In turn, the *ratio legis* behind Article 13(3) is that a marital relationship, even if bigamous, should not be disrupted if it continues to exist and if the previous marriage has already ended [Piasecki 2011b]. This line of reasoning was upheld by Pietrzykowski who also remarked that Piasecki's argument applies to Article 13(3) FGC *in principio*. Pietrzykowski emphasized that Piasecki's argument was misconstrued because in the analyzed situation, the admissibility of bringing an action for annulment of a bigamous marriage stems not so much from Article 18 as expressly from Article 13(3) *in fine* [Pietrzykowski 2023f]. The most convincing interpretation was offered by Gajda who rightly noted that Article 18 cannot be interpreted in isolation from Article 13(3) FGC because the latter corresponds to the former [Gajda 2014, 185; cf. Winiarz 1987, 80]. According to Gajda, Article 18 FGC applies to all bigamous marriages that ended but were not convalidated before dissolution. In this case, a bigamous marriage can be voided even after it has been dissolved. In turn, the aim of Article 13(3) FGC is to prevent the convalidation of a bigamous marriage through the death of the bigamous spouse, which would lead to the dissolution of both marriages. In the discussed scenario, Article 13(3) FGC prevents the convalidation of a bigamous marriage if both the first marriage and the bigamous marriage ended upon the bigamous spouse's death, which creates legal grounds for voiding the bigamous marriage [Gajda 2014, 185-86].

4. ANNULMENT OF MARRIAGE BETWEEN PERSONS RELATED BY ADOPTION

The foregoing arguments substantiate the proposal that the Polish legal system should permit the annulment of marriage between persons related by adoption after that marriage has been terminated. This postulate is justified mainly on axiological grounds.

Marriages between an adoptee and an adopter are penalized under criminal law and generally regarded as socially unacceptable. However, the fact that a marriage between an adoptee and an adopter cannot be annulled after its dissolution also appears to violate social norms. The purpose of an adoptive relationship (which is one of the impediments to marriage stipulated in Article 15 FGC) is to create a legal relationship between the adopter and the adoptee equivalent to that which exists between a parent and a biological child [Gajda 2024], (cf. Article 121(1) FGC). According to legal guidelines for strengthening and supporting families, adoption leads to the establishment of legal relationship which is directly equivalent

to a substantive parental relationship.[8] Therefore, the fact that a marriage between persons related by adoption cannot be voided after its dissolution runs counter to legal reasoning. The absence of such a mechanism appears to undermine the legislator's rationale.

Adoption is formalized through a court judgement. The main purpose of adoption is to prioritize the welfare of the child. Above all, adoption seeks to provide a minor with a safe and nurturing environment that replicates, as close as possible, a natural family setting [Gajda 2024]. According to Gajda, marriages between persons related by adoption are prohibited mainly on grounds of custom and social norms [cf. Darnowska 2014, 37-38]. In addition, Gajda argued that an adoptive relationship is characterized by the child's dependence on the adoptive parent, which justifies the rationale behind Article 15 FGC. In the absence of a prohibition on marriage between persons related by adoption, there is a risk that the adoptive parent might exert undue influence or coercion on the adoptee to enter into marriage [Gajda 2014, 179]. Lastly, a prohibition of marriage between persons related by adoption in justified on moral and ethical grounds [Stawarska-Rippel 2023b].

The FGC distinguishes three types of adoption: irrevocable full adoption, full adoption, and incomplete adoption [Prucnal-Wójcik 2024b]. In irrevocable full adoption, the child is treated as if born to the adoptive parents. A new birth certificate is issued, where the child's natural parents are replaced with the adoptive parents. In full adoption (and irrevocable full adoption), the adoptee enters into a relationship with the adopter, which is equivalent to that between parents and their natural children. The adoptee acquires the rights and obligations arising from a relationship with the adopter's relatives. In other words, in full adoption (and irrevocable full adoption), the adoptee becomes a full and permanent member of the adoptive family, and all legal ties with the natural family are severed. In turn, incomplete adoption establishes a legal bond solely between the adopter, the adoptee, and the adoptee's descendants, which implies that its effects extend only to the adoptee's descendants. A new birth certificate is not issued for the adoptee; only a relevant entry is made in the original certificate. The adoptee's ties with the natural family are not severed [Ignatowicz 2001, 297-304].

Article 15(1) FGC states than an adopter may not enter into marriage with an adoptee. However, since the type of adoption was not clearly stipulated by the legislator, some jurists have argued that the provisions of the above article apply to all three types of adoption [Prucnal-Wójcik 2024c]. In contrast, Pietrzykowski rightly asserted that in the light of Article 15(3) FGC, the provisions of Article 15(1) may not be construed as applicable to irrevocable

[8] Resolution of the full bench of the Civil Chamber of the Supreme Court of 9 June 1976, III CZP 46/75, Legalis no. 19477.

full adoption [Pietrzykowski 2025a]. However, this interpretation raises doubt. If irrevocable full adoption is the most comprehensive type of adoption (with the widest scope of legal consequences for both sides), what is the rationale for excluding this type of adoption from the scope of Article 15(1) FGC, which prohibits marriage between an adopter and an adoptee?

According to Pietrzykowski, the prohibition of marriage between persons bound by irrevocable full adoption follows from the provisions of Article 14 FGC [Pietrzykowski 2025b]. This argument is debatable. If we assume that an adoptive relationship is equivalent to kinship, then Article 15 FGC appears to be redundant [Gajda 2014, 179-80]. The wording of Article 15 has long been a source of interpretative uncertainty [Pietrzykowski 2025c and the literature cited therein]. In any future amendments to the FGC, the legislator should consider expressly including all three types of adoption in Article 15 in order to eliminate ambiguity and prevent misinterpretations in legal practice [cf. Gajda 2014, 180].

Most jurists are of the opinion that the prohibition of marriage stipulated in Article 15(1) FGC applies only to the parties to an adoptive relationship, namely the adoptee and the adopters [Prucnal-Wójcik 2024d]. This view is consistent with the literal interpretation of the above article [Pietrzykowski 2025d], but it raises doubt as to whether the prohibition of marriage extends to the adopter and, for example, the adoptee's children. Obviously, the absence of such a prohibition would undermine the fundamental principles of an adoptive relationship. For this reason, the provisions relating to the annulment of marriage between persons related by adoption should be amended. Article 15 FGC should be modified by clearly indicating the parties to an adoptive relationship who may not enter into marriage in all three types of adoption. In incomplete adoption, the prohibition of marriage should apply to the adopter, the adoptee, and the adoptee's descendants. In turn, in full adoption and irrevocable full adoption, this prohibition should be extended to the adopter's and the adoptee's direct-line relatives and siblings [Gajda 2014, 180].

As previously mentioned, a marriage between an adopter and an adoptee is prohibited under the Polish Penal Code (PC) as an incestuous union. According to Article 201 PC, any individual who has sexual intercourse with an ascendant, descendant, adoptee, adopter, brother or sister is liable to imprisonment for three months up to five years. A strictly semantic interpretation of the above regulation implies that all elements of the indicated offence are present only in the relationship between the adopter and the adoptee. However, this interpretation does not seem to be appropriate. In the case of incomplete adoption, these constituent elements are also fulfilled when the adopter engages in sexual intercourse with the adoptee's descendants. As regards full adoption and irrevocable full adoption, these elements are also fulfilled when the adoptee enters into sexual intercourse with the adopter's relatives [Budyn-Kulik

and Kulik 2023a]. Therefore, to avoid interpretative doubts, Article 201 PC should also be amended to consider three different forms of adoption.

CONCLUSIONS

In principle, the Polish legal system does not permit the annulment of marriage after it has been dissolved. Bigamous marriages and incestuous marriages are the only exceptions to this rule. These exceptions have been introduced to uphold the fundamental principles of Polish law, while also reflecting the fact that incestuous and bigamous marriages are generally regarded as socially unacceptable and are penalized under criminal law [Stawarska-Rippel 2023a; Domański 2024e; Zielonacki 2013].

The presented discussion validates the research hypothesis, namely that the annulment of a marriage between an adoptee and an adopter should be permitted in the Polish legal system after the marriage has been terminated. This proposal is supported by Article 121(1) FGC, which states that an adoptive relationship is equivalent to that which exists between a parent and a biological child. If these relationships are deemed equivalent under the law, it follows that they should be accorded identical legal treatment. In addition, the possibility of annulling a marriage between an adopter and an adoptee after its dissolution is further supported by Polish customs, culture, and the prevailing negative perception of incestuous marriages.

The provisions of Articles 18 and 15 FGC and Article 201 PC should be amended to achieve the above goal. These regulations should be harmonized with each other to eliminate any interpretative doubt in legal practice.

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PROCESSING OF CLASSIFIED INFORMATION IN THE INFORMATION AND COMMUNICATION TECHNOLOGY SYSTEMS OF PUBLIC UNIVERSITIES*

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Abstract. The processing of classified information in public universities is a subject that has not attracted considerable interest in the literature. Meanwhile, the role of classified information in administrative, personnel or disciplinary proceedings cannot be overstated. These materials enable proper functioning of the university in administrative and often also civil law transactions. However, improper handling of classified information in these proceedings can have deleterious consequences. For this reason, the knowledge regarding the gathering and use of classified information in practice should be systematically expanded, particularly among university employees who increasingly process such data.

Keywords: classified information; confidential materials; confidentiality clause; processing of classified information; information and communication technology (ICT) system; public university.

INTRODUCTION

The processing of classified information is a complex and multifaceted issue. The volume of classified materials and documents continues to increase in nearly all spheres of social and public life. Classified documents are also handled by public universities, which gather, use, and release classified information for the needs of administrative proceedings.

There is no doubt that access to classified information should be restricted to safeguard its sensitive nature. These postulates are not easy to introduce in practice. The issue is further complicated by the widespread implementation of information and communication technology (ICT) systems in the

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public administration. These systems are introduced to expedite university proceedings. However, ICT systems create new challenges for public universities regarding the protection and handling of confidential materials.

The aim of this article was to evaluate the legal regulations applicable to the processing of classified information in the ICT systems of public universities. Given the broad scope of the subject, the analysis was confined to the Polish and German legal systems. The analysis is preceded by several general remarks to highlight the nature and character of classified information in the practice of functioning of public universities.

1. POLISH LEGAL SOLUTIONS

1.1. Definition of Classified Information

The Act of 5 August 2010 on the Protection of Classified Information is the key legal act that establishes the rules for protecting classified information in Poland.[1] Article 1(1) of the above Act sets out the requirements for protecting classified information whose unauthorized disclosure could be damaging or detrimental to the interests of the Republic of Poland, including the rules for the handling and processing of such information, regardless of its form and manner of expression. These provisions outline the rules for assigning a classification level to information, protecting classified information, processing classified information, a security clearance procedure conducted to establish whether the person concerned provides sufficient assurance of secrecy, a procedure aiming to determine whether an entrepreneur is deemed reliable in safeguarding classified information, a procedure for controlling the security status of classified information, protection of classified information in ICT systems, and the application of physical security measures to classified information [Zapart 2020, 114].[2]

According to Article 1(2) PCI Act, the provisions of the act apply to the following individuals and entities: 1) public authorities, in particular the Sejm (the lower house of the Polish Parliament) and the Senate (the upper house of the Polish Parliament), the President of the Republic of Poland, central administration authorities, territorial government authorities, including organizations and departments subordinate to or supervised by these authorities, courts and tribunals, state audit and legal protection bodies; 2) organizations subordinate to or supervised by the Minister of National Defense; 3) National Bank of Poland; 4) state-owned legal entities and entities other than the previously mentioned state organizational units; 5) organizations

[1] Journal of Laws of 2024, item 632 [hereinafter: PCI Act].

[2] Decision of the Voivodeship Administrative Court in Warsaw of 27 April 2020, ref. no. II SA/Wa 2543/19, Lex no. 3058988.

subordinate to or supervised by public authorities; and 6) entrepreneurs intending to apply for or applying for contracts involving access to classified information, entrepreneurs performing such contracts or carrying out tasks that involve access to classified information pursuant to legal provisions.

In the light of Article 1(1) PCI Act, classified information is defined as information whose unauthorized disclosure could be damaging or detrimental to the interests of the Republic of Poland. According to Polish legal scholars, this legal definition has two principal components. The first component is the material element, which requires only that the information has a distinguishing feature whose unauthorized disclosure would or might harm the Republic of Poland or its interests, including during the processing of such information and regardless of its form and manner of expression [Szewc 2007, 115-16; Ziółkowska and Fleszer 2024; Szałowski 2017, 12].[3] The second component is the formal element implying that information does not have to be marked with any of the confidentiality classification categories (levels of sensitivity) provided for by Article 5 of the PCI Act to be deemed as legally protected classified information [Piskorz-Ryń and Wyporska-Frankiewicz 2016, 38-39; Ziółkowska and Fleszer 2024]. In Polish judicature, it is accepted that classified information is protected regardless of whether it was assigned a level of confidentially classification by the respective authority. This type of information is deemed classified on account of the potentially harmful consequences of its content or manner of acquisition, rather than by virtue of a formal confidentiality marking.[4]

1.2. Processing of Classified Information in the Information and Communication Technology Systems of Public Universities

Pursuant to Article 2(5) PCI Act, the processing of classified information is defined as all operations that involve and are based on classified information, in particular the generation, modification, copying, classification, gathering, storage, transfer, and release of such information [Stankowska 2014; Hoc 2010; Szewc 2007, 22]. According to Article 48(1-5) PCI Act, ICT systems intended for processing classified information are subject to security accreditation at least every five years. Security accreditation for an ICT system that processes classified information marked as "confidential" or assigned a higher category is granted by the Internal Security Agency (ABW) or the Military Counterintelligence Service (SKW). An accreditation certificate is issued based on ICT system security documentation approved by the ABW or SKW and the results of a security audit.

[3] Decision of the Supreme Administrative Court of 24 April 2018, ref. no. I OSK 1422/16, Lex no. 2592324.

[4] Decisions of the Supreme Administrative Court of 6 September 2016 (ref. no. I OSK 210/15, Lex no. 2143005) and 6 July 2017 (ref. no. I OSK 932/16, Lex no. 2375583).

A security accreditation certificate issued for an ICT system should contain the following data: name of the issuing agency, date of issue, name of the applicant, name of the organization applying for security accreditation of its ICT system, legal basis, factual and legal reasoning, certificate's validity, as well as the full name, function, and signature of the person authorized to issue the certificate (Article 48(7) PCI Act). The security accreditation certificate for an ICT system intended for processing classified information designated as "restricted" is issued by the head of an organization by approving the ICT system security documentation. If an ICT system is operated by more than one organization, accreditation is granted by the head of the organization managing the system (Article 48(9-10) PCI Act).

Software is an integral part of ICT system, and it must be accredited to prevent unauthorized access to and interference with sensitive data stored in computers and electronic systems [Barczak-Oplustil, Behan, Małecki, et al. 2023, 5; Mikowski 2016, 200]. According to the literature, security measures are implemented both before and during data processing in an ICT system or network, in the following stages: 1) planning – designing the intended purpose of an ICT system, the maximum confidentiality marking of classified information processed in an ICT system, security mode of operation of an ICT system, estimated number of users, and the system installation site; 2) design – preliminary assessment of the risk to the security of classified information with the aim of determining security requirements, selecting the most appropriate security solutions based on the results of the preliminary risk assessment, developing an accreditation plan detailing the scope and schedule of accreditation tasks in agreement with the accreditation authority, determining the required type and number of cryptographic devices and tools, as well as the manner of their use, in agreement with the supplier of cryptographic keys, and identifying special security requirements that are then specified in a protocol; 3) implementation – acquisition and implementation of security devices or tools for an ICT system, conducting system security tests, assessing the residual risk to classified information after the implementation of security devices or tools, development of a safe operation protocol, identification of additional security requirements, and acquisition of security accreditation for an ICT system; 4) operation – an ICT system's compliance with security documentation is monitored; ICT security risks are managed on a regular basis; security tests are conducted periodically to validate the effectiveness of security solutions and resolve the identified problems; the ICT system and security documentation are regularly updated, and any modifications that could affect ICT system security have to be approved by the accreditation authority; 5) decommissioning – the decommissioning of an ICT system must be reported in writing to the ABW or SKW; the accreditation certificate issued for an ICT system intended

for processing classified information marked as "confidential" or assigned a higher category is returned to the ABW or SKW; classified information is removed from the ICT system, in particular by transferring classified information to another ICT system, archiving data, or destroying data carriers [Ziółkowska 2024a].

Therefore, an ICT system security accreditation certificate protects classified information not only against malware, but also against any incidents that could potentially result in unauthorized access to confidential materials [Gwardzińska 2011, 31].

According to the Polish legislator, electromagnetic protection measures for safeguarding classified information marked as "confidential" or assigned a higher category have to be audited and evaluated by the ABW or SKW as part of the security accreditation process. Cryptographic devices and tools for the protection of classified information are also audited and evaluated as part of the security accreditation process (Article 50 PCI Act). The main aim of electromagnetic protection measures is to safeguard classified information and prevent unauthorized access to such data. These goals are achieved by assessing the security risks to classified information and selecting the most appropriate electromagnetic protection measures. For this purpose, protocols are implemented for creating and storing backup copies, handling classified information in crisis situations and during ICT system failures, and monitoring the operational status of ICT systems. Alternative connections, devices, and power sources are used to ensure uninterrupted access to ICT system resources [Ziółkowska 2024b].

According to the Polish legislator, to ensure effective electromagnetic protection, ICT systems processing classified information must be located within a Hardware Electromagnetic Protection Zone (HEPZ). This procedure is initiated by submitting a request with the ICT Security Department of the ABW or SKW. Hardware zones 0, 1, and 2 must be also created to specify the categories of hardware required to ensure electromagnetic protection. The ABW or SKW issues a certificate for every HEPZ. The certificate states the number of the HEPZ and the category of hardware required in a specific zone [Kij 2017]. The ABW issues certificates[5] for the following types of devices and tools: 1) electromagnetic protection measures, including shielded enclosures and HEPZ – an electromagnetic protection certificate is issued for a specific protection device or HEPZ; 2) cryptographic devices or tools: a cryptographic protection certificate designated with the letter 'T' is issued for a specific type or model of a cryptographic

[5] Decision No. 35 of the Head of the Internal Security Agency of 3 August 2021 on the certification of devices, tools, and measures for the protection of classified information (Official Journal of the Internal Security Agency, item 8).

device or tool that is intended for protecting classified information marked as "confidential" or assigned a higher category; a cryptographic protection certificate designated with the letter 'Z' confirms that a cryptographic device or tool with a valid 'T' certificate complies with the applicable requirements for protecting classified information; a cryptographic protection certificate is issued for a cryptographic device or tool that is intended for protecting information marked as "restricted"; 3) devices or tools used for safeguarding ICT systems – an ICT security certificate is issued for a device or tool designed for safeguarding an ICT system [Ziółkowska 2024b].

All devices, tools, and measures that are intended for protecting classified information and covered by a HEPZ certificate are subject to legal protection until they are destroyed or decommissioned.

2. GERMAN LEGAL SOLUTIONS

2.1. Definition of Classified Information

The General Administrative Regulation on the Material Protection of Classified Information of 13 March 2023[6] (Classified Information Directive, VSA) is the principal normative act setting out the rules for the handling of classified information in the Federal Republic of Germany. Pursuant to para. 1(1) VSA, the Classified Information Directive is addressed to federal authorities and federal public law institutions that have access to classified information, as well as to their employees who have access to classified information or perform duties that may entail such access. The German authorities are required to apply exclusively the Classified Information Directive in their dealings with the Bundestag and Bundesrat [Mickiewicz 2024, 175].

In para. 2(1) VSA, classified information is defined as facts, items, or findings, in any form of expression (such as documents, drawings, charts, maps, photocopies, photographic materials, electronic files, data carriers, electrical signals, devices, instruments, technical installations, and the spoken word) that are deemed confidential in the public interest, in particular to safeguard the security of the Federal Republic of Germany and its federal states. Trade secrets, business secrets, invention-related secrets, tax-related and other personal secrets and other matters pertaining to personal life may

[6] *Allgemeine Verwaltungsvorschrift zum materiellen Geheimschutz (Verschlusssachenanweisung)*, adopted pursuant to Article 86 sentence 1 of the Basic Law in conjunction with § 35(1) of the Security Clearance Act of 20 April 1994 (Federal Law Gazette I, p. 867), in conjunction with § 1(2) of the Competence Adjustment Act of 16 August 2002 (Federal Law Gazette I, p. 3165), and the Organizational Decree issued by the Federal Chancellor of 8 December 2021 [hereinafter: VSA].

also be regarded as confidential in the public interest. The wording of the cited regulation clearly indicates that in the German legal system, classified information is a broad concept that extends to various spheres of public life, including the exercise of justice and the functioning of the justice system.

In Germany, access to classified information is also regulated by the Act on the Preconditions and Procedure for Federal Security Clearances and the Protection of Classified Information of 20 April 1994 (Security Clearance Act, SÜG).[7] Pursuant to para. 1(1) SÜG, the Act regulates the prerequisites and conditions for a security vetting procedure involving a person who will be granted (initial security clearance) or has already been granted access to sensitive information (repeat security clearance) by the respective authority, as well as the protection of classified information. Any person whose duties will involve access to sensitive data (participant in the procedure) must first undergo a security clearance. Such proceedings require the participant's consent, unless otherwise provided by law. A person whose duties involve access to sensitive data must be at least 16 years of age (para. 2(1) SÜG).

2.2. Processing of Classified Information in the Information and Communication Technology Systems of Public Universities

Pursuant to the general provisions of the VSA concerning the use of ICT systems, institutions and authorized entities must ensure that ICT systems intended for processing classified information remain secure during their entire life-cycle – from the moment an ICT system is implemented to process classified information until the moment such information is removed from the repository of classified data (para 49(1)). These systems are applied to process classified information marked as "confidential" or assigned a higher category. The processing of such information should be preceded by a risk analysis based on the standards developed by the Federal Office for Information Security (BSI) (para. 49(2)) [Mickiewicz 2024, 179-80].

According to the German legislator, classified information may be processed only in ICT systems that have been approved for such use. For such approval to be granted, an ICT system must comply with the data security standards implemented by the BSI, and its compliance must be formally documented. The implemented data security measures are regularly audited by the BSI for compliance with the requirements of the Federal Ministry of the Interior and Community based on the risks specified in § 4a of the Act on the Federal Office for Information Security[8] (para. 50 (1-2) VSA).

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[7] *Gesetz über die Voraussetzungen und das Verfahren von Sicherheitsüberprüfungen des Bundes und den Schutz von Verschlusssachen (Sicherheitsüberprüfungsgesetz)*, Federal Law Gazette I, p. 867 [hereinafter: SÜG].

[8] *Gesetz über das Bundesamt für Sicherheit in derInformationstechnik (BSI-Gesetz –BSIG)*, https://www.gesetze-im-internet.de/bundesrecht/bsig_2009/gesamt.pdf [accessed: 12.08.2025].

The following security requirements must be also met for authorization to be granted: a) access is granted solely on a need-to-know basis – *Kenntnis nur, wenn nötig* (para. 3(1-2) and para. 58(1.2) VSA); b) the rules concerning the classification and marking of classified information must be observed (para. 15(1), para. 17 (1), para. 18 (2), para. 19 and para. 20(2) VSA); c) classified information must be administered and documented (para. 21 VSA); d) the rules concerning the (temporary) storage of classified information must be observed (para. 23 VSA); e) the security of ICT networks for processing confidential information must be guaranteed during their entire life-cycle (para. 49(1) VSA); f) classified information must be removed from databases and destroyed (para. 30 and para. 56 VSA); g) the guidelines on the transmission of classified information via communication channels must be observed (para. 55 VSA); h) the rules concerning supranational and international organizations and bilateral agreements on information security must be observed (para. 34 and 35 VSA); i) security accreditation must be accomplished (para. 36 VSA).

The BSI issues detailed requirements in the classified information security module included in the basic protection of ICT systems. In individual cases, information security officers may introduce additional data security requirements to comply with the provisions of national and international regulations concerning the handling and processing of classified information marked as "confidential" or assigned a higher category. Before an ICT system is approved for use, the effectiveness of the implemented information security measures must be verified (for example, by external auditors), and the results must be documented (para. 50(3) VSA).

According to para. 53(1) VSA, all transmission devices, lines, and distributors that carry classified information in non-encrypted format must be protected against unauthorized access. Information technology systems that process classified information categorized as classified information for official use only must be protected within facilities and zones that are as a rule protected against unauthorized access (para. 53(2) VSA). Information technology systems that process classified information marked as "confidential" must be protected within facilities and zones that are as a rule protected against unauthorized access (para. 53(3) VSA). The effectiveness of the safeguards in areas situated outside the protected facilities and zones stipulated in para. 53(2-3) VSA must be additionally verified by information security officers.

The provisions of para. 45 VSA deal with the facilities and zones in which ICT systems for processing classified information are located. Classified information marked as "confidential" or assigned a higher category is administered and processed in these facilities and zones. These premises should be located in security zones or should be declared as security zones within the meaning

of para. 39(3) VSA,[9] and they should be adequately protected against unauthorized access. Information security officers select the appropriate security measures for facilities and zones where classified information categorized as classified information for official use only is processed by ICT systems.

The means of entry and access to work areas where classified information is processed, security zones, premises where classified information is stored, facilities protected against technical eavesdropping, ICT systems for processing classified information marked as "confidential" or assigned a higher category, and technical monitoring systems for classified information must be adequately protected against unauthorized access. As a rule, such means should be kept in personal custody during working hours and locked away in a secure data storage facility or a key container at the end of the workday. Where possible, key containers and safes should be monitored. The keys to secure data containers and storage rooms should remain in the personal custody of the respective user of such containers and rooms (para. 46(1-2) VSA). The location where the means of entry and access are kept shall be known only to authorized personnel. The means of entry and access must be changed in the following circumstances: 1) before first use, 2) when there is a change in authorized personnel, 3) after use in the absence of authorized personnel, 4) when there is suspicion that the means of entry and access have been compromised, 5) at least every twelve months (para. 46(3) VSA).

Backup means of entry and access should be provided for emergency situations. They should be stored in labeled and sealed envelopes, separately from the means of entry and access that are currently in use, in the appropriate containers for classified information (para. 46(5) VSA).

In Germany, the processing of classified information is closely linked with the use of cryptographic means. Cryptographic means (national or domestic) are defined as products and devices with the associated documentation, as well as the cryptographic keys for encryption, decryption, and transmission of information, which are designated as such by the BSI, or – within the jurisdiction of the Federal Ministry of Defense – by the Federal Office of Bundeswehr Equipment, Information Technology and In-Service Support (para. 59(1) VSA). Classified cryptographic means shall be marked with the warning "KRYPTO" (cryptographic security) or "CRYPTO" (cryptosecurity). Cryptographic devices that have not been classified, the

[9] Pursuant to this provision, if necessitated by the scope and significance of classified information that is handled in a given location, the competent highest federal authority – acting in agreement with the Federal Ministry of the Interior and Community – must establish security zones within the agency or other public federal bodies (or parts thereof). These zones must be protected by personnel, organizational, and technical measures to prevent unauthorized access. Access is permitted only in locations with reliable access control. Security zones may comprise single rooms, multiple rooms, entire buildings, or groups of buildings.

associated cryptographic components and other associated modules performing security-sensitive functions shall be marked with the warning "CCI" (Controlled COMSEC Item). It should be noted that certification is required for all cryptographic means, and the certification process must comply with the rules applicable to the certification process of classified information marked as "confidential" or assigned a higher category (para. 59(2-3) VSA).

According to para. 60 VSA, the BSI is assigned the role of the Civil National Distribution Authority (CNDA) with regard to the tasks associated with the central documentation, administration, and distribution of cryptographic means. In turn, the Bundeswehr Information Technology Center performs the duties of the Military National Distribution Authority. German authorities and institutions operating cryptographic means shall appoint at least one cryptographic means administrator and one representative authorized to administer cryptographic means. These persons must possess the required specialist knowledge to perform the assigned tasks (para. 61(1) VSA). The personnel who have been granted access to cryptographic means shall receive instructions from the information security officer, in accordance with the model presented in Annex VIII to the VSA, and must receive authorization to operate cryptographic means (para. 62 VSA).

CONCLUSIONS

The processing of classified information faces many practical challenges, which are further compounded by the pervasive implementation of ICT systems across nearly all areas of public life. The above applies increasingly to public universities. In practice, most changes are introduced with the aim of expediting administrative, personnel or disciplinary proceedings, but employees of public universities generally have limited knowledge about the processing of classified information that is presented and used in these proceedings, particularly if that information is processed using ICT systems. It is reasonable to conclude that the implementation of new ICT systems and instruments should always be accompanied by adequate personnel training and followed by periodic verification of the competencies required for processing classified information. Compliance with both requirements should satisfy national legislative postulates regarding expedited administrative proceedings at public universities, ensure the secure handling of classified materials, and protect classified information against unauthorized use.

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THE RIGHT TO EDUCATION OF CHILDREN WITH DISABILITIES IN POLAND VIS-A-VIS THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES – INCLUSION OR EXCLUSION?

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Abstract. The article examines the Polish legal system in terms of the education for children with disabilities through the lens of Article 24 of the Convention on the Rights of Persons with Disabilities, which enshrines the universal right to education on an equal basis with others. In Poland, three parallel educational models coexist: segregated (special schools), integrated (integration schools and units), and inclusive (mainstream public schools), with the choice of educational path formally left to parents. The study critically analyses whether this pluralistic architecture fulfils the Convention's requirement of inclusion as the primary model of education. The article argues for a systemic reorientation of educational policy towards full inclusion: strengthening public schools as the primary educational environment, removing structural barriers through accessibility and reasonable accommodation, and gradually phasing out segregated solutions. Such a strategy is necessary to ensure the effective implementation of Article 24 of the Convention and to guarantee children with disabilities equal and meaningful access to education.

Keywords: international law; human rights; right to education; rights of people with disabilities.

1. INTRODUCTION AND OUTLINE OF THE RESEARCH PROBLEM

Article 24 of the Convention on the Rights of Persons with Disabilities[1] clearly states the right of persons with disabilities to undertake education. Persons with disabilities have universal access to education on an equal footing with people without disabilities. Currently, in Poland, there are three systems of education for students with disabilities: the system of segregation education – special schools and centres; the system of integration education – integration schools and schools with integration units; the system of inclusive education – public schools. It is solely at the parents' discretion to choose

[1] A/RES/61/106, adopted by the General Assembly of the United Nations (UN) on 13 December 2006, and opened for signature on 30 March 2007 [hereinafter: Convention].

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the educational path for a child with a disability certificate. Does the education system for children with disabilities designed this way correspond to the assumptions of the Convention on the Rights of Persons with Disabilities? How should the right of persons with disabilities to education be interpreted? Is the system based on their inclusion or is perhaps exclusion a base form. Which model ultimately leads to ensuring appropriate conditions for the development of persons with disabilities, thus contributing to the selection of better methods and the provision of a more complete education?

2. GENERAL CHARACTERISTICS OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The rights of persons with disabilities have been regulated at both national and international level. Globally, the Convention on the Rights of Persons with Disabilities is the act of the highest importance. It has been ratified by 193 countries and the European Union (countries that have signed the Convention but have not ratified it include, among other, Tajikistan, Tonga and the USA). Its adoption marked a special moment in several aspects. First, it had a special dimension among human rights acts. It is because the Convention combined first generation rights (civil and political) with those of the second generation (social and economic) [Stein 2007]. Secondly, it provided legal protection for people who are particularly vulnerable to discrimination, often multi-faceted. Third, the Convention presented disability as a natural and widespread phenomenon resulting from human diversity, rejecting the paradigm of disability as a health deficit [Lord and Stein 2023]. Moreover, the Convention has changed the ontology of human rights, shifting the focus from group protection (previously widely protected – for example in the case of ethnic minorities, women or children) to the affirmation of the individual subjectivity of each person, regardless of their functionality. In this sense, it does not so much protect persons with disabilities as a group particularly at risk of abuse, but proposes an inclusive approach to all of humanity, pointing out that physical, mental and cognitive diversity is a natural part of the human condition [Stein 2007]. Therefore, the Convention is a unique human rights act, because of its structure, content, but also because of the axiology of human rights.

3. ARTICLE 24 OF THE CONVENTION – SEMANTIC SCOPE

Article 24 of the Convention on the Rights of Persons with Disabilities creates a comprehensive, dogmatically coherent and axiologically consistent standard of the right to education of persons with disabilities, constituting a qualitative change in relation to earlier instruments of international human rights protection. This provision is not limited non-discrimination in access

to education, but places at the heart the positive obligation of States Parties to provide inclusive education at all levels.

The right to education – in the classical sense – is sometimes classified as a "second generation" right, i.e. of a social or cultural character (sometimes also economic). This is the spirit in which, among others, the Constitution of the Republic of Poland of 2 April 1997[2] is held; it places this right in Chapter II, among economic, social and cultural freedoms and rights [Zaborniak-Sobczak 2022]. Under the Convention on the Rights of Persons with Disabilities, however, this concept is significantly modified: Article 24 – *de lege lata* – breaks the dichotomy of the "first" and "second" generation by normative coupling civil and political rights with economic, social and cultural rights within a single, indivisible protection regime [Gauthier de Beco 2014, 91-92]. The consequence of such a construction is that access to education cannot be seen only as freedom from discrimination; it implies positive obligations of the state to provide adequate material, personnel and organisational conditions that enable students with disabilities to participate in the learning process in a real, full and continuous way.

Article 24 imposes such an obligation on States Parties, going beyond the classic formula of a negative prohibition of discrimination. It is therefore the responsibility of the States Parties to ensure an inclusive education system that enables full integration at all levels of teaching and learning. Key importance to the interpretation of Article 24 is brought by General Comment No. 4 of the UN Committee on the Rights of Persons with Disabilities,[3] which clearly states that "parallel systems" – including special schools operating alongside public schools – are incompatible with inclusion. Therefore, the state must transform the entire education system through legislative and administrative actions, including, among others, adaptation of curricula, preparation of teaching staff and elimination of architectural and communication barriers. However, the transition from a segregation model to an inclusive model requires not only that spaces and methods be adapted, but also that the organisational culture of the school, including the attitudes of teachers and communities towards diversity be changed.[4]

It should therefore be stressed that the only model solution in the light of the Convention is inclusive education, understood not as a "variant" alongside other mechanisms, but as a normative standard binding States *de lege lata*. In UNICEF's approach[5], inclusive education refers to a process

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[2] Journal of Law of 1997, No. 78, item 483 as amended.

[3] General Comment No. 4 (2016) on the Right to Inclusive Education, Committee on the Rights of Persons with Disabilities, CRPD/C/GC/4.

[4] Cf. Italian example: Ferri 2017.

[5] The Right of Children with Disabilities to Education: A Rights-Based Approach to Inclusive Education in the CEECIS Region, UNICEF Regional Office for Central and Eastern Europe and the Commonwealth of Independent States, Geneva 2017, 5-6.

of systemic transformation in which the burden of adjustment lies not on the student but on the school and the education system as a whole, thus reversing the classic responsibility vector: it is the responsibility of public institutions to shape the educational environment so that the diverse needs of students are the starting point and not a "problem to be solved".

Inclusion, understood in this way, is in full harmony with the social model of disability adopted in the Convention: limitations in participation stem primarily from environmental barriers – architectural, communication, organisational and cultural – not from the characteristics of the individual. The consequence of this perspective is a shift from a compensation logic in which the student "is adapted" to an immutable school, towards universal design for learning logic, in which the program, methods, assessment, resources and space are planned in advance as flexible and accessible.

The normative content of the inclusion obligation covers, in particular, immediate prohibition of exclusion from the public system at any stage of education; provision of reasonable accommodation and personalised support as rights-claims; the guarantee of accessibility of infrastructure, materials and technologies (including alternative formats, AAC, sign language and Braille); preparation and continuous improvement of teaching and specialist staff, including development of work competences in diverse classes; redesigning of the teaching organisation through flexible forms of work, co-conducting of classes, reasonable accommodation in assessment and assistant support; appropriate funding mechanisms that reward accessibility and support as close as possible to the catchment-area school instead of perpetuating segregation real participation of students, parents and organisations of persons with disabilities in the design and evaluation of solutions; and establishment of effective monitoring and accountability instruments, including inclusion indicators, complaints and redress measures and supervision of public authorities.

In this paradigm, it is crucial to distinguish integration – understood as the incorporation of the student into the unchanged structure of the school – from inclusion, which implies the transformation of the school and the system so that diversity is the norm. Inclusive education does not therefore consist in "attaching" the student to the existing framework, but in its reconstruction – programmatic, methodical and organisational – enabling real participation and learning of equivalent value.

In conclusion, Article 24 of the Convention is not only an equality clause, but a complete programmatic norm requiring a transition from a reactive model of protection (*ad hoc* interventions after an infringement has occurred) to a proactive model of ensuring the conditions for full and equal participation in education. Its implementation requires parallel legislative, institutional and social actions: legislative and executive changes, building human resources competences, redesigning funding and supervision,

systematically removing barriers and shaping a school culture based on acceptance of diversity. It is only coordinated actions understood in this way that allow us to build a truly inclusive education system, consistent with the axiology of the Convention and the principle of indivisibility of human rights. Inclusive education is a conventional standard resulting from Article 24, as it is clearly indicated as a target model for the realisation of the right to education. The Convention rejects both the segregation and integration model in its traditional form, recognising that only inclusive education in the public environment – with reasonable accommodation and individual support – implements the principle of equality and full participation in society.

Pursuant to Article 2 of the Convention, reasonable accommodation means "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms." This means that States Parties are obliged to take all measures to eliminate discrimination and ensure equality [Cała-Wacinkiewicz 2025]. This sets the Convention apart from previous general non-discrimination clauses, indicating in detail the need for solutions. In the context of education, it includes at least: adjustments in presentation, adjustments in response – expression, adaptation of time, work schedule and adaptation of space [Harrison, Bunford, Evans, et al. 2013], although it should be remembered that this is a broad conceptual category [Bełza-Gajdzica, Ciborowski, Knopik, et al. 2024].

According to the recommendations given in General Comment No. 4, refusal to provide reasonable accommodation constitutes a form of discrimination on the basis of disability. This is both material and procedural – the school or the governing body must actively identify the need for improvement and take action to implement it.

Article 24 of the Convention, understood in this way, directly yields another obligation for States Parties, i.e. a ban on the exclusion of persons with disabilities from the universal education system on the basis of the fact of disability itself. Segregation – understood as directing students to separate institutions or classes solely because of their health or functionality – violates the essence of the right to inclusive education, as it perpetuates social barriers and exclusion. The Convention requires that all forms of support be provided in a public environment and that separation occur only in exceptional, justified cases arising from the best interests of the child and not from the limitations of the system.

Thus, reasonable accommodation and the prohibition of segregation are interrelated pillars of the realisation of the right to inclusive education. The first one provides flexibility and individualisation of support, the second one guarantees that this support will be implemented in a way that ensures

the social and educational integration of the student with peers that do not have disabilities.

4. EDUCATION SYSTEM FOR STUDENTS WITH DISABILITIES IN POLAND

The education system for students with disabilities in Poland is based on three basic acts. The most important legal act regulating education of students with disabilities is the Education Law,[6] which in Article 1(5) and (6) states that the education system ensures the adaptation of the content, methods and organisation of teaching to the psychophysical capabilities of students and the possibility of using psychological and pedagogical assistance. Article 35 of the Law provides for the possibility of establishing special and integration schools. Pursuant to Article 127(14) of the Law, students who hold a decision on the need for special education (issued by public psychological and pedagogical clinics) have the right to receive education in the form and on terms specified in implementing acts. Key relevant regulations include, first of all, Regulation of the Minister of National Education of 9 August 2017 on the conditions of organising education of and care for children and young persons with disabilities, socially unfit and at risk of social maladjustment[7] which defines, among others, organisational forms, staff requirements, rules of work of support teachers and individualisation of teaching. Another legislative act is Regulation of the Minister of National Education of 9 August 2017 on the organisation and provision of psychological and pedagogical assistance in public pre-schools, schools and institutions,[8] that characterises individual forms of support, such as rehabilitation classes or specialist classes. The Teacher's Charter[9] is another act supporting the education system of students with disabilities. It defines the requirements for the qualifications of support teachers and specialists conducting classes with students with disabilities.

De lege lata, the Polish education system provides for three basic models of the organisation of education of students with disabilities: segregation, integration and inclusion. Their coexistence is historically conditioned and reflects the evolution of educational policy – from the care and specialist approach, through gradual integration, to the incorporation of elements of inclusive education in response to international obligations, including those resulting from Article 24 of the Convention on the Rights of Persons with Disabilities [Chrzanowska 2019].

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[6] Act of 14 December 2016, Journal of Laws of 2024, item 750 as amended.

[7] Journal of Laws of 2017, item 1578.

[8] Journal of Laws of 2017, item 1591.

[9] Journal of Laws of 2023, item 984 as amended.

The segregation model's foundation is special schools and centres intended exclusively for students with a specific type of disability. Its legal basis is laid down in Article 35(1-2) of the Education Law and the provisions of the Regulation of the Ministry of Education of 9 August 2017 on the conditions for organising education. Education takes place in small units, according to programs adapted to the psychophysical capabilities of students and with the participation of qualified specialist staff. Although such an environment promotes intensive therapeutic support, the literature emphasises its social cost: isolation and consolidation of integration barriers [Szpak 2017].

The integration model is implemented in integration schools and in public schools with integration units, pursuant to Article 35(2) of the Education Law and said Regulation of 9 August 2017. Students with disabilities and students without disabilities learn together, and the didactic process is conducted by the subject teacher in cooperation with the support teacher (specialist in special education). This solution broadens the scope of student participation in the life of the school, but still – as indicated in the literature – it is determined by the medical paradigm of disability: the student is perceived primarily from the perspective of deficits, not environmental barriers [Szpak 2017].

The inclusive model (inclusive education) assumes that the starting point is a public school, which adapts the curriculum, methods, organisation and learning environment to the diverse needs of students. Support includes reasonable accommodation, individualisation of learning objectives and content, use of assistive technologies and, where necessary, aid of an educational assistant. The legal basis is provided, among others, in Article 1(5) of the Education Law (the principle of adapting the content, methods and organisation of teaching to the psychophysical capabilities of students) and the regulations on psychological and pedagogical assistance contained in the Regulation of the Ministry of Education of 9 August 2017 on the organisation and provision of this assistance. In doctrinal terms, this model is consistent with the social understanding of disability and the axiology of the Convention; in practise, as aptly noted in the literature, it is still at the stage of institutionalisation and improvement of organisational solutions [Szumski 2019].

The assumptions of the Polish education system – although *de lege lata* not ruling out inclusive education – still allow, and in practise even reward, the functioning of special institutions and integration solutions. This empirically translates into the dominance of segregation and integration models [Skałbania and Grewiński 2017], which leads to a situation where formal declarations conducive to inclusion remain largely disconnected from the conventional standard included in Article 24 of the Convention. The teleological and systematic interpretation of Article 24 – in conjunction with Articles 2 (reasonable accommodation), 4 (general obligations), 5 (equality and non-discrimination) and 9 (accessibility) – leads to a conclusion that "inclusive

education" is not so much one of the possible means of realising the right to education, but a necessary form of that right. The *ratio legis* of this provision consists in ensuring "full and effective participation" of students with disabilities in the universal education system, that is, in public schools, by means that transform the learning environment rather than "match" the student to it.

The segregation model, even if it offers intensive therapeutic support, is by definition based on the separation of the addressees of the norm and builds social barriers that the Convention requires to remove. As a result, it is in conflict with the principle of equality in access to the common good–full participation in the education system–and with the imperative of combating stigmatisation. The integration model, in turn, while extending the scope of participation, is essentially assimilative: it makes the student's presence dependent on his or her ability to adapt to the unchanged organisation of the school, and the support focuses on compensating for the "deficits" of the individual. Such construction – implicitly rooted in the medical paradigm of disability – fails the "full and equal" participation test because it does not remove environmental barriers and does not make diversity a starting point for the design of the learning process.

Only inclusive education fully implements the obligations arising from Article 24 of the Convention. By implementing accessibility and universal design, it transforms the essential elements of the learning process (programme, methods, evaluation, environment and communication) so as to enable comparable learning outcomes to be achieved without the need for institutional separation. Only in the inclusive paradigm can the four classical attributes of the right to education – availability, accessibility, acceptability, adaptability – be coherently linked with the Convention's constitutive requirement for participation in mainstream education within public schools. Finally, inclusive education as a systemic standard remains the only model consistent with the social view of disability: it places sources of constraints in environmental barriers and therefore generates an obligation to redesign the school rather than select students.

In conclusion, from the perspective of the axiology and normative structure of the Convention, only inclusive education realises the content of Article 24: it combines the freedom dimension (equality of access without segregation) with the benefit dimension (real support and adjustment in a public school), guaranteeing full and effective participation in education at all its levels. Segregation and integration models, as transitional or historically conditioned solutions, are not able to implement this content completely, as they leave intact structural barriers contrary to the purpose and spirit of the Convention.

5. THE ROLE OF THE PARENT IN CHOOSING THE EDUCATIONAL PATH OF A CHILD WITH DISABILITIES

Against the background of previous findings, according to which inclusive education is the only model capable of fully implementing the standard of Article 24 of the Convention, the role of parents (legal guardians) in choosing the educational path becomes a guarantee, but not an absolute one: it is exercised within the horizon of the constitutional right to rear their children in accordance with their own convictions (Article 48(1) of the Constitution of the Republic of Poland) and within the limits of the statutory and conventional regime, which prefers inclusive solutions.

Pursuant to Article 35(1) and (2) of the Education Law, special education is organised on the basis of a decision on the need for special education issued by a public psychological and pedagogical clinic. This decision contains indications as to the appropriate form of education (generally available, inclusive or special), while parents (guardians) have the right to choose a particular institution. The ministerial regulation on the conditions of organising education and care imposes an obligation on the governing bodies and schools to ensure the implementation of the recommendations resulting from the decision in the institution chosen by the parents – provided that it meets organisational and personnel requirements. The decision must be submitted to the school principal to launch appropriate adjustments.

The role of parents of persons with disabilities in the implementation of the full right to education is therefore multifaceted and crucial. It is up to them to choose the form of education, because it is them who decide whether the child will realise the school obligation in a public, integrative or special school, provided the institution is able to implement the recommendations included in the decision. Parents also participate in the development of an individual educational and therapeutic plan, approval of didactic and program adjustments, as well as in monitoring the child's progress. They have the right to request a change of the institution or form of education if the current organisation of the educational process does not meet the needs of their child. They may refuse the child's referral to a special institution, even if such a solution is recommended by the clinic, provided that the school chosen by them is able to provide adequate education conditions.

According to generally applicable standards, parents have a wide autonomy in choosing the educational path. In practise, parents are often sceptical about the choice of inclusive education. However, this scepticism is largely structural: it results from the limited availability of genuinely inclusive institutions, the shortage of staff – especially of support teachers – and concerns about isolation in peer groups [Chrzanowska 2019]. These are environmental and organisational barriers, precisely those that, in line with the

Convention's social model of disability, should be removed by public authorities by ensuring accessibility, reasonable accommodation and personalised support in public schools.

Consequently, some parents choose a special school not out of conviction but out of necessity. Such "conditional autonomy" is contrary to Article 24 of the Convention, which requires the State to design the system in such a way that the inclusion option is realistically available and adequately supported – materially, personnel-wise, organisationally and culturally – in the nearest public school. In other words, as long as the choice of special education is forced by a lack of inclusive solutions, we deal not with a free choice of parents, but with a deficit in the implementation of the conventional standard.

6. BARRIERS TO THE IMPLEMENTATION OF INCLUSIVE EDUCATION IN POLAND

Such a model of education for persons with disabilities in Poland leads directly to the question about the degree of substantive realisation of the right to education referred to in Article 24 of the Convention. While the ratification of the Convention has established an obligation on the part of the Republic of Poland to implement inclusive education, practise reveals a clear gap between compliance "on paper" and conformity "in action". In a systemic perspective, this means tension between the formal admission of inclusive solutions and their actual availability and quality in public schools.

The sources of this gap are multi-faceted. Firstly, there are organisational and staff barriers: insufficient number of specialists, lack of qualifications of teachers in public schools and insufficient supervision over the implementation of recommendations resulting from decisions on the need for special education [Lewicka-Zelent and Chimicz 2019]. Secondly, cultural barriers and attitudes play a significant role: parents and teachers remain sceptical about inclusion, often motivated by the fear that diversity of educational needs will reduce the quality of the teaching process. As the research of the European Agency for Special Needs and Inclusive Education[10] shows, deficits in training and substantive support hinder the change of attitudes and the improvement of competences of teaching staff, which directly translates into schools' limited capacity to implement the inclusive standard. As a result, we are dealing not so much with a lack of normative basis, but with an implementation deficit, which requires correlated actions: strengthening supervision and accountability, expanding the personnel pool

[10] European Agency for Special Needs and Inclusive Education, Country Report: Poland, EASY, Brussels 2025, 14.

and training facilities and ensuring real, not only nominal, access to mainstream education support.

Architectural barriers remain a significant obstacle – the lack of elevators, ramps or adjusted toilets – as well as organisational limitations in conducting rehabilitation classes or specialist therapies. Failure to adapt school spaces to the needs of students with different types of disabilities results in their actual exclusion from some educational activities [Lewicka-Zelent and Chimicz 2019].

These barriers were also noticed by the UN Committee on the Rights of Persons with Disabilities. Analysing the first Polish report, the Committee expressed serious concerns about the implementation of inclusive education. In particular, it was pointed out that there is a lack of coherent strategy and legal regulations for inclusive education, which results in insufficient support for students with disabilities in public schools. Children with moderate and severe disabilities are at the highest risk of exclusion.[11]

The Committee's recommendations of this type clearly underline that Poland should take measures aimed at establishing comprehensive legislation and implementation measures that will realistically reduce the barrier to an inclusive education system and ensure access to all students regardless of their disability.

CONCLUSIONS

Against the background of previously made findings – according to which the primacy of Article 24 of the Convention determines the model nature of inclusive education – the analysis of the Polish education system leads to a conclusion that the implementation of the Convention standard is incremental and fragmented. Poland, by ratifying the Convention and introducing into the Education Law solutions enabling education in public schools (Article 1(5); Article 35(1-2)), has *de lege lata* recognised inclusion as an acceptable course of education policy. However, this did not translate into its universality: inclusive education functions in parallel with integration solutions and the special school system, and its real availability remains limited.

The pluralism of the forms of education, as recognised by national law, must be assessed in the light of the *ratio legis* of Article 24 and of the interpretation given in General Comment No. 4. The Committee makes it clear that maintaining "parallel systems" reproduces segregation and is contrary to the Convention's objective of transforming mainstream education towards full inclusion. This means that pluralism is not an intrinsic value, but can at most

[11] United Nations Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Poland, 2018, UN Doc. CRPD/C/POL/CO/1, para. 44(e).

serve a temporary function, provided that there is a clear strategy to phase out segregation solutions and gradually strengthen the public school as a place for the fundamental realisation of the right to education. The Committee's concluding observations on Poland[12] are also kept in this spirit, calling for the removal of barriers to education in public schools and for limiting the role of special institutions.

The argument that the Convention "does not exclude" segregation education can be maintained only in a narrow, implicit and exceptional way: as an incidental, short-term solution, strictly justified by the best interests of a particular child, with full guarantees of return to the mainstream. Meanwhile, practise shows that the choice of a special school is determined not so much by the profile of educational needs as by the deficits of the public system – the lack of support, the lack of support teachers, insufficient availability or the parents' fear of stigmatisation in the classroom. Such "conditional autonomy" on the part of parents does not prove the implementation of the conventional standard, but exposes the implementation deficit on the part of the state.

From the perspective of the social model of disability adopted by the Convention, it is crucial to shift the burden of responsibility: it is the school and the whole system that are to remove environmental barriers through accessibility, reasonable accommodation and universal design, so that student diversity is the starting point, not an obstacle. Only inclusive education can consistently link a non-discriminatory component of immediate enforceability (including the claims nature of reasonable accommodation) to the four attributes of the right to education – availability, accessibility, acceptability, adaptability – and to the constitutive requirement of participation in the mainstream. Integration and segregation models, even if they provide therapeutic support, remain essentially assimilating or separative and do not neutralise structural sources of exclusion.

Consequently, it must be assumed that the current architecture of the Polish system, by maintaining parallel solutions, does not fully fulfil the obligation under Article 24. The implementation of the conventional standard requires a consistent reorientation of educational policy: priority for a public school closest to the child's place of residence, strengthening staff and supervision over the enforcement of decisions, guaranteeing accessibility and accommodation of a claims nature, and building an organisational culture of the school based on acceptance of diversity. The *de lege ferenda* pluralism of forms should be regarded as a transitional instrument, subordinated to the objective of a truly inclusive system – the only scheme capable of realising the content of the right to education within the meaning of Article 24 of the Convention.

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[12] Ibid.

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RAW MATERIALS POLICY – LEGAL AND EDUCATIONAL ASPECTS

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Abstract. The article is devoted to the legal aspects of creating a raw materials policy in Poland, based on European Union solutions and pedagogical aspects related to the process of raw materials education. The authors attempt to analyze new legal solutions being prepared in the legislative process and point to the need for action in the field of education and training in the area under analysis. The authors conclude that without a solid educational foundation, society will not have reliable knowledge about the need to develop and implement raw materials policy.

Keywords: raw materials policy; raw materials education; education for sustainable development.

INTRODUCTION

The creation of raw materials policy, both in the European Union and at the national administration level, is primarily linked to current international politics. The war in Ukraine, instability in the Middle East, and tensions between China and the United States pose a threat to the supply of critical raw materials necessary for economic development. Perhaps paradoxically, thanks to this situation, the European Union has "matured" to the point of creating a legal framework for raw materials policy.

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Raw materials policy is inextricably linked to a wide range of sustainable development issues, yet it is a topic that is virtually unknown among the general public. It is difficult to find any activities related to promoting these issues among the public. It seems that the issue of education and upbringing in this regard will play a key role in the possible success of raising public awareness and deepening reflection on the dependence on raw materials in the sustainable development of the country, Europe, and the world. Regardless of what we call it – raw materials education, geological education – it is essential. On the other hand, the upbringing dimension is also important, because future generations must receive an education from us on which they will base their lives and actions, including in the direction of caring for critical national raw materials.

The issue of aspects related to the implementation of Poland's raw materials policy has not yet been the subject of in-depth research in either the legal or pedagogical fields. The literature on the subject includes publications that address this issue, but from an economic and political science perspective [Baldasarre and Carrara 2025; Haneklaus 2025; Tröster, Papatheophilou, and Küblböck 2024]. Aspects linking the issue of raw materials policy with sustainable development appeared in doctrine [Szewczak 2022], although it was only in the following years, when the legislative process moved in this direction, that the scientific community became interested in this issue. It is worth noting the outline of the issue of raw materials education [Galos 2025; Kot-Niewiadomska and Ruszkowski 2025], which is undoubtedly a key element of the analyzed process.

The research conducted in this article includes, in its theoretical part, an analysis of issues relevant to educational and upbringing tasks in the area of state raw materials policy. The analytical part of the legal analysis will identify legal provisions related to the implementation of state raw materials policy by public entities, in particular those concerning educational issues.

The aim of this article is to conduct a theoretical and legal analysis of issues related to raw materials education in relation to its functioning in the system of sustainable regional development. The research hypothesis is that the failure to introduce raw materials education processes and to include raw materials issues in the human education process will not result in the successful creation, development, and implementation of raw materials policy, especially in Poland. This may result in difficulties in the functioning of the state at the national and international level, and the legislative process may remain slowed down for a long period of time. The analysis of the proposed research platform was carried out using the dogmatic-legal method, the monographic method, and, to a lesser extent, the historical method.

1. RAW MATERIALS POLICY

The European Union has stepped up its efforts to ensure security of raw materials in view of the difficult geopolitical situation in Europe and worldwide. The European Parliament and the Council of the European Union emphatically state that: "Current knowledge of raw material deposits and mapping of their distribution in the Union dates from a time when securing supplies of critical raw materials for the development of strategic technologies was not considered a priority. The lack of up-to-date geological information on critical raw materials in the Union could hamper the development of extraction projects, thereby undermining efforts to reduce supply risks and ensure the functioning of the internal market. In order to collect and update information on areas of accumulation of critical raw materials, Member States should, where appropriate, taking into account geological conditions, develop national programs for mapping areas for the general exploration of critical raw materials and major minerals that are extracted together."[1]

That is why the European Union has decided to issue a legal act regulating raw materials policy. The aim of the regulation is to improve the functioning of the internal market by establishing a framework to ensure that the Union has access to secure, resilient, and sustainable supplies of critical raw materials, including by promoting sustainability, efficiency, and circularity throughout the value chain (Recital 42, Article 1(1)). Certainly, the above-mentioned actions of the European Union should be considered highly desirable in the current geopolitical situation. From a legal point of view, it is also important that these actions will be integrated at the EU level, which will result in greater efficiency of their scope.

The regulation provides an exhaustive list of strategic and critical raw materials. Strategic raw materials are defined as raw materials, including those in unprocessed form, obtained at any stage of processing and being a by-product of other extraction, processing, or recycling processes: bauxite/aluminum oxide/aluminum, bismuth, boron – metallurgical grade, cobalt, copper, gallium, germanium, lithium – in the standard required for batteries, metallic magnesium, manganese – in the standard required for batteries, graphite – in the standard required for batteries, nickel – in the standard required for batteries, platinum group metals, rare earth metals for the production of permanent magnets (Nd, Pr, Tb, Dy, Gd, Sm, and Ce), metallic silicon, metallic titanium, tungsten (Recital 42, Article 3(1)). Critical

[1] Recital 42 of the Regulation of the European Parliament and of the Council on establishing a framework to ensure a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020 [hereinafter: Recital 42], https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CONSIL:PE_78_2023_REV_1 [accessed: 23.11.2025].

raw materials are defined as raw materials, including those in unprocessed form, obtained at any stage of processing and as by-products of other extraction, processing, or recycling processes: antimony, arsenic, bauxite/aluminum oxide/aluminum, barite, beryllium, bismuth, boron, cobalt, coking coal, copper, feldspar, fluorite, gallium, germanium, hafnium, helium, heavy rare earth metals, light rare earth metals, lithium, magnesium, manganese, graphite, nickel – in the standard required for batteries, niobium, phosphate rock, phosphorus, platinum group metals, scandium, metallic silicon, strontium, tantalum, metallic titanium, tungsten, vanadium (Recital 42, Article 4(1)). The above presentation is not included in this article for the purpose of polemics, but only for informational and educational purposes, so that the reader has complete clarity regarding the subject matter of the analyzed area. From Poland's point of view, two raw materials seem to be the most important at present: copper (as we are the world's leading producer) and coking coal (which may prove to be a "salvation" for our difficult situation in the hard coal mining sector).

When talking about Poland's raw materials policy, we are undoubtedly referring to the strategic document that was adopted by the Council of Ministers in 2022.[2] At that time, the adoption of the above document was considered important because "the deadline for adopting the state's raw materials policy was the last one that allowed for the rapid adaptation of regulations to the concept of the state's raw materials security. On the other hand, the war in Ukraine caused a partial interruption of activities developing the raw material security system in the regions. It should be noted that this objective relates to two important issues, namely the time frame – 2050 – and access to both domestic and imported raw materials" [Dziadzio 2022, 563-65]. The time frame of 2050 seems relatively distant from a legislative point of view. However, a distant deadline carries the risk of postponing certain necessary changes to a later date, which may not bring the expected results. The scope of the subject matter, indicating the direction of raw material procurement, points, on the one hand, to the urgent need to verify national resources and the responsibility of public administration in this area, and, on the other hand, the need to import, and thus to establish directions for strategic cooperation in Europe and worldwide [Szewczak 2022, 231]. At the same time, when conducting an extended analysis of the problem, it should be pointed out that there are certain deficits in the area of shaping the state's raw materials policy. For example, in the aspect raised, one can point to the lack of institutional mechanisms ensuring the participation of the healthcare sector, which is important for society, in consultations on raw materials security. While detailed methodologies for risk assessment and strategic

[2] Resolution No. 39 of the Council of Ministers of 1 March 2022 on the adoption of the 'State Raw Materials Policy', M.P. item 371.

reserves have been developed for industry and energy, no such instruments exist for healthcare. In this area, interdisciplinary research teams combining expertise in geology, engineering, medicine, and public health should be established to provide the knowledge necessary for the development of an integrated raw materials policy and sustainable development of the state. This process should be supervised by the relevant public administration authorities. Until now, Poland has reacted to supply crises rather than anticipating them and building resilience mechanisms. An example of this is the lack of national strategic reserves of raw materials critical to the medical sector, whereas such reserves exist for oil and gas. There are also no procedures in place for long-term disruptions in the supply of materials essential to the functioning of key medical infrastructure. This state of affairs was reflected in the COVID-19 pandemic, which showed how quickly and unexpectedly threats can arise in global supply chains, leading to shortages in areas such as healthcare (access to ventilators, which are manufactured using rare earth metals, among other materials) [Kamprowski 2021, 214-32]. Therefore, the relationship between raw materials policy and health protection is an area of growing strategic importance, which has so far remained outside the mainstream of both raw materials planning and health policy in Poland. It is worth emphasizing that health protection falls within the broad concept of strategic and critical raw materials [Radwanek-Bąk 2016, 252]. This is particularly important in the context of deepening geopolitical instability, the concentration of critical raw material supply chains, and the accelerated digital and technological transformation of medicine. Integrating these two policy areas requires both institutional and instrumental changes, as well as a fundamental transformation of health and raw materials education.

Without going beyond the scope of this paper, let us try to take a synthetic look at the geopolitical conditions that have changed over the last three years. First, Poland is a frontline country in the ongoing war in Ukraine. Secondly, Poland is preparing for the difficult process of transforming its coal mining sector. Thirdly, Poland is seeking support from the European Union for its energy transition, for which the issue of critical raw materials is extremely important.

Following legal action by the European Union, legislative measures were introduced in individual member states, including Poland – Draft Act of August 29, 2025 on ensuring access to raw materials for the domestic economy, including critical raw materials.[3] According to the draft law, "the Council of Ministers shall adopt, by way of a resolution, and update at least once every five years, the State Raw Materials Policy" (Article 4(1)).

[3] See https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Flegislacja.rcl.gov.pl%2Fdocs%2F%2F2%2F12401805%2F13154229%2F13154230%2Fdokument735681.docx&wdOrigin=BROWSELINK [accessed: 23.11.2025].

The objective of the State Raw Materials Policy is to ensure the country's raw materials security by securing adequate access to raw materials, both domestic and foreign, in a manner that promotes environmental protection and the country's energy security, as well as the implementation of the principle of sustainable development. The State Raw Materials Policy includes, in particular: a) an assessment of the situation regarding the management of mineral deposits and raw materials, b) priority areas for state action in the field of geology and mineral resources, c) a forecast for individual raw materials, covering a period of not less than 10 years, d) a list of raw materials that are key to the national economy (Article 4 of the draft law). If this bill is passed, we will see the beginning of a process that will prepare our country for future economic challenges (it is already difficult to imagine further economic development without critical raw materials).

The above draft law specifies the tasks of the minister responsible for the environment, acting with the assistance of the Chief Geologist of the Country, which include in particular: 1) preparing a draft State Raw Materials Policy and updating it, in consultation with the minister responsible for energy resources management; 2) initiating and coordinating activities related to the implementation of the State Raw Materials Policy; 3) preparing proposals for new legal and economic solutions in the field of the State Raw Materials Policy; 4) initiating information and education activities in the field of the State Raw Materials Policy; 5) monitoring the implementation and functioning of solutions developed in the State Raw Materials Policy (Article 5 of the draft law).

Of the tasks listed above, the most important for the purposes of this analysis is the initiation of educational activities in the field of raw materials policy. It is worth noting here that the Earth Resources Management Council has been operating for over a year, and its tasks include supporting geological and raw materials education.

2. RAW MATERIALS EDUCATION

The topic of raw materials education has really developed over the past year, due to legal acts that have come into force or are being drafted in the area of raw materials security, as well as due to the dynamic geopolitical situation. However, it should also be remembered that raw materials education is part of broadly understood environmental education, or more specifically, education for sustainable development.

Let us take a moment to look at the activities of the new Council for Earth Resource Management, which has prepared two important working documents concerning: proposals to modify the core curriculum for primary schools in the subject of geography (natural sciences) and an initiative

to create a priority program called Geological Education, which would be established within the National Fund for Environmental Protection and Water Management. Among the main proposals in the document was the need to emphasize the importance of mineral resources for the country's economic development (including in terms of energy transition), sustainable production of these raw materials from domestic primary (mineral deposits) and secondary sources, as well as adequate information about Poland's geological potential in terms of such production [Galos 2025]. The above proposals were also prepared on the basis of a survey conducted by the aforementioned Council among students of universities offering geological studies. The answers indicated in the survey show the reasons for this situation, including: the core curriculum for geography in secondary schools, gaps or outdated knowledge presented in textbooks, media trends presenting an incorrect or distorted image of geologists, and, what is often overlooked in the media and in discussions on the subject, the issue of finding employment after graduation [Kot-Niewiadomska and Ruszkowski 2025]. The above studies were conducted in academic circles, which are certainly interested in creating and developing new fields of study in line with labor market demand, and issues related to raw material security are undoubtedly interesting. However, apart from the creation of new fields of study and focusing on teaching standards in higher education in individual scientific disciplines, even in the context of the deficits in raw materials policy in healthcare described in this study, it should be emphasized that students of medicine and public health do not receive knowledge about the substances used in medical technologies, their raw material dependencies, or the geopolitical conditions of access to key materials.[4] Therefore, at the higher education level, it is necessary to introduce interdisciplinary educational modules combining the perspectives of medical, geological, engineering, and management sciences. However, it is worth paying attention to the educational process as a whole in this procedure.

Therefore, when discussing educational issues, we cannot overlook the aspect of upbringing. This is, of course, a long-term process, as it requires multi-generational organic work to create a special "civic code," one element of which should be caring for our own raw material resources, which guarantee the country's economic development.

Starting from the beginning, the family plays an important role in the process of upbringing, especially integral upbringing. Saint John Paul II defined upbringing as "above all, the gift of humanity – a two-way gift. Parents

[4] Regulation of the Minister of Science of 10 October 2024 amending the regulation on the standards of education preparing for the profession of a physician, dentist, pharmacist, nurse, midwife, laboratory diagnostician, physiotherapist and paramedic, Journal of Laws item 1514.

bestow their mature humanity on the newborn, who in turn bestows on them all the newness and freshness of humanity that he brings into the world." John Paul II's references to man and his functioning in the world are references to integral education [Rynio 2010; Idem 2013]. Integral education should include education for sustainable development, including issues related to the Earth's raw materials. These issues are part of the overall concept of personalistic pedagogy.

When attempting to identify the most important characteristics of personalistic pedagogy, the following should be noted: a) "education is understood as an important factor in efforts to promote the 'personal universe,' b) the highest goal of education is to enable the subject (the student) to take control of their own development process, c) understanding education as 'maieutics of the person' (awakening the person in the pupil), the pupil is not considered an object or thing to be filled with anything, nor is he a being to be trained, but a person who needs to be 'awakened', d) the pupil is the first and fundamental factor in education, the educator is merely a cooperator, a collaborator in this work; this is a position that clearly emphasizes the realistic nature of the educational relationship, clearly opposing its idealistic interpretation, e) in essence, it supports the aspirations manifested in the movement of so-called New Schools movement, which also recognizes errors in the form of naturalistic reductionism, f) as a person, the pupil is not the property of either the family or the state, and no one is granted hegemony in this regard on the basis of any aspect, g) the importance and role of school is affirmed, highlighting its tasks alongside other educational institutions; the connection between teaching and upbringing is emphasized here; the concept of a 'neutral school' is criticized and rejected, h) the content of school education should be integral humanism, i.e. not only literary or artistic, but also scientific and technical, i) the educational function of the family is confirmed and defended, without concealing the manifestations of the crisis affecting the family, and the dangers associated with authoritarianism that may occur in family upbringing are recognized, j) respect for the 'mystery of the child' is emphasized, as the child becomes a person under the influence of multiple stimuli from various educational institutions in this process" [Nowak 2003]. One of the key dimensions of personalistic pedagogy is caring for the student, which seems to be fundamental in the process of creating education for sustainable development based on resource education.

It should be noted that an integrated approach must take into account several specific requirements: a) "firstly, consideration of the complexity and multifaceted nature of education. Education is a fact inherent in human life, in the complexity and diversity of human existence, both physical and spiritual, rooted in the past, occurring in the present, and projecting

into the future; b) secondly, the anthropological nature of education. We understand the reality of education as one of the many forms of human expression. At the level of becoming, education cannot be approached in absolute terms as a transition from one act to another, but as a process of moving from positive desires to their realization, c) thirdly, openness to the religious and spiritual dimension. Religious education opens people up to reality far more and reaches deeper into the inner layers of their personality than other areas of education, such as civic, political, or moral education, are able to do. It prepares individuals not only to engage with these areas, but also to acquire a general vision of the world and to shape their worldview" [Rynio, Braun, Jeziorański, and Szewczak 2015].

In summary, it must be said that the educational process is of key importance in the perspective of several decades, which may determine the economic future of our country. Integral education must include environmental issues, in particular those related to sustainable development and, consequently, raw materials. Failure to apply these elements will mean that no legislative or political processes will raise public awareness.

CONCLUSION

The issue presented, combining the legal aspects of raw materials policy with the pedagogical dimension of raw materials education, is a pioneering one, aimed at making political decision-makers and citizens aware of the need for joint action. At present, we do not know what the near geopolitical future will bring, when and how the war in Ukraine will end, in what direction China's economic expansion will go, how the United States will behave, and finally, whether the European Union, shaken by crises – migration, financial, demographic, and political – will survive. All these factors mean that every country should take action as soon as possible to secure its own future. Raw materials policy is one such key area.

From a legal perspective, it is necessary to introduce legal solutions that will allow for the development of raw materials education, both in schools and universities. While the higher education sector seems to be responding to market needs, education policy does not cover this area. It seems that raw materials education should become a key element of the educational process.

From an educational point of view, it seems necessary to continue and promote personalistic pedagogy and integral education in terms of raw material education, which is key to the development of this policy.

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DISQUALIFICATION OF AN EXPERT WITNESS FOR REASONS THAT UNDERMINE CONFIDENCE IN HIS KNOWLEDGE AND IMPARTIALITY – REALITY VERSUS THE LEGAL NORM OF ARTICLE 196(3) OF THE CODE OF CRIMINAL PROCEDURE

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Abstract. Criminal procedural law doctrine emphasizes that the evaluation of evidence is continuous and also encompasses expert opinions, which, because they are based on specialized knowledge, require verification using objective criteria such as methodological accuracy, coherence of argument, and compliance with the current state of science. However, practice shows that procedural authorities often accept expert opinions uncritically, leading to deficiencies and violations of fair trial standards. Of particular significance in this context is the wording of Article 196(3) of the Code of Criminal Procedure, which apodictically requires the appointment of another expert if circumstances are substantiated that undermine confidence in the expert's knowledge or impartiality. Despite the precise wording of the provision, this regulation is often marginalized, which favors the acceptance of flawed opinions and, consequently, increases the risk of procedural errors that can even lead to wrongful convictions.

Keywords: expert; opinion; expertise; forensics; criminal proceedings.

INTRODUCTION

The doctrine of criminal procedural law indicates that the assessment of evidence is a continuous process, beginning when the procedural authority becomes aware of the existence of a given piece of evidence and continuing until the conclusion of criminal proceedings [Cieślak 1955, 373]. This concept, formulated several decades ago, has never been questioned, which proves its lasting acceptance, both in doctrine and in jurisprudence. Within

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the catalogue of evidence, a special place is occupied by expert opinions, the importance of which has been emphasized by the legislator, who has devoted a separate provision to them in Chapter 22 of the Code of Criminal Procedure,[1] entitled: "Experts, interpreters, specialists". It should be emphasized here that an expert opinion is a type of evidence with a specific methodological structure, based on specialist knowledge and scientific tools. Its assessment, therefore, requires the application of objective criteria, consisting in separating it from the subjective assessments of the procedural authority, including verification in accordance with cognitive standards and the conceptual apparatus appropriate for a given field of knowledge [Widła 1992, 7].

The purpose of this article is to present, based on selectively chosen criminal proceedings concluded with final judgments, the authors' reflections on the exclusion of an expert witness for reasons that undermine confidence in his knowledge and impartiality. Therefore, the research problem was to answer the following question: despite its guarantee, is the normative construction of the provision of Article 196(3) CCP marginalized in the practice of law enforcement and judicial authorities? Concerning the main research problem, a central hypothesis was formulated, which is an opinion based on probability and requiring verification. Thus, the main hypothesis is that the wording of Article 196(3) CCP is sometimes overlooked in practice, which encourages the acceptance of flawed opinions and, consequently, increases the risk of procedural errors that may even lead to wrongful convictions.

In order to obtain answers to the research problem and thus attempt to verify the research hypothesis, the following research methods were used to prepare this study: analysis of sources of currently applicable law and analysis of case law. The empirical research was also based on a detailed method, namely *desk research* – the examination of documents.

1. THE ESSENCE OF AN EXPERT WITNESS IN CRIMINAL PROCEEDINGS

Tadeusz Widła rightly emphasized that the verification of an expert opinion by a procedural authority should include not only an assessment of its substantive content, but also an analysis of the correctness of the expert's logical reasoning based on which the conclusions were formulated. It is also necessary to determine whether the factual material of the case adequately supports the conclusions of the opinion and is not burdened with errors, inaccuracies, or contradictions that could lead to confusion or misinterpretation of the findings in the case. Particular attention should be paid to the

[1] Act of 6 June 1997, the Code of Criminal Procedure, Journal of Laws of 2025, item 46 [hereinafter: CCP].

correctness of the reasoning used by the expert, i.e., whether the individual elements of the argument are consistent with each other and logically lead to the conclusions [Widła 1992, 43].

In this context, it should unfortunately be noted that nowadays there is an increasing tendency for procedural authorities to uncritically accept expert opinions without making any effort to thoroughly verify them, even though this issue was already highlighted in the last century by the most prominent representatives of criminal procedural law and criminalistics. It therefore seems reasonable for those responsible for conducting criminal proceedings to refer once again to the work of Hans Gross, Edmond Locard, Tadeusz Widła, Marian Cieślak, Stanisław Waltoś, and Jerzy Kasprzak, restoring in practice the standards of reliability, objectivity, and, consequently, also justice, which are necessary in the pursuit of objective truth. For example, Hans Gross emphasized that although an expert witness is or should be a highly qualified specialist, a craftsman in the complete sense of the word, with in-depth knowledge in his field, his expertise must be evaluated at every stage of the criminal investigation process however, when a lawyer cannot reliably analyze expert opinion evidence, a kind of "submissiveness" towards the expert occurs, resulting in the inability to properly assess the evidentiary value, the adequacy of the research methods used, and the competence of the expert himself. The result is a limitation of the critical and conscious use of expert opinions as important evidence in criminal proceedings [Kasprzak and Jusupow 2021, 42].

Tadeusz Widła also pointed out the need to examine whether the opinion contains content that could mislead the trial authority, and in the event of a discrepancy between the opinion and other evidence, to indicate its nature and determine the nature of the inconsistency. At the same time, the procedural consequences of deficiencies in the opinion should be analyzed, in particular concerning the emergence of gaps, distortions of information, and unreliability, which may lead to misinformation of the trial authority and, as a result, hinder or even prevent the issuance of a correct and fair decision. Therefore, if we accept – in accordance with the prevailing doctrine – that the assessment of evidence is a permanent process, then the legal regulations relating to expert evidence should be interpreted as a description of successive stages of evaluation. This assessment is not a one-off activity, but should take the form of a sequence of activities leading to a final decision [Widła 1992, 7, 43-44].

On the other hand, based on the above considerations, lawyers and the general public are increasingly raising concerns about the lack of sufficient qualifications and experience among experts, their inadequate level of expertise, and the poor quality of their opinions. In this regard, the allegations include, among others, superficial analyses, unjustified conclusions, lack of references to standards and professional literature, and unclear interpretative language. As a result, this limits the usefulness of expert opinions for

procedural authorities. Therefore, it seems necessary to create a central register of experts, define clear and precise certification procedures, and establish competent supervision of their activities, as this currently constitutes a significant systemic limitation.[2] The lack of the proposed register also results in difficulties in verifying the preparation of experts and thus disrupts the assurance of uniform standards for issuing opinions. The literature on the subject indicates that the appointment of a person with formal education but limited practical experience in a given field may lead to the issuance of opinions of limited evidential value [Kustra and Lasek 2022, 84].

2. EXCLUSION OF AN EXPERT BASED ON ARTICLE 196(3) OF THE CODE OF CRIMINAL PROCEDURE

Against the background of the allegations made in the doctrine and public debate regarding the quality of expert opinions, the provision contained in Article 196(3) CCP, which provides for the obligation to appoint another expert in the event of circumstances undermining confidence in his knowledge, impartiality, or for other important reasons, takes on particular significance. However, despite its guaranteeing nature, this provision is sometimes marginalized in practice, which is primarily explained by the established presumption of the expertise and reliability of experts, considerations of procedural economy, and the procedural authorities' lack of knowledge regarding the evidentiary significance of opinions in the context of specific facts. An additional difficulty is the assessment – in other words, the subjective nature of the grounds for exclusion, which may lead to the application of inconsistent criteria by procedural authorities, especially courts.

Andrzej Gaberle rightly stated that both the position of an expert witness in criminal proceedings and the requirements for the proper performance of this function are specified in Article 196(3) CCP, which obliges the court and procedural authorities to appoint another expert in the event of circumstances undermining confidence in his expertise or impartiality, as well as in the event of other significant reasons. Although this provision does not explicitly formulate the effects of the disclosure of such circumstances on an opinion already prepared, the established grounds for questioning the competence or objectivity of the expert imply a reduction in the evidential value of that opinion. Consequently, the use of such an opinion in the determination

[2] See https://www.gov.pl/web/premier/projekt-ustawy-o-bieglych-sadowych-oraz-instytucjach-opiniujacych?utm_source=chatgpt.com [accessed: 26.08.2025]. In the fourth quarter of 2025, the Council of Ministers is expected to adopt a draft bill on court experts and opinion-issuing institutions, which is much needed in the legal sphere. The draft bill provides, among other things, for the creation of central registers of experts and the institutionalization of mechanisms for supervising experts.

of the facts in a given case constitutes a serious procedural irregularity, violating the principle of proper evidentiary procedure [Gaberle 2010, 207].

As already mentioned, the systemic problem is the evaluative nature of the grounds for excluding an expert, which in reality may result in the application of divergent and inconsistent evaluation criteria. However, both doctrine and case law have developed specific interpretative guidelines and practical instruments aimed at limiting this risk and ensuring the uniformity of procedural decisions [ibid.]. In a situation where a party raises an objection of lack of trust in an expert and requests his replacement, it is incumbent upon that party to demonstrate the existence of valid objective reasons justifying the appointment of another specialist. Only those circumstances which, after a factual and rational analysis, lead to the conclusion that there are indeed grounds for questioning the impartiality of the expert or for questioning the level of their professional knowledge and experience may be considered as such grounds. The foundation of trust in an expert is the conviction that he or she is not only objective but also possesses the relevant specialist knowledge to enable him or her to issue a reliable and credible opinion.[3] These important reasons are only those which, when considered logically, lead to the conclusion that the existing circumstances undermine the expert's objectivity or undermine confidence in his knowledge and experience.[4]

Sharing the line of reasoning adopted in the position discussed, it should be emphasized that the premises referred to as "objectively existing" refer to circumstances that are real and verifiable, and do not result from subjective assessments or individual feelings of the parties, representatives, or procedural authorities. In this context, it is important to assume that experts are presumed to be professional, reliable, and impartial, which ensures the correctness of the evidentiary proceedings. Effectively challenging this presumption requires the presentation of solid evidence to demonstrate that, in a specific case, the presumed characteristics of the expert have not been maintained. It means that in order to assess the admissibility of an expert's exclusion, it is necessary to present circumstances that can be established and verified in the course of the proceedings, rather than relying on the subjective feelings of the participants in the proceedings.[5]

Legal doctrine and case law emphasize that this approach promotes uniformity in the criteria for exclusion and minimizes the risk of arbitrary court decisions, thereby contributing to the protection of the integrity of criminal proceedings and maintaining confidence in the institution of expert witnesses [Gaberle 2010, 207]. In the case of circumstances relating to the expert's

[3] Ref. no. IV KR 176/69, OSNKW 1970, No. 2-3, item 21.

[4] Ref. no. IV KK 171/02, Lex no. 56916.

[5] Ibid.

knowledge, the point here is to indicate that the scope of this knowledge does not meet the conditions set out in Article 193 CCP. However, this does not apply to situations where, for example, the defendants disagree with the expert's statements, but rather to circumstances where the expert is unable to support his statements with appropriate arguments, refers to research methods considered unreliable in professional literature, and at the same time does not have knowledge of the methodology generally recognized as correct. Undoubtedly, the expert's lack of knowledge of scientifically recognized (meeting the criteria of evidence) new and constantly developing research methods will constitute a failure to deepen their knowledge and may undermine confidence in their expertise [Kurowski 2025].

Reasons that may undermine confidence in an expert's knowledge include circumstances indicating significant deficiencies in their specialist competence, which is essential for the proper preparation of an opinion. These may primarily include the expert's lack of knowledge specific to the field covered by the opinion, including the use of outdated terminology, failure to take into account the current state of scientific and technical knowledge on the issues being assessed, as well as the use of methodologies that deviate from the standards recognized as correct and generally accepted in a given discipline. In such a case, the credibility of the expert opinion is significantly weakened, and its use in the proceedings may lead to erroneous findings of fact. The doctrine emphasizes that in order to maintain the standards of fairness in criminal proceedings, the opinion must be prepared by a person with competence corresponding to the substantive requirements of the given specialization, and any shortcomings in this regard may constitute grounds for appointing another expert or for challenging the evidential value of the opinion [Stefański and Zabłocki 2019, 503].[6]

Importantly, legal doctrine and jurisprudence emphasize that in this area, it is not necessary to prove that the expert does not have sufficient skills or is not impartial in a given case, but it is sufficient to substantiate these circumstances [Konecki and Misztal-Konecka 2010, 154; Widła 1992, 36].

3. LEGAL NORM FROM ARTICLE 196(3) OF THE CODE OF CRIMINAL PROCEDURE AND LEGAL REALITY

An example of a current case in which, according to the authors of this study, contrary to the claim of the prosecutor handling the case, there were grounds for applying Article 196(3) CCP, is criminal proceedings concerning an offense under Article 115 of the Act on Copyright and Related Rights.[7]

[6] Judgement of the Supreme Court of 20 February 2014, ref. no. V KK 375/13, Lex no. 144147.

[7] Ref. no. 3008-3.Ds.33.2023 – District Prosecutor's Office in Gdańsk. The preliminary

In the course of other preparatory proceedings, the prosecutor appointed a court expert in the field of intellectual property protection and copyright, entered in the list of experts of the Regional Court, to analyze the evidence and prepare an opinion on a possible copyright infringement.

After the expert prepared his opinion, reasonable doubts arose that the expert may have misappropriated someone else's work. The subject of the findings was extensive excerpts from the Commentary on the Act on Copyright and Related Rights of February 4, 1994, which were then included in the opinion as the expert's own considerations, after the author's quotations and footnotes had been removed. In this context, there was a reasonable suspicion that the expert's conduct could constitute a criminal offense of infringement of another person's copyright, which is why the case materials in this regard were excluded, and, as a consequence, separate proceedings were initiated. Notably, the excluded case file also included the opinion of a private expert – a researcher specializing in copyright and intellectual property law – who clearly indicated that the expert's conduct constituted the statutory elements of the crime of plagiarism. Despite the categorical opinion of the expert and the testimony of the victim, according to whom a copyright infringement may have occurred (incidentally, also an expert in copyright law), the prosecutor did not take this assessment into account, disregarding the testimony of the author of the comment as well as the expert's statements.

From a procedural perspective, the conclusion seems clear: the content of Article 196(3) CCP explicitly requires the appointment of another expert in a situation where there are doubts as to the reliability or competence of the current expert. The failure of the prosecutor's office to take such action indicates that the provision in question has not been applied, which may raise serious doubts as to the correctness of the proceedings. Furthermore, what seems bizarre is that the expert himself explained the lack of footnotes as a "clerical error" and then supplemented these omissions in his opinion. In the circumstances of the case in question, there is no doubt that the lack of confidence in his knowledge has been substantiated. Furthermore, in the context of an expert appointed as an expert in copyright law, the question arises, not only of a substantive nature, but also of an ethical nature in terms of the credibility of such an explanation. Can the appropriation of fragments of someone else's work be treated as a simple clerical error in the case of an expert who is required to have the highest level of expertise and competence in copyright law? As already mentioned, these doubts are not only procedural but also systemic in nature, as they concern citizens' trust in the justice system in the broadest sense.

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proceedings in the case were discontinued, but the expert opinion remains in legal circulation.

Ultimately, the preliminary proceedings against the expert were discontinued, but it should be noted that no other expert was consulted to make a procedural assessment of whether the expert had, in fact, appropriated parts of someone else's work in his opinion. Unfortunately, the opinion prepared by the expert remains evidence in the criminal proceedings, which is regrettable. This case, with its complex legal and ethical implications, prompts reflection on the standards of professionalism in the work of court experts and on the mechanisms for reviewing expert opinions in the justice system, as well as on the reliability of some prosecutors in conducting cases. It seems fair to say that the cases in question, one of which is still ongoing, are nothing more than ignorance on the part of the justice system itself. Case law clearly emphasizes that the public often perceives the actions and omissions of experts as a reflection of the functioning of the justice system. For this reason, it cannot be tainted in any way.[8] A court expert cannot raise any suspicions as to bias, unreliability, or lack of objectivity,[9] and the existence of a reasonable suspicion of a crime in a case in which the expert issued an opinion that is the subject of suspicion of a crime committed by him is undoubtedly such a "blemish."

The concept of "guarantee of proper performance of the expert's duties" is defined as the totality of characteristics, events, and circumstances relating to the court expert, which constitute his image as a person of public trust. Any suspicion of unreliability in the performance of an expert's duties entitles one to conclude that he does not meet the basic condition of guarantee necessary to perform this function.[10] The above is also in line with para. 12(1)(4) and para. 4 of the Regulation of the Minister of Justice of January 24, 2005, on court experts. In this particular proceeding, in which materials were excluded by failing to call on the opinion of another expert, based solely on what the authors consider to be an unjustified discontinuation of the preparatory proceedings concerning the expert's conduct, doubts arose as to the reliability and objectivity of the case.

In the case cited, the issue of discontinuing the preliminary proceedings without obtaining what appears to be a necessary opinion, despite the claims of the victim herself and a copyright expert, is significant. Case law and criminal procedure literature emphasize that in every case where the resolution of a given issue requires "special knowledge," i.e., knowledge that goes beyond the common knowledge of the average person, it is necessary

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[8] Judgment of the Supreme Administrative Court of 10 June 2015, ref. no. II GSK 986/14 guarantee of proper performance of the expert's duties, Lex no. 1765567.

[9] Judgment of the Provincial Administrative Court in Warsaw of 23 April 2008, ref. no. VI SA/Wa 140/08, Lex no. 498390.

[10] Judgment of the Provincial Administrative Court in Warsaw of 18 October 2006, ref. no. VI SA/Wa 1553/06, Lex no. 264553.

to appoint an expert. Under no circumstances may a procedural authority, even if it has special knowledge (e.g., in the field of handwriting analysis, resulting from previous experience in this area), refrain from obtaining an expert opinion.[11] The legislator explicitly states that the determination of circumstances requiring remarkable knowledge results (mandatorily) in "consulting" an expert or experts [Kremens 2015]. The special knowledge that an expert can provide cannot be replaced by a procedural authority [Bachrach 1972, 175-77; Grzegorczyk 2014, 689].[12] In such a case, the expert opinion of the procedural authority would not be controlled either by the parties or by the authority itself [Waltoś and Hofmański 2016, 397]. This authority cannot play a dual role – that of a procedural authority and a source of evidence [Witkowska 2013, 67; Stefański and Zabłocki 2019, 455]. In the case in question, the prosecutor uncritically discontinued the preparatory proceedings concerning a reasonable suspicion of plagiarism by an expert acting in such a dual role.

It raises the question: What should a procedural authority do when an expert opinion proves to be unreliable? The answer has been developed in legal literature and case law, and its foundation can be found in Article 196(3) CCP – a provision formulated unambiguously and authoritatively. It is not just a matter of stating a fact – it is the duty of the trial authority to appoint another expert. Such an attitude is necessary to ensure that the proceedings remain reliable and credible. As Tadeusz Widła aptly pointed out in his monograph *Ocena opinii biegłego* (Eng. Assessment of an expert opinion), the epistemic status of an opinion from an inappropriate source is nil. Such an opinion should be rejected and not considered at all, nor taken into account when determining evidence. It cannot be used as a basis for decisions in a case – its admission would jeopardize the reliability and fairness of the proceedings. In this regard, the doctrine also emphasizes that the action provided for in Article 196(3) CCP is like putting out a fire – even if it is successful, there will be losses. The loss consists in the fact that a weak and unreliable opinion appears in legal transactions, which may mislead the procedural authorities and the court. Therefore, rejecting such an opinion is not merely a formality, but a fundamental duty of the procedural authority – a condition for maintaining the reliability, objectivity, and fairness of the proceedings [Widła 1992, 89].

This case is important from the point of view of justice, as it concerns an expert who issues opinions in many cases. Often, an expert's opinion determines people's fates. Case law emphasizes that the public often perceives

[11] Judgments of the Supreme Court: of 3 May 1982, ref. no. I KR 319/81, OSNPG 1982, No. 11, item 149; od 20 May 1984, ref. no. I KR 102/84, OSNPG 1984, No. 12, item 112.

[12] Judgments of the Supreme Court: of 19 June 1980, ref. no. I KR 118/80, unpublished; of 25 August 1980, ref. no. I KR 191/80.

the actions and omissions of experts as a way in which justice functions.[13] A court expert must not raise any suspicions as to bias, unreliability, or lack of objectivity.[14] It is therefore no exaggeration to say that an expert is a person of public trust – the accuracy of a decision in a criminal case, in which people's fates are weighed and decisions of the utmost importance are made: freedom and dignity [Gaberle 2010, 207], depends on their knowledge and reliability. A reasonable suspicion by an expert witness in intellectual property cases of plagiarism should be particularly sensitive for the justice system. Therefore, there can be no situation where there are doubts that undermine trust in the procedural authorities and, as a result, in the entire justice system.

Another case in which experts demonstrated a lack of due diligence is the case of Tomasz Komenda, which caused a stir not only in the legal community but also among the general public. The verdict in this case decided the fate of a man who, as we know, was wrongfully sentenced to imprisonment and then experienced the dramatic consequences of this mistake for many years. Expert opinions played a key role in the wrongful conviction, as they were the basis for finding the person guilty and sentencing him. The Supreme Court, acquitting Tomasz Komenda in 2018, found that the original expert opinions contained significant methodological and accounting errors, which resulted in the wrongful attribution of guilt. In particular, bite marks on the victim's body were misidentified, and scent traces, which allegedly indicated the defendant's presence at the crime scene, were incorrectly assessed.[15] Insufficient verification of these opinions by law enforcement authorities, and in particular by the court, led to the wrongful conviction of an innocent man and his serving 18 years of imprisonment. The final acquittal of Tomasz Komenda by the Supreme Court emphasizes the importance of reliability and objectivity in the work of experts and the need for their critical analysis by the trial authorities. This case also points to the need to reform the system of expert opinions and to strengthen the mechanisms for quality control of these opinions in order to prevent similar mistakes with serious consequences in the future.[16]

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[13] Judgment of the Supreme Administrative Court of 10 June 2015, ref. no. II GSK 986/14.

[14] Judgment of the Provincial Administrative Court in Warsaw of 23 April 2008, ref. no. VI SA/Wa 140/08.

[15] Judgment of the Supreme Court, ref. no. V KO 26/18, https://www.sn.pl/sites/orzecznictwo/orzeczenia3/v%20ko%2026-18-1.pdf [accessed: 27.08.2025].

[16] Ombudsman: *The Tomasz Komenda case should never have happened*. The Ombudsman points to nine reasons why innocent people are convicted in Poland, see https://bip.brpo.gov.pl/pl/content/sprawa-tomasza-komendy-rpo-wskazuje-9-przyczyn-skazywania-niewinnych?utm_source=chatgpt.com [accessed: 26.08.2025].

CONCLUSIONS

In summary, the issue of expert opinions in criminal proceedings reveals the multidimensional nature of the problem, combining epistemic, procedural, and ethical aspects. Criminal procedural law literature emphasizes that the assessment of evidence, including the concept of an expert opinion, is continuous and uninterrupted – it begins when the procedural authority becomes aware of the existence of evidence and continues until the proceedings are legally concluded. This concept, which has been largely unquestioned for decades, underscores the need for continuous evaluation of evidence, which cannot be limited to a single action but requires a systematic and sequential analysis encompassing both substantive and formal aspects.

Due to its specialist significance in criminal proceedings, an expert opinion should be treated as evidence of particular importance. Its assessment requires the use of scientific tools and terminology specific to the field in question, which allows the analysis to be separated from the subjective feelings of the trial authority and subjected to verification according to objective and scientifically justified criteria. As Tadeusz Widła aptly points out, the verification of an opinion includes not only an assessment of its content, but also an analysis of the correctness of the logical argument, the consistency of the reasoning, and the relationship between the conclusions and the evidence, while eliminating errors and inaccuracies that could lead to confusion on the part of the trial authority [Widła 1992, 7].

However, practice shows that procedural authorities often accept expert opinions without critical analysis, which constitutes a violation of the fundamental principles of reliability and objectivity in criminal proceedings. For this reason, legal literature repeatedly emphasizes the need to refer to the classics of criminalistics, such as Hans Gross, Edmond Locard, and Tadeusz Widła, who pointed to the need for careful, scientifically grounded evidence analysis as *a sine qua non* condition. It is also worth reading Hans Gross's Handbook for the Investigating Judge as a System of Criminalistics, which has been excellently translated into Polish by Professor Jerzy Kasprzak and is still relevant today, not only in the field of expert opinions.

In the context of statutory solutions, this issue is reflected in Article 196(3) CCP, which obliges the procedural authority to appoint another expert in the event of circumstances undermining confidence in the knowledge or impartiality of the first expert. Despite its guaranteeing nature, the normative construction of the provision is sometimes marginalized in practice, which not only poses threats to the administration of justice but also, above all, poses a threat to human life and fate, sometimes irreversibly. The literature and case law indicate that the appointment of another expert

is not only a formal obligation, but also a necessary tool for protecting trust in the administration of justice and ensuring the objectivity of the process.

An analysis of selectively chosen proceedings, including the case of Tomasz Komenda, clearly illustrates the dramatic consequences of accepting an unreliable opinion. It indicates that even minimal shortcomings in knowledge, experience, or methodology can lead to serious human rights violations and, in extreme situations, to wrongful convictions. Similarly, the case of an expert witness who was reasonably suspected of committing plagiarism in a case involving opinions on copyright and intellectual property infringement illustrates how the lack of reliable verification and the ignoring of evidence undermining the opinion undermines trust in the judicial authorities and the entire justice system.

The reflections drawn from this study allow us to formulate several key recommendations, including those of a systemic nature: first, expert opinions must be subject to critical and systematic analysis at every stage of the proceedings; secondly, the institutionalization of mechanisms for supervising experts, including the creation of central registers, precise certification and verification procedures, is necessary to maintain a high standard of expert opinions; thirdly, the trial authorities must respect the obligation to appoint another expert in the event of any circumstances that undermine confidence in his or her knowledge; finally, fourthly, education and training in the methodology of expert opinions and the skills of critical analysis of evidence should be an integral part of the professional training of trial authorities.

It should be emphasized that the role of an expert is not limited to providing an opinion – an expert is a person of public trust, and their knowledge and reliability have a direct impact on decisions concerning matters of the utmost importance, such as the dignity and freedom of the individual. In light of the above, maintaining high standards of expert opinion, rigorous verification of evidence, and consistent and authoritative application of Article 196(3) CCP are key to preserving reliability, justice, and public trust in the justice system.

Professor Marian Cieślak, analyzing the issue of evidence, aptly noted that the work of law enforcement agencies and courts is essentially similar to that of archaeologists and historians. Like them, the trial authorities use a historical and critical method, which consists of reconstructing facts in conceptual terms and verifying them thoroughly and from multiple angles. The foundation of this process is evidence – a mosaic of elements from which the reconstruction of past events is built [Cieślak 2011, 5]. Among this evidence, expert opinion occupies a special place, often constituting the key to a proper understanding and assessment of the circumstances under investigation.

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CONSTITUTIONAL GUARANTEES FOR THE PROTECTION OF TAXPAYERS' RIGHTS

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Abstract. The subject matter of protection of taxpayers is crucial, both from the theoretical and practical point of view. Tax law is a branch of public law which involves, among others, interference in the property sphere of the obliged entity. In addition, the unequal position of the parties to the tax law relationship and the method of its regulation require the development of instruments to protect taxpayers' rights, also at the constitutional level. These premises provided a springboard to carry out an in-depth analysis of legal measures relevant to this case. Therefore, the research looks into the provisions of the Constitution of the Republic of Poland and views of legal scholars and commentators. Particular attention is paid to the established line of judicial decisions of the Constitutional Tribunal. The findings provide a basis for the conclusions.

Keywords: the Constitution; tax legislation; taxpayers' rights.

INTRODUCTION

This paper addresses a topic of great importance, both for the theory and practice of tax law. The choice of the subject was dictated primarily by the specific characteristics of tax law, treated as a separate branch of law (yet showing a number of links with other branches). This is a division of public law of a particularly intrusive nature, especially when it comes to the sphere of property. Tax law, in addition to primarily performing a fiscal function, may be used for the implementation of many policies. Moreover, legal transactions performed under private law often have tax consequences. Without going into detail of all features of this law, as they could feed a separate study, it should be noted that addressing them was only intended to highlight the role of the legislator in the field of tax legislation. Therefore, it should be assumed that it requires the creation of such tax law regulations that will limit the natural disproportion of the position of the authorised entity and the obliged entities in tax law relations.

For obvious reasons, constitutional regulations are extremely important in this regard.

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The aim of the study is therefore to answer the question of whether and to what extent the provisions of the Constitution of the Republic of Poland[1] create a coherent and comprehensive system of protection of taxpayers' rights. The latter, in the absence of uniformity [Dzwonkowski, Duda, and Gorąca 2016, 289] are treated as human rights for the purpose of this paper, intended to limit the power of the state in order to establish *a sui generis* balance between the income needs of the state and the rights of the individual [Nykiel 2019, 10].

To realize this research intention, I examine the law in force by explicating the basic law, legal commentary and judicial decisions.

The scope of this study determines its design. First, general and introductory issues are discussed, so as to identify and examine the provisions of the Constitution directly and indirectly creating the basis for the protection of taxpayers' rights. To maintain the consistency of the discussion and avoid unnecessary repetitions, the section entitled "Introductory remarks" includes a synthetic presentation of the criteria for the separation of tax law, so that the relevant provisions of the Constitution may be examined in depth in this perspective in subsequent parts of the work.

1. INTRODUCTORY REMARKS

The analysis of constitutional measures in the field of protection of taxpayers' rights requires some general remarks. This is mainly due to the statement that the scope of the basic law's regulation in this respect is a consequence of taking into account both classic tax rules and doctrinal reasons for the separation of tax law, which also expose the characteristics of this branch of law. Therefore, the analysis concerning the protection of taxpayers' rights under the Constitution should be conducted through the prism of these determinants. Prior to that, it is fair to note that tax rules are at the same time one of the determinants of the assignment of legal norms to a given branch of law.

Thus, legal scholars and commentators most often mention the following criteria of division of law into branches [Redelbach, Wronkowska, and Ziembiński 1992, 231]: the criterion of the taxation object, the criterion of the person subject to tax, the criterion of the method of regulation, the criterion of the guiding principles, the criterion of the regulation function. Due to their important role, the require a short description.

The criterion of the taxation object allows a distinction of the type of social relations regulated by legal norms. Tax law regulates relations featuring

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

an obligation imposed on an entity in the form of a tax performance to the state or other public-law authority. Therefore, there are always two entities involved: the party entitled to demand the performance and the party obliged to provide it. Thus, one can use the claim that tax law regulates social relations related to the non-equivalent transfer of cash between these entities [Gomułowicz and Małecki 2000, 103]. It is also worth noting that social relations regulated by tax law are created by the will of the legislator, not the entities participating in them, and should therefore be classified as thetic (given) relations [Mastalski 1998, 12]. The subject of regulation often involves the "financial side" of a relationship arising under civil law, or more precisely the requirement to pay a cash performance in connection with the occurrence of an economic event regulated by the provisions of civil law.

The person subject to tax criterion determines the specific characteristics of the relation between the entities of a given legal relationship. Undoubtedly, the tax law relationship involves an obligation, while the position of the entitled entity is "stronger" than the position of the obliged entity. Another determinant that allows for assigning a legal norm to a specific branch of law is the criterion of guiding principles. The rules of the design of tax standards are in fact certain models, which a rational legislator should follow when creating these regulations. They are formulated in legal commentary and some of them are of a lasting nature. The canons of convenience, economy, certainty and equality of taxation (A. Smith) or the principles of economics, justice and tax management (A. Wagner) should be mentioned here. Nowadays, it is legal scholars and commentators and the established line of judicial decisions, especially the decisions of the Constitutional Tribunal, that play a leading role in shaping tax rules. The principle of tax fairness is of unquestionable importance in this respect, which, following the assumption cited earlier, will be presented later in the study.

The criterion of the method of regulation is important for distinguishing tax law as separate from other branches of law. In tax law, it is the administrative and legal method. It involves subordination of one entity to another [Mastalski 2000, 17], and affecting the character of tax legislation.

The classification of a standard to a given branch of law is also made taking into account the functions of regulation. The basic, although not the only, function of taxes is the fiscal function, which consists in the greatest simplification of feeding the state budget or the budgets of local government units with funds derived from taxes, which then serve to finance public needs. It undoubtedly affects taxpayers' attitudes towards taxation.

As the above clearly shows, there is a noticeable relationship between individual criteria, and in fact between certain characteristic elements that recur regardless of the angle from which the analysis of standards considered to be tax law standards is made. There is a common question of state

authority, which results in the inequality of the subjects of legal relations and their specific nature. It can therefore be concluded that the decisive importance should be attributed to two criteria: object and method of regulation, while reserving a complementary role for the other criteria.

2. UNIVERSALITY OF TAXATION IN THE LIGHT OF ARTICLE 84 OF THE CONSTITUTION

Article 84 of the Constitution bears fundamental importance among regulations which allow interference with the rights of an individual. It lays down that everyone is obliged to bear public burdens and performances, including taxes, specified in the statute – which is a normative expression of the principle of universality of taxation [Glumińska-Pawlic 2008, 88]. It is poignant that this article is placed in Chapter II of the Constitution, entitled "The freedoms, rights and obligations of persons and citizens", and therefore the obligation of paying levies should be examined as a constitutional duty. The analysis of the said provision leads to the following conclusions: First, the division between public "burdens" and "performances" is not sufficiently precise, since taxes are included among public performances [Kallas 1997, 52]. Second, the said Constitution provision determines that public levies are a permanent element of the state system [Dębowska-Romanowska 2009 110]. They are not incidental or occasional, but permanent and repetitive [Idem 2010, 123].

The issue of defining the relation of the levy law to civil rights and freedoms is a disputed matter. There are two opposing views: 1) it is believed that public levies should be treated as an exception to civil rights and freedoms, and at the same time it is indicated that civil rights and freedoms hold the primary role in a democratic state. Their limitation through the introduction of public levies can only be made to the extent necessary. This necessity must be understood as meaning that the amounts of public levies should be determined by their purpose, i.e. financing a state to satisfy public needs. The state apparatus performing these tasks should be as rational and cheap as possible [Smoktunowicz 1997, 1-2]; 2) following a contrary view, "public burdens", "public performances" or "taxes" should be treated as a constitutionally separate sphere of civic obligations, resulting from "a tribute" to the state. Therefore, they should not be treated as an exception to civil rights and freedoms, but as the opposite (opposition). However, this is not an equal and equivalent opposite, the size and scope of tributes given is the subject of a social contract [Dębowska-Romanowska 1996, 1].

Both of the above approaches highlight the element of the amount of the levies – it should be commensurate with the needs arising from the extent of financing public needs. It is particularly important at the stage of formulating the assumptions of the tax policy.

There is no doubt that although public levies, especially taxes, are an essential source of budget revenues, their fiscal function cannot dominate the design of the tax system [Kulicki and Sokół 1995, 22]. Also, despite the commonly adopted principle of giving the legislator considerable discretion in creating tax law, it is pointed out that its limits are defined by basic constitutional values. The principle of equitability of taxation is named as one of most important principles among them [Mastalski 2001, 2001], as will be discussed later.

From the point of view of the subject of this study, special attention should be paid to that part of the provision which states that statutes are the only legal acts that can introduce the obligation to pay tax. Such a measure should be considered appropriate; the unilateral imposition of financial performances must be in line with one of the fundamental principles of tax law, that is its certainty. At the same time, the principle of the statutory levying of taxes is the only general principle, clearly resulting from the provisions of the law in force [Brzeziński and Nykiel 2009, 139].

In conclusion, it should be noted that under Article 84 of the Constitution the possibility of interference in the sphere of civil liberties is accepted on the one hand, but on the other it may only be done by a statute, which should be considered as a kind of guarantee of protection of taxpayers' rights.

3. CONSTITUTIONAL RULES OF TAX LEGISLATION

Article 217 of the Constitution is one of the provisions that on the one hand serves as a constitutional basis of taxation, and on the other as a guarantee of the cohesion of the tax system. It expresses the principle of statutory completeness of taxation and is a development of Article 84. Apart from this, it should be treated as a provision guaranteeing both the rights of the taxpayer and the inviolability of the power of Parliament to impose taxes [Kryczko 2009, 110; Kosikowski 2006, 101].

Pursuant to Article 217 of the Constitution, the statute imposing a tax must specify the subjects to and objects of taxation, tax rates, and the principles for granting tax reliefs and remissions; it must also define categories of taxpayers exempt from taxation. First of all, it should be noted that the aforementioned provision refers to the doctrinally elaborated rules of the design of the tax law. In principle, they concern clearly defined elements of the regulation of individual taxes which are common to them. They are usually called "elements of tax design", and some of them are an essential condition for the implementation of tax performances. Traditionally, such mandatory elements include: those subject to tax, the taxation object, the tax base, the tax rate, the date and the method of payment of the tax [Kostecki 1985, 153].

It should be noted that this enumeration does not coincide with the scope of regulation of the cited constitutional provision. Therefore, the literature emphasises that elements such as the tax base, even if absent from the basic law's regulation, must be prescribed by a tax statute [Kosikowski 1999, 2; Nykiel 2023, 204; Kryczko 2009, 110-11]. A similar position has been expressed in the decisions of the Constitutional Tribunal[2] and, therefore, legislative practise fills this gap.

Another constitutional provision directly related to the issue of tax legislation is Article 123, pursuant to which the Council of Ministers may consider the draft law adopted by it to be urgent, with the exception of draft tax statutes, statutes concerning the election of the President of the Republic, the Sejm, the Senate and local self-government bodies, statutes regulating the system and competence of public authorities, and codes. Legal commentary emphasises that the quoted section of the Polish Constitution creates a separate zone of particularly protected legislation, safeguarded from hasty changes due to the importance of the issue regulated in its subconstitutional legal acts [Ławniczak 2014].

The differences between the ordinary and urgent procedure seem to suggest at least a longer period of work of the Sejm on ordinary projects, which are such either from the decision of the applicant submitting the draft to the Marshal's Office or from the will of the legislator, as is apparent from Article 123(1). Especially in the latter case, the will of the legislator indicates at least the need to carefully look at the submitted tax measures. Haste does not facilitate this, hence tax statutes, among other acts, are excluded from the urgent mode of processing drafts [Kulicki 2010, 5]. It is worth adding that, as stated by the Constitutional Tribunal, the extraordinary pace of work on a statute which affects, among other things, an important personal and political freedom, […] is not justified in any particular circumstances of the case. The adoption of a statute in such a hurry does not encourage reflection on, i.a., the compatibility of the adopted statute with the basic law.[3] This position has not been expressed in connection with the examination of the constitutionality of tax statutes, but, as indicated in the literature, it should be applied to all legal acts falling within the scope of the regulation of Article 123 of the Constitution [Radziewicz 2023].

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[2] Cf. Judgements of the Constitutional Tribunal of: 10 September 2010, ref. no. P 44/09, OTK-A 2010, No. 7, item 68; 2 April 2007, ref. no. SK 19/06, OTK ZU 2007, No. 4/A, item 37; 27 November 2007, ref. no. SK 39/06, OTK ZU 2007, No. 10/A, item 127; 10 December 2002, ref. no. P 6/02, OTK-A 2002, No. 7, item 91; 27 April 1999, ref. no. P 7/98, OTK ZU 1999, No. 4, item 72; 9 February 1999, ref. no. U. 4/98, OTK ZU 1999, No. 1, item 4; 16 June 1998, ref. no. U. 9/97, OTK ZU 1998, No. 4, item 51; 1 September 1998, ref. no. U. 1/98, OTK ZU 1998, No. 5, item 65.

[3] Order of the Constitutional Tribunal of 4 October 2011, ref. no. K 9/11, OTK-A 2011/8/85; judgement of the Constitutional Tribunal of 14 July 2020, ref. no. Kp 1/19, OTK-A 2020/36.

4. OTHER CONSTITUTIONAL GUARANTEES FOR THE PROTECTION OF TAXPAYERS' RIGHTS

Turning to the characteristics of the second group of constitutional regulations, i.e. indirectly constituting the protection of taxpayers' rights discussed here, one should refer to the criterion allowing for assigning a legal norm to a specific branch of law, that is the criterion of guiding principles. As already noted, the rules concerning the construction of tax regulations are in fact certain models or postulates which should guide a rational legislator when creating these regulations. They are formulated in legal commentary and some of them are of a lasting nature. The canons of convenience, economy, certainty, equity of taxation (A. Smith) or the canons of economics, justice and tax management (A. Wagner) should be mentioned here. Nowadays, it is legal scholars and commentators and the established line of judicial decisions, especially the decisions of the Constitutional Tribunal, that play a leading role in shaping tax rules.

Smith, who introduced the following four principles to the study of tax law, has been considered the creator of tax rules:

(1) The canon of equity of taxation, which is the most important of the principles and which, although defined as equity, in fact refers to tax justice. It comes from two concepts that are linked together: "benefit" and "ability to pay". The first concept is based on Smith's assumption that tax is a fee paid by citizens in return for the protection they receive from the state. On the other hand, the amount of the tax burden should be a reflection (measure) of this protection, while assuming that the ratio between the amount of tax and the state expenditure on citizens is proportional [Gomułowicz and Małecki 2000, 25]. For this reason, an appropriate (fair) amount of tax should be found and determined (valued), which may be different for entities with different wealth (the state protects more wealth by granting protection to a wealthier person, for which the person should pay a higher tax). The ability to pay is directly linked to the actual possibility of paying a tax of a certain amount. Therefore, Smith postulated that no one should pay a tax higher than he can pay, which boils down to the distribution of the tax burden depending on income, excluding from taxation the minimum necessary for existence [Gomułowicz and Małecki 2000, 26].

(2) The canon of tax certainty (it had been formulated earlier). This is a postulate which can be read to mean that the persons liable to pay a tax were informed in good time about the amount of the tax, the method and the date of payment, and therefore these elements should be clearly and precisely defined.

(3) The canon of convenience of taxation, which means that any tax should be collected at a time and in such a way that the taxpayer is most comfortable to pay it [Smith 2013,501].

(4) The canon of cheap taxation, which postulates that tax collection should be as cheap as possible. Too high costs of administration dealing with the collection of tax receivables destroy the benefits of taxes flowing into the budget.

All of Smith's tax canons are derived from the theory of liberalism, which refers to "objective laws of nature."

Of course, the Smithsonian principles have been the subject of numerous polemics and controversies, subject to subsequent studies, but nevertheless they have taken a prominent place in the science of tax law. However, the principle of fairness in taxation is of paramount importance for the issues raised in this work, and therefore, taking into account the breadth of the work, the natural consequence of this is to focus on it. It is assumed today that equity of taxation does not mean that all subjects to taxation should pay the tax in the same amount, but that they should bear equal burdens [Gomułowicz 1996, 3].

One can speak here of "vertical" and "horizontal" justice, where the latter requires equal treatment of entities belonging to the same category and can be expressed as "equal treatment of equals". In turn, "vertical" justice assumes a different distribution of the tax burden on entities operating in different economic conditions [ibid.].

First of all, it should be noted that the principle of justice is a principle of constitutional importance (although tax fairness is not mentioned). Pursuant to Article 2 of the Polish Constitution, the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.

The Constitutional Tribunal has interpreted the cited article many times,[4] also in relation to Article 32 of the Constitution. It is worth noting that its decisions on the relationship between Article 32 and Article 2 of the Constitution has evolved. The most recent rulings have consolidated the view that there is no need to adjudicate on a violation of the principle of social justice in a situation where the provisions of the Constitution formulating the principle of equality are shown as control models, and the arguments presented in support of both charges are repeated (convergent) or the entity initiating proceedings before the Constitutional Tribunal has not cited separate, additional arguments pointing to an inherent (i.e., in isolation from the

[4] The Constitutional Tribunal, examining the compatibility of legal acts with Article 2 of the Constitution, issued nearly 700 judgements, some of which directly referred to the principle of social justice.

principle of equality) violation of the principle of justice.[5] According to the accepted line of judicial decisions of the Constitutional Tribunal,[6] the constitutional principle of equality before the law (equality in law) in the broadest approach means that all subjects of the law (addressees of legal norms) that equally bear this significant (relevant) feature must be treated equally. Thus, on the same scale, without discriminating or favouring distinctions.[7] In developing this thesis, the Court also concluded that there is a close link between justice and equality in law (whereby "the belief in equality in law is a derivative of justice") and that if there are unfair differences in the distribution of goods (the granting of rights) and the related division of legal entities, these differences are considered inequalities. Fairness requires that the legal differentiation of the different entities (their categories) remain in an appropriate relation to the differences in the situation of these entities. Distributive justice expressed in this way means that equal persons should be treated equally, and similar persons should be treated similarly, but in the latter case, account should be taken of the extent to which certain characteristics exist among the various entities (categories of persons) that should be considered in the process of distributing certain goods (rights). This rule assumes the existence of a proportion between essential features of individual categories of people and their due treatment (relevance rule).[8]

What is equally important, Article 2 of the Constitution also lays down other rigours that tax legislation must meet. In its judgements, the Constitutional Tribunal presented them against the principle of certainty and convenience of tax. The established line of judicial decisions emphasises that the principle of non-retroactivity is the basis of the legal order. It shapes the principle of citizens' trust in the state and the laws it establishes. The principle of non-retroactivity of the law should be strictly respected, especially in cases where the laws contain provisions for taxpayers that are less favourable than those currently in force.[9] There is a marked emphasis on the fact that the principle of *lex retro non agit* and the principle of protection of duly acquired

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5 Judgements of the Constitutional Tribunal of: 14 November 2000, ref. no. K 7/00, Journal of Laws, No 100, item 1084; 5 September 2006, ref. no. K 51/05, Journal of Laws, No. 165, item 1180.

6 Judgements of the Constitutional Tribunal of: 8 May 1990, ref. no. K 15/90, OTK 1990, No. 1, item 2; 11 December 1990, ref. no. K 15/90, OTK 1990, No. 1, item 6.

7 Judgement of the Constitutional Tribunal of 6 March 1990, ref. no. K 5/89, OTK 1990, No. 1, item 1.

8 Judgement of the Constitutional Tribunal of 6 April 1993, ref. no. K 7/92, OTK 1993, No. 1, item 7.

9 Cf. judgements the Constitutional Tribunal of: 8 March 2005, ref. no. K 27/03, Journal of Laws No. 41, item 4010; 31 January 2001, ref. no. P 4/99, OTK ZU 2001, No. 1, item 5; 25 September 2000, ref. no. K 26/99, OTK ZU 2000, No. 6, item 186; 17 December 1997, ref. no. K 22/96, OTK ZU 1997, No. 5-6, item 71.

rights are substantive canons which define the limits of interference of the public authority in the sphere of subjective rights. Violation of these principles may be justified by the allegation of unacceptable interference by this authority within the sphere of the constitutionally protected rights or freedoms of the individual, which in consequence leads to the finding of a violation of these rights or freedoms contrary to the constitutional order.[10]

Moreover, the Constitutional Tribunal has repeatedly stressed in its decisions that tax legislation should provide for appropriate *vacatio legis* necessary to allow the taxpayer to adjust his handling of his matters to the situation arising from the new tax regulations. The Constitutional Tribunal also pointed out that it is forbidden to make changes in taxes imposed on a tax year during that tax year. The common denominator of these judgements was the emphasis that while an unequal position of the parties to tax law is inevitable, such standards of tax legislation must be upheld that will at least give the taxpayer a sense of tax certainty and minimise the inconvenience resulting from the tax obligation.[11]

Another provision of the basic law which constitutes a specific protection of taxpayers' rights is Article 7, pursuant to which public authorities act on the basis and within the limits of the law, i.e. they are bound by these provisions in the process of applying the law. This means, among other things, that it is impossible to apply administrative discretion without explicit statutory authority, which is of particular importance under the intrusive rules of tax law. It is worth mentioning that discretion takes place when a legal rule does not clearly define consequences, but allows the authority to make a choice, leaving a considerable scope of discretion in determining them. This boils down to the administrative authority determining the legal effect of the norm [Mincer 1983, 63]. In other words, it is associated with granting the administrative body the possibility of shaping the legal situation of the addressee of the norm through specific legal acts, especially an administrative act [Nowacki 1986, 40].

Therefore, we may speak of administrative discretion in those cases where the legislator does not make the decision completely dependent on the facts which are to be the factual basis for it, but only on certain elements of it, or certain elements of the decision are omitted in determining the facts of the decision. In these cases, the administration is to issue an administrative act in the face of the facts in which the choice, designation and even determination of some of its elements is left to it. Therefore, only a legal

[10] Order of the Constitutional Tribunal of 17 February 1999, ref. no. Ts 154/98, OTK ZU 1999, No. 2, item 34.

[11] Judgement of the Constitutional Tribunal of 15 March 1995, ref. no. K 1/95, OTK 1995, No. 1, item 7; cf. judgement of the Constitutional Tribunal of 29 March 1994, ref. no. K. 13/93, OTK 1994, No. 1, item 6.

norm or a norm constructed on the basis of the provisions of the relevant rank may serve as the basis for the application of the institution of discretion [Mincer 1983, 48]. Failure to respect this regularity could lead to unequal treatment of subjects before the law, which is unacceptable in a state governed by the rule of law.

When talking about constitutional guarantees for the protection of taxpayers' rights, it should also be pointed out that tax legislation should be consistent with those provisions of the basic law which concern the economic rights and freedoms of the individual (Articles 20, 21, 22 and 64) or the right to privacy (Article 47). It should be noted, however, that constitutional norms concerning fundamental economic rights and freedoms should in fact be a reference point for a discussion on constitutional limits of taxation. Comparing the constitutional provisions concerning economic rights and freedoms with the content of Article 84 and Article 217, one can assume that a violation of the constitutionally permissible substantive or procedural limits, provided for the establishment of taxes, can be qualified as a violation of economic rights and freedoms [Gomułowicz 2005, 29].

CONCLUSION

The specific nature of tax law, manifested, among others, in the state's power to tax, requires the creation of regulations for the protection of taxpayers' rights, also at the constitutional level. The taxpayers' rights are, in turn, a broad and heterogeneous category, which, however, is of unquestionable importance for the obligated persons. They can be classified as human rights and, as indicated, respect for them is intended to allow achievement of a kind of balance between the implementation of the fiscal function of taxation and individual rights.

The purpose of the study, as indicated at its introduction, was to answer the question of whether and to what extent the Constitution of the Republic of Poland implements the assumption of the need to ensure this protection.

An in-depth analysis of the provisions of the basic law in the investigated area allowed the following conclusions to be drawn. The first of these is that the Constitution contains, above all, regulations setting out the rules of tax legislation. In turn, they also contain those that directly refer to them, and those from which models of good legislation are derived. These regulations complement each other, creating a coherent catalogue of constitutional guarantees for the protection of taxpayers' rights.

The basic meaning should be attributed to two editorial units of the Constitution, namely Articles 84 and 217. The former, on the one hand establishes the right of the state to impose levy obligations, thus making them

duties of constitutional rank, but on the other, it prescribes the only possible way of determining them, which is a statute. Only a democratically elected Parliament can create tax laws. In turn, Article 217, which is a development of Article 84, sets out standards which the tax law must comply with. This reservation may be regarded as a characteristic, but also indispensable, restriction of the legislative freedom of Parliament. The implementation of the principle of good tax legislation is also to be strengthened by Article 123, which creates a ban on giving the draft tax law the attribute of an urgent draft, which is to facilitate not so much the extension of the legislative process as avoidance of too hasty legislative actions.

Another conclusion resulting from the research conducted in this article evidences the indisputable role of decisions of the Constitutional Tribunal in the protection of taxpayers' rights. The well-established, but also evolving lines of jurisprudence indicate the requirements that must be met by tax law acts (especially statutes), which must respect constitutional principles, such as justice, equality, the rule of law, protection of property, or economic rights and freedoms. Therefore, one should fully share the view that the Constitution, laying down the standard of protection of taxpayers' subjective rights, expressed in the regulations discussed, introduces measures according to which the Constitutional Tribunal is the guarantor of the principle of constitutionality of taxes [Gomułowicz 2005, 23].

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PROTECTION OF WHISTLEBLOWERS VS. PROTECTION OF PERSONAL DATA*

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Abstract. Directive 2019/1937 on the protection of whistleblowers and Regulation 2016/679 (GDPR) on data protection are key legal instruments safeguarding individual rights within the European Union. Despite their shared objective of protecting individuals, their concurrent application presents practical and legal challenges. To ensure compliance, organizations must adopt integrated mechanisms that reconcile whistleblower protection with data privacy obligations. This article explores the need for a coordinated approach that enables effective implementation of both frameworks, emphasizing the importance of legal clarity and operational balance in practice.

Keywords: GDPR; directive 2019/1937; whistleblower; right to information; right to be forgotten.

1. DIRECTIVE 2019/1937 VERSUS REGULATION 2016/679 – TWO DIFFERENT RIGHTS AND PURPOSES

The adoption of the new Directive 2019/1937 on the protection of persons who report breaches of EU law did not cause the change or demise of older legal regulations. In this context, it is necessary to address the protection of personal data in the current legal regulation within the context of reporting breaches of law and unfair practices [Mičudová 2016]. Even before the adoption of Directive 2019/1937, it was a challenge for many entities to comply with Regulation (EU) 2016/679 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. To further complicate this labyrinth of legal regulations and obligations, following the adoption of the

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Directive, it became necessary to address both the Directive and the GDPR and find mutual symbiosis and balance of rights and obligations set out in the individual legal regulations. Recognizing the mutual overlaps between both legal regulations, the European Data Protection Supervisor (EDPS)[1] adopted Guidelines on the processing of personal data in the context of reporting procedures.[2] These guidelines provide a framework for institutions, bodies, and agencies of the European Union to ensure compliance with data protection obligations during the implementation and execution of whistleblowing procedures. They include specific recommendations aimed at minimizing risks while guaranteeing lawful and secure data processing and offer practical instructions both before and after the introduction of whistleblowing mechanisms, ensuring that data protection obligations are followed [Nechala 2014]. These guidelines may also benefit private entities, as adherence to them can help ensure compliance with the GDPR [Mičudová 2019].

1.1. Purpose of Directive 2019/1937

The main objective of Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law,[3] is to strengthen the protection of whistleblowers. This Directive provides a framework for the protection of individuals who draw attention to illegal or unethical practices in various areas of both the public and private sectors [Križan 2014]. It provides guarantees against retaliation, discrimination, or other negative consequences that might result from their actions.

The text of the Directive itself states that it was adopted with the aim of strengthening the enforcement of EU law and policies in key areas by setting common minimum standards that ensure a high level of protection for persons reporting breaches of EU law. These standards create the basis for a uniform approach by Member States to the protection of whistleblowers and emphasize the need for minimum standards at the national level.

From the perspective of material scope, the Directive includes the protection of persons who report breaches of EU law in specified areas, emphasizing the establishment of a minimum standard of protection. According to Article 6 of the Directive, the reporting person must have reasonable grounds to believe that the information provided was true at the time

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[1] Wojciech Wiewiórowski is the European Data Protection Supervisor. He was appointed by a joint decision of the European Parliament and the Council on 5 December 2019 for a term of five years. For more information see: https://www.edps.europa.eu/about-edps/members-mission/supervisors/wojciech-wiewi%C3%B3rowski_en [accessed: 21.09.2025].

[2] Available on the website: https://www.edps.europa.eu/sites/default/files/publication/19-12-17_whisteblowing_guidelines_en.pdf [accessed: 21.09.2025].

[3] OJ EU L 305, 26/11/2019, p. 17-56 [hereinafter: Directive].

of reporting and falls within the scope of this Directive. Furthermore, protection applies to various forms of reporting, including internal (Article 6 of the Directive), external (Article 10 of the Directive), and public disclosure of information (Article 15 of the Directive). A specific feature of the Directive is that it works with the concept of public interest, which can be seen as the protection of the well-being of society and the general interest of the EU, especially in areas where legal breaches can seriously harm public interests [Debrecéniová 2008]. This concept is mentioned in the recitals of the Directive (Recitals 13 and 14 of the Directive) and plays a crucial role in its implementation. Unlike the GDPR, whose provisions do not directly include the term public interest, there is an evident difference in the approach of the two legal regulations regarding their purposes.

1.2. Purpose of Regulation 2016/679

Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data[4] aims to ensure the protection of fundamental rights and freedoms of natural persons when processing their personal data. It also aims to establish rules for the processing of personal data with emphasis on adherence to the principles of transparency, lawfulness, and fairness (Article 5(1)(a) GDPR). Since it is an EU legal instrument, last but not least, it aims to guarantee the free movement of personal data within the EU and prevent restrictions on this movement.[5]

Personal data has a broad definition under the GDPR, as personal data is considered to be any information relating to an identified or identifiable natural person.[6] Identification can be carried out directly, for instance, through a name or identification number, or indirectly, through data such as location data, online identifiers, or other attributes specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the person. The broad definition of personal data ensures that all modern technologies enabling the collection and processing of various types of information are taken into account, thereby providing comprehensive protection in the context of rapid technological progress.

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[4] OJ EU L 119, 4.5.2016, p. 1-88 [hereinafter: GDPR].

[5] Article 1(3) GDPR: "The free movement of personal data within the Union shall be neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data."

[6] Article 4(1) GDPR: "'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person."

The primary purpose of the GDPR is the protection of natural persons during the processing of personal data, which is enshrined, among others, in the Charter of Fundamental Rights of the European Union and the Treaty on the Functioning of the European Union. The right to the protection of personal data is recognized as a fundamental right, but it is not an absolute right.[7] When applying it, it is necessary to assess its function in society and find a balance between the protection of personal data and other fundamental rights [Barancová et al. 2019]. This approach is consistent with the principle of proportionality, which requires that data protection does not impede legitimate objectives, such as public interest or security. Naturally, in the context of EU law, an important purpose of the GDPR is also to ensure the free movement of personal data within the EU, or EEA, without restrictions and while maintaining a high level of protection for the data subjects.

Regarding material scope, the GDPR applies to a wide range of processing activities[8] involving personal data, and it is applied to both automated and non-automated processing of personal data. Processing operations include collection, recording, organization, structuring, storage, adaptation, retrieval, consultation, use, disclosure, transmission, dissemination or otherwise making available, as well as erasure or destruction of personal data. Exceptions from the scope of the GDPR are strictly defined in Article 2(2) and concern, for example, the processing of personal data for exclusively personal or household activities.

When applying the GDPR, it is essential to take into account the fundamental principle of EU functioning, which is the principle of proportionality. According to Article 5(4) of the Treaty on European Union (TEU), the content and form of EU action shall not exceed what is necessary to achieve the objectives of the Treaties. This principle of proportionality is crucial in applying the GDPR to ensure that the processing of personal data is appropriate and does not exceed the necessary scope of essential processing. Equally important is the principle of accountability of the controller, who bears objective responsibility for demonstrating compliance with the GDPR. This includes transparency and clarity regarding the processing of personal data. The controller must be able to demonstrate that it complies with all GDPR requirements and that personal data is processed in accordance with applicable laws.[9]

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[7] Judgment of the Court (Grand Chamber) of 16 July 2020, Case C-311/18, Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems (ECLI:EU:C:2020:559), point 172: "However, the rights enshrined in Articles 7 and 8 of the Charter are not absolute rights, but must be considered in relation to their function in society."

[8] Article 4(2) GDPR: "'processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction."

[9] Article 5(2) GDPR: "The controller shall be responsible for, and be able to demonstrate compliance with, paragrap. 1 ('accountability')."

1.3. Directive vs. Regulation

These two sources of law are legal instruments pursuing distinct objectives and addressing different legal areas. This disparity, however, raises questions regarding their mutual compatibility and interaction in practical legal application.

However, discrepancies can also be found between the two sources of law due to their pursuit of different purposes. Directive 2019/1937 and the GDPR deal with distinct legal aspects, but they interact in practical application. The Directive explicitly addresses the relationship with the GDPR in Article 17, as it "requires that the processing of personal data in the context of investigations of reported breaches must always be compliant with the rules of the GDPR."[10]

Despite this requirement, difficulties arise in aligning whistleblower protection with the principles of personal data protection. Since these legal regulations protect distinct interests (the Directive focuses on the protection of whistleblowers, and the GDPR prioritizes the protection of personal data against unauthorized processing), these different priorities can lead to conflicts, especially in cases where it is necessary to identify the whistleblower or other involved parties.

The Directive addresses the relationship with personal data protection and the GDPR specifically regarding investigations, where it is essential to ensure that all data processing procedures respect the provisions of the GDPR. This includes minimizing collected data, ensuring its security, and restricting access to it only to necessary entities. The existing legal framework requires simultaneous compliance with the Directive and the GDPR, necessitating careful coordination and thorough assessment of each case. A key aspect is the creation of clear internal policies and procedures that allow the requirements of both legal acts to be met without undermining their objectives.

The Directive and the GDPR represent important tools for the protection of individuals in various areas. However, their simultaneous application requires comprehensive solutions that can align whistleblower protection with data protection rules. In practice, it is essential for organizations to implement mechanisms to balance these two approaches and thus ensure the effective fulfilment of the requirements of both legal frameworks.

To apply the law and resolve conflicts, it is necessary to rely on the basic interpretative methods of EU law, which serve to fill legislative gaps. Interpretative methods are used particularly when there is ambiguity or deficiency in legislation,

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[10] Article 17(1) of the Directive: "Any processing of personal data carried out pursuant to this Directive, including the exchange or transmission of personal data by the competent authorities, shall be carried out in accordance with Regulation (EU) 2016/679 and Directive (EU) 2016/680. Any exchange or transmission of information by Union institutions, bodies, offices or agencies shall be undertaken in accordance with Regulation (EU) 2018/1725."

and their goal is to ensure the effective application of law and eliminate potential negative consequences arising from a legal vacuum.[11]

In addition to standard interpretative methods, the principle of proportionality is applied in case of conflict between legal norms, which requires that the adopted measures be proportionate to the objective pursued and do not exceed the scope necessary for its achievement. In the context of protecting the fundamental rights and freedoms of natural persons during the processing of personal data, the principle of proportionality plays a key role in finding a balance between data protection and other legitimate interests.[12]

1.4. The role of proportionality

The principle of proportionality is a fundamental concept that governs the exercise of powers by the EU. It requires that interventions by EU institutions do not exceed what is necessary to achieve the objectives set out

[11] It is particularly important to mention the teleological interpretation, which focuses on the purpose and objective of a legal norm. This method is crucial in situations where the legal regulation is not sufficiently clear, such as in the relationship between Directive 2019/1937 and the GDPR. The teleological approach supports the achievement of the goals of the legal regulation and helps to avoid negative consequences that could arise from a literal interpretation of the law. The systematic interpretation examines the legal norm within the broader context of the legal system, serving to understand the mutual interactions between individual legal acts, through which their coherence is to be ensured. The comparative method of legal interpretation involves assessing the influence of various sources of law that deal with the same area, such as the processing of personal data. This approach allows for a broader perspective and helps identify best practices from other legal systems.

[12] Judgment of the Court (Grand Chamber) of 16 July 2020, Case C-311/18, Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems (ECLI:EU:C:2020:559), point 174: "Furthermore, in accordance with the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Under the second sentence of Article 52(1) of the Charter, subject to the principle of proportionality, limitations may be made to those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others;" point 176: "Lastly, in order to satisfy the requirement of proportionality according to which derogations from and limitations on the protection of personal data must apply only in so far as is strictly necessary, the legislation in question which entails the interference must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards, so that the persons whose data has been transferred have sufficient guarantees to protect effectively their personal data against the risk of abuse. It must, in particular, indicate in what circumstances and under which conditions a measure providing for the processing of such data may be adopted, thereby ensuring that the interference is limited to what is strictly necessary. The need for such safeguards is all the greater where personal data is subject to automated processing (see, to that effect, Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraphs 140 and 141 and the case-law cited)."

in the founding treaties. This means that both the content and form of EU actions must be appropriate to the pursued objective. This principle is explicitly enshrined in Article 5(4) of the TEU. The criteria for its application are specified in Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, which is annexed to the Treaties. The principle of proportionality applies to all areas of EU competence, regardless of their nature (exclusive, shared, or supporting).

In connection with the principle of proportionality, the EU legislator must conduct a test to assess whether the proposed measure meets the following requirements: a) suitability – the measure must be objectively suitable for achieving the intended goal;[13] b) necessity – there must be no other equally effective but less restrictive measure that could achieve the goal;[14] c) proportionality in the strict sense (proportionality *stricto sensu*) – any potential negative effects of the measure must not be disproportionate in relation to the objective pursued.[15] It is therefore necessary to assess whether the benefits of the measure outweigh its impact on the rights or interests of individuals or Member States.

To successfully navigate these conflicts between the GDPR and the Directive, the principle of proportionality is critical. Proportionality requires that any limitation on fundamental rights (such as data protection) must be provided for by law, respect the essence of those rights, and be necessary and genuinely meet objectives of general interest recognised by the EU.

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[13] Judgment of the Court of 8 June 2010, case C-58/08, The Queen on the application of Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform (ECLI:EU:C:2010:321), point 53: "However, even though it has a broad discretion, the Community legislature must base its choice on objective criteria. Furthermore, in assessing the burdens associated with various possible measures, it must examine whether objectives pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators."

[14] Ibid., point 61: "As to whether the measure at issue was necessary, it is argued that the said measure goes beyond what is necessary to achieve the objective pursued, given the competitive nature of retail markets. A less intrusive and more proportionate approach would have been to regulate wholesale charges only, while allowing competition in retail markets to bring retail prices down in the normal way, according to the rules of supply and demand, and leaving the NRAs free to intervene in cases where the markets were not functioning properly, on the basis of well-established regulatory criteria."

[15] Ibid., point 70: "Therefore, by adopting, in Article 4 of Regulation No 717/2007, ceilings for retail charges in addition to ceilings for wholesale charges, the Community legislature did not exceed the limits of the discretion it is recognised as having. The same is true of the obligation to provide information laid down in Article 6(3) of that same regulation, given that that provision reinforces the effectiveness of the regulation of retail charges and is therefore justified by the objective of consumer protection."

Furthermore, to satisfy the requirement of proportionality, any limitations on data protection must apply only in so far as is strictly necessary. The legislation that entails such interference must lay down clear and precise rules governing the scope and application of the measure to ensure the interference is limited to what is strictly necessary. This interpretive approach, which includes the teleological[16] and systematic[17] interpretation of EU law, is essential to fill legislative gaps and ensure the effective application and coherence of the two legal acts.

2. ANONYMOUS REPORTING VS. RIGHT TO INFORMATION

2.1. Anonymous reporting

The Directive stipulates that reporting channels must be designed, established, and operated in a secure manner [Hajn and Skupień. 2021]. This manner must ensure the confidentiality of information regarding the identity of the reporting person and any third party mentioned in the report [Olšovská and Hrušovská. 2013]. It must also prevent access to this information by unauthorized employees. This approach is key to ensuring the credibility of reporting channels and protecting whistleblowers against possible retaliatory measures.

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[16] Teleological interpretation is one of the most important and frequently used methods in the decision-making practice of the Court of Justice of the EU. In interpreting legal norms, it does not limit itself to the wording of the provision but considers its purpose and the objectives pursued by the legislation. This method enables a dynamic interpretation of law, which responds to the needs of the integration process and ensures the effective application of legal rules. See judgment of the Court of Justice of 24 June 2015, C-373/13, H. T. v Land Baden-Württemberg (ECLI:EU:C:2015:413), point 58: "In that context, the meaning and scope of those terms must be determined, in accordance with settled case-law, taking into account both the terms in which the provisions of EU law concerned are couched and their context, the objectives pursued by the legislation of which they form part."

[17] The systematic approach is based on the principle of the unity of the EU legal order. This method examines the position of a specific provision within the entire legal act, its relationship to other provisions, and the context in which the norm is situated. The aim is to ensure internal consistency and the harmonious application of the EU legal order as a whole. See judgment of the Court of Justice of 23 November 1999, C-149/96, Portuguese Republic v Council of the European Union (ECLI:EU:C:1999:574), point 86: "The Court would observe that although it follows from Articles 2 and 3 of the Treaty, and also from Articles 130a and 130e, that the strengthening of economic and social cohesion is one of the objectives of the Community and, consequently, constitutes an important factor, in particular for the interpretation of Community law in the economic and social sphere, the provisions in question merely lay down a programme, so that the implementation of the objective of economic and social cohesion must be the result of the policies and actions of the Community and also of the Member States."

2.2. Right to information

In accordance with the GDPR, individuals have the right to transparent information regarding the processing of their personal data. This information must be provided without undue delay, or within one month, with the possibility of extension by two further months in exceptional cases. According to Article 14(2)(f) of the GDPR, individuals must be informed about the source of their personal data, or whether the data originates from publicly accessible sources.

Article 14(5)(b) of the GDPR sets out exceptions to the duty to inform, if the processing of personal data is necessary for archiving purposes in the public interest, scientific or historical research purposes, or statistical purposes. These exceptions apply if the obligation to inform individuals is likely to render impossible or seriously impair the achievement of the objectives of that processing. In such cases, it is essential to demonstrate the public interest in the processing of personal data. The conflict between Directive and the GDPR brings challenges in the area of personal data protection and ensuring the confidentiality of information. Ensuring confidentiality and the protection of personal data is key to the credibility of reporting channels and the protection of whistleblowers. At the same time, it is essential to adhere to the right to information and transparency in accordance with the GDPR, while taking into account exceptions to the duty to inform in cases of public interest.

2.3. GDPR – right to be forgotten

According to Article 17(1)(a) of the GDPR, natural persons have the right to erasure (the "right to be forgotten") of their personal data without undue delay if these data are no longer necessary for the purposes for which they were collected or otherwise processed. This right is crucial for the protection of individuals' privacy and ensures that personal data is not stored longer than necessary. The GDPR also regulates exceptions to the right to erasure of personal data. Furthermore, Article 17(3)(b) of the GDPR sets out exceptions to the right to erasure of personal data. These exceptions apply if the processing is necessary for compliance with a legal obligation under EU or Member State law to which the controller is subject, or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. These exceptions ensure that important data can be retained for purposes that are consistent with the public interest. On the other hand, Directive, in Article 12(1)(b), stipulates that external reporting channels must allow for the permanent retention of information in accordance with Article 18 for the purposes of subsequent investigation. This provision ensures that the information necessary for the investigation is retained for a sufficient period to allow them to be properly reviewed and assessed.

3. THE CONCEPT OF 'PUBLIC INTEREST' AS A KEY TO BALANCING RIGHTS

While Directive and the GDPR address distinct legal aspects and objectives, the concept of public interest serves as a vital tool for finding the necessary symbiosis between them. The Directive explicitly works with the concept of public interest, which is mentioned in its recitals. This public interest can be understood as the protection of the well-being of society and the general interest of the EU, particularly in areas where breaches of law can seriously harm public interests [Pichrt 2013].

The concept is crucial because the right to the protection of personal data, enshrined as a fundamental right, is not an absolute right. Its application requires finding a balance between data protection and other fundamental rights, consistent with the principle of proportionality.

3.1. Public interest and exceptions to the right to information

The core conflict between the Directive and the GDPR often arises concerning confidentiality versus transparency. The Directive mandates that reporting channels must be established and operated in a secure manner to ensure the confidentiality of information regarding the identity of the reporting person and any third party mentioned.[18] This is key to ensuring the credibility of the reporting channels and protecting whistleblowers from retaliation.

Conversely, the GDPR grants individuals the right to transparent information regarding the processing of their personal data, including being informed about the source of their data.

The resolution of this conflict relies on the exceptions provided by the GDPR (Article 14(5)(b)[19]). These exceptions allow the controller to defer

[18] Recital 63 of the Directive 2019/1937: "Lack of confidence in the effectiveness of reporting is one of the main factors discouraging potential whistleblowers. Accordingly, there is a need to impose a clear obligation on competent authorities to establish appropriate external reporting channels, to diligently follow up on the reports received, and, within a reasonable timeframe, give feedback to reporting persons."

[19] Article 14 GDPR establishes the right to information to be provided where personal data have not been obtained from the data subject. This right to information is not applicable if "the provision of such information proves impossible or would involve a disproportionate effort, in particular for processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, subject to the conditions and safeguards referred to in Article 89(1) or in so far as the obligation referred to in paragrap. 1 of this Article is likely to render impossible or seriously impair the achievement of the objectives of that processing. In such cases the controller shall take appropriate measures to protect the data subject's rights and freedoms and legitimate interests, including making the information publicly available."

or withhold the duty to inform the data subject if the processing is necessary for purposes of public interest, and if the obligation to inform individuals is likely to render impossible or seriously impair the achievement of the objectives of that processing. Adhering to the right to information and transparency is essential, but must take into account these exceptions in cases where public interest is demonstrated.

3.2. Public interest and exceptions to the right to erasure

A similar conflict occurs regarding data retention. The GDPR grants natural persons the right to erasure (the "right to be forgotten") if their personal data is no longer necessary for the purposes for which it was collected. However, the Directive stipulates that external reporting channels must allow for the durable retention of information for the purposes of subsequent investigation.[20]

The GDPR resolves this tension by stating exceptions to the right to erasure (Article 17(3)(b)[21]). The right to erasure does not apply if the processing is necessary for compliance with a legal obligation under EU or Member State law, or for the performance of a task carried out in the public interest or in the exercise of official authority. These exceptions ensure that crucial data required for proper review, assessment, and investigation purposes related to the public interest can be retained for a sufficient period.

CONCLUSION

The conflict between the Directive and the GDPR presents significant challenges in the area of personal data protection and ensuring information confidentiality. On the one hand, the Directive stipulates that reporting channels must be designed, established, and operated in a secure manner that ensures the protection of the confidentiality of information regarding the identity of the reporting person and any third party mentioned in the report. This approach is key to ensuring the credibility of reporting channels and protecting whistleblowers against possible retaliatory measures.

On the other hand, the GDPR grants individuals the right to transparent information regarding the processing of their personal data. This right also includes the right to erasure of personal data without undue delay if these data

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[20] For record keeping of records see Article 18 of the Directive 2019/1937.

[21] The right to erasure ("right to be forgotten") shall not apply to the extent that processing is necessary "for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller."

are no longer necessary for the purposes for which they were collected or otherwise processed. The GDPR also sets out exceptions to the right to information and the right to erasure of personal data if processing is necessary for compliance with a legal obligation or for the performance of a task carried out in the public interest.

Ensuring confidentiality and the protection of personal data is key to the credibility of reporting channels and the protection of whistleblowers. At the same time, it is essential to adhere to the right to information and transparency in accordance with the GDPR, while taking into account exceptions to the duty to inform in cases of public interest. This comprehensive approach ensures that personal data is processed in accordance with legal regulations and that the rights of individuals are protected.

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CARRIERS RESPONSIBLE FOR DAMAGE IN THE CARRIAGE OF GOODS PERFORMED BY SEVERAL CARRIERS

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Abstract This article aims to determine against which of several carriers involved in the performance of unimodal transport (by means of one mode of transport) the person originally entitled (sender or recipient of the consignment) may pursue claims for damages arising in connection with such transport. It comments on the provisions of international conventions governing in a uniform manner the contract of carriage in rail, air and road transport (RU/CIM, Montreal Convention, CMR) and in Polish domestic law (Civil Code, Transport Law). The discussion addresses two types of transport performed by several carriers – successive carriage and subcontracted carriage. The author points out the diverse regulations provided in the conventions, with their evolution intended to eliminate the differences between successive and subcontracted carriage by introducing joint and several liability of the contracting carrier and his subcontracting carrier for damage caused by the latter and allowing the possibility of direct redress by entitled persons against the subcontracting carrier. This solution, as well as changes in the market of transport services (liberalisation, demonopolisation), deems, in the author's opinion, the institution of successive carriage redundant. Therefore, the paper postulates that it be abandoned in the future Polish regulation of the contract of carriage, with the introduction – as do the RU/CIM and the Montreal Convention – of the possibility for the entitled person to pursue claims against the subcontracting carrier for damages caused by him.

Keywords: contract of carriage; joint and several liability; subcontracting; successive carriage.

INTRODUCTORY REMARKS

Execution of a single contract of carriage of a consignment often involves participation of several carriers. This is always the case with multimodal transport, involving carriers of different modes of transport.[1] However, in unimodal transport the performance of the contract between the sender and the first carrier by many carriers is not uncommon either. In international road

[1] Multimodal transport issues are discussed in: Dąbrowski 2023.

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transport, it is actually the rule. These are both situations in which several carriers actually carry out transport on individual legs of the route, as well as situations in which carriers conclude further contracts for the same carriage, but the entire service is actually performed by one contractor, the last carrier in the chain of contracts.

This article aims to identify carriers against whom a person originally entitled (sender or recipient)[2] may make a claim for compensation for damages arising in connection with the carriage performed by two or more carriers by means of one mode of transport. Therefore, similar issues in multimodal transport remain outside the scope of the study. So does the subject matter of claims between the carriers themselves.

The problem will be discussed against international conventions containing uniform standards governing transport contracts in rail,[3] air[4] and road transport,[5] as well as in Polish domestic law.

The research assumption is to show that, although the regulations contained in individual conventions differ, there is a general trend to blur the differences between the modes of transport involving several carriers (successive and subcontracting), developed in international transport law and transport practise. This article also aims to find an optimal solution to the discussed problem in the future internal regulation of contracts of carriage. There is no doubt that the current rules provided for in the Civil Code[6] are too vague, while the regulation contained in the Act of 15 November 1984 – Transport Law[7] – is anachronistic and inconsistent with today's economic realities.[8]

In preparing the study, the method of investigation of the law in force and legal comparison were used, referring to the provisions of domestic law and international conventions containing uniform rules of private law.

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[2] For legitimacy of seeking redress against a carrier see Ambrożuk 2017, 85-95.

[3] 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].

[4] Montreal Convention – Convention for the Unification of certain Rules for International Carriage by Air of 28 May 1999, Journal of Laws of 2007, No. 37, item 235.

[5] 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.

[6] Act of 24 April 1964, the Civil Code, Journal of Laws of 2025, as item 1071 [hereinafter: CC].

[7] Act of 15 November 1984, the Transport Law, Journal of Laws of 2024, item 1262 [hereinafter: Transport Law]. This law currently regulates the carriage of goods and passengers in all modes of transport, except maritime, air and horse transport (Article 1(1)) and postal transport.

[8] For more see Ambrożuk, Dąbrowski, Garnowski, and Wesołowski 2020, 215-22.

Views expressed in Polish and foreign literature are also taken into account. The historical-legal method was also used to a limited extent. The presentation of normative solutions and related doubts and an attempt to solve them will be preceded by general comments on the different ways of performing carriage by many carriers.

1. SUBCONTRACTED AND SUCCESSIVE CARRIAGE

Transport law identifies so-called successive carriage and subcontracted carriages. The former is performed by successive carriers under the same (one) contract of carriage concluded with the sender and under the same consignment note. The contract of carriage is constituted as an agreement of this kind by the acceptance by subsequent carriers of the consignment and the consignment note. The identity of the consignment and the consignment note are a condition for the succession of the contract.[9] It is generally assumed that successive carriers enter into a contract of carriage concluded between the consignor and the first carrier and are jointly and severally liable (with possible modifications in relation to the general model of joint and several liability, also qualified as *in solidum* liability) towards the person entitled to perform the entire carriage [Wesołowski 2013, 749-52].

Subcontracted carriage involves the conclusion by the carrier who has accepted the obligation to move the consignment of another contract of carriage with another carrier and entrusting him with the transport of the consignment on the whole or part of the route of carriage. The contract with a subcontracting carrier in the light of transport regulations is an independent contract of carriage, separate from the contract of carriage originally concluded. Sometimes the not very precise terms "contracting carrier" and "operating carrier" are used to refer to the first carrier and the subcontracting carrier, respectively.[10] The contracting carrier must be assumed to have the status of consignor[11] vis-à-vis the operating carrier. In practise, especially in international road transport, longer contract chains exist. In such carriage,

[9] More on this topic Wesołowski 2013, 730-44.

[10] The terms contracting carrier and operating carrier are used in 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. RU/CIM uses the terms contracting carrier and substitute carrier. CMR does not use these terms.

[11] For relations between carriers performing one carriage see Wesołowski 2017, 515-25.

the problem often lies in the question of determining the correct nature of the contract concluded by the sender with the first entity, because the activities actually performed by the first carrier, if he entrusts carriage along the entire route, do not differ in principle from typical forwarding activities[12]. However, this issue remains outside the scope of this study.

Both types of transport involving several carriers are known in conventions (Article 26 and 27 RU/CIM, Articles 36 and 39-48 of the Montreal Convention, Article 34-40 CMR) and in Polish domestic law (Article 789 CC, Article 5 and 6 of the Transport Law) alike. They are quite commonly opposed to each other.[13] However, this is a certain simplification. A successive carriage may occur (and most often does) by entrusting the carriage to a subcontracting carrier, if the conditions resulting from the provision on successive carriage are met.[14] Mixed configurations are also possible, e.g. those in which there is successive carriage, and one of the carriers of such carriage uses a subcontracting carrier who does not meet the requirements of a successive carrier, e.g. due to his failure to accept the consignment note. The fact that any of the successive carriers use a subcontracting carrier (under a separate contract) does not affect his legal situation, i.e. neither the scope of his liability nor the possibility of pursuing claims for damages against him.[15]

Judicial decisions, especially in international road transport, are also significant here as they assume a broad understanding of successive carriage, i.e. also in a situation where the transport was *de facto* performed by a single

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[12] More on this topic see Wesołowski 2015, 181-93.

[13] Cf. e.g. judgement of the Supreme Court of 18 February 2016, ref. no. II CSK 111/15, *Internetowa Baza Orzeczeń SN* [accessed: 18.08.2025]. See also judgment of the Court of Appeal in Warsaw of 24 May 2019, ref. no. VII AGa 1232/18, Lex no 2739643 and judgment of the Court of Appeal in Szczecin of 30 December 2022, ref. no. I AGa 32/22, Lex no 3722431.

[14] It is characteristic that the courts, when awarding compensation to the first succeeding carrier (which is most often sued in cases related to successive carriage), often refer not only to the provisions of the convention relating to successive carriage (e.g. Articles 34 and 36 CMR), but also to the provisions governing responsibility for subcontractors (e.g. Article 3 of CMR), thus underlining the dual liability of this carrier. For example, the District Court of Barcelona, in its judgement of 29 November 2004, www.poderjudical.es, no. 761/2003.

[15] See judgement of the French Court of Cassation of 3 May 1994, European Transport Law (ETL) 1995, 685, in which the court held that the carrier to whom one of the successive carriers has commissioned the last phase of the carriage under a separate contract is not the last carrier within the meaning of regulations on successive carriage. Cf. Court of Appeal judgement of 10 February 1988, Lloyd's Law Report (Lloyd's Rep.) 1988, vol. 1, 487-95, in which the court held that the fact that a carrier entrusts successive carriage to a carrier who is not a successive carrier under CMR does not change his status as a successive carrier or his responsibility for the entire carriage, including carriage performed by his subcontractor pursuant to Article 3 CMR.

carrier, when the previous carriers in the contractual chain did not have physical contact with the consignment.[16]

Nevertheless, as a result of the changes made to the conventional rules concerning carriage performed with the participation of subcontracting carriers, these forms of transport have come closer together. They involve the introduction of joint and several liability of the carrier and the subcontracting carrier for damages caused by the latter, and consequently the possibility of direct claims against the subcontracting carrier by the person originally entitled. Recourse claims between these carriers are also regulated, as is the case with successive carriage.

2. INTERNATIONAL RAILWAY LAW

Rail transport was the first branch of transport in which an international convention laying down uniform standards governing the contract of carriage in international transport was adopted. On 13 and 14 October 1890, nine States signed[17] the International Convention concerning the Carriage of Goods by Rail (CIM 1890) in Bern. This Convention entered into force on 1 January 1893.[18] It introduced a rule according to which the railway which accepted the consignment is responsible for carrying out the carriage until the handing over of the consignment. Each railway receiving the consignment together with the consignment note also become responsible for the performance of the carriage by participating in the contract of carriage (Article 27(1) and (2) CIM 1890). Consequently, the sender was granted the right to bring claims against the first railway, the last railway or the railway on whose line the damage occurred (Article 27(3) CIM 1890).

The Convention thus adopted a model of successive carriage, but it did not regulate transport on a subcontracting basis. This was a consequence of the fact that railways in individual countries were, as a rule, state-owned

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[16] The Supreme Court of the Netherlands in its judgement of 11 February 2015, ETL 2016, 109-18, argued in favour of a wide application of the rules on successive carriage.

[17] These were: Switzerland, Germany, France, Austria-Hungary, Italy, Belgium, Luxembourg, Netherlands, Russia. Pursuant to Article 19 of the Treaty between the Principal Allied and Associated Powers and Poland, signed at Versailles on 28 June 1919, Poland undertook to accede to the international conventions referred to in that Treaty, including the 1890 Bern Convention and the additional agreements to that Convention. The Accession Protocol was signed on 23 January 1922 and the Convention entered into force for Poland on 24 February 1922. Cf. Government Statement of 4 April 1922 regarding the Bern International Convention for the Carriage of Goods by Iron Rail, Journal of Laws, No. 76, item 685. For a broad discussion on the process of Poland's accession to the Convention, see Żółciński 1971, 49-52.

[18] The history of the first railway convention is described by Żółciński 1971, 24.

and monopolistic. It was therefore not possible to entrust the carriage to subcontracting carriers nor was the carrier who had signed the original contract able to perform it by himself in the territory of another country. In order to carry out an international carriage involving several countries, the sender had to either to conclude separate contracts with individual railways, which was troublesome, or to use the institution of successive carriage introduced by the CIM 1890 Convention, which involved the railways of individual countries for carriage performed under a single contract.

CIM's later versions (1923, 1933, 1952, 1961, 1970) did not introduce changes in this respect. Nor did the original version of the Convention concerning International Carriage by Rail (COTIF) signed on 9 May 1980 provide for subcontracting. Or perhaps to be more precise, its Appendices A and B containing uniform rules governing international carriage by rail failed to do so.[19]

A change only took place on 3 June 1999, when the Protocol amending the COTIF Convention was adopted in Vilnius, which provided the new content of the conventions and included appendices (the so-called Vilnius Protocol). The changes were the result of the demonopolisation and liberalisation of the rail transport market in the European Union, in particular the separation of infrastructure management activities from transport activities.[20] The very regulations of the contract of carriage (RU/CIM and RU/CIV) introduced provisions for the performance of carriage by subcontracting carriers.

Currently, following the changes made by the Vilnius Protocol, RU/CIM separately regulate transport performed by successive carriers (Article 26) and substitute_carriers (Article 27).

In respect of successive services, the RU/CIM provide for similar joint and several liability of successive carriers, except that an action may be brought against the first or final carrier or against the carrier who performed the part of the carriage during which the event giving rise to the claim occurred (Article 45(1)). An action against other carriers involved in the carriage by way of a counterclaim may be brought. An objection may also be raised against them "in connection with the principal action" arising from the same contract of carriage (Article 45(5)). This means that if a successive carrier other than that referred to in Article 45(1) of the RU/CIM brings an action under the contract of carriage (e.g. compensation for

[19] The main content of this Convention includes public law rules, it addresses, i.a. the establishment of the Bern-based Intergovernmental Organisation for International Carriage by Rail (OTIF), its structure and activities, arbitration and other organisational issues. Whereas, the very regulation of contracts of carriage is included in Appendix A (Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV)) and in Appendix B (Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM)) [hereinafter: RU/CIM].

[20] Cf. Freise 2009, 1237-238.

damage resulting from defective loading operations – Article 13(2) of the RU/CIM), the person entitled may bring a counterclaim against that carrier based on the provisions on liability for damages, as well as raise an objection in the proceedings to set off the carrier's claim against the claim arising from the fact that the damage was caused during the successive carriage. They may also raise an objection that the carrier's claim may be extinguished as a result of a set-off already made against the claim for payment of compensation.

It follows from the above that the impossibility of bringing an action against a successive carrier other than the one referred to in Article 45(1) RU/CIM does not mean that such carrier is not liable for damage to the consignment or resulting from a delay in carriage. He remains in debt with other successive carriers. However, the Convention creates a barrier to claim compensation from such a carrier. The situation of such a carrier resembles to a certain extent the situation of the debtor of a natural obligation. This means that if a carrier other than the one referred to in Article 45(1) of the RU/CIM carries out a voluntary performance for the right holder, its performance is not undue and that carrier himself acquires a recourse claim, to be satisfied according to the rules resulting from Articles 50 and 51 RU/CIM.[21] Similar measures were adopted in the CMR Convention.

Article 45(1) RU/CIM is the original instrument under the railway law, according to which when the carrier required to hand over the consignment is entered in the consignment note with his consent, an action may also be brought against him, even if he has not received the consignment or the consignment note.

A measure unknown to other conventions (or Polish law) involves also a time limit for bringing actions against individual carriers involved in successive carriage. If the claimant has a choice between several carriers, his right of choice ceases as soon as an action is brought against one of those carriers. In this situation, it is difficult to talk about joint and several liability in the sense in which this concept occurs in domestic Polish law.

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[21] The same line was adopted by the Austrian Obersten Supreme Court in its judgement of 20 June 2000, Transport Law 2001, 79. The Court of Appeal assessed the case differently in its judgement of 4 November 2005, Lloyd's Rep. 2006, vol. 1, 429-32, where it held that a carrier other than the first, last or the one on whose part of the route the damage occurred, by paying compensation does not acquire a recourse claim against the carrier that caused the damage and "with some reluctance" dismissed the action. The Court found that compensation was not paid under the provisions of the Convention and that a solution to the problem should be sought outside the Convention system. In the case in which the judgement was passed, payment of the compensation was made by the second carrier in the chain while the fourth carrier was responsible for the damage. Therefore, although the successive carriage took place as a result of subsequent carriers entrusting the performance of the carriage (subcontracting agreement) to other carriers, there was no other direct legal relationship between the plaintiff and the defendant except that which resulted from the construction of the successive carriage.

On the other hand, aviation law served as the model for regulating the situation of subcontracting carriers in RU/CIM (see below). RU/CIM provides in Article 27(4) for joint and several liability of the subcontracting carrier and the operating carrier(s), thereby giving the rightholder the right to directly pursue claims against the subcontracting carrier. This liability is independent of whether the first carrier (contracting carrier) was authorised to entrust the carriage to a subcontracting carrier. However, in contrast to successive carriage, where each of the carriers accepting a consignment together with a consignment note is liable for damage caused throughout the entire route, the joint and several liability of the subcontracting carrier is limited to the carriage performed by him (Article 27(2)). To this extent, the rightholder (the sender or recipient of the consignment) may, at his discretion, make claims against both the contracting carrier and the operating carrier, or against both. However, when bringing an action against a subcontracting carrier, he must prove that the damage occurred at the time when he was in charge of the consignment. Any limitation of liability which RU/CIM provides for in respect of the contracting carrier himself apply to the subcontracting carrier's liability. Any specific agreement under which a contracting carrier accepts obligations not arising from the RU/CIM or waives rights under these provisions will apply to the subcontracting carrier only if he has given his written consent (Article 27(3)). The total amount of compensation payable by the carrier, the subcontracting carrier and their agents or servants whose services they use in the performance of the carriage cannot exceed the maximum amounts of compensation provided for in RU/CIM (Article 27(4)).

The principle that if the claimant has a choice between several carriers, his right of choice ceases as soon as an action is brought against one of those carriers also applies to sub-contracted carriage.

3. AVIATION LAW

The Montreal Convention plays a key role in the regulation of international air transport agreements now. This Convention has in practise replaced the so-called Warsaw system, i.e. the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, as amended.[22] The performance of air carriage under this

[22] 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 (Dz. U. (Journal of Laws) 1933, no. 8, item 49), as amended by The Hague Protocol of 28 September 1955 (Dz. U. (Journal of Laws) 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 (Dz. U. (Journal of Laws) 1965, No. 25, item 167).

Convention has revealed the practise of entrusting the performance of a contract of carriage concluded with customers to other air carriers. There has also been chartering of aircraft, as well as sharing the cargo area of the aircraft between carriers [Konert 2010, 30]. Therefore, the question arose as to who should be considered an air carrier, or the so-called contracting carrier (the one with whom the customer concluded a contract of carriage), or the carrier that actually performed such carriage. These issues were regulated in 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 concluded in Guadalajara on 18 September 1961, which entered into force on 1 May 1964

The Guadalajara Convention extended the provisions of the Warsaw Convention (in the original version or as amended by The Hague Protocol) to actual air carriers. It introduced joint and several liability of the contracting carrier and the actual carrier against the injured party. The Guadalajara Convention, which is a model for later analogous regulations (including the RU/CIM discussed earlier in the version given by the 1999 Vilnius Protocol), introduced a measure according to which an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.

This measure was transferred to the Montreal Convention. As in the current version of RU/CIM, this Convention distinguishes between successive carriage (Article 36) and services under the authorisation of the contracting carrier (subcontracting – Articles 39 to 48). More complicated than rail law, the Montreal Convention regulates the designation of a successive carrier against whom an action may be brought. In the event of damage to the consignment, the sender may bring an action against the first carrier, the consignee entitled to receive may bring an action against the last carrier, and each of them may also bring an action against the carrier who performed the carriage during which the destruction or loss of, or damage to, baggage, or delay took place. These carriers are jointly and severally liable. As regards the other carriers, the Montreal Convention does not even give rise to counterclaims or to raise objections – these carriers are not subject to joint and several liability. However, the Convention does not contain provisions providing for the termination of claims against carriers bearing joint and several liability against whom the person entitled has not brought an action.

The Warsaw Convention was also amended by further protocols, which Poland did not adopt. The multiplicity of amending protocols, which were not adopted by all states – the parties to the original convention – led to the disintegration of the Warsaw system. See Żylicz 2002, 76-78.

4. INTERNATIONAL ROAD TRANSPORT

The CIM Convention (in its 1952 version) has become a model for the regulation of the international carriage of goods by road (CMR Convention). The Convention was signed in Geneva on 19 May 1956 by representatives of nine states: Austria, the Federal Republic of Germany, France, Luxembourg, the Netherlands, Poland, Sweden, Switzerland and Yugoslavia. It entered into force on 2 July 1961 after the deposit of notes of ratification by the first five states: Austria, France, the Netherlands, Yugoslavia and Italy.[23]

The CMR Convention does not, in principle, provide for a separate regulation of carriage performed with the participation of subcontracting carriers, provided that they do not take the form of successive carriage within the meaning of Articles 34 ff. CMR. The exception is the specific type of transport, as regulated by Article 2 CMR (so-called "piggyback" transport). In this case, however, the subcontracting carrier of the road carrier is the carrier of another mode of transport, carrying the car together with the consignment. The issue of such transport goes beyond the scope of this article [Wesołowski and Dąbrowski 2017, 273-83].

However, there is no doubt that Article 3 CMR applies to carriage by subcontracting carriers, whereby the carrier is responsible for the acts and omissions of his agents and servants and of any other persons of whose services he makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment, as if such acts or omissions were his ow. Unlike RU/CIM and the Montreal Convention, there is no basis for direct claims against a subcontracting carrier.[24] Under these provisions, the sender must enforce his claims in accordance with the chain of contractual relations, i.e. the sender against the first carrier and the latter against his subcontracting carrier.[25] The situation of the recipient, however, is different. Usually, in the contract concluded between the sender of the shipment and the first carrier and in the contract concluded between this carrier and his subcontracting carrier, the same person is indicated as the

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[23] As of 20 August 2025, 58 States are Parties to the CMR Convention.

[24] See judgement of the Antwerp Court of Appeal of 6 December 1999, The Case Law of the Port of Antwerp (JPA) 2000, 61-73; judgement of the Supreme Court of 9 July 2007, www.poderjudicial.es, No. 4811/2007.

[25] This is noted by e.g. Hill 1976, 198. See also judgements of the Antwerp Court of Appeal of 15 March 1989, European Transport Law 1990, 574 and the German Federal Court of Justice (BGH) of 24 October 1991, European Transport Law 1992, 83, as well as the Italian Court of Cassation of 16 may 2006, (RDIPP (Journal of Private International and Procedural Law) 2007, 1116-1117). However, the procedure of some countries also allows actions to be brought directly against subcontractors. They may also be sometimes liable on the basis of *ex-prescription* liability known to some legal systems. Cf. judgment of the Italian Court of Cassation of 26 November 1980, RDIPP (Journal of Private International and Procedural Law) 1981, 937.

recipient of the shipment (this is especially the case in typical situations in which the subcontracting carrier actually performs the entire carriage). The recipient, if he is entitled to pursue claims, therefore has the right to do so against both the first carrier and his subcontracting carrier.[26] However, they are liable for the damage on a different basis. It is a matter of non-performance or improper performance of various contracts (concluded with the original sender and between carriers). Obtaining compensation from any of the carriers by the entitled person also releases the other carrier from liability in this respect. It should be assumed that the liability of both carriers is not joint and several (no explicit normative basis), but liability *in solidum*. Of course, this does not close the issue of settlements between carriers.

The CMR Convention, on the other hand, contains an extensive regulation of successive carriage (Articles 34 to 39 CMR). Successive carriers, by accepting the same goods and the consignment note,[27] become a party to the first contract concluded between the sender of the goods and the first carrier. However, Article 36 CMR restricts the number of successive carriers against whom claims may be made for damage to the consignment and claims resulting from delay to the following: the first carrier, the last carrier or the carrier who performed that part of the carriage during which the event causing the loss, damage or delay of delivery occurred. An action may be brought against several of these carriers at the same time.

As in RU/CIM, however, the limitation of the number of carriers against whom the rightholder may bring an action does not apply to counterclaims or objections raised in the examination of an action arising from the same contract of carriage.

The Convention does not use any term which specifies the formula whereby successive carriers are liable for loss, damage or delay in carriage. In particular, it does not state that this is a question of joint and several liability. The literature, therefore, does feature a view that it is about responsibility *in solidum*.[28] However, this view is presented with excessive caution. The lack

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[26] See, however, judgement of the Italian Court of Cassation of 26 January 1995, Transport Law (DT) 1996, 282, as well as judgement of the Court of Milan of 9 April 2001, II Maritime Law (DM) 2003, 176-183, in which the court found, however, that that the recipient is entitled to pursue claims only against the subcontractor.

[27] On the so-called constitutive nature of the consignment note in respect of successive carriage see Messent and Glass 1995, 267-78 and Donald 1981, 44-46, as well as Loewe 1976, 396. The established line of judicial decisions also takes such a stand (cf. e.g. judgement of the Court of Appeal in Athens, European Transport Law 1987, 65). However, the Commercial Court of Antwerp took a different position in its judgement of 16 April 1975, European Transport Law 1975, 548-553, in which it considered the carrier operating on the last national section of an international carriage as a successive carrier despite the lack of a consignment note.

[28] The same in Rodière 1971, 584 and the Antwerp Court of Appeal in its judgement of 14 December 1983, European Transport Law 1983, 809.

of a clear indication that this is joint and several liability in a situation where the provision refers to the characteristics of this type of liability should not be an obstacle to such classification of the liability of successive carriers under the titles mentioned therein. The question becomes even more clear if the provision of Article 36 CMR is read as modifying the principle referred to in Article 34 CMR. All carriers with the liability referred to in Article 36 CMR shall be liable on the same factual and legal basis, which makes it impossible to qualify this liability as liability *in solidum*.[29]

5. POLISH LAW

Polish law also contains provisions on subcontracted carriage (Article 789(1) CC and Article 5 of the Transport Law) and successive carriage (Article 789(2) CC and Article of the 6 Transport Law).

The provisions on subcontracted carriage do not provide for joint and several liability of the subcontracting carrier together with the first carrier for damages caused by the subcontracting carrier. There is also no provision that would allow direct redress against the subcontracting carrier. Therefore, the sender of the consignment may bring an action only against the first carrier. This order of pursuing claims is not affected by the fact of entering the surname name (business name) of the subcontracting carrier in the consignment note or them signing the consignment note. However, the sender may pursue claims against subcontracting carriers where the action of such a carrier would bear the marks of tort (e.g. theft of goods by the carrier's employees).[30] However, the comments expressed above under the CMR convention regarding the possibility of direct redress between the recipient and the subcontracting carrier, due to the identity of the recipient in both carriage contracts (between the original sender and the first carrier and the subcontracting carrier), remain valid.

The design of successive carriage regulated in Article 789(2) CC and Article 6 of the Transport Law is slightly different. The systemic interpretation of the Code provisions indicates quite clearly that successive carriage is not a type of carriage different from subcontracting, but a sub-type of the former. It takes effect as a result of acceptance by the subcontracting carrier

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[29] The same in Clarke 2009, 168; Haak 1986, 113. The same also in German literature. See e.g. Basedow 1997, Article 34, 15; Koller 2007, Articles 34, 6; Thume 2007, Articles 34 and 7. See also the reasons for judgements of the Polish Supreme Court of 26 March 1985, ref. no. I CR 304/84, OSNIC 1986, No. 1, item 14; of 13 October 2010, ref. no. VI ACa 306/10, Lex no. 686781; of 6 February 2008, ref. no. II CSK 469/07, OSNIC 2009, No. 4, item 58. See also judgement of the District Court of Barcelona of 29 November 2004, www.poderjudical.es, No. 761/2003.

[30] See judgment of the Court of Appeal in Poznań of 16 September 2010, ref. no. I ACa 615/10, Lex no. 756686.

of the consignment on the basis of the same consignment note. The Transport Law regulates successive carriage as a separate type of carriage, which occurs by several carriers performing the same or different modes of carriage under one contract of carriage and one carriage document. Apart from this difference, the regulation in both these legal acts is identical. It provides for joint and several liability of all successive carriers. It does not introduce any restrictions (personal, time) on the possibility of pursuing claims against jointly and severally liable carriers. The provisions of the Civil Code and the Transport Law also govern recourse claims between carriers that are jointly and severally liable.

FINAL NOTES

As can be seen from the above comments, individual normative acts concerning the contract of carriage of goods regulate in different ways the issue of designating carriers against whom it is possible to bring an action by the person originally entitled (the sender or recipient of the consignment) in a situation where several carriers are involved in the carriage. The differences apply to both successive and subcontracted operations. This is not conducive to the clarity of the image or to the drawing of more general conclusions. This is also compounded by differences in procedural rules of individual countries, which modify in practice (contrary to the assumptions underlying the unified regulation) the conventional rules (e.g. in terms of the possibility of direct claims against subcontracting carriers under the CMR convention).

However, the introduction in international transport law of joint and several liability of the subcontracting carrier with the first carrier for damage caused during carriage performed by the former in practice eliminates the differences between the two types of carriage, in particular in view of the personal limitations provided for in respect of successive carriers against whom an action may be brought. The blurring of differences is also encouraged by the case law practice of some courts under CMR who broadly interpret provisions on successive carriage and apply these provisions in situations where carriers considered to be successive have not physically taken over the consignment and the consignment note from each other. Undoubtedly, this is a consequence of a lack of the possibility of direct redress under the CMR convention by persons originally entitled against subcontracting carriers.

The above questions the sense of distinguishing successive carriage, especially since – as can be seen from the above comments – they developed during the time of the monopoly position of railways of individual countries. They are also closely related to the idea of a consignment note, which,

due to dematerialisation of documents in business transactions, loses its importance. In addition, the design of successive carriage raises reasonable doubt from the point of view of the principle of safety of trading. It may arise against the will and even knowledge of some carriers.[31] Nevertheless, they are liable for damage caused by other carriers.

Therefore, resignation from successive carriage, as a somewhat anachronistic legal form of performing carriage by many carriers, which does not conform to the current economic conditions seems to be the appropriate solution in the future regulation of the contract of carriage in Polish law. At the same time, it should be postulated that joint and several liability of the subcontracting carrier together with the contracting carrier be introduced for damage caused by the former. The possibility of directly pursuing claims against the subcontracting carrier would simplify and speed up the process of settling claims. A model could be provided for by the Montreal Convention, which does not (as is the case under RU/CIM) terminate claims when actions are brought against those carriers who are jointly and severally liable and not covered by the claim.

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[31] See Wesołowski 2013, 734-35.

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TRADER INFORMATION REQUIREMENTS AS PER EU REGULATION 2023/988 ON GENERAL PRODUCT SAFETY (GPSR) AND CONSUMER PROTECTION IN THE E-COMMERCE MARKET

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Abstract. The article presents the obligation of economic operators to provide information in the field of general product safety, as introduced by Regulation (EU) 2023/988 (GPSR) of the European Parliament and of the Council on general product safety. The objective of the present study is to demonstrate the impact of these legal regulations on enhancing the safety of non-food products. The central argument of this thesis is that the obligation to inform imposed on traders by the GPS Regulation serves to bolster consumer protection within the e-commerce market. The provision of reliable safety-relevant information facilitates a more thorough evaluation of the product, thereby mitigating the risk of consumers purchasing hazardous goods. This, in turn, serves to uphold the core value of public economic law, namely the consumer right to be informed.

Keywords: consumer protection; right to information; general product safety.

INTRODUCTION

The development of the e-commerce market has been significantly influenced by technological progress, including the digitisation of the economy and the emergence of the Coronavirus pandemic. A paradigm shift in consumer purchasing preferences has been observed, concomitant with a transition in the modus operandi of consumer product acquisition, characterised by an escalating prevalence of online marketplaces. A body of research has indicated that this trend is set to continue, and that the proportion of electronic sales platforms in retail trade is likely to rise. The underlying cause of these changes is indisputably the swift and straightforward capacity to procure

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a comprehensive array of products from across the globe, frequently exclusive to this specific sales channel. However, the phenomenon of digitisation of shopping also generates new threats for consumers, with a growing risk of products that do not meet the safety standards required in the EU market. Consequently, new transparency obligations were imposed on businesses along with a more effective mechanism for supervising products placed on the EU internal market, with the aim of bolstering consumer protection in the e-commerce market.

In addressing this challenge, the European Parliament and the Council promulgated the Regulation (EU) 2023/988 of the European Parliament and of the Council on general product safety (hereinafter referred to as the General Product Safety Regulation, GPSR),[1] which formally entered into effect on December 13, 2024. The act imposes new obligations on businesses in terms of horizontal product safety, offered through all sales channels, including online, whereas public authorities are entrusted with conducting effective, multi-level controls and applying supervisory instruments. A preliminary analysis of the provisions of the regulation points toward an increase in the requirements to inform consumers about product characteristics. The provision of reliable information enables a proper assessment of the product and constitutes the first step in minimising the risk of purchasing a dangerous product.

In the present article, the author conducts an analysis of the information obligations incumbent upon economic operators in the domain of general product safety, as established by the GPS Regulation. The central argument of this thesis is that the obligation to inform imposed on businesses by the GPS Regulation serves to enhance consumer protection within the e-commerce market. The rationale for this assertion is that by being provided with reliable safety-relevant information, consumers are enabled to make informed assessments of products, thereby mitigating the risk of purchasing hazardous items. Moreover, this thesis contends that the GPSR Regulation also serves to uphold the fundamental value of public economic law, namely the right of consumers to be informed.

1. CONSUMER RIGHT TO INFORMATION

The right of consumers to be informed is considered a fundamental value of public economic law and the basis for effective consumer protection in the market. The role it plays in shaping the relations between EU

[1] Regulation (EU) 2023/988 of the European Parliament and of the Council of 10 May 2023 on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council and Directive (EU) 2020/1828 and repealing Directive 2001/95/EC of the European Parliament and of the Council and Council Directive 87/357/EEC, OJ EU L 135 of 23 May 2023, p. 1.

business and consumers within the internal market is pivotal. It facilitates informed purchasing decisions among consumers and protects them from unfair practices. The right of consumers to information is guaranteed under EU and national law. As per Article 169 TFEU, the European Union is bound to protect the health, safety and economic interests of consumers, with the aim of promoting the interests of consumers and ensuring a high level of protection. This is achieved, in part, by promoting the right of consumers to information and education about protecting their interests.[2] In accordance with Article 12 TFEU, consumer protection has been incorporated into all EU policy areas, including product safety policy. Article 38 of the Charter of Fundamental Rights of the European Union (CFREU) serves to reinforce the existing framework of consumer protection by ensuring that a high level of such protection is to be maintained within EU policies.[3]

Concurrently, at the national level, the legislator ensures consumer protection in Article 76 of the Polish Constitution. This establishes a mandate for public authorities to safeguard consumers, users and tenants against actions that jeopardise their health, privacy and safety, as well as against exploitative market practices. The extent of this protection is delineated by relevant legislation.[4] Given that the Polish consumer law is largely EU-regulated, the protection of Article 76 of the Polish Constitution is inherently linked to the principles and requirements of European law. It is also important to note the comprehensive concept of security outlined in Article 76 of the Constitution of the Republic of Poland. In particular, the legal security encompasses the establishment of citizens' trust in the state and its institutions across all domains of trade. This is further exemplified by the right to be informed.[5] The constitutional principle of the right to information is delineated and elucidated in numerous legislative instruments, and in systemic terms, in the 30th of May 2014 Act on Consumer Rights,[6] which formally codifies a fundamental compendium of information obligations for traders, thereby attesting to the legislator's pronounced emphasis on consumer protection. It is evident from the content of this Act that the legislature is keen to emphasise the necessity of fortifying the position of consumers in their interactions with traders. It also stresses that the information should

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[2] Articles 12 and 169 of the Treaty on the Functioning of the European Union (consolidated version), OJ EU, 2016, C 202/4.

[3] Charter of Fundamental Rights of the European Union, OJ EU C 326/391.

[4] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended; Act of 16 February 2007 on competition and consumer protection, Journal of Laws of 2024, item 1616.

[5] See Supreme Court judgments: of 24 October 2024, ref. no. II NSNc, 45/24, Lex no. 3787551; of 5 November 2024, ref. no. II NSNc 182/24, Lex no. 3783365, of 22 August 2024, ref. no. II NCNc 113/24, Lex no. 3748281.

[6] Journal of Laws of 2024, item 1795.

be presented in a clear and comprehensible manner. This means that the Act applies to the content and the delivery of information. In essence, the content provided should be linguistically accurate and composed using vocabulary that is easily understood by the general population and does not require specialist knowledge to comprehend.

The right of consumers to fair, reliable and complete information applies to all areas of their relations with economic operators and is a constant focal point for both EU and national legislators. The ongoing digitisation of economic transactions and public services has prompted EU legislators to intensify their efforts in light of the evident lack of sufficient knowledge among consumers about the enforcement of their rights and the pursuit of remedy claims, as well as the means of protection and legal instruments available to them.

The right of consumers to information has been subject to analysis from a number of perspectives in relevant literature over a considerable timespan. It is considered a fundamental warrant of transaction security [Węgrzyn 2013; Rutkowska-Tomaszewska 2021, 6-12; Maliszewska-Nienartowicz 2004; Zymonik 2011, 768-77; Zymonik and Cieśliński 2007; Żywicka and Wierzbowski 2023, 1162-173]. The works and commentaries of legal scholars place significant emphasis on the importance of the right to information and education, which derives from the underlying belief that a well-informed consumer is a well-protected consumer [Łętowska 2004, 123; Malczyńska-Biały 2010, 121-22]. In recent years, the issue of financial services has dominated the discourse within the public domain, scientific publications, and court rulings in relation to increasing the availability and transparency of information [Ziobrowska 2021]. Nonetheless, it would be an oversight to disregard the issues that arise from inadequate information in retail trade, particularly within its rapidly expanding e-commerce segment. The sheer diversity of products placed on the market by sales platforms, including those of third-country origin, poses a risk of misinformation and thus compromises the interests of consumers. These are consequently exposed to the purchase of potentially dangerous products that fail to comply with the EU standards. Confronted with the need of novel legal requirements concerning information about products posted online and new legal mechanisms for effective supervision of e-commerce, the legislator introduced legislative rules governing online trade at EU level, resulting in the adoption in 2019 of Directive (EU) 2019/2161 of the European Parliament and of the Council – Omnibus.[7] Under the new Directive, businesses are now subject to additional information obligations in connection with the use of complex marketing practices, including in the area of product

[7] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU as regards the better enforcement and modernisation of Union consumer protection rules (Text with EEA relevance) OJ EU of 18 December 2018 L 328/7.

pricing. Consumers, in turn, are protected in relation to the exercise of their right to withdraw from a contract. Nevertheless, to ensure a high degree of protection of consumer interest, it was necessary to re-evaluate the existing principles of product safety in a comprehensive manner.

With respect to the right to be informed, it is important to acknowledge the New Consumer Agenda Strengthening consumer resilience for sustainable recovery of 13 November 2020, which contains an updated vision for consumer protection policy for 2020-2025. The Agenda demonstrates the Commission's reaffirmed guarantee of upholding the right to information, focusing on the following five key priority areas: 1) as to the green transition, the objective is to rise to the emerging challenges posed by the ecological transformation with respect to consumer rights and empowerment, as well as to provide all individuals with sustainable products and lifestyles, irrespective of their geographical location or income; 2) as to the digital transformation, the objective is to create a safer online space for consumers, where their rights are protected, and to provide equal functioning conditions for everybody to enjoy innovative and improved services; 3) with respect to the effective enforcement of consumer rights, the objective is to address the impact of the COVID-10 pandemic on consumer rights, fight greenwashing and unethical online commercial practices, such as consumer manipulation or exploitation of personalised marketing; 4) as to the specific needs of certain consumer groups, the Commission is to take into consideration particularly vulnerable consumers who may require extra protection in specific situations; 5) as to the global context of consumer protection, the aim is to safeguard the transport of goods and protect EU consumers against unfair trading practices by non-EU suppliers through market surveillance and close cooperation with respective authorities in international partners.[8]

Though general in nature, the assumptions contained in the communication also include the obligation to inform consumers about the characteristics of the products offered, including their properties, design, intended use, materials from which they are made and origin, regardless of where they were manufactured. It is further intended to implement the horizontal product safety requirements in force in the EU.

2. BASIC PRINCIPLES OF GENERAL PRODUCT SAFETY IN THE GPS REGULATION IN THE CONTEXT OF THE RIGHT TO INFORMATION

A preliminary review of the provisions of the GPS Regulation suggests that the fundamental principles of product safety that do not fall under the

[8] Communication, https://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=CELEX:52020DC0696&from=PL [accessed : 18.09.2025].

scope of harmonised legislation bear a notable resemblance to the provisions delineated in the predecessor legislation, the General Product Safety Directive 2001/95/EC.[9]

Pursuant to Article 3 of the GPSR, the term 'safe product' pertains to any product which, under normal or reasonably foreseeable conditions of use, including the actual duration of use, does not present any risk or only the minimum risks compatible with the product's use, considered acceptable and consistent with a high level of protection of the health and safety of consumers. The term *risk* is defined as the combination of the probability of occurrence of a hazard causing harm and the severity of that harm. The term *serious risk* denotes a risk which, on the basis of a risk assessment and taking into account the normal and reasonably foreseeable use of the product, is considered to require rapid intervention by market surveillance authorities. This also applies in cases where the effects of the risk are not immediate. At this point, however, it is imperative to acknowledge that the evaluation process of product safety pertains to all the vital elements of the product. This includes its characteristics, such as its physical, mechanical, and chemical attributes, as well as its configuration. Additionally, it extends to the particular requirements and hazards that the product might pose to specific demographics of consumers, including children, elderly persons, and individuals with disabilities, who are susceptible to potential risks. These may also involve environmental hazards, insofar as the product poses a threat to the health and safety of consumers. The said evaluation must furthermore accommodate the health hazards engendered by digitally connected products, encompassing mental health hazards, in particular for vulnerable consumers, most notably children. Consequently, when evaluating the safety of digitally connected products that could potentially impact children, manufacturers must ensure that the products they offer on the market meet the highest standards of safety, protection and privacy, in the best interests of children, from the design stage onwards.[10]

It is important to recognise that the recently introduced general product safety standards address the utilisation of novel technologies (including artificial intelligence) in products, particularly those employed in cyberspace, with regard to their effect on consumers' mental well-being. Objects which are connected to other objects, or non-integrated objects affecting the functionality of another object, may pose a risk to product safety, which should be given due consideration as a potential hazard. The safety of an object should not be compromised by its connections and interdependencies with external objects. New technologies have the potential to create novel

[9] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, Official Journal L 011, 15 January 2002, pp. 0004-0017.

[10] See Recital 23 of the GPS regulation.

risks to consumer health and safety or modify the manner in which existing risks may materialize. An illustration of this would be external intervention, which may entail circumventing the product's security features or altering its characteristics. New technologies may significantly modify products, e.g. via software updates. These modifications should be risked separately if safety is affected. The EU legislator stresses that specific risks in cyberspace affecting consumer safety, as well as protocols and certifications, may be addressed in sectoral (vertical) legislation. In instances where sectoral legislation is not applicable, however, it is imperative to ensure that economic operators and national authorities duly consider the risks associated with new technologies at the product design and assessment stages, as appropriate, to prevent any compromise to safety resulting from changes made to the product.[11]

The accelerated digitalisation of economic transactions and the pervasive availability of the internet have collectively augmented the accessibility of products manufactured in diverse global regions and disseminated through an array of sales channels. The distribution of these products via digital sales platforms, which are registered in various countries (including those outside the European Union), has two main implications. On the one hand, it has facilitated consumer access to a wider range of goods. However, this development is accompanied by a significant increase in the risk of hazardous products being placed on the market, thereby endangering the health and even the lives of consumers. The pre-existing Directive 2001/95/EC, which established the overarching principles for product safety, has been deemed inadequate in this regard, as it failed to encompass products entering the internal market from third countries, predominantly through online marketplaces. The introduction of the new GPSR Regulation has addressed this void by establishing novel safety standards that apply to all products placed on the EU market, irrespective of their status as new, used, repaired or reconditioned,[12] and irrespective of the sales channel, including digital platforms. The scope of this legislation encompasses all commercial entities involved in the placement of products on the market within the European Union, including manufacturers, distributors, importers, and digital platform providers. The geographical location of these entities is not a determining factor for the application of the regulation. The regulation imposes more strict information requirements on businesses in terms of the products they offer, with the objective of ensuring comprehensive compliance with all safety aspects stipulated within the GPSR Regulation. A multi-faceted assessment of product safety should be reflected in the product information provided, inter alia, on the website where the product is offered.

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[11] See Recitals 24-26 of the GPS regulation.

[12] The GPS Regulation does not apply to medicinal products for human and veterinary use, food, feed, living plants and animals, plant protection products, or antiques.

3. SAFETY INFORMATION REQUIREMENTS OF TRADERS IN GPSR

3.1. General product information requirements

The consumer protection provisions for non-food product purchasers are strengthened by the imposition of a comprehensive array of general information obligations on manufacturers, importers and distributors at various stages of the supply chain. Concurrently, EU legislators underscore that the requirements of economic operators with regard to product safety should be proportionate to their role in the supply chain. It is incumbent upon all actors within the supply and distribution chain to undertake requisite measures to guarantee the provision of safe, GPSR-compliant products on the market. As a case in point, when verifying whether the manufacturer, and, where applicable, the importer, have fulfilled their obligations, distributors should be required only to verify the facts, as opposed to evaluating the information provided by them. In addition, economic operators are at liberty to provide information on product and economic operator identification, as well as instructions and safety information in digital form using electronic solutions such as QR codes or matrix barcodes.[13] It is noteworthy that the significance of providing reliable product information from the perspective of consumer protection has been acknowledged by legal commentators [Trzebiatowski 2021, 2-3].

Among the legal obligations imposed on manufacturers, they are to compile and maintain the technical documentation necessary to substantiate the safety of the product. This documentation must be rendered in a language comprehensible to consumers, as determined by the Member State within which the product is made available. In order to ensure the traceability of products, they must be labelled with a type, batch or serial number, or other identifiable element, in a manner that is clearly legible to the consumer. In instances where the size or nature of the product does not permit such labelling, the necessary information must be provided either on the packaging or in a document accompanying the product. Manufacturers are required to provide their name or registered trade name, or registered trade mark, along with their postal and electronic address, and the postal or electronic address of a single point of contact where they can be contacted, if different from the manufacturer's address. In addition, manufacturers are to ensure that their products are accompanied by clear instructions and safety information in a language easily understood by consumers, as determined by the Member State in which the product is made available.

In this regard, it is important to note that EU legislators are guided by the principle of proportionality, whereby the amount of information

[13] See Recital 21 of the GPS regulation.

required from manufacturers in technical documentation should be adequate to the complexity of the product and the potential risks identified by the manufacturer. Manufacturers ought to furnish a general description of the product and indicate the elements necessary to assess its safety. In the case of complex products or products posing a potential risk, this information should be more detailed. In instances where the product conforms to European standards or other elements employed to meet the general safety requirements stipulated in the GPSR, a comprehensive list of the pertinent European standards or other elements should be provided.

In the event that a manufacturer becomes aware of, or has reasonable grounds to believe, based on the information available to them, that a product they have placed on the market may pose a safety concern, they are obligated to take the necessary corrective measures to ensure the product is in accordance with the established requirements. These may include withdrawing the product from the market or initiating a targeted recall, as deemed appropriate. Furthermore, they are required to inform consumers of the potential risks associated with using the product and to liaise with the relevant market surveillance authorities of the Member States in which the product has been made available. Another obligation is to establish and disclose designated communication channels, including a telephone number, e-mail address, or a designated section of the website, in consideration of the accessibility requirements of persons with disabilities. This facilitates the lodgement of consumer complaints and the communication of safety concerns to manufacturers, including accidents experienced by consumers with the product. The manufacturer must then initiate an investigation of all such notifications and complaints received.

In accordance with the legal definition of a manufacturer as outlined in Article 3(8) of the GPSR, the aforementioned obligations are incumbent upon any natural or legal person who markets a product under their own name or trademark, or who makes a substantial modification to a product with the potential to impact its compliance with the requirements of the Regulation.

A number of these obligations apply to importers and distributors. These parties are obligated to ensure that the product they import is accompanied by clear instructions and safety information in a language that is easily comprehensible to consumers. The specific language to be used is determined by the Member State in which the product is made available on the market. It falls upon the responsibility of importers to provide their name or registered trade name or registered trade mark, postal and electronic address, and the postal or electronic address of a single point of contact where they can be contacted, if different from the importer's address, and information

about the manufacturer. Furthermore, it is obligatory for them to retain copies of the technical documentation for a period of 10 years.

The GPS Regulation, in essence, underscores the transparency of information within the supply chain, thereby enforcing the right of consumers to access product-related information. The information requirement imposed on all entities in this process is to ensure product identification and to provide information about the manufacturer and other relevant economic operators throughout the supply chain. This facilitates the identification of the provenance of a product, thereby significantly enhancing the level of safety for consumers. The solution adopted has been shown to facilitate the identification of economic operators and, where appropriate, the effective and proportionate implementation of corrective measures in relation to unsafe products, such as the recall of specific products. It is, therefore, clear that effective product identification and the provision of information regarding the manufacturer and relevant economic operators are pivotal in ensuring that consumers, including persons with disabilities, as well as market surveillance authorities, obtain reliable information on hazardous products. This, in turn, serves to strengthen confidence in the market and avert unnecessary disruptions to trade.

3.2. Safety information requirements of e-commerce operators in GPSR

The overarching framework for electronic commerce, in addition to a number of the obligations of online platform providers, are established within the provisions of Directive 2000/31/EC of the European Parliament and of the Council (EU). Meanwhile, the responsibility and accountability of online intermediation service providers with regard to illegal content, including dangerous products, is governed by Regulation (EU) 2022/2065 of the European Parliament and of the Council.[14] In consideration of the legal framework of horizontal nature delineated in the aforementioned Regulation, and acknowledging the substantial role of online marketplace providers in mediating between businesses and consumers in relation to the sale of products, it was deemed imperative to introduce specific requirements to effectively combat the sale of dangerous products online. The EU legislator recognised that consumers who purchase products online are most vulnerable to misinformation about the product and, as a result, to purchasing a product that does not meet the requirements, due to the nature of distance contracts.

The GPSR has therefore established comprehensive requirements for online sales, extending to those conducted via sales platforms. Nota bene,

[14] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on the Digital Single Market for Services and amending Directive 2000/31/EC (Digital Services Act), OJ EU L.2022. 277/1.

when establishing obligations for individual entities within the product supply chain, the EU legislator considered the possible case in complex business models related to online sales where a single entity may offer a diverse range of services. In essence, the categorisation of entities under the Regulation is dependent upon the specific nature of the services provided in relation to a given product, with the result that the same entity may be classified within different categories of business models. In the event that an entity provides solely online intermediation services in relation to a given product, it is classified exclusively as a provider of an online trading platform for that product. The situation is different, however, when one entity provides online marketplace services for the sale of a given product, and at the same time acts as an economic operator (i.e. a manufacturer, importer or distributor). Under the Regulation, in such cases, this entity performs two roles. Consequently, it is also classified as the relevant economic operator. Under such circumstances, the entity in question is bound by the obligations of a supplier, as well as those of a manufacturer, importer or distributor, as stipulated in the Regulation. To illustrate this point, if an online marketplace provider sells a product that it has manufactured itself, then it is considered a manufacturer in relation to that specific product. Conversely, should an entity sell products under its own brand, it is considered a manufacturer and is therefore obligated to adhere to the requirements pertinent to that role. Furthermore, certain entities may be identified as fulfilment service providers, should they offer fulfilment services.

As for products offered for sale online or via other forms of distance sales, the product in question should be regarded as available on the market if the offer of sale is directed at consumers within the European Union [Lubasz and Namysłowska 2025; Czech 2020]. An offer for sale should be considered to be targeted at EU consumers if the economic operator in question directs its activities in any way towards a Member State. The following factors should be taken into account in order to determine whether or not an offer is directed at consumers in the EU: the geographical areas to which shipment is possible, the languages available for placing an offer or order, payment methods, the use of the currency of a Member State, or a domain name registered in one of the Member States. In the context of online sales, it is not sufficient for the interface of the trader or online marketplace provider is accessible within the Member State where the consumer is established or resides.[15]

With respect to the specific information obligations imposed on traders engaged in distance sales (including online marketing), Article 19 of the GPSR Regulation is of paramount importance. This article stipulates that every operator that makes goods available on the market online must include

[15] See Recital 21 of the GPSR regulation.

at least the following information in its offer: 1) The name or registered trade name or registered trade mark of the manufacturer, along with the postal and electronic address at which they can be contacted; 2) In the event that the manufacturer is not domiciled or established in the Union, the name, postal and electronic address of the person responsible in the EU must be provided; 3) Information enabling the identification of the product, including its image, type and other product identifiers; 4) Any warnings or safety information that should be placed on or in the packaging, or included in an accompanying document written in a clear and understandable manner, as determined by the Member State in which the product is made available on the market.

The purpose of these provisions is to ensure that consumers purchasing products online are able to access the necessary information regarding the product. Online marketplace providers are obliged to designate a single point of contact, enabling consumers to communicate directly and rapidly regarding product safety concerns.

Furthermore, online marketplace providers are subject to additional specific information obligations as outlined in Article 22 of the GPSR. In particular, providers must: 1) disclose the information stipulated in Article 19 of the GPSR Regulation, as well as a statement confirming their commitment to offering products that are in compliance with the Regulation; 2) withdraw dangerous products from the platform on the basis of information available on the Safety Gate Portal; 3) remove content referring to an offer of a dangerous product from the marketplace and disable access to such content or display an appropriate warning, in accordance with an order received from the market surveillance authority; 4) suspend their services to sellers who frequently offer products that do not comply with the GPSR Regulation; 5) cooperate with market surveillance authorities by, among other things, providing them with access to the interface and data from the platform.

Online marketplace providers also play a key role in the process of recalling dangerous products. They are obliged to provide consumers with appropriate and timely information on their online platforms, as well as to directly notify all affected consumers who have purchased the product through their interfaces. This notification is required in the event of a product recall for safety reasons of which they have actual knowledge, or where consumers need to be made aware of certain information in order to ensure the safe use of the product ('safety warning'). It is important to note that fulfilling the information obligations imposed on online marketplace providers towards consumers is connected with corresponding obligations towards market surveillance authorities, as well as the obligation to cooperate with economic operators (manufacturers, importers, distributors) in the rapid exchange of product information.

In light of the expanding role of online sales platforms in the business world, it is vital to recognise the significance of these platforms in the supply chain. From a product safety and consumer protection standpoint, marketplace providers play a pivotal role, enabling traders to access a broader customer base. Providing product information on websites that complies with the provisions of the GPSR Regulation ensures transparent, consistent, reliable and efficient access to product information, including potentially hazardous properties. This facilitates effective decision-making processes for purchasers, reducing the risk of purchasing dangerous products. It is therefore clear that, by complying with the information obligations of the GPSR Regulation, online marketplace providers directly contribute to increasing the protection of consumers' health, life and safety within the product safety system.

CONCLUSIONS

The considerations outlined in this article, concerning the impact of the information obligations imposed on businesses by the GPSR Regulation on the strengthening of consumer protection in the e-commerce sector, serve to substantiate the initial hypothesis that the aforementioned information obligations of businesses, as regulated by the GPSR Regulation, indeed contribute to the enhancement of consumer protection within the e-commerce market. This is achieved by facilitating the assessment of products through the provision of reliable information, thereby mitigating the risk of consumers acquiring hazardous products, while concurrently fulfilling the fundamental principle of public economic law – the consumer's right to information.

The following conclusions can be drawn from the foregoing findings:

1. Transparent information, including the consumer's right to information, has been protected by EU law and public economic law in various areas for many years. However, due to the technological advancement of economic processes, this protection is becoming increasingly important. Recent amendments to EU regulations, which have led to an augmentation in product obligations, reflect this phenomenon. The introduction (or update) of legal measures with the aim of safeguarding consumer interests constitutes a preventative measure, thereby empowering consumers to make informed purchasing decisions and, consequently, mitigating the risk of procuring a hazardous product. Product information obligations are therefore the primary legal measure in the system of effective consumer protection within the framework of general product safety.
2. The GPSR has been developed to address the expectations of the contemporary information society and to cater to the needs of consumers in the

digital age. The recently introduced general product safety standards encompass a multifaceted, contemporary dimension of product risk evaluation, encompassing the integration of advanced technologies (e.g. artificial intelligence) within products and their repercussions on consumers' mental well-being. These standards are meticulously designed to address the diverse requirements and age demographics of consumers. Manufacturers are obliged to consider these issues throughout the design and production stages, as well as in the product information provided to consumers. The approach adopted has been shown to increase consumers' knowledge and awareness of the various properties of the products they purchase, thereby ensuring their protection.

3. As highlighted in the GPS Regulation, the transparency of information within the product supply chain is reflected in the availability of product information to consumers. The information requirement imposed on all entities in this process is to ensure product identification and to provide information about the manufacturer and other relevant economic operators throughout the supply chain. Thanks to the adopted solutions, consumers can easily trace the source of a product, which significantly increases their level of safety.
4. All entities involved in the supply chain offering products within the European Union are subject to information requirements. This includes entities operating within third countries and regardless of the delivery route. Consumers are assured of the reliability, consistency and compliance with uniform legal standards of information provided on all products, irrespective of their provenance, when offered within the EU.

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SUPPRESSION (DISSOLUTION) OF PARISHES PURSUANT TO THE PROVISIONS OF THE CANON LAW

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Abstract. In Cano. 515 § 2 of the 1983 Code of Canon Law, the ecclesiastical legislator stipulates that "[...] the abolition of parishes, [...] belongs exclusively to the diocesan bishop, who may not [...] abolish them, [...] without hearing the council of priests." Although a parish, as a defined community of the faithful, is erected on a permanent basis in the particular Church, the legislator himself provides for the possibility of its liquidation when the appropriate canonical prerequisites for this occur with the prescribed procedure. The subject of this submission is the issue of the liquidation of a parish in terms of the norms of canon law. The article is an attempt to answer the questions – problems: whether there is the possibility of liquidation of a parish and what are the reasons for this, which ecclesiastical authority is authorized to abolish a parish, and what is the case of the procedure associated with this act.

Keywords: parish; bishop; priestly council; consultation; decree.

INTRODUCTION

By the decree of His Excellency the Bishop of N. dated 24th July 1992, the said parish of N. was suppressed and its church reduced to profane but not sordid use.[1] "Having considered the need for further reorganisation of the parishes of the archdiocese according to criteria more in line with the current pastoral needs and the changed distribution of the population, having regard to the request submitted on 3rd February 2021 by Father Giovanni Montigli,

[1] Supremo Tribunale della Segnatura Apostolica, *Suppressionis paroedae et reductionis ecclesiae in usum profanum non sordidum*, Decreto definitivo (4 maggio 1996) Prot. N. 25500/94 CA – Em.mo Agustoni, Prefetto, Ponente, "Ius Ecclesiae" 10 (1998), no. 1, p. 189.

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administrator of the parish of S. Zanobi in Casignano, having noticed that the Vicariate has carefully considered what needs to be done and that the presbyteral council (Cano. 515 § 2 of the 1983 Code of Canon Law[2]), in its meeting of 4th February 2021 gave a favourable opinion […] I decree that the parish of S. Zanobi a Casignano, located in the Vicariate of Scandicci, with its seat at Via S. Zanobi, 3, shall be suppressed as of 30th March 2022."[3]

The decisions of competent ecclesiastical authorities quoted above and many other similar acts show how Cano. 515 § 2 CIC/83 is implemented in practice: "It is only for the diocesan bishop to erect, suppress, or alter parishes. He is neither to […] suppress […] parishes, unless he has heard the presbyteral council." Although a parish, as a specific community of the faithful, is erected in a stable manner in a particular Church [Sztafrowski 1991, 57],[4] the legislator itself provides for the possibility of its suppression when there are appropriate canonical grounds for doing so, in compliance with the prescribed procedure.

The subject of this study will be the question of suppression of a parish in the aspect of the norms of canon law. This gives rise to a number of questions, such as: 'Is it possible to suppress a parish and what are the reasons for doing so?'; 'Which ecclesiastical authority is entitled to suppress a parish?' and 'what is the procedure involving this act?' This article attempts to answer the questions presented as research problems.

1. THE CANONICAL POSSIBILITY OF SUPPRESSING A PARISH

The ecclesiastical legislator defines a parish in Cano. 515 § 1 CIC/83 as a certain community of the faithful, stably constituted in a particular Church and being the basic organisational unit distinguished in the ecclesiastical community. The parish community is defined, i.e. it has its boundaries. The criteria defining the boundaries of a parish can be subjective and objective. First of all, it is the territory in which the faithful have their place of residence (Cano. 107 § 1 CIC/83) [Coccopalmerio 2012, 907-16; Conn 2003, 262-63][5] and then it is the belonging of the faithful to a special category

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

[3] Arcivescovo di Firenze, *Decreto sulla soppressione delle parrocchie di S. Zanobi a Casignana* (30 marzo 2022), www.santamariascandicci.it [accessed: 08.10.2024].

[4] The community of the faithful constituting a parish must be 'erected in a stable manner' and so an element of stability is required. This is contained in the act of erection: the erection of a parish by a competent ecclesiastical authority gives the community constituting it a stable character.

[5] In order to belong to a territorial community, it is sufficient to belong to a particular territory. This means that other subjective conditions, specific to each person and therefore varying from person to person, are not required, e.g. social status, level of education, different forms of spirituality or possible membership of ecclesial associations or movements. The only necessary

of people, i.e. military, emigrants, faithful of a separate rite or nationality, or constituting a separate language group. With regard to the above, parishes can be territorial and personal [Krukowski 2005, 411] although in principle they are defined by territory (Cano. 518 CIC/83).

A defined community of the faithful, such as a parish, is constituted in a stable manner (*stabiliter constituta*) as part of a particular Church. 'Stably' means that the parish is established for an indefinite period of time; it is not a temporary community of the faithful, it is not simply an ordinary community or association of the faithful. 'Constituted' means that the creation of a parish takes place by an act, i.e. a decree, of the diocesan bishop after consultation with the presbyteral council. This is an act of a constitutive nature which erects the community of the faithful and configures it as a parish community. The same procedure is required in the case of a substantial change (e.g. boundaries) and the suppression of a parish (Cano. 515 § 2 CIC/83) [Coccopalmerio 1989, 130].

Once formally established, a community of the faithful, i.e. a parish, has the right to a permanent existence. The canonical figure of the parish is an artificial legal construct that does not cease to exist even though individual parishioners die and pastors change or are transferred to another parish [Ahlers 1985, 1988, can. 515/2].[6] In this connection, Reinhild Ahlers states that "a parish is established permanently, i.e. not just for a certain period of time. If it is not possible, not advisable or not appropriate to establish a parish, a quasi-parish can be established (Cano. 516 § 1 CIC/83) which is equivalent to a parish. Since a parish is established in a permanent manner, it exists even if the position of pastor is not filled. This means that it is not the particular pastor as a person who is constitutive of the parish, but the office of the pastor which continues to exist even during a vacancy. Conversely, the same cannot be said of the faithful. There are no faithful as such, only particular and individualised faithful" [Ahlers 1985, 1988, can. 515/3-4].

A parish is a public legal entity (Cano. 515 § 3 CIC/83) [Daly 2004, 446-47][7] which by its nature is perpetual (Cano. 120 § 1 CIC/83) [Coriden 2010,

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and sufficient condition for belonging to a territorial community is to have been baptised in the Catholic Church or to have been received into full communion with it and to have resided permanently or temporarily in the territory concerned.

[6] While the term 'community' is to be understood biblically and theologically, the term 'parish' primarily encompasses the legal (canonical) dimension. The term 'parish' is an attempt to add the idea of a living community of believers to the legal dimension of the parish. The term 'parish community' attempts to enrich the legal dimension of the parish with the idea of a living community of believers.

[7] A parish is a public ecclesiastical legal person by virtue of the law itself and is a subject of rights and obligations. A parish is a public, non-ecclesiastical legal person composed of a collective of persons. It is public because it has been established by a competent ecclesiastical authority and acts officially on behalf of the Church.

31-52],[8] can be suppressed (Cano. 120 § 1 CIC/83), merged with other parishes to form a new parish (Cano. 121 CIC/83) or divided and joined to other parishes; also, a new parish can formed from a separated part of another one (Cano. 122 CIC/83). The competent authority in this regard is the diocesan bishop (Cano. 515 § 2 CIC/83) [Provost 1993, 363].

The erection of a parish is an act that creates a new legal entity. Its opposite is the act of suppressing a parish making it cease to exist as a legal entity. These legal acts belong to singular administrative acts which are also called singular administrative decrees [Sztafrowski 1991, 65].

At this point, the question must be asked, "what is to be understood by the term 'suppression (dissolution) of a parish'?". This question was answered by the Congregation for the Clergy explaining that "there are four possible types of modification of a parish which are referred to by different terms, sometimes interchangeably, in different languages, leading to imprecision in decrees and other canonical documents. Such documents, however, cannot afford to be imprecise. For instance, all the four types of modification are sometimes referred to as 'suppressions', but it is by far best to restrict the use of this term in canonical documents to the fourth type in order to avoid confusion.[9] Likewise, the type of the intended merger of a parish should be clearly indicated in the bishop's decree. The four types of modification of a parish in operation are: 1) the suppression of parishes by extinctive union (sometimes known as merger), i.e. parishes A and B merge to form C, only parish C remains (Cano. 121 CIC/83); 2) the suppression of parishes by extinctive union (sometimes known as merger or amalgamation), i.e. parish A merges with B, only parish B remains (Cano. 121 CIC/83); 3) total division, i.e. parish A splits into B and C. Only parishes B and C remain (Cano. 122 CIC/83); and 4) suppression, i.e. parish A is suppressed, which means that the parish is extinguished (Cano. 123 CIC/83)."[10] The Congregation also adds that "since parishes are communities

[8] Once a community of believers has been erected and declared a parish, it must be allowed to continue, to exist, to act and to develop. Canon law contains a strong presumption in favour of its continuance as long as it is viable. As a legal person, it is perpetual by its very nature (Cano. 120 § 1 CIC/83).

[9] The diocesan bishop may only suppress a parish if there are no longer any parishioners living in the area. Usually, however, the bishop merges or consolidates parishes as part of a restructuring of the diocese.

[10] Congregation for the Clergy, *Circular Letter and Procedural Guidelines for the Modification of Parishes and the Closure, Relegation and Alienation of Churches* (30 April 2013), No. 1c, "The Jurist" 73 (2013), pp. 211-19 [hereinafter: Guidelines]. "Likewise, it should be noted that some commonly-used terms in these processes [i.e. changes in parishes – in the view of the authors of this article], e.g. 'suppression', have both a broad non-technical meaning as well as a precise canonical meaning. In order to avoid unnecessary confusion, it is best in canonical documents to avoid the non-technical use of such terms." Ibid., Introduction.

of the faithful, territorial parishes, as a rule, can only be merged or divided (cf. Cano. 121 and 122 CIC/83). Although as a matter of fact, personal parishes are occasionally suppressed (cf. Cano. 123 CIC/83), they are usually merged or divided, either with another personal parish or even with a territorial parish" (Guidelines No. 1d) [Daneels 1998, 119].[11] Bearing in mind the quoted statement from the *Letter from the Congregation for the Clergy and Procedural Guidelines for the Modification of Parishes*, there is, in practice, no complete closure of a parish or any other public juridical person referred to in Cano. 123 CIC/83 (whereby nothing remains of it; it is extinguished). There are only substantial modifications which actually suppress a particular parish and this is the subject of these thoughts. This conclusion is confirmed by the instruction of the Congregation for the Clergy *The pastoral conversion of the Parish community in the service of the evangelising mission of the Church*, which states that "the grouping of parishes, including their erection or suppression, is enacted by the diocesan Bishop, as envisioned by the norms of Canon Law, namely through extinctive union, where one Parish merges into another, being absorbed into it and losing its former individuality and juridic personality; alternatively, this can be effected through a true and proper fusion, that gives life to a new and unique parish, resulting in the suppression of the existing parishes and their juridic personality; or, finally, by division of a parish community into several autonomous parishes that are created *ex novo*. Moreover, the suppression of Parishes by extinctive union."[12]

The Italian Bishops' Conference states that "both merger by incorporation and a true and proper fusion constitute a legal event characterised by continuity in the sense that by incorporation the absorbing parish under a merger takes over all the legal titles of the incorporated parish, in the same manner that the new parish created by a true and proper fusion takes over all the legal titles of the extinct parishes."[13]

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[11] It should be noted that Cano. 515 § 2 CIC/83 also applies to the suppression of personal parishes since the reservation to this decision for the Holy See provided for in Cano. 216 § 4 of the Pio-Benedictine Code has not been maintained in the current Code.

[12] *Instruction 'The pastoral conversion of the Parish community in the service of the evangelising mission of the Church' of the Congregation for the Clergy* (20.07.2020) [hereinafter: IPC], https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2020/07/20/200720a.html [accessed: 13.12.2024]. 'Suppression of a parish through extinctive union' is included in the three items listed in No. 48. Cf. Conferenza Episcopale Italiana, *Nota Parrocchie soppressione, mutamento sostanziale, fusione* (22.02.2024), https://giuridico.chiesacattolica.it/nota-in-ordine-a-vicende-estintive-e-modificative-delle-parrocchie [accessed: 13.10.2024], p. 1.

[13] Conferenza Episcopale Italiana *Nota Parrocchie*..., p. 1.

2. AUTHORITY COMPETENT TO SUPPRESS A PARISH

The Second Vatican Council's Decree Concerning the Pastoral Office of Bishops in the Church *Christus Dominus* states that "the same concern for souls should be the basis for determining or reconsidering the erection or suppression of parishes […] which the bishop is empowered to undertake on his own authority."[14] Furthermore, the motu proprio *Ecclesiae Sanctae* recalls that "the bishop of the diocese on his own authority can establish or suppress parishes or change them in any way."[15] This right of the diocesan bishop is a part of the broad powers to exercise the pastoral office which were recognised by the Council Fathers in the decree *Christus Dominus* (CD 8) and set out in Cano. 381 § 1 CIC/83.

The ecclesiastical legislator stipulates in Cano. 515 § 2 CIC/83 that "it is only for the diocesan bishop to erect, suppress, or alter parishes" as the ordinary authority to erect parishes is vested in him. Therefore, it is within the diocesan bishop's exclusive competence to perform the administrative acts listed in this canon. In interpreting the provision cited above, one must also bear in mind Cano. 134 § 3 CIC/83 according to which: "Within the context of executive power, those things which in the canons are attributed by name to the diocesan bishop are understood to belong only to a diocesan bishop and to the others made equivalent to him in Cano. 381 § 2 CIC/83 excluding the vicar general and episcopal vicar except by special mandate." Thus the vicar general and the episcopal vicar are expressly excluded. They can only perform the act of erection after obtaining a special mandate from the diocesan bishop. Legally equivalent to the diocesan bishop are the territorial prelate, the territorial abbot, the apostolic vicar, the apostolic prefect and the apostolic administrator at the head of the apostolic administration erected in a stable manner and the military ordinary (Cano. 381 § 2 CIC/83) [Sztafrowski 1991, 65-66].

It can be deduced from the norm of Cano. 515 § 2 CIC/83 that the diocesan administrator does not have the authority to erect, suppress or alter parishes although this is not explicitly stated in the CIC/83. On the one hand, however, this follows from the principle *sede vacante nihil innovetur* contained in Cano. 428 § 1 CIC/83. On the other hand, it can be deduced from Cano. 525 CIC/83 according to which the diocesan administrator may not, in principle, even appoint pastors (only if the see has been vacant for a year). Hence, it is fair to think that a diocesan administrator may not erect a parish

[14] Concilium Oecumenicum Vaticanum II, Decretum de pastorali Episcoporum munere in Ecclesia *Christus Dominus* (28.10.1965), AAS 58 (1966), pp. 673-701 [hereinafter: CD], no. 32.

[15] Paulus PP. VI, Motu proprio *Ecclesiae Sanctae* (06.08.1966), AAS 58 (1966), pp. 757-87 [hereinafter: ES], no. 21 § 3; Sacra Congregatio pro Episcopis, Normae Directorium de pastorali ministerio Episcoporum *Ecclesiae imago* (22.02.1973), Città del Vaticano 1973 [hereinafter: EI], no. 177.

until one year after the episcopal see has been vacant [Ahlers 1985, 1988, can. 515/5; Sztafrowski 1991, 66].

The act of suppression of a parish in the circumstances outlined above is a legal transaction of great importance that does not take place very often and, moreover, requires great prudence and responsibility on the part of the bishop (Guidelines 1e).[16] The Guidelines of the Congregation for the Clergy also recall that "jurisprudence indicates that an extinctive union or suppression should be the last choice when dealing with various problems affecting parochial life, insofar as other possible remedies have been at least considered beforehand and ruled out" (Guidelines 1g).

Hence, in order for parishes to be suppressed, there must occur a reason commensurate with this act. It should be noted, however, that the ecclesiastical legislator makes no mention of the causes for the suppression of a parish. The cause is usually of pastoral nature, i.e. either too many worshippers or too large a territory, or other causes that make pastoral activity less effective [Barcelón Maicas 1984, 32-33]. Brendan Daly reminds us that "a parish is a community of the faithful which, being a legal person by the law itself, is perpetual by its nature (Cano. 120 § 1, 515 § 1 and 3 CIC/83). It must not be suppressed or even significantly altered without a just cause" [Daly 2004, 447].

The Instruction of the Congregation for the Clergy *The pastoral conversion of the Parish community* points out that "the suppression of parishes by extinctive union is legitimate for causes directly related to a specific parish. Some causes are not sufficient, such as, for example, the scarcity of diocesan clergy, and the general financial situation of a diocese, or other conditions within the community that are presumably reversible and of brief duration (e.g., numerical consistency, lack of financial self-sufficiency, the urban planning of the territory). As a condition for the legitimacy of this type of provision, the requisite motivations must be directly and organically connected to the interested parish community, and not on general considerations or theories" (IPC 48). Thus, the reasons for suppressing a particular parish must be individualised. This is confirmed by the Instruction *Pastoral Conversion* which provides that "with respect to the suppression of parishes, the decree must clearly state the reasons that led the bishop to make this decision. The just cause therefore, must be specifically indicated, it being insufficient simply to refer to the 'good of souls'" (IPC 50).

The guidelines of the Congregation for the Clergy also note that in judging whether there is the required just cause in the case of a proposed

[16] "The authority competent to erect, supress, or notably alter parishes is the diocesan bishop or those equivalent to him in law (Cano. 381 § 2, 368 and 515 § 2 CIC/83). He is competent to judge the existence of the required just cause, but his judgement must conform to ecclesiastical jurisprudence."

modification of a parish (cf. Cano. 515 § 2 CIC/83) or the required grave cause in the case of the closure and relegation of a church (cf. Cano. 1222 § 2 CIC/83), each case must be considered separately. Although the bishop may take into account the needs of surrounding parishes or even of the diocese as a whole, he must always justify his decree with a reason that is specific, i.e. ad rem, to the parish or church in question (Guidelines 1b and 1h).

The editors of the Instruction *The pastoral conversion of the Parish community* state that the reason for the suppression of parishes can be "more effective pastoral care of the People of God, the 'key factor' of which is proximity" (IPC 44) and that the extinctive union of parishes (one of the forms of suppression of parishes) should be effected "with particular attention given to specific territories, the establishment of which must take into consideration the homogeneity and customs of the inhabitants, together with the common traits of the area, in order to foster a close relationship between parish priests and other pastoral workers" (IPC 45).

It should be noted that many ecclesiastical documents present the reasons for the suppression of parishes in a very general way; pastoral work can be carried out 'only with difficulty or less effectively' (ES 21 § 1), 'concern for souls' (CD 32; ES 177), 'the good of the faithful' (Guidelines 1f).[17]

At this point, it would be worthwhile to exemplify some of the reasons for the suppression of parishes contained in specific decrees on this issue. In a decree merging four parishes the Archbishop of the Canadian Archdiocese of Ottawa-Cornwall gives the following reasons for his decision: to increase the effectiveness and efficiency of the mission by reducing the number of parishes in the region; to allow the pastor to focus on evangelisation and development of the parish; to gather enough volunteers to organise vibrant parish liturgies with the possibility of welcoming and hosting their participants after the Holy Mass.[18]

The Archbishop of Florence, on the other hand, in his decree to suppress a parish vindicates his decision by referring to the need for "further reorganisation of the parishes of the archdiocese according to criteria more in line with the current pastoral needs and the changed distribution of the population."[19] In the decree on the suppression of the parishes of Santa María de la Encarnación and San Ignacio de Loyola in the Diocese of Málaga, the reasons that the bishop judged as sufficient for this act were "the social

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[17] Congregaticio pro Episcopis, *Direttorio per il ministero pastorale dei vescovi* (22.02.2004), Città del Vaticano 2004 [hereinafter: AS], no. 215.

[18] Archbishop of Ottawa-Cornwall, Decree *Extinctive union of the parish of St. Catherine of Sienna in Greenfield with the Parish of St. Finnan in Alexandria* (20.09.2023), Prot. N.D. 11/2023, https://stfinnan.ca/wp-content/uploads/2023/09/11-2023-St_Catherine_of_Sienna_Greenfield-Extinctive_union_St_Finnan_Alexandria.pdf [accessed: 17.10.2024].

[19] Arcivescovo di Firenze, *Decreto sulla soppressione delle parrocchie di S. Zanobi a Casignana*.

and demographic changes that have occurred in the area […] as well as those that are likely to occur in the near future, make it advisable at present to suppress the parishes of Nuestra Señora de la Encarnación and San Ignacio."[20]

The decree on the suppression of the parish of Santa Teresa de Jesús in the city of Badajoz, Spain, gives the following reasons for the suppression of the parish: the departure in September 2019 of the Carmelite community that had served the parish since its canonical erection, the small size of its territory and the insufficient number of faithful served who can easily be entrusted to the pastoral care of the neighbouring parishes.[21] The lack of a parish church, the undertaking of pastoral activities in rented premises and the small number of inhabitants who are involved in parish life make it advisable to suppress the parish and incorporate its territory into the neighbouring parishes.[22]

The decree on the suppression of the parish of St Andrew the Apostle in the city of Lleida (Spain) cites the following reason for the suppression of the parish: "the parish of St Andrew the Apostle, in the city of Lleida, canonically erected by decree of the Bishop of Lleida […] on 18th November 1973, has seen a significant decline in population in recent years the consequence of which was a small number of pastoral services and a reduction in the dynamism of sacramental life."[23]

3. PROCEDURES AIMED AT SUPPRESSING A PARISH

Pursuant to Cano. 515 § 2 CIC/83, the decision to extinguish a parish is within the exclusive competence of the diocesan bishop, but it cannot be an arbitrary action. Since it is an act of great importance, the decision to effect such an act must be mature, well-considered and based on convincing grounds. Pursuant to the provision of Cano. 50 CIC/83, issuing a singular decree, the ecclesiastical superior should seek out the necessary information and proofs and, insofar as possible, hear those whose rights

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[20] Obispo de Málaga, *Decreto para la supresión de las parroquias de Santa María de la Encarnación y San Ignacio de Loyola* (24.06.2022), https://www.diocesismalaga.es/313015-/2014056389/decreto-para-la-supresion-de-las-parroquias-de-santa-maria-de-la-encarnacion-y-san-ignacio-de-loyola [accessed: 17.10.2024].

[21] Arzobispo de Merida-Badajoz, *Decreto de supresión de la Parroquia de Santa Teresa de Jesús, en la ciudad de Badajoz (25 de marzo de 2023)*, https://www.meridabadajoz.net/wp-content/uploads/2023/04/Dcreto-Supresion-Parroquia-Santa-Teresa-Badajoz.pdf [accessed: 17.10.2024].

[22] Arzobispo de Santiago de Compostela, *Decreto de supresión de la Parroquia de San Miguel Arcángel de A Coruña* (19 de junio de 2017), Boletín oficial del Arzobispado de Santiago 156 (2017), p. 487.

[23] Obispo Lleida, *Decreto de supresión de la Parroquia de Sant Andreu, apóstol, de la ciutat de Lleida* (17 juny 2018), https://www.bisbatlleida.org/sites/default/files/Decrets%20supressi%C3%B3%20Sant%20Andreu_0.pdf [accessed: 17.10.2024].

can be injured [Sztafrowski 1991, 66]. The bishop must therefore follow the prescribed procedure. In the case of the creation of a parish, the previous Code expressly directed that the persons concerned, especially the rectors of neighbouring churches, be heard.[24] The current Code of Canon Law, in the case of the suppression of a parish, requires the diocesan bishop to listen to the opinion of the presbyteral council, a collegial body elected from among the diocesan presbyterium and appointed to assists the bishop in the governance of the diocese.[25] Although the bishop is not obliged to make a decision in accordance with the opinion of this council, he may only legitimately issue a decree concerning the erection of a parish, the alteration of its boundaries or its suppression after consulting the council. The relation between the presbyteral council and the bishop in the matter under discussion here is crucial. The bishop makes decisions on matters of this kind according to his own prudence, but after considering the arguments submitted by the presbyteral council (Cano. 127 CIC/83) [Krukowski 2005, 412].

The Guidelines of the Congregation for the Clergy caution the bishop to faithfully observe the law in this matter recalling that: "Before making a decision, the bishop must obtain the necessary information and, as far as possible, listen to those whose rights could be violated (Cano. 50 CIC/83[26]). Before seeking consulting the members of the presbyteral council, which is required for validity, he must first provide them with all relevant information, lawfully convoke the council (cf. Cano. 127 and 166 CIC/83), and then himself must consult the members regarding each individual parish modification which has been proposed. The consultation must be genuine and should consider relevant arguments both for and against the proposed modifications" (Guidelines 1i). "Prior to establishing parish groupings, the bishop must first consult with the presbyteral council, in accord with canonical norms and in the name of ecclesial co-responsibility, shared between the bishop and the members of said council" (IPC 46).

It should be noted that the initiative to initiate the procedure to suppress a parish belongs to the bishop. He may, of course, receive advice from various sources. These include: the diocesan pastoral council, "which […] investigates, considers, and proposes practical conclusions about those things which pertain to pastoral works in the diocese" (Cano. 511 CIC/83); a vicar general or vicars general who assist him in the governance of the diocese (Cano. 475-476 CIC/83); deans who have the duty of promoting and coordinating common pastoral activity in the vicariate (Cano. 555 § 1, 1° CIC/83);

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[24] *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus* (27.05.1917), AAS 9 (1917), pars. II, pp. 1-593, Cano. 1428 § 1.

[25] Cf. Cano. 495-501 and 515 § 2 CIC/83; AS 215; Guidelines 1i; IPC 46.

[26] Cano. 50 CIC/83: "Before issuing a singular decree, an authority is to seek out the necessary information and proofs and, insofar as possible, to hear those whose rights can be injured."

and any other agencies, offices or consultative bodies that the bishop may create in the diocese to improve pastoral ministry. Because of its role in overseeing the financial health of the diocese and its parishes (Cano. 493 and 1287 § 1 CIC/83), the diocesan economic council may have valuable advice to offer. The presbyteral council, which assists the bishop in the governance of the diocese, may take such an initiative. However, none of these bodies can compel the bishop to initiate this process as it is for the bishop to decide whether and when to erect, suppress significantly alter parishes [Provost 1993, 363].

At this point it is important to note the position of Edward Sztafrowski who rightly points out that it does not seem likely that the bishop might obtain sufficient information on the matter by only consulting the presbyteral council. He will receive a much fuller picture by hearing the opinion of the neighbouring pastors, as the legislator prescribes in Cano. 1215 § 2 CIC/83 in connection with the building of a church. In the present circumstances, it is also advisable to hear the opinion of those faithful who will form the new parish community. This is because, as a rule, their offerings will create an endowment for the future parish [Sztafrowski 1991, 66-67; Provost 1993, 365-66].[27]

Consultation must take place before a decision is made on any particular matter. Otherwise, it is not a consultation but merely an attempt to validate a decision already taken, which is illegal. It must be added that due to the nature of the matter the prior consultation with the presbyteral council entails two requirements: a) that the council first receives due information; b) that it expresses its opinion as a legitimate body [Núñez 2013, 284].

The statutes of the presbyteral council may specify the manner in which the said consultation is to be carried out. For example, it is possible for the statutes to allow consultation by means of distance communication (telephone or Internet) provided that all members are provided with an opportunity to give advice. However, in order to properly draft the minutes and ensure that the consultation has fulfilled not only the letter but also the spirit of the law, it would be better to follow the full procedure set out in Cano. 127 CIC/83 [Provost 1993, 363]. James Provost is of the opinion that when it comes to the issue where the diocesan bishop is to 'hear' the council, it is strongly recommended that a formal protocol be drawn up, even verbatim so that there can be no doubt that a genuine consultation has taken place [ibid.].

It should be noted that when suppressing a parish or making other changes to its structure, the bishop must respect the intentions of the founders and donors and any vested rights. In some cases, an individual may have donated money for the creation of a parish; that individual or their heirs may be consulted to find out their intentions before making major changes to the parish or suppressing it [ibid., 365].[28]

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[27] Cf. Cano. 212 § 2 and 3 CIC/83.

[28] Cf. Cano. 122-123 CIC/83.

It would seem that while listening to those interested in suppressing a parish provides the bishop with the 'necessary information', but since the suppression of a parish is a very delicate, and sometimes sensitive, matter, it is occasionally useful to supplement this information in other ways, too. The 1973 Directory *Ecclesiae imago* advises the creation of a diocesan office or commission for new parishes. The aforementioned document contains the instruction: "if the bishop does not consider it more advisable to create a special and permanent diocesan office, he may appoint a commission. To it he delegates all matters relating to the erection of new parishes and the building of new churches. The commission shall act in consultation with the presbyteral council and other commissions concerned. Such a commission represents, as far as possible, the whole diocesan community, which consciously and zealously undertakes the erection of parishes and churches as a common matter, assuming burdens and expenses according to its means" (EI 178). The Directory *Ecclesiae imago* provides for new parishes, but also recalls that "if the good of the faithful so requires, the bishop should proceed, after consulting the diocesan presbyteral council, to alter territorial boundaries, to divide parishes that are too large, to merge small parishes, to establish new parishes or non-territorial centres for pastoral service in the community, or even to reorganize completely the arrangement of parishes within a particular city and to adapt the structures to the needs of the pastoral ministry, maintaining an all-embracing view and organic unity, as well as making it possible to reach out to individuals" (EI 177), which clearly indicates that the said commission can also advise the bishop on the suppression of parishes. The Directory *Apostolorum Successores* offers a similar possibility: "In order to study all the issues pertaining to the establishment of parishes and the construction of churches, the Bishop may wish to set up a diocesan office or commission that can operate in collaboration with other relevant diocesan commissions. This office or commission should be staffed by clergy or members of the lay faithful chosen for their professional competence" (AS 214) [Hernández 2004, 126-27].

After a consultation with the presbyteral council and those whose interests and rights must be respected, the bishop who has decided to suppress a particular parish should issue a relevant decree, certified by the chancellor (notary) so as to make this official act verifiable [Provost 1993, 366]. This decree belongs to the group of singular administrative acts.

The Congregation for the Clergy recalls that 'apropos to the erection or suppression of Parishes, it must be borne in mind that every decision must be adopted by means of a formal decree, given in writing (Cano. 51 CIC/83). Consequently, it is considered contrary to canonical norms to issue a single provision aimed at producing a reorganisation of a general character, either of the entire diocese, a part of it, or of a group of parishes, by means of a singular administrative act, general decree or particular law. With respect to the

suppression of Parishes, the decree must clearly state the reasons that led the Bishop to make this decision. The just cause therefore, must be specifically indicated, it being insufficient simply to refer to the "good of souls"' (IPC 49-50).

"Any decree modifying a parish must be issued in writing at the time that the decision is given and then lawfully communicated without delay. The period of time during which hierarchical recourse may be presented begins with the lawful notification of the decree (cf. Cano. 1734 § 2 CIC/83). In addition, the decree must mention at least in summary form the just cause(s) for the decision (Cano. 51 CIC/83)" (Guidelines 1j), and "clearly define the criteria for membership in all parishes affected by the modification" (Guidelines 1k).

An important issue to be regulated in the suppression decree is that concerning the temporal goods of parishes that are suppressed [Daneels 1998, 119-20]. "The act by which a Parish is suppressed must also make provision for the disposition of temporal goods in accord with the law; it is necessary to ensure that the church of the suppressed parish remains open to the faithful unless there are grave reasons to the contrary, after having heard the presbyteral council" (IPC 50). "The decree must likewise specify the disposition of temporal goods in accord with law, and must respect the intentions of the donors (cf. Cano. 121, 122 and 123 CIC/83)" (Guidelines 1l).

The ordinances quoted above show the great concern of the ecclesiastical legislator to ensure that the decree suppressing a parish is properly drafted, notified and justified because the suppression of a parish is a very delicate decision that may occasionally stir up emotions.

CONCLUSIONS

The above considerations lead to the following conclusions: the abolition of a parish must be carried out by the diocesan bishop and persons legally equivalent to him (Cano. 381 § 2 CIC/83) in accordance with the provisions of canon law. In order for a parish to be abolished, there must be a reason proportionate to this act, which must be individualised. Many Church documents outline the reasons for abolishing parishes in very general terms, such as: increasing the effectiveness and efficiency of the mission by reducing the number of parishes in the region; reorganising parishes according to criteria that better reflect current pastoral needs and changes in population distribution; social and demographic changes that have taken place in a given area.

The ecclesiastical legislator has defined the procedure for abolishing a parish. The decision to abolish a parish is the exclusive competence of the diocesan bishop (Cano. 515 § 2 CIC/83). Before making a decision, the bishop should gather the necessary information and evidence and hear the

opinions of the Council of Priests and those whose rights may be affected. The bishop makes decisions in such matters according to his own prudence, but after considering the arguments presented by the Priests' Council (Cano. 127 CIC/83).

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THE MORAL AUTHORITY OF THE BISHOP AND HIS IMPORTANCE FOR THE COMMUNITY OF BELIEVERS. SELECTED ASPECTS

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Abstract. The authority of the bishop, and in particular moral authority, belongs to the essence of the Gospel message, that is, to the nature of the Catholic Church, and is the basis for fulfilling its mission. It means that whoever is considered such an authority has special prerogatives, e.g. he knows more and better, has good will, etc., just like a good parent in a family. In this perspective, the position of the current Pope Francis is important, who, attaching great importance to what bishops in the Church should be like, states that bishops should be obedient to him, have a broad vision of the Church and reality, be men of prayer, should preach the Word of God and contribute to the unity of the faithful. An important answer to why such a requirement is made is given by Cano. 1752 of the 1983 Code of Canon Law, stating: *salus animarum suprema lex* (the salvation of souls is the highest law). This passage has in its eloquence a character summarizing the entire legal norm in the Church, built on Catholic theology and ethics. It has indeed been entered into the procedural rules for the transfer of parish priests, but its wording remains (for example, for a moral theologian or canonist) particularly significant. It is based on the fact that if a person is guided by the imperative of conscience, then his obedience results from the fear of sanction, not an external one, but an internal one.

Keywords: authority; bishop; moral crisis; mission of the Church; obedience; education and sanctification; community.

INTRODUCTION

Cardinal Reinhard Marx – writing about bishops in general – in a letter to Pope Francis stated: "I am deeply saddened by the decline of the authority of bishops in the Church and in the world" [Marx 2021]. Archbishop R.F. Prevost, Prefect of the Dicastery for Bishops, expressed his opinion even more strongly: "We must not hide behind the concept of authority, which no longer makes sense today," in an interview with Andrea Tornelli (May 4, 2023). However, this does not resolve the issue. The point is that Pope Francis' teaching on this matter (even if it is characterized by a struggle against clericalism)

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is nevertheless in line with the traditional position of the Church.[1] One of his characteristic statements is that a bishop should be, among others: "united with the universal Church, listening to the Pope and obedient to him, persevering in the implementation of the Second Vatican Council, rejecting «shortcuts» that lead to self-interest and a comfortable life."[2] Simply put, the question of *the exercise of power and authority* in his magisterium and in the life of the Church is both a sensitive and a topical issue. This is the opinion, for example, of a professor from Pontificia Universitas Gregoriana [Imoda 2015, 8].[3]

1. INTEGRATION AND SANCTIFICATION OF THE FAITHFUL AS A GOAL AND MEANING OF THE MORAL AUTHORITY OF THE BISHOP

Authority, Latin *auctoritas*, is moral authority, recognition [Olejniczak 2013, 41], as well as a person, institution, writing, etc. enjoying special recognition [Piórkowski 2016, 9]. The question of the need for authority on the part of a clergyman (i.e., a bishop) is so complex that the very concept of authority must be considered in two aspects: epistemic and deontological. "Epistemic authority, known as «the authority of the knowledgeable» (from the Greek *episteme*, meaning «knowledge»), is vested in people who know the subject better than we do" [Tofiluk 2008, 163]. Deontological (deontic), from the Greek *deon*, means duty, which refers to a superior, i.e., someone who has authority [ibid.].[4] This translates into the concept of formal (official) and personal (moral) authority. In the past, this concept was more homogeneous. Today, the layers of this concept are often separated, e.g., intellectual from moral, formal from material, formal from moral, etc., e.g., "someone is an authority due to their knowledge, but not because of their behavior" [Olejniczak 2013, 41]. However, it is recognized that authority is one of the sources of power, which means that those who are trustworthy also have the ability to act, to influence, i.e., to have an adequate impact on others [Szwed 2023; Romano 2013, 195-235]. Thus, although there is "complexity and multidimensionality in the definitions of the concept of authority" (the concept of "social authority of the Church" appears), in the Christian tradition, authority is invariably associated with someone who "works for social order, supporting religion and tradition, […] fulfilling the educational functions of a good guide" [Tasak 2023, 59].

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[1] Cf. Maier, Mattasoglio, and Serrano 2024.

[2] See https://deon.pl/kosciol/wzor-katolickiego-biskupa-wedlug-papieza-franciszka-jakie-cechy-powinien-miec,2741207 [accessed: 12.11.2024].

[3] Ibid.: "Nel magistero di Papa Francesco e nella vita della Chiesa il tema qui proposto costituisce un punto nevralgico ed attuale che, se ha innescato attuazioni aberranti, può anche ispirare guarigioni efficaci e nuove modalità di esercizio."

[4] Cf. Kobiela 2016, 123-39.

1.1. Mission of the Church as the basis of the bishop's authority and responsibility

In the Magisterium of the Church, as in theological and canonical literature, "authority" is a concept that is part of the Church's mission and has at least several overlapping meanings [see Kamiński 2020, 91-112; Milgram 2008]. Authority is the social recognition and prestige of persons and institutions due to their competence and power [Jacko 2007, 19]. Authority is a person or institution that enjoys recognition or one of the means of legitimate power. The issue of a bishop's authority refers primarily to the person on whose behalf he acts[5] (cf. the issue of apostolic succession for the good of the Church, etc.) [Wroceński 2016, 4]. The Petrine key – cf. Cano. 331 of the 1983 Code of Canon Law[6] – "can resemble a symbol of supreme authority, of opening and closing spiritual goods" [Brinda 2019, 10]. Already, "the medieval ideal of authority arises from the conviction that we are not the first: the search for truth does not begin with us" [Roszak 2011/2012, 75].

The importance of this perception can be found in St. Thomas Aquinas, who is considered an (angelic) doctor of the Church, i.e., one of the most outstanding thinkers of the West. His doctrine was adopted by the Church. He emphasizes the original nature of authority. It is God who is "first in the order of importance and therefore has the ultimate authority to judge (*auctoritas iudicandi*), which demands obedience. Therefore, in the Summa contra gentiles, it is possible to find formulas referring to the conformity or contradiction of a given thesis with regard to *auctoritas divina*" [ibid., 77]. For St. Thomas, the authority of the bishop is the authority of a person who represents the Church of Christ and acts only on its behalf. His function of exercising authority is carried out in the name of Christ's mission and it is something that participates in God's authority on the basis of obedience, fidelity, transparency, holiness, etc. This, in turn, points to a close relationship between the fidelity of the bishop's teaching (Magisterium) and the correct exercise of his authority (jurisdiction)[7] [Roszak 2011/2012, 77-78].

Moreover, if Christ granted the apostles and their successors, when sending them on their mission to preach the Gospel, a threefold authority: i.e., teaching, governing, and sanctifying [Jódar-Estrella 2023, 21-39],

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[5] Ioannes Paulus PP. II, Constitutio apostolica de Romana Curia *Pastor Bonus* (28.06.1988), AAS 80 (1988), pp. 841-912; Idem, Constitutio apostolica de Sede Apostolica vacante deque ROMANI pontificis electione *Universi Dominici Gregis* (22.02.1996), AAS 88 (1996), pp. 305-43; Francis, Costituzione apostolica *Praedicate Evangelium* sulla Curia Romana e il suo servizio alla Chiesa nel mondo (19.03.2022), "Communicationes" 54 (2022), pp. 161-93.

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

[7] See *Św. Tomasz z Akwinu. 2011. Summa contra gentiles. Prawda wiary chrześcijańskiej w dyskusji z poganami, innowiercami i błądzącymi*, vo. III, Wydawnictwo „W drodze", Poznań 2011.

then "modern man trusts witnesses more than teachers, experience more than doctrine, life more than theory."[8] Therefore, the Magisterium should not be confused with the power of governance (i.e., jurisdiction) aimed at the realization of the common good and directly concerning human external acts [Lucien 2012, 25]. Pius XII writes about this in his encyclical *Mystici Corporis Christi*: "The authority proper to the Magisterium derives from the inviolable order of truth: the teaching authority is engaged insofar as the Magisterium defines or sets forth the truth which it communicates. The authority of governance is reflected in morality, as well as in those who teach and those who are taught."[9] The legislator in CIC/83 expresses a similar view when it states that in order for ecclesiastical office to be entrusted to someone, "he must remain in communion with the Church and be suitable, that is, possess the qualities required for that office by universal, particular, or foundational law" (Cano. 149 § 1).

The authority of the bishop must always be regarded in terms of the fulfillment of God's intentions for the people. "If, therefore, the bishop replaces Christ in the Church, this means that the mission proper to Christ of gathering, sanctifying, and leading the people on the way to the Lord now becomes in a special way the mission and task of the bishop and determines the scope of his responsibility" [Dołganiszewska 2004, 73].

1.2. Canon law as the foundation and definition of the bishop's authority

Even if, in the light of canon law, authority in the Church comes down (primarily) to formal matters, i.e., it concerns the rules for holding office (cf. Can. 146 CIC/83 – "an ecclesiastical office cannot be validly obtained without canonical conferral"), in the sense of effectively gathering the faithful into one family of God (the meaning and spiritual purpose of authority), it translates into the quality and zeal of the ministry performed, and clearly depends on these realities[10] [Królikowski 2019, 117]. The point is that, according to Cano. 145 § 1 CIC/83, "an ecclesiastical office is any task established permanently by divine or ecclesiastical decision for the achievement of a spiritual end" [Dryja 2019, 32]. Thus, the community should (in principle) be headed by a special person (like a father in a family), i.e.,

[8] Ioannes Paulus PP. II, Litterae encyclicae de perenni vi mandati missionalis *Redemptoris missio* (07.12.1990), AAS 83 (1991), pp. 249-340, no. 42; cf. Sacrosanctum Concilium Oecumenicum Vaticanum II, Decretum de Presbyterorum ministerio et vita *Presbyterorum ordinis* (07.12.1965), AAS 58 (1966), pp. 991-1024 .

[9] Pius PP. XII, Litterae encyclicae de mystico Iesu Christi Corpore deque nostra in eo cum Christo coniunctione *Mystici Corporis Christi* (29.06.1943), AAS 35 (1943), pp. 193-243.

[10] Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio dogmatica de Ecclesia *Lumen gentium* (21.11.1965), AAS 57 (1965), pp. 5-71 [hereinafter: LG], nos. 26, 28, 35, 67.

someone who, in accordance with the mission of the Church, has the authority to sanctify[11] as one who is *peritus in re* (an expert in knowledge) and *peritus in usu* (an expert in management) [Kamiński 2021, 113-23]. Ultimately, when it comes to the bishop's role as a moral authority, this translates into legislative power [Dzierżon 2010, 45-55]. Hence, the 1983 Code of Canon Law, using the terms "authority" and "power," uses them interchangeably, indicating that these are attributes very typical of human relations [Żurowski 1985, 33]. However, the authority of the bishop, like the law of the Church, is not based solely on the social nature of the Church, but also on the power granted to the bishop by Christ Himself [Idem 1967, 7]. That is, on faith and trust in God.

In this context (it seems), the Congregation for Catholic Education in Instruction *Studia del diritto canonico alla luce della riforma del processo matrimoniale* states that bishops do not govern or "teach by their own authority, but on the basis of their mission.[12]" This is defined in theology, and the conclusions are communicated to canon law. "If, therefore, God is the highest authority for theology, if he is «the Authority of authorities, that is, perfect perfection»" [Pańkowski 2008, 154], then the purpose and nature of the bishop's authority follow from his revelation. The point is that the need for the bishop's authority is part of soteriology, i.e., the sanctification of the faithful. Hence the norm that "only what helps man on his way to salvation can bear the mark of authority for him" [ibid.]. Hence, in Canons 834-1253 CIC/83, in Book IV entitled *The Sanctifying Task of the Church*, "the ecclesial mission of sanctification is presented in its legal aspect" [Kamiński 2021, 113].

The authority of the bishop, in accordance with the aforementioned Instruction, is part of the close relationship between canon law and theological teachings, showing the bishop in his most important role for the community of the faithful, the family, the individual, etc. "Church law plays a secondary role in the life of faithful, as it is not primarily responsible for defining the Church and determining the principles of its proper role, but rather theological teachings formulate a broadly understood doctrine, which canon law seeks to guarantee a proper place and respect in the life of the community of faithful" [Wróbel 2016, 126]. Therefore, an important condition here is "reference to the sources that shape the life of the Church as the People of God, i.e., to the teaching of the Church and about the Church,

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[11] Franciscus PP., Adhortatio apostolica *Evangelii gaudium* de Evangelio Nuntiando nostra aetate (23.11.2013), AAS 105 (2013), pp. 1019-138, no. 23.

[12] Congregation for Catholic Education, Instruction *the Study of Canon Law in Light of the Reform of the Matrimonial Process* (29.04.2018), https://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_20180428_istruzione-diritto-canonico_en.html [accessed: 29.03.2025].

along with the theologically defined authority of the legislator" [ibid.]. The specific expression of these foundations in the Code of Canon Law is "the detailed hierarchical structure of the Church, the role of the pope, the place and mission of clergy in the Church," etc. [ibid.].

Pope Paul VI recalled this in his *Speech to the members of the Pontifical Council for the Reform of the Code of Canon Law*.[13] He addressed the erroneous concept that the letter of canon law requires only external obedience. According to him, "this is not the attitude required by canon law."[14] A bishop derives his moral authority from the fact that he is *peritus in re*, i.e., that he is distinguished by unwavering faith, good morals, zeal, pastoral wisdom, prudence, and human virtues. That he knows how to listen, mediate, etc. That he enjoys a good reputation. Another important issue is obedience. A bishop should be obedient to the Church, just as the Church requires obedience to the bishop – whether from clergy or from the faithful [Gręźlikowski 2021, 333]. It is in the context of personal commitment that formal requirements are inscribed, and not the other way around [Romanko 2016], e.g. when it is stated that: "a candidate for bishop should have at least 5 years of priesthood and at least 35 years of life," and Cano. 378 § 1, 5º CIC/83 requires a doctorate or at least a licentiate in Sacred Scripture, theology, or canon law, or true proficiency in these disciplines.

2. RELATIONSHIP OF MORAL AUTHORITY AND FORMAL AUTHORITY

The formal authority of the bishop is to possess the related powers of teaching, sanctifying, and governing conferred on him by particular canons of canon law. According to the CIC/83: "by divine institution, the following offices are in the Church: the office of the Bishop of Rome (Canons 330-333), the office of the College of Bishops (Cano. 330, also Canons 336-337) and, as such, the office of a bishop (Canons 375 § 1, 381 § 1 and 391). All others derive from Church law" [Sitarz 2015, 94]. Therefore, if the effectiveness of the bishop's ministry thus established depends largely on his moral authority, it is because the faithful, being scandalized by his immoral behavior, for example, could renounce his ministry or abandon the practice of the faith. Such authority of the bishop can be referred to as explicit or known. Everyone knows what is expected of a given person. Erich Fromm, an American philosopher and psychologist, notes that "the

[13] Paulus PP. VI, *Ad E.mos Patres Cardinales et ad Consultores Pontificii Consilii Codici Iuris Canonici recognoscendo* (20.11.1965), AAS 57 (1965), pp. 985-89.

[14] Ibid.

individual does not fear explicit authority," but rather "is ruled by the fear of anonymous authority of conformity" [Paszenda 2017, 68].

The bishop's authority, both moral and formal, is based on his personal fidelity to the teaching of the universal Church and derives from it. This implies that he must be sufficiently committed to his ministry in order to be recognized as sufficiently good. In exercising his authority, "the bishop must always respect God's law, the hierarchical community, and the rights of the faithful" [Krukowski 2005, 241]. This cannot be achieved without an adequate moral attitude on his part. The very concept of authority in the Church is defined as "moral authorization to perform managerial functions in a specific social system" [Sitarz 2015, 94] and refers to the moral dispositions of authority. Every office is "a permanent task, whether divine or ecclesiastical, for the realization of a spiritual goal" (Cano. 145 § 1 CIC/83). The bishop is a servant (LG 28, 56) exercising authority in the community of the Church [Dryja 2019, 31], i.e. he always aims to ensure that "it can fulfill its specific task and mission set by Christ" [Wroceński 2018, 230]. The salvation of the community of faithful is part of his responsibility and orthodox mission. Hence, his responsibility cannot result "solely from his position of hierarchical authority in the Church and is not a simple consequence of the principle of «respondeat superior», but is based on his duty of pastoral care for the faithful entrusted to the bishop" [Majer 2023, 7].

When bishops, for example, present rules that apply to clergy speaking in the mass media, they also express their awareness that these rules apply first and foremost to themselves. All this is done out of concern for the good of the faithful, the recipients of the media. This situation arises in the *Norms of the Polish Episcopal Conference on the Appearance of Clergy and Religious Persons as well as the Transmission of Christian Doctrine in Radio and Television Broadcasts*.[15] These norms include: "1) the duty of clergy to be faithful to the teachings of the Gospel (points 3, 19); 2) the duty to speak only within the limits of own competence, which is particularly important in relation to «difficult and controversial' programs» (point 8); 3) the duty to faithfully communicate the doctrine of the Church and to respect the official positions of the Polish Bishops' Conference, with the appropriate renunciation of the dissemination of «personal opinions» by clergy (point 9)" [Wróbel 2016, 69].

[15] See https://episkopat.pl/doc/167574.norms-konferencji-episkopatu-polski-dotyczace-wystepowania-duchownych-i-osob-zakonnych-or-przekazywania-nauki-chrzescijanskiej-w-audycjach-radiowych-i-telewizyjnych [accessed: 22.11.2024]; see also https://episkopat.pl/files/24/08/19/11/060324_qN2h_Dekret_ogolny.pdf [accessed: 22.11.2024].

2.1. Moral and formal authority of the bishop and the manner of exercising his authority: the requirement of obedience and respect and the establishment of adequate relationships

Authority as the exercise of a bishop's function, i.e., as the exercise of superior authority in the Church, if it is formal authority, it is also moral authority. It begins to belong to the bishop at the moment he takes office and refers to the expectation that his orders will be carried out. Hence, the existence of such authority presupposes (as is often formulated *ex lege*) showing reverence to the bishop and then obedience by respecting his orders [Tofiluk 2008, 172]. However, the special nature of such authority stems from the obligation of fidelity to legal norms, where such an obligation lies with both the subject and the object of authority. The point is that "all those who enjoy authority received from Christ are obliged to exercise it, assuming that the sole and fundamental goal is the good and benefit of the faithful, in accordance with the principle: *salus animarum suprema lex*" [Kamiński 2020, 98]. Basically, both the power and the entire program of the bishop's activity are a search for and implementation of God's will. Obedience is achieved on the principle of "not being guided by own ideas, but listening to the Word and the will of the Lord with the whole Church and allowing oneself to be guided by Him."[16] This principle also includes the bishop's legislative prerogative – decreeing, nominating, establishing, erecting, etc. (cf. Cano. 466, 470, 475, 492, 515, 579 CIC/83). Being aware of its content, the bishop should take into account the possibility of objections of conscience on the part of the faithful. This aspect also includes the concept of the People of God and the right to a just trial. According to Cano. 204 CIC/83, the faithful are not random people, but those who, through baptism, are incorporated into Christ. They constitute a community of persons equal in dignity, who are entitled to certain rights. An important element complementing this approach is Cano. 221 § 1 CIC/83, which lays down the principles of a fair trial [Leszczyński 2012, 159-60].

However, bishops in the exercise of their office – in accordance with the Apostolic Constitution *Sacrae disciplinae leges* – may be "confident of the help of God's grace, supported by the authority of the holy Apostles Peter and Paul, relying on certain knowledge and on the task of the bishops of the whole world" (no. 2). This conviction is also the basis for establishing adequate relationships between individual hierarchical levels: bishop, priest, and deacon, but also mutual relationships among bishops, priests,

[16] Benedictus PP. XVI, Homilia (24.04.2005), AAS 97 (2005), pp. 707-13; Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, Instruction the Service of Authority and Obedience *Faciem tuam, Domine, requiram* (18.05.2008), https://www.vatican.va/roman_curia/congregations/ccscrlife/documents/rc_con_ccscrlife_doc_20080511_autorita-obbedienza_en.html [accessed: 29.03.2025], no. 12.

or deacons. And this is why "the canons that protect the dogmatic teaching of the Church very clearly define the dependence of the latter two hierarchical levels on the bishop" [Tofiluk 2008, 168; cf. Gręźlikowski 2021, 321].

In the case of the bishop of Rome, the moral and formal nature of his ministry is well reflected in the principles governing relations with secular institutions. In this regard, "the sovereignty of the Apostolic See is defined by canon law, according to which it possesses moral personality by divine institution" (Cano. 361 and 1290 CIC/83) [Świst 2017, 701]. John Paul II referred to this principle of spiritual sovereignty in his speech at the United Nations on October 2, 1979. He emphasized its importance as an attribute of the international sovereignty of the Holy See, which "is not based on economic or military power, but on moral authority" [ibid.]. The raison d'état of a bishop's ministry consists (among others) in the fact that "he avoids confusion between faith and politics, and serves the freedom of all" [ibid.]. However, the relationship between these two realities should also assume that "leadership in service does not mean fear or submission to evil, but the exercise of moral authority when secular authorities become persecutors."[17]

In accordance with the provisions of Cano. 287 §2 CIC/83, clerics may not take an active part in political parties or in the management of trade unions" [Grabowski 2018, 66]. If this prohibition is relative, it is because clergy are not subject to this restriction when undertaking the aforementioned tasks is necessary for the defense of the rights of the Church or the development of the common good. "The *ratio legis* of the prohibition in Can. 287 § 2 CIC/83 lies in particular in the provision of § 1 of this canon, which verbalizes the obligation of clergy to act for the preservation of peace and harmony among people, based on justice. Therefore, it is the task of clergy to build unity as an element of the common good" [Grabowski 2018, 66].

2.2. Moral and formal authority of the bishop and moral negligence of the bishop

The bishop's role as an authority in the service of his faithful can also be seen in the fact that he understands the dignity of his vocation as a sacrifice of his life in the service of God alone. The basic condition for fruitful episcopal ministry is internal communion with Jesus Christ, creating unity with him. This is reflected in the CIC/83 (Canons 834-1253), where in Book

[17] *See Gallagher: l'autorità di un vescovo, intreccio di coerenza e pazienza* (05.07.2024), https://www.vaticannews.va/it/vaticano/news/2024-07/gallagher-visita-filippine-messa-vescovi-malaybalay-autorita.html [accessed: 06.04.2025]: "L'arcivescovo segretario per i Rapporti con gli Stati e le Organizzazioni Internazionali in visita nelle Filippine ha incontrato i vescovi locali a Malaybalay: la leadership di servizio non significa timidezza o silenzio di fronte al male, ma esercizio dell'autorità morale quando i poteri del mondo diventano persecuzione."

IV "The Sanctifying Task of the Church", the Church's mission of sanctification is presented [Kamiński 2021, 113]. Hence, the arrangement of books in the CIC/83 is not random. Following Book III "The Teaching Mission of the Church", Book IV addresses the "sanctifying mission of the Church" [ibid., 114]. If a bishop fulfills the pastoral mission entrusted to him in the name of Christ, he does so (in accordance with the Magisterium of the Church) in the form of three interrelated tasks: teaching, sanctifying, and governing, from which it follows that he must be internally subject to these principles and experience their benefits.

There is a very close relationship between power (and its authority) in the Church and its effectiveness, i.e. between command, justice, truth, etc., and the outcome of their application in life, i.e. in practice. An analogy that may confirm this relationship is the fact of misunderstanding canon law (i.e., in the spirit of legal positivism) [Rozkrut 2012, 125], and attempts to justify moral crimes by so-called authorities. This must result in the scandal of the faithful and similarly violate the aforementioned principle of *salus animarum suprema lex*. It is understood that if the various rights of the faithful correspond to the obligations of hierarchical Church, spiritual issues are of particular importance [Luńo 2023, 135-45]. This principle applies to the bishop's authority as the one who, in exercising this office and ministry, should in many ways protect this order. And if "all the faithful have the right to receive help from their pastors" (Cano. 213 CIC/83) [Mazur 2020, 96], the effectiveness of this obligation is based on the principle of a relationship that exists between the ministry and moral and formal authority of the superior (i.e., the bishop) and the obedience of the faithful [Berlingeri 2016, 11-15]. In terms of faith, such obedience and its effectiveness do not result from fear of punishment or external reward, but are an internal matter that has its reference in salvation in the conscience [Gręźlikowski 2021, 321-50].

A special dimension of the necessity for a bishop to maintain moral authority over the community of the faithful is the fact that when a given bishop violates it (e.g., in a manner of *graviora peccata delictus*[18]), he may, and in some cases must, be removed from office. In the document motu proprio *Come una madre amorevole*, the current pope, clarifying the norms set out in Canons 193 and 975 CIC/83, strictly provides for this possibility. "A diocesan bishop, an eparch, or any other cleric who, even temporarily, governs a particular Church or another community of the faithful equivalent to it, can be removed from office if, through negligence or omission of specific acts, significant harm has been caused to a person or to the community of the faithful"[19] [Stokłosa 2017, 133-34]. In accordance with the

[18] Congregatio pro Doctrina Fidei, *Normae de gravioribus delictis* (21.05.2010), AAS 102 (2010), pp. 419-30.

[19] Franciscus, Letterae apostolicae motu proprio *Come una madre amorevole* (04.06.2016), AAS 108 (2016), pp. 715-17.

above, it can be argued that a violation of duties by a bishop (whatever they may be) has negative legal and moral consequences, which, in the light of Catholic morality, can be called a moral violation of the bishop's authority by the bishop himself [Bertomeu 2023, 117-33].

CONCLUSIONS

An analysis of the bishop's authority based on the norms of the 1983 Code of Canon Law and the relevant theological and canonical literature (aided by family studies, etc.) leads to the conclusion that the bishop, in his formal function, is a representative of the Church who builds his moral authority on his own competence and his faith, which consists in fidelity to the teaching of Jesus Christ. Just as the mission of the Church: teaching, educating, sanctifying, disciplining (canonical), etc., requires authority as its source and constant point of reference (which is Christ), thus the function of the bishop retains characteristics identical or very similar to it. What applies to the Church and its law (authority, etc.) also applies to the bishop and his role as a special pastor in that Church. The requirement to care for the good of God's people is so far-reaching here that the Church is not afraid to resort to punishment, not excluding the prerogative of removing from office those who offend this mission. It does so in the belief that punishment has the power to heal, i.e., the power to repair [Bronk 2020].

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PRINCIPLES CONCERNING THE OPERATION OF CHURCH INSTITUTIONS OF A MISSIONARY, CHARITABLE AND WELFARE NATURE (ARTICLE 21(1) AND 22(1) OF THE POLISH CONCORDAT)

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Abstract. The 1993 Concordat between the Holy See and the Republic of Poland (ratified in 1998) provides a crucial legal framework for the Catholic Church's activities in Poland. Among its provisions, Articles 21(1) and 22(1) affirm the Church's right to carry out its missionary, charitable, and welfare works, and obligate the Polish State to treat these works on par with similar state activities. These articles are grounded in both legal and theological principles. Legally, they reflect Poland's constitutional commitment to Church-state cooperation for the common good (Article 25(3) of the Polish Constitution). Theologically, they echo the Catholic teaching that evangelization and acts of charity are integral to the Church's mission. This paper presents the analysis of these Concordat provisions, explaining the legal guarantees they establish and the theological rationale behind them, with references to Polish law, canon law, and authoritative commentaries.

Keywords: Concordat; principle of cooperation; state; Catholic Church; missionary.

INTRODUCTION

The 1993 Concordat between the Holy See and the Republic of Poland (ratified in 1998)[1] provides a crucial legal framework for the Catholic Church's activities in Poland. Among its provisions, Articles 21(1) and 22(1) affirm the Church's right to carry out its missionary, charitable, and welfare works, and obligate the Polish State to treat these works on par with similar state

[1] Concordat between the Holy See and the Republic of Poland signed 28 July 1993, Journal of Laws of 1998, No. 51, item 318.

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activities. These articles are grounded in both legal and theological principles. Legally, they reflect Poland's constitutional commitment to Church-state cooperation for the common good (Article 25(3) of the Polish Constitution).[2] Theologically, they echo the Catholic teaching that evangelization and acts of charity are integral to the Church's mission.[3] This paper presents the analysis of these Concordat provisions, explaining the legal guarantees they establish and the theological rationale behind them, with references to Polish law, canon law, and authoritative commentaries.[4]

1. LEGAL FRAMEWORK UNDER THE POLISH CONCORDAT AND DOMESTIC LAW

Article 21(1) of the Concordat stipulates that "the proper ecclesiastical institutions shall have the right, each according to its relevant nature, to carry out missionary, charitable and welfare activities". In other words, Catholic Church entities (dioceses, orders, charities, etc.) are guaranteed the freedom to pursue evangelization ("missionary" work) and organized assistance to those in need ("charitable and welfare" activities) in accordance with their specific ecclesial character. To facilitate this, Article 21(1) further acknowledges that the Church may "set up organizational structures and raise public funds" for these purposes. This means the Church can establish charities, aid agencies, missionary societies, hospitals, schools, shelters and other institutions, and conduct fund-raising drives to support them, without impediment. Article 21(2) reinforces this autonomy by exempting internal Church fund-raising from state regulation: "The provisions of Polish law on public fund-raising shall not apply to the collection of offerings for religious purposes [or] church charitable-welfare, scientific, educational and upbringing activities […] if they take place on church premises or in circumstances customarily accepted." In practical terms, collections conducted on parish property or during religious services – for example, donations for missions or the poor gathered at Mass – do not require a state permit. This exemption respects the Church's self-governance in mobilizing resources for its mission.

Article 22(1) of the Concordat addresses the state's obligation toward Church-run social works. It declares that "activity undertaken by ecclesiastical persons for humanitarian, charitable, welfare, scientific aims, and for

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

[3] Sacrosanctum Concilium Vaticanum II, Decretum de activitate missionali ecclesiae *Ad gentes* (07.12.1965), AAS 58 (1966), pp. 947-90, no. 2; Benedictus PP. XVI, Litterae encyclicae de christiano amore *Deus caritas est* (25.12.2005), AAS 98 (2006), pp. 217-52 [hereinafter: DCE], no. 25.

[4] See Krukowski 1999; Idem 2000; Pietrzak 2013; Góralski 1998.

upbringing and educational purposes shall enjoy legal parity with activity carried out for similar purposes by civil institutions". In effect, Catholic institutions serving the public – such as church schools, universities, hospitals, orphanages, nursing homes, relief organizations, etc. – must be treated equally under the law as their state-run or secular counterparts. This parity principle entails that Church organizations benefit from the same legal conditions, tax exemptions, and eligibility for public subsidies as comparable state institutions. Article 22(1) essentially obliges the State to extend tax reliefs and budget subventions to Church legal persons engaging in welfare, educational, or humanitarian work. Notably, this principle was "not new" in 1993. Polish law already leaned toward such equal treatment, but the Concordat elevated it to a bilateral guarantee. Article 22(1) thus enshrines in the treaty what had become a norm in Poland's legal system: church-administered charity or educational services are to be supported and regulated on the same footing as public services.

These Concordat norms are fully consistent with Poland's domestic legal acts. Even before the Concordat's ratification, the Act of 17 May 1989 on the relation between the State and the Catholic Church in the Republic of Poland[5] had restored the Church's freedom to conduct charitable work after decades of communist restrictions. Under the communist regime (1945-1989), Church charities were severely curtailed – in 1950 the authorities dissolved Catholic Caritas and all religious charitable institutions, eliminating their legal status. The legislator in the aforementioned Act reversed this policy, explicitly affirming that the Church conducts charitable and care activities in accordance with its mission and enabling the reactivation of church charitable organizations (Article 38). As one historical account notes, "only the Act of 17 May 1989 restored to the Church full freedom of action, including in the charitable sphere, which allowed the reactivation of various charitable associations." Indeed, Caritas Polska, the Church's primary charitable arm, was re-established in 1990 and quickly grew into the country's largest non-governmental relief network. Likewise, numerous Catholic orders and lay associations resumed or expanded their welfare work – running hospitals, orphanages, shelters, and aid programs – once legal barriers were lifted. The Concordat of 1993 built upon this foundation by giving these rights international treaty force, ensuring stability and clear obligations on the Polish State's part. In the words of one commentator, "the state party [in the Concordat] guaranteed respect for the right of church institutions to conduct missionary and charitable-caretaking activities and to create the special organizational structures needed." Article 21 thus reaffirms in the treaty the Church's autonomy in pursuing its religious and social mission, while Article 22(1) binds the State to facilitate and financially support those church-run initiatives just as it does its own public institutions.

[5] Journal of Laws No. 29, item 154.

It should be emphasized that these arrangements operate within the Polish legal system. The Concordat did not create a "state within a state" for the Church, but rather integrated Church activities into the broader framework of public benefit and social welfare law. For example, church charities in Poland generally register as organizations of public benefit and are subject to financial oversight and standards akin to secular NGOs, while enjoying applicable tax benefits.[6] Article 22(2) of the Concordat even foresaw a joint commission to adjust financial regulations concerning church institutions under scoring that details of funding and taxation would be worked out in line with Polish legislation and the Church's needs. In practice, church institutions today partner with state agencies and often receive public grants for educational, medical, or relief projects, exemplifying the principle of cooperation envisioned by both the Concordat and the Polish Constitution. Notably, Article 25(3) of the Constitution explicitly calls for the State and churches to "work together for the good of the person and the common good," while respecting their autonomy.

The Concordat's guarantees for missionary and charitable work are a direct manifestation of this constitutional principle of "friendly Church-State cooperation." Poland's model of church-state relations is one of coordinated separation: the State and the Church are independent in their spheres yet collaborate to serve society's welfare. The legal parity of church charitable institutions ensures that the Catholic Church, as the largest religious community, can fully contribute its extensive social ministry to the common good on an equal legal footing, without discrimination or undue hindrance.

2. THEOLOGICAL AND CANONICAL FOUNDATIONS

Beyond the legal texts, Articles 21(1) and 22(1) of the Concordat are deeply rooted in Catholic theology and canon law, which recognize evangelization and charitable service as fundamental aspects of the Church's identity and mission. Theologically, the Catholic Church understands itself as entrusted with a threefold mission: to preach the Gospel, to sanctify through the sacraments, and to exercise the ministry of charity. Pope Benedict XVI taught that "the Church's deepest nature is expressed in her three-fold responsibility: proclaiming the word of God (*kerygma*), celebrating the sacraments (*leitourgia*), and exercising the ministry of charity (*diakonia*). These duties […] are inseparable. For the Church, charity is not a kind of welfare activity which could equally well be left to others, but is a part of her nature, an indispensable expression of her very being" (no. 25). In other words, acts of charity – caring

[6] Act of 24 April 2003 on Public Benefit Activity and Volunteer Work, Journal of Laws of 2025, item 1338.

for the poor, the sick, the vulnerable – are not merely external philanthropy. They are intrinsic to the Church's religious mission. This doctrinal stance, articulated in the encyclical *Deus Caritas Est*, provides a clear rationale for why the Church insists on the freedom to establish and run charitable institutions. It is exercising a core element of its faith in action. The Concordat's protection of church charities thus safeguards a form of religious exercise: service to neighbor grounded in spiritual conviction.

Likewise, Catholic teaching emphasizes the Church's missionary nature. The Second Vatican Council's Decree *Ad gentes* famously proclaimed: "The pilgrim Church is missionary by her very nature" (no. 2). Pope John Paul II reiterated this in his encyclical *Redemptoris missio*, stating that the Church "cannot do other than proclaim the Gospel" to all peoples.[7] Evangelization – whether through preaching, catechesis, or the Christian witness of charity – is considered a divine mandate, not just an optional activity. Therefore, any legal provision (such as Article 21(1) of the Concordat) that guarantees the Church's right to carry out "missions" is reinforcing the Church's God-given right and duty to evangelize. In the Polish context, "missionary activity" includes not only foreign missions but also domestic evangelization initiatives, parish missions, youth ministry, media apostolates, etc., all of which the Church conducts according to its canon law and pastoral strategies.[8] The Concordat acknowledges this by allowing "each [institution] according to its nature" to engage in the appropriate form of mission or charity For example, a religious order devoted to missionary work can operate missions freely, while a congregation dedicated to the care of the sick can run hospitals and hospices – each pursuing its specific charism under the umbrella of the Church's mission.

In canon law, the rights and responsibilities of the Church in these areas are clearly delineated. The Church legislator affirms the Church's inherent authority to acquire and use temporal goods for its religious and charitable purposes. According to Cano. 1254 § 1 CIC/83: "The Catholic Church by innate right is able to acquire, retain, administer, and alienate temporal goods independently of civil power, to pursue its proper purposes." Those purposes are defined in § 2 as "principally: to order divine worship, to provide decent support for the clergy and other ministers, and to exercise works of the sacred apostolate and of charity, especially toward the needy."

Thus, under canon law, engaging in works of apostolate (mission preaching, teaching of faith) and works of charity is just as fundamental

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[7] Ioannes Paulus PP. II, Litterae encyclicae de perenni vi mandati missionalis *Redemptoris missio* (07.11.1990), AAS 83 (1991), pp. 249-340, no. 5.

[8] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, pp. 1-317 [hereinafter: CIC/83], Cano. 781.

as maintaining churches or supporting clergy. Canon law also encourages the faithful's involvement in these works, for instance by allowing bishops to establish diocesan Caritas agencies and by recognizing lay associations for charitable or missionary outreach (Cano. 215-216, 298 CIC/83). Religious institutes (orders) often have apostolic aims in education, health care, or social service. The legislator in Cano. 675 § 1 CIC/83 teaches that "apostolic action belongs to the very nature of institutes dedicated to works of the apostolate", and that charity toward the neighbor is part of their witness. All these canonical norms create an internal ecclesiastical mandate that the Church must be free to organize and carry out charitable and missionary institutions. The Concordat's provisions can be seen as civil law recognition of these canonical rights. Indeed, Polish commentators have observed that Article 21 of the Concordat essentially mirrors the principle of church autonomy in performing its salvific mission through pastoral and charitable works [Góralski 1998, 85]. By embedding this in an international agreement, both Church and State acknowledge that the Church's evangelical and charitable activities deserve protection and support as part of the common good.

Another theological principle is the idea of cooperation without confusion of Church and State roles, as emphasized in the Church's social teaching. The Church distinguishes her religious mission from the State's duties, yet she also seeks collaboration in areas of humanitarian concern. Pope Benedict XVI wrote that a just secular order and the Church's charitable work are complementary: "The State may not impose religion, but it must guarantee religious freedom […]. The two spheres [Church and State] are distinct, yet always interrelated" (DCE 28a). He further noted that building a just society is primarily the role of politics and law, but works of charity are an irreplaceable manifestation of faith and love that the Church contributes, even in a well-ordered society (DCE 28b-29). In this light, the Concordat's Article 22(1) – requiring the state to treat Church charitable endeavors on equal terms – is an application of the Catholic social teaching that the Church's charitable service complements the state's responsibility for justice. Neither is subsumed into the other: the Church remains independent but works alongside public authorities. This arrangement reflects what Polish Constitution calls "coordinated separation" or "friendly separation". The Church's charitable institutions in Poland often fill gaps in social welfare, motivated by Christian caritas, but do so in harmony with public objectives. For example, Catholic orphanages, hospitals, or hospice centers operate under state health and safety regulations and often cooperate with government programs, yet they retain their religious character and inspiration. This is precisely the scenario envisioned by Article 22(1)'s parity clause and by Article 25(3) of the Constitution – a partnership for human dignity and the common good, each respecting the other's identity.

Finally, it is worth noting that the Concordat's principles are not meant to privilege the Catholic Church to the detriment of others, but to affirm a model that is available to all recognized denominations in Poland. Following the Concordat, Poland extended similar rights to other churches via individual statutes. For instance, laws governing other major communities (Orthodox, Protestant, etc.) also guarantee their right to conduct charitable and educational activities and often mirror the language of the canon law[9]. This ensures the constitutional principle of equal rights is maintained (Article 25(1)), even as the Concordat provides a detailed framework for the largest church. Michał Pietrzak, who represented minority churches during the Concordat debates, emphasized that the Concordat's solutions should be consistent with the general regime of freedom of conscience and should not exclude other faiths. Accordingly, subsequent legislation and practice have largely harmonized the treatment of charitable and educational endeavors across denominations. The Catholic Church's extensive network (Caritas, religious orders, lay movements) means it plays a leading role in social charity, but it does so in a legal environment that encourages pluralistic cooperation – a fact frequently highlighted in Polish legal commentaries.

CONCLUSION

Articles 21(1) and 22(1) of the Polish Concordat articulate a set of guiding principles that enable the Catholic Church to fulfill its missionary and charitable mission within Poland's legal order. Through these provisions, the Polish State formally guarantees the Church's right to conduct evangelization and social welfare activities according to the Church's own norms, and pledges to support and equate those activities with similar activities carried out by the state. This Concordat-based framework is firmly grounded in Poland's constitutional values – particularly the autonomy and cooperation of church and state for the common good – and in the universal norms of canon law and Catholic doctrine that see works of faith and love as inseparable. The legal recognition of church institutions "of a missionary, charitable and care-giving character" has had tangible positive effects over the past decades: the Church in Poland operates a vast network of charitable institutions (schools, hospitals, soup kitchens, homes for the elderly, etc.) that complement the public welfare system and reach some of the most vulnerable populations. The Concordat's principles ensured that these church institutions function with legal stability, enjoying tax exemptions and access to public funds on equal terms, in exchange for their public service.

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[9] Act of 30 June 1995 on Relations with the Evangelical-Methodist Church, Journal of Laws of 2023, item 85, Article 19; Act of 4 July 1991 on the Polish Orthodox Church 1991, Article 17.

From a broader perspective, the Concordat provisions exemplify how legal and theological principles converge in governing church institutions. Legally, they reinforce the idea that freedom of religion encompasses not only private belief or worship, but also the organized expression of faith in charitable works and social engagement. The Polish Concordat thus serves as a model (studied by scholars like Góralski and Krukowski) of a modern concordat that upholds religious freedom in its collective dimension – enabling the Church's charitable apostolate to thrive in synergy with the state's secular efforts. Theologically, the provisions honor the Church's self-understanding as a servant of humanity: free to preach the Gospel and free to love one's neighbor in concrete acts. As Pope John Paul II observed, "Charity as practiced by the Church is not philanthropy, but a part of her mission and an essential manifestation of faith." The legal order in Poland, through the Concordat and related statutes, acknowledges this truth by giving space and support to the Church's missionary and charitable institutions.

In conclusion, Articles 21(1) and 22(1) of the Polish Concordat provide a robust legal-theological foundation for the Catholic Church's missionary, charitable, and welfare activities. They embody a balance of church autonomy and public collaboration that has been largely beneficial for Polish society. The Catholic Church, empowered by these norms, continues to contribute significantly to education, health care, and social aid in Poland, acting as both a partner to the state and an independent spiritual authority. The Concordat's drafters deliberately crafted these articles to respect the Church's divine mission while integrating it into the nation's legal fabric. More than two decades after ratification, one can affirm that those principles have stood the test of time: the Church's charitable institutions operate vigorously, and the State-Church cooperation for the common good – though not without occasional tensions – remains a constitutional and concordatarily enshrined reality. In sum, the Concordat's treatment of missionary and charitable activity in Articles 21 and 22 exemplifies a successful approach to safeguarding religious freedom and promoting human welfare hand in hand, true to both the spirit of the law and the spirit of the Gospel.

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CONCERN FOR THE FAMILY IN THE PASTORAL LETTERS OF THE BISHOPS OF TARNÓW BETWEEN 1918 AND 1939

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Abstract. The family is the centre and the heart of the civilisation of love and marriage is an institution by natural law. The bishops very often called on the faithful to guard the family against various social, economic and political threats. Attacking marital identity is the direct destruction of the family. This was also pointed out by the bishops of Tarnów in the interwar period. This article aims to present the pastoral teaching of Bishop Leon Wałęga and Bishop Franciszek Lisowski on the subject of concern for the family. This article will address the issues of threats to marriage and the family. In this matter, the bishops of Tarnów were also inspired by the preaching of Polish bishops. In this context, Bishop Wałęga and Bishop Lisowski emphasised that the upbringing of children is the fundamental task of the Christian family. However, upbringing cannot be effective without the good example set by the parents. Finally, this article discusses the duties of children towards their parents, among others: respect, obedience and love. The pastoral letters of the bishops of Tarnów in the interwar period are undoubtedly an important and significant element in the history of the Diocese of Tarnów in their message and broad references.

Keywords: Bishop Lisowski; Bishop Wałęga; marriage; family; upbringing.

INTRODUCTION

In his Letter to Families, John Paul II asks the question "What does the family as an institution expect from society?" The Pope gives the following answer: "First of all, it expects a recognition of its identity and an acceptance of its status as a subject in society. This social subjectivity is bound up with the proper identity of marriage and the family. Marriage, which undergirds the institution of the family, is constituted by the covenant whereby «a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children». Only such a union can be recognised and ratified as a «marriage» in society. Other interpersonal unions which do not fulfil the above conditions cannot

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be recognised, despite certain growing trends which represent a serious threat to the future of the family and of society itself. No human society can run the risk of permissiveness in fundamental issues regarding the nature of marriage and the family! Such moral permissiveness cannot fail to damage the authentic requirements of peace and communion among people. It is thus quite understandable why the Church vigorously defends the identity of the family and encourages responsible individuals and institutions, especially political leaders and international organisations, not to yield to the temptation of a superficial and false modernity."[1]

The family is the centre and the heart of the civilisation of love and marriage is an institution by natural law [Bączkowicz, Baron, and Stawinoga 1958, 142-43].[2] The bishops very often called on the faithful to guard the family against various social, economic and political threats. Attacking marital identity is the direct destruction of the family. This was also pointed out by the bishops of Tarnów in the interwar period. This article aims to present the pastoral teaching of Bishop Leon Wałęga[3] and Bishop Franciszek Lisowski[4] on the

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[1] Ioannes Paulus PP. II, Litterae Familiis datae ipso volvente sacro Familiae anno MCMXCIV *Gratissimam sane* (02.02.1994), AAS 86 (1994), pp. 868-925, no. 17.

[2] The literature on the sacrament of marriage in the 1917 Code of Canon Law is rich. It is worth mentioning such positions as: Bober 1935; Biskupski 1956; Grabowski 1934; Pycia 1922; Szmyd 1929; Wilanowski 1931.

[3] Bishop Leon Wałęga, son of Józef and Katarzyna, was born on 25th March 1859 in Moszczenica in Gorlice Poviat. He graduated from the primary school in Gorlice, but he attended lower secondary school in Tarnów. He passed his final exam in the secondary school in Jasło. Then he went to the seminar in Lviv. As a cleric, he was sent to Rome to study theology at the Gregorian University. In Rome, he was ordained as a priest on 24th March 1883 and in the same year he obtained a PhD degree in theology. From Rome, he returned to Lviv where he was successively a vicar, prefect of a small seminary, lecturer of dogma at the University of Lviv and served as a parish priest at the Metropolitan Basilica in Lviv. With a bull of 15th April 1901, Leon Wałęga was appointed Bishop of Tarnów. He took possession of the Episcopal See on 12th May 1901. The consecration was performed by Cardinal Jan Puzyna assisted by Archbishop Józef Bilczewski and Archbishop Józef Weber. In 1928, Bishop Leon Wałęga held the first diocesan synod. In the same year, he resigned, but the Holy Father asked the Bishop of Tarnów to hold another synod. On 8 April 1932, he sent an official request to the Pope and on 10 May a reply arrived from the Secretariat of State that the Holy Father had agreed to his resignation. Earlier, on 27 January 1932, the Pope appointed Bishop Wałęga as titular Archbishop of Ossirinco. He died on Saturday, 22 April 1933 at 10.35 a.m. He ruled the diocese for 32 years [Sitko 1933, 34, 45-46; Nowak 1986, 91-101; Nowak 1999, 56-62].

[4] Bishop Franciszek Lisowski was born on 1 October 1876 in Cieszanów. He attended secondary school in Jarosław, where he received his secondary school certificate on 5 June 1895. He pursued his theological studies in Lviv and Rome, where he obtained his PhD in theology in 1902. Earlier, on 19 August 1900, he was ordained a priest. He was vicar in Zolochiv and assistant catechist at secondary schools no. 4 and 5 in Lviv. Starting in 1913, he began to teach dogmatic theology at the Jan Kazimierz University in Lviv. He was successively prefect, vice-rector and, from 1923, rector of the Metropolitan Seminary in Lviv. On 20 July 1928, he became titular Bishop of Mariamme and helped as suffragan bishop in the Archdiocese of Lviv.

subject of concern for the family. This article will address the issues of threats to marriage and the family. In this matter, the bishops of Tarnów were also inspired by the preaching of Polish bishops.[5] In this context, Bishop Wałęga and Bishop Lisowski emphasised that the upbringing of children is the fundamental task of the Christian family. However, upbringing cannot be effective without the good example set by the parents. Finally, the subject of children's duties towards their parents will be discussed: respect, obedience and love.

1. THREATS TO MARRIAGE AND THE FAMILY

A serious threat to the institution of marriage and the family, in the opinion of Polish bishops, were civil weddings and civil divorce. In their *Pastoral Letter*, Polish bishops noted that there were various forms of civil marriage. In some countries, there is a so-called compulsory form, applicable to all, so that only that marriage is considered valid by the state and only that marriage is entitled to the defence of the state authority, which was concluded in the manner prescribed by the secular authority. Other countries introduced an arbitrary form, whereby the secular authority leaves it to the bride and groom to choose whether they wish to marry before a secular official or a priest. Other countries introduced a form known as conditional, whereby the state authority offers, gives its marriage officiant to all those whom the clerical authority refuses on the grounds of an ecclesiastical obstacle between the bride and groom. The bishops protest against the plans to introduce civil weddings in Poland.[6]

Under the state law, the state may, for just cause, dissolve a marriage and allow both parties to marry anew. The state bases the authority to grant divorce on the assumption that the marriage contract is a civil contract, equal to any other civil contract. Some representatives of the authorities

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With a bull of 27 January 1933, he was appointed Bishop of Tarnów – the tenth in succession. He began his rule in the diocese by solemnly offering the Tarnów diocese to the Heart of Jesus. He ordered that an enthronement of the Heart of Jesus be held in every parish. This event was commemorated by the commencement of the construction of the Church of the Sacred Heart of Jesus in Tarnów. Bishop Lisowski wanted to be present in the religious life of the diocese. Every major celebration in the parishes not only connected him to the parish spiritually, but he himself wanted to be at the celebration, to celebrate the service. He consecrated churches, bells, organs, came to the end of parish missions, retreats, attended priestly jubilees and funerals of deceased priests. In this way, he was in contact with his entire flock. In 1938, Bishop Lisowski convened the second synod of the Diocese of Tarnów. Bishop Lisowski died on 4 June 1939 at 2.30 a.m. His funeral took place on Wednesday, 7 June, under the presidency of Cardinal Primate Hlond [Kantor 2023, 14-16; Nowak 1998, 78-86; Nowak 1999, 36-39].

[5] *Listy pasterskie, orędzia, odezwy Episkopatu Polski 1918-1939*, edited by A. Gąsior, J. Królikowski, Wydawnictwo Naukowe Uniwersytetu Papieskiego Jana Pawła II, Kraków 2018.

[6] *List pasterski biskupów polskich do duchowieństwa i wiernych o małżeństwie* (20.10.1921), in: *Listy pasterskie, orędzia, odezwy Episkopatu Polski 1918-1939* [hereinafter: *Pastoral Letter*], p. 105.

justify the introduction of divorce on the grounds that the Catholic marriage law, by refusing to grant divorce, violates the laws of human nature, is detrimental to public morality, is against progress, the spirit of the times, reason. Well, the bishops, in their *Pastoral Letter* to the Clergy and Faithful, challenged the arguments cited. "It is true that God has also imposed difficult duties on the rational creature. Such a difficult duty is sometimes the duty to maintain lasting love for the unfaithful spouse. This duty can and must be fulfilled for the spiritual good of the spouses and of society as a whole."[7]

By observing everyday reality, Bishop Leon Wałęga was convinced that the right way and an effective means of preventing these threats and leading to the repair of the world was the Christian family. It is the first and most important school for the young generation. Where families are God-fearing, society is healthy. In his view, godless politics may prevail temporarily, persecution of the Church may even break out, but if only faith and virtue are deeply rooted in families, then society will weather all storms and be reborn to a better life. Only when this last stronghold falls, when families abandon the Lord, then the collapse of society becomes a reality. The Bishop of Tarnów saw in his time such deliberate actions by the godless enemies of religion. "They have already almost completely thrown the Lord out of public life, in politics almost no one looks to Him. After politics comes the turn of the schools, which they want to make completely secular, that is, without religious instruction and without religious practices. Finally, our godless men have launched violent attacks on the Christian character of the Polish family, for they realise that only then will they achieve complete victory when they banish the Lord from families, for then they will poison and destroy religious life at the very source."[8] Among the threats to the family, Bishop Wałęga identified actions in the parliament and outside the parliament to push for civil marriage and divorce. "Without the sacrament of marriage, there would be no Christian families, there would only be loose and sinful flocks – no permanent and lasting families at all. In the interests, therefore, not only of the Church but also of society itself, we are obliged to defend the Christian character of our families, that is, the sacrament of marriage and its indissolubility. It does not end there. Just as we see people who are Catholic by name and birth certificate, but in whom there is nothing Catholic, we also find, unfortunately more and more often, families registered in the parish books but living in a pagan way. Such families become schools of corruption and in them breed all the iniquities of which the world is full today. And who is called to this in the first place, if not the parents themselves?"[9]

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[7] Ibid., p. 108.

[8] L. Wałęga, *List pasterski na Wielki Post roku Pańskiego 1923*, "Currenda. Pismo Urzędowe Tarnowskiej Kurii Diecezjalnej" 1 (1923), p. 4.

[9] Ibid., p. 5.

Bishop Leon Wałęga wrote that every family is like a small closed community and is a separate world unto itself. At the head of this community, God has placed two people bound together by the sacrament of marriage – the father and the mother. Both constitute the parental authority guarded by the fourth commandment. The head of the family is the father, for he devises and directs the family, strives to provide for it and is responsible for everything. The heart of the family, on the other hand, is the mother, for from her maternal heart flows that warmth which produces a family atmosphere to which all are drawn. "The mother brings everyone together, she knows how to soothe suffering and win over the stubborn with her dedication. Just as it is difficult to determine what is more important and necessary in the human body: the head or the heart, it is also difficult to say whose role and mission in the family are more important: those of the father or those of the mother. Where the head and the heart are healthy, the organism is healthy and strong, and likewise the family is morally healthy if the father and the mother understand their task well and fulfil it conscientiously. These two influences complement each other and create a normal family."[10]

The relationship of the spouses to each other is best defined by the vows they take during a wedding ceremony. One vows to the other to love, to believe and to be honest in marriage until death. These obligations are the same for both parties, neither has greater rights or privileges, both are to be a unity bound by mutual love and lifelong fidelity. This love cannot be based on natural and transitory motives, for then it would not be lasting; it should be a supernatural love. However, for such mutual love to be possible, one party must deserve the respect of the other. Bishop Wałęga encouraged parents to have such respect. "A wife will respect a sober, hard-working, God-fearing husband sincerely attached to their home, and on the contrary, it will be difficult for her to have respect when she sees in her husband addictions, selfishness, tyranny, I do not want to mention marital infidelity, because this breaks marital unity, often even forever. But also the wife should have qualities and virtues so that she is respected and valued by her husband. We know how, in pagan times, women and wives lived in humiliation and contempt, and it was only Christianity that gave women dignity and even certain gloriousness by clothing them in Christian virtues: humility, piety, patience, modesty and self-sacrifice for others. Even the worst husband must bow before a wife adorned with such virtues. However, as today's woman sheds these Christian virtues and, forgetting her dignity, chases after sinful fashion and games, she also loses respect."[11]

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[10] L. Wałęga, *List pasterski w sprawie formacji młodzieży męskiej*, in: *Listy, orędzia i odezwy biskupów tarnowskich w dwudziestoleciu międzywojennym*, edited by R. Kantor, Wydawnictwo Diecezji Biblos, Tarnów 2023, pp. 92-93.

[11] Ibid., p. 93.

Bishop Franciszek Lisowski, on the other hand, included communism among the factors secularising the family. According to him, the Bolshevik worldview cannot be reconciled with the Catholic worldview. Communism wants a community of land and all goods; it abolishes private property, removes all supernatural elements, removes all faith, all religion, and thus wants to create "paradise on earth". This is directly opposed by the Church. Bishop Lisowski notes that "According to the Communists, the Church is the cause of all the misery that afflicts mankind and therefore it must be destroyed. Hence the struggle against God and against the servants of God. Remove God and all faith from the soul. Down with the Pope, the bishops, the clergy, down with all religion." Bishop Lisowski made it clear that consistently "the struggle against God aims at destroying in man the image and likeness of God. All communism's hatred of God was summarised in its hatred of man. This explains why the communists are so eager to mass murder people, above all the religious with the clergy being first. They murder because they hate God, because the souls of religious people are the tabernacles of God."[12]

2. BRINGING UP CHILDREN AS THE PRIMARY TASK OF CHRISTIAN PARENTS

The Lord offers children to the parents as an expensive deposit for the purpose of raising them not only to be good members of society but, more importantly, to bring them up for heaven, and one day He will demand from them a strict account of how they fulfilled this honourable mission. Bishop Franciszek Lisowski reminded parents that they are the first teachers and educators of their children and this right cannot be taken away from them by anyone. "The upbringing of a child should begin from conception itself, not from the cradle. This first period of education, silent, secret, known only to the mother herself and entrusted in prayer and Holy Communion to Jesus, is very important for the life and development of the child. Just as the farmer prepares the soil for the seed to take in and bear fruit, so too the mother has to prepare a dwelling for the child's soul. When, therefore, the mother realises that God has entrusted her with His treasure, let her henceforth remember that she no longer belongs to herself."[13]

The great secret of parenting is love. A child needs to be loved, but with a good, rational love. According to Bishop Lisowski, it is not good when it is based on the child's natural qualities and when it seeks only temporal welfare for the child. It is not just the body, but the soul that must be loved

[12] F. Lisowski, *List pasterski Światła i cienie w mojej owczarni*, in: *Listy, orędzia i odezwy…*, p. 237.
[13] Idem, *List na Wielki Post O kryzysie moralnym rodzin chrześcijańskich*, in: *Listy, orędzia i odezwy…*, p. 158.

above all. Love, based on natural qualities, is unstable, as are these qualities. "Soon bitter, unpleasant disappointments come and love fades away. Actually, such love is not really the love of the child, but rather the parents love themselves and seek their own satisfaction. Parental love is to be based on the belief that their child is first and foremost a child of God and bears the image of God. These values are supernatural, eternal and love based on them never fades. It is not true love when it is not guided by reason, but only by blind feeling, for then it will turn into weakness."[14]

In the interwar period, the Bishops of Tarnów taught that weak, indulgent parents become slaves to their children who will grow up to be capricious, unforgiving egoists. "When they are children, parents deny them nothing, they want their children to live at home like in paradise and they forget that paradise is gone irretrievably and that their children are destined to live in a valley of tears. When the child grows up, they pity him or her, lamenting his or her every effort and work at home or school, they pity him or her when the holidays are over and the child has to go back to school, as if they have forgotten that people have to work by the sweat of their brow. They pity their young daughters that they have not yet played, that is, that they have not enjoyed life."[15] The Hierarchs pointed out that this exaggerated emotional love blinds especially the mother who does not want to see the faults in her child. "She regards the child as an angel incarnate and allows him or her to do everything. And then what happens? Already at a young age, the child becomes a tyrant and the mother his or her slave. Evil inclinations, self-love, stubbornness, lying – unpunished, grow. The mother's exaggerated compassion and unthinking pity distorts character. The child will not learn and understand that life is linked to hardship, work, suffering and sacrifice. True, childhood is a time of joy and merriment. Where there is innocence, where there is lack of care and responsibility – there is joy. What sunshine is to a plant, joy is to youth. That is why children should be allowed to play innocently and not be discouraged by merriment and shouting. It's their age, it's their time. But on the other hand, children are to learn and understand that sports and games are not the content of life, but are only a brief respite after work to refresh their strength for further work."[16]

The Bishops of Tarnów emphasised that the entire upbringing of a child from the earliest years is to take place *sub specie aeternitatis*, i.e. from the standpoint of eternity. To educate means to raise (*educare*) the child higher and higher up to the peak of perfection, which is God. All other factors of education will fail, will not suffice, because they are insufficient. The important role of the upbringing of children in the family was very well summarised

[14] Ibid., p. 159.
[15] Ibid., p. 160.
[16] Ibid.

by Bishop Leon Wałęga who said that: "If all Christian parents conscientiously fulfilled their vocations, how different the world would look – there would not be so much depravity among the young, there would not be so many crimes. How many criminals sentenced to death accused their parents of being responsible for such a terrible punishment. With what complaint will all the condemned appear on the Day of Judgement? And yet the worse the world is, the more careful should be the upbringing at home to protect the young from corruption and to harden them for the future. Older people will remember the old and large families that were a good school of obedience, piety and good manners. Unfortunately, such families are becoming fewer and fewer today; even in Catholic families, laxity is creeping up on them. Parents abandon their children's obedience, leave them free, are too weak towards them and even quite often succumb to the influence of their sons and perhaps even more so of their daughters. Although some parents do their best to amass wealth for their children or to provide them with a career, but they do not care about their children's souls, they treat their transgressions leniently, and, indifferent to salvation, they do not know how to instil the fear or the love of God in young hearts."[17]

3. GOOD PARENTAL EXAMPLE

Bishop Wałęga as well as Bishop Lisowski were unanimous in stating that there is no more effective means of bringing up children well than by good example. The life of parents should in every respect be the model based on which their children are educated and formed. Bishop Wałęga recommends piety for the fathers of families. "In this respect, seldom can a father be a model for his children. The overwhelming majority of our men are truly cold and religiously indifferent. They do not feel the need to pray more fervently, they seldom receive the Holy Sacraments; worse still, they are ashamed of signs of more fervent piety and sometimes even ridicule it. Of course, children and especially older sons follow the paternal example. How much trouble poor mothers have with the sons of such fathers before they get them to pray or go to confession. On the contrary, where the children see their father often on his knees, see him frequently receiving the holy sacraments, there these practices of religious life become a common custom of the family, which even the older sons will not avoid."[18] With regard to the mothers, in turn, Bishop Wałęga recommends that they set a good example by modest dress. He argued that one of the greatest scourges of the modern world is the fashionable and indecent dress of girls, which

[17] L. Wałęga, *List pasterski w sprawie formacji młodzieży męskiej*, p. 92.
[18] Ibid., p. 95.

spreads widespread depravity. All serious people fear sad consequences for future families from this. The greatest blame for this widespread misfortune lies with the mothers who allow their daughters to dress in this way and often encourage them themselves by giving them bad example. "It will be of no avail for any exhortation to revive the Christian family if mothers do not understand their duty and declare war on sinful fashion. Only the example of an organised larger group of Christian mothers can effectively put an end to this misfortune."[19]

Bishop Lisowski equates good parental example with exemplary married life. He condemns so-called "trial marriages", "marriages until certain time". He expresses this in his Pastoral Letter of 1934 by writing: "And what is to be said of this fashionable, and so shamefully degrading to the woman, "trial marriage", "companionate marriage", "marriage until certain time", i.e. until it is shown whether or not there will be offspring from such a union? And what is to become of this unfortunate woman, whom this supposed spouse, friend, companion, after some time, will reject with revulsion, like a withered rose, like a squeezed lemon! What is to become of the poor, unhappy children of such unions? Think about it and you will understand why the Church constantly, so consistently, with such obstinacy defends the indissolubility of the marriage bond and has one answer to all the complaints, threats and imprecations: *Non possumus*, we cannot – and you will not suspect it of being too strict, of lacking heart and forbearance. The Church is the greatest benefactor of mankind, because the security of mother and child, of the Fatherland and of the Church, rests only on the indissolubility of the marriage bond."[20]

4. CHILDREN'S RESPONSIBILITIES TOWARDS THEIR PARENTS

The Christian family is not only the parents' responsibility for their children, their upbringing, good example, but it is also the children's duties towards their parents. The Hierarchs of Tarnów between 1918 and 1939 focused on three fundamental duties: respect, obedience and love.

The fourth commandment of the Decalogue is the truth, valid under the pain of sin. It is based on the principle that parents replace God on earth and, therefore, there is a halo of solemnity and majesty on their foreheads. Therefore, immediately after the commandments relating to the honour of God, the fourth commandment on the honour of parents takes first place. The reason for honouring parents is neither their virtues nor their merits, but the dignity of fatherhood, flowing from God. Conversely, the

[19] Ibid., p. 95-96.

[20] F. Lisowski, *List na Wielki Post O kryzysie moralnym rodzin chrześcijańskich*, p. 160.

lack of virtues and merits, and even weaknesses and sins, do not exempt the child from keeping the fourth commandment. Bishop Lisowski wrote: "The modern spirit has declared war on all authority and thus on the solemnity of parents. The son, as soon as he has grown up, and if he still has his studies, if he does not scoff, he pities his parents, their backwardness, because they cannot comprehend modern progress. Poor parents, they have often not eaten to educate their children and now this is how they are treated by their own son or daughter. After all, work and years of experience are perhaps worth no less than an academic degree. But this is what the child does not want to acknowledge. If such a son or daughter could look into the soul of his father and mother, they would see what bitterness and sadness they are filled with."[21] He further encourages the children: "Respect your parents because God has commanded it. Never, God forbid, be ashamed that they are unlearned, that they may be modestly dressed, but see with the eye of faith what a halo of divine dignity shines on their foreheads. Reverently kiss the work-worn hand, see what deep furrows have been ploughed in their foreheads by the concern for your education. Respect them not only externally, but in your soul, in your heart, and patiently endure their faults and the weaknesses of their old age."[22]

The second duty is obedience. It stems from this assumption that parents are God's vicegerents and therefore disobedience to parents is at the same time rebellion against God. Obedience should be sincere, not just outwardly, but from the spirit, from conviction. It is to be a kind of homage, i.e. obedience to God himself. Bishop Franciszek Lisowski encouraged obedience by writing: "Obey your parents, for they are your best teachers. They desire only your good. When you are in unfamiliar surroundings, do you not listen to your guide? And yet you are going on a distant, unknown journey. You are pilgrims and your parents have already travelled much of this journey, have gained experience and want to guide you along the right path."[23]

The Hierarchs of Tarnów in the 1930s taught that, after God, children would find no other person on earth who would be a greater benefactor and love them more than their father and mother. The heart must be paid for with the heart, the blessings with gratitude. "It sometimes happens, unfortunately among Catholic families, that son and daughter not only do not love their parents, but that they deal cruelly with them. By asking and crying, they force their parents to bequeath their property. The parents give them everything. After all, it is their child and will not harm them. How wrong they were. After receiving the estate, the hearts of the son and daughter-in-law became so evil. The old woman is a nuisance and they want to get rid

[21] Ibid., p. 169.
[22] Ibid., p. 168.
[23] Ibid., p. 169.

of her as soon as possible. They tease and harass her so much, skimping on a piece of bread, that the poor mother swallows the bitter tears, and when she cannot stand it any longer, she leaves the house with a begging stick."[24] In another place, Bishop Lisowski exhorted to love towards parents: "Dear children, remember that your fate depends on keeping the fourth commandment. As long as you have parents, you are happy. Only when God takes them away will you understand what you have lost. No one can replace your mother's heart. The miserable plight of the orphan. You will go to her grave, sad orphan, and cry: Mum, Mum – and you will not hear from your mother again, and only then will you understand what a mother means. Love your parents if you want to be happy, if you want your children to love you. Try to sweeten their old age. It is the duty of conscience under the pain of mortal sin to support them when they are in want."[25]

CONCLUSION

The Bishops of Tarnów in the interwar period very often called on the faithful to guard their family against various social, economic and political threats. In their view, attacking marital identity was the direct destruction of the family. The concern for the family in the pastoral letters of Bishop Wałęga and Bishop Lisowski can be summarised as follows:

1) The Bishops of Tarnów in the interwar period, when writing in their pastoral letters about the crucial importance of the family, drew attention to dangers that threaten this institution from outside. They condemned civil marriages and civil divorces. They argued that the family is the first and most important school for the young generation. Where families are God-fearing, society is healthy. In their view, godless politics may prevail temporarily, persecution of the Church may even break out, but if only faith and virtue are deeply rooted in families, then society would weather all storms and be reborn to a better life.
2) The primary task of parents in the family is to bring up their children. Parents are the first teachers and educators of their children and this right cannot be taken away from them by anyone. The upbringing of a child should begin from conception. This is the first period of education, silent, secret, known only to the mother.
3) In caring for the family, the good parental example cannot be forgotten. Bishop Wałęga as well as Bishop Lisowski unanimously stated that there is no more effective means of bringing up children well than by good

[24] Ibid., p. 170-71.
[25] Ibid., p. 171.

example. The life of parents should in every respect be the model based on which their children are educated and formed.

4) Finally, the Christian family is not only the parents' responsibility for their children, their upbringing, good example, but it is also the children's duties towards their parents. The Hierarchs of Tarnów between 1918 and 1939 focused on three fundamental duties: respect, obedience and love.

When analysing the teaching of the bishops of Tarnów in the interwar period on issues relating to the family, we can easily see that this teaching is still relevant today. Similar dangers threaten the contemporary family. Also the imperishable values related to upbringing such as good example, respect and love are up-to-date.

The pastoral letters of the bishops of Tarnów in the interwar period are undoubtedly an important and significant element in the history of the Diocese of Tarnów in their message and broad references. They are also an incentive to undertake further research into some manifestations of church life in the Diocese of Tarnów, especially the sacraments, faith and customs or ideological and political threats.

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ORTHODOX RELIGION TEACHING IN A PUBLIC SCHOOL IN THE GREEK REPUBLIC. LAW AND EDUCATION PERSPECTIVE

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Abstract. Teaching Oorthodox religion in schools in the Hellenic Republic is compulsory and has firm legal foundations as well as original educational solutions within the European Union. The subject of this analysis are: constitutional norms, laws, regulations and relevant literature. The article presents the religious demographics, denominantional relations in the Hellenic Republic, constitutional foundations of religious education, freedom of conscience and religion, the legal status of teachers, the structure of education, and curriculum. Religious education includes both catechetical and religious studies elements, with emphasis on the latter. The Greek legal system protects religious and ethical dialogue, which guarantees pupils the right to exercise freedom and conscience. This is expressed in the possibility for pupils to obtain exemption from compulsory participation in religion classes. Although the current multiculturalism of Greek society and globalization mean that the denominational nature of religious education is met with criticism, the link between teaching the Orthodox religion and education remains strong and is generally accepted by Greek society.

Keywords: Greece; religious education in schools; Orthodox Church; freedom of conscience and religion; Ecumenical Patriarchate of Constantinople; Ministry of Education, religion and sports.

INTRODUCTION

The Hellenic Republic is one of eight European Union countries where participation in school religion classes is compulsory. In addition to Greece, this subject is taught as a compulsory course in Austria, Cyprus, Denmark, Finland, Malta, most German federal states, and Sweden. In another fifteen EU member states, participation in religion classes is optional. These include

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Poland, Belgium, Croatia, the Czech Republic, Estonia, Spain, the Netherlands, Ireland, Lithuania, Latvia, Portugal, Romania, Slovakia, Hungary, and Italy. Among the 27 EU countries, only four do not provide religious education in public schools: Bulgaria, France, Luxembourg, and Slovenia – although it must be noted that in France, in the departments of Alsace and Moselle, religious education is present in public schools due to their specific legal status [Kiciński 2012, 7]. Models of religious education in Catholic and Protestant areas in Europe are relatively well studied, whereas the Orthodox model has remained on the margins of scholarly inquiry which in Greece has original legal framework and educational potential. In Greece, religious education in principle and practice shapes the identity of the inhavitatns of the southern Balkans and numerous islands, Teaching the Orthodox religion is a fundamental element at every level of education. The Orthodox tradition is linked to Greece's long history of reganing freedom from Ottoman (Muslim) rule, which lasted more than 370 years. Until Greece achieved full independence in 1830, this tradition fostered and reinforced national identity through language, Christian culture, and its own traditions and symbols. Despite that currently the multicultural character of Greek society and globalization make the denominantional character of religious classes to be met with cricism – for example, from the Aherist Union of Greece – the connection between Orthodox religious education and the shcool system remains strong and is generally accepted by Greek society.

Eurostat reports that Greece has 10,400,720 inhabitants (Eurostat 2025), and the U.S. Administration estimates that Orthodox Christians consitiute 81-90% of the population, while others note that the level of religious indifference has been clearly increasing in recent times [Olszówka 2009, 147, note 7]. Followers of Islam represent the second lardgest religious group. In the administrative region of Macedonia-Thrace, there are about 140,000 Muslims, including Alevi Muslims, who were recognized in the Treaty of Lausanne in 1923 as descendants of the Muslim minority. According to the Pew Research Center, there are currently about 520,000 Muslims in Greece: asylum seekers, refugees, and immigrants; half of them reside in Athens.[1] Other religious communities (approx. 5% of the Greek population) include: Old Calendarist Orthodox, Catholics (in both the Latin and Eastern rites), Protestants, Pentecostals, Jehovah's Witnesses, Jews, adherents of Hellenic polytheistic religions, Scientologists, Bahá'ís, members of the Church of Jesus Christ of Latter-day Saints, Sikhs, Seventh-day Adventists, Buddhists, and members of the International Society for Krishana Consciousness (ISKCON). The Hellenic Republic is also home to about 2,500 Ethiophian

[1] Report on International Religious Freedom: Greece, https://www.state.gov/wp-content/uploads/2024/03/547499-GREECE-2023-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf [accessed: 22.01.2025].

Orthodox Christians, nearly 1,000 Syrian Orthodox Christians, and about 100,000 aherents of the Armenian Apostolic Church.[2]

The aim of this article is to answer the following questions: what are the legal foundations of Orhodox religious education, and how is it organized in public schools in the Hellenic Republic? Achieving the research goal required appropriate research methods. The research is interdisciplinary in nature. Interdisciplinarity is today regarded as a genuine necessity in studies concerning legal analyses, particularly those relating to law and religious education in state schools. In the field of educational law, the dogmatic method was applied, associated with logical-linguistic analysis and interpretation of legal texts. In the field of education, the method of critical source analysis was employed. Finally, commonly used methods of analysis and synthesis were applied. Greek legal sources as well as scholarly literature on the subject will be analyzed. Among studies published in Polish, those by Anna Pikulska-Robaszkiewicz [Pikulska-Robaszkiewicz 1998, 249-66] and Marcin Olszówka [Olszówka 2009, 145-75] should be noted. In English, works were published by, among others: Margarita Markovit [Markovit 2019a, 45-48], Nikos Maghioros [Maghioros 2013, 130-38], Vasiliki Mitropoulou [Mitropoulou 2020, 57-84], Marios Koukounaras Liagkisa [Koukounaras Liagkisa 2015, 153-69], and Eda Gemi [Gemi 2021, 88-98]; and in Greek by Athanásios D. Sapounás [Sapounás 2019, 529-40]. The tranliteration of the text in Greek (PN-ISO 843:1999) will follow the BGN/PCGN rules ([B.a.] 1996).

1. THE LEGAL AND ORGANIZATIONAL STATUS OF THE ORTHODOX CHURCH AND THE MAIN RELIGIOUS MINORITIES

The tasks and role of Orthodox religious education in schools in the Hellenic Republic stem from the constitutional position of the Orthodox Church. The Constitution itself indicates that the religion of the Eastern Orthodox Church of Christ defines the identity of contemporary Greece, which is a confessional state. Not only does the Preamble of the Constitution of Greece invoke the One and Indivisible Trinity, but privileges are also granted to the Orthodox Church (Article 3).[3] This is evident, for example, in the system of Mount Athos. The Constitution, referring to the ancient privileged status of the Athos peninsula, recognizes the sovereignty of this territory and emphasizes the spiritual jurisdiction of the Ecumenical Patriarchate over it, as well as the executive authority exercised by the twenty "holy monasteries." In addition, it enjoys its own judicial authorities, as well as customs and tax privileges (Const. of Greece, Article 105(1-5)).

[2] Ibid.

[3] Article 3 of the Constitution of Greece. Parliament Hellenic 2022 [hereinafter: Const. of Greece].

The organization of the Greek Orthodox Church is complex. On the one hand, it does not cover the entire territory of the country, while on the other, Orthodox Greeks residing in Europe, the Americas, and Australia fall under its jurisdiction. The Orthodox community residing in Greece is divided between the jurisdiction of the Autocephalous Orthodox Church (hereinafter: AOC)[4] and the Ecumenical Patriarchate of Constantinople (EPC). The Orthodox Church in Greece exercises jurisdiction over the Ionian Islands, Thessaly, the province of Arta, selected areas of Epirus and Macedonia. The hierarchy of the Autocephalous Orthodox Church of Greece consists of 1 Archbishop and 45 Metropolitans, in accordance with the Patriarchal and Synodal Tome of June 29, 1850, and the Patriarchal and Synodal Acts of 1866 and 1882.[5] Meanwhile, the Ecumenical Patriarchate of Constantinople exercises jurisdiction over Mount Athos, 4 metropolises in the Dodecanese, the Exarchate of the Patriarchal Throne on Patmos, the semi-autonomous Church of Crete (1 archbishopric and 8 metropolises),[6] as well as 36 metropolises of the Patriarchal Throne in Macedonia, Epirus, Western Thrace, and the islands of Lemnos, Lesbos, Chios, Samos, and Ikaria. These metropolises were temporarily entrusted by the EPC to the administration of the AOC under the Patriarchal and Synodal Act of September 4, 1928 (Const. of Greece, Article 3(1)).

The legal status of the Orthodox Church in the Hellenic Republic is regulated not only by the Constitution (1975/1986/2001/2008/2019), but also by the Law of May 25, 1977 on the Status of the Greek Church.[7] The Autocephalous Orthodox Church remains inextricably linked with the Great Church of Christ in Constantinople as well as with the other autocephalous Orthodox Churches (Const. of Greece, Article 3(1)). Members of the Orthodox Church in Greece are Orthodox faithful. The Autocephalous

[4] Autocephaly is the hierarchical, administrative, and judicial independence of a local Church from other autocephalous Orthodox Churches, as well as its autonomy in shaping its own organizational distinctiveness in legislation, within the boundaries of Orthodox dogmatic teaching [Olszówka 2009, 147].

[5] The Patriarchal and Synodal Act of September 4, 1928 regulates the legal status of the provinces incorporated into the Kingdom of Greece in 1912. The EPC, in agreement with the Kingdom of Greece, temporarily entrusted the ecclesiastical administration of the so-called "New Lands" to the AOC. The EPC continues to exercise supremacy over these provinces. During liturgical services, the name of the Ecumenical Patriarch is mentioned. The EPC also accepts appeals and recourses from the judgments and decrees of AOC bodies in matters related to the so-called "New Lands" [Olszówka 2009, 148-49].

[6] The Church of Crete is an Orthodox Church with semi-autonomous status, maintaining dependence on the EPC. The Church of Crete consists of 1 archdiocese and 8 metropolises. Its highest administrative authority is the Holy Synod of the Church of Crete, based in Heraklion, chaired by the Archbishop of Crete, with the metropolitans as members.

[7] The Status of the Greek Church of May 25, 1977, Law No. 590 Government Gazette A' 146/31.5.1977.

Orthodox Church is governed by incumbent Metropolitans. Its supreme authority is the Holy Synod of the Hierarchy (Ierá Sínodos tīs Ierarchías), which holds legislative, administrative, and judicial powers. It consists of 1 Archbishop. 45 Metropolitans belonging to the AOC, 36 Metropolitans of the Patriarchal Throne (from the so-called "New Lands") under the jurisdiction of the Ecumenical Patriarchate of Constantinople, 9 titular Metropolitans, 18 assistant bishops, and 9 retired hierarchs. Current administrative tasks are carried out by the Permanent Holy Synod (Diarkís Ierá Sínodos), composed of: the Archbishop of Athens as its president, 6 Metropolitans of the Autocephalous Orthodox Church, and 6 Metropolitans of the Patriarchal Throne from the so-called "New Lands". Both synods are seated in Athens. The Metropolitans of the Dodecanese, Crete, and the Exarch of the Patriarchal Throne on Patmos are not members of the AOC Synod.[8] Metropolitans are elected and appointed by the President of the Hellenic Republic [Olszówka 2009, 150-52].

The Orthodox Church in Greece holds a dominant position and enjoys autonomy, with its dogmatic indissolubility guaranteed by the Constitution. In Greek scholarly literature, the state's predominance over the Orthodox Church and religious associations is exercised through the so-called "rule of state law" (sýstīma tīs kratoúsīs politikís), described as a form of "progressive caesaropapism." Greece, through legislation, may regulate the internal administrative affairs of the Orthodox Church. This system rests on granting Orthodoxy a dominant status. The Orthodox Church maintains dogmatic unity with other Orthodox Churches and enjoys constitutional guarantees for the preservation of the holy canons and sacred tradition (Const. of Greece, Article 3(1)).

By contrast, the legal status of other Churches and religious associations is defined by statute [Pikulska-Robaszkiewicz 1998, 249]. Churches and religious associations recognized as religions (gnōstí thrīskeía) are guaranteed freedom of worship as well as freedom of conscience and religion (Const. of Greece, Article 13(2)). Freedom of conscience and religion is secured by constitutional provisions, public international law agreements, and the case law of the European Court of Human Rights. A recognized religion is one whose doctrine is not secret, practices public worship, and has permission to establish and operate places of worship. In practice, religious proselytism is prohibited; it is understood as systematic, intensive, and intrusive interference with another's religious consciousness in order to induce a change of religious beliefs.[9]

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[8] The Status of the Greek Church of May 25, 1977, Law No. 590, item 1-9.

[9] Low of the Organization of the legal form of religious communities and their associations in Greece and other provisions of the General Secretariat for Religious Affairs and other provisions, No. 4301 Government Gazette A' 223/07.10.2014, item 14.

Public legal personality is granted to the Orthodox Church [Markovit 2019a, 45-48], the Jewish Community, and the Muslim minority in Western Thrace [Stawowy-Kawka 2006, 300-303].[10] By contrast, legal personality under private law is granted to[11] the Catholic Church in the Latin, Greek, and Armenian rites,[12] the Anglican Church, the Ethiopian Orthodox Church, the Coptic Orthodox Church, the Armenian Apostolic Church, the German-speaking Evangelical Community, the Greek Evangelical Community, and the Syrian Orthodox Church. Other religious communities are registered as non-profit civil law organizations: Jehovah's Witnesses, Scientologists, and Bahá'ís [Mitropoulou 2020, 58]. The Union of Greek Atheists, established in 2010, was registered in 2012 [Markovit 2019a, 57-58].

2. LEGAL FOUNDATIONS OF ORTHODOX RELIGIOUS EDUCATION IN PUBLIC SCHOOLS

The status of religious education in Greek public schools is defined in constitutional provisions, which were subsequently implemented in Law 1566/1985 on the *structure and functioning of primary and secondary education*.[13] The Council of State (Supreme Administrative Court) has held that religious education has a "confessional" (omologiakós) character, as it includes the teaching of both Orthodox doctrine and moral theology. This

[10] In Western Thrace, a school system has been established for the Muslim minority. Islamic education is provided in both Greek and Turkish, based on approved curricula [Maghioros 2013, 138].

[11] Following the 2014 judgment of the European Court of Human Rights against the Hellenic Republic, the Greek Parliament introduced into the national legal system the concept of private legal personality for religious communities. This law established the legal framework for religious communities, creating a unified official register. Churches and religious associations were recognized as possessing private legal personality without the requirement of registration or proof of a sufficient number of members (Low of the Organization of the legal form of religious…, item 13).

[12] The Roman Catholic Church, following a property dispute in Chania, Crete, concerning a church wall, lodged a complaint with the European Court of Human Rights against the Hellenic Republic on October 28, 1996. In its complaint, the Roman Catholic Church argued that it could not bring a civil action because Greek civil courts refused to recognize its legal personality. The Church demanded legal protection which, "de facto," it had enjoyed for centuries. On December 16, 1997, the European Court of Human Rights ruled that there had been a violation of Article 14 (right to non-discrimination) in conjunction with Article 6(1) (right to a fair trial) of the European Convention on Human Rights of November 4, 1950, see *The Canea Catholic Church v. Greece*, Application no. 25528/94, https://www.equalrightstrust.org/ertdocumentbank/The%20Canea%20Catholic%20Church%20v%20Greece%20_fair%20trial%20rights,.pdf [accessed: 22.01.2025] [Markoviti 2019b, 1-24].

[13] Low of the Structure and operation of primary and secondary education and other provisions, No. 1566, Government Gazette A'167/30.9.1985, item 1a.

model of education, in the context of religious and cultural pluralism, is criticized by some scholars on the grounds that it no longer meets the requirements of a democratic and pluralistic society [Sapounás 2019, 533-38]. Supporters of confessional religious education, however, point to sociological and historical arguments. From a sociological perspective, the majority of Greek society declares baptism in the Orthodox Church. From a historical perspective, the preservation of Christian and Greek national identity in the face of Islamic expansion between the fifteenth and twentieth centuries was made possible through the dedicated educational and religious activities carried out by the Orthodox Church [ibid., 530-33].

Religious education is compulsory in both primary and secondary schools [Koukounaras Liagkis 2015, 153]. On the one hand, students have the right to become acquainted with the authentic tradition of the Orthodox Church; on the other hand, they are entitled to exercise their freedom of conscience and religion (Const. of Greece, Article 13(1-2)).[14] The Ministry of Education and Religious Affairs, in its circulars of 10 July 2008, 4 August 2008, and 26 August 2008, took the position that under certain conditions students may be exempted from compulsory religious education classes. In a subsequent circular of 20 November 2008 addressed to the Ombudsman, the Ministry clarified these conditions: (1) religious education is compulsory for all students; (2) students who profess no religion or who are non-Orthodox may be exempted without having to declare their religious affiliation; (3) foreign students are required to attend Greek language classes in place of religious education, while Greek citizens must attend alternative classes designated by the teachers' association [Ypourgeío Paideías kai Thrīskeumátōn 2008].

The Council of State (Supreme Administrative Court), in its established case law, has held that students may apply for exemption from compulsory religious education by invoking "thrīskeutikī́s syneídīsīs," i.e., "freedom of conscience and religion."[15] The Data Protection Authority, however, has broadened the scope of this reasoning: students may request exemption on any grounds of a worldview-related nature. Such an approach contributes to ensuring full protection of freedom of conscience (Article 9 of the European Convention on Human Rights) [Rozner 2022, 111-36]. In this way, even Orthodox believers who disagree with the curriculum may seek exemption from religious education [Vlachópoulos 2023, 30, no. 77].

Finally, it should be emphasized that Greek legislation, which guarantees parents the constitutional right to raise their children in accordance with their

[14] See also: Law 1566/1985 on the Structure and function of primary and secondary education, Government Gazette A'167/30.9.1985.

[15] Symvoúlio tīs Epikrateías kai Dioikītikī́ Dikaiosýnī. 2018 Council of State and Administrative Justice, 2018 [A 660/2018], [A 926/2018]; 2019 [A 1750/2019].

religious convictions, also provides adherents of recognized religions and denominations with the right to establish private confessional schools.

3. IMPLEMENTATION OF ORTHODOX RELIGIOUS EDUCATION – ADMINISTRATIVE AND EDUCATIONAL ASPECTS

The central administrative body is the Ministry of Education, Religion, and Sports (Ypourgeío Paideías, Thrīskeumátōn kai Athlītismoú), which is responsible for, among other things, setting long-term educational objectives, developing curricula, and managing budgetary resources. Within the Ministry, the General Secretariat for Religious Affairs (Genikí Grammateía Thrīskeumátōn) oversees the implementation of Orthodox religious education. Its responsibilities include protecting freedom of conscience and religion, exercising administrative supervision over the religious education system, and overseeing religious education teachers. The Ministry is supported in its scientific and organizational work by the Institute of Educational Policy (Institoúto Ekpaideutikís Politikís), which is tasked with approving curricula[16] in accordance with the Guidelines for Approving Curricula and Educational Activities. At the regional level, responsibility for religious education rests with the Regional Directorates of Education in each of the 13 regions, while at the local level, school principals bear direct responsibility.

All citizens are entitled to free education at three levels. The first includes early years and primary education. The second consists of lower secondary school (gymnasio, cycle A) and either general or vocational upper secondary school (lykeio, cycle B). The third comprises higher education at universities, polytechnics, academies of fine arts, technical institutions, and the Higher School of Pedagogical and Technological Education (ASPETE Anṓtatī Scholí Paidagōgikís kai Technologikís Ekpaídeusīs). Compulsory education covers students aged 4-5 to 15. It includes two years of compulsory preschool education (nīpiagōgeío), although in practice, due to the limited number of preschools, many children begin at age five. This is followed by a six-year primary school (grades 1-6: dīmotikó scholeío) for students aged 6-12, and a three-year lower secondary school (grades 1-3: gymnásio) for students aged 12-15.

Distinct within the European Union legal and educational framework is the status of teachers. In primary schools, because one teacher is responsible for all subjects, that teacher also teaches religion. To do so, the teacher must be an Orthodox Christian. If no Orthodox teacher is available, a second Orthodox teacher is appointed. Primary school religion teachers are

[16] Law of Structure and operation of primary and secondary education and other provisions, Law No. 1566/1985 Government Gazette A'167/30.9.1985, item 24; Law of The Upgrading the school, empowering teachers and other provisions, No. 4823/2021 Government Gazette A 136/3.8.2021, item 87.

required to have completed four years of pedagogical studies. In secondary schools, religious education is entrusted to graduates of university-level theological studies, which can be undertaken at the theological faculties of Athens and Thessaloniki. These faculties, however, are not confessional in nature. In Greece, completion of pedagogical studies is the sole requirement for obtaining full teaching qualifications. Teachers are appointed through competitive examinations, and the consent of the local Orthodox metropolitan is neither required for appointment nor for dismissal. Primary and secondary teachers are employed and remunerated by the state budget [Pikulska-Robaszkiewicz 1998, 263]. Beginning teachers are obliged to complete internships, which include essential elements for developing professional competencies.

The objectives, content, and implementation of Orthodox religious education are regulated by laws, presidential decrees, and ministerial acts. Religious education is considered a subject of particular importance, as the majority of citizens declare baptism in the Orthodox Church [Maghioros 2013, 130]. Children in preschool (nīpiagōgeío) do not have religion classes, but religious themes are addressed within environmental education classes, which take an interdisciplinary approach, incorporating national and religious celebrations. Similarly, students in grades I-II of primary school do not have separate religion classes, but encounter religious themes in environmental education, which addresses personality development, the cultivation of ecumenical and universal values, and Greek national identity. Religion classes, held two hours per week, become compulsory from grades III-VI of primary school, with a separate textbook for each grade. In lower secondary school (gymnasio, cycle A), religion is also taught two hours per week, with a separate textbook for each grade. In general upper secondary schools (lykeio), students in grades I-II have two compulsory hours of religion per week, while in grade III, one hour per week. In vocational secondary schools, religion is taught one hour per week.[17]

The general objectives of religious education in primary and secondary schools are defined by statute.[18] More specific objectives for each grade in primary school [Ypourgeío Paideías, Thrīskeumátōn kai Athlītismoú 2021], lower secondary school [Ypourgeío Paideías, Thrīskeumátōn kai Athlītismoú 2020a], and upper secondary school [Ypourgeío Paideías, Thrīskeumátōn kai Athlītismoú 2020b] are set out in ministerial decrees.

The curricula of 2011, 2014, 2016, 2017, and 2020 emphasize the value of Orthodoxy in shaping the identity of contemporary Greek society, particularly through interreligious dialogue, the discovery of freedom, democracy,

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[17] The Deputy Minister of Education and Religions, *Curriculum of the Religious Studies course in Elementary and High School*, Government Gazette 698/B/4-3-2020, item 1.

[18] Law of the Structure and operation of primary and secondary education and other provisions. Law No. 1566/1985, Government Gazette A'167/30.9.1985 [hereinafter: Law No. 1566/1985].

and mutual respect. The goal of religious education in Greek public schools is the comprehensive and harmonious development of students' intellectual and psychophysical potential. It is intended, in particular, to foster love of neighbor, respect for human life and the natural environment, patriotism, and an understanding of the authentic principles of the Orthodox Christian tradition (Law No. 1566/1985, item 1.1.a). The legislator further specifies educational goals for primary and secondary schools. At the primary level, the aim is to help students gradually learn moral, religious, national, and universal values, and to formulate them into an ordered system (Law No. 1566/1985, item 4.1.e).

The general aim of religious education in secondary schools is to develop a system of ethical, religious, national, and universal values, applying them to conduct. Students should be able to direct their emotional life toward universal goals (Law No. 1566/1985, item 5.1.a). Additionally, upper secondary students are expected to gain a deeper awareness of the Orthodox Christian ethos in connection with universal values, fostering a spirit of interreligious dialogue (Law No. 1566/1985, item 6.2.b). Religious education in the upper secondary cycle also emphasizes the development of intellectual competence combined with the ability to critically and creatively evaluate reality (Law No. 1566/1985, item 6.2.c-d). The content and conduct of religious education are supervised by state authorities and are independent of catechetical instruction provided by the Orthodox Church. Education in Greece is free, as public schooling is funded by the state, and religious education textbooks are free of charge and available online.

An analysis of the objectives and implementation of Orthodox religious education in administrative and educational terms shows, on the one hand, that it assists students in discovering their historical and social roots grounded in the Holy Scriptures and the Tradition of the Eastern Church, and on the other hand, that it is a holistic process of building long-term memory encompassing spiritual, moral, and intellectual development.

CONCLUSION

Orthodox religious education in public schools in the Hellenic Republic is legally guaranteed and fully implemented at every stage of education. The issue of Orthodox religion is addressed in the Constitution of the Hellenic Republic and in binding normative acts as a foundation of the functioning of an independent state. The model of Orthodox religious education in Greek schools is comprehensively designed and implemented in both theoretical and practical dimensions. The very name of the Ministry of Education, Religion, and Sports reflects the holistic approach to the education of Greek children and youth, where religion is not considered merely

a private matter or the exclusive concern of the Orthodox Church. This original model of religious education is characterized by the coexistence of both catechetical and cultural elements, while showing a tendency to emphasize the context of Greek culture. The catechetical dimension is evident, for example, in the recitation of the Our Father by one of the students before lessons during the daily assembly, the presence of icons in schools, and the celebration of Christmas and Easter. The cultural dimension is reflected in the fact that the Ministry of Education, Religion, and Sports, through its legal acts, refers to the protection of Orthodox tradition and aims at long-term education in which physical, intellectual, and spiritual upbringing are balanced. Within this model, it is not the Orthodox Church but the Ministry that receives applications, organizes competitive examinations (deciding on the basis of points obtained), and appoints teachers of religion. The President of the Hellenic Republic confirms and orders the publication of such appointments in the Official Gazette of the Government (Efīmerídatīs Kyvernḯseōs – ΦΕΚ).

In its religious education curriculum, the Ministry of Education, Religion, and Sports respects the principles of objectivity of scientific knowledge and promotes tolerance toward religions, basic knowledge of religions, theological and philosophical justifications for religious beliefs, appreciation of religious diversity, and the countering of negative religious stereotypes [Ypourgeío Paideías kai Thrīskeumátōn 2020]. At the same time, it remains faithful to its own Orthodox identity.

The legislation of the Hellenic Republic provides clear principles for contemporary religious education in schools with a scientific character, while the Orthodox Church organizes parish-based catechesis on its own initiative. The metropolitan grants a mandate to older youth to provide catechesis to younger children. Catechetical meetings include both theological and ludic content with activating methods.

Undoubtedly, Orthodox religious education in schools fosters religious and ethical dialogue in the Greek socio-cultural context of the 21st century and has significant educational potential. It develops key competences, such as preparing students to cope with a dynamic and increasingly secularized world. At the same time, it offers the opportunity to discover one's cultural roots and communicative competences grounded in fundamental Greek values.

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THE SIGNIFICANCE OF CANON 1311 IN THE REVISED BOOK VI OF THE 1983 CODE OF CANON LAW

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Abstract. In 2021, Pope Francis promulgated a revised version of Book VI of the 1983 Code of Canon Law, introducing a variety of modifications to the existing canon law and new categories of canonical offences. Following these revisions, the entire Code was re-translated into the Polish language. The article focuses on Cano. 1311, which has been reformulated to include two paragraphs, replacing the single-paragraph structure of the previous version. The authors highlight the significance of this canonical norm for understanding the Catholic Church's penal law.

Keywords: canon law; offence; penal sanctions; application of penalties; purpose of punishment in the Church.

INTRODUCTION

The canonical penal law for the Latin Church is set out primarily in the Code of Canon Law of 1983,[1] which was promulgated by John Paul II with his Apostolic Constitution *Sacrae disciplinae leges*.[2] The 1983 Code consists of seven thematic books and includes a total of 1752 canons. Since the Code was promulgated, many of its canons have been revised,[3] which

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

[2] Ioannes Paulus PP. II, Constitutio apostolica *Sacrae disciplinae leges* (25.01.1983), AAS 75 (1983), pars II, pp. 7-14.

[3] See *Nowelizacje tekstu Kodeksu Prawa Kanonicznego*, in: *Kodeks Prawa Kanonicznego promulgowany przez papieża Jana Pawła II w dniu 25 stycznia 1983 roku. Stan prawny na dzień 18 maja 2022 roku. Zaktualizowany przekład na język polski*, Pallottinum, Poznań 2022 [hereinafter: KPK/2021], p. 5.

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reflects the dynamic nature of the law and the fact that, since it is meant to regulate the current life of the Christian community, it should be amended when necessary. However, until 2021, none of the Code's seven books had been revised in their entirety. The process of revising Book VI entitled "Penal Sanctions in the Church" (*De sanctionibus poenalibus in Ecclesia*), which included 89 canons (1311-1399), was initiated in 2007 by Benedict XVI. His work was completed by Pope Francis, who promulgated a new version of Book VI with his Apostolic Constitution *Pascite gregem Dei* on 23 May 2021. The revised version entered into force on 8 December 2021.[4] In his Constitution *Pascite gregem Dei*, the Pope wrote: "in continuity with the overall features of the canonical system, in accordance with the Church's tradition as consolidated over time, the new text introduces various modifications to the law presently in force and introduces several new types of crime, corresponding to the growing need in various communities to ensure the restoration of justice and order that the delict infringed" (PGD, p. 25). Following these changes, experts in the Church's penal law began to publish commentaries on the revised penal system.[5] Such commentaries were also published in Poland.[6]

The article is an attempt to present the provisions of Cano. 1311, focusing on the modifications introduced by Pope Francis. Cano. 1311, which opens Book VI, is of fundamental importance, as it introduces the norms that are included in the subsequent canons. The authors aim to show the grounds for punishing offences in the Church based this canon. All individuals vested with the authority to impose penal sanctions in the Church are required to act in accordance with the principles it sets forth. Furthermore, without understanding the *ratio legis* of the Church's penal law, it is impossible to understand the broader concept of ecclesiastical justice.

In order to distinguish between the versions of the canons before and after revisions, as well as between the earlier Polish translation of the 1983 Code and the most recent one, the abbreviations CIC/1983 and CIC/2021 and KPK/1983 and KPK/2021 are used, respectively. Nonetheless, the reference is always to the 1983 Code of Canon Law, as there is no 2021 Code of Canon Law.

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[4] Franciscus PP., Constitutio apostolica *Pascite gregem Dei* (23.05.2021), "L'Osservatore Romano" (edizione quotidiana) 161 (2021), no. 122, 1.06.2021, p. 2-4; Polish text in: "Akta Konferencji Episkopatu Polski" 33 (2021), p. 23-25 [hereinafter: PGD].

[5] Among canonists writing in languages other than Polish, the following are worth noting: Pighin 2022; Arrieta 2023, 795-859.

[6] For example: Kaleta 2022, 197-342; Krukowski 2022, 15-196; Trojanowski 2024a; Idem 2024b; Idem 2024c; Idem 2024d.

1. THE CHURCH'S RIGHT TO CONSTRAIN WITH PENAL SANCTIONS

CIC/1983	CIC/2021
Cano. 1311: *Nativum et proprium Ecclesiae ius est christifideles delinquentes poenalibus sanctionibus coercere.*	Cano. 1311 § 1: *Nativum et proprium Ecclesiae ius est christifideles poenalibus sanctionibus coercendi qui delicta commiserint.*
KPK/1983	KPK/2021
Cano. 1311: *Kościół posiada wrodzone i własne prawo wymierzania sankcji karnych wiernym popełniającym przestępstwo.*	Cano. 1311 § 1: *Kościół posiada przyrodzone i własne prawo karcenia sankcjami karnymi wiernych, którzy popełnili przestępstwo.*

The first paragraph of Cano. 1311 presents three key issues that will be addressed here one by one: the Church's own inherent right, the faithful, and the commission of an offence.

Before analysing the first paragraph of Cano. 1311, it is worth noting that it has a revised version in Latin, as well as in the Polish translation. While the Latin text has a slightly different sentence structure, its meaning has not changed. On the other hand, the new Polish translation is different from the previous one. First, it uses the term *prawo przyrodzone* (inherent right) instead of the term *prawo wrodzone* (innate right). When commenting on this change, B. Trojanowski writes that the new term "seems more appropriate, as it refers to the Church's very nature rather than to a right granted at the moment of its founding, and thereby further emphasises that this right is an intrinsic element of the community founded by the Saviour" [Trojanowski 2024a, 14].[7] Interestingly, the author of another commentary on this paragraph, which was published after the revision of Book VI, appears to have overlooked the change in the Polish translation. He explains the term *prawo wrodzone* (innate right) as used by the legislator, and fails to mention that the term *prawo przyrodzone* (inherent right) is used in the current Polish version [Krukowski 2022, 19].

Another noteworthy change is the replacement of the phrase *prawo wymierzania sankcji karnych* (right to coerce with penal sanctions) with *prawo karcenia sankcjami karnymi* (right to constrain with penal sanctions). This revision should be regarded positively, as the updated wording is more precise; however, this improvement has gone largely unnoticed by commentators. It can therefore be stated that the term "coercing" with penal sanctions is not precise enough. It would be more appropriate to talk about

[7] In the footnote, Trojanowski also refers to the semantic meaning of these two expressions.

constraining with, or applying[8] penal sanctions. Constraining has a broader meaning than inflicting penalties, because the latter could suggest that it refers only to penalties imposed after a criminal trial, whereas the Code also includes penalties imposed by force of the law itself, i.e. *latae sententiae* penalties,[9] which are also used to constrain, though in a different way.

2. THE CHURCH'S OWN INHERENT RIGHT TO CONSTRAIN WITH PENAL SANCTIONS

The legislator in Cano. 1311 § 1 states that: "The Church has its own inherent right to constrain with penal sanctions Christ's faithful who commit offences."[10] This means that this right has been given by Christ and also results from the very nature of the Church. It is not a right taken or borrowed from another system, e.g. a state system [Pawluk 1990, 65-66; Syryjczyk 2008, 41-45; Krukowski 2022, 19-20].

Although the Church's penal law in its current form has evolved over many centuries, it did not emerge suddenly; rather, it finds its origins in the institution established by Christ Himself and in the Church's inherently social character. While the New Testament does not set forth punishments or penal norms in the modern legal sense, it does provide guidelines and principles that later shaped the Church's penal law [Syryjczyk 2008, 35]. For example, the Gospel of Matthew (18:12-22) mentions how to deal with a sinner in the community, while the First Letter of St. Paul to the Corinthians (5:1-13) refers to the expulsion of an individual guilty of incest. Other sins mentioned in the New Testament that would later be codified as canonical offences include, for example, divisions within the faith (1 Tim 1:18-20; 1 John 4:2-6; 2 John 10-11) and heresies (2 Tim 2:14-18; Gal 1:8; Titus 3:10-11).[11]

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[8] As a side note, it is noteworthy that Title V of the first part of Book VI of the 1983 Code of Canon Law was *Wymierzanie kar* (*De poenis applicandis*), whereas now it is *Stosowanie kar* (*De poenarum applicatione*). This difference is visible only in the Polish translation, as Latin versions from 1983 and 2021 are identical (*De poenis applicandis*).

[9] Cano. 1314: "A penalty is ordinarily *ferendae sententiae*, that is, not binding upon the offender until it has been imposed. It is, however, *latae sententiae* if the law or precept expressly lays this down, so that it is incurred automatically upon the commission of an offence."

[10] It is noteworthy that this paragraph largely reiterates Cano. 2214 § 1 of the 1917 Code of Canon Law, which shows both its importance and the lasting relevance of its provisions. *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus* (27.05.1917), AAS 9 (1917), pars II, p. 2-593 [hereinafter: CIC/1917]: "Nativum et proprium Ecclesiae ius est, independens a qualibet humana auctoritate, coercendi delinquentes sibi subditos poenis tum spiritualibus tum etiam temporalibus".

[11] For more on the grounds of punishment in the Holy Scripture, see: Syryjczyk 2008, 34-39; Kiełpiński 2023, 30-54; Zawacki 2016, 9-38.

3. THE FAITHFUL AS THE SUBJECT OF CONSTRAINING

Since the Church has its own inherent right to constrain with penal sanctions, it is worth asking who these sanctions can be imposed on. The answer can be found in the same canon, which explicitly mentions "the faithful" as the subject of penal sanctions. According to Cano. 204, "the Christian faithful are those who, inasmuch as they have been incorporated in Christ through baptism, have been constituted as the people of God; for this reason, since they have become sharers in Christ's priestly, prophetic, and royal office in their own manner, they are called to exercise the mission which God has entrusted to the Church to fulfil in the world, in accord with the condition proper to each one." Therefore, all individuals who have received baptism are considered members of the faithful [Krukowski 2005, 15-18; Syryjczyk 2008, 45]. It is noteworthy that in the year 2000, seven Churches in Poland (the Evangelical Augsburg Church, the Evangelical Methodist Church, the Evangelical Reformed Church, the Polish Catholic Church, the Polish Autocephalous Orthodox Church, the Old Catholic Mariavite Church, and the Roman Catholic Church) formally recognised the validity of baptism administered by each other's clergy.[12] Accordingly, it can be stated that all members of these Churches are regarded as the faithful. However, such understanding of the term "faithful" would mean that the Roman Catholic Church could impose penal sanctions on all who have been baptised in any ecclesial community, and not just on the faithful of the Latin Church. With this in mind, it is worth recalling what J. Syryjczyk wrote: "A distinction must be made between the rights vested in the Church, or more precisely – its right to constrain all baptised persons – and the exercise of this right in relation to the separated brethen. In this matter the new Code refers to the teaching of the Second Vatican Council, which states that separated brethen can no longer be blamed for the sin involved in the separation and moreover, the Catholic Church should embrace them with brotherly respect and affection" [Syryjczyk 2008, 46].[13] However, to avoid any ambiguity regarding whom the Catholic Church may subject to canonical penalties, the following provisions of the Code should be considered. In Cano. 1, we read that "the canons of this Code affect only the Latin Church" (CIC/2021, Cano. 1),[14] and in Cano. 11: "Merely ecclesiastical laws bind those baptised in the Catholic Church or received into it and who enjoy the sufficient use

[12] See *Sakrament chrztu znakiem jedności. Deklaracja Kościołów w Polsce na progu trzeciego tysiąclecia* (23.01.2000), https://opoka.org.pl/biblioteka/T/TE/chrzest_deklaracja.html [accessed: 30.04.2025].

[13] Concilium Vaticanum II, Decretum de Oecumenismo *Unitatis redintegratio* (21.11.1964), AAS 57 (1965), pp. 90-122, no. 3.

[14] See more: Sobański 2003, 45-47.

of reason and, unless the law expressly provides otherwise, have completed seven years of age"(CIC/2021, Cano. 11).[15] Thus, the Church's authority to impose penal sanctions extends solely to members of the Catholic faithful [Pawluk 1990, 65-68; Syryjczyk 2008, 45-47].

4. PHYSICAL PERSONS AS THE SUBJECT TO CRIMINAL LIABILITY

Another question that arises when considering who may be subject to penal sanctions is whether the Church can punish only physical persons or also juridic persons. This question seems justified as the Code of Canon Law distinguishes between physical persons[16] and juridic persons.[17] With this in mind, it must be clearly stated that only physical persons may be subject to the Church's penal sanctions. In Cano. 1311 § 1, the legislator does not literally refer to physical persons; however, the use of the term "the faithful" implies that only physical persons may be subject to the Church's penal sanctions. It is not possible to impose penalties for an offence committed by a specific individual on others, even if they are legally connected to that person through a juridic entity. In such cases, the principle of personal responsibility takes precedence over any form of collective liability.[18] This follows from the concept of so-called just punishment. It is the person who is at fault and who has committed an offence that is punished, not the innocent one. Without guilt,

[15] See also: Sobański 2003, 60-62.

[16] The Code deals with the issue of physical persons, especially regarding their canonical status in Canons 96-112. It does not explain the concept of "physical person," as this term is by its nature clear and well-known. However, one can refer here to the dictionary definition, which states that a physical person is "an individual human being who is the subject of rights and obligations" [Sitarz 2004, 122]. A more detailed definition of a physical person can be found in the *Lexicon of Canon Law* see Sitarz 2019, 2003-2004.

[17] KPK/2021, Cano. 113 § 2: "Besides physical persons, there are also in the Church juridic persons, that is, subjects in canon law of obligations and rights which correspond to their nature;" Cano. 115: "1. Juridic persons within the Church are aggregates either of persons or of things. 2. An aggregate of persons, which cannot be constituted unless it consists of at least three persons, is collegial if its members determine its action through participation in making its decisions, whether by equal right or not, according to the norm of law and its own statutes; otherwise it is non-collegial. 3. An aggregate of things or an autonomous foundation consists of goods or things, whether spiritual or material, and is directed by one or several physical persons or a college according to the norm of law and its statutes." See also: Sitarz 2019, 2004-2007.

[18] However, this was possible under the previous code law. A juridic person could be punished in the following way: a penalty was imposed on individual delinquent persons; on a given community as a whole, i.e. on all that were members of a juristic person; or on each individual member of the juristic person and on the community as a whole. CIC/1917, Cano. 2285 § 1: "Si communitas seu collegium clericorum delictum commiserit, suspensio ferri potest vel in singulas personas delinquentes vel in communitatem, uti talem, vel in personas delinquentes et communitatem."

there is no criminal liability. Guilt is an essential element of a criminal offence [Syryjczyk 2008, 48]. This principle existed already in the Old Testament, although it concerned a sin [Myrcha 1986, 43-80; Maj 2016, 39-65]. Prophet Jeremiah wrote: "In those days they shall no longer say: The fathers have eaten sour grapes, and the children's teeth are set on edge. But every one shall die for his own sin; each man who eats sour grapes, his teeth shall be set on edge." (31:29-30). Thus, no one may be held liable for the sins of their ancestors. At this point, it is worth noting the practice among the faithful in Poland of requesting the celebration of Holy Masses for the atonement of so-called generational sins and for intergenerational healing. This practice was forbidden by the Polish episcopate.[19]

5. OFFENCE AS THE BASIS FOR PUNISHMENT

Another term that deserves attention in the first paragraph of Cano. 1311 is the term "offence." Penal sanctions may be imposed only on members of the faithful who have committed an offence, and such an offence must be duly proven. "When someone is in a proximate occasion of committing an offence or when, after an investigation, there is a serious suspicion that an offence has been committed, the Ordinary either personally or through another can give that person warning" (CIC/2021, Cano. 1339 § 1). This refers to giving a warning rather than imposing a penal sanction. However, an act must have certain characteristics to be classified as an offence. Although the Code of Canon Law does not provide a definition of an offence [Syryjczyk 2008, 99], the necessary elements of an offence can be found in Cano. 1321 § 2: "No one can be punished unless the commission by him or her of an external violation of a law or precept is gravely imputable by reason of malice or of culpability."[20] Accordingly, an offence can be defined as an external violation of a penal law or precept that carries at least an indeterminate penal sanction, which is gravely imputable, whether through intentional (deliberate) or negligent fault [Syryjczyk 2008, 100; Pawluk 1990, 68; Kaleta 2022, 45-46].[21]

It is worth reiterating that the Code of Canon Law provides for constraining with penal sanctions only for an offence committed. However, as J. Syryjczyk states, the original version of Cano. 1321 provided for punishment for causing

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[19] See https://episkopat.pl/grzech-pokoleniowy-i-uzdrowienie-miedzypokoleniowe-problemy-teologiczne-i-pastoralne/ [accessed: 26.04.2025].

[20] In the version before revision, it was Cano. 1321 § 1, which is now § 2, because a new § 1 has been added, which reads: "Any person is considered innocent until the contrary is proved."

[21] At this stage, it seems sufficient to focus on the general definition of an offence in canon penal law, as a detailed analysis would exceed the scope of this publication. Moreover, the essential elements of an offence are derived from canons other than Cano. 1311, which is examined here.

scandal through one's own conduct ("…qui legem vel praeceptum vidaverint vel scandalum dederint") [Syryjczyk 2008, 34]. This, however, was not included in the current version of the Code. If this original version had been included, an offence would not only consist in the violation of a penal law or penal precept, but also in the mere act of causing scandal [ibid.]. Consequently, a person could have incurred liability even in cases where no penal law was violated, but the act gave rise to scandal. The 1983 Code of Canon Law allows for imposing a just penalty, but of a lesser kind than that prescribed for the committed crime when the offender's actions or omissions resulted in scandal or other serious harm or danger (CIC/2021, Cano. 1328 § 2) [Krukowski 2022, 85-86]. However, what is at issue here is not merely any conduct, but the conduct that is directed toward the commission of an offence that has not yet taken place.

6. *RATIO LEGIS* OF THE CHURCH'S PENAL LAW

CIC/1983	CIC/2021
	Cano. 1311 § 2: *Qui Ecclesiae praeest bonum ipsius communitatis singulorumque christifidelium tueri ac promovere debet caritate pastorali, exemplo vitae, consilio et adhortatione et, si opus sit, etiam poenarum irrogatione vel declaratione, iuxta legis praecepta semper cum aequitate canonica applicanda, prae oculis habens iustitiae restitutionem, rei emendationem et scandali reparationem.*
KPK/1983	KPK/2021
	Cano. 1311 § 2: *Każdy, kto jest przełożonym w Kościele, zobowiązany jest strzec i promować dobro samej wspólnoty oraz poszczególnych wiernych przez miłość pasterską, przykład życia, radę i zachętę oraz, w razie potrzeby, także przez wymierzanie lub deklarowanie kar, zgodnie z przepisami ustawy, zawsze z zastosowaniem słuszności kanonicznej, mając na uwadze przywrócenie sprawiedliwości, poprawę przestępcy i naprawienie zgorszenia.*

Originally, Cano. 1311 in the 1983 Code of Canon Law was not divided into paragraphs. After revisions, it consists of two paragraphs. The first paragraph retains the Canon's original content as discussed above, while the second one introduces a new aspect, which may be viewed as the *ratio legis* of the Church's penal law. Any analysis of the Church's penal law must begin with the question about its *ratio legis,* which is fundamental to understand both the purpose and application of penal law in the ecclesial community. These issues are addressed in paragrap. 2 of Cano. 1311, which outlines the responsibilities of the ecclesiastical Superior [Trojanowski 2024a,

15].[22] Foremost among these is the duty to safeguard those entrusted to his care, where pastoral charity and the example of one's life are meant to draw others toward the good. This goal is also to be pursued through counsel and encouragement. The use of counsel, encouragement, and personal example as integral elements of pastoral ministry is emphasised in the Conciliar Constitution *Lumen gentium*,[23] a document to which Pope Francis also refers in his Apostolic Constitution *Pascite gregem Dei* (PGD, p. 2), where he adds that "love and mercy require that the Father act to correct what is wrong" (ibid.). These duties of superiors, and specifically of bishops, are also included in the Decree on the Pastoral Office of Bishops in the Church *Christus Dominus*: "Bishops should also be mindful of their obligation to give an example of holiness in charity, humility, and simplicity of life."[24] "In exercising their office of father and pastor, bishops should stand in the midst of their people as those who serve. Let them be good shepherds, […]. Let them be true fathers who excel in the spirit of love and solicitude for all."[25]

There may be cases where pastoral measures prove insufficient, leaving the superior no alternative but to impose a penalty in order to achieve the intended goal. However, it should be strongly emphasised that punishment is the last resort to be used when other measures have failed [Trojanowski 2024a, 15, 17]. Even so, these punishments should be viewed as something positive. As Pope Francis states, a revision of the penal discipline gave the Church's pastors a more flexible means of correction and salvation which may be "applied swiftly and with pastoral charity in order to avoid more serious evils and to bring healing to injuries caused by human weakness" (PGD, p. 24). And further, "Charity thus demands that the Church's pastors resort to the penal system whenever it is required" (ibid., p. 25). The Pope wrote clearly, citing his Address to Participants in the Plenary Session of the Pontifical Council for Legislative Texts on 21 February 2020, that "canonical sanctions also have a reparative and salvific end, and are primarily directed to the good of the faithful. In this sense, they represent a positive means for the realization of the Kingdom and for rebuilding justice in the community of the faithful, who are called to personal and common sanctification"

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[22] Trojanowski points out that "the addressees of this norm are not only bishops, but also all superiors […] who have the competence to apply the laws contained in this book, and therefore, first of all, ordinaries […], but these obligations can also be applied to judges."

[23] Sacrosanctum Concilium Vaticanum II, Constitutio dogmatica de Ecclesia *Lumen gentium* (21.11.1964), AAS 57 (1965), pp. 5-71, no. 27: "Bishops, as vicars and ambassadors of Christ, govern the particular churches entrusted to them by their counsel, exhortations, example, and even by their authority and sacred power, which indeed they use only for the edification of their flock in truth and holiness."

[24] Idem, Decretum de pastorali episcoporum munere in Ecclesia *Christus Dominus* (28.10.1965), AAS 58 (1966), pp. 673-701, no. 15.

[25] Ibid., no. 16.

(ibid.) According to the Holy Father, "it becomes necessary for bishops and superiors to inflict penalties. Negligence on the part of a bishop in resorting to the penal system is a sign that he has failed to carry out his duties honestly and faithfully" (ibid.) The Pope also referred to his two apostolic letters: *Come una madre amorevole* of 4 June 2016[26] and *Vos estis lux mundi* of 7 May 2019,[27] where this issue was expressly pointed out.

It should be emphasised that if penal sanctions are imposed, they must always be imposed in accordance with the provisions of the law, and their purpose is to achieve good by the restoration of justice, the correction of the offender, and the repair of scandal. The legislator lists these three aims of penal sanctions already in Cano. 1 of the Book on Penal Sanctions in the Church, to repeat them two more times: in Cano. 1341[28] and in Cano. 1343.[29] In the original version of Book VI, these aims were mentioned only once, in Cano. 1341.[30] On the other hand, the revised version of Book VI, mentions two of these aims: the restoration of justice and the repair of scandal in Canons 1335 and 1345.[31] The number of canons addressing the aims of the Church's penal sanctions highlights both the nature of punishment and the Church's commitment to fulfilling these aims. A careful reading

[26] Franciscus PP, Litterae apostolicae motu proprio C*ome una madre amorevole* (04.06.2019), AAS 108 (2016), pp. 715-17.

[27] Idem, Litterae apostolicae motu proprio *Vos estis lux mundi* (07.05.2019), AAS 111 (2019), pp. 823-31. These regulations were approved for a three-year period; however, they were revised after four years: Idem, Litterae apostolicae motu proprio *Vos estis lux mundi* (25.03.2023), AAS 115 (2023), pp. 394-404.

[28] KPK/2021, Cano. 1341: "The Ordinary must start a judicial or an administrative procedure for the imposition or the declaration of penalties when he perceives that neither by the methods of pastoral care, especially fraternal correction, nor by a warning or correction, can justice be sufficiently restored, the offender reformed, and the scandal repaired."

[29] KPK/2021, Cano. 1343: "If a law or precept grants the judge the faculty to apply or not to apply a penalty, he is, without prejudice to the provision of Cano. 1326 § 3, to determine the matter according to his own conscience and prudence, and in accordance with what the restoration of justice, the reform of the offender and the repair of scandal require; in such cases the judge may also, if appropriate, modify the penalty or in its place impose a penance."

[30] KPK/1983, Cano. 1341: "Only after he has ascertained that scandal cannot sufficiently be repaired, that justice cannot sufficiently be restored and that the accused cannot sufficiently be reformed by fraternal correction, rebuke and other ways of pastoral care is the ordinary then to provide for a judicial or administrative procedure to impose or to declare penalties."

[31] CIC/2021, Cano. 1335 § 1: "If the competent authority imposes or declares a censure in a judicial process or by an extra-judicial decree, it can also impose the expiatory penalties it considers necessary to restore justice or repair scandal;" Cano. 1345: "Whenever the offender had only an imperfect use of reason, or committed the offence out of necessity or grave fear or in the heat of passion or, without prejudice to the provision of Cano. 1326 § 1 n. 4, with a mind disturbed by drunkenness or a similar cause, the judge can refrain from inflicting any punishment if he considers that the person's reform may be better accomplished in some other way; the offender, however, must be punished if there is no other way to provide for the restoration of justice and the repair of any scandal that may have been caused."

shows that the order of these aims is identical in both canons, which – according to B. Trojanowski – is not accidental [Trojanowski 2024a, 17]. While the version before revision first mentioned the repair of scandal, then the restoration of justice, and finally the correction of the offender, the revised version first mentions the restoration of justice, the reform of the offender, and the repair of scandal. When imposing penal sanctions, care should therefore be taken to achieve all goals together. "None of them can be achieved without the other two" [Krukowski 2022, 28].

Taking into account the content of this paragraph, it is also worth noting that punishment has become one of the pastoral means. The r*atio legis* here is like a system that should be followed in the lives of the faithful. This is nothing new in the Church, as it was pointed out long before. Almost identical wording can be found in the 1917 Code of Canon Law: "Prae oculis autem habeatur monitum Conc. Trid., *sess. XIII, de ref., cap. 1*: «Meminerint Episcopi aliique Ordinarii se pastores non percussores esse, atque ita praeesse sibi subditis oportere, ut non in eis dominentur, sed illos tanquam filios et fratres diligant elaborentque ut hortando et monendo ab illicitis deterreant, ne, ubi deliquerint, debitis eos poenis coercere cogantur; quos tamen si quid per humanam fragilitatem peccare contigerit, illa Apostoli est ab eis servanda praeceptio ut illos arguant, obsecrent, increpent in omni bonitate et patientia, cum saepe plus erga corrigendos agat benevolentia quam austeritas, plus exhortatio quam comminatio, plus caritas quam potestas; sin autem ob delicti gravitatem virga opus erit, tunc cum mansuetudine rigor, cum misericordia iudicium, cum lenitate severitas adhibenda est, ut sine asperitate disciplina, populis salutaris ac necessaria, conservetur et qui correcti fuerint, emendentur aut, si resipiscere noluerint, ceteri, salubri in eos animadversionis exemplo, a vitiis deterreantur»" (Cano. 2214 § 2). However, the content of this canon is not new either, since it was taken from the documents of the Council of Trent. The Council Fathers addressed the bishops in the following words: "The same sacred and holy Synod […] thinks it meet that the bishops be first of all admonished to bear in mind, that they are pastors and not strikers, and that they ought so to preside over those subject to them, as not to lord it over them, but to love them as sons and brethren; and to strive, by exhortation and admonition, to deter them from what is unlawful, that they may not be obliged, should they transgress, to coerce them by due punishments."[32] The message contained in this Conciliar Decree is still relevant, as confirmed by the Code of Canon Law now in force. Its reintegration into the Code is therefore both appropriate and timely.

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[32] Concilium Tridentinum (1545-1563), *Sesio XIII. Decretum super reformatione* [Prooemium], in: *Dokumenty Soborów Powszechnych. Tekst łacińsko-polski*, vol. IV (1511-1870): *Lateran V, Trydent, Watykan I*, edited by A. Baron, H. Pietras, Kraków 2004, p. 459, 461.

This combination of mercy and constraint in the added paragraph of Cano. 1311 is confirmed in the Apostolic Constitution *Pascite gregem Dei*, where we read: "The observance of penal law is binding on the whole People of God, but responsibility for its correct application – as stated above – lies specifically with the bishops and the superiors of individual communities. It is a task that cannot be separated in any way from the *munus pastorale* entrusted to them, and is to be carried out as a concrete and essential requirement of charity, not only towards the Church, the Christian community and potential injured parties, but also towards those who commit crimes and are themselves in need of the Church's mercy and correction." This is the main idea behind the revision of Book VI of the 1983 Code (PGD, p. 24).

FINAL REMARKS

In conclusion, it should be reiterated that in the revised Book VI of the 1983 Code of Canon Law, Cano. 1311 has been amended to include a new paragraph. The first paragraph, both in the original Latin version and in the Polish translation, has not undergone any significant changes in content, although certain expressions have been translated differently in the new Polish version. The legislator of the Code reaffirms that the Church has the inherent right to constrain with penal sanctions Christ's faithful who commit offences. Canonists explain that, in this legal context, the term "faithful" refers specifically to members of the Catholic Church, rather than to all baptised persons. Another significant issue concerns the *ratio legis*, i.e. the underlying rationale, of the Church's penal law. In this context, emphasis is placed on achieving the aims of ecclesiastical penalties, rather than on applying them automatically as a consequence of criminal offences. Cano. 1311 presents penal sanctions as a pastoral instrument intended to uphold ecclesiastical discipline. However, these sanctions are to be employed only when other means (such as pastoral charity, example of life, counsel, and encouragement) fail.

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FINAL DOCUMENT OF THE 2024 SYNOD OF BISHOPS. AN IMPORTANT AND PRACTICAL SUMMONS TO REFORM THE PRESENT *SYNODAL CHURCH*

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Abstract. Institution of the Synod of Bishops was established by Pope Paul VI in motu proprio *Apostolica sollicitudo* dated September 15, 1965, in which, among other things, it can be read that it is established and directly subordinated to the Bishop of Rome. Paul VI also indicated that the general aim of the Synod of Bishops is intentional expression by the episcopate of its participation in the obligations of the Bishop of Rome, as well as joint responsibility for the entire Church. Pope Francis himself in his teaching and undertaken decisions very clearly desired to boost the dynamics of the meaning and role of the Synod of Bishops in the present Church even more. This was very explicitly expressed in his practical statements of the *Episcopalis communio* (2018) apostolic constitution. In his final speech on October 26, 2024, delivered during the second session of the Sixteenth Ordinary General Assembly of the Synod of Bishops Pope Francis communicated that he did not intend to issue an apostolic exhortation due to the completed works of the Synod of Bishops; he indicated that the final document of that Synod of Bishops is sufficient. He ordered to publish it in order to be itself, together with the guides included in it, a handbook for the mission of the present Church that is carried out on various continents and in different contexts. Presentation and analysis of this document that was prepared synodally and that is important for the present Church will be preceded with a short reflection on the role and meaning of the Synod of Bishops in the present Church. That reflection seems to be necessary as in 2025 there is exactly sixty years since that central institution of the Church has been established by Pope Paul VI in 1965, i.e. still during the session of the Second Vatican Council.

Keywords: accompanying note; final document; Pope Francis; Synod of Bishops; Synodal Church.

INTRODUCTION

Synod of Bishops that was held in Rome between October 2 and 27 of 2024, which was the second session of the XVI Ordinary General Assembly of the Synod of Bishops, published its final document titled *Per una Chiesa sinodale:*

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comunione, partecipazione, missione. The document official text is in Italian. However, successively there appeared translations into other present languages, including the Polish language.

Presentation and analysis of this document that was prepared synodally and that is important for the present Church will be preceded with a short reflection on the role and meaning of the Synod of Bishops in the present Church. That reflection seems to be necessary as in 2025 there is exactly sixty years since that central institution of the Church has been established by Pope Paul VI in 1965, i.e. still during the session of the Second Vatican Council. Taking the perspective of the undertaken main subject matter under consideration this short initial reflection will present the role and meaning of the Synod of Bishops in the post-conciliar Church. It must be stressed here that Pope Francis himself in his teaching and undertaken decisions very clearly desired to boost the dynamics of the meaning and role of the Synod of Bishops in the present Church even more. This was very explicitly expressed in his practical statements of the *Episcopalis communio* (2018)[1] apostolic constitution. That very determined will of Pope Francis to reform the institution of the Synod of Bishops was quickly stressed by his successor Pope Leo XIV in his teaching when shortly addressing the Ordinary Council of the General Secretariat of the Synod of Bishops on June 26, 2025, directly indicating that Pope Francis gave a new impulse to the Synod of Bishops.[2]

Synthetic analysis of the final document of the latest Synod of Bishops should also be perceived from the perspective of the "church assembly" (*Assemblea ecclesiale in Vaticano*) foreseen to be held in October 2028, the aim of which, most probably, will be analysis of a concrete implementation of the final document of the Synod of Bishops of 2024 in particular churches.

1. SYNOD OF BISHOPS – AN INSTITUTION IN CONSTANS DEVELOPMENT

Institution of the Synod of Bishops was established by Pope Paul VI in motu proprio *Apostolica sollicitudo* dated September 15, 1965, in which, among other things, it can be read that it is established and directly subordinated to the Bishop of Rome: *Nostra apostolica auctoritate erigimus ac constituimus hac in alma Urbe stabile Episcoporum consilium pro Ecclesia universa, Nostrae potestati directe atque immediate subiectum, quod nomine proprio Synodum Episcoporum appellamus*.[3]

[1] Hereinafter: EC.

[2] See https://www.vatican.va/content/leo-xiv/it/speeches/2025/june/documents/20250626-consiglio-sinodo.html [accessed: 11.07.2025].

[3] Paulus PP. VI, Litterae apostolicae motu proprio datae *Apostolica sollicitudo* quibus Synodus Episcoporum pro universa Ecclesia constituitur (15.09.1965), AAS 57 (1965), pp. 775-80.

Here, it is worth to indicate right away that Pope Paul VI was aware that the new institution of the Church founded by him will improve itself in time, the substantive sign of which are successive new legal norms that regulate the institution of the Synod of Bishops. Also, one cannot leave aside the fact that establishing the Synod of Bishops while the Second Vatican Council was still in progress, and what follows that participants of this undoubtedly decisive ecclesiastical event got familiar with it during the Second Vatican Council, was a very wise decision also from the practical point of view, as fathers of the Council returning to their Churches were not only able to inform about the fact (one cannot forget that sixty years ago communication and transfer of information created a completely different dimension than it is nowadays; it means that transfer of information at that time required relatively significant amount of time and engagement of various means), but they also were aware that this new central institution of the Church will soon be operational.

Defining the new Church institution as synod (*synodus*) must be perceived as reference to other, traditional and proven, and at the same time well known from their long and reach history in the Church, various and meaningful institutions, such as, e.g. diocesan synod, provincial synod or council; Moreover, V. Ferrara indicated that behind choosing the name of synod there stands an intention of distinguishing between the new central institution and other Church institutions, while at the same time stressing legal autonomy of the Synod of Bishops from other central institutions of the Church [Ferrara 1969, 502].

Paul VI also indicated that the general aim of the Synod of Bishops is intentional expression by the episcopate of its participation in the obligations of the Bishop of Rome, as well as joint responsibility for the entire Church. Establishment of the Synod of Bishops shows that the Church has remained open to doctrinal and pastoral issues of the present world and at the same time is able to constantly adjust its structures to the requirements of time in which it conducts evangelization activities.

Canons on the Synod of Bishops were successively put in the structure of the post-conciliar Code of the Canon law promulgated by John Paul II in 1983 after canons on the Bishop of Rome and the College of Bishops, and before canons on the College of Cardinals, as this was the explicit will of Pope John Paul II.[4] We must suppose that it was based on an ecclesiologi-

[4] See *Invertatur ordo capitulorum, ita ut hoc Caput II («De Synodo Episcoporum») veniat post Caput III («De Sanctae Romanae Ecclesiae Cardinalibus»), propter praestantiam munerum quae Collegio Cardinalium committuntur, praesertim ipsa electio Romani Pontificis (tres Patres). R. Animadversio non recipitur. Summus Pontifex de hac quaestione interpellatus est a Praeside Commissionis, in Audientia die 28-3-1981 habita, suumque responsum fuit ordinem systematicum servandum esse uti iacet*, "Communicationes" 14, n. 1 (1981), p. 180.

cal rationale and its goal above all was to highlight a close connection of the institution of the Synod of Bishops with the rule on collegiality of bishops [Górecki 2005, 174].

Generally, it must be indicated that canons on the Synod of Bishops consist of three pillars. In other words, they have three sources that were used by the legislator of the Church to introduce a picture of a code-based institution.[5] These are: the council ecclesiology in the *Lumen gentium* Dogmatic Constitution on the Church, motu proprio *Apostolica sollicitudo* of Paul VI and the *Ordo Synodi Episcoporum* dated 1966, together with its consecutive amendments as well as experience gained from the previously held Synods of Bishops.

According to J. P. Schotte, the Secretary General of the Synod of Bishops in the years from 1985 to 2004, there are seven code canons (Canons 342-348) that in a synthetic manner provide information about the nature and aim of the Synod of Bishops, that describe authority of the Bishop of Rome in relation to the institution, define types of synodal assemblies, specify selection criteria for its participants, define tasks for specific assemblies, and the subject of work for the Secretary General of the Synod of Bishops [Schotte 1992, 289ff].

It must be indicated in this synthetic historic *iter* that for the last few years Pope Francis also undertook the task to reform the Synod of Bishops, in particular when it comes to its practical functioning and playing a more dynamic role in the life of the present Church, specifically in local communes. It must be assumed that Pope Francis wanted the Synod of Bishops to have a more specific influence on the life and functioning of particular Churches. This is due to his decision that the latest assemblies of the Synod of Bishops had two phases. This was true for e.g. the Synod of Bishops on family. This means that first of all there was held a Third Extraordinary Assembly of the Synod of Bishops (from 5 to 19 October, 2014) and successively the Fourteenth Ordinary General Assembly of the Synod of Bishops (from 4 to 25 October, 2015) or for the latest meeting of the institution on synodality, where the first stage of the Synod of Bishops took place from 4 to 29 October, 2023 and the second from 2 to 27 October, 2024. This creates a new practice when it comes to executing the Synod of Bishops and it seems that this is an important *novum* from the practical point of view that should have effects in a better work of the Synod.

Furthermore, on 15 September, 2018, Pope Francis published his Apostoli Constitution on the Synod of Bishops titled *Episcopalis communio* as well as the

[5] Pontificia Commissio Codici Iuris Canonici Authentice Interpretando, *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus fontium annotatione et indice analytico-alphabetico auctus*, Libreria Editrice Vaticana 1989, pp. 96-98.

General Secretariat of the Synod of Bishops successively published Instructions on conducting the Synod of Bishops and functioning of the General Secretariat of the Synod of Bishops that is an integral part of the new legal picture of the institution described in the aforementioned Apostolic Constitution (*Istruzione sulla celebrazione delle Assemblee Sinodali e sull'attività della Segreteria Generale del Sinodo dei Vescovi*).

2. *EPISCOPALIS COMMUNIO* APOSTOLIC CONSTITUTION OF POPE FRANCIS AND ITS MEANING FOR THE PRESENT OF SYNOD OF BISHOPS

J.I. Arrieta notices that legislative initiative of Pope Francis that was synthetically fulfilled by the *Episcopalis communio* Apostolic Constitution has a significant influence on restructuring the Synod of Bishops, it means, that central institution of Church and describes it as one of the most important initiative undertaken by Pope Francis [Arrieta 2019, 275].

On the other hand, G. Ghirlanda indicates that by publishing the "Epscopalis communio" Apostolic Constitution Pope Francis expressed the necessity of renewing functioning of the Synod of Bishops by developing dialogue and cooperation among bishops and between the bishops and the Bishop of Rome [Ghirlanda 2019, 621]. Why? Because in the view of Pope Francis the Synod of Bishops remained an institution that was too static [ibid.]. Undoubtedly, we must agree with this point made by Pope Francis, as experience gained from recent years shows that reception of the Synod of Bishops in particular Churches was rather insignificant. Moreover, the reform of the Synod of Bishops wants to accommodate present ecclesiological requirements that ought to be characterized by mutual stepping forward, which was so greatly stressed by Pope Francis [ibid., 648].

A glance on the sixty-year-long history of the institution of the Synod of Bishops from the perspective of a great outline educates at the same time that it is on its way of evolutional growth to meet the needs of the Church that at that time, especially in the post-conciliar period, was undergoing numerous changes as well as adjusting to various situations, in which it must have spread the Gospel all over the world. At present, the institution of the Synod of Bishops must be perceived not only as an important ecclesiastical event that would have a static character, it means that the synod had place, but the present Synod of Bishops must be seen as a dynamic process, in which the held synodal assembly plays a fundamental role, which is not its only role; nowadays, having the new vision of the institution, the Synod of Bishops must be perceived as an event that will be executed in a progressive manner in line with the passing time. This is especially true for the particular Churches [Visioli 2021, 181].

There is no doubt that the legislative thought of Pope Francis concerning the institution of the Synod of Bishops is not only a simple amendment; as, here, we face a new method of developing jointly made decisions that should be specifically executed in particular Churches. Therefore, that reform has set new tasks not only for the Bishop of Rome but also for the entire episcopate.

When discussing the practical aspect of the Synod of Bishops and specific execution of its decisions, we must indicate and call-in selected elements of the Pope Francis' reform that are as follows: "*Redaction and Approval of the Final Document.* The conclusions of the Assembly are brought together in a Final Document. For the redaction of the Final Document, a special Commission is set up, consisting of the Relator General, who chairs the Commission, the General Secretary, the Special Secretary and some members elected by the Synod Assembly taking due account of the various regions, as well as others appointed by the Roman Pontiff. The Final Document is submitted for the approval of the members, in accordance with particular law, with a view to obtaining moral unanimity insofar as this is possible" (EC 17 § 1-3).

"*Delivery of the Final Document to the Roman Pontiff.* Once the approval of the members has been obtained, the Final Document of the Assembly is presented to the Roman Pontiff, who decides on its publication. If it is expressly approved by the Roman Pontiff, the Final Document participates in the ordinary Magisterium of the Successor of Peter. If the Roman Pontiff has granted deliberative power to the Synod Assembly, according to the norm of cano. 343 of the Code of Canon Law, the Final Document participates in the ordinary Magisterium of the Successor of Peter once it has been ratified and promulgated by him. In this case, the Final Document is published with the signature of the Roman Pontiff together with that of the members (EC 18 § 1-2).

Formally ended assembly of the Synod of Bishops initiates an executive phase of the synodal assembly that, specifically, is expressed as follows: "*Reception and Implementation of the Conclusions of the Assembly.* The diocesan or eparchial Bishops see to the reception and implementation of the conclusions of the Synod Assembly, once they have been accepted by the Roman Pontiff, with the help of the participatory bodies provided for by law. The Synods of Bishops of the Patriarchal Churches and Major Archbishoprics, the Councils of Hierarchs and the Assemblies of Hierarchs of the Churches *sui iuris* and the Episcopal Conferences coordinate the implementation of the aforementioned conclusions in their territory, and to this end they may set up common initiatives (EC 19 § 1-2).

3. THE 2024 SYNOD OF BISHOPS FINAL DOCUMENT – FORMAL AND LEGAL ASPECT

In his final speech on October 26, 2024, delivered during the second session of the Sixteenth Ordinary General Assembly of the Synod of Bishops Pope Francis communicated that he did not intend to issue an apostolic exhortation due to the completed works of the Synod of Bishops; he indicated that the final document of that Synod of Bishops is sufficient. He ordered to publish it in order to be itself, together with the guides included in it, a handbook for the mission of the present Church that is carried out on various continents and in different contexts.[6]

At the same time, he stated that he is aware that the document – a gift for all people of God – will not be read by everyone. For this reason, he made it public that these are especially the participants of the latest Synod of Bishops who are tasked to promote its content in individual local Churches, adding their own testimony about the synodal experience they had.[7]

There is no doubt that nowadays, also in the context of what was presented in the synthetic manner at the beginning of the presented deliverance, we must also look at the Synod of Bishops, especially on its ecclesiastical role and meaning, most of all in the context of its latest meeting held in October

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[6] "For this reason, I do not intend to publish an 'Apostolic Exhortation': what we have approved is enough. The Document already contains very substantial indications which can guide the mission of the Churches, on different continents, and in particular contexts: hence I am making it available to everyone straight away; hence I have asked for it to be published. In this way, I want to acknowledge the value of the synodal journey which has been made, and which, by means of this Document, I entrust to the holy faithful People of God. Time is needed in order to arrive at decisions and choices that involve the whole Church on some aspects of the life of the Church to which the Document draws attention, and on the themes entrusted to the ten 'Study Groups', which need to work freely in order to offer me proposals. I shall, therefore, continue to listen to the Bishops and the Churches entrusted to them. This is not the classic way of putting decisions off for ever. It is what corresponds to the synodal style with which the Petrine ministry, too, is to be exercised: listen, convene, discern, decide and evaluate. Pauses, silence and prayer are necessary at every one of these steps. It is a style we are learning together, a little at a time. The Holy Spirit calls us and supports us in this way of learning, which we need to see as a process of conversion. The General Secretariat of the Synod and all the Dicasteries of the Roman Curia will help me in this task," https://www.vatican.va/content/francesco/en/speeches/2024/october/documents/20241026-sinodo-vescovi.html [accessed: 22.07.2025].

[7] "The Document is a gift to the whole faithful People of God, in all its various forms. It is obvious that not everyone will set about reading it: it will be you, above all, together with many other people, who will make what it contains accessible in the local Churches. Without the witness of the experience acquired, the text would lose much of its value," https://www.vatican.va/content/francesco/en/speeches/2024/october/documents/20241026-sinodo-vescovi.html [accessed: 22.07.2025].

2024. This means that we must see it in the context of synodality that becomes a priority topic and a universal challenge in the present Church.

Specifically, when reading the final document from the latest Synod of Bishops approved on October 26, 2024, i.e. *Documento Finale della Seconda Sessione della XVI Assemblea Generale Ordinaria del Sinodo dei Vescovi (2-27 ottobre 2024): Per una Chiesa sinodale: comunione, partecipazione, missione*, we can get to a conclusion that through this document we can find current universal and very strong call for an intensive evangelisation and multidimensional reform of the present Church.

This, without any question, is "the work" that the present Church must complete on every level. Hence, this document must be defined as "priority" for the work and mission of the present Church, the more that it not only was developed jointly, but also jointly approved by participants of the Synod of Bishops, and Pope Francis added, so to say as a supplementation, that he will not publish any apostolic exhortation, stressing at the same time the great meaning and importance of that document.

The aforementioned decision made by Pope Francis and communicated very officially during the latest session of the Synod of Bishops in 2024 may astonish some people, however it seems to be logical and connected with the new image of the institution of the Synod of Bishops.

Since the execution phase of the Synod of Bishops is introduced as its important stage, it is a logical thing that such an execution must be undertaken promptly, without unnecessary waiting for a new papal post-conciliar document, as it had place in the past when the entire Church was awaiting a new post-conciliar apostolic exhortation.

Moreover, the mentioned decision of Pope Francis raises the status of the aforementioned synodal document in the sense that it remains a sole document of the Synod of Bishops ended in 2024 that was developed and approved by the commune. Any post-conciliar apostolic exhortation would only "overshadow" it and automatically destined it for oblivion, because then the Church itself as well as mass media would focus on the document issued by the pope.

Undoubtedly, the above mentioned synodal dynamics that is foremost connected with its proposals must be substantially executed in individual particular Churches and without any unnecessary delay. Thus, there appears a specific question that will be worth to ask after some period of time: how did the 2024 Synod of Bishops influenced functioning of individual particular Churches and other institutions of the Church, especially through its final documenta?

4. THE 2024 SYNOD OF BISHOPS FINAL DOCUMENT – SUBJECT MATTER ASPECT

It is worth to cite some selected positions from the approved synodal document *Documento Finale della Seconda Sessione della XVI Assemblea Generale Ordinaria del Sinodo dei Vescovi (2-27 ottobre 2024): Per una Chiesa sinodale: comunione, partecipazione, missione*.

To start with the initial point of "Introduction" we can read that every new stage in life of the Church should be perceived as a return to the source, namely the experience of meeting of the Resurrected with His disciples that took place in the Cenacle on the Passover evening. That meeting, enriched by the presence of the Holy Spirit, was also an inspiration for the Synod of Bishops that was finished in 2024.[8]

Continuation is a very important issue, as the initiated synodal process does not end when the assembly of the Synod of Bishops is finished or closed, but it also includes its successive phase, namely the execution phase, that is based on introducing into life things that had been previously discussed and proposed. Hence, the final document proposes that all local Churches perform synodal conversion of various realities of the Church based on the synodal methodology. Specifically, we can read in the document: "The synodal process does not conclude with the end of the current Assembly of the Synod of Bishops but also includes the implementation phase. As members of the Assembly and as synodal missionaries within the communities from which we come, we feel it is our responsibility to promote this process. The local Churches are asked to continue their daily journey with a synodal methodology of consultation and discernment, identifying concrete ways and formation pathways to bring about a tangible synodal conversion in the various ecclesial contexts (parishes, Institutes of consecrated life and Societies of apostolic life, movements of the faithful, dioceses, Episcopal Conferences, groupings of Churches, etc.). Planning for an evaluation of the progress made in terms of synodality and the participation of all the Baptised in the life of the Church should also occur. […] The Final Document expresses awareness that the call to mission is, at the same time, the call to the conversion of each local Church and of the whole Church, in line with the Apostolic Exhortation Evangelii Gaudium (cf. EG 30) (FD 9, 11).

In the holy People of God, that is the Church, community of faithful (*communio Fidelium*) and at the same time community of Churches (*communio Ecclesiarum*) can be seen through the community of bishops (*communio Episcoporum*). That was preached by saint Cyprian who presented that doctrine

[8] See https://www.synod.va/content/dam/synod/news/2024-10-26_final-document/ENG---Documento-finale.pdf [accessed: 22.07.2025]. Final Document [hereinafter: FD].

during the last decades as his magisterium of the Second Vatican Council, specifically in the *Lumen gentium* dogmatic constitution on the Church (cf. FD 18). The referred document of the last Synod of Bishops also explains the concept of present synodality and its meaning as well as the way it is supposed to serve the harmonic unity of the Church (cf. FD 28, 32, 36, 37). Among other things, the document states as follows: "Synodality is not an end in itself. Rather, it serves the mission that Christ entrusted to the Church in the Spirit. To evangelise is "the essential mission of the Church. It is [...] the grace and vocation proper to the Church, her deepest identity" (EN 14). By being close to all without distinction of persons, preaching and teaching, baptising, and celebrating the Eucharist and the Sacrament of Reconciliation, all the local Churches and the whole Church respond concretely to the Lord's command to proclaim the Gospel to all nations (cf. Mt 28:19-20; Mk 16:15-16). By appreciating all charisms and ministries, synodality enables the People of God to proclaim and witness to the Gospel to women and men of every place and time, making itself a 'visible sacrament' (LG 9) of the fellowship and unity in Christ willed by God. Synodality and mission are intimately linked: mission illuminates synodality and synodality spurs to mission" (FD 32).

The document of the Synod of Bishops greatly accentuates richness of individual particular Churches that enrich the universal Church that was already very strongly taught by the Second Vatican Council. Specifically, the document of the Synod of Bishops states that: "In addition, the synodal process highlighted the spiritual heritage of the local Churches, in which and from which the Catholic Church exists and the need to combine their experiences. By virtue of catholicity, 'the individual parts bring their own gifts to the other parts and to the whole Church, in such a way that the whole and individual parts grow greater through the mutual communication of all and their united efforts towards fullness in unity' (LG 13). The ministry of the successor of Peter "safeguards legitimate differences while taking care that what is particular not only does no harm to unity but rather is conducive to it" (ibid., cf. AG 22) (FD 37).

From the formal point of view, it is also worth to draw our attention to relations existing between synodality and the organisms of participation that have been very clearly indicated based on the existing Latin and Eastern codes (cf. FD 103, 108).

Hence, in the present ecclesiastical reality the synodal form is very important. Above all, it is based on the understanding that "Formation in synodality and the Church's synodal style will make people aware that the gifts received in Baptism should be put to use for the good of all: they cannot be hidden or remain unused" (FD 141).

The mentioned final document of the latest Synod of Bishops *Documento Finale della Seconda Sessione della XVI Assemblea Generale Ordinaria del Sinodo*

dei Vescovi (2-27 ottobre 2024): Per una Chiesa sinodale: comunione, partecipazione, missione acquires special meaning due to the "Accompanying note" signed by Pope Francis on the Solemnity of Jesus Christ, King of Universe on November 24, 2024, which in its very title refers to the mentioned final document *Nota di accompagnamento del Documento finale della XVI Assemblea Generale Ordinaria del Sinodo dei Vescovi del Santo Padre Francesco, 25.11.2024*.

The above-mentioned note fully corresponds with formal decision of Pope Francis in the subject of the Synod of Bishops as well as direction of setting out new tasks and new church-recognized meaning of the institution.

We can read in it that: 1) the final document of the Sixteenth Ordinary General Assembly of the Synod of Bishops collets fruits of the synodal path; it was approved by the synodal assembly in respect to all its points. Moreover, it was also approved by Pope Francis who signed it and ordered it to be published, thus remaining in unity with the entire assembly of the Synod of Bishops;[9] 2) the document must be perceived as an authentic guide post for the life of the Church and execution of its mission;[10] 3) the final document of that Synod of Bishops takes part in a regular magisterium of the Bishop of Rome and, as explicitly stated by Pope Francis, it must be accepted as such having in mind inter alia provisions of the apostolic constitution *Episcopalis communio* on the Synod of Bishops (see 18 § 1);[11] 4) apart

[9] "The Final Document of the XVI Ordinary General Assembly of the Synod of Bishops gathers the fruits of a journey marked by listening to the People of God and by the discernment of Pastors. The whole Church, allowing itself to be enlightened by the Holy Spirit, was called to review its own experience and identify the steps to be taken to live communion, realise participation and promote the mission that Jesus Christ entrusted to the Church. The synodal journey began in the local Churches and then proceeded through the national and continental phases, leading to the celebration of the Assembly of the Synod of Bishops in the two sessions of October 2023 and October 2024. Now, the journey continues in the local Churches and their groupings, treasuring the Final Document that was voted on and approved by the Assembly in all its parts on 26 October. I, too, approved it and, signing it, ordered its publication, joining the 'we' of the Assembly, which, through the Final Document, addresses the holy faithful People of God," https://www.synod.va/content/dam/synod/news/2024-10-26_final-document/ENG---Documento-finale.pdf [accessed: 22.07.2025].

[10] "Acknowledging the value of the synodal journey undertaken, I now hand over to the whole Church all that is contained in the Final Document restoring to the Church what has matured over these years through listening and discernment and as an authoritative orientation for the Church's life and mission," https://www.synod.va/content/dam/synod/news/2024-10-26_final-document/ENG---Documento-finale.pdf [accessed: 22.07.2025].

[11] "The Final Document is part of the ordinary Magisterium of the Successor of Peter (cf. EC 18 § 1; CCC 892), and as such, I ask that it be welcomed and received. It represents a form of exercise of the authentic teaching of the Bishop of Rome that has some novel features but which, in fact, corresponds to what I had the opportunity to point out on 17 October 2015, when I affirmed that synodality is the appropriate interpretative framework for understanding hierarchical ministry," https://www.synod.va/content/dam/synod/news/2024-10-26_final-document/ENG---Documento-finale.pdf [accessed: 22.07.2025].

from indicating the nature of the final document of the Sixteenth Ordinary General Assembly of the Synod of Bishops, the note of Pope Francis also explains that it is in the strict sense a normative document; nevertheless, individual Churches are called to follow it, whereas final conclusion of the Synod of Bishops do not end the synodal process;[12] 5) the final document contains guidelines that are to be executed in individual Churches; moreover, every bishop in his successive relations related to the *ad limina* visit is obliged to address the execution of the Final Document decisions by the particular Church entrusted to him; however, the executive phase of the latest Synod of Bishops was entrusted to both the General Secretariat of the Synod of Bishops and the Roman Curia Dicasteries.[13]

CONCLUSION

Undoubtedly, it should be indicated in the summary that due to raising the status of the final document of the Synod of Bishops from 2024, we deal with a vital novelty concerning functioning of the Synod of Bishops

[12] "In approving the Final Document on 26 October, I said that it 'is not strictly normative' and that 'its application will need various mediations'. This does not mean that it does not commit the Churches from now on to make choices consistent with what is stated in it. The local Churches and groupings of Churches are now called upon to implement, in their different contexts, the authoritative proposals contained in the Document through the processes of discernment and decision-making provided for by law and by the Document itself. In my Final Greeting, I also added that 'time is needed in order to arrive at decisions that involve the whole Church'. This is particularly true for the topics entrusted to the ten study groups, to which others may be added as necessary decisions are made. The conclusion of the XVI Ordinary General Assembly of the Synod of Bishops does not put an end to the synodal process," https://www.synod.va/content/dam/synod/news/2024-10-26_final-document/ENG---Documento-finale.pdf [accessed: 22.07.2025].

[13] "The Final Document contains proposals that, in the light of its basic orientations, can already now be implemented in the local Churches and groupings of Churches, taking into account different contexts, what has already been done, and what remains to be done so that the style proper to the missionary synodal Church can be ever-better learned and developed. In many cases, it is a matter of effectively implementing what is already provided for in existing law, both Latin and Eastern. In other cases, it will be possible to proceed, through a synodal discernment and within the framework of the possibilities outlined in the Final Document, to the creative activation of new forms of ministeriality and missionary action, experimenting and testing or verifying these experiences. In the report envisaged for the ad limina visit, each bishop will take care to report what choices have been made in the local Church entrusted to him in relation to the indications in the Final Document, what difficulties have arisen, and what fruits have resulted. The task of accompanying the 'implementation phase' of the synodal path, on the basis of the guidelines offered by the Final Document, is entrusted to the General Secretariat of the Synod together with the Dicasteries of the Roman Curia (cf. EC 19-21)," https://www.synod.va/content/dam/synod/news/2024-10-26_final-document/ENG---Documento-finale.pdf [accessed: 22.07.2025].

throughout the last sixty years by specifically referring to its very important stage of updating it in individual Churches. Up to this moment, in practice no attention was drawn to conclusions made by individual Synods of Bishops, instead of that foremost it was drawn to individual post-conciliar documents of the Bishops of Rome. Thus, great engagement of Pope Francis himself and successively the General Secretariat of the Synod of Bishops in specific fulfilment of proposals of the Synod of Bishops by individual particular Churches must be emphasized. Furthermore, in the provided context it is necessary to refer to the letter of the Secretary General of the General Secretariat of the Synod of Bishops, card. Mario Grech, on the update of decisions of the latest Synod of Bishops, dated March 15, 2025 (Secretaria Generalis Synodi, *Letter on the Accompaniment Process of the Implementation Phase of the Synod*, Vatican, 15 March 2025 Prot. No. 250062[14]). Generally speaking, this letter addressed to the entire catholic episcopacy indicates the route that individual particular Churches should take and finish before the meeting that is scheduled to be in Rome in October 2028, and that must be perceived as summary of the updating stage of the Synod of Bishops from 2024, in particular recommendations provided for in the final document. Therefore, it is not a surprise that at the very beginning of his letter card. Mario Grech indicates that he writes the letter in the spirit of joint responsibility for proper updating of the final document of the Synod of Bishops held in 2024. Without any doubt, the starting point for this very important stage of functioning of the present Church is still the most thorough familiarity with the *Per una Chiesa sinodale: comunione, partecipazione, missione* document and undertaking specific initiatives in the perspective of its practical and specific updating.

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[14] See https://www.synod.va/content/dam/synod/news/2025-03-15_letter_process2028/ENG_Letter_To_the_Bishops_-_implementation_phase_of_the_Synod.pdf [accessed: 22.07.2025].

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THE PROPER PARTICIPATION OF THE CHRISTIAN FAITHFUL IN THE CELEBRATION OF THE SACRED LITURGY

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Abstract. According to the Constitution of the sacred liturgy *Sacrosanctum Concilium* "Mother Church earnestly desires that all the faithful should be led to that fully conscious, and active participation in liturgical celebrations which is demanded by the very nature of the liturgy. Such participation by the Christian people as a chosen race, a royal priesthood, a holy nation, a redeemed people […], is their right and duty by reason of their baptism" (no. 14). The aim of the article is to analyse the juridical and liturgical norms governing the participation of the lay Christian faithful and the role of the choir in liturgical celebrations.

Keywords: liturgy; *participatio actuosa*; canon law; Christian faithful; Second Vatican Council.

INTRODUCTION

The liturgical reform of the Second Vatican Council placed particular emphasis on the full, conscious, and active participation of the Christian faithful in the sacred liturgy. It was the earnest desire of Mother Church that all the faithful be led to that fully conscious and active participation (*participatio actuosa*) – both internal and external – which is demanded by the very nature of the liturgy[1] (no. 14). This vision entails a decisive shift away from the passive reception of sacred rites toward the involvement of the entire People of God in celebrating the mysteries of faith. Such active participation,

[1] Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio de sacra liturgia *Sacrosanctum Concilium* (04.12.1963), AAS 56 (1964), pp. 97-138 [hereinafter: SC].

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however, must proceed within a proper juridical framework and with due regard for assigned liturgical roles.

This article examines the juridical and liturgical norms governing the participation of the lay Christian faithful and the role of the choir in liturgical celebrations. The analysis draws upon Canons 834-839, 846, and 928 of the 1983 Code of Canon Law,[2] alongside the relevant teaching of the Magisterium, specifically: the Constitution *Sacrosanctum Concilium*; the Instruction *Musicam Sacram*;[3] the Instruction *Redemptionis Sacramentum*;[4] the General Instruction of the Roman Missal;[5] and the Instruction of the Polish Episcopal Conference on Music in the Liturgy.[6]

1. JURIDICAL FOUNDATIONS OF LITURGICAL PARTICIPATION

1.1. The 1983 Code of Canon Law

In the 1983 Code of Canon Law, the ecclesiastical legislator addresses the question of liturgical participation within the Church's sanctifying office (*munus sanctificandi*). The Church discharges this sanctifying mission in a particular way through the sacred liturgy, which is an exercise of the priestly function of Christ. In the sacred liturgy, the sanctification of humanity is signified through sensible signs and effected in a manner proper to each sign, and the whole public worship of God is carried out by the mystical Body of Christ, the Head and the members alike (Cano. 834 § 1). This norm recalls conciliar teaching (cf. SC 7) and underscores that the liturgy is, by its very nature, the public act of the Church as a communion ordered toward salvation. The author of the CIC/83 specifies that such worship takes place when it is celebrated in the name of the Church by persons lawfully designated and through acts approved by the authority of the Church (Cano. 834 § 2).[7] Liturgical law therefore safeguards the authenticity and unity of worship by defining who conducts liturgical actions and how they are

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

[3] Sacra Congregatio Rituum, Instructio de musica in sacra liturgia *Musicam Sacram* (05.03.1967), AAS 59 (1967), pp. 300-20 [hereinafter: MS].

[4] Congregatio de Cultu Divino et Disciplina Sacramentorum, Instructio de quibusdam observandis et vitandis circa sanctissimam Eucharistiam *Redemptionis sacramentum* (25.03.2004), AAS 96 (2004) 549-601 [hereinafter: RS].

[5] *General Instruction of the Roman Missal* [hereinafter: GIRM], https://www.vatican.va/roman_curia/congregations/ccdds/documents/rc_con_ccdds_doc_20030317_ordinamento-messale_en.html [accessed: 12.11.2025].

[6] See *Instrukcja Konferencji Episkopatu Polski o muzyce kościelnej* (14.10.20217), "Akta Konferencji Episkopatu Polski" 29 (2017), pp. 137-51 [hereinafter: Instruction of 2017].

[7] See also Krzywda 2011, 15-16.

to be performed. This ordered distribution of responsibilities permits the genuine participation of all the faithful.

The CIC/83 sets out the hierarchy of those who exercise the sanctifying office: first bishops as the high priests, the principal dispensers of the mysteries of Gods, but at the same time, the promoters and guardians of the liturgical life in their entrusted churches (Cano. 835 § 1); next presbyters under the authority of the bishop; they are consecrated to celebrate divine worship and to sanctify the people (Cano. 835 § 2); there are also deacons who have a part in the celebration of divine worship according to the norm of the prescripts of the law (Cano. 835 § 3). Particularly relevant is Cano. 835 § 4 CIC/83, according to which, "The other members of the Christian faithful also have their own part in the function of sanctifying by participating actively in their own way in liturgical celebrations, especially the Eucharist. Parents share in a particular way in this function by leading a conjugal life in a Christian spirit and by seeing to the Christian education of their children." This provision gives juridical expression to the common priesthood of the faithful[8] within the liturgical context, obliging every baptized person to take an active part in divine worship.

The legislator of the CIC/83 expands on this idea by emphasizing the communal character of the liturgy. Cano. 837 § 1 reiterates the fundamental principle of the Second Vatican Council, "Liturgical actions are not private actions but celebrations of the Church itself which is the sacrament of unity, that is, a holy people gathered and ordered under the bishops" (cf. SC 26). This signifies that every liturgical celebration constitutes a manifestation of the Church as a communion; even when conducted within a small assembly, it remains an act of the entire body of the Church (SC 26) [Green 1979, 610]. The liturgy exposes and simultaneously edifies the Church, rendering her unity present and engaging all members in distinct ways according to their sacred orders, assigned functions, and concrete ways of participation. Consequently, each person – cleric, consecrated religious, or lay – has a role that is properly his or her own, rooted in the Church's ordered structure. The legislator further introduces a significant practical norm in Cano. 837 § 2 CIC/83: inasmuch as liturgical actions by their nature entail a common celebration, they should be celebrated with the presence and active participation of the Christian faithful where possible. In doing so, it reaffirms that the liturgy is a public and communal act, not the private prayer of the priest; therefore, whenever circumstances allow, care should be taken to ensure the presence of the faithful and their active engagement, for example, in Holy Mass through responses, chants, and gestures. All the faithful enjoy the right to a liturgy celebrated

[8] Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio dogmatica de Ecclesia *Lumen gentium* (11.11.1964), AAS 57 (1965), pp. 5-71 [hereinafter: LG], no. 10.

in conformity with the Church's prescriptions; also, for the good of the community of the Church, some of the lay faithful are allowed to exercise ministries in the celebration of the sacred liturgy (RS 43) [Celary 2006, 258]. The communal character of the liturgy is thus intrinsically linked to participation, for the liturgy, by its very nature, requires the cooperative engagement of all who take part in it (cf. RS 44; SC 28) [Celary 2006, 258-59].

In the CIC/83, the ecclesiastical legislator clarifies matters related to worship. The Church legislator provides that the ordering and guidance of the sacred liturgy depends solely upon the Church authorities: the Apostolic See and the diocesan Bishop (Cano. 838 § 1). The ordering of the sacred liturgy across the entire Church, the publishing of liturgical books, and the exercise of vigilance that liturgical regulations are observed faithfully everywhere falls within the competence of the Apostolic See (Cano. 838 § 2). The Episcopal Conferences oversee the preparation and approval of translations and permitted adaptations of the rites within defined limits (Cano. 838 § 3). Within the limits of his competence, it is the diocesan Bishop who lays down liturgical regulations, which are binding on all, in the Church entrusted to his care (Cano. 838 § 4). These competence norms safeguard the unity of the celebration from arbitrariness – no one other than the competent authorities may establish new rites or alter long-established customs (SC 22). This principle is further elaborated in Cano. 846 § 1: "In celebrating the sacraments the liturgical books approved by competent authority are to be observed faithfully; accordingly, no one is to add, omit, or alter anything in them on one's own authority." This fundamental principle of adhering faithfully to the approved rites embraces not only the sacraments but the whole of public worship. It forbids celebrants or other participants from introducing private "adjustments" to the liturgical proceedings. The principle safeguards the liturgy from abuses and ensures that the faithful take part in the celebrations as the Church intends and has established (cf. RS 11) [Celary 2006, 259]. The faithful possess the right to an authentic liturgy, one that accords with the Church's norms and tradition, and any unauthorized alterations infringe upon this right and compromise the unity of divine worship[9] (RS 11).

In Cano. 839 CIC/83, the ecclesiastical legislator sets out that the Church carries out the function of sanctifying also by other means, both by prayers and by works of penance and charity, all of which greatly help to strengthen the kingdom of Christ in souls (§ 1). Furthermore, ecclesiastical law requires local ordinaries to take care that the prayers and pious and sacred exercises of the faithful be fully conforming to the teaching of the Church (§ 2). Popular devotions are highly commended, provided they do not replace the sacred liturgy and are conducive to full participation therein (cf. SC 13).

[9] Ioannes Paulus PP. II, Litterae encyclicae de Eucharistia eiusque necessitudine cum Ecclesia *Ecclesia de Eucharistia* (17.04.2003), AAS 95 (2003), 433-75, no. 52.

In conclusion, Canons 834-839 CIC/83 underscore the central place of the liturgy in the sanctification of the faithful and the active participation of all members of the Church in divine worship, while at the same time preserving the hierarchy of ministries and fidelity to liturgical norms.

1.2. The Second Vatican Council and Post-Conciliar Instructions

The liturgical provisions of the CIC/83 rest upon the Constitution *Sacrosanctum Concilium* and the later prescriptive documents on music and liturgy. The Council Fathers recalled the principles that were subsequently incorporated into the CIC/83. As in Cano. 837 § 1, they find that liturgical actions are not private actions but those of the Church itself as "the sacrament of unity," with the entire holy people gathered under the bishops (SC 26). In liturgical celebrations "each person, minister or layman...should do all of, but only, those parts which pertain to his office by the nature of the rite and the principles of liturgy" (SC 28). This principle serves to avert the clericalization of the laity (e.g. their undertaking functions reserved to the ordained), as well as the displacement of the clergy from their proper duties (such as abstaining from the homily or from presiding over prayer in favour of lay individuals). The Church desires that pastors of souls zealously foster the full, conscious, and active participation of the faithful, which is meant to be the first and indispensable source of genuine piety, and that they introduce the faithful into the liturgy through "necessary instruction" (SC 14). In nos. 113-116 SC, the Council Fathers address sacred music, recommending that Gregorian chant hold "pride of place" in the liturgy, while also urging the cultivation of the *schola cantorum* and the active participation of the whole body of the faithful in singing (SC 114). Bishops and other pastors of souls must ensure that all the present faithful may be able to contribute the portions of liturgical song which is rightly theirs; even in the presence of a well-performing choir, the people may not remain completely silent (SC 114). In other words, the *schola cantorum* should support the singing of the people and not replace them [Filipczak 2017, 193].

These conciliar directives were further developed in the Sacred Congregation of Rites' Instruction *Musicam Sacram*, which provided a comprehensive framework for the place of music and song in the liturgy. The congregation introduced, among other things, the concept of "degrees of participation" in liturgical singing, indicating which parts are to be sung by the faithful and which may be performed by the choir or a cantor (MS 28-36). The dialogues and responses of the faithful, alongside the common acclamations, should always be sung or recited by the assembly; this is the minimum expression of active participation (MS 16). Although certain portions of the liturgical song may occasionally be entrusted solely to the choir, for instance,

more complex elements of the Ordinary or the Proper of the Mass, such delegation must never be carried out in a manner that excludes the people from the participation that is rightfully theirs (cf. MS 14-15). The instruction states explicitly that careful listening to the chant likewise constitutes a form of participation on the part of the faithful; participation need not invariably be vocal, provided that the people pray interiorly together with the choir (MS 15; Instruction of 2017, 11). The liturgy, by its nature, is given "a noble form" and acquires greater dignity when celebrated in song and with the ministers of each degree fulfilling their ministry and the people participating (MS 5; cf. Instruction of 2017, 8). The instruction further mandates due care for appropriate liturgical music – music that is sacred, beautiful, and adequate, and never secular or trivial (MS 4; Instruction of 2017, 7, 9). The document further recommends the formation of parish choirs and *scholae*, stipulating that "the choir should be placed in such a way that each of its members may be able to participate easily in the Mass" (MS 23c). Members of singing ensembles are themselves part of the liturgical assembly; they should therefore be able to hear the Word of God and take part in prayers and rites (Instruction of 2017, 11a). The same recommendation is to be found in the General Instruction of the Roman Missal which reads, "the choir should be positioned...so as to make clearly evident its character as a part of the gathered community of the faithful...The location should also assist the choir to exercise its function more easily and conveniently allow each choir member full, sacramental participation in the Mass (GIRM 2013, 312).

In the Instruction *Redemptionis Sacramentum*, the Congregation for Divine Worship and the Discipline of the Sacraments addresses the issue of liturgical abuses, stressing the need to conform with the norms outlined above. It reiterates that no liturgical celebration may be considered the possession of the celebrant or of the community. It further stresses that the faithful have the right to a liturgy celebrated in conformity with the Church's norms (RS 11-12). Active participation by the laity is not merely a right but also a duty derived from baptism. The lay faithful "rightly and laudably" carry out certain ministries within the liturgy, distributing these among themselves (RS 43) [Celary 2006, 258]. The congregation, after SC 28, reminds that "whether ordained ministers or lay faithful, in exercising their own office or ministry should do exclusively and fully that which pertains to them" (RS 44). It reproves instances in which roles are confused, such as when laypersons assume functions reserved to the clergy, notably the homily (RS 64-66), or when the celebrant entrusts parts of Holy Mass, for example, the Eucharistic Prayer, to be sung by the people or the choir, a practice deemed impermissible. The congregation mandates the elimination of such abuses in order to uphold the faithful's right to authentic participation, untainted by the celebrant's personal innovations (RS 18).

The liturgy is the common work of the whole Church, governed by law to safeguard unity and to facilitate the full participation of all the faithful in accordance with the proper ecclesiastical order [Green 1979, 610].

2. THE THEOLOGY OF LITURGICAL PARTICIPATION

Underlying these juridical provisions is a substantive theology of participation, grounded in the Church's doctrinal understanding of herself and liturgy. A central concept of the Second Vatican Council is *actuosa participatio*, that is, active participation. This term should not be reduced to outward activity such as singing, responding, or making gestures; above all, it signifies an internal engagement, a conscious and devout entering into the liturgical action with both heart and mind (SC 11). Pope Benedict XVI taught that genuinely fruitful participation presupposes an interior spirit of prayer and the offering of oneself with Christ, and that external activity devoid of spiritual attention does not accomplish the purpose of the liturgy.[10] Accordingly, full participation is simultaneously external and internal: the faithful are to carry out the actions prescribed by the rites – singing, responding, kneeling – while also comprehending the significance of the signs and uniting themselves to Christ who is present and operative within the liturgy.

Liturgical theology explains that the basis of the lay faithful's dignity and obligation to participate is the common priesthood of the faithful. Through baptism, each person is incorporated into Christ – the High Priest – and has a share in His common priesthood, distinct in essence yet collaborating with the ministerial or hierarchical priesthood (LG 10). The faithful, as "living stones" of the spiritual temple, are called to offer spiritual sacrifices to God and, above all, to participate in the Eucharistic sacrifice (1 Pet 2:5; LG 11). Participation in Holy Mass does not mean merely watching the priest's actions; it means offering oneself together with Christ. Hence the call for the faithful not to be passive spectators but partners in the dialogue of salvation enacted in the liturgy. The liturgy is the "source and summit" of the Church's life (SC 10), and the faithful are meant to take an active part in it (SC 14). Active participation is therefore both a right and a duty of all the baptized (cf. Cano. 214 CIC/83).

It is worth noting that the notion of *participatio actuosa* surfaced in papal teaching well before Vatican II – Pius X, for instance, in his 1903 Motu Proprio *Tra le sollecitudini*, urged the faithful to take an active part in liturgical song and worship. Yet it was only with the Council Fathers that the term assumed its central significance. Post-conciliar liturgical theology expanded this idea: active

[10] Benedictus PP. XVI, Adhortatio apostolica postsynodalis de Eucharistia vitae missionisque Ecclesiae fonte et culmine *Sacramentum caritatis* (22.02.2007) AAS 99 (2007), pp. 105-80, no. 52.

participation means the engagement of the whole person – not only their voice, but also their intellect and will – in the liturgical action (SC 7). In the liturgy, Christ draws the Church together and leads her in offering worship to the Father, while the faithful take part as members of His Mystical Body. The liturgical assembly constitutes a theological sign, manifesting the mystery of the Church praying and acting together [Nadolski 1989, 221].

The engagement of the faithful in the liturgy manifests itself in a variety of forms: the recitation of acclamations and responses, the singing of major parts of Holy Mass, such as the Gloria or the Creed, the performance of ritual gestures, including the sign of the cross, genuflections, or the processional approach to Communion, and at times the exercise of entrusted ministries, such as the proclamation of the readings, the chanting of the psalm, or service at the altar. These external expressions of participation are ordered toward fostering an interior union with the content of the liturgy. The Council Fathers interpret "active" participation in conjunction with what is "conscious," implying an understanding of the rites, and with what is "full," namely, participation that encompasses the entire assembly and excludes no one (SC 14). Consequently, the liturgical reform emphasized the introduction of vernacular languages, the simplification of the rites, and the liturgical formation of the faithful, with a view to promoting such conscious participation. The introduction of the Polish language into the post-conciliar liturgy was sanctioned by the ecclesiastical legislator in, but noy only, Cano. 928 CIC/83, "The eucharistic celebration is to be carried out in the Latin language or in another language provided that the liturgical texts have been legitimately approved." This norm permits the use of the language of the faithful, thereby significantly promoting their active participation; for participation to be genuinely conscious, the faithful must comprehend the words of the prayers and chants (SC 36).

In sum, from a theological standpoint, the active participation of the faithful is both a sign and a prerequisite for the Church to form a communion. It is a sign, insofar as the liturgical assembly manifests the Church united in worship; and it is a prerequisite, for only a living liturgy can build a genuine community of faith. The Church's sanctifying mission is realized not in the isolation of individuals but in the communal celebration of the mystery of Christ. Through canon law and liturgical regulations, the Church seeks to preserve and uphold this ideal.

3. THE CHOIR AND THE *SCHOLA CANTORUM* AS INTEGRAL COMPONENTS OF THE LITURGICAL ASSEMBLY

The church choir holds a distinctive role in the liturgy: it enriches the celebration with song, leads and supports the singing of the faithful, and performs

those parts of Holy Mass that demand greater musical expertise (Instruction of 2017, 11). Both the Church's tradition and post-conciliar documents emphasize the choir's significance – *Musicam Sacram* recommends that every cathedral and major church foster a *schola*, and that parishes form and maintain their own singing ensembles (MS 19, 23). The choir acts as a custodian of the beauty proper to liturgical music and assists the faithful in lifting their hearts to God through chant. At the same time, the Church teaches unequivocally that the *schola* is not to replace the assembly but to serve its participation. The choir is to perform the parts assigned to it, whereas the faithful are to be given the opportunity to sing the other sections of divine worship (Instruction of 2017, 10, 11).

The Polish Episcopal Conference indicated that, "A proper proportion between the singing of the *schola*, the choir, and the people must always be maintained" (Instruction of 2017, 11). What follows, the liturgy ought neither to devolve into a choral performance with a silent congregation nor to consist solely of joint acclamations without space for musical artistry. The Polish bishops noted that the faithful's full participation is not limited to singing along – "listening is also a form of participation," and at certain moments "a silence filled with reverence should be observed" (Instruction of 2017, 11). Thus, when the choir performs the offertory chant or the Communion song, the faithful participate by listening and contemplating – an engagement that is far from passive, insofar as they understand such moments to be prayer expressed through attentive listening.

The placement of the choir is no less important. The choir should be positioned so as to clearly be part of the gathered community and not apart from it (GIRM 312). Historically, choirs were often located in lofts or galleries high above the nave – arrangements that offered acoustic advantages yet were likely to create a sense of separation. Contemporary directives recommend that, wherever feasible, the choir be positioned in a visible place within the assembly, enabling its members to participate in the rites, e.g. to kneel during the consecration, or to have an unobstructed view of the altar (Instruction of 2017, 11a). Choir members must also be afforded the possibility of full sacramental participation; for example, choir singers are themselves to receive Holy Communion during Mass (MS 23c; Instruction of 2017, 11a). The choir is not to function as an autonomous body, detached from the rest of the faithful; it constitutes a liturgical ministry, comparable to that of altar boys. The Instruction of the Polish Episcopal Conference on Music in Liturgy further stipulates that every parish singing ensemble is to have a spiritual guardian, either the pastor or another priest designated for this purpose, who oversees the liturgical and spiritual formation of its members (Instruction of 2017, 11b). Singing in a choir is thus a form of liturgical engagement, not merely an artistic pursuit.

CONCLUSIONS

The liturgical reform and the post-conciliar canonical legislation have integrated the theological and normative aspects of the faithful's participation in divine worship, thereby forming a unified vision of the full, conscious, and active involvement of the whole People of God in liturgical celebrations. A closer look at Canons 834-839, 846, and 928 CIC/83 reveals that the ecclesiastical legislator rigorously implements the principles of the Second Vatican Council: the liturgy constitutes the act of the Church as a hierarchical communion, within which each person, cleric or lay, fulfils a ministry proper to his or her status; lay members of the faithful are both obligated and entitled to active participation in the liturgy, particularly in the celebration of the Eucharist; and no one may introduce changes to the liturgy on personal authority, since it is to serve the entire Church. The Constitution *Sacrosanctum Concilium*, along with the Instruction *Musicam Sacram* and the Instruction *Redemptionis Sacramentum*, the General Instruction of the Roman Missal, and the 2017 Instruction of the Polish Episcopal Conference on Music in the Liturgy, collectively elaborate these principles, offering practical means for their application and cautioning against deviations.

The choir and liturgical music do not supplant the participation of the faithful; rather, they sustain and complement it. The beauty of choral chant does not stand in opposition to active participation but enhances it, so long as the appropriate balance is preserved. An ideal liturgical celebration is one in which the whole community at times raise their voices to sing God's praise, at other moments keeps a reverent silence, and at still others listens to the choir's masterly chant elevating hearts toward heaven. Liturgical abuses disrupt this ordered harmony and must accordingly be addressed both with charity and due firmness by those charged with the oversight of the liturgy.

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