Institute of Legal Studies
Faculty of Law and Administration
University of Szczecin

Court of Appeal in Szczecin
Voivodeship Administrative Court in Szczecin

ACTA IURIS STETINENSIS

4/2019 (28)

Szczecin 2019

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Enhancing the academic level and internationalization of the journal Acta Iuriss Stetinensis – a task financed under agreement 638/P-DUN/2019 from the funds of the Minister of Science and Higher Education allocated for activity popularizing science.

Publication of the journal co-financed from the funds of the Ministry of Science and Higher Education under agreement no. 384/WCN/2019/1 of 16 July 2019 which constitute aid granted under the programme "Support for academic journals".

The journal was published thanks to the financial support of the Court of Appeal in Szczecin and the Voivodeship Administrative Court in Szczecin

The paper version is the original version

Full version of the publication available at: https://wnus.edu.pl/ais/en/

Summaries of published papers are available online in the international database: Central European Journal of Social Sciences and Humanities, cejsh.icm.edu.pl | Central and Eastern European Online Library (CEEOL), www.ceeol.com | BazHum, bazhum.muzhp.pl | Directory of Open Access Journals (DOAJ), doaj.org

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ISSN 2083-4373 | e-ISSN 2545-3181

WYDAWNICTWO NAUKOWE UNIWERSYTETU SZCZECIŃSKIEGO
Wydanie I. Ark. wyd. 11,5. Ark. druk 15,3. Format B5. Nakład 170 egz. powered by TCPDF (www.tcpdf.org)

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Podziękowania

W imieniu Instytutu Nauk Prawnych Uniwersytetu Szczecińskiego
oraz Redakcji czasopisma naukowego Acta Iuris Stetinensis
składamy serdeczne podziękowania
Panu dr hab. Markowi Andrzejewskiemu, prof. US,
wieloletniemu Redaktorowi Naukowemu oraz współtwórcy czasopisma,
za zaangażowanie, poświęcony czas i trud włożony w jego funkcjonowanie.

Instytut Nauk Prawnych Uniwersytetu Szczecińskiego
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Letter of appreciation

On behalf of the Institute of Legal Studies of the University of Szczecin
and the Editorial Office of the journal Acta Iuris Stetinensis
we would like to thank sincerely
dr hab. Marek Andrzejewski, prof. US,
a long-term Scientific Editor and co-founder of the journal,
for his commitment, time and effort put into the journal's functioning.

Institute of Legal Studies of the University of Szczecin
Editorial Office

ARTICLES

ACTA IURIS STETINENSIS 4 (28)

DOI:10.18276/ais.2019.28-01

Rafał Adamus*

CLAIMS SECURED BY A REGISTERED PLEDGE IN SANATION PROCEEDINGS

Abstract

This study concerns the legal situation of a receivable secured by a registered pledge in a debtor's sanation (restructuring) proceedings. The registered pledgee has a special position in the course of such proceedings. The study discusses the rules of subjecting the receivable secured by the arrangement, the rules of preparing and contesting the list of receivables, and finally the rules of satisfying the pledgee.

Keywords: restructuring, sanation proceedings, list of claims, registered pledge, arrangement

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Introduction

General comments on sanation proceedings

Sanation proceedings – one of four restructuring proceedings under the Polish[1] Restructuring Law Act – are intended to avoid the debtor's bankruptcy and to satisfy the debtor's creditors.[2] Sanation proceedings are 'hybrid' restructuring proceedings with a very wide range of practical applications, which makes them quite popular in practice. Opening and conducting the proceedings is independent of the 'payment morality' of the debtor.[3] Sanation proceedings allow the features of restructuring liabilities and liquidating assets to be combined. Sanation mass (the assets of the debtor that existed on the day the sanation proceedings were begun and those acquired during the proceedings), unlike in other restructuring proceedings, may be liquidated by the administrator with the effect of a bankruptcy (enforcement) sale.[4] In this case, the creditors are satisfied even before the arrangement is concluded at the creditors meeting and approved by the restructuring court. The arrangement reached in the sanation proceedings may be either a restructuring or a liquidation in nature.[5] The establishment of the list of claims in sanation proceedings is simplified. Sanation proceedings are subjected to the principles of speed of conduct. In the absence of a consensus in the course of proceedings regarding claims, it is possible to settle the dispute (trial before the court) on general principles.

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[1] Comparative legal analysis was abandoned in this study. In the justification of the bill on the so-called the following simplified restructuring proceedings were raised as follows: 'It should be noted that, according to the Restructuring and Bankruptcy Directive, in-kind secured claims must be covered by law by arrangement' (Print No. 382 of the Sejm of the 9th Term).

[2] Adamus, R., *Polish Restructuring Law*, Saarbrücken 2019, p. 87; Adamus, R., *Bankruptcy and Restructuring Law in Poland*, "Societas et Iurisprudentia" 2019, Vol. VII (2), pp. 19–49; Malmuk-Cieplak, A., in: Torbus, A., Witosz, A., Witosz, A.J. (eds.), *Prawo restrukturyzacyjne. Komentarz*, Warszawa 2016, p. 721; Zimmerman, P., *Prawo restrukturyzacyjne. Komentarz*, Warszawa 2016, p. 1579.

[3] Adamus, R., *Importance of payment morality in the Polish bankruptcy law*, "Journal of Business Law and Ethics" December 2019, Vol. 7, No. 1 (2), p. 9; Adamus, R., *Grounds for opening restructuring proceedings in Poland*, "Gaps in Russian Legislation" 2018, No. 7, pp. 162–166.

[4] Adamus, R., *Likwidacja masy upadłości. Zagadnienia praktyczne*, Warszawa 2016, p. 56.

[5] Adamus, R., *Some remarks on the issue of the legality of arrangement proposals under the Polish Reorganization Law*, "The Social and Political Sciences", Moscow 2018, No. 5, pp. 300–306.

Registered pledge and restructuring proceedings

A registered pledge is an institution of substantive civil law. The restructuring law does not lead to prejudice to the personal right of the pledgee to the registered pledge,[6] but it provides a certain procedural order under which the pledgee's rights guaranteed by substantive law are exercised. However, the interpretation of procedural provisions should not lead to a reduction of the pledgee's personal right under substantive law. Restructuring proceedings only provide a simplified way to recognise claims, and thus, as mentioned above, generally does not preclude a trial on general principles.

The status of a claim secured by a registered pledge on the debtor's property in sanation proceedings

The claim secured by a registered pledge as a non-arrangement claim

In accordance with Article 151 section 2 Restructuring Law Act (RL), which applies to all types of restructuring proceedings, the arrangement does not – by virtue of the law – cover claims secured on the debtor's property by a registered pledge in the part covered by the value of the subject of the registered pledge, unless the creditor has agreed to include it in the arrangement. It is worth recalling here that as early as the inter-war period, in the comments to the arrangement law of 1934, the view was expressed that claims secured by a mortgage or pledge in the part not covered by the subject of the registered pledge are not covered by the arrangement.[7] The legislature has given this concept a normative power. The provision of Article 151 section 2 RL serves to preserve the essence of the registered pledge, and thus effective *erga omnes* security, the essence of which is to provide satisfaction to the pledgee with prior right to the personal creditors.

It is worth emphasising the legislature's flexible approach to the legal fate of claims on a debtor's property secured by a registered pledge. The pledgee's consent to cover the claim with the arrangement should be expressed unconditionally

[6] Groele, B., in: Hrycaj, A., Filipiak, P. (eds.), *Prawo restrukturyzacyjne. Komentarz*, Warszawa 2016, p. 56; Zimmerman, P., op. cit., p. 1336.

[7] Arnold, S., *Prawo o postępowaniu układowem wraz z przepisami związkowymi z uwzględnieniem motywów Komisji Kodyfikacyjnej*, Kraków 1936, p. 15.

and irrevocably, at the latest before voting on the arrangement at the creditors' meeting. Consent may be expressed orally in the minutes of the meeting of creditors. The effects of initiating sanction proceedings extend to secured claims as soon as the creditor submits a statement of consent to be included in the arrangement. Consenting to cover the claim with the arrangement is not tantamount to waiving the security (registered pledge). The creditor may be allowed to cover only part of the claim by the arrangement. In the event the security (registered pledge) expires or is waived in the course of sanation proceedings, the claim becomes an arrangement claim.[8]

The extent to which a claim is secured by a registered pledge may be the subject of a dispute in restructuring proceedings. In this case, the source of the dispute may be the value of the subject of the registered pledge. In some situations, the value of the subject of the registered pledge may be 'mobile' by nature, in particular when a registered pledge is established on a set of items with variable composition.

There are some crucial issues not regulated by the legislature. In the context of securing claims, the legislature did not regulate the following issues in particular. First, there is a dilemma according to which assumptions should be made about the valuation of the subject of a registered pledge – at liquidation value or at normal market value. Secondly, there is a question concerning when the value of the subject of a registered pledge should be determined – on the day the sanation proceedings are begun, on the day inventory is taken, on the day the inventory is prepared, or on another day. Thirdly, there is a question of how to proceed in a situation where the subject of the registered pledge degrades during the restructuring procedure (significant value changes).

The role of the inventory and the list of claims

The legal nature of the inventory in sanation proceedings

In accordance with Article 294 RL, on the day the sanation proceedings are begun, the property used to run the business and the property belonging to

[8] Gurgul, S., *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz*, Warszawa 2016, p. 1116.

the debtor become the sanation mass.[9] According to *Lege non distunguente*, the sanation mass includes components of the debtor's property encumbered by a registered pledge. The composition of the sanation mass is determined by the administrator (Article 296 RL),[10] and the administrator has this authority when, pursuant to Article 288 section 3 RL, the debtor is allowed to manage the sanation mass. The composition of the mass is determined within thirty days of the opening of sanation proceedings based on entries in the debtor's books and on uncontested documents. The composition of the sanation mass is determined by making an inventory. Together with the inventory, the property included in the sanation mass is assessed (Article 275 sections 1 and 2 in connection with Article 296 section 3 RL). Herein, property evaluation does not have to take place with the participation of professional property appraisers. However, in doubtful situations it would be advisable to prepare an appraisal report. The contents of the inventory cannot be appealed by either creditors or the debtor in the course of sanation proceedings. The regulations do not provide for the inventory to be changed, but it is reasonable that the liquidation value[11] of an asset encumbered by a registered pledge should be assumed.

Legal nature of the list of claims in sanation proceedings

In accordance with Article 76 section 1 RL, the list of claims includes personal claims against the debtor arising before the day the restructuring proceedings are initiated.[12] The list of claims is universal since, as a rule, it covers all arrangement claims, taking into account the criterion of when they are created. This applies to both public and private law claims, claims against which the debtor is the main debtor, as well as claims against a pro rata co-debtor and a joint debtor. The list of claims includes both monetary and non-monetary claims (Article 79 RL).[13] It does not matter whether the creditor is a domestic or foreign entity. The list of claims includes only personal claims, i.e. those in respect of which the

[9] Filipiak, P., in: Hrycaj, A., Filipiak, P. (eds.), op. cit., p. 964; Zimmerman P., op. cit., p. 1612.

[10] Filipiak, P., in: Hrycaj, A., Filipiak, P. (eds.), op. cit., p. 966.

[11] Groele, B., in: Hrycaj, A., Filipiak, P. (eds.), op. cit., p. 568; Zimmerman P., op. cit., p. 1616.

[12] Lipowicz, Ł., in: Hrycaj, A., Filipiak, P. (eds.), op. cit., p. 319.

[13] Ibidem, p. 332.

debtor corresponds with all his present and future assets. Personal debt can be secured by a mortgage or a pledge, and this is also subject to inclusion in the list of claims. The list includes claims arising before the day of opening the restructuring proceedings. The time when the claim arises is decisive.

According to Article 76 section 2 RL, the inclusion of claims in the list of claims determines the amount with which the creditor participates in the restructuring proceedings.[14] This regulation is absolutely crucial. The list of claims, thus, has a specific legal function: it determines a) whether the person is the creditor in the restructuring procedure, and b) at what amount of the claim. The list of claims also serves to determine, for the purposes of sanation proceedings, what part of the claim is subject to the arrangement and which is not subject to the arrangement due to the value of the subject of the registered pledge. The legal function of the list of claims indicated herein is not exclusive. In accordance with Article 107 section 1 RL, as a rule, at the meeting of creditors, the right to vote is given to creditors whose claims have been placed in the approved list of claims, and to creditors who appear at the meeting of creditors and submit to the judge-commissioner an enforcement order confirming their claim.[15] At the same time, pursuant to Article 107 section 2 RL, creditors vote with the sum of claims included in the approved list of claims or in the writ of execution. The legal function of the list of claims is related to its informative function. The enforcement function of the list should also be mentioned. In accordance with Article 102 RL, the list of claims is a building part of the writ of execution against the debtor.[16] Importantly, in accordance with Article 101 section 1 RL, failure to include claims in the list of claims does not prevent their recovery in the proper manner (by trial). Therefore, the list of claims does not create the *res iudicata* or *res transacta*, which is characteristic of civil proceedings.

When is the value of the subject of the registered pledge determined? Various dates could be considered. It seems that it should be assumed that in the event of changes in the value of the subject of the registered pledge the date when the list of claims was established should be considered.[17] In the civil procedure, the rule of assuming the state from the date of adjudication applies. In accordance

[14] Ibidem, p. 323.

[15] Hrycaj, A., Geromin M. in: Hrycaj, A., Filipiak, P. (eds.), op. cit., p. 319.

[16] Lipowicz, Ł., in: Hrycaj, A., Filipiak, P. (eds.), op. cit., p. 400.

[17] Groele, B., in: Hrycaj, A., Filipiak, P. (eds.), op. cit., p. 567.

with Article 316 § 1 of the Code of Civil Procedure, after closing the trial, the court issues a judgment based on the *status quo* at the time the trial closes. In addition, the value of the subject of the registered pledge estimated on the date of the list of claims corresponds best to the actual state of affairs.

In the list of claims in sanation proceedings, the amount that is covered by the arrangement and which determines the creditor's voting power and the value of the entire claim sesectiontely is included.[18] The author of the list of claims in sanation proceedings (the entity responsible for its creation and content) is the administrator (Article 84 RL).[19] According to Article 320 RL, the administrator prepares and submits a list of claims to the judgecommissioner within thirty days of the opening of the sanation procedure.[20] The administrator prepares the list of claims on first of all the debtor's documents, i.e. the debtor's accounting books and 'other documents of the debtor,' 'Other documents of the debtor' refers to documents in the possession of the debtor, not necessarily created by the debtor. However, this does not mean the value of the subject of the registered pledge is determined at book value. Secondly, the administrator draws up an inventory based on public registers. The legislature indicates land and mortgage registers. Nevertheless, it should be remembered that in the restructuring proceedings, the list of claims relates only to personal creditors (who can additionally be subject to the material subject of the registered pledge on the debtor's assets). Another register may be, e.g. a register of registered pledges. In the procedure for preparing the list of claims, creditors do not have to submit anything.

Opposition to the list of claims in sanation proceedings

It is permitted to make an objection that includes claims in the list or omits claims in the list. The structure of the objection is important when there is no institution for the submission of claims. An objection may be lodged by a participant in the restructuring procedure. In other words, both the creditor and the debtor have the right to object. This principle requires some explanation. First, in accordance with the resolution of the seven judges of the Supreme Court of 15 May 2014, III CZP 88/13, '*gravamen* is a prerequisite for the admissibility

[18] Witosz, A.J., in: Torbus, A., Witosz, A., Witosz, A.J. (eds.), op. cit., p. 431.

[19] Lipowicz, Ł., in: Hrycaj, A., Filipiak, P. (eds.), op. cit., p. 344.

[20] Hrycaj, A., in: Hrycaj, A., Filipiak, P. (eds.), op. cit., p. 1089.

of an appeal, unless the public interest requires substantive consideration of that measure.' This rule applies accordingly to submitting an objection against the list of claims. Herein, the debtor may file an objection, provided that the list of claims is not consistent with his statement. Secondly, any creditor may object to the inclusion of claims in the list. Thirdly, an objection to the omission of claims in the list may be made by a creditor omitted from the list. It seems that as part of the opposition, the method of determining the amount of the claim subject to the arrangement may be questioned due to the accepted value of the subject of the registered pledge.[21] In the literature, Aleksander J. Witosz expressed the opinion that 'the correction of the division of property claims into parts can only be made as a result of the creditor's opposition.'[22] According to Article 96 RL, after the decision regarding the objection to the list of claims becomes final, changes shall be made to the extent specified in the decision. According to Article 98 section 1 RL, after the expiry of the deadline for submitting an objection – and, if it is submitted, after the ruling on the objection becomes final – the judge-commissioner approves the list of claims.[23] Objection is not, however, an instrument used to adjust the list of claims if the value of the object of the registered pledge changes after the list of claims is approved.

Permissible changes and supplements to the list of claims in sanation proceedings

First, in accordance with Article 99 RL, the judge-commissioner may *ex officio* remove a claim from the list of claims if it is found that the list contains a claim which in whole or in part does not exist or is entitled to a person other than the one indicated in the list as a creditor. The ruling on deleting the claim from the list of claims shall be served on the creditor concerned, the debtor, or the administrator. It should be remembered that a change of name, surname, name of the creditor, change of address, or other data or a change of creditor (as a result of subject transformations, assignment of claims, or *cessio legis*) which occurred after the list of claims is submitted to the judge-commissioner does not constitute grounds for changing the list and does not deprive the creditor of the right to

[21] Witosz, A.J., in: Torbus, A., Witosz, A., Witosz, A.J. (eds.), op. cit., p. 431.

[22] Ibidem, p. 432.

[23] Lipowicz, Ł., in: Hrycaj, A., Filipiak, P. (eds.), op. cit., p. 393.

participate in further restructuring proceedings (Article 100 section 2 RL). The decision of the judge-commissioner is subject to an instance control.[24]

Secondly, the judge-commissioner changes the list of claims in accordance with the final judgments presented to him (Article 101 section 2 RL) because failure to include claims in the list of claims does not prevent it being properly asserted. Theoretically, in this mode the amount of the subject of the registered pledge to the arrangement could be adjusted.

Thirdly, according to Article 100 section 1 RL, if – after the list of claims is submitted, a claim is disclosed that has not been included in the list, the administrator prepares a supplement to the list of claims. In this mode, however, the amount of claims cannot be revised.

Effects of not including claims in the list of claims in sanation proceedings

In accordance with Article 101 section 1 RL, failure to include claims in the list of claims does not prevent their recovery in the proper manner. Moreover, in accordance with Article 310 RL, opening sanation proceedings does not exclude the creditor from initiating court, administrative, administrative or court proceedings before arbitration courts in order to pursue claims that may be included in the list of claims. However, the costs of these proceedings are charged to the person initiating the proceedings if there were no obstacles to placing the claim in its entirety in the list of claims. Recognition of claims in restructuring proceedings is simplified. It is mainly subordinated to the objectives of the restructuring procedure. The authority that 'recognises' the claims is the administrator, and only in the event of an objection to the judge-commissioner and the restructuring court in the event of an appeal against the decision of the judge-commissioner will the administrator step in. The procedure is adversarial to a limited extent. Consequently, the recognition of claims in restructuring proceedings does not create a claim. Failure to include the claim in the list does not prevent it being pursued properly, except for restructuring proceedings. It should be remembered that, as a rule, the arrangement binds all creditors whose claims under the law are subject to the arrangement, even if they were not included in the list of claims (Article 164 section 1 RL).[25]

[24] Ibdiem, p. 397.

[25] Groele, B., in: Hrycaj, A., Filipiak, P. (eds.), op. cit., p. 601.

If the dispute is resolved during the restructuring proceedings, the judge-commissioner changes the list of claims in accordance with the final judgments presented to him. In accordance with Article 102 section 3 RL, the debtor may request a determination that the claim covered by the approved list of claims does not exist or exists to a lesser extent, if he has lodged an objection in the restructuring proceedings and no final court decision has been issued regarding the claim. It seems, therefore, that it is also possible to determine the amount of the claim that is subject to the arrangement outside of the restructuring proceedings, provided that the conditions listed above are complied with. According to Aleksander J. Witosz[26] and approved by Andrzej Jakubecki:

> The distribution of the sum of claims is binding for the purposes of determining the creditor's voting power in the course of proceedings. It has no material meaning. This means that in a situation where the determined value of the subject of the registered pledge item turns out to be underestimated, the greater part of the claim (…) will not be restructured. If the value was overestimated, the arrangement will cover the given claim to a greater extent than expected.[27]

Ways to satisfy the pledgee

Satisfying the pledgee in the pledgee's sanation proceedings in the event an object secured by a registered pledge is liquidated

In accordance with Article 323 section 1 RL, the components of property belonging to the debtor and included in the sanation mass may be sold by the administrator with the consent of the judge-commissioner, who sets out the conditions for their disposal. However, this does not apply to the sale of property components as part of business operations if it does not exceed the scope of ordinary management (Article 323 section 5 RL). The sale has effects similar to sales made by a trustee in bankruptcy proceedings (Article 323 section 3 RL). In this case, the administrator prepares a sanation plan for the distribution of sums obtained from the sale of things, claims, and rights encumbered by a registered

[26] Witosz, A.J., in: Torbus, A., Witosz, A., Witosz, A.J. (eds.), op. cit., p. 432.

[27] Jakubecki, A., in: *System prawa handlowego. Prawo restrukturyzacyjne i upadłościowe*, A. Hrycaj, A. Jakubecki, A. Witosz (eds.), Vol. 6, Warszawa 2020, pp. 363–364.

pledge, in accordance with the provisions of the Bankruptcy Law (Article 323 section 4 RL). In this case, the issue of subjecting the claim to the arrangement is irrelevant. The administrator *ex officio* includes a pledgee with a sesectionte division plan.[28]

Satisfying the pledgee in the pledgee's sanation proceedings if the claim is not covered by the arrangement

If the claim of the registered pledgee maintains its non-arrangement status, then the satisfaction of the creditor in the sanation proceedings occurs outside the scope of the arrangement. Suspending the obligation to perform obligations under the law is an exception to the rule. What does this mean in practice? First, a statutory moratorium allowing the legal cessation of obligations must be based on a clear legal norm. Secondly, no expanding interpretation is allowed (*exceptiones non sunt extandae*). In accordance with Article 151 section 2 RL, the arrangement does not include claims secured on the debtor's property with a registered pledge in the part covered by the value of the subject of the registered pledge, unless the creditor has agreed to be included in the arrangement. In accordance with Article 252 section 1 in relation to Article 297 RL, from the day the sanation procedure is begun until it is completed or the ruling to discontinue composition proceedings becomes final, the administrator cannot satisfy claims which are legally covered by the arrangement. In other words, the secured claim is subject to voluntary satisfaction by the administrator. Therefore, if in the course of sanation proceedings the secured claim is subject to voluntary satisfaction by the debtor – the pledgee, it is *prima facie* to conclude that the creditor – the pledgee may, in principle, use other forms of satisfaction, including the clause for taking over the subject of the pledge.[29] A claim secured by a registered pledge can and should be satisfied by the administrator during the sanation proceedings. In addition, from Article 326 section 2 RL, the conclusion is that non-arrangement obligations should be regulated by the administrator under consequences of discontinuing the proceedings. Therefore, if a given claim is not subject to the rigors of the arrangement, the administrator should pay it because the debtor, in principle, is responsible for it with

[28] Filipiak, P., in: Hrycaj, A., Filipiak, P. (eds.), op. cit., p. 1051.

[29] Sierakowski, B., *Pozycja wierzyciela rzeczowego w postępowaniu sanacyjnym – wybrane zagadnienia*, "Monitor Prawa Handlowego" 2017, No. 4, p. 30.

all his property, both property constituting the sanation mass and that which is excluded from the mass.[30]

Obtaining satisfaction from the subject of the registered pledge

In the course of sanation proceedings, the pledgee may in principle use the clause on taking ownership of the subject of a registered pledge.[31] First of all, it should be stated that the pledgee's competence to take ownership of the subject of the registered pledge, and therefore the personal right, may be excluded or limited only by an explicit provision of the law, and there is no such normative regulation in the provisions on sanation proceedings. This argument is conclusive. If the provisions on sanation proceedings do not provide for any deadlines for the pledgee to exercise their right, or if no formal rigor is introduced by the provisions, it only means that the pledgee exercises greater freedom when exercising their right. In the literature on the subject, Bartosz Sierakowski aptly notes that 'cases in which the creditor encounters restrictions on the possibility of satisfying his due claims against the will of the debtor have been regulated by law and should not be interpreted broadly.' It must be further argued that the subject of the registered pledge may be disposed of in the course of sanation proceedings by the administrator. The sale of assets under sanation proceedings requires that this circumstance be included in the restructuring plan (Art. 323 section 1 sentence 1 RL).

The administrator prepares a sesectionte plan for the distribution of sums obtained from the sale of things, claims, and rights encumbered by a registered pledge in accordance with the provisions of the Bankruptcy Law (Article 323 section 4 RL). In the summary of this argument, it should be noted that if in the course of sanation proceedings the administrator sells the subject of the registered pledge subject to the pledgee's right, the pledgee may also take ownership of the pledge.

It should be further noted that the pledgee's self-satisfaction clause cannot be eliminated *in genere* by the provisions of Article 248 RL in connection with

[30] Adamus, R., Chrapoński D., *Problem nadania klauzuli wykonalności bankowemu tytułowi egzekucyjnemu po ogłoszeniu upadłości dłużnika*, "Monitor Prawa Bankowego" 2014, No. 6, p. 73.

[31] Adamus, R., *Dopuszczalność przejęcia przedmiotu zastawu rejestrowego na własność w toku postępowania sanacyjnego prowadzonego wobec zastawcy*, "Przegląd Prawa Handlowego" 2019, No. 4, pp. 48–53.

Article 297 RL, which stipulate that a contract to which the debtor is a party that prevents or obstructs the achievement of the purpose of sanation proceedings is ineffective in relation to the sanation mass.

Conclusions

In the event of placing a claim secured by a registered pledge in the list of claims in sanation proceedings, the amount to which the creditor participates in the restructuring proceedings is determined. The list of claims separately specifies the amount that is covered by the arrangement and which determines the creditor's voting power and the value of the entire claim. The list of claims, therefore, specifies to what extent a claim secured by a registered pledge is subject to an arrangement and to what extent it is a non-arrangement.

The pledgee may question the value of the subject of the registered pledge given in the list of claims.[32] The appropriate procedure within the sanation proceedings is to raise an objection. However, this does not apply if the value of the subject of the registered pledge changes after the list of claims is approved. It is permissible to question the value of the subject of the registered pledge as determined in the list of claims in a civil procedure on general principles. A civil trial may still be initiated during sanation proceedings.

The value of the claim which is not covered by the arrangement should be calculated according to the liquidation value of the subject of the registered pledge determined on the date the list of claims is prepared. In the literature, the prevalent view is that the list of claims does not specify the division of arrangement claims and non-arrangement claims with final effect.

The list of claims specifies the rules for the division of claims into arrangement and non-arrangement claims due to the value of the subject of the registered pledge for the purposes of sanation proceedings. Payment made to the pledgee by the administrator in the course of sanation proceedings leads to the redemption of the claim or its relevant part within the limits of the payment made. In the event that payment was made, in fact, without covering the claim secured by the security, it could be assumed that the creditor had received an undue payment. The benefit may be untitled due to its duration or to its amount.

[32] The terminological inconsistency of the legislature is noteworthy in Article 284 sec. 2, Article 86 and Article 151 sec. 2. From the phrase 'likely satisfaction' it can be concluded that the value of the object of security should be reduced by the anticipated enforcement costs.

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ACTA IURIS STETINENSIS 4 (28)

DOI:10.18276/ais.2019.28-02

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JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION OF 19 NOVEMBER 2019[1] – SELECTED COMMENTS

Abstract

The changes introduced into the judiciary system within the last few years have actually led to the infringement of the principle of a tripartite division of power – Poland is inclining towards authoritarianism. The Constitutional Tribunal affected by formal changes and (partially) filled with persons who cannot guarantee independence – has ceased to perform their constitutional functions and ensure the constitutionality of laws long time ago. The "reforms" have already had impact on the judiciary authority, i.e. the courts. The above-described situation alerted the international opinion, thus, apart from the individual countries, many international organisations have also voiced their concerns. From among of the aforesaid organisations, the European Union (EU) is responsible for the key task. The changes in the structure of the Supreme Court and National Council of the Judiciary have become the subject of the preliminary procedure addressed to the Court of Justice of the European Union. In response thereto, the European Court of Justice located in Luxembourg stated that the cases concerning judges may not be tried by the

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[1] Joint cases C-585/18 *A.K. versus the National Council of Judiciary*, C-624/18 and C-625/18 *C.P. and D.O. Versus the Supreme Court*, ECLI:EU:C:2019:982.

court which is not independent or unbiased. The preliminary procedure is based on conciliation, which guarantees uniform application of Community law in all Member States. Therefore, it is always the national court that is responsible for the final resolution of the case. In the analysed case, it is the Supreme Court.

Keywords: preliminary procedure, Court of Justice, principle of unity, Supreme Court, National Council of the Judiciary

Introduction

The judiciary reform that has been implemented for several years now affected the state's institutional foundations and pushed Poland towards anti-democratic and authoritarian country.[2] The changes, which affected the judiciary authority, were reasoned by the need to expedite court proceedings, enigmatic will of the sovereign, and necessity to introduce and maintain social benefits (e.g. 500+). I think that the opinion of prof. W. Osiatyński, according to which the country is convinced about the overriding weight of economic and social goals, achieved at the expense of the rights of the individual and characterised by the socialist concept of law is (sometimes) also valid today.[3]

The purpose of this paper is to show that the changes that have consistently been implemented in our country since 2015, including those that affected the National Council of the Judiciary and allowed to establish the Disciplinary Board at the Supreme Court violate the principle of a tripartite division of power and destroy the Polish judiciary system. The so created concept

[2] I am aware of the fact that every authoritarian system is – as a matter of principle – also anti-democratic, but, since the party which currently holds the reins of power wants to make us believe that this is the will of the "sovereign" and that the will of the majority justifies infringement of a social agreement, such as the Constitution, I have decided to invoke this opinion. One of the main arguments justifying the infringement of the Constitution of the Republic of Poland is the concept of the so-called will of the majority, which has already been mentioned herein a number of times, as well as referring to such changes (e.g. replacing three legally appointed judges of the Constitutional Tribunal with three "imposters") as democratic. However, the contemporary understanding of the concept of "democracy" means the will of the majority, but with the guarantee that the minority rights are respected and appropriate standards followed. The infringement or lack of the principle of a tripartite division of power are the characteristics of each authoritarian system.

[3] See: Osiatyński, W., *Prawa człowieka i ich granice*, Kraków 2011, pp. 236–238.

of diarchy with indirect or even servant judiciary authority deprives Poland of essential characteristics of a democratic state under the rule of law, which observes the laws. Therefore, it may lead to Poland's exclusion from the group of the most important international organisations and significantly weaken the country's position on the international front. The analysis of judicature presented in this article was mainly supported by the dogmatic and legal method and comparative method. The main thesis is based on the statement that the changes affecting the National Council of the Judiciary and Supreme Court mean not only the violation of the Constitution of the Republic of Poland, but also the Community regulations.

The amended acts related to the Third Estate and unprecedented repressive act (i.e. "muzzle law"),[4] preceded by prior disassembly of the Constitutional Tribunal as well as activities of particular authorities breach many principles and provisions of the Constitution of the Republic of Poland.[5] In particular, the following principles are specifically violated: tripartite division of power, autonomy and independence of courts, legalism of the formal state under the rule of law, compliance with international law, and the principle of equality, including the prohibition of discrimination. What is more, the following human rights are also breached: presumption of innocence, right to fair proceedings or freedom of speech.[6] The current government, parliamentary majority and President of the Republic of Poland consistently and continuously infringe also the foundations of the Community law, also by challenging the decisions issued

[4] The Act of 20 December 2019 – the Law on the System of Common Courts, the Act on the Supreme Court and certain other Acts, Dz.U. (Journal of Laws) of 2020, item 190.

[5] The Constitution of the Republic of Poland of 2 April 1997, Dz.U. (Journal of Laws) of 1997, No. 78, item 483, as amended.

[6] Furthermore, the cases of M. Kamiński or K. Parchimowicz should also be mentioned here. The acquittal of M. Kamiński, the minister and coordinator of special services, before the decision of the court of second instance was issued led to a situation when it was the President of Poland and not the court who decided about the guilt. The above-mentioned case may not be considered legal, since the presumption of innocence is not only the human right, but also unqualified right. What is more, the right to fair proceedings was also substantially limited. The disciplinary proceedings initiated against the prosecutor and president of the *LEX SUPER OMNIA* Association of Prosecutors, due to the fact that he openly talked about the infringement of the Constitution constitute a significant breach of the freedom of speech.

by the EU authorities.[7] Illegal activities of particular authorities and their repercussions received wide coverage on the international arena. Many countries expressed their concerns about the situation in Poland, including such international organisations, as, among other things: The United Nations (UN), the Council of Europe, the Organisation for Security and Co-operation in Europe, and finally the European Union. From the very beginning of the so-called "reform", the European Union has been involved in an enhanced dialogue with the Polish authorities (even though, at some point, it became a monologue) and has undertaken numerous activities with two fundamental objectives: to ensure compliance with the Community legal norms and remedy the situation (which encourage Poland to start observing the rule of law and international regulations once again) as well as to prevent current violations. The example of accomplishment of the first objective may be the fact that Poland has eventually decided to abandon (under the pressure of the EU) their discriminatory regulations concerning the retirement age of judges. The second objective was also reached by preventing further devastation of Białowieża Forest (it was possible thanks to the decision issued by the Court of Justice of the European Union to stop deforestation[8]). The Białowieża case was examined in the context of the rule of law[9] and potential pecuniary penalty for non-implementation of the interim measures was based on the significant EU value pursuant to Article 2 of the Maastricht Treaty – Rechtsstaat.

On 19 November 2019, in response to the preliminary procedure of Polish courts, the European Court of Justice in Luxembourg took another step forward to protect the rule of law in wide context. When providing response according to

[7] A good example may be the well-founded opinion of the Commission issued pursuant to Article 258 of the Treaty on the Functioning of the European Union, signed in Rome on 25 March 1957 (codified version), Official Journal of the European Union C 202, 7/06/2016, 47–390 (TFUE) regarding Białowieża. Due to failure to comply with the aforesaid opinion, the case was referred to the Court of Justice of the European Union, pursuant to Article 260 TFUE, and the decision was issued, according to which the Republic of Poland breached the Treaty obligations. Furthermore, by virtue of Article 7 of the Treaty on the Functioning of the European Union, signed in Maastricht on 7 December 1992 (codified version), the infringement proceedings have been pending against Poland for several years already, Official Journal of the European Union C 202, 7/06/2016, 13–390 (Maastricht Treaty) regarding serious infringement of EU values. Article 7 of the Maastricht Treaty – colloquially referred to as the "nuclear option", as it may cause the suspension of certain rights under the EU treaties – has been enforced for the first time against Poland.

[8] Case C-441/17 *European Commission versus Poland*, ECLI:EU:C:2018:255.

[9] See: Ziętara, D., *Zasada praworządności jako fundament Unii Europejskiej*, "Prawo Europejskie w Praktyce" 2019, No. 5/6 (179/180), pp. 15 et seq.

the preliminary procedure of the Supreme Court, the European Court of Justice examined the issues related to the infringement of the principles of autonomy, independence and impartiality of judiciary authorities. While analysing such issues and making the decision, the Court of Justice of the European Union used the preliminary procedure format stipulated in Article 267 TFUE[10] – the conciliatory means, whose main purpose is to ensure the uniform application of Community law.

Preliminary procedure

The preliminary procedure is one of the oldest legal institutions referring to both the Community and EU law. The origin of the aforesaid procedure dates back to the first Founding Treaty[11] establishing the European Coal and Steel Community in 1952, which still remains in force, without many amendments, as part of the Treaty of Lisbon.[12] Its existence under the EU's legal system is a typical effect of absorption or, in other words, adoption of the national instrument. The EU preliminary procedure has been inspired by the French complaint filed with the Council of State (Conseil d'État). Similar institutions of law are present in many other countries, including common law countries, i.a: the United States of America. In the Polish legal system, a legal question that a common court may direct to the

[10] Article 267 TFUE:

The Court of Justice of the European Union is competent to adjudicate in preliminary proceedings regarding:

a) construction of treaties;

b) effectiveness and construction of acts passed by various institutions, bodies or organisational units of the European Union.

In the event when the question with respect thereto is raised before the court of one of the Member States, the court may address the Court of Justice, at their sole discretion, to provide a reply to such question if the court believes that the decision is essential to make the judgement.

If the aforementioned question is raised in the case pending before the national court, whose decisions are not subject to appeal according to domestic law, such court shall file the case with the Court of Justice.

If the question is raised in the case pending before the national court with respect to a person deprived of liberty, the Court of Justice shall issue their decision in the shortest time possible.

[11] The Treaty establishing the European Coal and Steel Community (ECSC) signed in Paris on 18 April 1951, in: Gelberg, L. (ed.), *Prawo międzynarodowe i historia dyplomacji*, Vol. III, Warszawa 1960, pp. 401–440.

[12] The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community signed in Lisbon on 13 December 2007, Official Journal of the European Union C 306, 17/12/2007, 1–271, (TL).

Constitutional Tribunal constitutes the preliminary procedure.[13] Pursuant to Article 267 TFUE, the preliminary procedure (also referred to as the "preliminary ruling") allows to decide on the effectiveness and interpretation of the EU law. Even though the European Court of Justice located in Luxembourg may interpret both 'primary' and 'secondary' legislation, it may only adjudicate on the effectiveness of the secondary legislation. The effectiveness of the treaties (or the entire treaty law) is the exclusive domain of Member States. Any potential examination of this issue and other issues related to the compliance of the treaties with the constitutions of Member States is entrusted with the national constitutional judicature. It is also an important argument in the dispute over EU Member States' sovereignty. In other words, the sovereignty of those Member States that agree to undertake certain EU obligations shall not be in any way affected. Nonetheless, coming back to the main theme of my considerations, it must be noted that from the very beginning the most important function of the preliminary procedure was to ensure uniform construction of the EU law in all Member States. The unity of effectiveness and implementation of the EU law is one of the most significant guarantees protecting the autonomous legal order of the European Union and the European Union itself.

Essence of preliminary procedure

The effectiveness or, in other words, co-existence of two legal orders leads to the situation, in which the judiciary authority must examine issues related to external Union law. Such decentralisation of the EU law, which assumes the inclusion of the national authorities in the Union proceedings brings potential risk of radically different decisions in the same or very similar cases.[14] The aforesaid differences could appear not only in particular Member States, but also in various courts of one of the Member States. The preliminary procedure blocks incorrect interpretation of the EU law, i.e. the interpretation that could be made only on the basis of internal methods and standards. Therefore: "the proceedings to issue the decision according to the preliminary procedure are considered neither an action nor a complaint. It is a form of collaboration between a national court, before which such proceedings are pending, and the Court of Justice. The proceedings

[13] For more information, see: Kubryk, K., *Postępowanie w sprawach wydawania orzeczeń wstępnych w świetle przyszłego rozszerzenia Unii Europejskiej*, in: Mik, C. (ed.), *Wymiar Sprawiedliwości w Unii Europejskiej*, Toruń 2001, pp. 194 et seq.

[14] See: Emmert, F., Morawiecki, M., *Prawo europejskie*, Warszawa 1999, p. 227.

are aimed at ensuring uniform application of the EU law in all Member States and efficient legal protection."[15] In light of the above, the preliminary procedure constitutes a safeguard mechanism ensuring the unity of its implementation and preventing the creation of the national schools of interpretation of the EU law.[16] "(…) The institution of the preliminary procedure is a special 'clamp' which provides the application of the EU law in the Member States."[17]

The preliminary procedure is a special and temporary procedure, which allows to make a break in the proceedings pending before the national court. On the basis of the response given by the Court of Justice of the European Union, the aforementioned proceedings may be continued and the national court has the 'last word.' In the case of Pasquale Foglia *vs* Mariella Novello,[18] the European Court of Justice located in Luxembourg showed that the compliance with the Community (Union) law while interpreting and implementing the treaties shall be a common domain of the EU and national judiciary powers. In the decision issued even earlier in the case of Rheinmühlen-Düsseldorf,[19] the European Court of Justice stressed that due to the sensitive nature of the preliminary procedure, it provides the laws established on the basis of the Treaties with the characteristics of a common law and ensures unitary effect in all Member States. The European Court of Justice also pointed out that the national courts must ensure full enforceability of the Union (Community) law, which would not be possible if there were any legal loopholes in the EU (Community) legal system. The preliminary procedure is one of the measures preventing such legal loopholes.

Questions of the Supreme Court

The preliminary procedure was referred to the European Court of Justice in Luxembourg due to the situation of three judges (from the Supreme Court and the Supreme Administrative Court), after the entry into force of the new Act on

[15] Rosiek, P.K., Szpunar, M., *Postępowanie przed Trybunałem Sprawiedliwości i Sądem I Instancji Wspólnot Europejskich. Aspekty praktyczne*, Warszawa 2005, p. 76.

[16] See: Kenig-Witkowska, M.M. et al., (eds.), *Prawo instytucjonalne Unii Europejskiej*, Warszawa 2019, p. 440.

[17] Ibidem.

[18] Case 244/80 *Pasquale Foglia v. Mariella Novello*, ECLI:EU:C:1981:302.

[19] Case 166/73 *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle Für Getreide und Futtermittel*, ECLI:EU:C:1974:3.

the Supreme Court and the National Council of the Judiciary. According to the new regulations, the judges aged 65 and over are obliged to make a declaration whether they wish to keep their position[20] and obtain the consent of the President of the Republic of Poland. Otherwise, such judges shall be forced to retire. The required declaration was only made by the judge from the Supreme Administrative Court, but the National Council of the Judiciary expressed negative opinion with respect thereto, hence, the case was closed. Two judges from the Supreme Court stated that, in compliance with the no-retroactivity rule, their situation is subject to the provisions of the previous act, pursuant to which they may hold office up to 70 years of age. Furthermore, they were older than 65 years of age before the aforesaid act entered into force. The judges appealed to the Chamber and the Labour Law and Social Security at the Supreme Court, showing, among other things, that the above-described situation was unacceptable according to Directive 2000/78 (Article 2 sec.1),[21] which forbids discrimination, and Article 47 of the Charter of Fundamental Rights of the European Union,[22] which ensures the right to effective remedy and fair trial. The[23] right to fair trial[24] – mentioned in

[20] The Act of 16 November 2016 amending the Act on retirement pensions and other pensions from the Social Insurance Fund and certain other acts, Dz.U. (Journal of Laws) of 2017, item 38, Articles 7, 8 and 26.

[21] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal of the European Union L 303, 02/12/2000, 16–22.

[22] Article 47 of the Charter of Fundamental Rights: Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. Charter of Fundamental Rights of the European Union, Official Journal of the European Union L 202, 02/12/2000, 389–405.

[23] The Charter of Fundamental Rights of the European Union, Official Journal of the European Union L 202, 02/12/2000, 389–405. *Universal Declaration of Human Rights of 10 December 1948*, in: Przyborowska-Klimczak, A., *Prawo międzynarodowe publiczne. Wybór dokumentów*, Lublin 2006, p. 134–138. International Covenant on Civil and Political Rights adopted by the United Nations General Assembly on 16 December 1966 and signed in New York on 19 December 1966, Dz.U. (Journal of Laws) of 1997, No. 38, item 167 – appendix. European Convention for the Protection of Human Rights and Fundamental Freedoms adopted in Rome on 4 November 1950, Dz.U. (Journal of Laws) of 1993, No. 61, item 284, as amended.

[24] More information on the right of fair trial in different legal systems is in: Połatyńska, J., *Prawo do rzetelnego procesu sądowego*, in: Koba, L., Wacławczyk, W. (eds.), *Prawa człowieka. Wybrane zagadnienia i problemy*, Warszawa 2009, pp. 212 et seq.

the Charter of Fundamental Rights of the European Union, Declaration of Human Rights, Covenant on Civil and Political Rights, and Convention on Human Rights – has special status in the Luxembourg's system. In the opinion of former Advocate-General of the Court of Justice,[25] P. Léger, the above-mentioned right is consubstantial to the entire legal order of the European Union (Community).[26] Apart from the regulations included in the Charter of Fundamental Rights, the right was also construed in the secondary legislation and decisions issued by the Court of Justice of the European Union.[27] The generational personal right to fair trial is also provided for in Article 45 sec. 1 of the Constitution of the Republic of Poland,[28] in a manner referring to the most important provisions included in the international treaties. The interpretation of law by international judiciary authorities significantly improved its implementation in Poland. At this point, I may also mention the decisions of the Strasbourg Court issued with respect to the excessive duration of the proceedings before Polish courts, which resulted in the introduction of the systemic solutions reducing the duration of the proceedings in Poland.[29]

The Chamber and the Labour Law and Social Security proved their jurisdiction, since the Disciplinary Board – which is responsible for such issues – has not been established yet. The Supreme Court also stated that the special circumstances, under which the judges were supposed to be appointed for the Disciplinary Board, raise serious doubts as to their impartiality and autonomy. The issue of changing the method for appointing judges to the National Council of the

[25] At that time – the European Court of Justice.

[26] See: Léger, P., *Le dronit á un recours juridixtionnel effctif*, in: Sudre, F., Labayle, H. (eds.), *Réalité et perspectives du droit communautaire des drois fondamentaux*, Bruxelles 2000, p. 200.

[27] More information in: Sozański, J., *Prawa Człowieka w Unii Europejskiej*, Warszawa–Poznań 2013, p.76, and Sozański, J., *Ogólne zasady prawa a wartości Unii Europejskiej (po traktacie lizbońskim) – studium prawnoporównawcze*, Toruń 2012, pp. 481 et seq.

[28] Article 45 of the Constitution of the Republic of Poland sec. 1 Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

[29] See: Florczak, A., Bolechow, B. (eds.), *Prawa i wolności I i II generacji*, Toruń 2006, p. 143. The cases, during which the issue of the excessive duration of the proceedings before Polish courts was analysed, include, among other things, the following: European Court of Human Rights, *Kukówka & Wende v. Poland*, complaint no. 56026/00, 24 September 2007, European Court of Human Rights, *Wawrzynkiewicz v. Poland*, complaint no. 73191/01, 17 February 2007, European Court of Human Rights, *Zwoźniak v. Poland*, complaint no. 25728/05, 13 November 2007.

Judiciary was of key importance.[30] In compliance with the provisions of the Constitution of the Republic of Poland and established practice – the judiciary organisations should be responsible for appointing members of the National Council of the Judiciary. Meanwhile, the new regulations introduced the so-called support letters. 25 judges or a group of 2000 citizens were supposed to provide their support, which is a flagrant breach of the provisions of the Constitution.[31] During the work on the Constitution promulgated in 1997, one of the considered variants of the structure of the Board assumed that the "Sejm" of the Republic of Poland had to appoint four members, but not from the group of members of parliament or senate, but from the group of law professors. Such professors were to be represented in double by the national representation of law faculties.[32] However, the idea to appoint judges to the National Council of the Judiciary in a manner other than by selection made by the judiciary organisations has never occurred. Both the archetype and final provisions of the Constitution prove the advantage of the judges appointed to the National Council of the Judiciary in a non-political way. The governing coalition continues to promote the concept of the "democratic control of courts" (whose one of the factors was supposed to be the support of candidates for the National Council of the Judiciary), forgetting that the appropriate form of controlling courts in the democratic country under the rule of law, where the principle of a tripartite division of power prevails, is to entrust the responsibility for passing acts – based on which the courts make judgements – to the Parliament. Even the Constitutional Tribunal, which has the power to repeal acts, may not establish their own laws to substitute the repealed acts. What is

[30] The decision that the judiciary organisations were supposed to appoint judges to the National Council of the Judiciary did not raise any controversy. On the other hand, the issue that was widely discussed was the choice of persons to be appointed by the "Sejm" and "Senat" of the Republic of Poland. One of the propositions assumed that both chambers of the Parliament "should select the candidates out of the group of law professors, represented in double by the national representation of the university faculties of law"; Chruściak, R., Osiatyński, W., *Tworzenie konstytucji w Polsce w latach 1989–1997*, Warszawa 2001, p. 319.

[31] Article 187 of the Constitution of the Republic of Poland sec. 2. Fifteen judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts; The Constitution does not stipulate that the judges could be chosen by organisations other than the judiciary organisations. It is also explicitly stressed that the term used is "choice" not "recommendation". Additionally, the commentary to the Constitution by prof. B. Banaszak or prof. W. Skrzydło include the opinion about the "democratic appointment of judges". See: Banaszak, B., *Konstytucja Rzeczpospolitej Polskiej. Komentarz*, Warszawa 2012, p. 925; Skrzydło, W., *Konstytucja Rzeczpospolitej Polskiej. Komentarz*, Kraków 1999, p. 199.

[32] Chruściak, R., Osiatyński, W., op. cit., p. 319.

more, other important criteria applying to the judiciary include education and age. Therefore, it is apparent, or even a truism, that the decisive factor determining the decisions issued by the Supreme Court must be – apart from high morale – excellent knowledge and not the desire to please politicians or certain groups of citizens.

The Supreme Court also noticed that the changes introduced by the Act of 8 December 2017 (and some other acts), according to which the judges could be appointed to the National Council of the Judiciary not by the General Assembly of Judges, but by "Sejm", do not only breach the principle of a tripartite division of power (as already mentioned), which is essential for the existence of the democratic state under the rule of law, but also the European and international standards. Other organisations have already mentioned the above standards,[33] among other things, in the following documents:

- recommendation of the Committee of Ministers of the Council of Europe no. CM/Rec (2010)12 of 17 November 2010 (on independence, efficiency and responsibilities of judges),[34]
- opinion of the Venice Commission no. 904/2017 [CDL-AD(2017)031] of 11 December 2017,[35]
- opinion of the Consultative Council of European Judges (CCJE) no. 10(2007) of 23 November 2007 (on the Council of the Judiciary at the Service of Society).[36]

In their argumentation, the Supreme Court paid special attention to the following facts regarding different formal and material aspects (hence, the establishment and operations of the National Council of the Judiciary):

- the selection process of new members of the National Council of the Judiciary was non-transparent and questionable as regards the compliance with the binding provisions of law,
- new members were not represented at all levels of the judiciary (as many as 12 judges were recruited from the district courts and there was not

[33] The Supreme Court invoked the aforesaid documents in the preliminary procedure. The Court of Justice of the European Union referred to the documents in section no. 41.

[34] *Judges: independence, efficiency and responsibilities. Recommendation CM/Rec(2010)12 and explanatory memorandum.* 2011, https://rm.coe.int/16807096c1. Accessed on: 5.02.2019.

[35] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)-031-e. Accessed on: 5.02.2019.

[36] https://rm.coe.int/168074744c. Accessed on: 5.02.2019.

any representative of the Supreme Court, courts of appeal and military courts),
- the entire period of operations of the National Council of the Judiciary was characterised by the complete absence of acts, where the Council would protect the autonomy of the Supreme Court, which – in light of the so-called "reform" and increasing legal chaos – was truly significant,
- public criticism of the Supreme Court due to the preliminary procedure initiated thereby at the Court of Justice of the European Union (i.e. fulfilment of the Supreme Court's obligation imposed by the provisions of the Treaty on the Functioning of the European Union) or collaboration with the EU authorities (in particular, the European Commission),
- expressing negative opinions (without any justification) about the judges who wanted to apply – in compliance with the new regulations – for the right to hold their office.

The Supreme Court also mentioned special structure of the Disciplinary Board, which *de facto* gives it more power than the Supreme Court, filled with judges from other 'bridgeheads.' As a result, the Disciplinary Board is not autonomous, but superior – reduced to structure of the court over the court. It is composed of six prosecutors, two judges, two legal counsels, two research workers. Prior to their appointment, some of these persons were subject to executive power or – as of 2015 – acted upon its request or in accordance with its plan. What is more, the persons who do not meet the legal criteria of eligibility or committed disciplinary offences may be added to the above list of shortcomings.

Expedited procedure and proceedings before the Court of Justice of the European Union

The motion of the Supreme Court was accepted in the proceedings conducted by the Court of Justice of the European Union, hence, the procedure was accelerated. In compliance with the regulations included in the Rules of the Court of Justice,[37] the date of hearing was set immediately. All interested parties were also notified forthwith. Additionally, the Court of Justice set the deadline for (potential) submission of written comments.

[37] Rules of proceedings before the Court of Justice of 25 September 2012, Official Journal of the European Union L 265, 29/9/2012, 173, 26/6/2013, 217, 12/8/2016, 111, 25/4/2019, 316, 6/12/2019, Article 105 § 2 and 3.

The position of the broadly defined government side[38] may be understood as the intended play for time. After the first hearing on 19 March 2019, the National Council of the Judiciary submitted a motion for another hearing on the grounds that their representative was absent at the hearing in March and no written comments were provided. The Council also stressed the significance of the recent decision issued by the Constitutional Tribunal (issued immediately after the first hearing of the Court of Justice of the European Union), in which the Constitutional Tribunal considered the amended act on the National Council of the Judiciary compliant with the Polish Constitution.[39]

After the next hearing, which took place on 14 May 2019, the National Council of the Judiciary, Polish government and the Minister of Justice – General Prosecutor applied for reopening of the oral stage of the hearing. The government of M. Morawiecki stressed that they did not agree with the opinion of the European Union's Advocate General announced after the oral stage of the hearing and explained that the arguments provided by the Advocate General required further discussion between the parties, which, of course, necessitated another hearing. At this point, it must be stated that the opinion of the Advocate General is not subject to any discussion and does not require the consent or stance of a given party. Furthermore, the Polish government suggested that the Court of Justice wrongly interpreted their own judicial decisions.[40] What is important, in the decision invoked by Poland with respect to the case of Associação Sindical dos Juizes Portugueses,[41] the Court of Justice emphasised both the role of independent judiciary authorities and their competence to evaluate such independence of judiciary authorities in a given Member State.[42] The National Council of the Judiciary also mentioned that they did not agree with the opinion of the Advocate General and

[38] Therefore, the current National Council of the Judiciary shall also be treated as the government side. The reasons for that are not only linked to the appointment of judges in breach of the Constitution of the Republic of Poland, but also the fact that, contrary to the regulations in the Constitution, such judges represent only the position of the government, hence, violate the autonomy of courts and independence of judges.

[39] Decision of the Constitutional Tribunal of 25 March 2019, K 12/18, Dz.U. (Journal of Laws) of 2019, item 609.

[40] Case C-64/16 *Associação Sindical Dos Juizes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117.

[41] Ibidem.

[42] For more information, see: Pustuła, D., *Naruszenie praw podstawowych jako przesłanka odmowy wykonania ENA w kontekście zasad wzajemnego uznawania i zaufania między państwami członkowskimi UE*, "Prawo Europejskie w Praktyce" 2019, No. 1 (2) (175/176), p. 63.

demanded reexamination of their own opinion (the motion in that respect was filed after the deadline), but the arguments in this case were raised at the additional hearing in May. The representative of the Advocate General supported the position of both the government and the National Council of the Judiciary, and, trying to prolong the case, proposed new discussion of the old arguments. Subsequently, the representative accused the Court of Justice of misunderstanding, hence, wrong interpretation of their own judicial decisions, and demanded a possibility of providing the response to the opinion of the European Union's Advocate General, even though the treaties have never provided for such a possibility. According to I.C. Kamiński: the purpose of a well-founded opinion is to present the facts and the national and EU laws, crucial for the examination of the case, in an orderly manner. The opinion should include not only the comparative analysis of the legal systems of Member States, but also the arguments of democratic systems outside the European Union.[43] The advantage of an independent and single opinion is the fact that it ensures "(...) clarity, consistency and comprehensiveness as the material being prepared by an independent legal expert."[44] In fact, the Advocate General is responsible for presenting the case and their own solutions in an unbiased and independent manner.[45] The Treaty on the Functioning of the European Union imposes the same requirements on judges and advocates (i.e. unquestionable independence, qualifications to hold the highest court posts, recognised competence). What is more, the method of appointment of judges and advocates is identical (Article 253 TFEU), which additionally strengthens their position. When T.T. Koncewicz called advocates general the "artists of general law", he referred to the statement of R. Lecourt, long-term President of the Court of Justice: "The opinion, as the last barrier separating the arguments of both sides from their evaluation by the judges includes a useful summary of the whole court battle between the parties. It should be appreciated that an independent and expert voice analyses the case and positions of the parties. (...) Even though our meetings are held in the absence of advocates, their opinions are voiced through the presented arguments."[46]

[43] See: Kamiński, I.C., Wy*miar sprawiedliwości we Wspólnocie Europejskiej. Praktyczny komentarz i przepisy*, Warszawa 2004, pp. 53 et seq.

[44] Ibidem.

[45] See: Barcz, J., et. al., *Instytucje i Prawo Unii Europejskiej*, Warszawa 2017, p. 183.

[46] Kocewicz, T.T., in: Brodecki Z. (ed.), *Europa sędziów*, Warszawa 2007, pp. 28–29.

Conclusions of the Court of Justice

The position of the European Court of Justice located in Luxembourg was clear. First of all, the Court of Justice in Luxembourg showed that both the organisation and composition of the National Council of the Judiciary may be the subject of analysis by the Court of Justice of the European Union, since they have significant impact on the process of appointment of judges. The judges who perform service in Poland are also the EU judiciary, which results from special correlations between the EU and national legal orders. It was explicitly shown in the decision issued in the case of Simmenthal,[47] in which the EU legal order was considered a hierarchically higher component of the national legal orders.[48] On the other hand, the issue of independence of the Disciplinary Board is inherently related to the political conditions of the National Council of the Judiciary. With reference to the National Council of the Judiciary, the Court of Justice mentioned the following points that may raise doubts:

- interruption of a term of office of the former National Council of the Judiciary,
- increase of the number of members of the National Council of the Judiciary appointed under a strictly political procedure,
- uncertainty as to the reliability of the appointment of judges – members of the National Council of the Judiciary (concealment of support lists),
- appropriate exercise of constitutional competence,
- lack of efficient court control of the decisions issued by the National Council of the Judiciary.

As far as the Disciplinary Board is concerned, the Court of Justice of the European Union pointed out to the fact that the Board was composed of newly appointed judges only and its authorisation was beyond standard autonomy.

The interpretation of the provisions in Article 47 of the Charter of Fundamental Rights of the European Union and Article 9 sec. 1 of the Council Directive 2000/78/EC of 27 November 2000 show that they do not allow "the disagreements regarding the application of the EU law to be resolved solely by the body which is not autonomous and unbiased court within the meaning of the

[47] Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SA*, ECLI:EU-:C:1978:49.

[48] Ibidem.

first of the aforementioned provisions."[49] This is the case when: "(…) objective circumstances, in which a given body was established, its characteristics, and the method of appointment of its members may raise – in the opinion of entities – reasonable doubts as to the independence of such body of external factors, in particular direct or indirect influence of legislative and executive powers, and its neutrality towards the conflicting interests faced thereby, hence cause lack of undermine the trust that the judiciary authority should evoke among individuals in a democratic society."[50] It must be noted that the conclusions were formulated in a manner typical for the Court of Justice of the European Union. On one hand, the conclusions provide grounds for appropriate judgement at the national level, but on the other – constitute a universal formula that may be applied in any Member State. The Court of Justice indicated that it is the Supreme Court that should finally determine whether the Disciplinary Chamber is an autonomous, independent court, enjoying the trust of citizens, which should be the case of every court in a democratic state under the rule of law.

Effects of the preliminary procedure

The decisions of the Court of Justice are binding upon the court that initiated the preliminary procedure,[51] which means that the Supreme Court shall be bound by the interpretation made in the decision issued in joint cases C-585/18,[52]

[49] Joint cases C-585/18 *A.K. versus the National Council of Judiciary*, C-624/18 and C-625/18 *C.P. and D.O. Versus the Supreme Court*, ECLI:EU:C:2019:982.

[50] Ibidem.

[51] See: Wyrozumska, A. (ed.), *System ochrony prawnej w Unii Europejskiej*, Warszawa 2009, pp. V–360.

[52] In case C-585/18, the following questions have been referred under the preliminary procedure: "1) On a proper construction of the third subparagraph of Article 267 TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the [Charter of Fundamental Rights], is a newly-created chamber of a court of last instance of a Member State which has jurisdiction to hear an appeal by a national court judge and which is composed exclusively of judges selected by a national body tasked with safeguarding the independence of the courts (the National Council of the Judiciary), which, having regard to the systemic model for the way in which it is formed and the way in which it operates, is not guaranteed to be independent from the legislative and executive authorities, an independent court or tribunal within the meaning of EU law?
2) If the answer to the first question is negative, should the third subparagraph of Article 267 TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the [Charter of Fundamental Rights], be interpreted as meaning that a chamber of a court of last instance of a Member State which does not have jurisdiction in the case but meets the requirements of EU law for a court seised with an appeal in an EU case should disregard the provisions of national legislation which preclude it from having jurisdiction in that case?".

C-624/18 and C-625/18[53] on 19 November 2019 and shall undertake all the necessary actions to enforce the judgement. Failure of the court of a Member State to comply with the preliminary procedure shall not directly lead to the initiation of the proceedings by the Court of Justice of the European Union. Nonetheless, the above does not mean that the decision of the Court of Justice may be neglected by the Member State. Both the European Commission and other Member States may file a motion with the Court of Justice for determination of infringement of treaty obligations, pursuant to Articles 258 and 259 TFEU. By virtue of Article 260 TFEU, the Court of Justice may rule on the necessity to undertake appropriate measures ensuring enforcement of the judgement. Since Poland continues to flagrantly and persistently breach the treaty obligations, violate all standards related to the requirements of lawfulness and autonomy of the judiciary authority, and is the first Member State against which the proceedings for infringement of the core values of the European Union (Article 7 of the Maastricht Treaty) have been initiated, the Court of Justice of the European Union (after repeating the procedure) may charge a flat fee or cash penalty. They are considered definitive measures and, in practice, imposed very rarely. As the experience of other Mem-

[53] In cases C-624/18 and C-625/18, the following questions have been referred under the preliminary procedure:
"1) Should Article 47 of the [Charter], read in conjunction with Article 9(1) of [Directive 2000/78], be interpreted as meaning that, where an appeal is brought before a court of last instance in a Member State against an alleged infringement of the prohibition of discrimination on the ground of age in respect of a judge of that court, together with a motion for granting security in respect of the reported claim, that court – in order to protect the rights arising from EU law by ordering an interim measure provided for under national law – must refuse to apply national provisions which confer jurisdiction, in the case in which the appeal has been lodged, on a chamber of that court which is not operational by reason of a failure to appoint judges to be its members?
2) In the event that judges are appointed to adjudicate within the chamber with jurisdiction under national law to hear and determine the action brought, on a proper construction of the third paragraph of Article 267 [third paragraph TFEU], read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the [Charter], is a newly created chamber of a court of last instance of a Member State which has jurisdiction to hear the case of a national court judge at first or second instance and which is composed exclusively of judges selected by a national body tasked with safeguarding the independence of the courts, namely the [(National Council of the Judiciary)], which, having regard to the systemic model for the way in which it is formed and the way in which it operates, is not guaranteed to be independent from the legislative and executive authorities, an independent court or tribunal within the meaning of EU law?
3) If the answer to the second question is negative, should the third paragraph of Article 267 TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the [Charter], be interpreted as meaning that a chamber of a court of last instance of a Member State which does not have jurisdiction in the case but meets the requirements of EU law for a court seised with an appeal in an EU case should disregard the provisions of national legislation which preclude it from having jurisdiction in that case?".

ber States (including, among others, France or Greece) shows, the penalties are as painful as efficient. However, it should be noted that, generally, the courts of the Member States, their bodies and institutions observe the decisions issued by the European Court of Justice in Luxembourg. Such decisions also have impact on judicial decisions of other Member States. "The interpretation of the EU law by the Court of Justice is widely seen as the most authoritarian means for shaping and establishing the content of the EU law."[54]

Conclusion

When responding the above questions asked by the Supreme Court, which basically referred to the issue of legality of establishment of the National Council of the Judiciary as well as the autonomy and independence of the Disciplinary Board, the Court of Justice mentioned the premises negating the legality as well as autonomy and independence of both entities. Additionally, the Court of Justice stressed that the issuance of the final and binding decision in this case, pursuant to the Polish and EU laws, falls exclusively within the jurisdiction of the Supreme Court.

With the above in mind, it must be stated that the first step should be undertaken by the Supreme Court, which – despite being bound by the arrangements of the European Court of Justice in Luxembourg – shall independently resolve the issues relating to both the Disciplinary Board and the National Council of the Judiciary. Subsequent (legal and remedial) decisions shall be made by the bodies having legislative and executive power. On the other hand, the preliminary procedure, which is an example of successful absorption of the national legal instrument by the EU legal order, is of key importance not only in terms of the unity of implementation of such a law, but also the very existence and autonomy of the system itself. Questioning its validity or failure to comply with its provisions violates the EU legal order, thus, the Member State responsible for such actions or omissions puts itself outside the European Community.

[54] Kenig-Witkowska, M.M., et al. (eds.), op. cit., p. 499.

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ACTA IURIS STETINENSIS 4 (28)

DOI:10.18276/ais.2019.28-03

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THE INDIVIDUAL'S RIGHT OF DEFENCE AS AN INSTITUTION OF THE ADMINISTRATIVE PROCEDURAL LAW

Abstract

This paper deals with the issue of the individual's right of defence in the administrative procedural law. In the opinion of the author, in addition to the principle of the right to a fair and equitable trial and the right to good administration, the individual should have the right to defend his or her legal interest by the possibility to initiate appropriate procedures to verify the activities of the public administration. The grounds for deriving the individual's right of defence should be based on the principle of a democratic rule of law. The exercise of this right shall take place in different proceedings and through different legal remedies.

Keywords: administrative proceedings, administrative law, right of defence, rights to a trial, right to good administration

The right to exercise administrative control in (indirect and direct) determination of the sphere of individual's rights and obligations constitutes an

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immanent feature of the public administration.[1] The administrative control is based on the administrative-law relationship. F. Longchamps indicated that the legal relationship is always established when "(…) the right in question is significant for two legal entities so that in specific circumstances the legal situation of one entity is in a certain manner connected with the situation of the other entity."[2] Whereas, the essence of the administrative-law relationship consists in the right of the public administration to bindingly adjudicate and settle the situation of the entity outside the organisation's structure.[3] The public administration authority acts on behalf of the state and to the benefit thereof, which gives it the right to apply authoritative measures.[4] Administrative control does not have a uniform character, which results from the diversity of substantive law regulations, where the individual's rights and obligations are written down. The multitude of legal forms of public administration's activity translates into the gradability of the administrative control. Interference of the public administration authority shall be different in the case of issuing a classic, individual administrative act and in the case of supervision over the individual's execution of the obligation stipulated under the law. A lack of the equivalent position of the public administration authority and the individual obligates to provide the individual with the right to subject the activities to verification and assessment in relevant procedures. In the democratic rule of law based on legalism and legality, it is difficult to accept a situation when an individual does not have relevant legal instruments to counteract legally unjustified public administration's interference.

It is therefore desirable that the procedural law should include appropriate legal institutions that would enable an individual to actually defend his or her legal interest.

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[1] See: Krawczyk, M., *Istota władztwa administracyjnego a obszar wolności jednostki*, in: Zimmermann, J. (ed.), *Wolność w prawie administracyjnym*, Warszawa 2017, pp. 97–120.

[2] Longchamps, F., *O pojęciu stosunku prawnego w prawie administracyjnym*, "Acta Universitatis Wratislaviensis" No. 19, Prawo XII, Wrocław 1964, p. 45.

[3] Filipek, J., *Stosunek administracyjnoprawny*, Kraków 1968, p. 21.

[4] Zimmermann, J., *Prawo administracyjne*, Kraków 2006, p. 142.

It needs to be made clear that the concept of 'legal institution' is a legal language term. T. Stawecki and P. Winczorek indicated that a legal institution means "permanent (relatively permanent) forms of legal regulation of typical social relations."[5] And Z. Ziembiński pointed out that the term "legal institution" can be understood not only as a set of legal standards distinguished as a separate whole (basic meaning), but also as a set of activities resulting from the separated set of standards (functional approach) or a group of persons acting under the authority of legal standards or in their implementation (personal approach).[6] However, the key feature of a legal institution is its goal-oriented approach. There is no doubt that the content of a legal institution may be included both in a single standard and a set of standards. Hence, under the administrative procedural law it should be accepted that the procedural institution is a set of standards regulating the procedural situation of an individual in relations with a public administration body.

The objective of this publication is therefore to derive an individual's right of defence from the rules of administrative procedural law. Such an objective requires, in the first place, an analysis of already developed standards of procedural protection of an individual, i.e. the right to a fair and just trial and the right to good administration. Then, it will be essential to determine how the protection of individual's legal interest is developed by the administrative procedural law in the context of the ways in which administrative and legal relationships are established (individual's right of defence). Whereas, to determine the content of an individual's right of defence, his or her legal remedies should be analysed in accordance with the Act of 14 June 1960 – the Code of Administrative Procedure,[7] the Act of 29 August 1997 – Tax Ordinance,[8] the Act of 17 June 1966 on enforcement proceedings in administration,[9] the Act of 30 August 2002 – the Law on proceedings before administrative courts.[10] Since the deliberations will

[5] Stawecki, T., Winczorek, P., *Wstęp do prawoznawstwa*, Warszawa 2003, p. 104.

[6] Ziembiński Z., *Problemy metodologiczne badania instytucji prawnoustrojowych*, "Problemy Rad Narodowych" 1973, No. 25, p. 12; Ziembiński Z., *Szkice z metodologii szczegółowych nauk prawnych*, Warszawa–Poznań 1983, pp. 88–90.

[7] Consolidated text Dz.U. (Journal of Laws) of 2020, item 256, as amended, hereinafter: the Administrative Procedure Code.

[8] Consolidated text Dz.U. (Journal of Laws) of 2019, item 900, as amended, hereinafter: the Tax Ordinance.

[9] Consolidated text Dz.U. (Journal of Laws) of 2019, item 1438, as amended.

[10] Consolidated text Dz.U. (Journal of Laws) of 2019, item 2325, as amended, hereinafter: the Law on proceedings before administrative courts.

be carried out in the form of theoretical studies, the analytical-legal (logical-linguistic) method has been considered as an appropriate research method.

The right to a fair and just trial

Pursuant to Article 31 par. 1 of the Constitution of the Republic of Poland,[11] human freedom is subject to legal protection. Guarantee of the right to court pursuant to Article 45 par. 1 of the Constitution of the Republic of Poland, according to which: "Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court," whereas, in the scope of the criminal proceedings, Article 42 states as follows: "Anyone against whom criminal proceedings have been brought shall have the right of defence at all stages of such proceedings. He may, in particular, choose counsel or avail himself – in accordance with principles specified by statute – of counsel appointed by the court (par. 2). Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court (par. 3)." The right to a fair and just trial is similar in wording to the constitutional right to court and the source thereof is provided by Article 6 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[12] which stipulates that: "In the determination of his civil rights and obligations of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...)." Article 14 par. 1 of the International Covenant on Civil and Political Rights[13] adopts the right to a fair and just trial as the basic civil right. Furthermore, the right to court constitutes one of the general rules of the Union law, which is confirmed with the contents of the Charter of Fundamental Rights of the European Union.[14] Pursuant to Article 47 of the Charter of Fundamental Rights: "(…) Everyone is entitled to a fair and public hearing

[11] Dz.U. (Journal of Laws) of 1997, No. 78, item 483, as amended, hereinafter: the Constitution of the Republic of Poland.

[12] Dz.U. (Journal of Laws) of 1993, No. 61, item 284, as amended, hereinafter: the Convention.

[13] Dz.U. (Journal of Laws) of 1977, No. 38, item 167, hereinafter: the International Covenant.

[14] Official Journal of the European Union C 326 of 2012, p. 391, hereinafter: the Charter of Fundamental Rights.

within a reasonable time by an independent and impartial tribunal previously established by law (…)." It should be noted that the aforementioned legal guarantees do not directly refer to the administrative law. Nevertheless, it is acceptable in the jurisdiction to apply them to certain categories of administrative cases, respectively.

For example, in the judgment of 3 November 2004 the Tribunal stated that the concept of criminal liability "has a broader meaning than the one adopted by the Criminal Code. (...) The Constitutional meaning of this concept cannot be determined by reference to the binding legislation, otherwise the analysed provision would lose its guarantee significance. Therefore, it should be assumed that the scope of applying Article 42 of the Constitution comprises not only the criminal liability in the strict sense of this word and thus, the liability for crimes, but also other forms of legal liability related to awarding punishments against the individual."[15] The Constitutional Tribunal included in these other forms of liability: the disciplinary liability,[16] liability for offences[17] and liability of collective entities.[18]

In the scope of liability for administrative financial penalties, the Constitutional Tribunal limited application of Article 42 of the Constitution of the Republic of Poland only to penalties of a repressive character. In its decision of 5 March 2008, the Tribunal did in fact state that the financial penalty is not covered with criminal liability, since "it does not constitute a retribution for the committed act, but it has a character of a coercive measure for ensuring execution of executive–administrative tasks of the administration aggregated by the concept of a public interest. Therefore, it constitutes a manifestation of the state intervention in the sphere that has been recognised by the legislator as especially important".[19] The Constitutional Tribunal noticed that in the cases when due to its severity a sanction causes the given standard to become, in fact, a basic criminal standard, it is

[15] Judgement of the Constitutional Tribunal of 3 November 2004, K 18/03, OTK–A 2004, No. 10, item 103.

[16] See: Judgement of the Constitutional Tribunal of 23 October 2001, K 22/01, OTK–A 2001, No. 7, item 215.

[17] See: Judgements of the Constitutional Tribunal of 8 July 2003, P 10/02, OTK–A 2003, No. 6, item 62; of 26 November 2003, SK 22/02, OTK–A 2003, No. 9, item 97.

[18] See: Judgement of the Constitutional Tribunal of 3 November 2004, K 18/03, OTK–A 2004, No. 10, item 103.

[19] See: Decision of the Constitutional Tribunal of 5 March 2008, SK 82/06, OTK–A 2008, No. 2, item 34.

necessary to provide a procedural standard in criminal cases.[20] Furthermore, the criminal-administrative liability shall belong to the criminal liability.

Whereas, in the jurisdiction of the European Court of Human Rights,[21] the concepts of a civil case and a criminal case have an autonomous character, independent of domestic regulations. The European Court of Human Rights adopted as a criminal case, among others: disciplinary proceedings (case *Engel*,[22] *Demicoli*[23]), anti-monopoly proceedings (case *Menarini*[24]), stipulation of an administrative sanction (case *Steininger*[25]), stipulation of a tax obligation (case *Pakozdi*[26]). The Tribunal accepted as civil cases: proceedings for a permit to buy land (case Ringeisen[27]), or the right to build on own land (case Zander[28]), restrictions regarding sales of alcohol (case Tre Traktorer[29]), performance of free professions (case Koenig[30)], or proceedings in social insurance cases (case Salesi).[31] The referred jurisdiction confirms that regulations included in the Constitution as in the aforementioned international law acts can also be applied in administrative cases in which individuals are subject to the authoritarian intervention of public administration authorities in the scope of their rights and obligations.[32]

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[20] See: Judgement of the Constitutional Tribunal of 18 April 2000, K 23/99, OTK–A 2000, No. 3, item 89; see more: Szumiło-Kulczycka, D., *Prawo administracyjno-karne*, Kraków 2004, pp. 173–197 and p. 188.

[21] More: the European Court of Human Rights.

[22] See: ECtHR, *Engel and others v Holland*, Application no. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, Plenary, 23 November 1976.

[23] See: ECtHR, *Demicoli v Malta*, Application no. 13057/87, Chamber, 27 August 1991.

[24] See: ECtHR, *Menarini Diagnostics S.R.L v Italy*, no. 43509/08, Second Section, 11 September 2011.

[25] See: ECtHR, *Steininger v Austria*, Application no. 21539/07, First Section, 23 October 1995.

[26] See: ECtHR, *Pakozdi v Hungary*, Application no. 51269/07, Second Section, 25 November 2014.

[27] See: ECtHR, *Ringeisen v Austria*, Application no. 2614/65, Chamber, 16 July 1971.

[28] See: ECtHR, *Zander v Sweden*, Application no. 14282/88, 25 Chamber, November 1993.

[29] See: ECtHR, *Traktorer AB v Sweden*, Application no. 10873/84, Chamber, 7 July 1989.

[30] See: ECtHR, *Koenig v Germany*, Application no. 6232/73, Plenary, 28 June 1978.

[31] See: ECtHR, *Salesi v Italy*, Application no. 13023/87, Chamber, 26 February 1993.

[32] As also Adamiak, B., in: Hauser, R., Wróbel, A., Niewiadomski, Z. (eds.), *System prawa administracyjnego. Prawo procesowe administracyjne*, Vol. 9, Warszawa 2014, p. 102.

The right to good administration

The individual's right to impartial and just hearing of his or her case on the grounds of the administrative law can also be deduced from the conception of the individual's right to good administration. It should be noticed that at the beginning, the good administration standard was expressed solely in the jurisdiction of the Court of Justice of the European Union,[33] or in the act of non-binding character, i.e. the Resolution of the European Parliament of 6 September 2001 on the European Code of Good Administrative Behaviour,[34] the Recommendation of the Committee of Ministers of the Council of Europe of 20 June 2007 CM/Rec(2007) on Good Administration.[35] Only as on entry into force on 1 December 2009 of the Treaty amending the Treaty on European Union of 13 December 2007 the right to good administration obtained a binding character.[36] The Charter of Fundamental Rights became, in fact, the primary legislation of the European Union.

In Article 41 of the Charter of Fundamental Rights entitled "Right to good administration" the following principles of good administration have been adopted *expressis verbis*: "1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. 2. This right includes: a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; c) the obligation of the administration to give reasons for its decisions. 3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. 4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language."

According to M. Wyrzykowski and M. Ziółkowski, it should be indicated that the right to good administration shall consists of:

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[33] See: e.g. Case 29/69, *Erich Stauder v Stadt Ulm – Sozialamt*, ECLI:EU:C:1969:57.

[34] https://www.rpo.gov.pl/pliki/12124042030.pdf. Accessed on: 11.11.2019.

[35] https://wcd.coe.int/ViewDoc.jsp id=1155877&Site=CM. Accessed on: 11.11.2019.

[36] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community signed in Lisbon on 13 December 2007, Official Journal of the European Union C 306, 17.12.2007, pp. 1–271.

- the right to initiate proceedings before administration authorities,
- the right to develop administrative procedure in compliance with principles of justice, publicness and two-instance,
- the right to obtain resolution of the administrative case and
- the right to proper development of the system and the position of authorities hearing the administrative case.[37]

It should be agreed that the right to good administration does not directly include domestic administration executing the Union law. The Charter of Fundamental Rights applies exclusively to institutions, bodies and agencies of the European Union.[38] Nonetheless, in Article 51 par. 1, first sentence of the Charter of Fundamental Rights it has been stated that: "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law." It means that it is acceptable to extend the scope of the Charter's application to the situations, when structures of a given state apply the Union law and in particular when their activity can be treated as executing administration on behalf and to the benefit of the European Union.

In the Polish law there are no provisions directly regulating the individual's right to good administration. In chapter II of the Constitution of the Republic of Poland the right to good administration was not enumerated as one of the human's, citizen's freedoms or rights. In the doctrine, an opinion was expressed that it is, however, possible to deduce particular components of the right to good administration in domestic provisions.[39] As an example, general principles of administrative (tax) proceedings should be indicated, among others, the principle of conducting proceedings in such a way as to increase the trust of citizens in the state bodies (Article 8 par. 1 of the Code of Administrative Procedure) or the principle of conducting tax proceedings in a manner that builds confidence in the tax authorities (Article 121 par. 1 of the Tax Ordinance).

[37] Wyrzykowski, M., Ziółkowski, M., in: Hauser, R., Niewiadomski, Z., Wróbel, A. (eds.), *System Prawa Administracyjnego. Instytucje prawa administracyjnego*, Vol. 1, Warszawa 2012, p. 32.

[38] Magiera, S., in: Meyer, J. (ed.), *Charta der Grundrechte der Europäischen Union*, Baden–Baden 2006, commentary to Art. 41, p. 435.

[39] Kieres, L., *Pojęcie prawa do dobrej administracji w przepisach prawa konstytucyjnego*, in: *Prawo do dobrej administracji*, "Biuletyn Biura Informacji Rady Europy" 2003, No. 4, pp. 24–28.

The individual's right of defence

The right to a fair and just trial and the right to good administration are based on the assumption that legal provisions should grant the individual a possibility of protecting his or her rights and obligations under the properly developed procedure. These are undoubtedly the basic legal standards, which should be met within the administrative (tax) proceedings. This view is presented by B. Adamiak, who – using the term "the right to trial" – indicates the need to ensure that an individual case is dealt with in administrative proceedings in accordance with the procedural guarantees, provided that "the applicable legal order includes a standard of the substantive law which gives rise to its authoritative specification in terms of individual's right or obligation in the form of an administrative decision."[40] The limits of the right to trial will be determined by the general competence of a public administration body (Article 5 of the Administrative Procedure Code, Article 13 of the Tax Ordinance) and the concept of a party to administrative proceedings (Article 28 of the Administrative Procedure Code, Article 133 of the Tax Ordinance).[41]

However, it should be indicated that administrative-law relationships can be established in two ways. First of all, the administrative-law relationship can be established under an administrative act, i.e. a conventional action of the public administration body. According to R. Hauser, such a relationship is a consequence of the authoritarian specification of the law conducted by the authorised body[42]. Secondly, the legal provision itself can constitute the basis of the administrative-law relationship. J. Zimmermann explains that thus, "in principle, solely the obligations of the other party to the legal relationship are created, they are specified by particular factual events and the public administration cannot immediately proceed to enforcement thereof without a separate act of specification."[43] By using the concept of a legal situation, J. Boć indicates that in the case of developing the individual's rights and obligations under the law, the role of the body comes down only to control, whether the behaviour of specific entities in particu-

[40] Adamiak, B., w: Hauser, R., Wróbel, A., Niewiadomski, Z. (eds.), *System prawa administracyjnego. Prawo procesowe…*, p. 102.

[41] Ibidem, pp. 103–107.

[42] Hauser, R., in: Hauser, R., Wróbel, A., Niewiadomski, Z. (eds.), *System prawa administracyjnego. Instytucje…*, p. 216.

[43] See: Zimmermann, J., op. cit., p. 257.

lar situations is compliant with the law. "The administrative authority intervenes only when it believes that the individual does not apply the standard, despite the factual circumstances justifying application thereof, or when he or she interprets the standard wrongly."[44] In such an understanding, the standard itself, despite the developed administrative procedure, seems to be insufficient.

The situation of the individual can be developed by the public administration authority outside the administrative (tax) proceedings. From the individual's point of view it shall be therefore crucial to allow initiating a relevant procedure within which public administration activities shall be verified. As rightly indicated by M. Bernatt, the principle of the democratic rule of law and the principle of social justice implies the obligation to develop a mechanism of effective legal protection in the statutorily stipulated procedure against all activities of state authorities, provision of just and equitable procedures, as well as extension of the individual's procedural guarantees in doubtful situations.[45] Therefore, the basis for deducing the individual's right of defence on the grounds of the administrative procedural law should be sought in Article 2 of the Constitution of the Republic of Poland (the principle of the democratic rule of law), as well as Article 7 of the Constitution of the Republic of Poland (the principle of legalism).

Whereas, the effective right of defence requires equipping the individual with legal remedies providing grounds for demanding recognition of his or her case and providing legal protection by the control of activities undertaken with regard to the individual. Thus, these are specific procedural solutions with which the individual can pursue from relevant authorities a specific behaviour within the given legal relationship.[46] In this respect, it should be noted that in the administrative law, the individual's legal interest is subject to protection. According to S. Włodyk, a legal interest exists when the individual loses any legal advantages that can be manifested as an increase in the obligations or a decrease in the

[44] Boć, J., in: Boć, J. (ed.), *Prawo administracyjne*, Wrocław 2007, p. 374. Also see: Chełmoński, A., *Typy norm materialnego prawa administracyjnego i ich rola w kształtowaniu sytuacji prawnej jednostki*, "Acta Universitatis Wratislaviensis – Przegląd Prawa i Administracji" 1972, No. 2.

[45] Bernatt, M., *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, p. 51.

[46] Hauser, R., *Ochrona obywatela w postępowaniu egzekucyjnym w administracji*, Poznań 1988, p. 45.

rights.[47] Whereas, according to J.P. Tarno, "an individual has a legal interest in proceedings, if between his or her legal situation and the matter of proceedings there is, justified with the contents of the substantive law norm, an actual and factual connection causing the individual to be »interested« in these proceedings and, in consequence, entitled to participate therein as a party thereto."[48]

The access to the effective legal remedy is guaranteed both, by Article 13 of the Convention and Article 47 of the Charter of Fundamental Rights. Article 78 of the Constitution of the Republic of Poland also vests in the individual the right to appeal decisions and judgments. According to this provision "Each party shall have the right to appeal against judgements and decisions made at first stage. Exceptions to this principle and the procedure for such appeals shall be specified by statute." However, the right to appeal does not take into consideration all relationships of the individual with public administration authorities. In fact, B. Adamiak notices that the contents of Article 78 of the Constitution of the Republic of Poland concerns only appealing decisions by the parties to the proceedings. Whereas, with regard to the subject of appeal, the Constitution of the Republic of Poland is limited only to resolutions in the form of administrative decisions, it does not include decisions issued at a given instance.[49]

In the doctrine of the administrative law, the concept of "a legal remedy" is defined differently. According to T. Bigo, "a legal remedy is a request to implement internal control based on the claim submitted to the authority for re-examining the case."[50] Whereas, J. Starościak considers legal remedies to be control measures which the party to the proceedings or the participant thereof can apply.[51] A legal remedy is defined in a similar manner by E. Iserzon, who is of the opinion that a legal remedy means the possibility of appealing acts issued in administrative proceedings. While, in general, the aim of such an appeal is to verify the correctness of the act in terms of its legality and, in effect, amendment or repeal

[47] Włodyka, S., *Interes prawny jako przesłanka dopuszczalności zaskarżenia orzeczeń w procesie cywilnym*, "Nowe Prawo" 1963, No. 9, p. 928.

[48] Tarno, J.P., in: Chróścielewski, W., Tarno, J.P., *Postępowanie administracyjne i postępowanie przed sądami administracyjnymi*, Warszawa 2011, p. 160.

[49] Adamiak, B., in: Hauser, R., Niewiadomski Z., Wróbel, A. (eds.), op. cit., pp. 220–226.

[50] Bigo, T., *Prawo administracyjne i instytucje ogólne*, Wrocław 1948, p. 207.

[51] Starościak, J., *Prawo administracyjne*, Warszawa 1969, p. 300.

thereof.[52] On the other hand, B. Graczyk indicates legal remedies in the broad and narrow understanding. The former are to serve the individual to take the initiative of challenging the decision. Whereas, the latter create a special entitlement of the party to question the decision with legally specified consequences.[53] While, W. Kałuski is of the opinion that "A legal remedy is each, stipulated in a formal provision, act of the party or authority aimed at amending the decision."[54] Legal remedies are understood differently by I. Wajnes, who indicates legal remedies *sensu largo* and *sensu stricto.* The former constitute protective instruments which, due to the public good or individual's interest, enable control or amendment of decisions taken in administrative proceedings. The latter are vested in the party for the protection of his or her interests.[55] As far as the contemporary doctrine of the administrative law is concerned, it is worth noting the opinion of A. Wiktorowska, who defines legal remedies as: "(...) procedural institutions, such instruments through the agency of which entities whose identity is being established (parties and entities participating as parties) initiate the mechanism of control executed by administrative bodies and administrative court over correctness of administrative resolutions (decisions and rulings)."[56] Whereas, according to R. Hauser, legal remedies constitute legal possibility of undertaking by a specific entity a legal activity which results in the control of legal and factual activities undertaken by authorities conducting the proceedings.[57]

The double manner of establishing an administrative-law relationship results in various legal remedies being vested in the individual in order to defend his or her legal interest. In the case of issuing an individual administrative act, the individual's defence shall be executed under administrative proceedings. Defence measures shall include: an appeal (Article 127 par. 1 of the Code of Administrative Procedure, Article 220 par. 1 of the Tax Ordinance), a request for revision

[52] Iserzon, E., *Postępowanie administracyjne. Komentarz. Orzecznictwo–Okólniki*, Kraków 1937, p. 345.

[53] Graczyk, B., *Postępowanie administracyjne. Zarys systemu*, Warszawa 1953, p. 152.

[54] Zimmermann, M., in: Jaroszyński, M., Zimmerman, M., Bigo, T., *Prawo administracyjne. Cz. 2 (The Administrative Law. Part 2)*, Warszawa 1952, p. 124.

[55] Wajnes, I., *Ochrona praw i interesów jednostki w postępowaniu administracyjnym*, Vilnius 1939, p. 103.

[56] Wiktorowska, A., in: Wierzbowski, M., Szubiakowski, M., Wiktorowska, A., *Postępowanie administracyjne*, Warszawa 2008, p. 180.

[57] Hauser, R., in: Leoński, Z. (eds.), *Zarys prawa administracyjnego*, Warszawa–Poznań 1985, p. 196.

of a case (Article 127 par. 3 of the Code of Administrative Procedure) and an objection (Article 141 par. 1 of the Code of Administrative Procedure, Article 236 par. 1 of the Tax Ordinance), and then an appeal to the administrative court (Article 3 par. 2 point 1 and point 2 of the Act of 30 August 2002 – the Law of the Administrative Courts Procedure[58]). It shall also be acceptable to verify the administrative decision or ruling in extraordinary proceedings i.e. revision of proceedings (Article 145 of the Code of Administrative Procedure, Article 240 of the Tax Ordinance), annulment of decision (Article 156 of the Code of Administrative Procedure, Article 247 of the Tax Ordinance), reversal or amendment of a decision (Article 154 and Article 155 of the Code of Administrative Procedure and Article 253 and Article 253a of the Tax Ordinance). Whereas, in the case of rights and obligations resulting directly from legal provisions, the individual can protect his or her legal interest only at the moment of undertaking supervisory activity by the public administration authority. A lack of the obligation to specify the substantive law norm results in unacceptability of conducting the administrative (tax) proceedings. However, the individual can defend his or her legal interest in the course of the enforcement proceedings or under administrative court proceedings. In the case of obligations under law defence measures shall be, among others: administrative legal remedies in enforcement proceedings e.g. charges in the case of conducting administrative enforcement (Article 33 of the Act of 17 June 1966 on the Enforcement Proceedings in Administration), or an appeal to the administrative court on rulings issued in enforcement proceedings (Article 3 par. 2 point 3 of the law on administrative court proceedings). Despite the above, the individual shall have the right to appeal to an administrative court on other acts or activities in the scope of public administration concerning rights or obligations resulting from legal provisions (Article 3 par. 2 point 4 of the law on administrative court proceedings).

Conclusions

The research shows that the individual's right to defend his or her legal interest, which is complementary to the right to a fair and just trial and the right to good administration, can be derived from the standards of the administrative procedural law. When building the content of the individual's right of defence,

[58] Consolidated text: Dz.U. (Journal of Laws) of 2018, item 1302, as amended.

account should be taken of the ways in which administrative and legal relationships are established (by administrative act and by virtue of law). In this context, the individual's right of defence will exceed the regulations on administrative (tax) proceedings. Legal remedies available to the individual should be considered as the exercise of this right. Due to the multitude of procedural arrangements, these remedies will not be uniform and will depend on the type of administrative and legal relationship. In the cases subject to authoritarian specification, defence measures shall constitute the means of challenge regulated in provisions on administrative (tax) proceedings, i.e. an appeal, a request for revision of a case, an objection and then, an appeal to the administrative court. Defence of the individual's rights shall also be acceptable by activating extraordinary proceedings. In the case of rights and obligations resulting from provisions the individual's right of defence shall be exercised under enforcement proceedings, among others, by administrative legal remedies or under an appeal to the administrative court.

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Judgement of the Constitutional Tribunal of 26 November 2003, SK 22/02, OTK–A 2003, No. 9, item 97.

Judgement of the Constitutional Tribunal of 3 November 2004, K 18/03, OTK–A 2004, No. 10, item 103.

ACTA IURIS STETINENSIS 4 (28)

DOI:10.18276/ais.2019.28-04

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PROTECTION OF THE SEAL OF CONFESSION IN THE LAW OF CIVIL PROCEDURE AND CRIMINAL PROCEEDINGS

Abstract

This paper focuses on the issue of the different constructions of the law of civil procedure and criminal proceedings in reference to protection of the seal of confession. The analysis includes a review of the basic constitutional condition of the guarantee of the freedom of conscience and religion, as well as the detailed problems concerning the procedural status of clergy of various churches and religious associations within which there is individual confession. Furthermore, the authors also discuss the significant issue of the procedural status of other persons who have consciously or accidentally obtained information relayed to a member of the clergy during confession and the need to regulate their rights and obligations as witnesses in civil and criminal cases.

Keywords: protection of the seal of confession, clergy, law of civil procedure, law of criminal proceedings

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Introduction

The basic procedural aspect of the constitutionally guaranteed freedom of conscience and religion is protection of the seal of confession. Confession constitutes one of the foundations of Catholic Church liturgy (Latin and Byzantine-Ukrainian rituals), as well as that of other churches and religious associations. Individual confession is present, among others, in the Polish Autocephalous Orthodox Church, the Old Catholic Mariavite Church, and in the Polish Catholic Church. Individual confession is also available in the Evangelical Church of the Augsburg Confession (Lutheran), as well as the Anglican Church (in Poland, this is the Warsaw chaplaincy, attached to the Gibraltar Diocese in Europe).[1] Based on, among others, the doctrine of the law of criminal proceedings, Poland is an ideologically neutral state and, furthermore, in compliance with the constitution, because all churches and religious associations are equal, solutions concerning protection of the seal of confession do not solely refer to the sacraments administered in the Roman Catholic Church but also to other registered religious groups applying the same forms of releasing the worshiper from sins.[2] A necessary condition constitutes the existence of such a practice in a specific church or religious association.

In Art. 53 par. 2 of the Constitution of the Republic of Poland,[3] the legislator enumerated the activities and behaviours within the concept of freedom of religion, indicating that in includes "the freedom to profess or to accept a religion by personal choice, as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing rites or teaching. Freedom of religion shall also include possession of sanctuaries and other places of worship for the satisfaction of the needs of worshipers, as well as the right of individuals, wherever they may be, to benefit from religious services." Admittedly, this provision does not enumerate behaviours related to the sacrament of individual confession, yet, as indicated by M. Florczak-Wątor, the contents thereof should be addressed in a rational manner, and it should be interpreted that it does not include a closed catalogue of behaviours comprising the freedom of religion and it can be supplemented with behaviours not directly enu-

[1] Tomkiewicz, M., *Tajemnica spowiedzi i tajemnica duszpasterska w procesie karnym*, "Prokuratura i Prawo" 2012, No. 2, pp. 50–51.

[2] Skorupka, J., *Kodeks Postępowania Karnego. Komentarz*, Warszawa 2015, p. 413.

[3] Act of 2 April 1997 – the Constitution of the Republic of Poland, Dz.U. (Journal of Laws) of 1997, No. 78, item 483, as amended.

merated therein.[4] This allows one to state that protection of the seal of confession, also reflected in procedural law, constitutes one of the instruments guaranteeing the freedom of conscience and religion. A worshiper should, within the perceived legal safety, be certain that the way they behave within a binding liturgical setting shall not be used by the state authorities, including ordinary courts, against them, even if they directly or indirectly reflect the existence of events or acts not socially or legally accepted.

However, the question arises as to whether the statutory constructions implemented in the law of civil procedure and the law of criminal proceedings sufficiently secure the information obtained by a member of the clergy during an individual confession against obtaining and using it for the purposes of court proceedings. To this end, the subjective and objective scope of protection of the seal of confession, as well as detailed procedural constructions, which are decisive for verification of the effectiveness of this protection in civil and criminal proceedings, has been subjected to in-depth analysis.

The essence of the seal of confession

To clarify the essence of the seal of confession, it shall be discussed with the example of the Roman Catholic Church. The Sacrament of Penance and Reconciliation (in other words: the sacrament of confession) is, according to the teachings of the Catholic Church, one of the most important elements of Christian life.[5] The construction of the seal of confession is based on the conviction that every person has the right to intimacy, that is, not disclosing hidden weaknesses and sins to bystanders, and the right to protect their good reputation. This aim is to be achieved with the canon institution of the seal and secret of confession, introduced for the protection of the person administering the sacrament of penance.[6]

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[4] Florczak-Wątor, M., in: Tuleja, P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, LEX, commentary to Art. 53.

[5] Szymański, M., *Tajemnica spowiedzi w prawie polskim – stan aktualny i propozycje zmian*, "Internetowy Przegląd Prawniczy TBSP UJ" 2017, No. 4, p. 73, http://www.tbsp.wpia.uj.edu.pl/documents/4137545/137185925/IPP_2017_4/acde991d-c387-4e04-a9ee-fe173bdd46bf#page=73. Accessed on: 16.11.2019.

[6] Janczewski, Z., *Tajemnica i sekret w prawie kanonicznym Kościoła katolickiego*. Speech during the symposium Prawo do Prywatności w Kościołach i Innych Związkach Wyznaniowych: od Tajemnicy Duszpasterskiej do Ochrony Danych Osobowych, https://ekai.pl/tajemnica-spowiedzi-w-prawie-kanonicznym/. Accessed on: 17.11.2019.

Therefore, this seal is also protected by canon law since, in compliance with can. 983 par. 1,[7] the sacramental secret is inviolable and therefore it is absolutely forbidden for a confessor to betray, in any way, a penitent in words or in any manner or for any reason (*sacramentale sigilum* – the sacramental seal). This covers not only disclosed sins but also all information given to the confessor during confession (defects, inclinations, pangs of conscience, flaws, etc.). The confessor cannot break the seal even to protect one's own life, and the seal even continues after the penitent's death (e.g., St. John Nepomucene, who was murdered in 1393 for not disclosing the contents of a confession[8]). It is binding irrespective of whether the confession ended with absolution, and even the fact of giving or withholding absolution is covered by the seal of confession. W. Wenz underlines that a priest's obligation to keep sacramental secrecy is of an absolute character since he must keep the secret from bystanders, as well as from the penitent, from the moment after the confession, even if the confessor would like to disclose the information at another time for the benefit of the penitent. The seal of confession is binding not only outside the confession but also during other confessions. This means that due to the circumstances, information cannot be exchanged among confessors even if they believe that the substance of the information is irrelevant.[9] However, the doctrine of canon law underlines that the priest is not bound by the seal of confession in the case of a simulated confession, e.g., in order to ridicule the clergy.[10]

Because of the lack of a definition of 'clergy' in procedural acts, as well as in legal acts concerning churches and other religious associations, in order to consider a particular person a member of the clergy, an in-depth analysis of the rules of conduct of a specific church or religious association is required.[11] In principle, the clergy should be considered persons belonging to the church or religious asso-

[7] Code of Canon Law of 1983, https://www.katolicki.net/ftp/kodeks_prawa_kanonicznego.pdf. Accessed on: 18.11.2019.

[8] Adamowicz, L., *Tajemnica spowiedzi*, https://www.niedziela.pl/artykul/84830/nd/Tajemnica-spowiedzi. Accessed on: 12.12.2019.

[9] Wenz, W., *Co się komu należy, czyli prawo kościelne o sakramentach świętych (4)*, https://www.archidiecezja.wroc.pl/index.php?option=com_content&view=article&id=138:sakrament-pokuty-pierwszy-dar-zmartwychwstaego-pana-&catid=57:sakramenty&Itemid=194. Accessed on: 12.12.2019.

[10] Pieron, B., *Ochrona tajemnicy spowiedzi w prawie polskim*, "Kieleckie Studia Teologiczne" 2012, No. 11, p. 325.

[11] Judgement of the Supreme Administrative Court in Warsaw of 19 September 2000, III SA 1411/00, LEX No. 47198.

ciation who have a different status than the community of worshippers of a given religion, expressed as having been appointed to the permanent organisation and administration of the religious sect.[12] Nevertheless, this status must be analysed in-depth not only with regard to the performance of the clergy's function, but also to specific rights vested in a particular person performing such activities (e.g., with regard to authorisation in the scope of an individual confession).

To sum up, the status of clergy in Polish law is granted to a person who has such a status in compliance with the internal legal norms of a church or other religious association that has a regulated legal situation, and who can act as a confessor in accordance with those norms.

However, the seal of confession is binding not only on the confessor but also other persons directly participating in the communication between the confessor and the applicant or witness thereof (purposely or accidentally). Pursuant to can. 983 par. 2, an interpreter, if there is one, and all others who in any way have knowledge of sins admitted during a confession are also obliged to observe this secrecy. In this aspect, one cannot omit the circumstances that, along with the development of the technique and technical means of saving the contents of a remote statement or communication, new practical problems concerning the seal of confession have occurred. Currently, it may be violated not only by the confessor and persons physically present during the confession but also by a third party acting remotely, e.g., in the case of eavesdropping devices affixed at the place where the penitent has a conversation with the confessor. In 1988, the Congregation for the Doctrine of the Faith issued a decree regarding the excommunication of those who divulge confessions, in order to protect the sanctity of the sacrament of Penance and to defend the rights of ministers and Christian worshipers associated with the sacrament of Penance, the sacramental seal and secrecy of Confession. In this decree, it has been determined that, without prejudice to the prescription of can. 1388, anyone who by means of any technical device makes a recording of what a priest or penitent says in a Sacramental Confession (either real or simulated) by oneself or by another person, or who divulges it through the means of social communication, incurs excommunication *latae sententiae*.[13] The

[12] Resolution of the Supreme Court of 6 May 1992, I KZP 1/92, Decision of the Supreme Court – Criminal and Military Chamber 1992, No. 7–8, item 46.

[13] Decree of 23 September 1988 Regarding the Excommunication of Those Who Divulge Confessions, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19880923_scomunica-confessioni_pl.html. Accessed on: 28.10.2019.

limitation applies, among other things, to the simulated confession. The reason is that a third party has no right to judge whether a confession was valid or invalid. Thus, it should be assumed that any form of an individual confession is subject to legal protection and should not be recorded and, specifically, it should not be distributed.

The form of an individual confession expressed by the place and procedure thereof also plays an important role in the proper specification of this framework of the seal of confession. Canon law stipulates that the proper place to hear sacramental confessions is a church or oratory (can. 964 par. 1). Simultaneously, the ecclesiastical legislator stipulated that the conference of bishops is to establish norms regarding the confessional (can. 964 par 2). The Polish Episcopal Conference implemented a relevant act and stipulated that an individual confession takes place in confessionals situated in churches, chapels, and premises in which the bishop permits the celebration of Holy Mass. Furthermore, the bishops agreed that, in necessary cases, clergy have the right to, at any place, in a valid and dignified manner, listen to a confession and give absolution, e.g., during a pilgrimage, field mass, or a special ministry. In consequence, it should be assumed that confessions are not to be heard outside a confessional without just cause (can. 964 par. 3).[14] However, thus flexibly stipulated rules concerning the place and, at the same time, the lack of rigour with regard to the procedure determine the wide scope of procedural guarantees concerning protection of the seal of confession.

Violation of the seal of confession constitutes one of the gravest infringements of canon law; therefore, in compliance with can. 1388 par. 1, a confessor who directly violates the sacramental seal incurs *latae sententiae* excommunication binding *ex lege*; whereas, the right to lift this excommunication is reserved to the Apostolic see. On the other hand, one who does so only indirectly is to be punished according to the gravity of the delict. Whereas, an interpreter and any others mentioned in can. 983 par. 2 who violate the secret are to be punished with a just penalty, not excluding excommunication. The direct violation of the seal of confession occurs when a priest discloses a sin confessed in the sacrament of penance and indicates the person who committed this sin or gives circumstances that allow for identifying the specific person. In such a case, the confessor absolutely incurs excommunication. He can be protected from excommunication only if he did not act consciously or voluntarily. Indirect violation of

[14] Wenz, W., op. cit.

the seal of confession occurs when a priest describes a sin in a manner that poses a real threat of identifying the person concerned.[15] Cases of indirect violation of the seal of confession by words include the following situations: "when the confessor 1) says that somebody's confession was arduous, difficult, etc.; 2) discusses the penitent's sins with persons who knew of such sins from somewhere else; 3) warns parents or superiors to be more vigilant over subordinates with regard to the behaviour described during confession; 4) praises a penitent for his or her purity of conscience and compares him or her to other persons; 5) discusses with the penitent his or her confession without prior consent of such a person to have such a conversation; 6) discusses the event during public speeches by giving circumstances in a manner allowing easy identification of the penitent; 7) when, after listening to a small number of confessions, the confessor declares that during these confessions, he encountered a grave sin and individualises this sin; 8) publicly divulges that in a certain environment in which he acts as a confessor, certain events took place."[16] It should be noted that this protection refers not only to the ban on disseminating information among third parties but also – as has already been signalled – on referring to the contents of the confession in a conversation with a penitent who has not previously expressed such a will. This solution seems to be just considering that confessed sins are usually a reason for shame and remorse for the penitent, which is better dealt with in the shadow of the confessional than in repeated conversations face to face with the confessor.

Thus, one should agree with M. Szymański that for violating the seal of confession, priests are punished in the most severe manner. As has already been underlined, in this case, the penalty of excommunication (i.e., exclusion from the church) is of a *latae sententiae* character, as the confessor loses the status of a religious community member at the moment of disclosing the secret. What is more important is that this excommunication is 'reserved to the Apostolic see'; thus, in order for the violator to return to the church, it is required to obtain the consent of the Supreme Tribunal of the Apostolic Penitentiary, being one of the three tribunals of the Roman Curia.[17] The degree of effect of this penalty is pertinent to the significance of the seal of confession, which constitutes one of

[15] Nowicka, J., *Kiedy można złamać tajemnicę spowiedzi? Pytamy eksperta*, 29.05.2018, misyjne.pl, https://misyjne.pl/kiedy-mozna-zlamac-tajemnice-spowiedzi-pytamy-eksperta/. Accessed on: 23.11.2019.

[16] Płatek, J.S., *Sprawowanie sakramentu pokuty i pojednania*, Częstochowa 2001, p. 381.

[17] Szymański, M., op. cit., p. 73.

the premises on which the openness of penitents, aware of the absolute character of the obligation to remain silent in a conversation with a confessor, is based.

While referring to the court proceedings, it is worth noting that in canon law, it is underlined that all matters heard by anyone and in any way on the occasion of confession cannot be accepted even as an indication of the truth in any court proceedings (can. 1550 par. 2 point 2). Furthermore, pursuant to can. 984 par. 1, a confessor is completely prohibited from using knowledge acquired from a confession to the detriment of the penitent, even when any danger of revelation is excluded. Furthermore, a person who has been placed in authority cannot use, in any manner for external governance, knowledge about sins which he has received in confession at any time (can. 984 par. 2). However, from the point of view of procedural law, the ascertainment that the seal of confession in court proceedings does not cover the fact of having an individual confession, as it ensures the possibility of benefiting from the mechanisms of protection of the seal of confession included in procedural acts, which shall be discussed later on, is of key significance.

To complete the analysis of the provisions of canon law, it should be pointed out that similar solutions are only included in the Code of Canons of the Eastern Churches (*Codex canonum Ecclesiarum Orientalium auctoritate Joannis Pauli PP. II promulgatus*). This is a uniform set of canon law for the Eastern Catholic Churches, promulgated on 18 October 1990 by Pope John Paul II by the Constitution *Sacri canones* and entered into force on 1 October 1991. The term *Eastern Catholic Churches* refers to 23 of the 24 existing, autonomous Churches, the basic feature of which is dependency on the Pope[18] and which are grounded in Eastern-Christian liturgical traditions: Alexandrian, Antiochene, Byzantine, Chaldean, and Armenian. Each of the indicated churches is *sui iuris* or autonomous, yet, all of them respect the clerical and legal authority of the Pope, which allows for unification of understanding of certain religious foundations. Furthermore, this Code introduces the rule that no one can waive the obligation to keep the seal of confession (can. 733 par. 1 of the Code of Canons of the Eastern Churches). A confessor who has directly violated the seal of confession (with identification of the person and the substance covered by secrecy) is to be punished with the most severe ecclesiastical penalty (excommunication), with

[18] *Nie samym chlebem żyje człowiek*, http://cerkiew.net.pl/Wiadomosci/Wiadomoscjedna.php?polaczenie=wiad_1490019803&cerkiew=cerkiew. Accessed on: 12.12.2019.

the obligation to refer to the Apostolic see in order to repeal the penalty (can. 1456 par. 1 of this Code), and at the same time, indirect violation of the seal of confession is also punishable (can. 1456 par. 1 of the Code). The Code of Canons of the Eastern Churches stipulates that the obligation of observing secrecy also binds an interpreter if one is present, as well as all others to whom knowledge of the sins from the confession comes in any way (can. 733 par. 2 of the Code of Canons of the Eastern Churches).

Due to the differentiation of the liability of the indicated individuals, it should be underlined that only a confessor is obliged to keep the sacramental secret, whereas an interpreter and other persons are strictly obliged to keep the secret. As aptly indicated by W. Wenz and M. Janusiewicz, this differentiation does not change the fundamental stance of the church on the integral protection of the sacramental forum. Whereas, as far as the priest being obliged to absolute sanctity of the secrecy is concerned, the type of the authorisation he has to hear confessions or the source of such an authorisation is also irrelevant. This authorisation may only be supplemented by, or is even based on, can. 976 (concerning the priest giving absolution to a person in danger of death).[19] The basis for differentiation is provided by the source of origin of a given obligation: for a priest, this is divine law, for others – the natural law and the obligation to respect a natural secret.

Polish state law, considering the determined model of canonical protection of the seal of confession, undertakes more or less successful attempts to introduce effective instruments guaranteeing this protection, which shall be discussed below. Nevertheless, some domestic legal systems, often with Catholic roots, on the contrary, not only do not protect the seal of confession, but, in fact, attempt to introduce sanctions forcing disclosure thereof. In Ireland, the focus of a public discussion was a bill obliging clergy to transfer to law enforcement authorities any information that can help identify a sexual offender, whose victim may be either a child or an adult.[20] In Belgium, a priest was accused of a different offence, since he kept the seal of confession of a penitent who confessed the intention to commit suicide. The case was referred to the court of misdemeanours in Bruges. It was established that the priest, A. Stroobandt, received a phone call

[19] Wenz, W., Janusiewicz, M., *Zapewnienie poszanowania i ochrony prawnej tajemnicy sakramentalnej w polskim systemie prawa*, "Wrocławski Przegląd Teologiczny" 2008, No. 16/1, p. 164.

[20] *Irlandia: 5 lat więzienia dla kapłanów, którzy nie zdradzą tajemnicy spowiedzi*, 4.05.2012. Bibuła, http://www.bibula.com/?p=56284. Accessed on: 12.12.2019.

from a person he had known for at least 20 years. The penitent, suffering from depression, confessed that he intended to commit suicide. After several fruitless conversations, the man committed suicide in his garage. The wife of the deceased accused the clergy that he did not attempt to persuade her husband against this intention and, primarily, that he did not inform anyone. What is especially interesting, while commenting on this situation, H. Wattiaux, a professor of moral theology, stated that the fact that the confession was supposedly conducted on the phone raises doubts, and if there are any doubts in this matter, then, in his opinion 'the priest is not necessarily bound with absolute secrecy.' In the procedural layer, it should be added that the Belgian provisions protect professional secrecy; however, they do not directly mention the seal of confession, and qualification of the latter because professional secrecy in the Belgian legal system is not unequivocal.[21] As a result of the conducted proceedings, the court stated that the seal of confession is a special type of professional secrecy. However, in the court's opinion, it does not release the clergy from the obligation to provide assistance.[22] In response to the court decision, Belgian bishops published a letter in which they sated that during a confession both the priest and the penitent are aware that the sin can repeat itself. A priest must use all of his power of persuasion in order to persuade a person to change his/her behaviour and take responsibility for his/her actions. In extreme cases, for example, abuse against minors, a confessor can stop administering the sacrament and postpone absolution until the penitent turns himself or herself in. However, the confessor cannot disclose what he learned during the confession through any words or gestures. Canon law does not provide for any exclusions in this case.[23] Thus, in some legal systems, the apparent issue of state law deviating from the absolute adherence to protection of the seal of confession in significant situations, e.g., for the protection of the penitent's life and health or a person hurt by the penitent, occurs.

In summarising this analysis of the substantive aspects of the seal of confession, it should be underlined that individual confession pursuant to the law

[21] *Tajemnica spowiedzi w centrum batalii sądowej ws. samobójstwa w Belgii*, 17.11.2017. Polonia Christiana, https://www.pch24.pl/tajemnica-spowiedzi-w-centrum-batalii-sadowej-ws--samobojstwa-w-belgii,56210,i.html. Accessed on: 13.12.2019.

[22] *Kapłan skazany, bo dotrzymał tajemnicy spowiedzi*, 20.12.2018. eKai, https://ekai.pl/kaplan-skazany-bo-dotrzymal-tajemnicy-spowiedzi/. Accessed on: 15.12.2019.

[23] *Belgia: ksiądz skazany za dochowanie tajemnicy spowiedzi*, 19.12.2018. misyjne.pl, https://misyjne.pl/belgia-ksiadz-skazany-za-dochowanie-tajemnicy-spowiedzi/. Accessed on: 13.12.2019.

of churches and religious associations should be differentiated from a pastoral conversation or a conversation held within a so-called spiritual direction. Furthermore, this concept does not refer to the public confession of worshipers' guilt during a Holy Mass. It is worth noting that the statement that such a narrow interpretation 'favours one religion by granting it privileges not available for other religions' is not correct.[24] Even more incorrect is the position of Z. Kwiatkowski, according to whom, the ban on hearing from clergy only from churches practising individual confession is contradictory to the guarantees of the freedom of conscience and religion resulting from the provisions of the Constitution of the Republic of Poland.[25] Representatives of the doctrine who express such opinions propose to introduce an explicit sanction on the obligation to keep in secret the information given to the clergy by the worshiper due to the pastoral functions fulfilled by the priest and, at the same time, to cover it with legal protection as in the case of other types of professional secrecy.[26] However, as aptly noticed by J. Krukowski, the principle of equality of religious association is manifested in the fact that a state cannot grant special rights to one church or religious association in the scope in which all associations have the same features. Although different treatment of religious associations is not excluded if they have a feature that others do not have[27] (in this case, individual confession). Extending the substantive scope of the discussed protection would lead to interpretative chaos and generally unlimited possibilities to avoid answering questions asked by procedural authorities (or the application of the inadmissibility of evidence) in any case in which a clergy is a witness.

The issue of the seal of confession in civil procedure

With regard to the law of civil procedure, the provisions of Art. 261 par. 2 *in fine* of the Code of Civil Procedure,[28] pursuant to which a member of clergy

[24] Jurzyk, M., *Ochrona spowiedzi w postępowaniu dowodowym a prawa penitenta i duchownego*, "Radca Prawny" 2004, No. 2, p. 74.

[25] Kwiatkowski, Z., *Zakazy dowodowe w procesie karnym*, Kraków 2005, p. 173.

[26] Pieron, B., *Równe czy identyczne traktowanie osób duchownych w prawie polskim*, "Annales Canonici" 2007, No. 13, p. 167.

[27] Krukowski, J., *Kościół i państwo. Podstawy relacji prawnych*, Lublin 2000, p. 279.

[28] Act of 17 November 1964 – the Code of Civil Procedure, Dz.U. (Journal of Laws) of 2019, item 1460.

may refuse to answer questions regarding facts entrusted to him during a confession, the key significance for shaping the protection of the seal of confession. As indicated by T. Ereciński, the manner of formulating this norm allows stating that clergy can, in fact, refuse not only to answer the questions but also refuse to give testimony regarding facts covered with the seal of confession.[29] Since a confession is one, closed, and secret whole, it is impossible to disclose its specific stage or single piece of information. As an exception, the substantive scope of confession does not include presenting facts and circumstances for non-religious reasons, that is, as a joke, not for real, etc. In that case, confession as a religious act simply does not exist.[30] The procedural act does not introduce any detailed references regarding the assessment of the clergy's status or verification of penitent's declarations as an individual confession due to the place and form thereof.

The provisions of internal acts establishing churches and religious associations legally functioning in the Polish legal system and indicating who is clergy, as well as who is authorised to perform the duties of a confessor, are of key significance for a procedural assessment of the subjective conditions of applying Art. 261 par. 2 *in fine*. Legal recognition of a church or a religious association can have the form of an act or registration act, and the member of clergy's status and liturgical rights, existing at the moment of the individual confession, should be confirmed by the witness by presenting a relevant document. However, one should agree with the position of B. Rakoczy that even if there are some loopholes regarding the clergy's authorisation, the information obtained by the unauthorised confessor from the penitent during an invalid confession should be covered with protection. The aim of the protection of the seal of confession is, in fact, the wellbeing of the person confessing, and such a person cannot suffer negative consequences of an invalid confession if the person acted in good faith and the invalidity is not caused by the person confessing.[31] Nevertheless, a fundamental problem occurs in the case of more advanced loopholes, e.g., a situation when somebody impersonates a member of the clergy and in reality the person is a layman. The act does not refer to this type of cases, yet, it should be assumed

[29] Ereciński, T., in: Ereciński, T. (ed.), *Kodeks Postępowania Cywilnego. Komentarz. Tom II. Postępowanie Rozpoznawcze*, Warszawa 2016, LEX, commentary to Art. 261.

[30] Wielec, M., *Naruszenie zakazu dowodowego tajemnicy spowiedzi w prawie karnym (materialnym i proceduralnym)*, "Przegląd Prawa Wyznaniowego" 2012, No. 4, pp. 111–124.

[31] Rakoczy, B., *Tajemnica spowiedzi w polskim postępowaniu cywilnym, karnym i administracyjnym*, "Przegląd Sądowy" 2003, No. 11–12, p. 130.

that, if a penitent acted in good faith and confessed his or her sins convinced that they are protected by the seal of confession then, they should obtain such protection. However, there are no doubts that the possibility to refuse to answer questions can also be used in the case of a lack of clergy status during answering questions provided that the witness had such status and authorisation to hear confessions provided for by the church's or religious association's law at the moment of obtaining information within a confession.

Also, with regard to the material scope of this privilege, it should be noted that, similar to the provisions of canon law, in the Code of Civil Procedure, the possibility of the clergy to refuse to answer questions can only refer to the facts learned during an auricular confession and not, e.g., during Confiteor or other form of the worshipper's contact with the clergy (e.g., within the so-called pastoral conversation).

As far as the course of the testimony given by clergy or former clergy is concerned, K. Knoppek states that instructing the witness about the right to refuse to answer questions basically should take place only at the moment when the witness is asked a question that could infringe the objects covered by the protection pursuant to the provisions of Art. 261 par. 2 of the Code of Civil Procedure. However, there might be a situation when a court does not have the information that the question asked in the given case gives the witness the right to refuse answering and thus, shall not instruct the witness of this right. Nevertheless, such a situation cannot be considered a procedural irregularity.[32] Similarly, as in the case of other persons authorised to refuse to answer questions, if the clergy decided to exercise the right to refuse to answer a question, the court cannot treat the decision as confirmation of the existence of a fact with regard to which the witness did not give an answer to the question asked.

There is no doubt that the solution introduced in the Code of Civil Procedure in the scope of the protection of the seal of confession should be assessed negatively. Above all, the application of the refusal to answer questions depends on the will of the clergy or former clergy. As stated by B. Pieron, clergy with procedural status as a witness, in the case of giving information crucial to the resolution of a given case and obtained during a confession, can freely exercise the

[32] Knoppek, K., in: Dolecki, H. et al. (eds.), *Kodeks postępowania cywilnego. Komentarz. Tom I. Artykuły 1–366*, Warszawa 2013, LEX, commentary to Art. 261 par. 2.

right vested in him and decide if he should refuse to answer the questions.[33] This solution is especially dangerous with regard to persons who have lost their status as clergy or even were excluded from the community of a church or a religious association (e.g., as a result of excommunication had left the Catholic Church) and thus, for whom the strict provisions of ecclesiastical law no longer have any meaning. The following statement by B. Rakoczy should be considered interesting 'due to the principle of autonomy and independence of the church from the state, which requires mutual respect even in the case of giving by the clergy consent to answer questions, the court, taking into consideration respecting the seal of confession, should not accept such testimony.'[34] However, such a solution is not supported with the provisions of the procedural act, yet, one may attempt to defend such a solution by direct application of the Constitution of the Republic of Poland, including Article 25 par. 3, which stipulates that the relationship between the state and churches and other religious organisations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.

Another negative aspect comprises shaping protection of the seal of confession as a right exclusively reserved to clergy and not as an inadmissibility of evidence referring to a specific category of information irrespective of the person at their disposal. One should agree with the position of M. Rusinek, expressed on the grounds of the law of criminal proceedings, that 'a solution forbidding questioning a confessor with regard to the information obtained by him during a confession and at the same time allowing questioning other persons is inadmissible, especially since, as a rule, such persons obtain knowledge on this topic in a manner which is morally reprehensible, and even illegal.'[35] Meanwhile, in the law of civil procedure, not only has absolute inadmissibility of evidence not been introduced but also a situation when a third party has obtained information disclosed during a confession is not foreseen. This issue only partially solves the professional status of such persons occurring in some cases (e.g., a sworn translator obliged to keep professional secrecy). And, again, it can be assumed

[33] Pieron, B., op. cit., p. 331.

[34] Rakoczy, B., op. cit., p. 136.

[35] Rusinek, M., *Tajemnica zawodowa i jej ochrona w polskim procesie karnym*, Warszawa 2007, p. 78.

that due to respecting the legal provisions of churches and religious associations resulting from the Constitution of the Republic of Poland and detailed regulations between the state and those entities, despite the lack of explicit provisions of the procedural act, the court should not accept such testimony. Nonetheless, it should be underlined that not all representatives of the doctrine accept this possibility, e.g., A. Cudak stated that this provision unequivocally narrows the law to refuse answering questions only with regard to clergy, which does not give the right to intensive interpretation.[36] It significantly weakens the possibility of the practical use of such far-reaching protective solutions.

In this aspect, one should also indicate an important issue regarding the protection of the seal of confession in the case of taking evidence in a hearing of parties. The discussed Art. 261 par. 2 *in fine* of the Code of Civil Procedure does not refer to this means of evidence, yet, due to the aforementioned reasons, also in the case of a clergy giving testimony as a party, the court should not accept as evidence information obtained by the member of clergy during a confession (e.g., in the situation when a penitent is the opposing party). In the literature, it is indicated that canon law treats the seal of confession as professional secrecy subject to protection irrespective of the procedural role of the person obliged to adhere to it.[37] Such a solution can be accepted as sufficient to accept the legitimacy of extending this type of procedural construction with other means of evidence.

While proceeding to the analysis of criminal procedural solutions, the necessity to ensure a coherent approach by procedural bodies in both types of proceedings to the protection of the seal of confession should also be signalled, which is noticeable in other cases of persons authorised to refuse to answer questions or covered with the inadmissibility of evidence. As stipulated in the judicial decisions, the testimony given by a particular person in criminal procedure cannot be used as evidence in the case if they exercise the right to refuse to answer questions in the civil procedure. Other opinion would constitute circumvention of the law, and to be more exact, provisions concerning the refusal to give testimony or answer questions and, at the same time, it would infringe the principle of

[36] Cudak, A., in: Marciniak, A. (ed.), *Kodeks Postępowania Cywilnego. Tom II. Komentarz. Art. 205^{1}–424^{12}*, Warszawa 2019, Legalis, commentary to Art. 261.

[37] E.g. Zubert, B.W., "Sigillum Sacramentale Inviolabile Est", in: Dębiński, A. et al. (eds.), *Divina et Humana. Księga jubileuszowa w 65. rocznicę urodzin Księdza Profesora Henryka Misztala*, Lublin 2001, pp. 723–741.

directedness.[38] Such a position should be considered as right due to the necessity to maintain a coherent approach of the legislator to statutory solutions that have a decisive significance for shaping proper relations of the state with churches and religious associations. Simultaneously, it should be underlined that the feature of coherence and effectiveness cannot be attributed to the provisions of the Code of Civil Procedure with regard to the right to refuse to answer questions vested in a clergy, which require as quick adjustment as possible at least to the standards of the law of criminal proceedings.

Protection of the seal of confession in criminal procedure

The protection of the seal of confession in criminal procedure is constructed in compliance with different principles than in civil procedure. In compliance with Art. 178 point 2 of the Code of Criminal Procedure,[39] a member of clergy may not be examined in the capacity of a witness on facts communicated to him in a confession. As indicated in the doctrine 'as far as the provisions providing for the right to refuse to answer questions are addressed at persons whom the legislator vests this right due to specific reasons, the absolute inadmissibility of evidence is predominantly addressed at procedural bodies and means the inadmissibility of evidence irrespective of the will of the person who cannot be heard.'[40] Therefore, 'the provision stipulating the inadmissibility of evidence from the seal of confession not only releases the witness from answering the question but also forbids asking this type of question.'[41] This separation of the exclusion of taking evidence based on the intent of the source makes the procedural solution resistant to the ill-willed activities of witnesses who would like to circumvent the mechanisms of protecting specific secrets.

In the subject literature, it is commonly accepted that the ban stipulated in Art. 178 point 2 of the Code of Criminal Procedure stating that a member of the

[38] Judgement of the Administrative Court in Warsaw of 18 April 2018, VI ACa 2008/16, Legalis No. 1865594.

[39] Act of 6 June 1997 – The Code of Criminal Procedure, Dz. U. (Journal of Laws) of 2018, item 1987.

[40] Decision of the Administrative Court in Cracow of 1 January 1995, II A Kz, 237/95, KZS 1995, No. 6, p. 36.

[41] Nisenson, J., Siewierski, M., *Kodeks postępowania karnego z komentarzem i orzecznictwem*, Częstochowa 1947, p. 77.

clergy may not be examined in the capacity of a witness on facts communicated to him in a confession, is an incomplete absolute (unconditional) ban. As defined by B. Kurzępa, this ban is incomplete as it bans the taking of evidence in specific conditions, using a specific source or means of evidence or obtaining means of evidence in a specific mode. In other words, it is a ban on taking evidence through the agency of certain evidence or with the use of specific methods. At the same time, this ban cannot be repealed.[42] B. Kurzępa aptly states that the ban on examining clergy in the capacity of a witness on facts communicated to him in a confession, prevents the use of a given source of evidence in order to determine important circumstances.[43] The ban concerning the seal of confession is incomplete since the circumstances covered by the seal of confession can be proven through the agency of other means of evidence. Because of these circumstances, one cannot agree with the opinion that since the obligation of discretion serves to protect the individual's interests, whereas the secrecy itself is created by the individual with the activity of 'entrusting,' there are no reasons to exclude a kind of symmetrical accessibility of lifting the protection of this secrecy by the individuals themselves as well.[44] It seems that the essence of this ban also consists of the fact that the person covered by this ban cannot give testimony against the statutory regulation of their free will. Otherwise, the legislator would apply in this case the right to refuse to answer questions stipulated with regard to, e.g., persons obligated to not disclose 'proprietary,' 'confidential' or classified information, or persons bound by the secrecy clause due to their profession or function (Art. 180 par. 1 of the Code of Criminal Procedure).

The issue of the protection of the seal of confession in criminal procedure was already the object of a Supreme Court analysis in the interwar period, and, due to the stability of the construction applied by the legislator in this matter, these deliberations continue to be valid. The Supreme Court stated that the provision banning hearing clergy in the capacity of a witness on facts communicated during a confession does not stipulate to what kind of religious confessions it refers, whereas, on the other hand, this provision stipulating the exception from the rule cannot be subject to extensive interpretation. Simultaneously, as underlined by the

[42] Kurzępa, B., *Zakazy dowodzenia w procesie karnym*, "Prokurator" 2002, No. 2, p. 28.

[43] Ibidem.

[44] Gruszecka, D., in: Skorupka, J. (ed.), *Kodeks Postępowania Karnego. Komentarz*, Warszawa 2020, Legalis, commentary to Art. 178.

Supreme Court, it is obvious that use of this right should depend solely on the internal provisions of the religious association recognised by the state, stipulating the institution of the seal of confession and clergy authorised to hear confessions. While referring to the specific factual circumstances discussed in this procedure, the Supreme Court noted that Mosaic faith (Judaism) does not include any religious activity that could be identified with confession, that is, confessing sins before a priest and receiving absolution given by the priest's authority and thus, extending this provision to confessions made by this religion's worshipper before a rabbi, is not justified.[45] It confirms the basic thesis that for the assessment of the subjective and objective scopes, also pursuant to the law of criminal proceedings, provisions of acts creating the status, organisational structure and rites of the churches and religious associations legally operating in Poland, are of decisive significance. The lack of individual confession in their liturgies, as well as the status of clergy with authorisation to hear auricular confessions, do not allow application of Art. 178 point 2 of the Code of Criminal Procedure against a specific person and information held by such a person.

As in the scope of the civil procedure, protecting the penitent's goodwill is also of significance in criminal procedure. It seems that this opinion is expressed, among others, in the position by T. Grzegorczyk, who stated that the seal of confession is binding also in a case in which clergy have not yet obtained the authority to hear confessions pursuant to the law of a given religious association and thus, according to the internal provisions, the confession with his participation would be invalid.[46] In each of these cases, the party's evidentiary motion contrary to this ban should be denied pursuant to Art. 170 par. 1 point 1 of the Code of Criminal Procedure when the taking of such evidence is inadmissible.

In analysing the timeframe of the protection of the seal of confession in criminal procedure, one could state that it refers to the period of performing the function of clergy by a person who is to act as a witness, yet, due to the aforementioned provision resulting from, among others, canon law, such a narrow interpretation cannot be applied. Therefore, it should be assumed that the inadmissibility of evidence also refers to former clergymen who had a relevant status and authorisation at the time of obtaining the information and it does not cease even after the penitent's death, irrespective of his procedural status. Similarly,

[45] Judgement of the Supreme Court of 14 June 1937, I K 454/37, LEX No. 351899.

[46] Grzegorczyk, T., *Kodeks postępowania karnego. Komentarz*, Warszawa 2014, p. 614.

it is not possible to approve the opinion according to which hearing as a witness with regard to the facts disclosed during a confession of a person who has purposefully eavesdropped on a confession (e.g., recorded it), as it would menace religious feelings and the privacy of the confessing person; whereas, gaining information from an interpreter or a person who has accidentally overheard the confession would be a clear violation of the freedom of conscience of those persons.[47] Therefore, modification of the provisions of Art. 178 of the Code of Civil Procedure should be considered in order to ensure the effective protection of the seal of confession in criminal procedure, especially in the context of the problem of applying Art. 168a of the Code of Criminal Procedure in practice, which shall be discussed later on.

At the same time, it should be underlined that also in the law of criminal proceedings, the objective scope of the inadmissibility of evidence refers to the information obtained during a confession (both, with regard to the contents of the penitent's statement and to the fact that he or she has not mentioned something to the confessor), and not during other contacts between the penitent and confessor (e.g., within periods of 'spiritual guidance'). Furthermore, it is worth noting an interesting opinion according to which the inadmissibility of evidence stipulated in Art. 178 point 2 of the Code of Criminal Procedure does not prevent from hearing from clergy who heard the confession of the accused but earlier had been an eyewitness to an event that later on constituted the object of the confession. In such a situation, the object of the clergy's testimony can comprise solely facts he saw.[48] In consequence, the information obtained during an individual confession also in this case cannot be the object of testimony (e.g., with regard to the motivation of the accused's activities).

Another interesting aspect of protection of the seal of confession noted in the doctrine of the law of criminal proceedings consists of situations in which the penitent's sins are manifested in written form (e.g., a deaf-mute person presents the confessor with a written list of their sins). In this scope, an opinion occurs according to which the ban on disclosing information obtained during a confession should also refer to materials that include information constituting the seal of

[47] Gensikowski, P., in: Drajewicz, D. (ed.), *Kodeks postępowania karnego. Tom I. Komentarz. Art. 1–424*, Warszawa 2020, Legalis.

[48] Sowiński, P.K., *Prawo świadka do odmowy zeznań w procesie karnym*, Warszawa 2004, p. 29.

confession.[49] Nonetheless, this opinion should be considered as too far-reaching, since in such a situation an accused could refer the discussed inadmissibility of evidence to each evidence in the form of a private document including notes, e.g., because they include a set of acts that could constitute a subject of the confession. It would result in numerous complications in the scope of the assessment of the inadmissibility of evidence and, in practice, would lead to abuses of the procedural authorisation.

With reference to the same course of evidence from the testimony given by a witness, it is worth noting that the inadmissibility of evidence hindering testimony does not repeal the clergy's obligation to appear, since the court has to verify formal aspects referring to the status of this person in light of the law of their church or religious association and detailed procedures concerning forgiving sins in order to apply the inadmissibility of evidence stipulated in Art. 178 of the Code of Criminal Procedure. It cannot do so effectively without the personal appearance of the member of clergy in order to remove any doubts and present relevant documents.

To sum up the deliberations referring to the protection of the seal of confession in criminal proceedings, testimony given by a member of clergy (also former clergy with secular status, or so-called secularisation) in the scope covered with the ban, does not constitute evidence and thus, cannot influence the contents of the factual grounds for resolution. However, one should agree with the opinion of D. Gruszecka, who claims that in this context, the lack of the inadmissibility of evidence due to the inconsistency with the inadmissibility of evidence with regard to so-called private evidentiary activity pursuant to the new regulation of Art. 168a of the Code of Criminal Procedure, can have alarming consequences.[50] This provision stipulates that the evidence cannot be considered inadmissible only on the grounds that it has been obtained in violation of the provisions of the procedure or by means of a prohibited act referred to in Art. 1 par. 1 of the Criminal Code, unless the evidence was obtained with regard to the public officer performing official duties as a result of manslaughter or voluntary cause of the detriment to health or deprivation of freedom. In consequence, the present procedural construction does not sufficiently protect the values constituting the foundations of the regulations of internal acts of churches and religious associations

[49] Tomkiewicz, M., op. cit., p. 59.

[50] Gruszecka, D., op. cit.

absolutely protecting the seal of confession since it allows presenting information entrusted during an individual confession by third parties, who, e.g., obtained this knowledge as a result of eavesdropping. It is obvious that also in this case one could apply the conclusions already indicated on the grounds of the Code of Civil Procedure that respecting the internal regulations of churches and religious associations should exclude the acceptance of such evidence. However, in this case we deal with a different situation because of the clear provisions of Art. 168a of the Code of Criminal Procedure, which does not have an equivalent in the Code of Civil Procedure and which then hinders, if not prevents, the adoption of such an interpretation. It may, in practice, have negative consequences for the relation of the state with churches and religious associations that have individual confession in their liturgies if in the criminal procedure there is a case which is *de facto* a circumvention of the inadmissibility of evidence aimed at protecting this secrecy.

Conclusions

Ensuring coherence of the provisions of state law and the internal law of churches and religious associations (demonstrated herein with the example of the canon law of the Catholic Church) is of fundamental significance to an assessment of the effectiveness of the protection of the seal of confession in civil and criminal procedure. The latter constitute a point of reference for proper stipulation of the subjective and objective scopes of procedural construction, which are to protect the seal of confession and, in turn, decide on the actual protection of the freedom of conscience and religion in procedural law. In the doctrine, it is underlined that the admissibility of interference in the contents of a confession via the proceedings would inevitably lead to the limitation of worshipers' trust in the clergy and thus, has been deemed inadmissible.[51] As rightly noted by M. Szymański, 'the most important reason for recognising by the state the inviolability of the seal of confession constitutes the necessity to protect the dignity of a person who confesses their sins. It would be difficult to reconcile constitutional guarantees of human dignity and the freedom of conscience and religion with the admissibility of the state's interference in such an intimate area of religious life. It must be remembered that a penitent wishing to experience spiritual purification,

[51] Hofmański, P., et al., *Kodeks postępowania karnego. Komentarz*, Warszawa 2007, p. 817.

confesses his or her sins, which often influence not only their spiritual situation.'[52] As results from the aforementioned deliberations, constructions of procedural acts are far from perfection and, above all, do not reflect the intention of the ecclesiastical legislator, who wishes to provide worshipers with full comfort of speaking about the most intimate spheres of their lives.

In the first place, in both cases, procedural law does not represent subjective assumptions of protecting the seal of confession expressed in canon law in the triad of confessor–interpreter–third party. Both the law of civil procedure, as well as the law of criminal proceedings, in Art. 261 par. 2 of the Code of Civil Procedure and Art. 178 point 2 of the Code of Criminal Procedure, respectively, focus on clergy and omit the two other individuals. While sworn translators are obliged to observe the professional standards of secrecy protection, which, in a way, fills in the legal loophole, a non-professional translator or a third party (who intentionally or unintentionally overhears a confession, etc.) there are no safeguards in place. It is a problem, the solution to which, by reference to the general principle of respecting the rules applied by churches and religious associations legally operating in Poland, may be, in many cases, insufficient, especially in the context of Art. 168a of the Code of Criminal Procedure, which introduces as evidence in criminal proceedings certain categories of the 'fruit of the poisonous tree'. To this end, decidedly weaker protection in civil proceedings should be indicated, which, by exercising the right to refuse to answer questions, leaves the possibility of exercising this privilege to the will of the authorised, which, in case of ill will on the part of a former member of clergy, can be a contradiction of the essence of the relation between a confessor and a penitent based on complete trust.

This relation of mutual trust between a clergy and worshippers is necessary for proper implementation of the mission of a religious association and entrusted tasks. It constitutes another argument in favour of diversification of the legal status of clergy of churches or religious associations where a confession or other analogous practice is exercised, with regard to clergy that belong to churches or religious associations not exercising this religious practice.[53] Therefore, it is appropriate that the legislator provides protection only in the case of an occurrence of an individual (auricular) confession in liturgy, not taking into consideration other situations referring to the clergy's relations with worshippers. In this

[52] Szymański, M., op. cit., p. 78.

[53] Pieron, B., *Ochrona Tajemnicy…*, p. 167.

case, there are also several signalled doubts primarily referring to the situation when a confessor does not adhere to the rule of his liturgy or even has no right to hear confessions and the penitent does not know about it and gives very personal information in confidence. Truthfully, most often an interpretation favourable for the penitent acting in good faith is proposed; however, due to the fact that exclusions referring to the evidence from testimony given by a witness are exceptional in character, they should not be interpreted in an extended manner. Thus, it should be specified in provisions of procedural acts. Similar doubts cover the issue of the place and procedures applied in the scope of confessing and the significance thereof for stating that we deal with a confession and not, e.g., with a pastoral conversation excluded from procedural protection. However, it should be assumed that the seal of confession does not cover the fact of the existence of penitence, since it opens the path to benefit from solutions protecting the secrecy.

To sum up, *de lege* ferenda, the civil-procedural construction of the protection of the seal of confession requires decisive interference by introduction of regulations concerning the clergy who obtained information during a confession to the categories of individuals who cannot act as witnesses (Art. 259 of the Code of Civil Procedure). Moreover, both the Code of Civil Procedure (Art. 261 of the Code of Civil Procedure), as well as the Code of Criminal Procedure (Art. 178 of the Code of Criminal Procedure), require refocusing provisions in order to specify the subjective and objective scope of procedural guarantees of the seal of confession's protection.

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ACTA IURIS STETINENSIS 4 (28)

DOI:10.18276/ais.2019.28-05

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CONSISTENCY OF THE EUROPEAN PROJECT PEICL WITH THE POLISH CIVIL CODE IN VIEW OF ART. 807

Abstract

This paper contains an analysis of the meaning of art. 807 of the Polish Civil Code in the context of the possibility of applying uniform international law to an insurance contract. The essence of the Project on Insurance Contract Law (PEICL) is presented in the text and a discussion about international reinsurance contract law (PRICL) is included. Attention is drawn to the current shortcomings of the content of art. 807 of the Civil Code, which is why the author also formulates a *de lege ferenda* conclusion regarding the content of art. 807 of the Civil Code to the concept of allowing an indication of substantive law prior to its latest amendment, with appropriate clarification. The paper also presents the possibilities of a codex interpretation of the current regulation of an insurance contract.

Keywords: insurance contract, PEICL, PRICL, uniform law

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Introduction

Article 807 of the Polish Civil Code is the norm of Title XXVII, Book 3, which, when compared to its original contents, underwent major changes, fundamentally inspired by the social and economic changes that occurred in the years since the Civil Code entered into force on 1 January 1965.[1] Even its current editorial structure suggests the evolution of the provisions (*vide* art. 807 §2 of the Civil Code is designated as repealed). Originally, this provision was restricted only (and as much as) beyond the trade among state-owned companies. Currently, its imperative function is formulated differently in relation to the original situation, which does not mean that this fact is in practice meaningless for the needs of insurance trade, both domestic and international. Therefore, its content in a natural way implies the assessment of possible absorption of international insurance standards, whether in the scope of commonly applied insurance terms and conditions, such as Institute Cargo Clauses, or solutions constituting in its substance '*soft law acquis*,' such as PEICL (Principles of European Insurance Contract Law).

It is worth emphasising here that an example analogous to the above, referring to attempts at creating uniform international law, but now on the trans-European, global scale (regarding reassurance and retrocession), is PRICL (Project on Reinsurance Contract Law). However, it must be noted that the current state of progress of works on this project has not reached beyond *status nascendi*.[2]

An issue cognitively interesting for the above reasons, given the subject matter of this study, is the possibility and scope of application of PEICL within the domestic legal order, both at the current stage (i.e., European project) as well as in case of possible entry into force of the EU legal act that will contain the contents of these clauses.[3] Therefore, the thesis that the regulation of insurance contracts in Europe should be uniform and not divided according to the applicable law of particular countries would be the right *motto* of the works of the group preparing PEICL,[4] and hence, it is a project of an act containing clauses regulating the rights

[1] Act of 23 April 1964 Civil Code, consolidated text: Dz. U. (Journal of Laws) of 2019 item 1145, as amended.

[2] Cf. tab PRICL: www.dariuszfuchs.pl. Accessed on 19.04.2020.

[3] For interesting remarks in the context of the evolution of European civil law, see: Bronsword, R., *Contract Law. Themes for the twenty-first century*, Oxford 2006, pp. 173 et seq.; from the PRICL point of view: Fuchs, D., *Ujednolicenie kontraktowego prawa reasekuracyjnego w skali międzynarodowej in statu nascendi-PRICL*, "Wiadomości Ubezpieczeniowe" 2019, No. 1.

[4] Cf. Heiss, H., *Introduction*, in: Basedow, J., Birds, J., Clarke, M., Cousy, H., Heiss, H., Loacker, L. (eds.), *Principles of European Insurance Contract Law (PEICL)*, Köln 2016, pp. 1–3.

and obligations of insurance contract parties. These provisions will make it possible, as a general rule, to apply them by the parties in the near future as the governing law for a concluded contract. In this understanding, the cross-border attribute occurs in substantive terms, the achievement of which, according to the author, would be the most desirable condition in Europe, particularly due to the interest of the insured, as well as the freedom of insurers in provided business services. It will also allow avoiding the troublesome situation of conflicting general conditions (so-called battle of forms) in the B2B insurance relationship.[5]

It should also be stressed that all members of the group preparing PEICL agree the contents of *Insurance Restatement* (i.e., the working term for PEICL) should constitute the point of reference for contracts that do not have a cross-border relation, although unfortunately, internal regulations might be an obstacle (at least partially), such as art. 807 of the Polish Civil Code. Simultaneously, an analogous situation might occur if, however, the insurance contract has a cross-border attribute but it will be the Polish substantive law that will constitute *lex causae.* Obviously, the remarks above do not refer to a situation in which the applicable law is foreign law, because art. 807 of the Civil Code can be considered neither a norm enforcing its applicability (the provision enforcing its validity), nor an example of the public order clause (*vide* further notes).[6]

The matter of the problem in the context of the importance of art. 807 of the Civil Code

In other words, the potential for such a conflict might (most probably in the actual and legal reality) exist *de lege lata* in case the parties to the insurance contract subjected to Polish law, performing absorption of *Insurance Restatement* clauses to the contract, cause a collision with mandatory provisions of art. 805–834 of the Civil Code.[7] In this case, there is a visible (at least partial) lack of coherence between designed European solutions regarding substantive insurance law

[5] Cf. O'Sullivan, J., Hiliard, J., *The Law of Contract*, Oxford 2006, pp. 41–43.

[6] For an interesting analysis of the applicable law situation (in the context of conflict of laws), see, for example: Ciepła, H., in: Gudowski, J. (ed.), *Kodeks cywilny. Komentarz*, Vol. 5, *Zobowiązania. Część szczegółowa*, Warszawa 2017, commentary to art. 807, note 10, LEX.

[7] Commentary on the content of the project: Fuchs, D., *PEICL jako materialnoprawny projekt europejskiego instrumentu opcjonalnego o umowie ubezpieczenia*, in: Fuchs, D., Malinowska, K., Maśniak, D. (eds.), *Kontrakty na rynku ubezpieczeń*, Warszawa 2020.

and regulations of domestic law, which limit the substantive freedom of insurance contract parties. Consequently, this fact affects the systemic coherence between the most advanced – in terms of its contents (*AD 2020*) – European project of insurance contract law and Polish legislation regarding the insurance contract. As emphasised above (*Introduction*), the particular character of art. 807 of the Polish Civil Code is based also on the fact that it is the norm of Title XXVII of Book 3, which, when compared to its original contents, has undergone a major metamorphosis, fundamentally inspired by the social and economic changes occurring in the years since the Civil Code entered into force on 1 January 1965. Obviously, the question is still valid whether all the changes that occurred in the contents of this regulation really help the development of the Polish insurance market, and in particular in promotion of Polish insurance law institutions in the international trade (*vide:* further notes).

Historically speaking, at the beginning, due to the specificity of insurance activity, in the socialist state-controlled economy, what in reality should be an exception functioned in the halo of the rule.

At that time, the Civil Code stated that the general terms and conditions of insurance, if referring to an insurance contract and concluded by a state-owned company, then in the scope in which it referred to specifically listed institutions (such as the manner of contract conclusion, methodology of calculating and collecting a premium) could be shaped differently than the content included in Title XXVII of Civil Code (§ 1).[8] In § 2, the cogency for contracts with the insurer other than a state-owned company (literally in other cases), under pain of nullity, was introduced as a particular deviation from the above.[9] It was promptly modified on November 1, 1990.[10]

The basic reason was certainly the departure from the state-controlled economy and change to a free market economy and elimination of the special

[8] An analogous evolution of the delivery contract, see: Polish regulation: Fuchs, D., Malik, A., in: Habdas, M., Fras, M. (eds.), *Kodeks cywilny. Komentarz*, Vol. IV, Warszawa 2018, pp. 161–163.

[9] Art. 807: '§ 1. General terms and conditions of insurance contracts concluded by state-owned companies may constitute the manner of concluding contracts, calculating and collecting premium, notifying about changes occurring after the conclusion of the contract, the commencement, scope and termination of insurance company liability, the manner of notification about the occurrence, determination of loss and compensation and its payment, other than regulations of this title. § 2. In other cases, the provisions of a contract of insurance inconsistent with the provisions of this title are void, unless further regulations provide for exceptions in this scope.'

[10] Based on art. 1 of the Act of 28 July 1990, on the Amendment of the Civil Code, Dz.U. (Journal of Laws) No. 55, item 321.

status of state-owned companies but also a wish to obtain a higher status for the Polish insurance market compared to well-developed countries and economies. So, following the amendment, art. 807 of the Civil Code stated that '§ 1. The provisions of the General terms and conditions of insurance or the provisions of a contract of insurance inconsistent with the provisions of this title are void, unless further legislation provides for exceptions. § 2. In insurance related to foreign trade foreign terms and conditions of insurance may apply, other than the provisions of this title.' Such a legal situation did not raise any objections concerning the core of the doctrine, since due to the legal framework of the functioning of the insurance market in Poland and the rules applicable in the international market, Polish law for a long time allowed the dichotomy regarding being subject to the regulations of Title XXVII of the insurance contract, subject to whether the given assurance contract included a foreign element (was bound by a legal area other than Polish legislation).[11] This solution allowed maintaining (at least partially) the attractiveness of Polish law as *lex causae*, since in the scope applicable to the parties of the contract they could *de facto et iure* lead to the exclusion of Polish legal standards unacceptable for a party through substantive indication of foreign insurance terms and conditions.

In this context, an attempt could be made at an interpretation of what foreign insurance terms and conditions meant at that time. Basically, it was possible to perform *litterram iuris* its dichotomic division into insurance terms used by domestic insurance companies, but applied to insure transborder risks, such as cargo insurance on international transport, in its contents based on Institute Cargo Clauses (referred to directly or through the contents of INCOTERMS provisions, in which the parties agree the delivery, e.g., on a CIF basis), and the terms of insurance used in practice by foreign insurance companies in relation to Polish civil law entities, regardless of whether their seat (after Poland joined the EU) was located in a member country or elsewhere, and the fact if the insurer operated within the territory of the Republic of Poland through its branch was irrelevant, or whether a Polish entity concluded the contract with it online. If this legal status remained until the current moment, then it would not be a problem to possibly refer to the PEICL clauses (in case of their adoption in an EU act) by the parties of

[11] Cf. representative opinion of Ogiegło, L., in: Pietrzykowski, K. (ed.), *Kodeks Cywilny. Komentarz*, Vol. 2, Warszawa 2000, pp. 440–441.

the insurance contract in the scope not covered by the contract,[12] which is, however, possible nowadays, but not on account of the contents of the Civil Code, in which art. 807 of the Civil Code in its current version constitutes a significant constraint for such a practice (in case of non-compliance of PEICL with Polish regulation about the insurance contract).[13]

The current temporary solution to this situation (apart from practical means of unravelling this matter – *vide An attempt at remedying the lack of compliance,* or *Conclusion)* can be sought by the fact of entry into force of the Rome I regulation, under which such practice is separately legitimated. In the preamble, the EU legislator *explicite* states, 'This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.'[14] Additionally, it must be emphasised that there is no doubt that in case of contracts (i.e., insurance operations) to which art. 807 § 1 of the Civil Code is not applicable, but which otherwise constitutes emanation of insurance operations acceptable in Polish law, such as a contract of insurance guarantee or reassurance contract, the substantive indication of terms and conditions of the insurance other than the contents of Title XXVII is fully acceptable, the example of which for the reassurance contract will soon additionally become the contents of PRICL clauses.[15] The reason for that is that insurance guarantee is marginally regulated by the Civil Code (and it is not in art. 805–834 c.c. but art. 372, in conjunction with art. 473 c.c.), and the reassurance contract, through art. 820 c.c. is excluded from the regime of cogent regulation of the abovementioned articles of the Civil Code about the insurance contract.

It should be additionally noted as well that the notion of foreign insurance terms and conditions was not to be understood as a synonym for foreign General Terms and Conditions of Insurance (i.e., contractual model, or just the insurance regulations), since due to heterogeneous practice in this matter in particular legal orders as well as a specific situation of the given insurance contract they could

[12] Details: Fuchs, D., *PEICL jako materialnoprawny projekt europejskiego instrumentu opcjonalnego o umowie ubezpieczenia*, in: Fuchs, D., Malinowska, K., Maśniak, D. (eds.), op. cit.

[13] Details: Fuchs, D., in: Fuchs, D., Maśniak, D., Malinowska K. (eds.), op. cit., commentary to Art. 807.

[14] *Vide*: recital 13 of the preamble to the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal of the European Union L 177/6.

[15] Details: Fuchs, D., in: Fuchs, D., Malinowska, K., Maśniak, D., op. cit., commentary to Art. 820.

also mean foreign Specific Terms of Insurance, provided for the specific type of the recipient of services, or the clauses negotiated individually between a foreign insurance company and a Polish legal entity, or, determined by means of request for proposal by the potential insurer, risks located beyond the borders of Poland, contractual clauses, accepted as a result of including them in the offer by the Polish insurer. This way it may be assumed that any sort of connection with the foreign legal area of the given insurance contract (i.e., its cross-border aspect in the substantive meaning) allowed making a successful reference in the insurance contract to foreign contractual agreements, which might deviate from the contents of art. 805–834 of the Civil Code, regardless of whether the legislator *explicite* allowed it in its content.

This concept was maintained, as a general rule, even later, although a significant change was implemented in 2003 in relation to the solution established beforehand by the amendment of 1990. After several years of validity, consequently, most of all with regard to Polish membership in the EU, further liberalisation in the scope of foreign insurance trade was implemented – resigning from the adjective 'foreign,' hence allowing each provenance of deviations from the contents unconditionally binding art. 805–834 c.c., which further answered the needs of practice.[16] This legal status was applicable until 10 August 2007, when art. 807 of the Civil Code in the current form was established by means of repealing art. 807 § 2 of the Civil Code.[17] Obviously, the remarks above do not refer to the situation (as indicated in the *Introduction*) in which the applicable law, as indicated by the applicable rule of the conflict of laws, is the foreign law, as art. 807 of the Civil Code can be regarded neither as a norm enforcing its applicability (the provision enforcing its validity), nor, even more, as *mutatis mutandis* a public order clause.[18]

[16] Which took place on January 1, 2004, based on changes implemented by art. 233 of the act of May 22, 2003, repealed, on insurance activity, Dz. U. (Journal of Laws) of 2015, item 1206, as amended.

[17] Based on Art. 1 of the act of 13 April, 2007, on the amendment of the Civil Code, Dz. U. (Journal of Laws) 55, item 557; arguments supporting the implementation of the discussed amendment and against the previous legal status: Orlicki, M., Pokrzywniak, J., *Umowa ubezpieczenia. Komentarz do nowelizacji kodeksu cywilnego*, Warszawa 2008, pp. 37–38; Orlicki, M., *Reforma regulacji prawnej umowy ubezpieczenia*, in: Nowak, A., Fuchs, D., Nowak, S., *Umowa ubezpieczenia. Dyskusja nad formą prawną i treścią unormowań*, Warszawa 2007, pp. 44–45, as well as: Mróz, D., *Kodeks cywilny. Komentarz do zmian wprowadzonych ustawy z 13 kwietnia 2007 r. o zmianie ustawy – Kodeks cywilny oraz o zmianie niektórych innych ustaw*, LEX 2008.

[18] Cf., Ciepła, H., op. cit., commentary to Art. 807, note 10.

This thread can, however, be tracked in the evolutionary approach, for instance, due to the *acquis* of EU law in order to search for regulations that could be recognised as enforcing its applicability, based on the concept of the general good.

This idea was *explicite* (*general good or general interest; intérêt general* in French) implemented by the Third Directive in the scope of applicable law for the contract of insurance of risks other than life (further: Third Directive).[19] The very concept of the general good as a limitation of freedom of parties of the contract derives from the judicial practices of the then Court of Justice of the European Union, whose rulings regarding freedom to provide services suggest formulating the criteria allowing the application of limitations of autonomy to choose the law by the country of insured risk location based on applicable internal law regulations.[20]

For the first time, this concept was applied in the Second Banking Directive (art. 21 section 5)[21] and in the Investment Services Directive (art. 19 sentence 6).[22] However, the limitation that the general good constitutes in these two Directives most of all refers to financial supervision and limitation of service provision. Only the Third Directive in art. 28 *explicite* introduced the notion of

[19] Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations, and administrative provisions relative to direct insurance other than life insurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive), Official Journal of the European Union L 228/1992.

[20] Which is not a closed catalogue, cf.: Pearson, P., *Opening Address*, in: Reichert-Facilides, F.U., *Jessurun d'Oliveira H. International Insurance Law in the EC*, Deventer 1993, p. 8; id. Reproduced typescript, New Trends in Insurance Market, Brussels 1995, p. 6; Chance, C., *Insurance in the EEC*, London 1991, p. 48; also worthwhile, with reference to the very concept of a general good in the context of commercial insurance, cf.: Lasok, K.P., *The Professions and Services in the European Economic Community*, Deventer 1986, p. 730; etiam: Fuchs, D., *Dobro powszechne (ogólne) jako wyznacznik ewolucji wspólnotowego prawa ubezpieczeń gospodarczych*, in: Mik, C., *Prawo gospodarcze Wspólnoty Europejskiej na progu XXI wieku*, Toruń 2002, pp. 71 et seq., also: id. *Regulacja koasekuracji w prawodawstwie Unii Europejskiej*, "Radca Prawny" 1999, No. 2 (41), pp. 22–23; id: *Dyrektywy III generacji prawa ubezpieczeniowego oraz ich implementacja w wybranych prawodawstwach państw członkowskich Unii Europejskiej*, in: Mik, C. (ed.), *Implementacja prawa integracji europejskiej w krajowych porządkach prawnych*, Toruń 1998, pp. 299–301.

[21] Second Council Directive on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit instructions and Amending Directive 77/780, EEC 89/646 O.J. L386/1z1989; Fojcik-Mastalska, E., *Prawo Bankowe Unii Europejskiej*, Wrocław 1996, pp. 48–49; Dassesse, M., *Retail Banking Service in 1992*, in: Cranston, R. (ed.), *European Banking Law: The Banker-Customer Relationship*, London 1993, pp. 61–62; Szpringer, W., *Europejskie regulacje bankowe*, Warszawa 1997, pp. 27–28.

[22] Investment Services Directive 93/22 of 10 May 1993 Official Journal of the European Union L141/27; Ashall, P., *The Investment Services Directive: What was the Conflict All About*, in: Andenas, M., Kenyon-Slade, S. (eds.), *E.C. Financial Market Regulation and Company Law*, London 1993, pp. 94–95; Szpringer, W., op. cit., pp. 94–95.

general good, however, as an additional limitation of freedom of the parties in the indication of the contract status, and first justified by the application of the so-called *general good test*.[23] According to the author, art. 807 of the Civil Code is not of similar importance; what can be done at best is to consider particular regulations of the Civil Code, such as arts. 833 or 834, in the context of regulations enforcing their applicability (i.e., validity), or making the given insurance as obligatory by the legislator in the given scope, the detailed discussion of which, however, goes beyond the limits of this study.[24] Additionally, given the current contents of art. 807 §1 of the Civil Code, it needs to be accepted as a general rule that the regulation concerning the insurance contract has an unconditionally binding character, and the only exclusions are provided in the content of the Title of Book III of the Civil Code (e.g. art. 814 § 1, art. 815 § 2 sentence 1 of the Civil Code).[25] The fundamental cause of this is the adhesion and large scale of legal relationships of insurance, which tempts the legislator to similar procedures as in the case of regulation of consumer law in the broad sense.[26] The convergence, moreover, is not accidental, since the legislator referred to it in art. 805 § 4 of the Civil Code.[27] This issue was also noticed in the judicature of common courts: '(I)n view of the universality of application of general terms and conditions of contracts to the ones concluded by insurance companies, they became adhesive contracts, where it is usually impossible for the other party of the contract to individually negotiate provided conditions. For this reason there is a need to ensure protection of the weaker party, which, in abidance to the will of the legislator, implements 807 § 1 of the Civil Code – allowing to repeal provisions of general terms and conditions of insurance in case they are inconsistent with the code provisions regarding insurance.'[28]

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[23] For a broader discussion with bibliography, see: Fuchs, D., *Dobro powszechne*..., pp. 71–95.

[24] The abovementioned issue is the subject matter of a separate study being prepared by the author.

[25] Fuchs, D., Szymański, Ł., *Zróżnicowanie zakresu ochrony poszczególnych kategorii nieprofesjonalnych uczestników rynku ubezpieczeniowego*, "Prawo Asekuracyjne" 2012, No. 3, LEX; cf. Dubis, W., in: Gawik, Z. (ed.), *Kodeks cywilny z komentarzem*, Warszawa 2010, pp. 1323 and 1346.

[26] Ogiegło, L., op. cit., p. 440; cf. also, in the context of the development of consumer law: Cooke, J., Oughton, D., *The Common Law of Obligations*, London 2000, pp. 45–46.

[27] Fuchs, D., in: Fuchs, D., Malinowska, K., Maśniak, D. (eds.), op. cit., commentary to Art. 805.

[28] Decision of the District Court in Kamienna Góra of March 1 2017, I C 377/16; LEX No. 2252831.

The above includes not only model insurance contracts created and applied by the insurers themselves but also those created by other participants of the insurance market, such as insurance intermediaries, the best practical example of which are brokerage clauses.[29] At the same time, it is worth emphasising that regardless of the current contents of art. 807 of the Civil Code, this is, as a general rule, a norm of a specific nature, and due to the nullity sanction it *explicite* includes, it should be applied *stricte* in case of collision with the content of the cogent norm included in arts. 805–834 of the Civil Code: The appropriate application of the provision of art. 807 § 1 of the Civil Code and using the nullity sanction it provides requires an unequivocal indication, in a manner beyond any doubt, with which provision of Title XXVII of the Civil Code related to the insurance contract the particular provision of the insurance contract or a particular provision of the General Terms and Condition of Insurance is inconsistent.[30]

Such a collision may also take place regarding the contents of PEICL provisions, at least due to its specificity, by far exceeding the conciseness of Polish Civil Code regulations, which in particular refer to the regulation of the institution not referred to directly in arts. 805–834 of the Civil Code, such as group insurance. Further examples are specific regulations concerning period of prescription of claims resulting from the insurance contract, division of insurance for loss insurance and (fixed) sum insurance, or the regulation of the bonus-malus system for third-party liability insurance.

Legal nature of PEICL

For this reason, it must be emphasised that the specific justification of concentration of works of the expert group preparing PEICL (i.e., the Project Group on a Restatement of European Insurance Contract Law) on imperative norms is the conviction (both present in literature and represented by EU institutions) that exactly norms of this kind – varying according to admissible initiatives of particular member countries of the European Union – are a fundamental barrier of the internal development of the insurance market.[31] This, in turn, leads to differentiation of the status of insurance protection for entities predestined to it,

[29] Serwach, M., *Klauzule brokerskie w umowach ubezpieczenia zawieranych w trybie zamówień publicznych (cz. 1)*, "Finanse Komunalne" 2008, No. 11, LEX, p. 1.

[30] Decision of the Supreme Court of 18 December 2003 (I CK 365/02), LEX No. 599511.

[31] Broader, see: Fuchs, D., *Dyrektywy III…*, pp. 287 et seq.

which affects both the consumer and the entrepreneur. Another important issue is the assumption that *Insurance Restatement* will continue the tradition developed in the directives of second- and third-generation insurance law, reaching the so-called co-insurance rulings, based on the guarantee of broad autonomy of will of insurance contract parties in case of so-called major risks, given the interests of the consumer of the insurance service justified the limitation of the above freedom with reference to the so-called mass risks.[32] An analogous approach is adopted by the EU legislator with reference to the issue of prorogation and derogation agreements in the provision of EU regulation – so-called Brussels I bis.[33] At the same time, from the very beginning the intention of the authors of the *Insurance Restatement* was to develop a model for the European legislator and for legislators from particular member countries and to make the project a point of reference for enterprises undertaken by the European insurance market in order to harmonise the terms of insurance applied in trade and guarantee maintaining the public interest.[34]

PEICL has only (and as much as) the feature of uniform regulation of substantive law, therefore one cannot expect they will solve, also after their implementation, the problems related to the applicability of court and state jurisdiction, or broader – civil procedure. Therefore, there are detailed solutions in force concerning court jurisdiction in disputes in insurance cases in the regulation Brussels I bis. This helps to eliminate the hazard that the Polish legislator seems to try to prevent by means of art. 807 of the Civil Code, since the assumed goal of PEICL is to protect the interest of the recipient of services in the insurance contract, and, in particular, the customer. This obviously refers to the substantive law, not the process or enforcement law. With regard to the last matter, the only solution that can be recalled refers to the European warrant,[35] namely the European project (PEICL) assumes that an authorised

[32] Details, see: Fuchs, D., *Regulacja koasekuracji…*, pp. 18 et seq. In the context of the development of consumer law, cf.: Cooke, J., Oughton, D., op. cit., pp. 45–46.

[33] Details: Fuchs, D., *Jurysdykcja sądów powszechnych w zakresie ubezpieczeń gospodarczych zgodnie z rozporządzeniem* nr *1215/2012 (Bruksela I bis) taking into account Lugano Convention II*, in: Fuchs, D., Malinowska, K., Maśniak, D. (eds.), op. cit.

[34] For detailed characteristics with reference to business insurance, see: Fuchs, D., *Dobro powszechne…*, pp. 71–95.

[35] Article is based on the contents of Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (Official Journal of the European Union EC L 166, p. 51, as amended).

entity (defined in § 2, art. 1:301 of PEICL) is entitled to apply to the applicable domestic court or organ in order to prevent breaching the regulations of PEICL, in accordance with art. 1:102. The authorised entity means an organ or organisation included on the list drawn up by the European Commission based on art. 4 of Directive 98/27/WE of the European Parliament and of the Council of May 19, 1998, on injunctions for the protection of consumers' interests.[36] Therefore, the problems currently encountered by the policyholder and the insured remain unsolved.

There is hope that in accordance with the phrase *Iustitia est obtemperatio scriptis legibus institutisque populorum*,[37] the national legislator accepts this project as inspiration also for further work on reform of the whole of insurance law, also in particular with reference to the concept and range of insurance contract regulation in the Civil Code and the issue of detailedness of this regulation in the context of possible separate regulation, in a legal regulation other than the Civil Code (cf. *Conclusion*). Another possible solution would be regulating in Poland the complex matter of commercial insurance law in a separate legal regulation based on PEICL. In the European Union, despite the discrepancies, we may justifiably refer to a renaissance of European private law despite (unfortunately) the slowing down of the decision-making process of Union bodies in this regard, since originally the implementation of PEICL was assumed to take place within the Union legislative process until the end of 2012 and currently it is planned for about 2020–2022.

PEICL vs Polish ADR

At the same time, according to the author, PEICL is exceptionally useful to resolve disputes by arbitrators in international and domestic arbitration courts. These might include, for instance, domestic trade courts (e.g., Court of Arbitration at the Financial Ombudsman, Court of Arbitration at the Polish Financial Supervision Authority, and the Court of Arbitration at the Polish Chamber of

[36] Cf. Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version), Official Journal of the European Union, 1 May 2009, L 110/30.

[37] 'Justice is conformity to written laws and national institutions,' Latin and Polish version, in: Jędraszko, C., *Łacina na co dzień*, Warszawa 1983, p. 141.

Commerce).[38] In case the parties referred to PEICL in the insurance contract while simultaneously introducing an arbitration clause to the contract (it is not likely that such a possibility is provided for by GITC as domestic insurers have relatively rarely supported the ADR formula in insurance relationships), to resolve a possible dispute, such a condition would have a fundamental and – we must add – immensely positive meaning, at least because of the lack of uncertainty of contract parties regarding the law, but also it would constitute a balanced proposal for arbitrators in case of an *ex equo et bono* ruling. Moreover, PEICL includes in this scope a direct solution, according to which the application of regulation does not preclude access to an out-of-court complaint and redress mechanisms otherwise available to the policyholder, insured or beneficiary (1:302 PEICL). The authors' intention here is also the arbitral judiciary (so-called private arbitration).

Obviously, nothing precludes PEICL from being applied also in the course of insurance mediations, whether with the participation of mediators listed at the Polish Chamber of Commerce, the Polish Financial Supervision Authority, or in case of *ad hoc* mediation. Particularly in this last case the authority or mediator may influence the application of specific solutions provided by PEICL by parties in case of reaching a consensus. With reference to mediation, it should also be noticed that mediation based on applicable judicial resolution has become increasingly popular, pursuant to the Code of Civil Procedure, which may also facilitate the application of clauses included in PEICL when reaching a settlement before a mediator (listed permanently at the applicable District Court). In this case, there is a need to consider yet again the matter of the consistency of PEICL with Polish legal provisions in force regarding an insurance contract, since in this case the court of law will grant the approval of the mediation agreement. It seems, however, that due to the current barriers of mediation development in the scope of business insurance, particularly with reference to the area of international trade in Poland, against overcoming them successfully (for instance, through specialisation of mediators with educational development paths for mediators in business, criminal cases, etc., clarification of mediator status regulation and stabilisation of this regulation at the statutory level, more flexible approach to remuneration of

[38] Although the significance of uniform law for arbitration courts judicature has obviously already been noted, an example is a speech by Zoll, F., *Projekty europejskiego prawa umów a praktyka arbitrażu*, given at a conference organised by the Court of Arbitration at the Polish Chamber of Commerce in Warsaw, Prawo Ekonomia Arbitraż, on 18 November 2010.

a mediator in business mediations, and/or elimination of the inconsistency with fees in other types of mediation proceedings, such as criminal or family cases, social education development with regard to possible mediation in insurance cases), the application of PEICL in mediation will be marginal.

An attempt at remedying the lack of compliance, or Conclusion

According to the author, the fundamental *de lege lata* rational solution to the problems signalled above, and sometimes the literal impossibility to square the PEICL project with the decisive will of the Polish legislator, visible in the contents of art. 807 of the Civil Code, would be the acceptance, according to prof. J. Łopuski, of a systemically logical view that Civil Code norms regulating an insurance contract in Title XXVII of Book 3 are of a semi-imperative nature for the insurer. This would consequently mean that there is the possibility of a derogation from the will of the legislator, but only in case this solution serves the good of the policyholder and of the insured, or possibly, the entity entitled to receive the benefits.[39] The policyholder and the insured might be particularly predestined to receive protection understood this way. Neither should the matter of the status of the injured be forsaken in *stricte* third-party liability insurance or hybrid insurance (such as D&O).

Obviously, the problem of assessment remains, first by contractual parties, and in case of dispute, by the appropriate court, whether *in casu* the actually absorbed solution is convenient for the policyholder compared to maintaining exclusively the *expressis verbis* characteristics of norms concerning the insurance contract from the Civil Code.

Recognising simultaneously that one of the main aims of the *Insurance Restatement* is the protection of the justified legal and economic interests of the policyholder, the insured and the beneficiary of the insurance benefit, and accepting the abovementioned concept of prof. J. Łopuski as most eligible, the author is certain about the possibility of the admissibility of acceptance of the *Insurance Restatement* in internal relations, particularly in case of B2C relations.

Simultaneously, due to the basic concept of the policyholder's protection – regardless of whether they are a consumer or an entrepreneur – it is necessary to support the justified application of *Insurance Restatement* clauses also in the case

[39] Łopuski, J., in: Winiarz, J., *Kodeks cywilny z komentarzem*, Vol. 2, Warszawa 1989, commentary to Art. 807, p. 726.

of B2B relations (entrepreneur–entrepreneur). Another argument supporting such an interpretation is the contents of art. 1:103(2) of PEICL: 'When there is doubt about the meaning of the wording of any document or information provided by the insurer, the interpretation most favourable to the policyholder, insured or beneficiary, as appropriate, shall prevail.'

Hence, in light of the above, a postulate can be made as a *de lege ferenda* conclusion to return in the scope of art. 807 of the Civil Code to the concept of substantive permission of indicating the law from before its last amendment, having specified it appropriately.[40] It is beyond any doubt that a literal return to the solution of *acien regime* cannot be justified, mainly due to its lack of precision, whereas taking into account the concept expressed by the legislator beforehand would result in a more flexible insurance trade and increased attractiveness of Polish law as the applicable law.

It is worth emphasising here that international legal acts and various academic projects have created examples of norms that serve as worldwide model rules,[41] both for legislators and for parties of various trade agreements, which – even if they do not indicate them as provisions regulating certain aspects of the agreements – may absorb these projects, which is explicitly emphasised in the contents of the Rome I regulation.[42] This is a fundamental solution also for the application of PEICL, even at the present moment, only on the basis of the will of the contract parties, resulting from substantive indication, or rather based on the incorporation of specific PEICL project articles to the contract. Motive No. 13 of the Rome I regulation in the preamble, *expressis verbis* states, 'This Regulation does not preclude

[40] For comprehensive arguments, along with a bibliography of literature against the validity of art. 807 § 2 of the Civil Code in the previous version, see the literature cited in footnote 14.

[41] As the European Commission puts it in the Green Paper: 'For example the Organisation for the Harmonisation of Business Law in Africa has been working on developing a Uniform Act on Contracts largely inspired by the UNIDROIT Principles of International Commercial Contracts. The UNIDROIT Principles and PECL have also inspired the Chinese Contract Act of 1999,' Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010)0348 final, http://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A52010DC0348 (footnote 9); additionally, it may be pointed out that PEICL was the inspiration for the Hungarian legislator while regulating the insurance contract in the Civil Code; the insurance contract modelled most widely on PEICL was implemented in the Civil Code by Turkey, whereas the consumer-related legislation valid in Scotland adopted some 'consumer' solutions of PEICL as its own.

[42] For more about the interdependence of substantive and conflict law autonomy, as well as a broader discussion of the Rome conventions, cf.: Dragun-Gertner, M., *Ograniczenie autonomii woli stron morskich kontraktów żeglugowych*, Gdańsk 1996, pp. 89–90.

parties from incorporating by reference into their contract a non-State body of law or an international convention.' This is additionally underlined in art. 3 of the Regulation, which respects the autonomy of parties of the given contract, also in this scope.[43] For the same reasons, teams of scientists from university centres developed Principles of European Contract Law (PECL), the aim of which is to create uniform contract law for the domestic market,[44] which the PEICL regulation corresponds to.[45] Since differences between contract law systems cause difficulties in international trade, various international and regional organisations worked to limit these difficulties by means of implementation of uniform model regulations. The United Nations Commission on International Trade Law (UNCITRAL) created norms of sales of goods between enterprises. Similarly, the effect of works of the United Nations is the UN Convention on Contracts for the International Sale of Goods, giving the parties of such contracts subjected to this convention an option of excluding the convention from use (so-called opt-out right).[46] The International Institute for the Unification of Private Law (UNIDROIT), in turn, prepared rules for international trade agreements that constitute model regulations concerning the sales of goods and provision of services.[47]

Simultaneously, it corresponds to the prevailing view in the world doctrine of civil law that the legal relationship is defined by the regulations of positive law, standard contract terms and conditions (templates), and most of all, respecting the rules of contract autonomy, individual arrangements between the parties.[48]

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[43] Fundamental consideration in this scope, cf.: Skąpski, J., *Autonomia woli w prawie międzynarodowym prywatnym w zakresie zobowiązań z umów*, Kraków 1964, pp. 31 et seq.; for the Anglo-Saxon *acquis*: Jaffey, A.J.E., *Introduction to the Conflict of Laws*, London 1988, pp. 268 et seq.; for the so-called Rome convention of 1980 ('predecessor' of the EU Rome I Regulation); and the still up-to-date Plender, R., *The European Contracts Convention. The Rome Convention on the Choice of Law for Contracts*, London 1991, pp. 87 et seq., as well as Jaffey, A.J.E., op. cit., pp. 268 et seq.

[44] 'The network, entitled "Commission on European Contract Law", was composed of academics from all the Member States and activated, under the chairmanship of Ole Lando, between 1982 and 2001'; cf., Green Paper..., footnote 7.

[45] Cf. art. 1:105 (2) PEICL and further notes. Polish translation by Fuchs, D., Szymański, Ł., Boguska, M., *Zasady europejskiego prawa ubezpieczeń (ZEPU)*, in: Basedow, J., Birds, J., Clarke, M., Cousy, H., Heiss, H., Loacker, L. (eds.), op. cit., pp. 657 et seq.

[46] Cf. art. 6 of the UN Convention on Contracts for the International Sale of Goods, signed in Vienna on 11 April, 1980, Dz.U. (Journal of Laws) of 1997, item 286, as amended; cf. also notice the Minister of Foreign Affairs of September 30, 2011, concerning correction of an error, Dz.U. (Journal of Laws) item 1374.

[47] Cf. *UNIDROIT Principles of International Commercial Contracts 2010*, Rome 2010.

[48] Instead of many: Smith, S. *Contract theory*, Oxford 2004, in particular pp. 303 et seq.

It should also be emphasised that PEICL are applied, as a general rule, to commercial insurance *stricte*, not excluding mutual insurance, and simultaneously they are not applicable in indirect insurance (reassurance and retrocession). This last exclusion is present *de lege lata* in Polish law (art. 820 of the Civil Code) and other legal orders of European countries.[49]

Consequently, the discussed provisions will be applied to the co-insurance contract, which was not excluded from the scope of the given project and also corresponds to the views of domestic doctrine and judicature concerning the application of art. 805 of the Civil Code to the co-insurance contract (regardless of whether it is internal or external).[50] This matter is strictly related to the matter of interpretation of PEICL provisions. According to the authors of the discussed clauses, PEICL 'should be interpreted in accordance with the contents, context, aim, and results of comparative legal analysis. Attention should be paid in particular to the principles of good faith, good market practices, as well as homogenous application and applicable protection of policyholders' (art. 1:104). Therefore, the key interpretation should be the autonomous interpretation, fundamentally devoid of the context of provisions of particular member countries since the contradictory conclusion would lead in practice to the breach of the postulate of consistency of applicability.[51]

The abovementioned interpretation directives refer, according to the author, to the consequences resulting from the applicability of yet another act of international law, namely the Vienna Convention on the Law of Treaties of May 23, 1969 (further Vienna convention).[52] Therefore, the relationship occurs here granting the priority to PEICL, and only the lack of its appropriate regulation justifies the application (possibly) of norms of other international conventions.[53] The above means that the provisions need to be interpreted according

[49] Details: Fuchs, D., in: Fuchs, D., Maśniak, K., Malinowska D. (eds.), op. cit., Warszawa 2020, commentary to Art. 820.

[50] Details, cf.: Fuchs, D., *Umowa koasekuracji – stan obecny i postulowany*, in: Pazdan, M., Popiołek, W., Rott-Pietrzyk, E., Szpunar, M. (eds.), *Europeizacja prawa prywatnego, Vol. I*, Warszawa 2008, pp. 225 et seq.

[51] Fuchs, D., *Restatement of European Insurance Contract Law a koncepcja polskiego kodeksu ubezpieczeń*, in: Kowalewski, E., (ed.), *O potrzebie polskiego kodeksu ubezpieczeń*, Toruń 2009, p. 142.

[52] Vienna Convention on the Law of Treaties. 1969. Vienna, 23 May 1969, Dz.U. (Journal of Laws) of 1990, item 439. Details: Fuchs, D., *PEICL jako materialnoprawny projekt….*

[53] Cf. along with the subject literature, also Fuchs, D., *Jurysdykcja sądów*....

to their normal meaning, taking into account the teleological interpretation. At the same time, specific, special (differing from normal, usual meaning) understanding of the given term should be assigned to the meaning used in the given act of international law in case it was determined this was the parties' intention. Additionally, it needs to be borne in mind that, if necessary, there is a need to apply so-called ancillary means of interpretation, which include the *expressis verbis* results of preparatory works to a given act of international law and circumstances of its conclusion. The postulates above reinforce the directive of autonomous interpretation of PEICL as *principium*. Therefore, it should be emphasised due to the claim of insurance-service-consumer-interest protection that, as a general rule, PEICL should be applicable if parties – taking into account possible limitations of choice of law – decided so, and then they should also be applied as a whole, without the possibility of excluding particular clauses. There is a significant deviation from the above principle with regard to the so-called major risks, since in accordance with art. 1:103 section 2 of PEICL, 'The contract may derogate from all other provisions as long as such derogation is not to the detriment of the policyholder, the insured or beneficiary'. The above means that the exclusion is unacceptable for consumer risks, in particular if it refers to art. 1:102 sentence 2, art. 2:104, 2:304, 13:101, 17:101, and 17:503, which are binding unconditionally. Additionally, the proponent stated that the remaining articles of PEICL are unconditionally binding as long as they refer to sanctions due to unfair and wilful acts (i.e., subjects of the insurance relationship). Ultimately, such exclusions may be applied in contracts regarding risks described in art. 12 section 27 of the Solvency II Directive[54]). It is also noteworthy that the principle of autonomous interpretation of PEICL, many times emphasised above, is subject to a significant and, it seems, rational limitation in the contents of art. 1:105, according to which the legal provisions of a member country may be applicable despite the contents of PEICL, if they are absolutely binding provisions of domestic law, specific for the given kind of insurance, provided there are no PEICL regulations referring to the given issue. Additionally, 'Questions arising from the insurance contract, which are not expressly settled in the PEICL, are to be settled in conformity with the Principles of European Contract Law (PECL) and, in the absence of

[54] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (amended version), Official Journal of the European Union of 17 December 2009, L 335/1.

relevant rules in that instrument, in accordance with the general principles common to the laws of the Member States' (art. 1:105 sentence 2).

Another possible direction of PEICL absorption for Polish practice (apart from the acceptance of prof. Łopuski's concept), even without direct implementation in Civil Law or without adoption of the contents of the Principles of European Insurance Law as Union law valid in all member states, is the interpretation of their current and – anticipatory – future importance in light of art. 56 of the Civil Code: 'A legal act gives rise not only to the effects expressed therein but also to those that stem from the law, principles of community life and established custom.' The practice of the Polish insurance market will decide whether PEICL will become a vital reference point for insurance relations in the regulation of rights and obligations of insurance contract parties. The provision of art. 65 of the Civil Code will also be meaningful: '§ 1. A declaration of intent should be interpreted in view of the circumstances in which it is made as required by principles of community life and established custom. § 2. In contracts, the common intention of the parties and the aim of the contract should be examined rather than its literal meaning.' In view of the above, if in the foreseeable future the project becomes popular in European practice, then in the Polish reality the policyholder and the insured (as well as the insurer) will be able to refer to it even when there is no *expressis verbis* reference to the project (or the contents of Union legislation valid in this respect) in a particular insurance contract.[55] It needs to be emphasised here that the insurer, according to the law applicable in Poland, was obliged (art. 25 of Act on Insurance and Reinsurance activity[56]) – in case the policyholder is a natural person, regardless of whether the insurance contract will be concluded in relation to the performed business or professional activity or not) to inform the policyholder before entering into the agreement about:

a) applicable law of the contract, in case the parties are not free to choose the law;
b) applicable law proposed by the insurance company, in case the parties are free to choose the law.

[55] Cf. also Fuchs, D., *Konsument w ubezpieczeniach. Szczególne unormowanie w europejskiej regulacji umowy ubezpieczenia*, in: Monkiewicz, J., Orlicki, M., *Ochrona konsumentów na rynku ubezpieczeniowym w Polsce*, Warszawa 2015, pp. 218–219.

[56] The Act on Insurance and Reinsurance activity of 11 September 2015, Dz.U. (Journal of Laws) of 2019, item 381, as amended.

This duty does not occur in case the insurer's contractor is a civil law entity other than a natural person. Therefore, according to the author, the insurer is primarily responsible for the appropriate recognition of limits of the conflict-of-law freedom available to the parties of the contract, as well as proper substantive indication, since this will be the nature of the reference of the parties of the insurance contract to clauses included in the *Insurance Restatement*, if the contract is related to international trade. It is beyond any doubt, however, that the thesis put forward above that PEICL undoubtedly will in a fundamental way allow in practice to avoid mistakes and faults concerning improper notification of the other party of the agreement about the applicable law of the contract, or improper use by parties of the freedom of choice of law in the situation, when such freedom is not granted, which is also a common case in Poland nowadays.

There is no doubt, however, that for the practice, the most desirable manner of obtaining coherence between PEICL and the legislation would be either restoring the possibility of application other than cogent Civil Code solutions about the insurance contract in international trade or, which would be the author's best wish for participants of the insurance market in Poland, *explicite* implementation of PEICL in civil law. The answer to the question whether this implementation should be done by means of a separate act and not the Civil Code, or rather by means of an amending act, will constitute the derivative of the fact, whether the Polish legislator decides to adopt the concept of the insurance code or the decision is made to remain with the traditional approach valid so far in which the regulation of an insurance contract causes it to be referred to as the insurance code.

Nonetheless, possible legislative changes in the Civil Code, inspired by PEICL, will have a direct impact also upon the application of regulations about the obligatory insurance contract, even in case of a lack of their amendments *explicite*, namely through the contents of art. 22 section 1 of the obligatory insurance act,[57] according to which Civil Code regulations apply to obligatory insurance contracts in cases unregulated in the act.

Summing up, hope remains that in case of further legislative initiatives with respect to the insurance contract, the legislator will notice the theoretical, and most of all, practical significance of standardisation of the Polish insurance mar-

[57] The Act of 22 May 2003 on compulsory insurance, the Insurance Guarantee Fund, and the Polish Motor Insurers' Bureau – Dz.U., (Journal of Laws) of 2019, item 2214.

ket in accordance with the best available models. According to the author, PEICL is just an example of this, and only the lack of adequate reflection may explain maintaining solutions that make applicable absorption to the Polish legal order difficult. Unfortunately, art. 807 of the Civil Code in its current form is an example of this.

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Directive 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version), Official Journal of the European Union L 110/30, 1.05.2009.

Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal of the European Union L 177/6.

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ACTA IURIS STETINENSIS 4 (28)

DOI:10.18276/ais.2019.28-06

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OBLIGATORY SUSPENSION OF A POLICE OFFICER FROM OFFICIAL DUTIES

Abstract

This paper focuses solely on issues related to the obligatory suspension of police officers from official duties. The relevant provisions are contained in Art. 39 (1) of the Act of 6 April 1990 on the Police. Suspension from official duties is obligatory when the stage of preparatory proceedings conducted against a police officer changes from *in rem* to *ad personam*. Such change automatically results in loss of impeccable opinion, which is a necessary condition for serving in the Police. Attention is focused on the objective to be achieved by the institution. The limits of the meaning of the phrase "initiation of proceedings against a police officer" were also indicated as a prerequisite for the application of the legal construction of Art. 39 (1) of the Police Act.

Keywords: police, police officer, service in the Police, suspension from official duties, impeccable opinion

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Preliminary issues

Ensuring public security and order is a task of such importance that the legislator has established a special formation for this purpose. As expressly stated in Art. 1 (1) of the Act of 6 April 1990 on the Police,[1] the Police are a uniformed and armed formation serving the public and designed to protect people's security and to maintain public safety and order. As Wojciech Kotowski points out, this is the basic duty of this organisation, which the legislator has obliged it to fulfil.[2] On the other hand, Art. 1 (2) of the Police Act lists the basic tasks of the Police.[3] It should be emphasized that this regulation only indicates the most important duties of the Police and the list contained therein is not exhaustive.[4] The list of tasks is systematically enlarged and modified as changes occur in various spheres, including, in particular, the socioeconomic sphere.[5] However, there is no doubt that the position of the Police, as an organisation obliged to ensure public safety and order, is dominant[6] and, even though other formations are also required to fulfil this obligation, it should be pointed out that their par-

[1] Act of 6 April 1990 on the Police, consolidated text Dz. U. (Journal of Laws) of 2019, item 161, as amended – hereinafter referred to as the Police Act.

[2] Kotowski, W., *Ustawa o Policji. Komentarz*, Warszawa 2008, p. 114.

[3] Dobkowski, J., *Administracja bezpieczeństwa i porządku publicznego*, in: Bednarek, W. (ed.), *Wybrane zagadnienia administracyjnego prawa materialnego*, Olsztyn 2000, p. 139; Jurgilewicz, M.K., *Podstawy systemu organizacyjnego Policji*, in: Letkiewicz, A., Misiuk A. (eds.), *Państwo. Administracja. Policja. Księga pamiątkowa dedykowana Profesorowi Kazimierzowi Rajchelowi*, Szczytno 2012, p. 236; Pieprzny, S., *Policja. Organizacja i funkcjonowanie*, Warszawa 2011, p. 32; Róg, M., Sęk, A., *Materialno-administracyjne aspekty pracy Policji*, Pułtusk–Warszawa 2015, p. 12; Szałowski, R., *Prawnoadministracyjne kompetencje Policji*, Łódź 2010, p. 30.

[4] Hanausek, T., *Ustawa o Policji. Komentarz*, Kraków 1996, p. 19; Opaliński, B., Rogalski, M., Szustakiewicz, P., *Uwagi do art. 1*, in: *Ustawa o Policji. Komentarz*, Warszawa 2015, Legalis; Opaliński, B., Szustakiewicz, P., *Policja. Studium administracyjnoprawne*, Warszawa 2013, p. 27.

[5] The legislator may impose new tasks on the Police, as well as provide it with other competences, with the reservation, however, that the tasks and competences of the Police cannot be presumed – Czuryk, M., Karpiuk, M., Kostrubiec, J., Orzeszyna, K. (eds.), *Prawo policyjne*, Warszawa 2014, p. 55.

[6] Kotowski, W., op. cit., p. 114; a similar opinion is expressed in: Opaliński, B., Szustakiewicz, P., op. cit., p. 26; Róg, M., Sęk, A., op. cit., p. 11; Wiśniewski, B., Piątek, Z. (eds.), *Współczesny wymiar funkcjonowania Policji*, Warszawa 2009, p. 54.

ticipation in achievement of this objective is only of supplementary nature.[7] As Jarosław Dobkowski rightly points out, the Police deals with all or almost all issues related to public safety and order.[8]

Like any other organization, the Police act through its members – police officers. It is their duty to carry out the sub-tasks in accordance with their job descriptions. The sum of these sub-tasks determines the completion of the tasks of each section of a Police unit. The sum of the tasks of individual sections, in turn, determines the completion of the tasks of the entire Police unit. All Police units, in fulfilling the tasks entrusted to them, strive to complete the mission assigned to the Police. The tasks and objectives set for the Police require the legislator to treat separately the issue of employment of officers. The basis for employment in the Police is an appointment. However, there are no references to appointment in Art. 76 of the Labour Code Act of 26 June 1974.[9] Service relationship,[10] which is referred to in the aforementioned article, is fully regulated in the official practices, which are set forth in the Police Act. As indicated at the beginning of this paper, the distinctive characteristics of the basis for employment of Police officers can be found in the purpose for which this organization has been established. While a civilian employer may freely determine the purpose for which an employee is hired, the superior in charge of human resource matters (who is the employing entity) is limited by the provisions of the Police Act, which oblige him or her to carry out the mission of the Police, which is set out in the aforementioned legal provisions. All legal constructions contained in official practices, including the hiring of police officers, must be subordinated to this objective. A different assumption could make it very difficult, or even impossible, for the Police to achieve the objective of ensuring public safety and order. It should also be emphasized that the Police is a formation

[7] According to the doctrine, apart from the Police, the objectives and tasks provided for in the Police Act are fulfilled by other public administration bodies, but only to a limited extent (Maciejko, W., *Osobowe prawo administracyjne*, Warszawa 2008, p. 149; Maciejko, W., Rojewski, M., Suławko-Karetko, A., *Prawo administracyjne. Zarys wykładu części szczególnej*, Warszawa 2011, p. 134).

[8] Dobkowski, J., op. cit., p. 139.

[9] Act of 26 June 1974 – Labour Code, consolidated text: Dz.U. (Journal of Laws) of 2019, item 1040, as amended).

[10] For more information on the service relationship, see: Kuczyński, T., Mazurczak-Jasińska, E., Stelina, J., *Stosunek służbowy*, in: Hauser, R., Niewiadomski, Z., Wróbel, A. (eds.), *System prawa administracyjnego*, Vol. 11, Warszawa 2011. Wieczorek M., *Charakter prawny stosunków służbowych funkcjonariuszy służb mundurowych*, Toruń 2017.

that plays the role of a servant to the public.[11] Service (employment) in the Police should, therefore, be treated as special type of public service. The tasks carried out by the Police are primarily intended to serve the public (to be aimed at achieving this objective). However, the organisation is only able to carry out its statutory tasks through the officers forming its ranks. Thus, the performance of the tasks by the individuals who are members of the Police makes it necessary to apply a special legal bond (to be established between the individual and the Police organisation), which gives Police officers the mandate they need to act on behalf of the state. Therefore, the main purpose of the service relationship is to create conditions that enable full implementation of the tasks set for this organisation.

In Art. 28 (1), the Police Act establishes the appointment of an officer as the basis for his or her employment. An appointment is a strictly administrative relationship[12] that does not result in an employment relation-

[11] Jurgilewicz, M.K., op. cit., p. 236.

[12] Gacek, P., *Nawiązanie stosunku służbowego z funkcjonariuszem Policji*, "Administracja. Teoria – Dydaktyka – Praktyka" 2011, No. 2(23), pp. 76ff; Gacek, P., *Odwołanie od rozkazu personalnego*, "Przegląd Policyjny" 2016, No. 3(123), p. 80 – and the jurisprudence referred to therein; Hanausek, T., et al., *Prawo Policyjne. Komentarz*, Katowice 1992, p. 69; Kacprzak, J., *Stosunki służbowe w formacjach zmilitaryzowanych – charakter prawny, ochrona sądowa*, "Przegląd Policyjny" 1994, No. 1(33), p. 97; Liwo, M., *Status służb mundurowych i funkcjonariuszy w nich zatrudnionych*, Warszawa 2013, pp. 311ff; Maciejko, W., Korcz-Maciejko, A., *Postępowanie w sprawach osobowych w Policji*, Wrocław 2010, p. 20; Pływaczewski, W., Kędzierska, G. (eds.), *Leksykon policyjny*, Szczytno 2001, p. 304; Szustakiewicz, P., *Istota stosunku służbowego*, in: Maciejko, W., Szustakiewicz, P. (eds.), *Stosunek służbowy w formacjach mundurowych*, Warszawa 2016, Legalis. Also, compare this with the service relationship of officers of the former communist police – the Civic Militia – see: Zorska, M., *Komentarze do ustaw z 31 stycznia 1950 r. o stosunku służbowym funkcjonariuszów Milicji Obywatelskiej i z 31 stycznia 1959 r. o zaopatrzeniu emerytalnym funkcjonariuszów Milicji Obywatelskiej i ich rodzin*, Warszawa 1960, p. 10. The administrative character of the service relationship is an essential meaning in context of issues included in this paper because only administrative decisions may establish, change content and resolve the service relationship. Suspending a Police officer from official duties has tremendous impact on the content of the service relationship, therefore, application of this institution must also be based on an administrative decision (personal command).

ship.[13] The administrative body (the superior competent in human resource matters) unilaterally and in a sovereign manner shapes the legal situation of an individual. An individual may accept or reject the conditions offered to him or her in their entirety, but he or she does not participate in their construction. This is the domain of the administrative authority. The only element that depends on the individual (the addressee of the administrative decision concerning an appointment) is the will to serve. Pursuant to Art. 28 (1) of the Police Act, a service relationship may be established only on the basis of a voluntary application for service. On the other hand, a written notification of a police officer leaving service requires his or her discharge.[14] The service relationship is fundamentally different in its construction from the employment relationship. What makes them different is not only the lack of equality of the parties to this legal relationship. The characteristics of the service relationship include, first of all, an increased availability of an officer as to the time, place, and type of duties to be performed, an increased degree of subordination to the superior, including the direct superior, the superior in charge of human resource matters, and other superiors, as well as an increased disciplinary and organizational responsibility. This relationship is also characterised by durability, in the sense that service practices provide for enumerative grounds for discharge from service in the Police (obligatory and optional). Therefore, an officer may not be discharged from service if the superior in charge of human resource matters does not apply the appropriate grounds for the officer's discharge or fails to demonstrate the existence of the prerequisites for such discharge.

[13] Liwo, M., op. cit., p. 311; Maciejko, W., Korcz-Maciejko, A., op. cit., p. 20; Korcz-Maciejko, A., *Prawny charakter rozkazu personalnego*, "Administracja. Teoria. Dydaktyka. Praktyka" 2013, No. 3 (32), pp. 138ff; Kacprzak, J., op. cit., p. 97, "It should be noted that the appointment referred to in the above provision [Art. 32 of the Police Act – author's note] is not an 'appointment' within the meaning of the Labour Code. There are fundamental differences between the legal relationships created by appointments under the Labour Code and the Police Act. The essential features of these legal relationships are regulated differently in both separate legal acts, i.e. the Labour Code and the Police Act. The wording of Art. 32 of the Police Act indicates that both the act of appointment and the act of discharge from service are made by way of administrative decisions, which means that a police officer's service relationship is an administrative relationship and thus is not an employment relationship within the meaning of Art. 2 of the Labour Code (judgment of the Provincial Administrative Court in Kielce of 9 March 2007, II SA/Ke 480/06, Legalis No. 433962; and the aforementioned Zieliński, T., *Prawo pracy – zarys systemu*, part I, Warszawa 1986, p. 240; and resolution of the Supreme Court of 5 December 1991, I PZP 60/91, OSNC 1992/7 – 8/123).

[14] Art. 41 (3) of the Police Act.

As indicated above, the nature of the service relationship obliges the police officer to be more available and subordinated in the course of the service. In some cases, however, it is necessary to remove a police officer from his or her duties without delay. This is to be done by way of the procedure of suspension of a police officer from official duties. This procedure is regulated in Art. 39 of the Police Act and in the Regulation of the Minister of Interior and Administration of 17 July 2002 on the procedure of suspension of a police officer from official duties by superiors.[15] The official practice provides for both an obligatory suspension and an optional suspension. The further parts of this paper, however, focuses exclusively on the obligatory suspension from official duties referred to in Art. 39 (1) of the Police Act. It is therefore necessary to indicate the purpose for which the procedure was established and then to analyse the prerequisite that conditions and, at the same time, obliges the superior in charge of human resource matters to issue a personal order to suspend a police officer from his or her duties.

It is also necessary to write that the Polish Legislator established two institutions that have identical names and are regulated through different acts of law. The first is situated in Art. 39 of the Police Act and the second in Art. 276 of the Act of 6 June 1997 – Code of Criminal Procedure.[16] Despite the identical names, these are completely different legal constructions. The latter one can be used as one of the preventive measures if it is necessary to ensure proper conduct of criminal procedure. According to Art. 276 of the Code of Criminal Procedure, as a preventive measure, the accused (as well as suspect) may be suspended in the execution of his official or professional duties or may be ordered to refrain from a certain activity or from driving vehicles of a certain type or prohibited from participating in public procurement procedures for the period of duration of the proceedings. This preventive measure is oriented to achieving a goal that is solely indicated in the aforementioned provision. Therefore, these two legal constructions also do not serve the same purposes, rather, they have mutually independent ones. Thus, the further parts of this paper will not comprise construction based on art. 276 of the Code of Criminal Procedure. Attention will be focused exclusively on the legal construction included in the official practice, i.e. in Art. 39 (1) of the Police Act.

[15] Regulation of the Minister of Interior and Administration of 17 July 2002 on the procedure of suspension of a police officer from official duties by his/her superiors, Dz. U. (Journal of Laws) of 2002, No. 120, item 1029, as amended.

[16] Act of 6 June 1997 – Code of Criminal Procedure, consolidated text: Dz.U. (Journal of Laws) of 2018, item 1987, as amended.

The problems referred to in this paper are significant in the context of the rights and obligations of police officers, because they have direct financial consequences for them. Moreover, they may compel the superior in charge of human resources matters to resolve the service relationship based on Article 41 (2) (9) of the Police Act. For these reasons they should be subjected to further in-depth analysis.

Purpose of suspension from official duties

The purpose of suspension, as has been indicated above, is to temporarily remove a police officer from the performance of his or her official activities. Public service may be conducted only by police officers who constantly meet the requirements set out in Art. 25 (1) of the Police Act. This is because these requirements not only are the condition for the candidates' ability to (start to) serve in the Police, but also enable officers who constantly fulfil them to continue their service. Persons against whom criminal proceedings are conducted raise reasonable doubts as to whether they still enjoy an impeccable opinion. According to the statement of the Supreme Administrative Court included in its judgment of 20 April 2017, I OSK 1084/16[17], "In order to be able to perform his or her duties effectively in the home formation, a Police officer must be free from any suspicions concerning any illegal behaviour. The mere act if charging of a police officer with an intentional crime committed during the performance of his or her duties may raise reasonable doubts as to the behaviour appropriate for a person of impeccable opinion, and thus as to the fulfilment of one of the obligatory conditions that must be demonstrated by any police officer interested in continuing his or her service. The loss of the "impeccable opinion" attribute may also be due to factors other than the criminal record of the person concerned. Such an effect may also result from the specific person being subject to a suspicion or an insinuation."

Suspension of a police officer is, therefore, intended to provide a guarantee that the officer against whom such action is being taken will not be allowed to serve. This thesis also confirms the judicature. As rightly pointed out by the Provincial Administrative Court in Poznań in its judgment of 29 July 2014, II SA/Po 273/14,[18] "suspension from official duties, referred to in Article 39 (1) of the

[17] Legalis No. 1632220.

[18] Legalis No. 1104412.

Act of 6 April 1990 on the Police (consolidated text: Journal of Laws of 2015, item 355), is a procedure whose purpose is to quickly remove a police officer from the current performance of tasks in Police bodies, if it turns out that he or she no longer meets the requirements imposed on a police officers and has adopted a reprehensible attitude towards the applicable law which justifies his or her exclusion from the organisational framework of public service. Thus, presentation to the municipal Police commander of the prosecutor's decision to present specific charges to a police officer is sufficient for the assumption, on the basis of Article 39 (1) of the Police Act, that criminal proceedings have been initiated against this officer." By not performing his or her official duties, the officer will not jeopardize the good name of the Police. Therefore, the purpose of suspension is to protect the image of the Police that this institution needs to have in the eyes of the public. Hence, one should agree with the conclusion expressed by the Provincial Court Administrative Court in Gdańsk, in its judgment of 5 July 2018, III SA/Gd 335/18,[19] in which the court emphasised that "It should be pointed out that the good of the Police, i.e. the purpose of the suspension from official duties, is connected with the obligation to carry out the tasks of the Police by persons who give a guarantee of compliance with the binding legal order and the necessity to ensure a proper perception of the Police by the public," and also with statement of the Provincial Administrative Court in Warsaw included with its judgment of 8 April 2016, II SA/Wa 1507,[20] "It should be emphasized that the introduction of Art. 39 (1) of the Police Act was intended to protect the public interest, which in this case means implementation of Police tasks by persons who guarantee compliance with the legal order and who enjoy positive perception by the public." As a formation that serves the public, it must take care of this image and strengthen confidence in itself. It would be unacceptable if a police officer suspected of committing a criminal offense, qualified as a deliberate offense or a fiscal offense prosecuted by public prosecution, could perform his or her duties, in particular, if those duties were carried out against victims of the same or similar offenses or against persons suspected of committing the same or similar offenses. Suspension from official duties, therefore, protects the interest of the Police itself, which in this case is tantamount to the public interest. Suspension from official duties provides feedback to the public that is supposed to clearly testify to the fact that

[19] Legalis No. 1810427.

[20] Legalis No. 1584363.

only officers enjoying impeccable opinion are in the ranks of the Police and that any emerging justified doubts as to their possession of this characteristic result in their discharge from the service. Only such action can guarantee efficient performance of statutory tasks assigned to the Police. These, in turn, as the doctrine rightly point out, can be efficiently performed only with support of the public.[21] Consequently, the Police must not allow for situations that could put it at risk of losing the trust of the public. This is to be counteracted by the procedure of suspension from official duties, which temporarily excludes an officer's right to perform his or her duties and, consequently, prevents him or her from taking actions ascribed to a public official – official activities which would authorize him or her to represent the state and act on its behalf, including the use of repressive measures against members of the public, i.e. direct coercion measures.[22]

Initiation of criminal proceedings against a police officer as a premise for obligatory suspension from official duties

The content of Art. 39 (1) of the Police Act provides an obligatory basis for suspension of a police officer from his or her official duties. In the situation covered by this regulation, the superior in charge of human resource matters is compelled to suspend an officer from his or her official duties.[23] The decision in this respect is obligatory, which means that it is not at the discretion of that

[21] Opaliński, B., Rogalski, M., Szustakiewicz, P., *Uwagi do art. 39*, in: *Ustawa o Policji. Komentarz*, Warszawa 2015, Legalis.

[22] Compare with "In order to be able to perform his or her official duties effectively, an officer must present himself or herself as a principled, conscientious person, which is a condition for his or her credibility and justifies the powers granted by law to control other persons and interfere with their rights and freedoms" (judgment of the Supreme Administrative Court of 27 July 2018, I OSK 2588/16, Legalis No. 1866932). "(...) police officers are subject to particularly stringent requirements as regards compliance with law and ethical principles and, in order to be able to perform their official duties effectively, they must be free from any suspicion concerning illegal activities or conduct" (as well as judgment of the Provincial Administrative Court in Lublin of 12 December 2017, II SA/Lu 866/17, Legalis No. 1756819).

[23] Compare with "The legislator has left no choice as to the application of Art. 39 (1) of the Act of 6 April 1990 on the Police, consolidated text: Dz.U. (Journal of Laws) of 2007, No. 43, item 277, as amended). This provision must be applied obligatorily in a situation where criminal proceedings have been instituted against a police officer in a case concerning an offense or a fiscal offense that is intentional and prosecuted by public indictment" (judgment of the Provincial Administrative Court in Warsaw of 5 April 2012, II SA/Wa 242/12, Legalis No. 465998, as well as judgment of the Supreme Administrative Court of 13 October 2010, I OSK 589/10, Legalis No. 338198).

superior. It is, therefore, necessary to pay particular attention to the condition for the admissibility of this procedure. As the doctrine[24] indicate, an officer is suspended from his or her official duties if:

– criminal proceedings have been initiated against the officer;
– the criminal proceedings concern an offense or a fiscal offense that is prosecuted on public indictment; and
– the offense was committed intentionally.

There is no doubt that it is the criminal law that determines whether a given act constitutes an offense or a fiscal offense. Art. 1 of the Act of 6 June 1997 – Penal Code[25] and Art. 1 of the Act of 10 September 1999 – Penal Fiscal Code[26] can be used to derive the formal and material definition of an offense[27] and of a fiscal offense,[28] as an act that is punishable by the law in force at the time of its perpetration and is more than negligible, socially harmful, unlawful, and culpable.[29] As a rule, an offense or a fiscal offense may be committed intentionally, unless the Act provides otherwise[30] (Art. 8 of the Penal Code and Art. 4 (1) of the Penal Fiscal Code). It does not matter whether the offense involved direct inten-

[24] Opaliński, B., Rogalski, M., Szustakiewicz, P., op. cit.

[25] Act of 6 June 1997 – Penal Code, consolidated text: Dz. U. (Journal of Laws) of 2019, item 1950, as amended.

[26] Act of 10 September 1999 – Penal Fiscal Code, consolidated text: Dz. U. (Journal of Laws) of 2019, item 1958, as amended.

[27] Górniok, O., Hoc, S., Kalinowski, M., Przyjemski, S.M., Sienkiewicz, Z., Szumski, J., Tyszkiewicz, L., Wąsek, A., *Kodeks karny. Komentarz, Vol. I, art. 1–116*, Gdańsk 2005, p. 12; Marek, A., *Prawo karne. Część ogólna*, Bydgoszcz 1993, p. 89.

[28] Prusak, F., Skowronek, G., *Uwagi do art. 1 – Kodeks karny skarbowy*, in: Bojarski, M. (ed.), *System Prawa Karnego, Vol. 11, Szczególne dziedziny prawa karnego. Prawo karne wojskowe, skarbowe i pozakodeksowe*, Warszawa 2018, Legalis, p. 29. Also, compare this with: Bafia, J., Białobrzeski, J., Czerlunczakiewicz, S., Hochberg, L., Kowalski, J., Kulesza, M., Sosnowski, K., Szpakowski, Z., Śmietanka, I., Wiącek, J., *Ustawa karna skarbowa z komentarzem*, Warszawa 1973, p. 15.

[29] "The Polish Criminal Code does not contain a definition of an offense. However, Art. 1 (1), which specifies who is subject to criminal liability, indirectly indicates certain elements of this definition. An analysis of this provision in connection with Art. 1 (2 and 3), and other provisions of the general part of the Criminal Code that concern criminal liability, leads to the conclusion that, on the background of Polish criminal law, the definition of an offense is the following (...) [as indicated above – author's note]". (Gardocki, L., *Prawo karne*, Warszawa 1999, p. 46). Also, compare this with: Marek, A., op. cit., pp. 88ff.

[30] Górniok, O., Hoc, S., Kalinowski, M., Przyjemski, S.M., Sienkiewicz, Z., Szumski, J., Tyszkiewicz, L., Wąsek, A., op. cit., p. 98; also: Andrejew, I., *Polskie prawo karne w zarysie*, Warszawa 1989, p. 107; Andrejew, I., *Kodeks karny. Krótki komentarz*, Warszawa 1981, pp. 15ff.

tion or conceivable intention (*dolus directus* or *dolus eventualis*). In both cases the offense is considered as intentional. In practice, the supervisor in charge of human resource matters is obliged to obtain information on the legal qualification of the act allegedly committed by a police officer, and on this basis, the supervisor can determine whether the alleged act is an offense or a fiscal offense, as well as whether it was committed intentionally. As the judicature rightly points out, the Police authorities are bound by the formal legal qualification of the act presented by the prosecutor when initiating criminal proceedings[31] against the defendant. They cannot, therefore, make their own assessment in this respect. Consequently, it should be noted that the superior in charge of human resource matters is not competent to verify the charges presented to an officer. These activities are reserved in their entirety to the body conducting the procedure at the pre-trial stage. When obtaining information about the initiation of proceedings against an officer, the supervisor in charge of human resource matters is only obliged to take this fact into account, which must result in suspension of the officer from official duties. Any challenge of procedural decisions or dispute with the assessment of facts and evidence gathered in the course of pre-trial proceedings in a criminal case would be an unauthorised interference of the superior in charge of human resource matters with the competences of bodies conducting the process.

In principle, offenses are prosecuted pursuant to the *ex officio* prosecution procedure,[32] unless the relevant act provides otherwise. This also applies to offenses prosecuted in response to an application. An application submitted by an authorised entity enables the proceedings to be conducted pursuant to the *ex officio* prosecution procedure.[33] The same arguments should be applied to offenses that are prosecuted pursuant the private prosecution procedure but have been the subject of a public complaint under Art. 60 of the Act of 6 June 1997 – Code of Criminal Procedure. If a public prosecutor prosecutes such a crime, he or she changes the procedure from private prosecution to *ex officio* prosecution.[34]

[31] Judgment of the Supreme Administrative Court of 7 July 2016, I OSK 1429/15, Legalis No. 1511316.

[32] "Most offenses are of subject to the ex officio prosecution procedure..." (Gardocki, L., op. cit., p. 58).

[33] Submission of an application is only a condition for initiation of proceedings, which are the same as any other proceedings concerning an offense subject to *ex officio* prosecution (Gardocki, L., op. cit., p. 59); a similar opinion was expressed by Andrejew, I., *Polskie prawo...*, p. 111.

[34] Gardocki, L., op. cit., p. 58.

Thus, the premise obliging the suspension of a police officer from official duties materialises at the moment of initiation of criminal proceedings against the officer, provided, however, that it must be an intentional offense or fiscal offense prosecuted *ex officio*. Moreover, it does not matter if the characteristics of the police officer's alleged act are contained in the Penal Code, the Penal Fiscal Code, or another law containing criminal provisions.

Therefore, from the point of view of the issues discussed herein, it is important to determine the meaning of the term used in Art. 39 (1) of the Police Act, i.e. to indicate the limits of the meaning of the phrase "initiation of criminal proceedings against a Police officer." In the criminal procedure, the phrase is immanently linked to a change in the stage of criminal (pre-trial) proceedings from *in rem* to *ad personam*. Pursuant to Art. 313 (1) of the Code of Criminal Procedure, if the data existing at the time of initiation of an investigation or collected in the course of an investigation sufficiently justifies the suspicion that an act has been committed by a specific person, a decision on presentation of charges is made and is immediately announced to the suspect, and the suspect is questioned. It should be added that the initiation of proceedings against a person does not yet make it possible to establish that a certain person has committed a crime, but the fact that the evidence gathered indicates a high probability of this fact.[35] Such suspicion exists permanently throughout the subsequent proceedings (pre-trial and jurisdiction), conducted *in personam* against a specific suspect and then defendant, until the charges are finally cleared. The indictment

[35] It is worth emphasizing that a comparison of the term "reasonable suspicion of perpetration of an offense" contained in Art. 303 of the Code of Criminal Procedure with the term resulting from Art. 313 (1) of the Code of Criminal Procedure leads to an unquestionable conclusion that in the latter provision a justified suspicion in relation to a specific person means a higher degree of suspicion, both in relation to the fact of perpetration of a crime and in relation to the person of the perpetrator (Brodzisz, Z., *Uwagi do art. 313*, in: Skorupka, J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2019, Legalis; as well as Resolution of the Supreme Court – Criminal Chamber of 23 February 2006, SNO 3/06, Legalis No. 518682; similarly: Resolution of the Supreme Court – Criminal Chamber of 17 November 2017, SNO 47/17, Legalis No. 1715564, Resolution of the Supreme Court – Criminal Chamber of 18 July 2016, SNO 29/16, Legalis No. 1488748, Resolution of the Supreme Court – Criminal Chamber of 27 May 2015, SNO 11/15, Legalis No. 1263191, Resolution of the Supreme Court – Criminal Chamber of 13 April 2015, SNO 12/15, Legalis No. 1245372, Resolution of the Supreme Court – Criminal Chamber of 9 October 2013, SNO 20/13, Legalis No. 739772, Resolution of the Supreme Court – Criminal Chamber of 7 August 2013, SNO 14/13, Legalis No. 722039, and Resolution of the Supreme Court – Criminal Chamber of 26 April 2010, SNO 17/10, Legalis No. 388932. According to Stanisław Waltoś, there must be a sufficiently high degree of plausibility of the allegation; Waltoś, S., *Proces Karny. Zarys systemu*, Warszawa 1985, p. 208.

only triggers jurisdictional proceedings involving a change of the status of the suspect to a defendant. The end of the pre-trial proceedings, therefore, concludes the stage of gathering of evidence that is analysed and constitutes the basis for the public prosecutor to construct an indictment to be proven before a court. The indictment, thus, only shows that there is still a high probability that the defendant against whom charges have been brought has committed an act with the characteristics of an offense.

According to the doctrine, the procedure of presentation of charges referred to in the Code of Criminal Procedure constitutes a set of activities (consisting in drawing up of a decision to present charges, announcement of charges to the suspect, and questioning of the suspect), which separate proceedings conducted *in rem* from proceedings conducted *ad personam*[36] and which result in the fact that from that moment on, the proceedings are directed against a specific (individually designated) person. One should agree with Arkadiusz Ludwiczek's statement that, in fact, the phrase "directing proceedings against a specific person" is, on the grounds of the criminal procedure, the same as the phrase "instituting proceedings against a person."[37] The procedure of presentation of charges, hence, consists in the execution of a certain sequence of activities, i.e. drawing up of a decision to present charges, announcement of charges, and questioning of the suspect.[38] Consequently, the rule is that the drawing up of the decision concerning presentation of charges is not in itself sufficient to change the stage of the proceedings and must be completed by the other activities, i.e. announcement of

[36] This is because presentation of charges transforms the proceedings from *in rem* into *ad personam*; Korcyl-Wolska, M., in: Światłowski, A.R. (ed.), *Postępowanie karne. Przebieg*, Warszawa 1999, p. 26; a similar opinion is expressed by Brodzisz, Z., op. cit.; Kalinowski, S., *Polski proces karny*, Warszawa 1971, p. 193; Kalinowski, S., *Polski proces karny w zarysie*, Warszawa 1981, p. 270; Kegel, Z., in: Kegel, Z. (ed.), *Polski proces karny. Tom II. Zagadnienia szczegółowe*, Warszawa 1988, p. 26.

[37] Ludwiczek, A., *Wszczęcie postępowania przeciwko osobie jako moment przerwania biegu terminu przedawnienia karalności*, "Iustitia" 2012, No. 2, p. 91.

[38] "Thus, in order to assume that the proceedings have been transformed from the *in rem* into the *in personam* phase, three conditions must be met jointly: the decision to present the charges must be drafted, it must be announced immediately, and the suspect must be questioned, obviously unless the suspect exercises his or her right to refuse to give testimony and when the situations referred to in Art. 313 (1) *in fine* of the Code of Criminal Procedure are not in place" (judgment of the Supreme Court – Criminal Chamber of 24 June 2013, V KK 453/12, Legalis No. 712236); similarly: judgment of the Supreme Court – Criminal Chamber of 5 March 2014, IV KK 341/13, Legalis No. 924802. Also, cf.: Stefański, R.A., *Czynności przedstawienia zarzutów*, "Prokuratura i Prawo" 2013, No. 7–8, pp. 20ff.

the charges and questioning of the suspect. An exception to this rule is a situation where the suspect is in hiding or absent from the country. In such a situation, a change in the stage of the proceedings does not require the last two activities. Of course, the sequence presented herein may be subject to some modifications. As a general rule, the decision to present charges is drawn up in the course of ongoing proceedings, after the order to open an inquiry or investigation has been issued. Presentation of charges is also admissible as early as at the stage of proceedings conducted to the necessary extent (Art. 308 (2) of the Code of Criminal Procedure).[39] At this stage, no decision concerning presentation of charges is drawn up.[40] The content of the charge is included in the record of the questioning of the suspect, and the activity consists in announcing the content of the charge(s) to the suspect and questioning him or her as a suspect. However, this does not in any way affect the change of the stage of the proceedings. It should be emphasized that presentation of charges results in commencement of proceedings against a specific person, regardless of whether the action constitutes an ordinary presentation of charges referred to in Art. 313 (1) of the Code of Criminal Procedure or a simplified presentation of charges referred to in Art. 308 (2) of the Code of Criminal Procedure. In addition, it should be stated, that if charges have already been presented at the stage of the proceedings to the necessary extent, and the form of the proceedings is an investigation, then in accordance with Art. 308 (3) of the Code of Criminal Procedure, the prosecutor, within 5 days from the day of questioning of the suspect pursuant to Art. 308 (2) of the Code of Criminal Procedure, is required to issue a decision concerning presentation of the charges to the suspect.[41] If, on the other hand, the prosecutor refuses to issue such a decision, he or she is required to discontinue the investigation in relation to this suspect.[42] However, the inquiry does not, as a rule, require drawing up of a decision concerning presentation of charges, regardless of whether they have

[39] Also, cf.: Art. 276 of the Act of 19 April 1969 – Penal Code, Dz.U. (Journal of Laws) of 1969, No. 13, item 94, as amended – see: Bednarzak, J., in: Mazur M. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 1976, pp. 375ff; Waltoś, S., op. cit., p. 209.

[40] Stefański, R.A., op. cit., p. 21.

[41] Pursuant to the Penal Code of 1969, the deadline was 3 days. According to the doctrine, this is a follow-up control of the legitimacy of the conduct of this activity by a non-prosecutorial body involved in pre-trial proceedings; Bednarzak, J., in: Mazur, M. (ed.), op. cit., p. 376.

[42] Pursuant to the Penal Code of 1969, in a situation where the prosecutor did not issue a decision to present charges, there was a conclusive discontinuance of the proceedings in relation to the person questioned as a suspect; Waltoś, S., op. cit., p. 209.

been announced at the stage of the proceedings to the extent necessary or after the decision to initiate the inquiry (Art. 325g (1) of the Code of Criminal Procedure). The content of the charge may be included, in the course of the inquiry, in the record of the questioning of the suspect in connection with the commencement of his or her questioning as a suspect.[43] It may, therefore, be in a simplified form. The exception is a situation where the suspect is detained in pre-trial custody. In such a case, the decision concerning presentation of charges is mandatory (Art. 325 (1) of the Code of Criminal Procedure *in fine*).[44]

As the above indicates, the actions related to the presentation of charges referred to in the criminal procedure are a multi-stage procedure that requires a number of consecutive actions. The mere drafting of a decision to present charges is not, in principle, sufficient to consider that there has been a change of the stage in the proceedings from *in rem* to *ad personam*, unless the suspect is hiding or absent from the country. The initiation of the proceedings (the criminal trial) against a person results in the appearance of a party to the proceedings, i.e. a suspect.[45] A suspected person, on the other hand, is not a party. It is not sufficient for the body conducting the process to direct certain activities related to evidence toward a particular person. This does not change the stage of the proceedings.[46] A suspected person, as Kazimierz Marszał points out, is a person who is justifiably suspected of having committed a crime, but who has not yet been presented the relevant charges.[47] By acquiring his or her status as a result of presentation of charges, a suspect acquires

[43] In accordance with Article 325g (2) of the Code of Criminal Procedure, the questioning of a suspect begins by notifying him or her of the content of the charge entered in the report from the questioning. From the start of the questioning, the person is treated as a suspect.

[44] Marszał, K., *Proces karny*, Katowice 1998, p. 349; Waltoś, S., op. cit., pp. 208ff.

[45] A suspect is a passive party in criminal proceedings.

[46] "There is no normative basis, either in the Code of Criminal Procedure of 1969 or in the current Code of Criminal Procedure, for assuming that criminal proceedings against a person are initiated before a decision has been issued to present charges to him or her or before the start, in accordance with the provisions of those procedures, of questioning of him or her as the suspect without issue of such a decision. In particular, the mere taking of evidence aimed at prosecuting a specific person for committing an offense does not have that effect". See: Decision of the Supreme Court – Criminal Chamber of 25 September 2013, I KZP 7/13, Legalis No. 734590.

[47] Marszał, K., op. cit., p. 152. A similar opinion is expressed by: Grzegorczyk, T., Tylman, J., *Polskie postępowanie karne*, Warszawa 2007, p. 324. "A suspected person is someone who only is the subject of a reasonable guess (and not a suspicion) that he or she has committed an offense, in relation to whom no decision has been issued to present charges, and who even has not been questioned as a suspect in connection with being informed of the charges"; Posnow, W., *Uwagi do art. 71*, in: Skorupka, J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa 2019, Legalis.

the rights and obligations set out in the criminal procedure, which a suspected person does not have[48] (or has only some of them).

It follows from the above that the phrase "initiation of criminal proceedings against a person" links criminal procedural law to the procedure of presentation of charges. In practice, however, a considerable period of time may elapse between the drafting of the decision to present charges and its announcement and questioning as a suspect, due to various circumstances. Literal interpretation of the above mentioned phrase contained in Art. 39 (1) of the Police Act, by referring its strict scope of meaning to all rules applicable in a criminal process, would oblige the superior in charge of human resource matters to wait for all actions to be performed by the body conducting the criminal proceedings, which would change the stage of such proceedings, as only the performance of a sequence of such actions would make it possible to suspend a police officer from official duties. However, such a position does not withstand criticism. This is because the purpose of suspension, i.e. to immediately stop a police officer's performance of duties, must be borne in mind. Only a police officer that possesses all the characteristics referred to in Art. 25 (1) of the Police Act can guarantee proper performance of his or her official duties and, in a broader sense, of the statutory tasks of the Police. It would be unacceptable if these tasks were to be performed by police officers that raise reasonable concern of loss of impeccable reputation. Any doubts in this respect should be resolved to the benefit of the public interest (the interest of the service). Presentation of charges does indeed initiate proceedings against the relevant person. Consequently, execution of the aforementioned sequence of actions is relevant from the point of view of the criminal process, including the establishment of a point on the timeline when the stage of the proceedings is changed from *in rem* to *ad personam*. The appearance of a party to the proceedings – a suspect – involves the requirement to guarantee his or her rights in the course of the ongoing process. The suspension from duties referred to in Art. 39 (1) of the Police Act does not in any way affect the course of criminal proceedings. It is an instrument that has been set up to protect the interests of the Police, and, in particular, to protect such values as the interests of the service.

Of course, one should bear in mind that this applies only to suspension from official duties pursuant to Art. 39 (1) of the Police Act and not to the preventive

[48] See: Decision of the Supreme Court – Criminal Chamber of 2 July 2003, II KK 268/02, Legalis No. 77406.

measure referred to in Art 276 of the Code of Criminal Procedure.[49] The latter can be used, like other preventive measures, to ensure proper conduct of criminal proceedings. Thus, it is oriented towards achievement of a different goal. As rightly points out by the Supreme Administrative Court in its judgment of 16 October 2009, I OSK 167/09,[50] "It should also be added that the purpose of suspension of a police officer from performance of official duties is undoubtedly to ensure the performance of police tasks by officers enjoying impeccable opinion (cf. Art. 25 (1) of the Act). The preventive measures are applied not for the purpose of ensuring the interests of the specific formation that the defendant is a member of, but rather to address the concern of obstruction of criminal proceedings in an unlawful manner (Art. 258 (1) (2) of the Code of Criminal Procedure) and the concern of perpetration of a new serious offense (Article 258 (2) of the Code of Criminal Procedure)." Thus, despite their identical names, the aforementioned instruments are not mutually competitive and serve mutually independent purposes. Application of the measure provided for in Art. 276 of the Code of Criminal Procedure also does not constitute a positive or negative ground for suspension, by the superior in charge of human resource matters, of a police officer from official duties pursuant to Art. 39 (1) of the Police Act. This position is also confirmed by the judicature. The Supreme Administrative Court indicated that "The rules concerning preventive measures in criminal proceedings may not be applied in any way to the suspension of a police officer from the performance of his or her official duties."[51]

It should also be added that the superior in charge of personal matters generally obtains information about the initiation of proceedings against a police officer from three sources, i.e.:

– from a police officer performing the duty arising from sec. 13 (3) of the Regulation of the Minister of Interior of 14 May 2013 on the specific rights and obligations and the course of service of police officers;[52]

[49] "The basis for suspension of a police officer from official duties may be not only the administrative decision of the relevant superior, provided for in Art. 39 (1 and 2) of the Act of 6 April 1990 on the Police, consolidated text: Dz.U. (Journal of Laws) of 2016, item 1782. The same result is achieved in criminal proceedings by the use by the prosecutor of a preventive measure in the form of suspension from official duties" (judgment of the Supreme Administrative Court of 20 April 2017, I OSK 1084/16, Legalis No. 1632220).

[50] Legalis No. 212027.

[51] Judgment of the Supreme Administrative Court of 16 October 2009, I OSK 167/09.

[52] Regulation of the Minister of Interior of 14 May 2013 on the specific rights and obligations and the course of service of police officers, consolidated text: Dz.U. (Journal of Laws) of 2013, item 644, as amended.

– from a prosecutor performing the duty arising from Art. 21 (2) of the Code of Criminal Procedure;
– on the basis of his or her own information.

In some cases, this information may concern only the draft decision to present charges and not the presentation of charges itself.[53] Since the procedure provided for in Art. 39 (1) of the Police Act is supposed to be capable of protecting such an important value as the interest of the Police, it must be implemented immediately. If the mere drawing up of a decision to present charges did not require suspension of an officer from official duties, it could turn out that the police officer would continue to perform duties covered by the content of the charges[54] (and their content would not be known to the superior in charge of human resource matters), until the time of announcement of these charges to the officer. In such a case, a delay in removal of the police officer from his or her official duties would not only endanger the interest of the Police, but would also inadequately safeguard the course of the ongoing criminal proceedings.

Moreover, in the criminal procedure, a change in the stage of criminal proceedings that is linked to the presentation of charges is not treated in an absolute manner. Cases where the mere drawing up of a decision has the effect of initiation of proceedings against a person are admissible.[55] Hence, a rigorous understand-

[53] Example: a police officer reported to his superior that a prosecutor had summoned him in order to present charges against him, or a prosecutor informed the police officer's superior that a decision had been made to present charges against the police officer and that the police officer did not appear in response to the summons.

[54] Whose detailed content, *nota bene*, would be unknown to the superior because the police officer would notify him about the summons the purpose of presentation of charges, which he would draw up on the basis of the content of the summons received from the body conducting the process, or the prosecutor would inform him only about the very fact that the decision to present the charges has been drawn up, without indicating its content.

[55] "In the conditions of pre-trial proceedings concluded with an application pursuant to Art. 324 (1) of the Code of Criminal Procedure – in view of the obligatory participation of a defence counsel in the case – the very issue of a decision to present charges and its inclusion in the case file – if it is found impossible to announce it to the person suspected of committing an offense under Art. 31 (1) of the Code of Criminal Procedure, fulfils the duties of the body conducting the process arising from Art. 313 (1) of the Code of Criminal Procedure and does not make the procedural effectiveness of further pre-trial and court proceedings dependent on the announcement of a decision to present charges and to question the perpetrator of an offense" (decision of the Supreme Court – Criminal Chamber of 13 June 2012, II KK 302/11, Legalis No. 507112). Thus, it is not only the hiding of the perpetrator or his or her absence from the country that may cause a change in the stage of the criminal proceedings at the time of the drawing up of the decision to present charges. Compare this also with the judgment of the Provincial Administrative Court in Warsaw of 8 April 2016, II SA/Wa 1507/15, Legalis No. 1584363.

ing of the phrase "initiation of proceedings against a person", which *nota bene* also has exceptions laid down in criminal proceedings, could distort the sense of the procedure contained in official practice. Thus, one should agree with the conclusion expressed by the Supreme Administrative Court in its judgment of 10 November 2017, I OSK 70/16,[56] in which the court indicated that:

"One should first of all bear in mind the purpose of this regulation, which is to immediately remove persons suspected of committing the offenses specified in this regulation from their duties. After all, only a person enjoying impeccable opinion can be a police officer (Art. 25(1) of the Act). Without entering at this point into the discourse on the meaning of the word "suspect" on the grounds of the criminal procedure, especially against the background of Art. 71 (1) of the Code of Criminal Procedure, it must be stated that in certain circumstances the term "issue" contained therein may be equated with the term "drawing up" used in Art. 313 (1) of the Code of Criminal Procedure. The Supreme Administrative Court is of the opinion that criminal procedural regulations have a guarantee function, providing the suspect with certain rights in the proceedings. It is not correct to move them *in extenso* to other domains, especially in the present case. In particular, this cannot be approved of due to the different nature of both legal regimes. Therefore, transposition in the process of interpretation of the provisions of the Police Act of regulations applicable to criminal proceedings must take into account the unique characteristics of the service, as well as the purpose of the suspension."[57]

The above is not in agreement with the position contained in the judgment of the Provincial Administrative Court in Warsaw of 27 October 2015, II SA/Wa 358/15,[58] in which the court expressed the belief that:

"Suspension of a police officer from official duties on the basis of Art. 39 (1) of the Act of 6 April 1990 on the Police (consolidated text: Journal of Laws of 2011, No. 287, item 1687, as amended) is possible in the event of initiation of criminal proceedings against the police officer, i.e. the phase of the proceedings

[56] Judgment of the Supreme Administrative Court of 10 November 2017, I OSK 70/16, Legalis No. 1710801.

[57] A similar opinion was expressed in the judgment of the Supreme Administrative Court of 17 July 2018, I OSK 1913/16, Legalis No. 1833570; and in the judgment of the Provincial Administrative Court in Wrocław of 18 January 2018, IV SA/Wr 684/17, Legalis No. 1716693.

[58] Judgment of the Provincial Administrative Court in Warsaw of 27 October 2015, II SA/Wa 358/15, Legalis No. 1364493.

conducted against a person. This phase starts at the time of issue of the decision to present charges, whereby the "issuing" of the decision consists not only in the drawing up of the decision but also in simultaneous announcement of the decision to the person concerned and questioning of that person as a suspect. The mere fact that a prosecutor has issued a decision to present charges cannot be equated with the fact of presentation of the decision to the suspect."[59]

An opinion different from the latter is certainly not evidence of interpretation and application of Art. 39 (1) of the Police Act in isolation from how this issue is defined in the criminal procedure. However, it is not possible to uncritically transfer certain procedures contained in a regulation separate from the official practice without taking into account the purpose for which individual procedures have been established in the practice. This is primarily a matter of safeguarding the interests of the service (the public interest) in situations where a considerable period of time has elapsed between the drafting of the decision to present charges and their announcement. A police officer may deliberately evade appearing in response to summons, only to prevent the charges from being announced to him or her if the authority conducting the process does not order his or her arrest or force him or her to appear for the purpose of this activity (Art. 247 (1) of the Code of Criminal Procedure). Thus, a police officer against whom a decision has been drawn up to present charges that are related strictly to his or her previously performed duties could, at least for some time, continue to perform those duties and thus could perform activities contrary to the interest of the service, as well as activities having a negative impact on the ongoing process, because they hinder the course of the criminal proceedings.

Conclusion

The Police are a formation committed to ensuring public safety and order. The effectiveness of achievement of these tasks depends mainly on the human resources available. It is the officers who are members of this organisation who are responsible for the performance of particular tasks, which in a broader sense are a part of the

[59] A similar opinion was expressed in the judgment of the Provincial Administrative Court in Gdańsk of 5 July 2018, III SA/Gd 335/18, Legalis No. 1810427; the judgment of the Provincial Administrative Court in Białystok of 21 January 2016, II SA/Bk 740/15, Legalis No. 1432094 (this judgment applies to a customs officer); and the judgment of the Provincial Administrative Court in Gdańsk of 2 April 2014, III SA/Gd 60/14, Legalis No. 953297.

tasks that the Police are required to perform. No less important a factor determining the proper performance of tasks by the Police is the need to deepen the public trust in this organization. The Police are an institution created for and serving the public. An important element that fosters this trust is the desire to reassure members of the public that the formation only works through officers of impeccable reputation. The qualities referred to in Art. 25 (1) of the Police Act must, therefore, be examined not only in connection with the acceptance of candidates for service, but also in relation to officers during the period of their ongoing service relationships. It has also become necessary to create certain mechanisms that, if necessary, enable immediate removal of a police officer from performance of his or her official duties in situations where there are reasonable doubts as to whether the officer possesses the specific properties necessary for further service. One of them is the procedure of suspension from official duties. In cases where a police officer is charged in criminal proceedings with an intentional offense or a fiscal offense prosecuted by public indictment, justified doubts arise as to his or her impeccable reputation. Therefore, the legislator has obliged the superior in charge of human resource matters to suspend a police officer from official duties in the event that criminal proceedings are initiated against the officer for an intentional offense or fiscal offense prosecuted by public indictment. The relevant decision is obligatory.

There is no doubt that presentation of charges is a part of criminal proceedings that involves not only drawing up of a decision to present charges, but also announcing the charges and questioning a person as a suspect. As a rule, these activities (in the order set out above) are carried out immediately by the body conducting the process. This applies in particular in situations where the charges have already been presented to a person in the proceedings to the extent necessary. The content of the charges is then entered in the report, they are announced, and the person is questioned as a suspect. Clearly, performance of these actions changes the phase of the proceedings from *in rem* to *ad personam*. However, in some cases, a considerable period of time may elapse between the drafting of the decision to present charges and the performance of the remaining activities. The superior in charge of human resource matters must not, however, take a passive attitude towards an officer in respect of whom he has knowledge of a decision to present charges against him, until completion of all the actions with which the procedural criminal law connects the result in the form of a change of the stage of the proceedings to the stage conducted against a person. This is because it is

necessary to indicate the purpose of the suspension, which is the obligation to immediately remove the police officer from performance of his or her official activities. The instruments provided for in the practice of the service must be suitable for achieving the desired objective. The knowledge among members of the public that a police officer has been allowed to perform official duties only because he or she has not yet been presented charges is certainly not conducive to building the authority and image of the Police as a formation that serves the public. This applies notably to situations where a police officer, as a result of his or her own behaviour, delays the performance of actions related to the announcement of charges against him or her (by not appearing in response to summons issued by the body conducting the process). In such cases, it is necessary to suspend the police officer from official duties as soon as information about the decision to present charges is obtained, without the need to wait for the performance by the body conducting the process of other activities that the criminal procedural law connects with the result in the form of a change in the stage of the criminal proceedings. The change of the stage of the criminal proceedings is of fundamental importance to the passive party to the proceedings appearing in the criminal process – the suspect – because this is when he or she acquires certain rights. With regard to the issue related to the activity of the Police as a formation, the time of the change of the stage of the criminal proceedings is not so crucial. Thus, the constructions provided for in the criminal process must not be transferred uncritically *a limine* to the domain of official practice. The specific nature of the Police, and, therefore, the purpose of the specific structures it must serve must be taken into account. It could turn out that if the superior in charge of human resource matters waits for all the activities related to the change of the stage of the criminal proceedings to be completed by the body conducting the criminal process, this not only would result in a loss of public trust in the Police, but also would cause a significant breach of the proper course of criminal proceedings.

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ACTA IURIS STETINENSIS 4 (28)

DOI:10.18276/ais.2019.28-07

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PARALLELS BETWEEN POLISH AND ENGLISH 13TH CENTURY LEGAL REASONING: CASE COMMENTARY ON THE OWNERSHIP DISPUTE OF THE FOREST OF GŁĘBOWICE IN KSIĘGA HENRYKOWSKA

Abstract

The *Księga Henrykowska* has long been acknowledged by legal scholars as providing prime examples of Polish customary law that still serve as foundations for Polish legal history. In this paper, one of the disputes chronicled in *Księga Henrykowska* is treated as a case study in order to shed light on legal reasoning and argumentation in 13th-century Poland. These developments are paralleled with their contemporaries in England, which laid the foundations for common law. Legal concepts from common law research are then applied to the case, resulting in broader conclusions and speculative research questions that open the door to further research paralleling Polish and English legal history.

Keywords: Księga Henrykowska, Silesia, Polish customary law, common law

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Introduction

The *Księga Henrykowska* (hereafter *KH*), along with *Księga Elbląska* (hereafter *KE*), have been declared the foundational texts of Polish law by many legal historians, who also note the books' immeasurable worth as historical and cultural sources, with the former praised as a "literary monument" (*piśmienny zabytek*).[1] They are particularly important for revealing and elucidating the development of Polish customary law (*prawo zwyczajowe*) in Piast Poland, especially the conflicts between the Poles and the Germans throughout Silesia and the Baltic coast that make the exact nature of Polish law difficult to determine. This is due to the fact that from the 11th through the 14th century, the Silesian and Baltic regions of Poland switched hands between different Polish dynasties and Piast cadet branches, as well as between German princes and religious orders, with various semi-autonomous monastic orders scattered throughout. This led to a mixing of Roman, German and Polish legal systems, with the Poles often having some measure of self-rule under the Order of Brothers of the German House of Saint Mary in Jerusalem, commonly known as the Teutonic Order.[2] Thus, weighing relative importance of these legal systems and assessing their intersection with each other is difficult for legal scholars, both those who lived in the 13th century, as well as in subsequent generations.

The debate between Matuszewski and Vetulani on this topic is instructive.[3] Matuszewski is more or less of the opinion that although the Polish customary law that developed in Silesia was undoubtedly influenced by German law, it also pushed back against it as something distinctively Polish. However, Vetulani is sceptical of the 'Polishness' of this law. The author sides more with Matusze-

[1] "Do we have such a literary monument? – We certainly do, the only one in writing, but important beyond words. Every our writer who studies history knows it, each of them read it and many claim it to be an »invaluable source of information on social relationships in Poland in the 12th and 13th centuries«. Nonetheless, this source has not yet been utilised to the extent it deserves and demands to be used. I mean the book published by Stenzel back in 1854 *Liber fundationis claustra s. Mariae virginis in Heinrichow*, Małecki, A., *Ludność Wolna W Księdze Henrykowskiej*, Odbitka z "Kwartalnika Historycznego", Vol. III, Lwów, 1894, p. 5.

[2] Matuszewski, J., *Najstarszy zwód prawa polskiego*, Warszawa 1959, pp. 66–67; Grodecki, R., *Księga Henrykowska* [Liber Fundationis Clasustri Sancte Marie Virginis in Heinrichow], Poznań 1949, vi-xii.

[3] Matuszewski. J., *Najstarszy zwód prawa…*, pp. 7–8, 11–13, 61–62; Vetulani, A., *Z badań nad katurą prawniczą w Polsce piastowskiej*, Wrocław 1976, pp. 129–127, 144, 148. For a neutral take on Vetulani's view of the *Księga Elbląska*, see: Lis, A., *Świadectwa kultury prawnej w Polsce do 1320 roku*, "Przegląd Prawno-Ekonomiczny" 2013, No. 24, p. 52.

wski, at least in regard to the *KE*: though surviving records of it were written in Old Germanic or Latin, it begins with the Poles declaring that they would not unilaterally accept German law.[4] Górecki makes a similar argument, but from the *KH*: that a critical part of the narrative was that a legal problem arose due to the fact that the Germans did not have a satisfactory understanding of Polish customary law. Polish and German customary law were similar enough to be coherently compared with each other, but not completely interchangeable, or else there would have been no need for this distinction.[5] Thus, both founding texts of Polish law suggest that Polish customs remained relatively intact and autonomous, which the German rulers recognised to some degree.

KH was written as the history of a Silesian abbey, and though it largely constrains itself to local events,[6] it chronicles a legal dispute over the interpretation of these customary laws between a local knight and an abbey over a forest, mediated by Duke Henry the Bearded, who oversaw the property, the knights, and the abbey by feudal relations. The book, written by a prior at the abbey, known only to us as Vincent, outlines his legal reasoning on behalf of the abbey, which eventually won the dispute. Throughout his argument, Vincent contextualises the debate by stressing the importance of Polish customary law and how Germans did not understand it correctly, thus leading to potential conflicts.[7] This *legal reasoning* and *form of argumentation*, rather than the exact legal outcome, is what is vitally important for legal scholars, as it sheds insight into how Polish customary law and its interpretation was quite similar to English customary law, with particular interest given to ambiguities between legal *norms* and *rules*, and the situations by which *norms* may become *rules*. Górecki clarifies the distinction, with *norms* as "declaratory propositions" that inform when a behaviour is right (permitted) or wrong (denied), whereas *rules* are "clarified, explicit, formalized, and above all written" down and which have "unquestioned authority."[8] In some sense, the evolution of the common law can be thought of as the tension of norms

[4] Higgins, J.P., *More in Common (Law) Than Originally Thought? A Theoretical First Comparison of the Magna Carta and the Księga Elbląska*, "Acta Universitatis Lodziensis Folia Iuridica" 91, pp. 25–36.

[5] Górecki, P., *A Historian as a Source of Law: Abbot Peter of Henryków and the Invocation of Norms in Medieval Poland*, c. 1200–1270, "Law and History Review" 2000, No. 18, p. 488.

[6] Grodecki, R., op. cit., xliii-xliv.

[7] Górecki, P., *A Historian…*, pp. 483, 522.

[8] Ibidem, pp. 483, 518.

and rules, and how customary law (norms) have evolved into statutory law (rules) over time.[9]

While comparisons of the similarities between Polish and English customary law and legal tradition are not uncommon in the literature, they are often written for specialists in medieval law, history, or philosophy.[10] Presenting the judgment given in *KH* as a case study will allow the comparison of 13th-century English and Polish customary law systems to be more accessible to a wider audience. At first glance, such a comparison may seem academic, as Poland is universally accepted as a member of the civil-law family by contemporary legal historians; however, recent literature suggests that this distinction may not be so clear after all, on several accounts: first, that there were many striking parallels between the intricate system of rights and liberties achieved by the English nobility under *Magna Carta* and the nobility in the Polish-Lithuanian Commonwealth[11]. Sec-

[9] Hale, D., *The Jury in America: Triumph and Decline*, Lawrence–Kansas 2016, pp. 8–10, 14; Lobingier, C.S., *Precedent in Past and Present Legal Systems*, "Michigan Law Review" 1946, No. 44, p. 960; Lubert, H.L., *Sovereignty and Liberty in William Blackstone's 'Commentaries on the Laws of England*, "The Review of Politics" 2010, No. 72, p. 292; Palmer, R.C., *The Origins of Property in England*, "Law and History Review" 1985a, No. 3, pp. 31–50; Palmer, R.C., *The Economic and Cultural Impact of the Origins of Property: 1180–1220*, "Law and History Review" 1985b, No. 33, pp. 375–396; Holmes Pearson, E., *Remaking Custom: Law and Identity in the Early American Republic*, Charlottesville 2011, pp. 11–19; Pojanowski, J.A., *Reading Statutes in the Common Law Tradition*, "Virginia Law Review" 2015, No. 101, pp. 1357–1424; Postema, G.J., *Custom, Normative Practice, and the Law*, "Duke Law Journal" 2012, No. 62, pp. 727, 736; Ernest, R., *On Comparative Research in Legal History and Modern Law*, "Bulletin of the Polish Institute of Arts and Sciences in America" 1944, No. 2, p. 870; Riddel, W. R., *Common Law and Common Sense*, "Yale Law Journal" 1918, No. 27, pp. 995–996, 1005; Seipp, D.J., *Bracton, the Year Books, and the 'Transformation of Elementary Legal Ideas' in the Early Common Law*, "Law and History Review" 1989, No. 7, pp. 175–218; Snow, D., Morton, F.L. (eds.), *Precedents, Statues, and Legal Reasoning*, in: *Law, Politics, and the Judicial Process in Canada, 4th edition*, Calgary 2018, pp. 330, 333–334; Sriram, K., *Roman Impact on Common Law: Legend or Legacy?*, "Student Bar Review" 2004, No. 16, pp. 27, 33; Wesley-Smith, P., *The Sources of Hong Kong Law*, Hong Kong 1994, pp. 3–4, 10–13, 19.

However, the narrative of common law as evolving from tradition and custom is contested. Wesley Smith stresses how there may be multiple interpretations and definitions of common law. For those who outright oppose this narrative, see: Epstein, R.A., *The Static Conception of the Common Law*, "Journal of Legal Studies" 1980, No. 9, pp. 253–275; Rudolph, J., *Common Law and Enlightenment in England, 1689–1750*, Woodbridge, Suffolk 2013, p. 267; Vermuele, A., *Common Law Constitutionalism and the Limits of Reason*, "Columbia Law Review" 2007, No. 107, pp. 1482–1532.

[10] Górecki, P., *Viator to Ascriptititus: Rural Economy, Lordship, and the Origins of Serfdom in Medieval Poland*, "Slavic Review" 1983, No. 42, p. 25 Cf 51, 31 Cf 77; Wieacker, F., Bodenheimer, E., *Foundations of European Legal Culture*, "The American Journal of Comparative Law" 1990, No. 38, p. 16.

[11] Rau, Z., Żurawski vel Grajewski, P., Tracz-Tryniecki, M. (eds.), *Magna Carta: A Central European Perspective of Our Common Heritage of Freedom*, London and New York 2016.

ondly, the Księga Elbląska, the other major source of 13th-century Polish law, was created under similar socio-political situations as the *Magna Carta*.[12] Next, that Poles were slow to adopt Roman law and other civil codes in the period before and during the Polish-Lithuanian Commonwealth, with much of the day-to-day legal practice remaining informal and customary law for a period spanning nearly 700 years.[13] While many of the institutions in Poland bore Latin names, this does not mean that they were the same institutions. This was an oversimplification by past Polish historians.[14] Finally, the imperial civil codes imposed upon Poland by Austria, Prussia or Russia were often resisted or incompletely or inconsistently implemented.[15]

Thus, while the last two hundred and fifty or so years of Polish legal history represents various attempts to codify it, both by the Poles themselves and by foreign rulers, for about three times as long in duration the Poles were governed by customary law. Given Poland's rich political and social history, it is only sensible that its legal history should be equally complex, with customary law, civil law and concordant methods of interpretation all playing a role. This paper will contribute a more robust historical inquiry to this budding contemporary literature by building off recent comparative work on the beginning of the Polish legal and political system, contending that the legal argumentation presented in *KH* is highly reminiscent of those in 13th-century England, and suggesting that deeper, comparative research is necessary.

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[12] Higgins, P.J., op. cit.

[13] Lewandowicz, M., *Is there a Polish Legal Tradition? – On the Margins of Considerations Regarding the 1933 Code of Obligations*, "Journal of European History of Law" 2013, No. 2, pp. 74–75; Karabowicz, A., *Custom and Statue: A Brief History of Their Coexistence in Poland*, "Krakowskie Studia z Historii Państwa i Prawa" 2014, No. 7, pp. 112–119, 126–127; Matuszewski, J., *Dlaczego nie uczono prawa polskiego na akademii? Praw zwyczajowe w kulturze oralnej i w kulturze pisma*, "Krakowskie Studia z Historii Prawa" 2015, No. 3, pp. 215–228.

[14] "The entire organisation of court and territorial offices in Poland, according to that researcher, whose opinions were shared by others, was a transposition of foreign solutions to the Polish land."

"This opinion cannot be supported. A hasty conclusion was drawn from Latin, i.e. western terminology that adoption of the names of certain institutions means transposition of those institutions," Vetulani, A., op. cit., p. 12.

[15] Gałędek, M., Klimaszewska, A., *A Controversial Transplant? Debate over the Adaptation of the Napoleonic Code on the Polish Territories In the Early 19th Century*, "Journal of Civil Law Studies" 2018, No. 11, pp. 269–298; Matuszewski, J., *Dlaczego nie uczono…*; Karabowicz, A., op. cit.

The facts of the case[16]

The original holder of the lands, Duke Henry the Bearded, gave land to Nicholas, a local lord, as well as other peasants known as the 'heirs of Cienkowice'. These peasants had also received land from Nicholas.

Nicholas had given lands as a gift in perpetuity, including a forest, to the local abbey at Głębowice. The forest was near the property of a local knight, Stephen Kobylagłowa.

Upon Nicholas' death, his lands were to be distributed to his heirs, and the peasants, incited by Stephen, claimed to the Duke that they were the heirs of the forest property as well.

The Duke believed the peasants and agreed to award them the land. Stephen then approached the Duke and gave him a horse worth 28 silver marks. The Duke was pleased with the gift and granted Stephen the forest as a favour, rather than to the peasants.

Stephen, who was poor, tried to sell the land but did not receive any immediate bidders.

The Church was upset that the forest land had been taken away, but would not accept buying it from Stephen. As the land had been granted to Stephen by the Duke, it would revert from the Church to his heirs upon his death.

The prior of the abbey, a local noble by the name of Vincent, convinced the Abbot that, because the Abbot was German, he had misunderstood Polish inheritance law and that the land would not return to Stephen's heirs on his death. The abbey bought the land again from Stephen, in perpetuity.

They brought the case before the Duke for settlement about whether the land would return to Stephen's heirs after his death.

The original case is as follows:

> "In diebus antique ducis Heinrici sedebat non longe ab ispa silua quidam miles Stephanus nominee cogomine uero Cobylaglova. Hic idem Stephanus post mortem domini Nycolai incitauit qosdam rusticos qui uocabantur tunc

[16] Grodecki, R., *Księga Henrykowska*, pp. 54–90. Since the author of the article is not a Latinist, he relies on Górecki's translation of the KH, as presented in: Górecki, P., *A Historian*, pp. 519–523. For those interested in the original Latin text digital scans may be accessed at: *Liber fundationis claustra Sancte Marie Virginis in Henrichow* (Księgozbiór Wirtualny Federacji, pp. 1268–1273), xvi-xvii in the original manuscript. http://digital.fides.org.pl/dlibra/doccontent?id=744&fbclid=IwAR0LqSOWHd8nxtEzL_BEO0QC_fQc5JLcP6CYRIwFNEqWbNDW-FtuRFnIT51U. Accessed on: 30.05.2020.

temporis Pyrosovizci ut a domino dvce peterent sibi siluam Glambowiz. Sed quia hii rustici errant proprii ducis et diuites et errant heredes de Cenkowitz, dixerunt ad ducem, Domine hec silua est nobis per potentiam notarii tui domini Nycolai uiolenter ablata. Nos autem si est gratia tua iure hereditario tenemur eam possidere. Quia antiquus Glambo erat uterinus frater aui nostril Pyrosonis. Quibus dux ut suis pro priis rusticis credidit abstulit siluam tunc claustro et dedit earn eisdem rusticis. Videns autem prefatus Stephanus de Cobylaglova suam astuciam in eisdem rusti cis preualuisse accessit ad ducem offerens ei dextrarium qui tunc coram duce com Putabatur pro uiginti et viiiO marcis argenti. Quem equum dominus dux lete sus Cipiens dixit ad Stephanum, Pro hac gratia et tuo munimine si quicquam rogaueris inpetrabis. Quod audiens Stephanus reuerenter et lete accessit ad ducem dicens, Domine tu scis quia tibi libentissime seruio sed habeo modicas possessiones. Vnde rogo ut tibi domino meo tanto melius ualeam seruire mihi siluam que tibi modo cessit digneris conferre. Hiis auditis dominus dux uocatisque dictis rusticis con tulit eidem Stephano iam sepedicto siluam. Ecce ratio quare filii et heredes eiusdem Stephani minantur eximere a claustro eandem siluam. Sed insequentibus ostendemus qualiter dicta silua sit claustro postmodum in perpetuam possessionem confirmata, et quodfilii Stephani et ipsorum heredes in praefata silua nullamhabent iurisdictionem requirendi uel redimendi.

Hec silua prescripto modo perdita est primo anno post mortem domini Nycolai. Sed cum sepedictus Stephanus hanc siluam modico tempore tenuisset prebuilt earn diuersis personis uenalem ea uidelicet ratione quia indigens erat et illo in tem pore mimime curabatur de aliqua deserta possessione. Erat autem in diebus illis in Camenz quidam prepositus Vincentius nomine qui prepositus erat uir nobilis patruus uidelicet comitis Mrozkonis et erat fundator illius claustri de Camenz. Huic preposito prebita est a Stephano dicta silua Glambowiz aliquociens uenalis. Sed idem prepositus sicut erat uir grandeuus et ualde timoratus noluit nostum claustrum hac silua priuari. Misit ydoneum nuncium domino H. huius loci abbati suadens ei ut dictam siluam suo claustro quocumque modo posset redimeret. Quod audi ens dominus abbas propria persona adibat prepositum, dicens ei, Si hanc siluam emero heredes Stephani postmodum iure Polonico requirent.

Ad quod prepositus respondens dixit, Nequaquam. Sed scire debetis Domine abbas quod aput attauos nostros et patres ex antiquo statutum est, ut si quisquam de genere Polonorum uendiderit quodlibet patrimonium suum

eius heredes post modum poterunt redimere. Sed forte uos Teuthonici non plene intelligitis quid sit patrimonium. Vt ergo plenarie intelligatis uobis exponam. Si quicquam possideo quod auus meus et pater michi in possessionem reliquerunt hoc est meum uerum patrimonium. Hoc si cuiquam uendidero heredes mei habent potestatem iure nos tro requirendi. Sed quamcumque possessionem mihi dominus dux pro meo seruicio uel gratia donauerit illam uendo etiam inuitis amicis meis cuicumque uoluero quia in tali possessione non habent heredes mei ius requirendi. Vnde quia scitur et con stat quod iam dicta silua Glambovicz non erat nec est patrimonium Stephani sed donacio ducis, [unde] libere et absque timore potestis eam emere secure. Quia nullus heredum Stephani habet nec umquam habebit in ea aliquod ius requirendi, si sunt uel erunt in claustro uestro qui sciant se iure Polonico et had ratione defendere […]Auditis hiis uerbis dominus abbas a preposito emit a Stephano de Cobylaglova supradictam siluam pro uiginti et octo marcis argenti huic claustro inperpetuam possessionem."[17]

Legal issue

The legal issue behind the case was the weighing of claims on land by *patrimony and inheritance* vs acquisition by *gift*. The property right to the land was held by the noble family and returned to the family on the death of either the lord or his vassal. The property rights granted by patrimony between a lord and his vassal could not be alienated without the consent of the family members (*nie można było alienować bez zgody członków rodziny*).[18] However, at any time, the Lord was capable of having the right of the land return to him, especially in the case of a new lord inheriting the land due to death of his ancestor, or the death of the tenant. The only exception to this rule is if the lord granted it as a gift and permanently transferred the ownership.

As Vetulani explains in full:

Land given by a duke remained to be his property and even if it was passed down from father to son or from son to sons, the duke still had the right to take it back. Also, every new duke could take back land given by his predecessor, as this involved the property rights of the ruling family, which could

[17] Górecki, P., *A Historian*…, pp. 519–520, *Liber fundationism*…, pp. 38–39.

[18] Vetulani, A., op. cit., p. 30.

not be permanently reduced by a discretionary decision of a given ruler. On the other hand, the party receiving land from a duke could freely alienate the land without any participation of the members of his own family. In time, this could lead to a relatively speedy distinction between patrimony, land passed down by predecessors and belonging to the entire family and acquired goods, regardless of the method of acquisition. Only the first category of property (patrimony) could not be alienated without the consent of family members. However, acquisition became a component of patrimony and was subject to alienation limitation on par with other family property, if it was passed, together with other property, down to a new generation, to the acquirer's descendants.

Family rights to patrimony remained very stronger in the late historical period, which was manifested, for example, by the right of closer proximity. Patrimony sold without the consent of authorised family members could be bought back by them at the selling price. But even if the family consented to alienation, they still kept the pre-emption right to land. If the new purchaser or his descendants wanted to sell land, the family members of the former owner had the pre-emption right to buy that land back.[19]

Holding

The Duke sided with the abbey and reclaimed the right to the forest, which he then permanently gifted to the abbey, which cancelled out the claim of Stephen and his heirs. Stephen was compensated the 28 silver marks for his horse. The Duke gathered all of his local lords to inform them of the purchase and then remeasured the land to confirm the bounds of the abbey's property.

The Duke announced this to Stephen:

"Volo ut hoc factum decetero sit claustro firmum. Vnde scias quia prius erat mea donatione domini Nycolai qui omnes suas possessiones mea auctoritate claustro de Heinrichov confir mauit. Veni et resigna coram me et meis baronibus claustro quod prius suum fuer at. Et dominus abbas de Heinrichow restituat tibi equum tuum in ea summa pecunie sicut tunc fuerat taxatus uidelicet xx et viii marcas pro eo. Quam summam pecunie cum Stephanus de Cobylaglova ibidem accepisset, Dixit iterum dominus dux, Vos domini

[19] Vetulani, A., op. cit., pp. 30–31.

barones et omnes qui nunc presentes adestis sciatis quod Stephanus pro suis peccatis nunc resignauit et restituit claustro de Heinrichow siluam suam Glambovicz, quam licet nostra donatione tamen iniuste tenuit."[20]

Reasoning

The prior's argument, which the abbey and then the Duke accepted, was as follows: in the Polish feudal legal system, if a family had received land from a noble above them in a 'patrimonial' relationship, it would be passed from a man to his heirs. Even if the father sold the land to another person, upon his death, the right to the land would return to the original owning family. This estate could only be forfeited with some degree of familial consent, i.e., that the heirs would also be forfeiting their rights and would have to agree to it. However, if land was acquired as a gift, then the owner was able to freely dispossess it, regardless of the consent of their heirs. As the Duke had given the land to Nicholas, who then had gifted it to the abbey, Nicholas' original 'heirs,' which were dubious, would not have had legal claim to it.[21] The peasants who were Nicholas' tenants did not understand the Polish customary law of gift-giving or had misrepresented the situation to the Duke, and the Duke had erroneously given them the forest in violation of customary law. As he was German, the Abbot had been unfamiliar with Polish customary law, and had not been sure whether or not to buy the forest again from Stephen, which technically should have belonged to the Abbey.[22] The only way to correct the situation was for the Duke to retract his gift to Stephen, recompensate him the value of the horse in order to then re-gift the land back to the monastery. In this sense, the weight of claiming a gift was apparently stronger than that of inheritance.

[20] Górecki, P., *A historian*…, p. 520; *Liber fundationism*…, p. 39.

[21] Górecki P., *A historian*…, p. 487.

[22] When the Abbot inquired of Vincent whether upon the Abbot's death the land would return to Stephen's heirs, he clarifies:

"Nequaquam. Sed scire debetis Domine abbas quod aput attauos nostros et patres ex antiquo statutum est, ut si quisquam de genere Polonorum uendiderit quodlibet patrimonium suum eius heredes post modum poterunt redimere. Sed forte uos Teuthonici non plene intelligitis quid sit patrimonium. Vt ergo plenarie intelligatis uobis exponam. Si quicquam possideo quod auus meus et pater michi in possessionem reliquerunt hoc est meum uerum patrimonium. Hoc si cuiquam uendidero heredes mei habent potestatem iure nos tro requirendi. Sed quamcumque possessionem mihi dominus dux pro meo seruicio uel gratia donauerit illam uendo etiam inuitis amicis meis cuicumque uoluero quia in tali possessione non habent heredes mei ius requirendi," Górecki, P., *A historian*, p. 520; *Liber fundationism*…, p. 39.

Case impact: deriving principles of legal reasoning from 13th-century Polish customary law

KH has traditionally received weight from Polish legal historians for two main reasons: its cultural-historical value and legal-historical value.[23] Regarding the first, it contains the first sentence ever written in Polish,[24] and presents one of the few glances into the complicated social and political situation of Poland at the time, particularly in Silesia.[25] As a legal-historical source, it is of equally important value, and as one of the few surviving legal texts from the time period, it has 'no analogy in [Poland's] entire medieval historiography'. From it, generations of legal scholars have tried to extrapolate the system of Polish customary law from its painstaking details and lucidity of presentation. At its core, the book is the 'history of establishing and furnishing' the monastery and then details its properties through time in order to 'prepare the most effective defence of the property rights of the monastery.'[26]

Generations of legal historians have tried to extrapolate much of the 13th-century Polish legal system from *KH*. Lis, for example, suggests that it gives a definitive answer to the right of relationship (*Ius propinquitatis*) regarding *patrimonium* vs purchasing of land,[27] of which Górecki and Grodecki are sceptical. The latter explicitly comments on how the book was 'practical,' 'narrow,' 'one-sided' in content, presented no 'word about the religious-church activity' of the time, and that the unknown writer explicitly mentions that he is avoiding discussing political matters or the affairs of individual princes.[28] Górecki emphasizes that not only did Prior Vincent need to clarify the situation of property rights for the Abbot and the other monks, some of whom were presumably Poles, but that Duke Henry, the peasants, and Stephen either did not know the rule themselves or there was enough ambiguity for Stephen to dupe them. However, even after the case was settled, the property rights had to be reconfirmed by the Duke's son and the monastery preserved their

[23] Grodecki, R., *Księga Henrykowska*…, XVI–XLI; Lis, A., *Studies on the legal culture of the 13th and 14th century – the Book of Elbląg and the Book of Henryków*, "Przegląd Prawno-Ekonomiczny" 2013, No. 23, p. 9.

[24] Mateuszewski, J., *Najstarze polskie zdanie prozaiczne: zdanie henrykowskie i jego tło historyczne*, Wrocław 1981; Lis, A., *Studies on the legal culture*…, p. 8.

[25] Grodecki, R., op. cit., v–xii.

[26] Ibidem, xliii; Lis, A., *Studies on legal culture*…, p. 9.

[27] Lis, A., op. cit., p. 9.

[28] Ibidem, xliii–xliv.

legal records for centuries. All of this suggests that the weighing of acquisition by gift and by patrimony may not have actually been so clear for its time after all. Górecki goes on to further suggest that heritability vs acquisition was itself dependent upon a set of norms that determined the appropriate legal forms, and compares the *KH* with other legal sources and anecdotes.[29]

Though Górecki does not say it explicitly, his discussion about, as well as the evaluation of the 'eclectic approach' to norms differ from the interpretation of Grodecki in that it is wider in scope. Indeed, it appears to fuse together these two historical strands in a legal-sociological manner. He then concludes by speculating on how the abbey's defence of its property was in fact a highly contextualised process where the monks themselves became translators of 'norms into rules – and in that sense, as one of their sources of law.'[30] This method of legal interpretation, which necessarily combines the social-cultural with the legal, is a process that has long been explored and noted as a feature in the evolution of common law. In this sense, it is necessary to think about both what is meant by 'common law' and what is meant by 'legal interpretation,' or the transformation of norms into legal rules. Only if similarities in legal interpretation can be demonstrated, then is it possible to speculate about likeness in the evolution of Polish customary law with English common law.

For this exercise, it is necessary to go beyond the *nominative* discussion of common law as a system (e.g., compared and contrasted with civil law or statutory law), to a more *substantive* discussion of common law as a *way of thinking* about law, that is, as a set of meanings about law and also the process of law.[31] For example, there is a historically based explanation of common law emerging from when the Norman kings synthesised various legal systems into one law that was *common* throughout the territory. Another interpretation is that common law comes from judicial decisions, rather than legislative fiat. Another is a variation of the second, but that common law only emerged from a specific set of courts. Finally, there is a systematic comparative way, that tries to contrast common law with Roman law, civil law, etc.[32] Of these four perspectives, the most useful interpretation to facilitate comparison is a combination of the first and third option: historical expla-

[29] Górecki, P., *A Historian*…, pp. 488–492, 504.

[30] Ibidem, pp. 513–518.

[31] Edlin, D.E., *Judges and Unjust Laws: Common Law Constitutionalism and the Foundations of Judicial Review*, Ann Arbor 2008, p. 22.

[32] Wesley-Smith, P., op. cit., p. 4.

nation and judicial decisions. This combination must be qualified, however: while there may be parallels between the Teutonic Order in Silesia and the Norman conquerors in terms of foreign rulers attempting to synthesise local customary law into one general system, this clearly did not happen in the 13th century. Indeed, the whole legal reasoning of *KH* and *KE* point to an absence of such a synthesis. Further, the law is being interpreted, but in this case, it is through feudal relations, rather than some formal legal system. Thus, the judgment reached in *KH* would be specific only to its particular circumstance, hence why the records would have to be kept. In other words, while there is more room for optimism in further comparative research, one or two cases are more indicative rather than definitive.

Whatever one's conception of common law, it is clear that it has some historical and sociological character, as this is what provides the context for legal interpretation. Thus, the nature of common law is to 'craft' practical reasoning that balances judicial and normative meanings, where the latter is situationally determined in each case. Common law is driven by the cases first, rather than by legal principles.[33] This, by its very nature, gives common law a greater diversity of legal arguments and methods than civil codes, such as in German or French law,[34] and operates by precedent and analogy. Rather, civil law systems rely more on the 'interpretation and application of codified legal rules to cases' that are specific to certain areas, i.e., commerce vs criminal codes. If there is a gap in the legal codes, only then does following the precedent of other cases come into importance. [35] Put another way, civil legal reasoning sees gaps *as exceptional*, whereas in common law they are *constitutive*.[36]

An important issue that arises in common law is how to proceed when there are incomplete or differing understandings of how to interpret legal criteria. In common law, this puts emphasis on argument, interpretation, and comparison of the current case with previous ones. This is accomplished through common law

[33] Balganesh, S., Parchomovsky, G., *Structure and the Common Law*, "University of Pennsylvania Law Review" 2015, No. 163, pp. 1302–1304.

[34] Prott, L.V., *Judicial Reasoning in the Common Law and Code Law Systems*, "Archiv für Rechts- und Sozialphilosophie/Archives for Philosophy of Law and Social Philosophy" 1978, No. 64, pp. 432–434.

[35] Nievelstein, F. et al., *Effects of conceptual knowledge and availability of information Sources on law student's legal reasoning*, "Instructional Science" 2010, No. 38, p. 24.

[36] Whalen-Bridge, H., *The Reluctant Comparativist: Teaching Common Law Reasoning to Civil Law Students and the Future of Comparative Legal Skills*, "Journal of Legal Education" 2008, No. 58, p. 368.

courts being an adversarial system, which is 'essentially a competitive model of evidence production' that incentivises litigants to produce the best evidence and compose the most coherent legal reasoning. Often, the discovery and debating process between the litigants provides more evidence and thus proves more efficient under common law than under inquisitorial law, for example, where the prosecuting authorities may underproduce legal information when they believe that they have won their case.[37]

There are two broad forms of legal reasoning in common law: reasoning by analogy, and reasoning by distinction. This is essentially a judgment by the legal interpreter: if the logic of the two cases is similar, they are compared, if the logic is too dissimilar, they are contrasted. These arguments, however:

> "[A]ssume that when an interpreter knows the appropriate result in a particular case, but cannot identify the criteria that make that result appropriate, he can still know enough about what the criteria might be to sense whether a given circumstance should matter. If that assumption is right, then analogising and distinguishing cases in this way are valid methods of reasoning, although they seem puzzling and disappointing because they cannot spell out the argument fully. One cannot explain why, according to criteria, one cannot state a given circumstance should not matter."[38]

In light of this difficulty, common law argumentation often tries to use similar cases to construct general rules, which, as they come from imprecise and specific legal sources, are likely to be themselves imprecise. This form of argumentation will try to examine both exceptions to the rule and the normal circumstances in which the rule should be applied. To simplify, these rules must themselves be simple enough and clear enough, or else there is no point in producing them in the first place. Though many different criteria may be used to construct these rules, the two most relevant to this discussion are classificatory rules and legal principles, i.e., rules that sort circumstances of cases together so that similar logic may be applied.[39]

The process outlined above is nearly the same as indicated by Górecki's evaluation of *KH* and its social context. The existence of the book as a defence

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[37] Zywicki, T.J., *Spontaneous Order and the Common Law: Gordon Tullock's Critique*, "Public Choice" 2008, pp. 45–46.

[38] Gordley, J., *Legal Reasoning: An Introduction*, "Columbia Law Review" 1984, No. 72, p. 148–149.

[39] Ibidem, pp. 147–152, 153–156.

of the abbey's property claims was itself a form of precedent – which the monks themselves constructed – and displays a historically based reasoning, rather than appealing to natural law, canon law, or some other legal source.[40] The central legal issue in the case was not the definition of norms and criteria for property, as both the acquisition of property by patrimony as well as by gift were well-known at the time; the issue was how to weigh these two understandings. In this sense, the precise ways in which property could be passed between persons does not matter: *any* combination of methods would do, so long as this process of refining norms into rules through an evidentiary, adversarial process was present. Given that these concepts of property ownership and acquisition were embedded in the culture at the time, there was enough similarity for there to be a legal case, but not enough clarity for it to be resolved clearly. The inherent adversarial nature between Stephen and the abbey allowed for precedent and norms to be generalised into legal rules. Górecki notes that the Abbot even constructed a strict syllogism to outline the reasoning, similar to how common law processes would use analogy today.[41] This is exactly how common law legal arguments develop.

Conclusion

Górecki claims that the legal defence presented by the abbey was 'eclectic' and often typical for its time in 13th century Poland, implying that Polish law was not well-developed and systematised during this period. He also cautions that any attempts by legal historians to make definitive judgements about this complex mix and to draw broad conclusions risks historic anachronism.[42] That being said, it is quite possible that much of Polish legal historical scholarship itself suffers from a recency bias, in that many of the historians were treating Poland as part of the civil, Roman, and statutory law traditions uncritically. Countervailing research on the *Magna Carta* and Piast Poland suggests that these categories cannot be applied so simply, and that giving more weight to comparing Polish customary law with English customary law may help reduce some of these 'eclecticisms.' It may be that while Piast Poland was a complex society going through a series of political and legal transitions, the models used to describe it from the reference

[40] Górecki, P., *A Historian*…, pp. 480, 483, 487, 512–515.

[41] Ibidem, pp. 517–518.

[42] Ibidem, pp. 485, 506, 511, 517.

of codified law may be obfuscatory. Along these lines, this article's examination of similar styles of *legal thinking* between Polish and English customary law is intended to be propaedeutic, rather than definitive. If the model of the transition from *customary law* to *common law*, rather than from *customary law* to *statutory law*, proves to be fruitful in clarifying 13th century Polish institutions, then broader investigations into a Polish common-esque law may be warranted.

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ACTA IURIS STETINENSIS 4 (28)

DOI:10.18276/ais.2019.28-08

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AMENDMENTS TO TRANSFER PRICING REGULATIONS SINCE 2019 – SELECTED ISSUES

Abstract

The aim of this paper is to describe the changes in the law that have taken place in the area of transfer pricing regulations starting 1 January 2019. First, the essence of the legal structure of transfer prices is presented. Then, the changes in the reclassification and omission of transactions for the purpose of transfer pricing, the catalogue of transfer price estimation and verification methods, and simplified settlement rules and changes in transfer pricing documentation are specified. The research method used in this research consists in analysis of legal acts using the literature on the subject. Based on the analysis, it may be concluded that, on the one hand, changes in the law were aimed at removing administrative burdens from taxpayers which the legislature considered unnecessary and, on the other hand, the scope of powers of tax authorities was extended and the potential severity of tax sanctions was increased.

Keywords: transfer prices, safe harbour, transfer pricing documentation

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Introduction

The Act of 23 October 2018 amending the Act on personal income tax, the Act on corporate income tax, the Tax Ordinance Act, and some other acts[1] introduced a number of changes in the tax law, which, for the most part, came into effect on 1 January 2019.[2] The significant changes introduced by the amending act include the provisions relating to transfer pricing. The legislature decided to introduce several new legal institutions. In individual cases, the changes were of an organisational or clarifying nature. Some particularly important solutions adopted in the amendment relate to modifying the procedure for reclassifying and omitting transactions, introducing the 'safe harbour' simplifications, extending the list of transfer price estimation and verification methods, modifying the sanction rate, and exempting domestic entities from the documentation obligation. In order to organise the regulations, Chapter 4b 'Transfer Pricing' was added to the Personal Income Tax Act of 26 July 1991[3] (PIT Act), while in the Corporate Income Tax Act of 15 February 1992[4] (CIT Act), this chapter was marked 1a.[5]

Transfer prices are important for tax audits. The total upward adjustment of the tax base in transfer prices in Poland in 2016 was 650 million PLN, and in 2017 it was 2.3 billion PLN.[6]

The essence of the legal construction of transfer pricing

The essence of transfer pricing regulations is that related parties (associated companies) should agree the terms and conditions of their mutual transactions in the same way as unrelated parties would have agreed them. This concept is

[1] Dz. U. (Journal of Laws) of 2018, item 2193.

[2] The amended act contains provisions relating, among others, to taxation of virtual currencies, reporting of tax schemes, innovation box, taxation of income from unrealised gains (so-called exit tax). Besides, the provisions on the general anti-tax avoidance clause and the provisions on the withholding tax have been modified, in particular by clarification of the "real owner" definition. Provisions establishing a new legal institution defined by the legislator as an "additional tax liability" have been also introduced.

[3] Consolidated text: Dz. U. (Journal of Laws) of 2018, item 1509, as amended.

[4] Consolidated text: Dz. U. (Journal of Laws) of 2018, item 1036, as amended.

[5] Transfer prices are not particularly specific in terms of taxpayer, and that is why the PIT Act and CIT Act regulations are almost identical.

[6] Georgijew, I., Każuch M., *Spór o ceny transferowe – perspektywa podatnika*, "Przegląd Podatkowy" 2018, No. 9, p. 22.

referred to as the arm's-length principle.[7] If the arm's-length principle is breached, the tax authority is entitled to determine the income/loss of a taxpayer without taking into account the conditions resulting from the relationship between the related parties. The definition of the related parties distinguishes three planes, within which the parties concerned are considered related: personal and capital links, as well as exerting an actual influence on the activities of these entities.

Transfer prices are intended to address the problem of creating networks of links between businesses who use existing mutual relationships to achieve the best possible tax result for all entities in a given group. The use of transfer pricing shows the inconsistency between civil law and the economic reality of international groups of entities. Entities that constitute separate legal entities under civil law operate within a group in economic terms, where the interest of the group as a whole is the priority. As a result, a given taxpayer may deliberately strive to obtain the highest possible tax loss if it contributes to a favourable tax treatment of all entities in the group. Being independent under civil law may be deemed contrary to the right of an entity to decide on any action taken by another entity based on the links that exist between them. If an entity within a capital structure deliberately acts to its disadvantage in order to contribute to the advantageous tax effect for the group as a whole, this action may be considered as detrimental to the entity according to Article 296 of the Penal Code of 6 June 1997 (hereinafter: the Penal Code).[8] According to Article 296(1) of the Penal Code, whoever – while under an obligation resulting from the provisions of law, a decision of a competent authority, or a contract to manage the property or business of a natural person, a legal person, or an organisational unit which is not a legal person, by exceeding powers granted to him/her or by failing to perform his/her duties– causes it to suffer considerable material damage shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.[9]

[7] This principle, introduced to Polish legislation, is based on Art. 9 of the Model OECD Convention on income and on capital. Accessed on: 25.07.2019, https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en#page1. See: Georgijew, I., Każuch, M., op. cit., p. 21.

[8] Consolidated text: Dz. U. (Journal of Laws) of 2018, item 1600, as amended.

[9] Until 2011, a provision establishing liability for acting to the detriment of the company was also contained in the Act of 15 September 2000, the Commercial Companies Code. Pursuant to its Article 585(1), whoever, participating in the creation of a commercial company or partnership or being a member of the management board, supervisory board or audit commission, or a liquidator thereof, acts to its detriment shall be liable to penalty of a deprivation of liberty of up to five years and a fine.

The presented problem was referred to by the District Court in Białystok in its judgement of 20 March 2014.[10] One of the issues that were subject to the court's decision was to decide whether an action to the detriment of a subsidiary which is also advantageous from the point of view of the capital group as a whole may be considered lawful and, if so, under what conditions. The court did not provide an explicit answer to this question. The court observed that there are no regulations in Polish law relating to capital groups which would clearly resolve doubts connected with the relationship between the interest of the group and the interest of the company participating in the group. As the court concluded in this case, the finding that damage has been caused to a subsidiary may not automatically translate into criminal liability of the management board of that subsidiary. As stated in the judgement, in each case where the court finds the defendant acted to the disadvantage of a subsidiary, it must consider whether the action was based on the applicable law and whether and within what timeframe the entity in question was to obtain specific benefits. It should then be assessed whether these benefits would justify the initial adverse action and its consequences. It is important here that the issue of the admissibility of actions to the detriment of a subsidiary from the point of view of obtaining benefits by a capital group should in any case be examined in detail.[11]

International groups avoiding pursuing their claims in court is also a unique feature of transfer pricing. This is mainly due to the fact that transfer pricing disputes are mainly connected with the economic results of the transactions concerned. In this case, an assessment of a given event must be based on economic knowledge.[12]

Reclassification and omission of transactions

Article 11c(4) of the CIT Act was particularly controversial among the regulations adopted by the amendment in question. This provision relates to the reclassification, also referred to as recharacterisation, and omission of a transaction, which is also referred to as non-recognition. In accordance with Article

[10] Judgement of the District Court in Białystok of 20 March 2014, VIII Ka 491/13, LEX No. 1722360.

[11] Pobożniak, G., Sowa, T., *Jaka odpowiedzialność za wyrządzenie szkody majątkowej spółce*. Accessed on: 17.11.2019 https://www.rp.pl/Firma/311179980-Jaka-odpowiedzialnosc-za-wyrzadzenie-szkody-majatkowej-spolce.html.

[12] Georgijew, I., Każuch, M., op. cit., p. 23.

11c(4) of the CIT Act, in the event that the tax authority deems that in comparable circumstances, unrelated parties – guided by commercial rationality – would not have entered into a particular controlled transaction or would have entered into another transaction or would have carried out another action – referred to as the 'relevant transaction' – taking into account 1) the conditions that would have been agreed between the unrelated parties and 2) the fact that the terms and conditions agreed between the related parties preclude the determination of a transfer price at a level that would have been agreed by unrelated parties guided by commercial rationality, taking into account options that were realistically available at the time of the transaction, the tax authority shall determine the taxpayer's income/loss without taking into account the controlled transaction and, if justified, shall determine the taxpayer's income/loss from the relevant transaction in relation to the controlled transaction. Pursuant to Article 11c(5) of the CIT Act, the reclassification or omission of a transaction may not be based solely on the difficulty in verifying the transfer price by the tax authorities or the lack of comparability of transactions between unrelated parties in comparable circumstances. In addition, pursuant to Article 11d(5) of the CIT Act, the reclassification of a controlled transaction into another relevant transaction results in the tax authority applying a method of determining an appropriate transfer price for the newly identified relevant transaction. Such a legal construct is provided for in the OECD Guidelines.[13]

Doubts have been raised over the statement of the authors of the amendment that the regulation is of a clarifying nature. This means that the legal constructions of reclassification and non-recognition of transactions may be also applied to transactions concluded before 1 January 2019. It is noted in the literature that repealing Article 11(1) of the CIT Act and replacing it with the regulation of Article 11c of the CIT Act is of a legislative nature and that there are no convincing arguments for considering this change to purely clarifying. It is argued that Article 11c of the CIT Act includes content which was not explicitly included in the repealed Article 11 of the CIT Act.[14]

[13] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017. Accessed on: 25.07.2019 https://read.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2017_tpg-2017-en#page1. Hereinafter: "the Guidelines", chapter I paragraphs 1.119 – 1.128.

[14] Litwińczuk, H., *Przekwalifikowanie (nieuznanie) transakcji dokonanej pomiędzy podmiotami powiązanymi w świetle regulacji o cenach transferowych przed i po 1.01. 2019 r.*, "Przegląd Podatkowy" 2019, No. 3, p. 17.

Legal instruments indicated in Article 11c(4) of the CIT Act provide the tax authorities with broad competences. Without the right to reclassify or omit a transaction, a tax authority who wishes to challenge the terms of a transaction is only entitled to modify them. For example, the tax authority could change the interest rate on a loan agreement, but it would not have the right to treat the agreement not as a loan agreement but, for example, a donation agreement. The adopted solution is similar to the legal possibilities available to the tax authorities under the general anti-tax avoidance clause.

The tax authorities should use transaction reclassification and omission instruments after a detailed analysis of the substance of the transaction. These instruments interfere with the taxpayer's transactions to a far greater extent than a simple change in the terms of the transaction by the tax authority.[15] In the opinion of Iwona Georgiyew, the new regulations do not specify what kind of analysis should be carried out by the tax authorities in order to establish that the taxpayer's transaction does not reflect commercial rationality and, as a consequence, that it should be reclassified or omitted.[16] According to the OECD Guidelines, a transaction may be reclassified or omitted after the real substance of the transaction has been determined (referred to as the delineation). Tax authorities have been provided with their powers as part of the legal construct of the discretion. The only premise for applying the reclassification or omission of the transaction is an indication that in comparable circumstances unrelated parties, guided by commercial rationality, would not have entered into a particular controlled transaction, would have entered into another transaction, or would have carried out another action.[17]

When regulating the issues of reclassification and omission of transactions, the legislature has insufficiently demonstrated the acceptability of using these constructions for transactions before 1 January 2019. In addition, due to the very intrusive nature of these instruments, these provisions should be clarified by more detailed rules for their applicability. Attention is especially drawn to the fact that a similar construct exists under the general anti-tax avoidance clause, which

[15] Georgijew, I., *Recharakteryzacja i pominięcie transakcji dla celów cen transferowych – nowe instrumenty ostatniej szansy*, "Przegląd Podatkowy" 2019, No. 2, p. 43.

[16] Ibidem, p. 41.

[17] Laskowska, M., *Zmiany w polskich regulacjach dotyczących cen transferowych*, "Przegląd Podatkowy" 2019, No. 1, p. 32; Koronkiewicz, J., *Podatkowa kostka Rubika*, "Przegląd Podatkowy" 2019, No. 4, p. 22.

defines in a much more precise manner the conditions for replacing a transaction with a relevant one (Article 119a(1) of the Act of 28 August 1997 – Tax Ordinance[18] [Tax Ordinance Act]) or recognition of such tax consequences as if the transaction had not been carried out (Article 119(4) of the Tax Ordinance Act).

Modification of the catalogue of transfer price estimation and verification methods

Starting 1 January 2019, the range of methods used to verify a transfer price has been extended. The basic methods to be used to verify and determine a transfer price are as follows: the comparable uncontrolled price method, the resale price method, the cost plus method, the transactional net margin method, and the transactional profit split method.[19] In addition to this catalogue, other methods have been allowed, including valuation techniques, if none of the above five methods can be used.[20] Additionally, hierarchy has been abandoned for the above five methods, which means that the taxpayer may choose the most appropriate method.[21] Application of the valuation techniques method may be particularly useful for intangible assets.[22] These could be valuation techniques based on an analysis of the discounted value of cash flows from the use of intangible assets.[23] A new concept has been introduced: intangible assets that are difficult to evaluate.[24] Research and development works are mentioned as an example.[25] A characteristic feature of intangible assets difficult to evaluate is that tax authorities have the right to investigate whether the financial information or data used in the calculation differ from the actual financial data and information; if the discrepancy

[18] Consolidated text: Dz. U. (Journal of Laws) of 2019, item 900.

[19] Art. 11d (1) of the CIT Act.

[20] Art. 11d (2) of the CIT Act.

[21] Mika, J. F., *Ceny transferowe. Komentarz do rozporządzeń. Metody szacowania i analizy cen transferowych. Obowiązki sprawozdawcze. Schematy podatkowe MDR*, Warszawa 2019, p. 40.

[22] Pachnik, J., *Wycena wartości niematerialnych i prawnych w transakcjach realizowanych pomiędzy podmiotami powiązanymi – analiza podatkowa*, "Przegląd Podatkowy" 2019, No. 6, p. 44.

[23] Ibidem, p. 44.

[24] Art. 1(3) of the Regulation of the Minister of Finance of 21 December 2018 on transfer prices in the field of corporate income tax, Dz. U. (Journal of Laws) of 2018, item 2491, hereinafter: "the Regulations."

[25] Pachnik, J., op. cit., p. 45.

between the forecast data and the actual data is at least 20% of the market price calculated using the forecast data, the authority may determine the transaction price based on the actual data, even though at the time of such transaction they were unknown to the parties.[26] This is an exception to the rule that in determining a taxpayer's income/loss in respect of the controlled transaction by estimation, the tax authority does not take into account circumstances – including comparative data which could not have been known to the parties at the date of the transaction and which, if known, could cause the parties to specify a higher or lower value of the object of such a transaction.[27]

To conclude, this amendment was intended to make things easier for taxpayers. The hierarchy of transfer pricing verification methods used by a taxpayer to show that a transaction was in line with market conditions was abandoned. Previously, the choice among the five methods was not arbitrary and it was necessary to justify the unsuitability of one method in order to be able to choose another. Additionally, the list of methods is now open: if none of the five methods under Article 11d of the CIT Act can be applied, the taxpayer may establish his/her own rules for verifying the market price, with justification.

Simplified settlement rules ('safe harbour')

As a result of the amendment to the Polish legal system, the simplified rules for transfer pricing settlements have been introduced, referred to as 'safe harbour,' following the OECD Guidelines.[28] The term safe harbour is not used only in the area of transfer pricing; these are generally conceived simplifications.[29] As indicated in the explanatory memorandum to the draft bill, the introduction of simplified solutions, (i.e. safe harbours), once applied by the taxpayer, results in the price or price element being considered the market price. The use of such a solution provides taxpayers protection against the transfer price being challenged by the tax authority and exempts the taxpayer from most of the documentation obligations. Such solutions are foreseen for two types of transactions: low-value-adding services and loans. These simplifications were introduced by Articles 11f and 11g of the CIT

[26] Cf. Art. 8 of the Regulation.

[27] Art. 7(1) of the Regulation, cf. Mika, J. F., op. cit., p. 35.

[28] Paragraph 7.61 of the Guidelines.

[29] For example Case C-362/14 *Schrems* of 6 October 2015, CURIA. The judgement concerns safe harbours for data transmission between countries.

Act. The essence of the simplifications is that a mark-up set by a taxpayer on prices of the low-value-adding services or an amount of the interest rate on a loan falling within the limit specified in those provisions will not be considered by the tax authority as non-market. Also, the documentation obligations have been facilitated.

Article 11f of the CIT Act provides for using safe harbours for low-value-adding services. This provision defines the concept of the low-value-adding services. In addition, Appendix 6 to the Act contains an exemplary catalogue of such services (e.g. bookkeeping, HR and payroll services, or general tax advice). Due to the fact that the value of the transfer price for the described services is determined on the basis of a cost mark-up, the taxpayer must have calculations specifying the type and amount of costs included in the cost base.

The safe harbours provided for loans assume that the taxpayer does not have to prepare a comparative analysis[30] of the loan transaction if the loan interest rate on the day of signing the contract is calculated from the base interest rate and profit margin specified in the announcement of the minister in charge of public finance, valid on the day of signing the loan agreement.[31]

If the services in question are deemed to meet the definition of low-value-adding services, or if the loan is deemed to meet the conditions of Article 11g of the CIT Act, the taxpayer may prepare transfer pricing documentation which does not contain a comparative analysis or compliance analysis (Article 11q(3) of the CIT Act). This means that there is no obligation to justify that the cost mark-up or interest rate does not differ from the amount that would have been agreed between unrelated parties.

Due to the fact that the tax authority does not verify the cost mark-up for low-value-adding services and interest rates on loans, when the safe harbour conditions are met, the tax authority may undertake verification of other aspects of these transactions. It will then verify whether the transaction in question has actually taken place and will verify the cost base. The tax authority will check whether the costs to which the mark-up has been applied have been correctly determined.

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[30] Comparative analysis is a key tool for examining whether the terms of the transaction comply with the arm's length principle. This is an analysis of unrelated parties or transactions concluded with unrelated parties or between unrelated parties, considered as comparable to the conditions established in controlled transactions (Article 11g(1)(3)(a) of the CIT Act, cf. Rawa, B. in: Mika, J. F. (ed.), *Leksykon cen transferowych*, Warszawa 2019, p. 38.

[31] Announcement of the Minister of Finance of 21 December 2018 on the publication of the type of base interest rate and margin for transfer pricing in the area of personal income tax and corporate income tax (Official Gazette of 2018, item 1868).

Changes in transfer pricing documentation

Two areas can be distinguished when analysing changes in transfer pricing documentation. The first one is an amendment to the rules governing the documentation obligations, and the second one relates to the consequences of not having the documentation required by law. The scope of documentation required after the new changes applies only to transactions carried out after 1 January 2019.[32]

Article 11n(1) of the CIT Act exempts transactions between related parties whose place of residence, registered office, or central management is in the territory of the Republic of Poland from the obligation to prepare documentation. The provision of Article 11n(1) of the CIT Act includes the detailed conditions for this exemption.

The amendment has repealed Paragraph 4 of Article 19 of the CIT Act, which provided for a 50% sanction to be imposed on the amount of upward adjustment made by the tax authority on a transaction with a related entity in the absence of tax documentation. One drawback of this solution was that the 50% rate could not be applied if the difference between income declared by the taxpayer and that determined by the authority was negative. New rules for imposing tax sanctions have been introduced. The regulation was included in the Tax Ordinance Act. Section III of the Tax Ordinance Act was supplemented with Chapter 6a, 'Additional tax liability.' The burden of liability for missing tax documentation was shifted to incorrect transfer pricing. As the authors of the amendment stated, there is currently no legal basis for imposing sanctions on a taxpayer who, despite having complete transfer pricing documentation, does not apply the arm's length principle and underestimates the tax base. Under the existing regulations, a taxpayer pays the basic rate of income tax on the amount of income adjusted upwards. This means that the currently applicable regulations on sanctions in cases concerning transfer pricing do not meet the assumption of having a preventive effect. A lack of transfer pricing documentation, due to the resulting difficulties for the authorities in auditing settlements and the increased costs of audits, will be a circumstance that allows the sanction rate to be increased in the case of an upward adjustment.

To sum up the changes in this respect, the legislature has exempted related parties in domestic transactions from the obligation to prepare tax documentation.

[32] Mika, J. F., op. cit., p. 20.

This obligation was considered superfluous, because domestic transactions cause much less erosion of the underlying base than transactions with an international element. The exemption from the documentation obligation does not mean that related parties in domestic transactions are not obliged to apply the arm's length principle, however. With the changes to the sanctions for missing tax documentation, the sanctions have become much more rational. The new sanction provides a greater incentive for related parties to verify whether transactions between them comply with the arm's length principle. The previous construction provided that a taxpayer who had tax documentation but did not comply with the arm's length principle was only obliged to pay taxes in the appropriate amount with default interest.

Conclusion

Transfer pricing regulations are subject to frequent changes. The changes that came into effect in 2019 are based on two priorities. Firstly, they aim to reduce the administrative burden on taxpayers; secondly, they are intended to make transfer pricing regulations more effective in achieving the objectives set before them. The task transfer pricing is faced with, i.e. to protect the state against the transfer of incomes to countries with more favourable tax rules, is difficult to achieve. It is common practice to develop a policy of mutual transactions between related parties so as to show the lowest possible income in countries with a high tax burden. Due to the fact that transfer pricing is based on the arm's length principle, in many cases it is highly disputable what the market price should be, and the tax authority may be unable to show taxpayers that the terms and conditions of their transactions differ from those that unrelated parties would agree upon.

The regulation on the reclassification and omission of transactions should be considered positive. It would be advisable to clarify this legal regulation in order to ensure that the tax authority does not have too much freedom in applying these instruments and in determining which transactions should be deemed relevant. My proposal is justified by the fact that both the reclassification and the omission of transactions are legal instruments of an extremely intrusive nature.

The changes in methods can be assessed as clearly positive. These changes provide taxpayers with greater flexibility. Introduction of safe harbours will allow the authorities to focus on elements of the transaction other than profit margins

and interest. It will be easier for the tax authority to analyse whether a given transaction has taken place at all and whether the costs on which a mark-up has been imposed have been correctly determined. I welcome the changes in sanctions for non-compliance with the arm's length principle. In the previous state of law, the sanction was inadequate and did not sufficiently dissuade taxpayers from breaching the regulations.

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ACTA IURIS STETINENSIS 4 (28)

DOI:10.18276/ais.2019.28-09

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ACCESS TO HEALTH AMONG WOMEN WITH DISABILITIES – LEGAL ASPECTS AND PRACTICAL PROBLEMS IN BULGARIA

Abstract

This scientific study is dedicated to the legal aspects and practical problems in the Bulgarian legislation of access to healthcare for women with disabilities. Its relevance comes from the growing need to understand the legal construction linked to the right to health of one of the vulnerable groups in society. Attention herein is directed to the existing legal framework in the People with Disabilities Act, the Health Act, the Health Insurance Act and the Medical-Treatment Facilities Act, as well as separate provisions in other legal acts. The analysis is accompanied by conclusions and suggestions for optimising practice and legislation.

Keywords: women with disabilities, people with disabilities, access, healthcare, Bulgarian law

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Introduction

People with disabilities, and in particular women with disabilities, are part of a modern society that has more specific needs than its other members, but that does not mean that they have lost the capacity to retain certain rights and their corresponding responsibilities; they just need more protection for their legitimate interests, resulting in broader engagement with institutions, both nationally and internationally. Women with disabilities face many difficulties in different spheres of public life that are of a medical, educational and working nature. Among those in need of consideration and suggestions for improving legislation is the area of access to healthcare. The urgency of the topic arises from the lack of specific legal provisions concerning the specific needs of women with disabilities in health services. Current regulations affecting the lives of disabled women include the Convention on the Rights of Persons with Disabilities (CRPD), the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the United Nations General Assembly on 18 December 1979, the Convention for the Protection of Human Rights and Human Dignity in relation to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Constitution of the Republic of Bulgaria, People with Disabilities Act, Health Act, Health Insurance Act, Medical-Treatment Facilities Act, and Ordinance No. 2 of 1 February 1990 on the conditions and procedures for artificial Interruption of pregnancy.

Legal concepts relating to access to healthcare for disabled women

The clarification of a main conceptual apparatus related to access to healthcare for women with disabilities contributes to a more comprehensive understanding of the issues. That is why we will consider separately notions such as 'healthcare,' 'people with disabilities,' 'health,' 'health information,' 'patient,' 'health records,' 'screening,' and 'informed consent.'

The Bulgarian legal doctrine and practice lacks a legally attached concept of healthcare. Therefore, the present work will present the structure of healthcare in the Republic of Bulgaria as derived from the relevant normative acts, namely the Health Insurance Act, Medical-Treatment Act and Health Act.

The main strategic framework for healthcare policy is defined by the Ministry of Health through the document 'National Health Strategy 2020,' which contains the priorities and policies that address the growing challenges for the health

of Bulgarian citizens. Included are ways of linking health policies with measures ensuring a level playing field, the necessary impacts on the social determinants of health, and the basic prerequisites for the functioning of the health system.

A critical part of the healthcare structure is the Bulgarian national health system, which is legally regulated and based on an insurance model that consists of compulsory and voluntary health insurance.[1] Compulsory health insurance provides a package of health activities guaranteed by the budget of the National Health Insurance Fund, while voluntary health insurance is carried out by limited public companies. The legal regulation of social health insurance is in the Health Insurance Act. The status, activity and legal instruments are arranged by the National Health Insurance Fund (NHIF). According to Associate Professor Pehlivanov, 'It is a public institution with a monopoly in the pursuit of its business.'[2] The main purpose of the NHIF is to ensure equal access to the health system for insured persons. The basic package of health services and their prices, guaranteed by the budget of the NHIF, are the subject of negotiations between the NHIF and the professional organisations of doctors and dental practitioners. This negotiation ends with the adoption of national framework contracts. National framework contracts are intended to be adopted for a period of three years and, where necessary or at the request of either party are updated in the order of their adoption.

The Medical-Treatment Facilities Act regulates the standard and activity of medical institutions in Bulgaria. They are independent actors in the health services market, and the medical institutions are organisationally separated structures of functional principle in which doctors or dental practitioners alone or with the help of other medical and non-medical professionals, carry out all or some of the following activities: diagnosis, treatment, and rehabilitation of patients, monitoring of pregnant women and delivery of maternity care, monitoring of chronically ill and threatened persons, prevention of diseases and early detection of diseases, measures to strengthen and protect, and transplantation of organs, tissues and cells (art. 2, para. 1 of the Medical-Treatment Facilities Act). The act defines three types of medical institutions. The first are medical establishments

[1] Ilieva, A., *Control in Healthcare*, Sofia 2018, p. 19.

According to Professor Mrychkov, 'The legal framework for health insurance in domestic law is contained in Art. 52 of the Constitution and in the new health insurance legislation created since 1998: Health Insurance Act, Professional Organisations of Doctors and Dentists Act, Medical-Treatment Facilities Act, Health Act, etc.' Mrychkov, V., *Insurance Law*, Sofia 2014, p. 441.

[2] Pehlivanov, K., *Independent Administrative Bodies in Parliamentary Governance*, Sofia 2016, p. 133.

for outpatient care. The second are medical institutions for hospital care. And the third are of mixed type[3] and include emergency medical centres, transfusion haematology centres, mental health centres, skin-venereal disease centres, complex oncology centres, homes for medical-social care for adults, centres for complex services for children with disabilities and chronic diseases, hospices, dialysis centres, as well as tissue banks.

The Health Act regulates the conditions for the exercise of a medical profession. Medical professionals in Bulgaria are natural persons holding a university degree in professional disciplines including 'medicine,' 'dentistry,' 'pharmacy,' and 'healthcare.' Medical care is a system of diagnostic, curative, rehabilitative, and prophylactic activities provided by medical professionals (§ 1, item 9 of the supplementary provisions of the Health Insurance Act). A detailed study on the concept of 'healthcare' was made by Dr Antonia Ilieva in her work 'Control in Healthcare.'

The CRPD was ratified, promulgated, and entered into force in the Republic of Bulgaria in 2012. It is a sign that the international community, and, in particular, national society, is ready to overcome the imposing millennia of understanding of people with disabilities as 'the subject of care' and will perceive them as 'entities' with equal rights. According to art. 1) of the Convention, people with disabilities are persons with a permanent physical, mental, intellectual or sensory insufficiency which, in interaction with their environment, may have the potential to regain their full and effective participation in society on an equal basis with others.[4] In the newly adopted People with Disability Act (PDA), in force since 1.01.2019, the Bulgarian legislator implemented, ratified and promulgated a law that entered into force in Bulgaria. Until the PDA was adopted, the term 'people with disabilities' had been legally enshrined only in art. 1) of the CRPD. And now, this concept is found in **§** 1, item 1 of the PDA.

In my opinion, the Bulgarian legislator needs to amend § 1 of the additional provisions of the PDA by adding the legal notion of 'women and girls with disabilities.' I believe that such a legislative approach will clarify the perception of women and girls with disabilities and will lead to filling the gaps in acknowledging their fundamental rights, in particular, access to healthcare.

[3] Zinovieva, D., *Medical Law*, Sofia 2016, p. 54.

[4] Miteva, I., *Specialized enterprises and cooperatives of people with disabilities – Legal regime according to the Bulgarian legislation*, "Society and Law" 2018, No. 9, p. 62.

In the Constitution of the World Health Organisation,[5] health is defined as one's complete physical, mental, and social wellbeing, not just the absence of disease or handicap. This shows how important health is considered at the international level.

Part of the legally enshrined concepts such as 'health information,' 'patient,' 'health records,' 'screening,' and 'informed consent' are set out in the Health Act. These definitions are of utmost importance in this work with a view to the perception of women with disabilities as equal participants in access to healthcare in the Republic of Bulgaria.

According to art. 27, item 1 of the Health Act, health information is personal data relating to the state of health, physical and mental development of individuals, as well as any other information contained in medical prescriptions, prescriptions, protocols, certificates and in other medical records.

In view of their right of access to healthcare, women with disabilities at certain stages are patients. The Health Act provides a legal concept for a patient in art. 84, para. 1, where it states that a patient is any person who has sought or has been medically assisted. According to Professor Zinovieva,[6] there has always been a lot of discussion about the exact definition of the concept of a patient in medical law. In summary, it may be formed of two principle opinions. The first is that a 'patient' is a person who suffers from disease. The second opinion is that a 'patient' is a person who needs medical attention and/or medical care.

In § 1, items 1, 6, and 15 of the additional provisions of the Health Act are the legal concepts of 'health records,' 'screening' and 'informed consent'. Health records comprise registration and stored health information. Screening is a targeted prophylactic study carried out within a particular programme to identify the prevalence of a particular sign, symptom or disease among a group of individuals. When accessing health services for women with disabilities, the practical problems often stem from the lack of, for example, screening for breast cancer or cervical cancer due to inaccessible medical equipment in relation to the specificity of the disability and the need to change the regulatory requirements for it. Informed consent is granted voluntarily after acquaintance with certain information. Art. 88 of the Health Act provides that the person who gives this information

[5] CWHO, https://www.who.int/governance/eb/who_constitution_en.pdf.

[6] Zinovieva, D., *Medical Law*, Sofia 2016, p. 139.

More on the concept of 'patient' in: Zinovieva D., *Rights of the patient – an analysis of the existing legislation in some specific hypotheses*, "Medical Law" 2008, No. 1.

to the patient about the person's condition or impending treatment is the attending physician. Also are listed the main points about which the patient needs to be informed, namely the diagnosis and the nature of the disease, a description of the objectives and the nature of the treatment, reasonable alternatives, expected results and prognosis, potential risks related to the diagnostic and therapeutic methods offered, including side-effects and adverse reactions, pain and other inconveniences, as well as the likelihood of a favourable response, the health risk in the application of other treatment methods, or in case of refusing treatment. Medical information should be provided to the patient in a timely manner and in appropriate volume and form.

Access to healthcare for women with disabilities – analysis of international acts

People with disabilities, and in particular women with disabilities, face at an international level many challenges stemming from the lack of specific legal measures related to their rights under individual national legislation and the absence of international instruments. Internationally, more often women with disabilities have a minimum income and are dependent on social services or their families. Thus, they are less able to pay for quality healthcare. Even in countries with free health services or health insurance, there will be additional costs for services and medicines that a person needs to pay for themselves. In many countries, access to health insurance depends on gainful employment or family status. Women with disabilities have higher health risks than women without disabilities. For example, physical disability can lead to lack of exercise and therefore to weight problems. The risk of osteoporosis, heart disease, high blood pressure, and diabetes are also associated with this. The social isolation associated with disability and illness involves the danger of depression, as well as of emotional, physical, and sexual violence. In addition, there are social and physical barriers present in, for example, doctor's offices, gynaecological surgeries, or early detection centres (e.g., mammography centres) – which are rendered unavailable or not adapted to the needs of women with disabilities. A major problem is the lack of knowledge that women with disabilities and their guardians or families have of basic preventive healthcare. In many societies, social constraints or the existence of cultural prejudices lead to not supporting the reproductive rights of

women with disabilities. Due to regulatory shortages, women with disabilities are still perceived as sexually explicit. This means that health services related to contraception, sexually transmitted diseases, prenatal classes[7] and birth control or infertility are either not adapted to the needs of women with disabilities or not taken into account in their personal backgrounds. Conversely, girls and women with disabilities are more often victims of sexual violence than women without disabilities are, or have to undergo forced sterilisation or to terminate their pregnancy.[8]

The UN Standard Rules on equality and equal opportunities for people with disabilities[9] are a key document in the national development of disability policies. It provides guidance on the development of a legal framework in the area of disability affecting the fundamental rights of persons with disabilities, namely education, labour rights, accessibility and health. One document, entitled 'Family life and personal integrity,' specifically focuses on women and girls with disabilities, and declares that states must take measures to change the negative relationship that still prevails in society towards marriages, sexual relations, and the parental qualities of people with disabilities, especially with regard to girls and women.

In light of the variety of barriers affecting women with disabilities as regards their health, the establishment of relevant governmental measures based upon the provisions in the text of the CRPD are aimed at guaranteeing the right to health. The CRPD states in its preamble that women and girls with disabilities are often at greater risk both inside and outside the home from violence, injury or harassment, disparaging or negligent treatment, abuse or exploitation. The Convention does not intend to create new rights or to influence national policies on the size of the family, reproduction, or other areas concerning disability. It does not require the adoption of new laws on reproductive health or related matters, but rather that people with disabilities, and in particular women and girls with disabilities, have the same, non-discriminatory access to the relevant health services. Art. 6 of

[7] Prenatal classes prepare women for what to expect during pregnancy and during childbirth and the immediate postpartum period.

[8] General discussion on women and girls with disabilities, United Nations Committee on the rights of persons with disabilities, 2014, http://www.fundacioncermimujeres.es/sites/default/files/general_discussion_on_women_and_girls_with_disabilities.pdf. Accessed on: 20.4.2019.

[9] Standard Rules on Equality and Equal Opportunities for People with Disabilities, Sofia 2000.

the Convention relates directly to women with disabilities. States that are parties to the Convention acknowledge that women and girls with disabilities are subject to multiple forms of discrimination and, in this regard, the signature states must take measures to assist them in their full enjoyment of all human rights and fundamental freedoms. One of these rights is access to healthcare. Member states therefore shall take all necessary measures to ensure the full development, social growth, and empowerment of women in order to ensure the recognition and enjoyment of human rights and fundamental freedoms as enshrined in this Convention. Healthcare is specifically regulated in art. 25 of the CRPD. This is primarily an anti-discrimination provision whereby states parties ensure that the health services provided can also be used by persons with disabilities without discrimination on the grounds of their disability. As this is a non-discriminatory clause, it shall immediately apply.

In the area of sexual and reproductive health, this could lead to the following measures, which should be publicly promoted and supported. People with disabilities, in particular women with disabilities, must receive sexual education equal to young people without disabilities and in a comprehensible way. This should include education on the legal methods of family planning and the dangers of sexually transmitted diseases. Social, medical, or family prejudices, according to which women with disabilities should be asexual, must be discarded. Bodily changes during puberty, care during menstruation, or first sexual experience should be discussed openly with young women with disabilities as well as, if necessary, with families or caretakers. As women with disabilities are at greater risk of becoming victims of sexual violence, they need help to learn how to recognise and defend against sexual violence. The independence of women with disabilities should be supported using family planning methods or other legal methods for regulating fertility. When choosing methods of contraception, care should be taken about the possible higher risk of thrombosis in women with disabilities. Sterilisation or abortion should only be carried out on a consensual basis, as defined in art. 25 (d) of the Convention. People with disabilities, particularly women with disabilities, should be informed about all the factual possibilities of reproductive healthcare services in formats adapted to them. Reproductive healthcare services should also be accessible and acceptable to persons with disabilities. Moreover, women with disabilities in adolescence should have the possibility of basic gynaecological health services. Adequate,

sensitive healthcare must be provided. Gynaecological examinations should not be directed to specialists in the field of the relevant disability, but rather common gynaecological practices should be accessible. Physicians and other medical personnel should be aware that disabilities in women are not sexually transmitted, but that they may have sexually transmissible diseases, unwanted pregnancies, and breast or cervical cancer. Early prophylactic examinations for breast cancer should be carried out more often for women with disabilities, depending on the extent to which these individuals have paraesthesia[10] in their hands due to their disability. Since oral examinations can be difficult due to physical disabilities, it is important that medical staff know the possible transfer techniques or alternative inspection positions, and that they can help the patient relax. For pregnant women with disabilities and their partners, medical advice should be provided during pregnancy, childbirth and postpartum. Their decisions on prenatal diagnostics should be respected.[11]

The Universal Declaration of Human Rights of 1948, in art. 25, defines a right of living level, including medical care, suitable for the health and wellbeing of each person. As the first legally binding treaty, the International Economic Act, Social and Cultural Rights (IAESCR) of 1976 contains the right of everyone to benefit from the highest attainable standard of physical and mental health (art. 12 of the IAESCR). As in the CRPD, the right to health is also included in the Convention on the Rights of the Child (art. 24) and the Convention on the Elimination of All Forms of Discrimination against Women (art. 12). Provisions on the right to healthcare are also available in the Convention for the Protection of Human Rights and Human Dignity in relation to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (art. 5–art. 16). In addition, the right to health is established in regionally binding human rights treaties, such as the Council of Europe's European Social Charter.

[10] Paraesthesia is a spontaneous, arousing, non-palpable manifestation that is most commonly described as skin tingling. Similar sensations can be experienced by any individual in the form of acroparaesthesia in violation of the blood supply to some of the limbs. In such cases, acroparaesthesia is temporary and completely reversible after removal of compression on the arteries of the limb. Paraesthesias can be caused by affecting all parts of the somatosensory system – from the peripheral nerve to the somatosensory cortex. Shotekov, P., *Neurology*, Sofia 2010, p. 35.

[11] General discussion on women and girls with disabilities, United Nations Committee on the rights of persons with disabilities, 2014, http://www.fundacioncermimujeres.es/sites/default/files/general_discussion_on_women_and_girls_with_disabilities.pdf. Accessed on: 20.4.2019.

Interest in this article of the Convention stems from the widespread pseudo-science of the past – eugenics, the idea of which is that the human race can be perfected, purposefully, by artificial abortion to multiply the desired and eliminate undesirable qualities. A 1914 report on the most effective practice of eliminating a defective genetic resource among the American population, prepared by a commission at the American Breeders' Association, argued that 'the genetic resource must be seen as not just the individual who is the bearer of the society.' As the main means of reducing a defective genetic resource, the report recommended isolation, sterilisation, and, accordingly, re-education of the ten percent of the population that it described as 'socially unadjusted.' It also included a modelling law for sterilisation. It foresaw the sterilisation of parents of potentially socially unadapt offspring: 'Mentally backward, mental, criminals, epileptics, alcoholics, sick, blind, deaf, handicapped and people, unable to survive without help.' In 1907, the first law authorising forced sterilisation of armed criminals, mental patients, rapists, and the mentally 'retarded' was adopted in the state of Indiana. By 1931, already 30 states had adopted similar acts. In the United States, there are cases in which the applicants insisted that these acts violate the right to equal protection and the right to a fair trial provided for in the Fifth and Fourteenth Amendments to the US Constitution. So, a few bills were rejected, but in 1927, the Supreme Court supported an act in the state of Virginia, prepared with the aim of eliminating such legal obstacles. With it, the sterilisation of Carrie Buck was carried out.[12]

Under the CRPD, forced, forced or non-conformable sterilisation is a violation of human rights, and women with disabilities have the right to keep their birth rates on an equal footing with others. The guidelines of the International Federation of Obstetrics and Gynaecology state that only women themselves can give ethically valid consent to be sterilised, and sterilisation cannot be a condition for access to medical care or any other benefit. Despite legal prohibitions, forced sterilisation is used to limit the fertility of some people with disabilities, especially those with intellectual disabilities. The failure of some countries to prohibit forced sterilisation is challenged before the European Court of Human Rights (Gauer in France).[13]

[12] Johnson, A., *The Birth of Bioethics*, Sofia 2011, pp. 61–63.

[13] Stephani, O., *Women with disabilities and the justice system: rights without remedies* 2013, https://worldjusticeproject.org/news/women-disabilities-and-justice-system-rights-without-remedies. Accessed on: 20.4.2019.

Access to healthcare for women with disabilities in Bulgarian law

The Constitution of the Republic of Bulgaria, adopted on 12.07.1991 and currently in force, contains provisions relating to the fundamental rights of the citizens of the state (e.g., the right to health insurance), such as those pertaining to women with disabilities. The main provisions of the Constitution are art. 29, para. 2, art. 47, para. 2, and art. 52. In art. 14, the Constitution provides that family, motherhood and children are under the protection of the state and society. Furthermore, in art. 47, para. 2 of the Constitution, the mother shall benefit from the special protection of the state, which provides paid leave before and after childbirth, free obstetric care, relief of labour, and other social benefits. The right of social security and welfare and the right to health insurance are regulated, respectively, in arts. 51 and 52 of the Constitution. A fundamental right of citizens is the right to health insurance under the basic law. According to Professor Drumeva[14]:

'(…) the function of health insurance, and hence the right to health insurance is to avoid material difficulties in the treatment of the injured health of the insured person. The entitlement to health insurance must guarantee affordable medical care; it also includes the right of free use of medical care, but from art. 52, para. 1 comes an explicit assignment to the legislator to regulate the terms and conditions thereof. A special law is the Health Insurance Act, also the Health Act and the Medical-Treatment Facilities Act. From the overall framework of art. 52, the Constitutional Court concludes that the Constitution recognises people's health as a public good.'

The PDA of 1.01.2019 has as its object public relations related to the exercise of the rights of persons with disabilities. It is a special act, as in art. (4). Its basic principles are laid down, namely the personal choice and independence of persons with disabilities and their families, equal treatment and non-discrimination, social inclusion and full and effective participation of persons with disabilities and their families in social life and accessibility. In art. 5, para. 1, item 1, the PDA provides that one area of support for people with disabilities is healthcare, as in para. 2, which sets out a non-exhaustive list of means of support – medical, occupational, social, occupational and psychological rehabilitation, education and vocational training, services supporting employment, accessibility and reasonable facilities, social services, financial support, accessible information,

[14] Drumeva, E., *Constitutional Law*, Sofia 2018, pp. 787–788.

access to justice and legal protection, providing personal mobility with a maximum degree of independence, personal assistance, universal design, and other means. The news in the PDA is that for the first time it implements provisions of the CRPD, but the Bulgarian legislator has neglected to create legal rules specifically for women and girls with disabilities, who in the international and national scale are one of the most vulnerable groups of people with disabilities, especially as regards their right to healthcare.

I believe that the Bulgarian legislator should introduce separate provisions in the PDA on the right to health of women and girls with disabilities, as it is a special act in the field of disability, and the CRPD in its art. 6 pays special attention to women with disabilities.

The Health Act entered into force in 2005 and repealed the Public Health Act (PHA -revoked). According to Professor Zinovieva,[15] 'it can practically be said that both laws constitute the "Constitution of health", as they regulate all the basic principle relationships in healthcare.' In art. 2 of the Health Act, the protection of citizens' health as a state of complete physical, mental and social wellbeing is defined as a national priority and is guaranteed by the state through the implementation of the principles set out in paras. 1–6. They are a level playing field in the use of health services, providing affordable and quality healthcare, priority for children, pregnant women, and mothers of children up to one year, priority of health promotion and integrated disease prevention, preventing and reducing the risk to citizens' health from the adverse effects of living environment factors, particularly the protection of the health of children, pregnant women, mothers of children up to one year and persons with physical disabilities and mental disorders, as well as state participation in the financing of activities aimed at protecting citizens' health.

In my opinion, it is necessary for the Bulgarian legislator to make the appropriate additions to art. 2, items 2 and 5 of the Health Act, as the principles are basic rules of conduct from which the state, citizens, and relevant organisations responsible for women with disabilities are governed. Item 2 should be supplemented with the phrase 'including those with disabilities' to provide affordable and quality healthcare, with priority for children, pregnant women and mothers of children up to one year old. Art. 5 should be supplemented with language extending the scope of the types of disability, besides physical and psychological,

[15] Zinovieva, D., *Medical Law*, Sofia 2016, p. 30.

to add intellectual and sensory difficulties, as in the legal notion of people with disabilities' in art. 1) of the CRPD and § 1, item 1 of the additional provisions of the PDA.

Chapter Three of the Health Act refers to medical care, with provisions on the availability and quality of medical care provided in Section One. Every Bulgarian citizen, including women with disabilities, is entitled to affordable medical care. Section Two regulates the rights and obligations of patients. Here, it is important to emphasize that women and girls with disabilities are also patients at certain stages of their lives and need adequate health services on an equal footing with other members of society. Art. 85 of the Health Act is an anti-discrimination provision that stipulates that the patient is provided with healthcare regardless of the listed social signs, including disability and type and cause of the disease. In art. 86, para. 1, the same law exhaustively regulates the rights of the patient, and art. 87 refers to informed consent of the patient. When the patient is underage or is placed under limited guardianship, it is necessary to carry out medical activities in addition to the patient's informed consent and the consent of a parent or guardian. When the patient is a minor or incapacitated, informed consent is expressed by the parent or guardian, except in cases provided by the act. Chapter Four of the Health Act defines the health protection of certain populations.

In my view, it is necessary to establish in Chapter Four of the Health Act a section dedicated to the health protection of women and girls with disabilities. This is because they are a vulnerable group of society and are often subjected to double discrimination – by gender and disability. Also, women with disabilities are at increased risk to their health than are women without disabilities. For example, physical disability can lead to a lack of exercise and therefore to weight problems. The risk of osteoporosis, heart disease, high blood pressure and diabetes is also associated with this. Furthermore, the social isolation associated with disability and illness involves the danger of depression, as well as of emotional, physical, and sexual violence. In addition, there are social and physical barriers such as those found in doctor's offices, gynaecological surgeries or early detection centres (e.g., mammography centres) that are unavailable or not adapted to the needs of women with disabilities. A major problem is the lack of knowledge that women with disabilities and their guardians or families have for basic preventive health care. What is more, practical, social constraints or the

existence of cultural prejudices lead to not supporting the reproductive rights of women with disabilities.

Section Two, Chapters Three and Four of the Health Act are devoted, respectively, to reproductive health and assisted reproductive and genetic health and genetic research. A detailed study of genetic health was made by Professor Mariela Deliverska.[16] Chapter Five of the act is devoted to mental health.

Important provisions on access to healthcare for women with disabilities are also contained in the Health Insurance Act (for example, for the status of NHIF, for assistive devices, and for devices for people with disabilities) and the Medical-Treatment Facilities Act (types of institutions, which women with disabilities can visit).

Ordinance No. 2 of 1 February 1990 on the conditions and procedures for artificial termination of pregnancy regulates the conditions and procedures for the artificial termination of pregnancy (abortion).[17] This ordinance is issued on the basis of § 11 of the National Health Act (cancelled). According to it, the decision to perform an abortion may be done in one of two ways – optionally or medically. Of interest is abortion based on medical indicators, provided in arts. 12–17 of the ordinance. These are performed at the request of a pregnant woman in the presence of a disease, undoubtedly proven and documented, in which the further course of pregnancy or childbirth can endanger the life or health of the woman or the vitality of the offspring (for example, mental illnesses) and within a period of gestation no greater than 20 weeks. If the disease is not listed in Appendix 2 of the ordinance, abortion may be granted by exception. Abortion exceeding 20 weeks of gestation is allowed only if there are urgent reasons to save a woman's life or with proven course of morphological changes or severe genetic damage to

[16] Deliverska, M., *Genetic Discrimination, Nature, Regulation and Protection*, Sofia 2013. Also Miteva, I., *Legal and Ethical Issues in the Application of the Regulation of Genetic Research in Bulgaria*, "Norma" 2017, No. 2.

[17] Abortion – sweeping; premature birth; abortion – Boychev, G., *Legal Latin-Bulgarian Dictionary*, Sofia 2004, p. 17. Abortion is the termination of pregnancy. Abortion constitutes a crime when committed in violation of provisions governing its lawful conduct – illegal abortion. The Penal Code (CC) provides for aggravated liability when the defendant does not have a university degree in medical education, upon re-performance, when performed without the consent of the pregnant woman, or when the patient dies as a result of abortion. A pregnant woman has no criminal liability. Georgiev, Ch., Velinov, L., *Legal Dictionary*, Sofia 1994, p. 9.

the foetus.[18] A pregnant woman with the designated disease visits her GP, which shall immediately provide the necessary clinical and paramedical examinations and consultations and refer the case to the relevant special medical committee with direction, accompanied by the results of the examinations, consultations and other medical documents justifying abortion by medical evidence. Abortion in medical indications is carried out in specialised obstetric-gynaecological hospitals and in regional, interregional and national multi-profile hospitals in the obstetric-gynaecological (gynaecological) clinic or ward.

Conclusion

Gaps in legislation on women with disabilities and in particular their access to healthcare still exist in places in Bulgarian laws. Therefore, *de lege ferenda* needs the Bulgarian legislator to make a positive change in § 1 of the additional provisions of the PDA by adding the legal notion of 'women and girls with disabilities.' I believe that such a legislative approach will clarify the perception of women and girls with disabilities and will lead to the filling of gaps in acknowledging their fundamental rights, in particular access to healthcare.

The author also believes that the Bulgarian legislator should introduce separate provisions in the PDA on the right to health of women and girls with disabilities, as it is a special act in the field of disability, and the CRPD, in its art. 6, pays special attention to women with disabilities.

Moreover, it is necessary for the Bulgarian legislator to make the appropriate additions to art. 2, items 2 and 5 of the Health Act, as the principles are basic rules of conduct from which the state, its citizens and relevant organisations responsible for women with disabilities are governed. Item 2 should be supplemented with the phrase 'including those with disabilities' to provide affordable and quality healthcare, with priority for children, pregnant women and mothers of children up to one year of age. Item 5 should be supplemented by extending the

[18] The decisions of the European Court of Human Rights are of interest. Where the law permits abortion only in cases of malformation of the foetus, there should be an adequate legal and procedural framework to ensure that the pregnant woman is provided with all relevant, detailed and reliable information on the health of the foetus. By creating such a clear framework and allowing the doctors to unduly delay the issuance of the genetic test referral, the Polish authorities violated the applicant's privacy. According to the court, it also constitutes degrading treatment within the meaning of Art. 3 of the Convention (Convention for the Protection of Human Rights and Fundamental Freedoms) – R. R. v. Poland, No. 27617/04.

scope of the types of disability, besides physical and psychological, to add intellectual and sensory difficulties, as in the legal notion of 'people with disabilities' in art. 1) of the CRPD and § 1, item 1 of the additional provisions of the PDA.

The author also believes that it is necessary to establish in Chapter Four of the Health Act, a section dedicated to the health protection of women and girls with disabilities, as they are a vulnerable group of society and are often subjected to double discrimination – by gender and disability. More arguments to support the proposal are that women with disabilities are at increased risk to their health than women without disabilities. For example, physical disability can lead to lack of exercise and therefore to weight problems. The risk of osteoporosis, heart disease, high blood pressure and diabetes are also associated with this. The social isolation associated with disability and illness involves the danger of depression, as well as of emotional, physical and sexual violence. In addition, there are social and physical barriers such as those found in doctor's offices, gynaecological surgeries or early detection centres (e.g. mammography centres) that are made unavailable as they are not adapted to the needs of women with disabilities. A major problem is the lack of knowledge that women with disabilities and their guardians or families have of basic preventive healthcare. Practically, social constraints or the existence of cultural prejudices lead to not supporting the reproductive rights of women with disabilities.

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ACTA IURIS STETINENSIS 4 (28)

DOI:10.18276/ais.2019. 28-10

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TAXATION OF FREE-OF-CHARGE EMPLOYEE BENEFITS. GLOSS TO THE JUDGEMENT OF THE SUPREME ADMINISTRATIVE COURT OF 29 NOVEMBER 2018, II FSK 799/18

Abstract

In this paper, the author presented his critical view of the position which the Supreme Administrative Court expressed in its judgement of 29 November 2018 (II FSK 799/18).[1] The case in question concerned taxation of free-of-charge employee benefits, which consisted in providing an employee with accommodation in the place of secondiment. The court stated that, as a result of using the accommodation provided, the employee obtained taxable revenue. The author conducted a dogmatic and legal analysis of applicable provisions of the Personal Income Tax Act of 26 July 1991 and referred to views expressed in the doctrine of law and numerous judgements passed by administrative courts. The author paid particular attention to discussing the ruling of the Constitutional Tribunal of 8 July 2014 (K 7/13), in which the conditions under which a free-of-charge employee benefit may be deemed as revenue were described. Furthermore, the author expressed his critical view of the conclusions which arise from the resolution of the Supreme Court of 10 December 2015 (III UZP 14/15) and which the

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[1] Central Database of the Jurisprudence of Administrative Courts (Centralna Baza Orzeczeń Sądów Administracyjnych, hereinafter CBOSA).

Supreme Administrative Court passively accepted in its grounds of the judgement in question. Finally, the author demonstrated that in the case in question, the requirement to provide the benefit in the interest of the employee was not met, and thus the benefit should not have been deemed the employee's revenue.

Keywords: personal income tax, employment relationship, free-of-charge employee benefits, employee accommodation, secondment

Introduction

The judgement of the Supreme Administrative Court (hereinafter: "the SAC") discussed herein concerned the matter of taxation of free-of-charge benefits provided by the employer to its employees by means of ensuring accommodation for the latter in the place of work, which is at a significant distance from their place of residence. In the judgement in question, the SAC definitely departed from the current manner of interpretation of the provisions of the Personal Income Tax Act (hereinafter: "the PITA")[2] which apply to such employee benefits.[3] It is an important matter from the perspective of income tax payers and remitters alike, as categorising such benefits as taxable revenues directly affects the amount of the income tax paid by the employees. Furthermore, it gives rise to the obligation on the side of the employer to collect an appropriate income tax prepayment.[4] This matter is often a subject of disputes between taxpayers and tax authorities, for the applicable regulation leaves large room for interpretation. Moreover, non-salary benefits have recently become very common.[5] Authorities competent to issue tax law interpretations generally take the view that providing employees with overnight accommodation during work away from their place of residence represents their revenue. The opposite view is held by income tax

[2] Personal Income Tax Act of 26 July 1991, Dz.U. (Journal of Laws) of 2019, item 1387, as amended.

[3] Judgements of the SAC of 19 September 2014, II FSK 2280/12; of 23 July 2015, II FSK 1689/13; of 15 April 2016, II FSK 635/14; of 17 May 2017, II FSK 1132/15. Available in CBOSA.

[4] Breach of this obligation entails the remitter's liability for tax offences under Article 78 of the Penal Fiscal Code Act of 10 September 1999, Dz.U. (Journal of Laws) of 2018, item 1958, as amended.

[5] Cf. Marczak, A., *Nieodpłatne świadczenia dla pracowników w świetle wyroku Trybunału Konstytucyjnego z dnia 8 lipca 2014 r., K 7/13*, "Przegląd Podatkowy" 2014, No. 10, p. 12.

remitters, most often employers from the construction and assembly industry that second their employees to work abroad. Consequently, they often request individual tax law interpretations.

Background information

The construction company that requested an individual tax law interpretation seconded its employees abroad. This was not travel for official duties within the meaning of Article 77[5] of the Labour Code,[6] for the applicable annexes to their employment contracts amended their workplace and remuneration payable.[7] The company (or its foreign counterparty) would rent, at its own expense, multi-person dwellings of differing standards, which it would subsequently make available to the employees. The company did not keep any detailed records of the utilisation of the accommodation, and it paid the costs of rent regardless of whether the flats were fully occupied or temporarily vacant. The company argued that it had to pay for overnight accommodation in order for its employees to be able to perform their official duties, and therefore the related cost could not be deemed as revenue from the employment relationship in accordance with Article 12, sec. 1 of the PITA.

At first, the Minister of Finance shared the company's view, but the favourable interpretation was changed *ex officio* in June 2016.[8] In his reasoning, the Minister pointed out that the value of the benefits concerned represented the employees' revenue, and therefore the company was under obligation to assess and collect the related income tax prepayments. In doing so, the Minister invoked Article 12, sec. 2 in connection with Article 11, sec. 1 and Article 12, sec. 3 in connection with Article 11, sec. 2-2b of the PITA. The company challenged the change to the interpretation before the administrative court, and the court

[6] Labour Code Act of 26 June 1974, Dz.U. (Journal of Laws) 2019, item 1040, as amended.

[7] Cf. Article 3 of Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Official Journal of the European Union L 18, 21.1.1997, pp. 1–6. More on the employer's obligations regarding secondment of employees to work abroad – see: Sokołowska, A., Skibińska, M., *Delegowanie pracowników za granicę*, Warszawa 2016, pp. 260–261.

[8] At that time, the Minister of Finance changed *ex officio* at least 14 individual interpretations issued in the period concerned. See: Szulc, M., Pokojska, A., *Spór o PIT od noclegów dla pracowników wróci do sądów*, "Gazeta Prawna" 15.09.2016. Accessed on: 9.11.2019 https://podatki.gazetaprawna.pl/artykuly/976069,pit-od-noclegow-pracownikow-problem-wraca-do-sadu.html.

supported the position of the company. In its reasoning, the administrative court of first instance explained that the expenses on providing overnight accommodation for the employees were incurred in the employer's interests, for they brought the employer a tangible benefit in the form of appropriate and effective performance of employee responsibilities and, furthermore, served reasonable organisation of work by making it less arduous. The Minister of Finance filed an appeal in cassation against that judgement arguing that it contained an incorrect interpretation of the provisions of the PITA. Taking into consideration the facts of the case, the SAC supported the position of the Minister. The SAC overruled the first instance judgement and dismissed the company's challenge, deeming the substance of the case as sufficiently clarified.[9]

Case analysis

I. One cannot agree with the SAC judgement. Based on a cursory interpretation of the provisions of law, the court erred in applying Article 12, sec. 1 of the PITA to the facts of the case and stating that the employees received revenues. Although in its reasoning the court cited extensive fragments of judgements passed by the Constitutional Tribunal and the Supreme Court, it failed to conduct an in-depth analysis of those judgements and thus drew unwarranted conclusions. Furthermore, a general conclusion that transpires from the reasoning in question is that revenue is generated each time overnight accommodation is provided free-of-charge to employees, which is in flagrant contradiction with the pro-constitutional interpretation of the provisions of the PITA proposed by the Constitutional Tribunal.

II. Which rules of substantive law should be applied as the basis of the judgement was not a contentious issue in the case in question. In accordance with Article 11, sec. 1 of the PITA, revenues include cash and pecuniary values received by or made available to the taxpayer in a calendar year, as well as the value of benefits in kind and other free-of-charge benefits. The SAC rightly pointed out that the legal definition of revenues and their statutory catalogue provided in Article 10 of the PITA are general. Therefore, the linguistic interpretation of the

[9] The SAC dismissed the challenge pursuant to Article 188 of the Act of 30 August 2002 Proceedings Before Administrative Courts, Dz.U. (Journal of Laws) of 2018, item 1302, as amended.

provisions concerned should be linked with an internal systemic interpretation.[10] In the case in question, they should be interpreted in connection with Article 12 of the PITA, where revenues from the employment relationship and similar revenues are described. The legislator recognises all benefits which require a legal bond between the employee and the employer as revenues from the employment relationship.[11] The catalogue of these revenues includes cash payments, the value of benefits in kind or equivalents thereof, the value of cash benefits paid for the employee, as well as a number of other free-of-charge or reduced-cost benefits. Of the aforementioned revenue catalogue, the term "other free-of-charge benefit," which was not defined by the legislator, raises the most serious doubts. This issue has been the subject of numerous disputes in literature and case law.[12]

The problems regarding the term "other free-of-charge benefit" were principally solved by the Constitutional Tribunal, which interpreted it in the context of employee benefits in its judgement of 8 July 2014 (K 7/13).[13] The Tribunal stated that the provisions of Article 12, sec. 1 in connection with Article 11, sec. 1 and Article 12, sec. 3 in connection with Article 11, sec. 2-2b of the PITA, interpreted as meaning that "other free-of-charge benefit" is only a material gain of individually defined value received by an employee, are compliant with Article 2 in connection with Article 217 of the Constitution of the Republic of Poland.[14] The said judgement is therefore an interpretative judgement that recognises at least one variant of interpretation of the rules as compliant with the Constitution.[15] In its reasoning for the judgement, the Tribunal explained that the scope of a free-of-charge benefit interpreted as revenue includes all economic phenomena and

[10] Mastalski, R., *Prawo podatkowe*, Warszawa 2016, p. 427.

[11] In other words, whether benefits are recognised as revenues from the employment relationship depends on whether a specific benefit may be received only by a specific employee. See: Marciniuk, J. (ed.), *Podatek dochodowy od osób fizycznych. Komentarz*, Warszawa 2017, p. 147.

[12] See: Koperkiewicz-Mordel, K., *Podatek dochodowy od osób fizycznych*, in: Nykiel, W. (ed.), *Prawo podatkowe w Polsce. Podręcznik akademicki*, Warszawa 2018, p. 191. Cf. judgement of the SAC in Wrocław of 12 May 1999, I SA/Wr 115/98, LEX No. 37247.

[13] Dz.U. (Journal of Laws) of 2014, item 947.

[14] Constitution of the Republic of Poland of 2 April 1997, Dz.U. (Journal of Laws), No. 78, item 483.

[15] More on interpretative judgements of the Constitutional Tribunal – see: Białogłowski, W., *Wznowienie postępowania w następstwie wydania przez TK wyroku interpretacyjnego*, in: Bernatt, M. et al. (eds.), *Skutki wyroków Trybunału Konstytucyjnego w sferze stosowania prawa*, Warszawa 2013, pp. 191–198; Woś, T., *Wyroki interpretacyjne i zakresowe w orzecznictwie Trybunału Konstytucyjnego*, "Studia Iuridica Lublinensia" 2016, No. 3, Vol. XXV, pp. 985–995.

legal occurrences that result in free-of-charge (i.e. not related to any costs or other equivalent forms) and financially tangible gain by the person concerned. The Constitutional Tribunal thus accepted the view expressed in resolutions adopted earlier by the SAC.[16] It also noted that for income to be recognised, it is necessary to have a material profit (gain), which may consist in either increasing the taxpayer's assets or avoiding the expenses (i.e. saving) which the taxpayer would have to incur. According to the Tribunal, only benefits that meet the following three conditions may be recognised as revenues: 1) they have been provided with the employee's consent (the employee has used them on a fully voluntary basis); 2) they have been provided in the employee's interest (not the employer's interest), and the employee has profited from them by increasing his or her assets or avoiding the expenses he or she would have to incur; 3) the profit is tangible and allocated to a specific employee (it is not generally available to all entities).

The judgement of the Constitutional Tribunal was welcomed both by the case law and the doctrine of law.[17] The requirements for a free-of-charge benefit to be recognised as revenue were cited in the case concerned by both the SAC and the court of first instance. However, the conclusions drawn from their analysis were completely different. Neither the company in the case nor the Minister of Finance challenged the fact that the requirements concerning the employee's consent and individualisation of the benefit had been met.[18] The doubts concerned only the assessment in whose interest the overnight accommodation at the place of work was provided. In the opinion of the SAC, the assessment arose directly from the reasoning for the judgement by the Constitutional Tribunal, which stated that the situation was completely clear when one's contract of employment specified benefits which the employer would provide to the employee, e.g. company

[16] Resolutions of the SAC of 24 May 2010, II FPS 1/10, CBOSA; of 24 October 2011, II FPS 7/10, CBOSA. The fact that the Constitutional Tribunal invoked the said resolutions has attracted the criticism of some commentators, cf. Mariański, A., Nowak-Piechota, A., *Glosa częściowo aprobująca do wyroku Trybunału Konstytucyjnego z dnia 8 lipca 2014 r., K 7/13*, "Przegląd Podatkowy" 2014, No. 11, p. 46; Olesiak, J., Pajor, Ł., *Glosa do wyroku Trybunału Konstytucyjnego z dnia 8 lipca 2014 r., K 7/13*, "Przegląd Orzecznictwa Podatkowego" 2015, No. 1, p. 13.

[17] Cf. Marczak, A., op. cit., pp. 13–20; Mariański, A., Nowak-Piechota, A., op. cit., pp. 43–46; Olesiak, J., Pajor, Ł., op. cit., pp. 10–13.

[18] It does not mean, however, that the requirements will be met in every case with similar facts. If there is objectively no alternative choice of accommodation at a given place of work, then it is doubtful that the "voluntary basis" requirement can be met. Furthermore, the benefit may occur impossible to be individualised when the employees are provided with a single large "rotation" flat in which they stay occasionally for a few days at a stretch at most. Cf. judgement of the VAC in Warsaw of 17 October 2017, III SA/Wa 2555/16, CBOSA.

flat, monthly transport ticket, health insurance package, transport to work (point 3.4.3 of the reasoning for the judgement by the Constitutional Tribunal). The SAC recognised the judgement by the Constitutional Tribunal as unambiguous in this respect and confined itself to a laconic statement that such a situation could be seen in the case in question.

However, the matter is not as obvious as the SAC said it was. Indeed, the court failed to thoroughly consider the issue of which of the parties – the employee or the employer – gains benefits. According to the Tribunal, a gain appears when an employee has received a benefit at his or her own disposal and can freely manage and use it to satisfy his or her own needs (point 3.4.2. of the reasoning to the judgement by the Constitutional Tribunal). In light of the facts of the case, however, the employee's rights to the dwelling made available to him or her were materially restricted. The rented flats remained at the disposal of the employer, who not only assigned specific flats to individual employees, but also paid the rent regardless of how long they actually used the accommodation. When an employer seconds employees to work abroad, giving them flats at their free disposal is certainly not in its interest. Indeed, the employer has no interest in allowing its employee to live there with his or her family, let any third parties into the flat, leave his or her belongings inside during his or her permanent absence or sub-rent the accommodation to third parties.[19] The freedom of disposal in this sense is what makes "a company flat," as referred to in the judgement by the Constitutional Tribunal, different from employee accommodation, which in fact is just a night shelter and a place to rest for the employee.

Furthermore, the position held by the SAC unjustifiably ignores the view taken by the Constitutional Tribunal as regards the gains obtained by an employee. According to the Tribunal, there is hardly any gain for the employee if he or she cannot take the benefit "outside the employment relationship" (point 3.3.2. of the reasoning for the Constitutional Tribunal). This is exactly so in the case concerned, for the overnight accommodation is strictly and solely linked with the employment relationship. One should note that the employees use the flat in their breaks from work. Contrary to what the SAC stated, such overnight accommodation is a nuisance rather than a benefit.[20] The employees are guided

[19] In principle, the tenant cannot hand over the rented property for free-of-charge use or sub-let it, without the landlord's consent – in accordance with Article 668^2 of the Civil Code Act of 23 April 1964, Dz.U. (Journal of Laws) of 2019, item 1145, as amended.

[20] Cf. judgement of the VAC in Warsaw of 10 March 2016, III SA/Wa 3984/14, CBOSA.

by their intention to earn an income, not to satisfy their private needs. Nobody would use accommodation provided by the employer if they were not seconded to work away from their place of residence.[21]

The view invoked by the SAC, according to which, in the absence of the benefit, the employee would have to pay for his or her housing needs himself or herself, should also be found as illogical and clearly removed from reality. Group accommodation is perceived by employees as one of the key requirements for providing work, a condition on which they base their consent to be seconded, and is not perceived as a component of their remuneration. Firstly, finding and renting a flat by the employee himself or herself is impossible or at least difficult due to a higher price (compared to group accommodation) and the need to finalise the related formalities, which requires foreign language competency. Secondly, the average construction worker cannot afford to pay a high deposit for renting a flat abroad, which in Germany may amount even up to three monthly rents.[22]

Finally, it should be emphasised that the employer, by offering group overnight accommodation, pursues its own interest, i.e. the intention to ensure the safety of its employees and effective utilisation of their working time. Regardless of whether the requirement to provide overnight accommodation is rooted in law or is just a fact, it is not a right, but rather an obligation on the side of the employee to use the overnight accommodation offered by the employer. Indeed, in the absence of such benefit, the employee would himself or herself have to find somewhere to stay. However, the case in question is not about any place of overnight stay, but about the one specific place selected and preferred by the employer. The fact that the employee stays there serves the employer's economic interests. This is connected with a thesis present in the case law, according to which overnight accommodation is a kind of "work tool". Although the thesis does not seem to be optimal, one has to admit that its supporters are correct.[23]

The above arguments clearly show that one cannot draw hasty conclusions from the verdict passed by the Constitutional Tribunal as the SAC did in its judge-

[21] Similarly – the VAC in Warsaw in its judgement of 7 February 2018, III SA/Wa 594/17, CBOSA.

[22] See § 551 Para. 1 Bürgerliches Gesetzbuch (German Civil Code). Accessed on: 9.11.2019. https://www.gesetze-im-internet.de/bgb/.

[23] Cf. judgements of the SAC of 2 October 2014, II FSK 2387/12; of 17 May 2017, II FSK 1132/15; judgement of the VAC in Warsaw of 18 October 2017, III SA/Wa 3045/16; judgement of the VAC in Gliwice of 25 October 2017, I SA/Gl 602/17. Available in CBOSA.

ment discussed in this paper. A comprehensive and thorough analysis of premises pointed out by the Tribunal, already at this stage of deliberations, leads one to conclude that the employee does not obtain any revenue as a result of using accommodation made available by the employer. However, one must not content oneself with this conclusion, for further in its reasoning, the SAC refers to other issues which undoubtedly had a certain impact on the final decision in the case in question.

III. The court could have certain doubts with regard to questioning whether the employer's obligations included the requirement to provide overnight accommodation to its seconded employees.[24] In order to dispel these doubts in interpretation, the SAC drew attention to the content of the resolution of the Supreme Court of 10 December 2015 (III UZP 14/15).[25] Although the resolution concerned mobile, and not seconded, employees, there are no obstacles that would prevent consideration of the view of the Supreme Court in the context discussed in this paper.[26]

The thesis of the said resolution of the Supreme Court is that revenues – in accordance with the provisions of the Social Insurance Scheme Act[27] – include the value of employee accommodation benefits provided by the employer, which thus constitute the basis for calculating social insurance contributions.[28] In its reasoning, the court clarified that a flat made available to an employee cannot be regarded as "a work tool," for it serves the satisfaction of off-work living needs (i.e. social needs). According to the Supreme Court, provisions of law do not oblige an employer to provide its employees with "a place of residence" in which

[24] The Labour Code stipulates the obligation to organise work in a manner that makes it less onerous (Article 94, point 2a of the Labour Code) and provides for full utilisation of the work time (Article 94, point 2 of the Labour Code). Commentators also call the latter obligation a reasonable work time organisation. See: Nałęcz, M., *Obowiązki pracodawcy*, in: Muszalski, W. (ed.), *Kodeks pracy. Komentarz*, Warszawa 2017, pp. 221–222; Świątkowski, A., *Kodeks pracy. Komentarz*, Warszawa 2018, p. 593.

[25] Jurisprudence of the Supreme Court: Labour Law, Social Security and Public Affairs Chamber (Orzecznictwo Sądu Najwyższego: Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych – OSNP), 2016/6/74.

[26] It should be clarified that mobile employees include, for instance, sales representatives, drivers, sometimes also construction workers, whose work requires constant mobility and whose place of work is defined as a specific geographical area. See: Sokołowska, A., Skibińska, M., op. cit., pp. 22–25.

[27] Social Insurance Scheme Act of 13 October 1998, Dz.U. (Journal of Laws) of 2019, item 300, as amended.

[28] "Revenue" within the meaning of the Social Insurance Scheme Act can be considered equivalent to "revenue" within the meaning of the PITA, and therefore the deliberations of the Supreme Court should be considered as relevant to the case in question.

they could satisfy their living needs.[29] If it is required to provide accommodation to an employee to enable him or her to work, then it is a factual – not legal – requirement which the employee must take into account when commencing work far away from his or her place of residence. The onerous nature of working away from one's life centre may only affect the amount of one's remuneration for work. Furthermore, the Supreme Court referred to Article Article 21, sec. 1, point 19 1, point 19 of the PITA, which in its view defines certain "other free-of-charge benefits," including the value of employee accommodation benefits provided by the employer, which is tax-free up to the amount of PLN 500 per month. In the view of the Supreme Court, that value is an employee's revenue, but up to the specific amount (PLN 500), it is considered by the legislator as a revenue earning cost.

Although the position held by the Supreme Court was by no means binding for the SAC, the latter fully accepted the views presented in the resolution. Thus, it moved away from the view established in the case law of administrative courts, according to which provision of overnight accommodation to employees falls within the scope of the reasonable work organisation obligation, provided that the use of such benefit is required for the employees to be able to meet their work responsibilities.[30]

However, the interpretation of the provisions of the Civil Code should not be given as much significance as the Supreme Court did and which the SAC passively accepted. Indeed, it is of crucial importance to resolve the two fundamental issues discussed in the judgement by the Constitutional Tribunal – namely, in whose interest it is to provide overnight accommodation and whether the employer does in fact "act in lieu of" its employee by paying the cost of the employee's accommodation in the latter's place of secondment. One should assume that the SAC deemed itself bound by the Constitutional Tribunal's judgement in this respect.[31] Therefore, the view held by the SAC should not incorporate

[29] The Supreme Court, probably by mistake, used the term "place of residence" instead of "accommodation." It would be completely absurd to admit that the court referred here to the term defined in Article 25 of the Civil Code. Indeed, a mobile employee (and a seconded employee, for that matter) never intends to reside permanently in a locality in which he or she provides work. Cf. Strugała, R., *Miejsce zamieszkania*, in: Gniewek, E. (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2017, pp. 65–66.

[30] Judgements of the SAC of 19 September 2014, II FSK 2280/12; of 2 October 2014, II FSK 2387/12; of 9 August 2016, II FSK 1970/14; judgement of the VAC in Warsaw of 28 September 2017, III SA/Wa 3309/16. Available in CBOSA.

[31] In principle, administrative courts accept that verdicts passed by the Constitutional Tribunal are universally applicable. See: Białogłowski, W., op. cit., p. 202.

those statements made by the Supreme Court which are in flagrant contradiction with the judgement of the Constitutional Tribunal. The Supreme Court's thesis referring to Article Article 21, sec. 1, point 19 1, point 19 of the PITA should be considered as such. Contrary to what the Supreme Court stated, the purposive interpretation does not lead to a conclusion that the inclusion of the employee accommodation benefit in the tax exemption catalogue would mean that revenue is always generated in such a situation. Referring to non-linguistic interpretation was unfounded in this case, for the findings of the linguistic interpretation leave no doubt.[32] Article 21, sec. 1 of the PITA states that "income tax-free are…," not that "the following revenues shall be exempt from the income tax." The Constitutional Tribunal clearly contradicted such purposive interpretation by stating that tax exemptions of specific employee benefits "rather show that the values subject to exemption are not considered by the legislator as an employee's income" (point 3.3.2. of the reasoning for the judgement of the Constitutional Tribunal).

Conclusions

The arguments presented herein speak in favour of the conclusion that the SAC's ruling is incorrect. In the context of the case analysed, the expense on accommodating a seconded employee was incurred in the interest of the employer. Therefore, one of the premises pointed out by the Constitutional Tribunal was not met. The position held by the SAC cannot be considered objective, as it partly adopts the approach of the Constitutional Tribunal, while disregarding the arguments speaking in favour of the taxpayer. It seems that by adopting the views expressed in the Supreme Court's resolution, the SAC fell into a routine manner of thinking by accepting that the taxation of free-of-charge employee benefits aims at completeness, i.e. at taxing all socio-economic phenomena.[33] It is hard to resist the impression that the SAC made its deliberations somehow in isolation from the facts of this specific tax case and referred generally to all cases of employee accommodation provided by employers. Such generalisation certainly cannot be justified in cases where the dispute concerns interpretation of an imprecisely defined term. Whether the requirements for recognising an employee benefit as revenue that arise from the Constitutional Tribunal's judgement are met

[32] As regards admissibility of the purposive interpretation – see: Brzeziński, B., *Podstawy wykładni prawa podatkowego*, Gdańsk 2008, p. 92.

[33] Ibidem, p. 64.

should be analysed *in concreto*, even in a seemingly obvious case where a flat is given to an employee at his or her free disposal.

For the abovementioned reasons, the change in the case law initiated by the judgement commented herein is difficult to accept. It can be seen in recent judgements by administrative courts that the interpretation of the law, which is unfavourable to taxpayers, has been expanded to include cases of accommodation of seconded and mobile employees,[34] as well as contractors.[35] However, the view expressed in the judgement discussed herein is still disputed.[36] Finally, one can hope that we are not in danger of a return to "the madness of taxing free-of-charge benefits," as it was colloquially described by Professor Bogumił Brzeziński a decade ago.[37]

[34] Judgement of the SAC of 23 July 2019, II FSK 2721/17; judgement of the VAC in Gorzów Wielkopolski of 8 May 2019, I SA/Go 163/19; judgement of the VAC in Gliwice of 8 July 2019, I SA/Gl 248/19. Available in CBOSA.

[35] Judgements of the SAC of 13 August 2019: II FSK 2724/17 and II FSK 2904/17; judgement of the VAC in Gliwice of 16 January 2019, I SA/Gl 871/18; judgement of the VAC in Rzeszów of 9 April 2019, I SA/Rz 136/19. Available in CBOSA.

[36] Judgement of the VAC in Warsaw of 14 December 2018, III SA/Wa 304/18 (non-final), CBOSA.

[37] Brzeziński, B., *Szaleństwo opodatkowania nieodpłatnych świadczeń*, "Kwartalnik Prawa Podatkowego 2010", No. 3–4, pp. 115–117.

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DOI:10.18276/ais.2019.28-11

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COMMENTARY (GLOSS) TO THE RESOLUTION OF THE PANEL OF SEVEN JUDGES OF THE SUPREME COURT OF 20 MARCH 2019, I KZP 15/18[1]

Abstract

The paper addresses the issue of an extraordinarily lenient penalty for crimes threatened with mandatory cumulative penalties of deprivation of liberty and fines. It was established that Article 60 § 6, point 2 of the Criminal Code clearly resolves this issue in a positive way and provides for imposing only the penalty of deprivation of liberty as an exceptionally lenient penalty. Thus, the author questioned the assertion that the extraordinary leniency in respect of the cumulative sanctions of imprisonment consists in the meting out of a sentence of imprisonment not less than one third of the lower limit of the statutory penalty and a fine pursuant to general principles.

Keywords: extraordinary leniency, cumulative fine, extraordinary punishment, counteracting drug addiction, crime

First, a bit of history, which is useful in interpreting the present legislation. As is known in the first Polish Penal Code of 1932, the method of extraordinary leniency was regulated by art. 59 § 1 points a-d. Instead of detention for up to 5 years,

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[1] OSNKW 2019, No. 4, item 20.

the court could impose a fine from 5 to 200 000 PLN (in the original wording of art. 42 § 1). Instead of imprisonment of more than 5 years (art. 59 § 1, point b or up to 5 years (art. 59 § 1, point c), detention could not be used if the offence was based on low motives (art. 59 § 2).[2] In many cases, particularly for property offences, such inclusion has prevented the application of extraordinary leniency.[3] Thus, it was not a successful regulation, and, therefore, in the post-war period it met with almost widespread criticism within the science of criminal law. Indeed, it was described as "*flawed, unclear and in need of a prompt amendment*."[4] The fact that the fine was not subject to extraordinary leniency deserves special attention.[5]

As is known, also against the background of the Penal Code of 1969, the dominant case law of the Supreme Court assumed that the fine was not subject to extraordinary leniency (both spontaneous and cumulative). This was the main argument in favour of the well-known resolution of a panel of seven judges of the Supreme Court of 16.12.1971, VI KZP 7/71.[6] The problem resolved by the Supreme Court appeared against the background of art. 3, point 1 of the Act of 22 April 1959 on Fighting with illegal spirits.[7] This position was then repeated by the Supreme Court in subsequent judgments. It was reminded in the voted resolution. All these judgments strongly emphasised that the Code's rules on extraordinary leniency apply only to imprisonment and not to fines.

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[2] See: Wolter, W., *Zarys systemu prawa karnego. Część ogólna*, Vol. II, Kraków 1934, pp. 96–97.

[3] See: Śliwiński, S., *Polskie prawo karne materialne. Część ogólna*, Warszawa 1946, p. 475.

[4] Ibidem; additionally Bafia, J., *Odpowiedzialność karna za przestępstwa przeciwko własności społecznej*, Warszawa 1960, p. 43; Andrejew, I., in: Andrejew, I., Świda W., Wolter, W. (eds.), *Kodeks karny z komentarzem*, Warszawa 1973, p. 241; Judgment of the Supreme Court of 2.09.1958, II K 793/58, OSPiKA 1959, No. 6, item 170.

[5] See: Siewierski, M., *Kodeks karny i prawo o wykroczeniach. Komentarz*, Warszawa 1965, p. 111 (thesis 3); and the Supreme Court judgment given there (published "OSNKW 25/65"). That is the judgment of the Supreme Court of 4.12.1961, II K 863/61, OSNKW 1963, No. 2, item 25 – the same as recalled in the resolution voted on.

[6] LEX No. 20842.

[7] Dz. U. (Journal of Laws) No. 27, item 169. In the criminal law literature such a solution has found both its supporters and opponents. See: in particular Daszkiewicz, K., *Nadzwyczajne złagodzenie kary w polskim kodeksie karnym*, Warszawa 1976, pp. 147–157; Raglewski, J., *Model nadzwyczajnego złagodzenia kary w polskim systemie prawa karnego (Analiza dogmatyczna w ujęciu materialnoprawnym)*, Kraków 2008, pp. 382–386.

It should be noted, however, that this was not a uniform line of jurisprudence when it comes to determining which basic or additional penalty was subject to extraordinary leniency. The decision of the panel of seven judges of the Supreme Court of 3 February 1951, II K 1216/50[8] explicitly allows for the possibility of not adjudicating the mandatory confiscation of all property provided for in art. 7(b) of the Decree of 31 August 1944 on the punishment of fascist-Hitlerite criminals guilty of murder and ill-treatment of the civilian population and of prisoners of war, and the punishment of traitors to the Polish Nation,[9] threatening cumulatively with the death penalty for the crime specified in art. 1 of this Decree. The Supreme Court assumed that "if the court, under the provisions of the law (art. 5 of the Decree) has the power to lenient the most severe penalty – the death penalty (art. 1 of the Decree), it must be presumed that it was the legislator's intention that the power granted to the court should also include the leniency of penalties on property (...)."

As can be seen, no specific legal basis was sought for the possibility of waiving the mandatory cumulative confiscation of all property when the court applied extraordinary leniency. It should also be noted that the Supreme Court did not invoke the fact that the confiscation of property is not subject to extraordinary leniency under art. 59 of the Criminal Code of 1932 (since the confiscation of property was not known to the Code, the rules of extraordinary leniency could not apply to it either[10]). Simply referred to the well-known *a maiore ad minus* conclusion ("who can do the greater can certainly do the lesser"). However, it was not referred to in those Supreme Court judgments (recalled by the Supreme Court in its voted resolution), in which, against the background of various legal solutions, the admissibility of an extraordinary leniency of a cumulative fine was consistently denied. From this point of view, the accuracy of these judicature's statements can be questioned. Indeed, if the Criminal Code of 1969 allowed for extraordinary leniency of imprisonment, then it also allowed for extraordinary leniency of fines. It is particularly noteworthy that the above-mentioned judgment of the Supreme Court of 3 February 1951 did not used the argument that the crime under art. 1 point 1 of the August Decree is characterised by a high

[8] LEX No. 161234.

[9] Consolidated text: Dz. U. (Journal of Laws) of 1946, No. 69, item 377.

[10] After all, the additional punishment of the confiscation of all the convicted person's property was a complete novum in Polish criminal law. See: Kubicki, L., *Zbrodnie wojenne w świetle prawa polskiego*, Warszawa 1963, p. 176.

degree of social noxiousness (it is difficult to find an example of a more social noxiousness act than the crime under Article 1 item 1 of the August Decree[11]), and that the Court when allowing the extraordinary leniency of confiscation of property, connected to the death penalty, will lead to a specific preference for the perpetrators of such crimes over the perpetrators of crimes for which there is no risk of the mandatory confiscation of all property (that is to say, the court applying extraordinary leniency will treat both cases equally[12]). Moreover, neither the argument that extraordinary leniency of property confiscation would go against the legislator's intention as expressed in the cumulative sanction, nor the argument that extraordinary leniency is an exceptional situation and, as such, is not subject to a broadening interpretation (it involves the application of the *exceptiones non sunt extendendae* rule) have been addressed. Rather, it has simply taken a judgment that was fully based on the rules of the universally accepted legal inference (*a fortiori*). It is clear that this kind of inference has nothing to do with a broadening interpretation.[13]

It should only be added here that the principle set out in the judgment of 3 February 1951, that the extraordinary leniency of the death penalty also consists in waiving the mandatory confiscation of property, was also extended by the Supreme Court to include sentences of timely imprisonment for the crimes referred to in articles 2, 3 and 4 of the said Decree.[14] This is noteworthy because it was a radical change in the case-law of the Supreme Court in this area, as the

[11] The exceptionally high degree of social noxiousness of all acts covered by the August Decree was unequivocally stressed in the literature. See: Kubicki, L., op. cit., p. 176.

[12] It should be noted that this is the direction in which Z. Ćwiąkalski's main argumentation goes in: Wróbel, W., Zoll, A. (eds.), *Kodeks karny. Część ogólna*, *vol. I, komentarz do Art. 53–116*, Warszawa 2016, p. 174. Of course, this circumstance may lead to doubts as to the appropriateness of the admissibility of an extraordinary leniency of the cumulative fine *de lege ferenda*, but it cannot be an argument in favour of its inadmissibility *de lege lata*.

[13] M. Cieślak gave warning that the question of whether extraordinary leniency is certainly an exceptional situation and the provisions expressing it are exceptional seems quite legitimate. It can be argued, after all, that the rule is rather the freedom of the individual, and the criminal prohibition and punishment is the exception to this freedom. Thus, extraordinary leniency, which mitigates the exceptional criminal responsibility of certain behaviour, is to some extent a return to the rule. In short, it is the provisions introducing criminal responsibility that constitute exceptions to the higher non-punishment rule, so that provisions, even if they reduce such criminal responsibility, are not exceptional. This is against the danger of mistakenly recognising a certain provision as exceptional in the context of the prohibition of broadening interpretation of exceptional provisions – Cieślak, M., *Polskie prawo karne. Zarys systemowego ujęcia*, Warszawa 1996, p. 95.

[14] See: Kubicki, L., op. cit., pp. 178–179.

Supreme Court had previously assumed on several occasions that the confiscation of all the convicted person's property was mandatory even when the court applied extraordinary leniency under art. 5 of the Decree.[15] Since this direction of interpretation referred to the additional penalty, the confiscation of property, and thus – by analogy with a fine – of a property penal measure, it should be treated as an important reference in considerations on the shape of the penalty for crimes mitigated by obligatory cumulative fines.[16]

The most important thing is that with the entry into force of the Criminal Code of 1997 providing for extraordinary leniency of "every penalty"[17] and thus also fines, the rules on extraordinary leniency have changed radically. For this reason, the statements of the Supreme Court, broadly referred to in the voted resolution that had been clarified under the previous criminal codes and which generally rejected the admissibility of extraordinary leniency of cumulative fines (*de lege lata*), have completely lost their validity. This is because they were formed under different legal conditions, i.e. when the fine was generally not subject to extraordinary leniency. Therefore, these statements cannot support the interpretation specified in the voted resolution.

It turns out that the thesis expressed in the voted resolution that "the institution of extraordinary leniency was shaped in the Criminal Code of 1997 in a similar way as in the Codes of 1932 and 1969" deviates from the truth. The point is that, from the point of view of the admissibility of extraordinary leniency, the institution of extraordinary leniency in the 1997 Criminal Code, as compared to the 1932 and 1969 Criminal Codes, has been shaped differently. It is necessary to stop here for a while when emphasizing the most important issues.

Firstly, in Article 60 § 6 point 2 of the Criminal Code, the Act operates with the term "if the act constitutes another crime." Since the general term "another crime" is used here, so the normative rationale (*lege non distinquente*) clearly indicates that the solution provided for in art. 60 § 2 of the Criminal Code

[15] See: Pasek, A., *Przestępstwa okupacyjne w polskim prawie karnym z lat 1944–1956*, Wrocław 2002, pp. 163–164, note 571 and the case law cited there.

[16] An important remark: it is sometimes claimed that art. 60 § 6 point 1 of the Criminal Code is an "empty regulation", because in the current state of law there is supposedly no crime punishable by a minimum of 25 years' imprisonment. See: Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz*, Warszawa 2017, p. 227. It's hard to agree with this position. After all, it is obvious that art. 1 point 1 of the Decree is in force – and precisely to the crime specified in this article the mechanism of extraordinary leniency specified in art. 60 § 6 point 1 of the Criminal Code may apply.

[17] See: Góral, R., *Kodeks karny. Praktyczny komentarz*, Warszawa 2007, p. 127.

has been broadly defined by the legislature and generally also includes crimes threatened with an obligatory cumulative fine. This is also indicated, without any doubt, by the logical rationale behind the logical division. The point is that the provision of art. 60 § 6 of the Criminal Code reflects all types of statutory threats occurring in the Polish legislation, including those arising in non-codex acts providing for criminal liability. This is reliably due to the requirement of the adequacy of logical division.[18] Otherwise, it should be considered that the legislator is not a rational legislator and has insufficient knowledge in the field of logic,[19] because in the logical division created by him, whose normative reflection is the provisions of art. 60 § 6–7 of the Criminal Code, he completely omitted the types of prohibited acts threatened with obligatory cumulative sanctions.[20] Rejecting *a limine* such unacceptable reasoning, it should be assumed that the solution provided for in art. 60 § 6 point 2 of the Criminal Code also applies to crimes threatened with obligatory cumulative fines. Therefore, there is not any lack of regulations in this Act.[21] Different statements, referring to the fact that in the case of granting extraordinary leniency, the "difference between the crimes differentiated by the number of obligatory sanctions" is obliterated or that "art. 60 § 6 of the Criminal Code sets out the rules for leniency," boil down exclusively to challenging the clear decision of the legislator, who decided in art. 60 § 6 point 2 of the Criminal Code that the rules of extraordinary leniency also apply to obligatory cumulative sanctions. Therefore, additional precision

[18] See: Siwek, K., *Nadzwyczajne złagodzenie grzywny kumulatywnej*, "Czasopismo Prawa Karnego i Nauk Penalnych", 2018, No. 4, pp. 7–20. Following the work given, it should be briefly repeated that points 1–2 § 6 of art. 60 of the Criminal Code apply to all crimes of any form of criminal threat. This case was similarly solved in art. 101 § 1 points 1–2 of the Criminal Code. This is what the logical division is all about, including the use of the term "another crime". As it is known, the term "another" expresses the completion of the separated parts of the division, which reliably provides the exhaustive character of logical division. See: Ziembiński, Z., *Logika praktyczna*, Warszawa 1995, p. 59. Therefore, art. 60 § 6 point 2 of the Criminal Code refers to all crimes not threatened with a minimum penalty of 25 years of imprisonment, while art. 101 § 1 point 2 of the Criminal Code refers to all crimes remaining after the exclusion of the crime of murder.

[19] More information on rational and intellectual assumptions, including the legislator's best knowledge of logic can be found in: Zieliński, M., *Wykładnia prawa. Zasady – reguły – wskazówki*, Warszawa 2017, pp. 260–261, p. 266.

[20] It would not be a logical division at all, because an incorrect logical division is not a logical division. See: Siwek, K., op. cit., p. 9, and the literature given there.

[21] The issue of the admissibility of an extraordinary leniency of cumulative fine is positively resolved in the Act. It is understandable that not everything in the Act must be clearly (explicitly) stated. It is in such cases that the rules of *a fortiori* are applied. There is nothing special about this.

in the Act of the method of extraordinary leniency of a cumulative fine would be a legislative "over-feeding" by the legislator.

Secondly, it cannot be disputed that when the Criminal Code, in addition to the optional basis for extraordinary leniency, provides for the possibility to waive the penalty (e.g. art. 22 § 2 of the Criminal Code), such waiver is of a full nature, as it always applies to the entire penalty – including the obligatory cumulative fine. By reasoning *a fortiori* (arg. *a maiori ad minus*), it should be inferred that the extraordinary leniency of a cumulative fine in these cases results from the Act more strongly than an exemption from it.[22] It would be grossly inconsistent to assume that the waiver (more) also applies to the cumulative fine, while the extraordinary leniency (less) is to be applied without it and only to the imprisonment.

Thirdly, the Supreme Court is obviously right when it emphasises that the principles of extraordinary leniency provided for in art. 60 § 1–7 of the Criminal Code are not specified in art. 38 § 1–3 of this Code. After all, these provisions concern the extraordinary aggravation of the penalty or the extraordinary reduction of the upper limit of the statutory threat, and not the lower limit, as is the case with extraordinary leniency. However, it is not at all certain whether the said rules are not also contained in art. 59 or 61 of the Criminal Code. After all, it is obvious that when the law allows for a waiver, it allows for extraordinary leniency too.[23] From a practical point of view, this is very important. For if in relation to the perpetrator defined in art. 60 § 3 of the Criminal Code the court may refrain from imposing the penalty under the general art. 61 § 1 of the Criminal Code, then it may also extraordinary lenient the penalty (arg. *a maiori ad minus*).[24] In any event, a firm determination that there has been a normative exclusion of the admissibility of extraordinary leniency of a cumulative fine requires a careful analysis of all

[22] It is important to note that the whole group of provisions of the general part of the Criminal Code providing the possibility to waive the penalty (art. 14 § 2, 22 § 2, 25 § 2 and 26 § 3) may be applicable to all types of offenses under penalty, including the most serious crimes and murders, therefore they are not limited (like in art. 59 of the Criminal Code) to minor offences only. It is difficult to suppose that the legislator's view on this matter would be diametrically opposed to the view on act of illegally processing poppy straw for personal gain.

[23] See: Makarewicz, J., *Kodeks karny z komentarzem*, Lwów 1935, p. 167; Śliwiński, S., op. cit., p. 475. Opposite point of view – Wolter, W., op. cit., p. 95.

[24] It should be emphasized that pursuant to art. 61 § 2 of the Criminal Code, a withdrawal from imposing a penalty on the offender specified in art. 60 § 3 of the Criminal Code consists in total withdrawal from applying criminal consequences. See: Marek, A., *Kodeks*, p. 207. Therefore, there is no doubt that art. 61 § 2 of the Criminal Code is the basis for waiving the cumulative fine.

criminal law solutions, in particular those providing for the possibility of immunity from fines, because the law "must be interpreted on the basis of the whole text of the issued and non-repealed provisions."[25] Therefore, the manner of interpretation and application of the provision of Article 60 § 6 point 2 of the Criminal Code is co-decided by the implications of the solution provided for in art. 61 of the Criminal Code, which immanently also includes extraordinary leniency.

Fourthly, since the *a fortiori* rules are based on the assumption of the consequences of the legislator's preferences and assessments,[26] it can no longer be justifiably claimed (referring in the sphere of interpretation and application of art. 60 § 6 point 2 of the Criminal Code to the *a maiori ad minus* reasoning and assuming that since the court may extraordinarily lenient the penalty of imprisonment, it may also extraordinarily lenient the cumulative fine) that the admissibility of an extraordinary leniency of the cumulative fine would "undermine the aim of the legislator as expressed in the cumulative fine." Such an argument in fact amounts to a negation of an explicit decision by the legislator. Of course, the reference to *a maiori ad minus* argumentation in this respect does not mean that the linguistically unambiguous provision conferring competence is broken, since it is a consistent conclusion and adds nothing new to the content of the legal rule.[27]

Fifthly, the Supreme Court's assertion in the resolution voted on that "the elimination of an obligatory sanction for a crime must have the clear statutory mandate" present the whole problem from the wrong side. The answer was requested not by the question whether the Criminal Code allows for a waiver of an obligatory cumulative fine in such situations in which the court applies extraordinary leniency, but by the question whether the court was equipped with the power to impose such a fine at that time (i.e. that it was necessary to demonstrate the power to impose a fine). The answer to this question must be negative. As we know, the extraordinary size of the sentence, and thus the extraordinary leniency, leads to a "modification of the criminal penalty."[28]

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[25] See: Ziembiński, Z., *Problemy podstawowe prawoznawstwa*, Warszawa 1980, p. 289.

[26] See: Jabłońska-Bonca, J., *Wstęp do nauk prawnych*, Poznań 1994, p. 118; Ziembiński, Z., *Logika*, p. 251–253.

[27] The *a fortiori* conclusion is the consequence of a standard being a part of the legal system and binding as the standards directly established by the legislator. See: Wróblewski, J., *Wstęp do nauki o państwie i prawie. Część II. Mechanizm działania prawa*, in: Ehrlich, S. (ed.), Warszawa 1962, pp. 111–112.

[28] See: Marek, A., *Prawo karne*, Warszawa 2011, p. 348.

Against this background it should be stressed that the method of extraordinary leniency described in the Criminal Code (at the normative level of reading the legal text) modifies (absorbs) the sanction (the shape of the statutory threat of penalty) without, however, changing this statutory threat (only at the descriptive level of reading the legal text) in an independent and autonomous way, shaping only new (milder) limits of the statutory threat (thus, it contains elements modifying the sanctioning standard).[29] It is obvious that the classification provision is always an incomplete central provision, the content of which is affected by other provisions (modifiers) contained mainly in the general part of the Criminal Code, including art. 60 § 6 of this Code.[30] In short, when a court applies extraordinary leniency, it is unfailingly incapable of ruling all the criminal measures provided for under the threat of the classification provision. In such a case, the court has at its disposal only penal means provided for in the provisions of art. 60 § 6–7 of the Criminal Code. This applies equally to situations in which the court applies an extraordinary leniency of an obligatory or of an optional nature.

Consequently, if a court applies extraordinary leniency, then there are no longer general rules on the assessment of a cumulative fine.[31] These rules are abolished by the code for the setting of extraordinary leniency. This is determined by the fact that in such situations the entire penalty is subject to extraordinary leniency and only the imprisonment provided for in art. 32 point 3 of the Criminal Code may be imposed under extraordinary leniency. This penalty consumes the entire statutory threat.[32]

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[29] The literature on criminal law has a different understanding of the content and scope of the terms "statutory threat" and "statutory penalty", sometimes dividing the latter into so-called general statutory penalty and specific statutory penalty. See: Raglewski, J., op. cit., pp. 39–44. However, these are old views, not taking into account the achievements of the modern science of legal interpretation, where a clear distinction is made between two levels of reading the legal text (descriptive and directive). From this point of view, neither the traditional understanding of the term "statutory threat" (as including only the threat in the classification provision. See: Stefańska, B. J., *Kara pozbawienia wolności do 20 lat*, "Prokuratura i Prawo" 2018, No. 5, pp. 33–35 and the statements of the judiciary and the literature cited therein) nor the distinction between "statutory penalty", including "general statutory penalty" and "specific statutory penalty", are valid today.

[30] As we know, "the provisions formulated in the general part of the act are an editorial supplement to all the specific provisions of a given act, if it is not reserved otherwise". See: Ziembiński, Z., *Problemy podstawowe...*, p. 289.

[31] Opposite point of view – the judgment of the Court of Appeal of Lublin of 23.03.2003, II AKa 286/06, LEX No. 183571 and the Supreme Court in the main thesis of the voted resolution.

[32] See: Raglewski, J., op. cit., pp. 387–388.

Sixthly, in the final part of the justification of the voted resolution, the Supreme Court emphasises that although the present case is an example of the application of art. 116 of the Criminal Code, the cumulative sanction does not reflect the legislator's preference, defined in art. 32 points 1–3 of the Criminal Code, in the choice of the type of penalty by the judge, since in these cases the accumulation of penalties simply excludes the choice. This is a completely wrong approach. The point is that the whole of art. 32 of the Criminal Code concerns only the ordinary penalty. That this is the case is confirmed by the fact that art. 32 points 4–5 of the Criminal Code contains the two most severe penalties, 25 years imprisonment and life imprisonment, which can never be imposed under the extraordinarily lenient penalty.[33] In short, art. 32 of the Criminal Code is not a provision from the sphere of extraordinary punishment. It should be emphasized that art. 60 § 6 of the Criminal Code expresses, independently and exhaustively, preferences when choosing the type of penalty imposed under extraordinary leniency and in this respect art. 32 of the Criminal Code is not applicable (art. 60 § 6 of the Criminal Code constitutes a *lex specialis* in relation to art. 32 of the Criminal Code). This preference, expressed by the legislator, for the choice of the type of penalty, is clearly (explicitly) reflected in the provisions defining extraordinary leniency for crimes, and reflects the system of penalties specified in art. 32 of the Criminal Code (from the most lenient – to the most severe).

Moreover, it should be clearly stated that art. 32 of the Criminal Code is only a reflection of the overriding principle of punishment, taking into account the principles of humanitarianism (art. 3 of the Criminal Code).[34] Because art. 3 of

[33] The most severe penalty already extraordinarily lenient in accordance with art. 60 § 6 point 1 of the Criminal Code is the penalty of imprisonment from 8 to 15 years, also with respect to the act under art. 1 point 1 of the already cited August Decree. See: Hałas, R., in: Grześkowiak, A., Hałas, R. (eds.), *Kodeks karny. Komentarz*, Warszawa 2015, p. 460. See also: Zgoliński, I., in: Konarska-Wrzosek, V. (ed.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 373.

[34] The principle contained in art. 3 of the Criminal Code should be treated "as the main principle of the application of criminal law sanctions". See: Trafny, M., *Zasada humanitaryzmu w kodeksie karnym*, "Prokuratura i Prawo", 2007, No. 3, p. 32. It is from art. 3 of the Criminal Code "the primacy of imprisonment penalty arises". See: Kunicka-Michalska, B., in: Rejman, G. (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa 1999, p. 209. Therefore, the literature on the subject emphasizes that the construction of art. 32 of the Criminal Code proves its compliance with art. 3 of this Code. See: Sienkiewicz, Z., in: Bojarski, M. (ed.), *Prawo karne materialne. Część ogólna i szczególna*, Warszawa 2015, p. 287.

the Criminal Code constitutes not only the fundamental principle of the penalty,[35] but also plays a role in the interpretation of the provisions of criminal law,[36] this provision should have been taken into account when deciding the present case. However, this issue escaped the attention of the Supreme Court.[37]

In short, the normative content included in art. 32 of the Criminal Code results directly from art. 3 of the Criminal Code, also with regard to the level of the extraordinarily leniency of the penalty.[38] After all, there is no doubt that "the provision of art. 3 of the Criminal Code applies to the choice of penalties".[39] Therefore, "the entire Criminal Code as an ordinary law is based on the assumption of respect for the principle of humanity. Thus, the obligatory nature of a specific penalty does not by itself abolish the possibility to choose the type of penalty within the meaning of art. 32 of the Criminal Code, as this possibility is guaranteed in the first place by the overriding conventional and constitutional norms and art. 3 of the Criminal Code that serves as a general principle of criminal law of a directive nature. Therefore, there are no grounds for the thesis that the extra-codex acts which provide for cumulative sanctions for prohibited acts do not pursue the objective resulting from art. 32 points 1–3 of the Criminal Code".

Seventhly, it is a truism to say that certain circumstances *in concreto* may argue not only for extraordinary leniency, but also for a particularly low level of the extraordinary leniency. After all, it cannot be absolutely ruled out that the imposition of imprisonment within the limits set by art. 60 § 6 point 2 of the Criminal Code and a fine on general principles will nonetheless lead to the level of punishment exceeding the established degree of guilt. This will particularly

[35] See: Warylewski, J., *Prawo karne. Część ogólna*, Warszawa 2017, p. 620. The author rightly emphasises that art. 3 of the Criminal Code includes the principle and not the directive of the penalty. See also Lachowski, J., Marek, A., *Prawo karne. Zarys problematyki*, Warszawa 2018, p. 277–278; Królikowski, M., Zawłocki, R., *Prawo karne*, Warszawa 2015, p. 396.

[36] See Wąsek, A., *Kodeks karny. Komentarz*, vol. I, Gdańsk 1999, p. 51.

[37] Attention to the link between the solution provided for in art. 3 of the Criminal Code and the grounds for extraordinary leniency specified in art. 60 § 2 of the said Code we owe to Wąsek, A., op. cit., pp. 52–53.

[38] On the application of art. 3 of the Criminal Code in the sphere of extra-codex criminal law. See: Zalewski, W., in: Królikowski, M., Zawłocki, R. (eds.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa 2017, pp. 172–173. In the literature it has been emphasized that the exclusion of the application of art. 3 of the Criminal Code by a special law "is not probable". Kunicka-Michalska B., in: *Kodeks karny*, p. 203.

[39] See: Kozłowska-Kalisz, P., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz*, Warszawa 2017, p. 33.

be the case where there are multiple grounds for extraordinary leniency. Therefore, the judge must have a wide range of possibilities to determine the level of extraordinary leniency, including the possibility not to impose a cumulative fine.

Finally, it should be stressed that under art. 60 § 5 of the Criminal Code, only an exceptionally lenient penalty of imprisonment (only such a penalty is mentioned in the provision) is subject to conditional suspension. It follows from this that a cumulative fine, imposed on general principles, is not subject to conditional suspension and must be executed. And since the cumulative fine, citing only the example of the penal regulation referred to by the Supreme Court in the final fragment of the justification of the resolution (art. 171 section 1-3 of the Act of 29 August 1997 on Banking Law[40]), may reach as much as 10 million PLN, such a perspective will not inspire the perpetrator to cooperate with the law enforcement agency too much.[41] From this point of view, it is feared that the resolution voted on may lead to a serious limitation of the application of art. 60 § 3–4 of the Criminal Code in matters of organised financial crime.

Therefore, the position should be maintained[42] that in the light of art. 60 § 6 point 2 of the Criminal Code, extraordinary leniency for a crime cumulatively threatened with imprisonment and a fine consists only in serving the penalty of imprisonment below the lower limit of the statutory threat, but not lower than one third of the limit. The above rule should be extended to all offences. In this matter there is no dilemma of the kind of either extraordinary leniency exclusively for imprisonment and the imposition of a fine on general principles in addition to the imprisonment, or the inability to apply extraordinary leniency at all.[43] This approach amounts to creating a false alternative as there is a third option consisting in extraordinary leniency also for the cumulative fine.

[40] Consolidated text: Dz. U. (Journal of Laws) of 2018, item 2187, as amended.

[41] After all, it should be borne in mind that a fine of this amount is almost ten times the fine that the court may impose under art. 71 § 1 of the Criminal Code when it conditionally suspends the execution of the sentence of imprisonment under art. 60 § 5 of this Code (PLN 1 080 000). For the perpetrator, it certainly makes a difference whether a fine of just over a million PLN or ten million PLN can be imposed on him.

[42] See: Siwek, K., *Nadzwyczajne złagodzenie*, p. 20.

[43] See: Ćwiąkalski, Z., *Nadzwyczajne złagodzenie kary w praktyce sądowej*, Warszawa 1982, p. 161.

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ACTA IURIS STETINENSIS 4 (28)

DOI:10.18276/ais.2019.28-12

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PENALTY FOR 'LAWLESSNESS OF USE' OF A BUILDING OBJECT – COMMENTARY (GLOSS) TO THE JUDGMENT OF THE SUPREME ADMINISTRATIVE COURT OF 11 MAY 2017, II OSK 2283/15[1]

Abstract

This commentary (gloss) to the judgment of the Supreme Administrative Court of 11 May 2017, file reference number II OSK 2283/15, concerns the issue of imposing a penalty for 'lawlessness of use' of a building object. In the opinion of the Supreme Administrative Court, the allegation that a public administration organ should impose a penalty for unlawful accession to only one investor, despite the fact that there are two of them, which indicates that an administrative penalty should be imposed on all investors. The basic issue to consider is the imposition of a penalty that should take into account the circumstances of the specific case, including the actual and legal use of real estate.

Keywords: completion of the construction, use of the building objects, lawlessness use, administrative penalty

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[1] LEX No. 2303846.

The judgment of the Supreme Administrative Court (hereinafter: NSA) concerns a case from a cassation appeal against the judgment of the Voivodeship Administrative Court in Gliwice (hereinafter: WSA) of 6 May 2015, II SA/GL 90/15[2] on the penalty for lawlessness regarding the use of a building object ('lawlessness use' or 'lawlessness of use'), which dismissed the cassation appeal. It should be noted at the outset of this glossa that it is of an approving nature. The aim of the deliberations is to clarify the legal solutions and to develop the material and legal assessment of the Court in relation to the examined matter.

Factual and legal status

The decision on the building permit for a single-family residential building was obtained by two investors, who at the same time were co-owners of the property covered by this permit. Under the building permit, the investors started to carry out construction works. In May 2014, the District Building Supervision Inspectorate (hereinafter: PINB) conducted an inspection of investors' real estate. During the inspection, PINB established that on the real estate a building has been constructed which bears the characteristics of use, but the investors did not express a formal willingness to use of this building object in the form of a notification to the building supervision authority with information about the completion of the construction work. During subsequent inspections, PINB stated that the ground floor of the building is finished (kitchen, bathroom, bedroom and living room), while the attic is in its raw closed state. During the control inspection it was also established that the ground floor of the building is used by the investor. Moreover, the investor, during the inspection of the building object presented a copy of the decision of the District Court in which he was granted security of the claim by giving him the right to exclusive use of the real estate developed with a residential building, obliging him at the same time to bear all fees related to the use of this real estate, until all civil proceedings will be finally concluded. Bearing in mind the identified factual and legal state, PINB issued a decision in which it confirmed the findings of the inspection that the use of the building had been commenced despite the lack of formal notice of completion of the construction and imposed an administrative penalty of 10 000 PLN on the investor for commencement of using of a single-family residential building with-

[2] LEX No. 1754369.

out the legally required formal notification of the completion of the construction. In the opinion of PINB, only one of the investors was guilty of lawlessness of use of the building.

Against this decision, the investor submitted a complaint to the Voivodeship Building Supervision Inspectorate (hereinafter: WINB). WINB upheld the decision, stating that PINB, as the first instance authority, correctly imposed the penalty for lawlessness of use of the building object in a situation where the investor used this building.

The investor then filed a complaint against the decision issued by WINB to the Voivodeship Administrative Court in Gliwice. The WSA issued a judgment in which it dismissed the complaint, thus confirming the correctness of the findings of the authorities of both instances. In the WSA's opinion, the imposition of the penalty specified in art. 57 section 7 of the Construction Law Act of 7 July 1994[3] is mandatory in each case when the party was obliged to file a notification or obtain a permit for use, and the investor has arbitrarily proceeded to have made use of the building objects. In addition, the WSA noted that the building supervisory authority has no possibility to waive the penalty due to lawlessness of use of the building object. The legislator, when using the phrase "imposes a penalty", does not give any freedom in the interpretation of the law in this respect. Therefore, in the WSA's opinion, the commencement of use of a building object within the meaning of the said provision justified the imposition of a financial penalty. The investor filed a cassation appeal against the WSA judgment with the Supreme Administrative Court, which, however, shared the position of the court of first instance and dismissed it.

NSA's decision and reasoning

The NSA shared the factual findings adopted by the WSA following the authorities of both instances, stating that it was clear from the evidence gathered in the case that the investor started using the building despite the lack of formal notice of completion of the construction. According to the NSA, the complainant's accusation that only one investor was fined for illegally using the building is unfounded, even though there are in fact two of them. Therefore, as the complainant argued, on the assumption that the use of the building has taken place at all, the penalty should be imposed on all investors.

[3] Consolidated text: Dz. U. (Journal of Laws) of 2009, item 1186, as amended.

The NSA stated that in this case it was fully justified to impose an administrative penalty on only one investor. The penalty for lawlessness of use of a building object should take into account the circumstances of the specific case. In the present case, it was undisputed that only the applicant in cassation, to whom the District Court, in its decision, granted the right to exclusive use of the real estate developed with a residential building, commenced using it. Therefore, knowing that the first investor was granted by the District Court the right to use the real estate in question, the second investor had neither the actual nor the legal possibility to use that building, and thus could not be the addressee of the order issued under art. 57 section 7 of the Construction Law.

Evaluation of the NSA position

For the purposes of the analysis of the NSA judgment in question, it should be noted at the beginning that the Construction Law does not contain a definition of the term "use of the building objects". However, in the light of the provisions of the Construction Law, in particular art. 5 section 2, 61, 71 and 71a thereof, it may be assumed that the understanding of this concept is similar to the "use of things" as commonly understood (also in terms of civil law), and in the case of the use referred to in art. 57(7), it does not to have the permanent or complete character,[4] since the legislature itself indicates that the basis for imposing the penalty for lawlessness in use is simply the commencement of use of the building object, even in its part. The jurisprudence of administrative courts often indicates that the notion of use of a building object should be understood in the sense of common language, as the use of a thing, with no meaning of its scope and duration, the scale of which would be anyway difficult to determine clearly.[5] The regulation for the commencement of use can be added to the mechanisms regulating the use of building object, as a preliminary activity in the process of using it. The law introduces an obligation to notify and obtain a permit to use the building object. The permit for use is needs-oriented in accordance with the general principles of

[4] Judgment of the Supreme Administrative Court of 18 November 2010, II OSK 1715/09, LEX No. 746749; judgment of the Supreme Administrative Court of 10 June 2010, II OSK 983/09, LEX No. 597984.

[5] Judgment of the Supreme Administrative Court of 27 February 2007, II OSK 386/06, LEX No. 927649; judgment of the Voivodeship Administrative Court in Gliwice of 11 January 2013, II SA/Gl 936/12, LEX No. 1296154.

the construction law. Permission for use has two forms, the first one is given by notification as a so-called tacit agreement by a competent administrative authority, while the second one takes the form of an administrative decision.

The notice of completion of the construction is an expression of willingness to start using the building object, which should be understood as a situation which corresponds to a specific factual state, consisting in the commencement of use of the object or its part, in particular in accordance with the provisions of Chapter 6 of the Construction Law regulating the maintenance of building objects.[6] The form of the notice of completion is a simplified administrative procedure where the authority does not issue an administrative decision in case of a positive settlement. The commencement of use, by way of notification, is the general rule applicable in the case of completion of a construction work for which a building permit or notification of construction referred to in art. 29 section 1, 1a and 19 is required, subject to art. 55 and art. 57 of the Construction Law. In order to put the building into use, the investor should submit a notice of completion at least 14 days before the intended date of entry into use. Completion of the construction in the technical and constructional sense requires that the investor meets the conditions provided by the construction law. The building object should be in a technical condition such that it can be accepted and put into normal use and service.[7] The notification of the intention to commence using of the building object should be made in writing, containing the investor's data and indicating the object concerning the notification. The notification in accordance with art. 57 section 1–2 of

[6] Judgment of the Voivodeship Administrative Court in Wrocław of 19 February 2013, II SA/Wr 793/12, LEX No. 1330371.

[7] See judgment of the Supreme Administrative Court of 20 June 1996, SA/Wr 2735/95, LEX No. 29545; Different way (without referring to the technical conditions) the scope of a completion of the construction was presented in the judgment of the Supreme Administrative Court of 21 August 1997, II SA/Kr 998/96, LEX No. 1691727; "As the completion of the construction of a building object within the meaning of art. 103(2) of the Construction Law shall be deemed such a state in which it is possible, even partially, to start using this object in accordance with its intended purpose. The recognition of the construction as completed shall not be hindered by a partial failure to carry out finishing, fitting-out or other works of a similar nature that may be carried out in the building in use." As a result, taking into account the very different views presented in the judgments of the Supreme Administrative Court (NSA), and accepting the rejection of the above contradictory positions, it would be worth considering a more general and accurate formulation contained in the judgment of the Supreme Administrative Court of May 7, 1997 (SA/Rz 538/95, CBOSA) that as the completion of the construction should be recognised such condition "in which it will be at least partially possible to start using the given building object in accordance with its intended purpose." Mzyk, E., *Orzecznictwo sądowo-administracyjne w sprawach budowlanych*, "Magazyn Prawniczy Ekonomiczny i Socjologiczny" 1998, No. 1, p. 21–22.

the Construction Law should also include documents required by law. The scope of documents which the investor is obliged to attach to the notice of completion of the construction is closely related to the conducted construction and enables a formal assessment of its correctness.[8] To the adopted principle, according to which the use of a building object can be commenced after the expiry of the deadline for the competent authority to object to the investor's notification of the completion of the construction work, the legislator introduced in art. 55 of the Construction Law three exceptional situations in which the completion of the construction process requires obtaining a permit for use. These situations have been identified by: 1) indication in the Act of the categories of building objects requiring a permit for use; 2) reference to the provisions of the Act providing for the creation of such an obligation; 3) indication of the possibility to start using the building object before all construction works have been completed. Moreover, the legislator gives the investor the opportunity to apply for a decision on the permission to use instead of making a notice of completion of the construction. All regulated possibilities of obtaining a permit to use a building object are not subject to recognition by the competent authority. Therefore, it can be said that the sole basis for imposing the obligation to obtain a permit to use a building object is a provision that boils down to a complete determination of three situations.[9]

If a building object is constructed and then used in lawlessness, then it is reasonable to impose a fine on the investor. The investor, at the stage of completion of a building object, has the status of the only one party who has the legal interest in bringing about the possibility of using such object.[10] Narrowing the party only to the investor is a result and a consequence of lawful conduct of the investor, who, when starting to use the object, is to show whether the constructed object was built in accordance with the approved construction design and conditions of the building permit, and therefore whether it is technically possible to allow it to

[8] Judgment of the Supreme Administrative Court of 27 March 2007, II OSK 520/06, LEX No. 503755.

[9] Serafin, S., *Prawo budowlane. Komentarz*, Warszawa 2006, p. 400.

[10] According to E. Radziszewski, it is possible to express significant doubts whether restricting the parties' participation in the proceedings for permission to use only to the investor's person will always be consistent with the rights serving other entities, including art. 4 of the Construction Law and art. 21, 31 section 3, 64 section 1 and 2 of the Constitution. Radziszewski, E., *Prawo budowlane. Przepisy i komentarz*, Warszawa 2005, pp. 165–166.

be used.[11] According to the judgment of the Supreme Administrative Court, the investor commenced the use of the building object without the legally required notification to the competent public administration authority, which resulted in the violation of the construction law and the application by the authority of art. 57(7). Such a factual situation is referred to in the jurisprudence as "lawlessness use" or "lawlessness of use" and concerning a building object, the use of which was commenced without obtaining the legally required consent from the authority. It is not a separate type of lawlessness of use or lawlessness use, on the contrary, it falls within the scope of this concept.[12] This means that lawlessness use of the building object or part of it will occur when the investor has not submitted a notice of completion of the construction of the building object or has commenced to use it before the expiry of the period within which the competent authority may effectively object, or despite such objection. It is also inadmissible to use a building object, which is subject to the obligation to obtain a permit to use, if the investor has not obtained a final decision authorising the use of this object. The finding by the competent authority of 'lawlessness use' of a building object or parts thereof shall lead to the imposition of penalty for unauthorised use. The imposed financial penalty shall be determined on the basis of the rules relating to the penalty for irregularities found during the compulsory inspection of the construction site, with the rate of the fee being increased tenfold. This penalty is a sanction which determines the liability for commence using of the building object or part thereof without legal completion of the construction process. It is a penalty for violation of the law, which is in fact a form of protection against the possibility of negative effects of such violation.[13] The penalty for so called "lawlessness use" can only be imposed once. The re-application of a penalty for the same violation, if it has already been legally imposed, is void.[14]

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[11] Małysa-Sulińska, K., *Administracyjnoprawne aspekty inwestycji budowlanych*, Warszawa 2012, p. 242.

[12] Cherka, M., Grecki, W., *Samowola budowlana w polskim prawie budowlanym*, Warszawa 2013, p. 33; The term "construction lawlessness" is understood by the NSA as the performance of construction or construction of building object without a valid building permit or notification, or despite an objection raised by a competent authority. Judgment of the Supreme Administrative Court of 7 June 2001, IV SA 952/99, LEX No. 54192.

[13] Judgment of the Constitutional Tribunal of 15 July 2007, P 19/06, OTK-A 2007, No. 1, item 2.

[14] Judgment of the Supreme Administrative Court of 7 September 2009, II OSK 1494/09, LEX No. 746583.

It should also be noted that the authority punishing the investor for lawlessness use of an object is not bound by the category assigned in the building permit and may determine it on the basis of its own findings, especially when the type of object and its parameters clearly do not correspond to the category defined in this permit.[15] According to the Constitutional Tribunal, the established penalty is a manifestation of State interference in the sphere of property rights of an individual, however, this interference is a sanction of illegal behaviour of such individual. In the absence of an appropriate sanction, the provision would be dead and therefore the failure to comply with the obligation could be commonplace.[16] According to the Constitutional Tribunal, the established fee is a manifestation of the state's interference in the sphere of property rights of the individual. The essence of the prohibition of excessive interference is that the legislator may not impose restrictions exceeding a certain degree of nuisance, between the degree of violation of the individual rights and the rank of the public interest that is to be protected. In this general view, the prohibition of excessive interference has a protective function in relation to all rights and freedoms of the individual, although in fact the criteria of excessiveness must be relativized, among others, due to the nature of individual rights and freedoms. Its addressee is a state that should act towards the individual in a way that is determined by real need. This prohibition becomes one of the manifestations of the principle of citizen trust in the state, and thus is one of the requirements that a democratic state imposes on its organs.[17]

In the context of the SAC judgment under analysis, the organ's interference in the entity's property rights sphere constitutes a sanction of the unlawful conduct of certain entities. In the absence of an appropriate penalty, the provision would be dead, and therefore failure to comply with the obligation could be common.[18] It should be noted that the need to apply the sanctions provided for by law

[15] Judgment of the Supreme Administrative Court of 8 April 2011, II OSK 602/10, LEX No. 992609.

[16] Judgment of the Constitutional Tribunal of 18 April 2000, K 23/99, OTK 2000, No. 3, item 89.

[17] Judgment of the Constitutional Tribunal of 26 April 1995, K 11/94, OTK 1995, No. 1, item 12.

[18] Judgment of the Constitutional Tribunal of 18 April 2000, K 23/99, OTK 2000, No. 3, item 89.

to investors starting to use the building object without the legally required permit is a consequence of the mere fact of a breach of the law, and this in turn, the basis for the application of sanctions. Such a formula of liability makes the principle of the presumption of innocence in such situations inapplicable, and the basic premise of liability is the lawlessness of the action understood as activities conducted contrary to the law and the rules of social coexistence.[19]

As a consequence of the authority's finding that the building object or part of it has been used in violation of the above-mentioned obligations, a penalty for 'lawlessness use' of the building object shall be imposed. According to the Constitutional Tribunal, administrative penalties are in fact measures aimed at mobilising entities to perform their duties for the state in a timely and correct manner.[20] Therefore, automatically applied administrative sanctions are primarily preventive in nature.[21] An administrative penalty is not a fee for an act committed, but a coercive measure to ensure the performance of executive and management tasks of administration aggregated by the concept of public interest.[22] The investor's obligation to notify the completion of construction or to obtain a final decision on the permission to use and the sanction provided for to ensure fulfilment of these obligations serve to protect important values distinguished by virtue of public interest, which include above all: the environment, safety of people and property, health and life of people, spatial order and respect for legitimate interests of third parties. The essence of the administrative penalty for a lawlessness use of the building object is to force the observance of orders and prohibitions.[23] The penalty referred to in art. 57 section 7 of the Construction Law is mandatory in each case when a party is obliged to submit a notification or apply for a permit to use, and the investor, in violation of such obligation, does not do so and arbitrarily starts to use the completed building object. The supervisory authority shall have no option but to impose such a penalty. The legislator,

[19] Judgment of the Constitutional Tribunal of 15 January 2007, P 19/06, OTK-A 2007, No. 1, item 2.

[20] Judgment of the Constitutional Tribunal of 5 May 2009, P 64/07, OTK-A 2009, No. 5, item 64.

[21] Judgment of the Constitutional Tribunal of 24 January 2006, SK 52/04, OTK-A 2006, No. 1, item 6.

[22] Judgment of the Constitutional Tribunal of 31 March 2008, SK 75/06, OTK-A 2008, No. 2, item 30.

[23] Judgment of the Constitutional Tribunal of 15 January 2007, P 19/06, OTK-A 2007, No. 1, item 2.

when using the phrase "imposes a penalty", does not give any discretion in this respect.[24] Administrative penalties – as stated by the Constitutional Tribunal – are in fact measures aimed at mobilizing entities to timely and properly perform their duties on behalf of the state.[25] Therefore, in view of the above, the Court held that the above provisions of the Construction Law Act oblige a competent authority to impose a penalty for lawlessness use of a building object whenever it is found that the building object or a part thereof is used in violation of art. 54 or 55 of this Act.[26]

In the light of the NSA's judgment, it was justified to impose an administrative penalty on only one of the investors, as a coercive measure aimed at creating a threat that is expected to affect the attitude of the addressee of the obligation.[27] The penalty for commencement of using a building object without the required permit cannot be imposed without taking into account the circumstances of the specific case. As a rule, the investor cannot claim that he/she is not the one who commenced the use of the building object, but it was another person. Only in situations where, without a shadow of a doubt, the commencement of use was against the investor's will, it will not be possible to impose a penalty for lawlessness use of the building object.[28] In the course of the case, it was undisputed that the investor who had the right to exclusive use of real estate developed with a residential building commenced to use it. Such a situation resulted in the fact that other investors, having no legal and even less actual possibility to use the object, could not start using it illegally, despite the fact of being the investors. In the case cited above, i.e. when the investor has commenced to use the building object without the will of another investor, there are no grounds for imposing a penalty for lawlessness use of the building object upon that other investor. The purpose of the administrative sanction must be invoked here. It is to enforce the application of art. 54 and 55 of the Construction Law. Therefore, imposing this

[24] Judgment of the Voivodeship Administrative Court in Gliwice of 6 May 2015, II SA/GL 90/15, LEX No. 1754369.

[25] Judgment of the Constitutional Tribunal of 1 March 1994, U 7/93, OTK 1994, No. 1, item 5.

[26] Judgment of the Voivodeship Administrative Court in Wrocław of 19 February 2013, II SA/Wr 793/12, LEX No. 1330371.

[27] Bojanowski, E., *Kara administracyjna. Kilka refleksji*, in: Jakimowicz, W., Krawczyk, M., Niżnik-Dobosz, I. (eds.), *Fenomen prawa administracyjnego. Księga jubileuszowa Profesora Jana Zimmermanna*, Warszawa 2019, p. 68.

[28] Kostka, Z. in: Gliniecki, A. (ed.), *Prawo budowlane. Komentarz*, Warszawa 2012, p. 530.

penalty on a third party, which could not comply with these provisions, would be contrary to the purpose of art. 57 section 7 of the Construction Law.[29] An administrative penalty requires a prior determination that the person punished has violated the law, in breach of certain obligations imposed by law. It should be noted that the penalty is always individualised, which means that the public authority, when imposing a penalty, should always take into account the assessment of the circumstances of the specific case. The point is that all circumstances affecting the level of the penalty are assessed only in relation to the specific person concerned. Where there are several investors, the circumstances that will affect the imposition of the penalty are assessed for each of them. As the Supreme Court points out, a specific and individualised punishment should ensure the internal fairness of the judgment, with due regard for the role of each of those involved in the violation of the law.[30] While analysing the above ruling of the NSA, it is worth emphasizing that the literal interpretation of art. 57 section 7 of the Construction Law does not give rise to the claim that only the investor may be penalised in a situation where he has handed over the documentation and premises for finishing to the purchasers, but has not given them permission to use these premises in any way.[31] Therefore, it should be fully accepted that the penalty for lawlessness use of the building object shall be imposed only upon the person who committed the offence.

In stressing the rightness of the decision of the Supreme Administrative Court, as in the opinion of the author of a fair approach to the case, one should bear in mind the view that states that the administrative penalty constituting a means of coercion and acting for the public interest falls under the so-called 'regime of objective responsibility.' This means that the imposition of administrative fines is detached from the necessity to state the guilt and other circumstances of the case. Such a position on this NSA ruling would clearly harm a second investor who actually had limited right to proceed to use the facility. Given that the administrative court should defend the rights and freedoms of the individual against excessive authority of administrative bodies, the decision of the Supreme Administrative Court seems to be correct.

[29] Ibidem, p. 530.

[30] Judgment of the Supreme Court of 8 February 1978, I KR 6/78, OSNKW 1978, No. 7–8, item 80.

[31] Judgment of the Voivodeship Administrative Court in Wrocław of 19 February 2013, II SA/Wr 793/12, LEX No. 1330371.

Conclusions

As a result of the analysis of the judgment in question, it should be concluded that it is only the formal completion of the investment and construction process commenced on the basis of a construction permit or notification that allows for the legal use of the building object. Generally speaking, it is possible to commence the use of a building object after notifying the building supervision authority of the completion of the construction or after obtaining a permit for use. In art. 54 and 55 of the Construction Law, the legislator has presented how construction should be formally completed, specifying the cases in which it is necessary to make a notification and obtain a permit for use. If the building supervisory authority determines that the commencement of use of a construction work or a part thereof was in violation of the provisions of art. 54 and 55 of the Construction Law, then the authority has no option but to impose a penalty on the investor for lawlessness use of the building object in accordance with art. 57 section 7 of this Law. The factual and legal situation presented in this case leaves no doubt that the building supervisory authority, acting on the basis and within the limits of the law, was obliged to impose a penalty for lawlessness of use, and this only on one investor. The cursory review of the construction law does not formulate a rule that would allow to impose a penalty for lawlessness use of a building object on any investor who was the addressee of the permit if it was found that the use of the building object was commenced without the legally required notice of completion of the construction. It should be borne in mind that the administrative penalty shall be individualised and applied only to the person who has actually committed the violation of the law. Therefore, I believe that the judgment of the Supreme Administrative Court is correct because, taking into account the fact that the District Court granted the right to use the real estate developed with a building to the first investor, no penalty can be imposed on the second investor due to his legal and factual limitations related to the use of the building object, which may have caused that the use of the building object was started in a lawlessness manner and against his will.

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ACTA IURIS STETINENSIS 4 (28)

DOI:10.18276/ais.2019.28-13

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THE PRINCIPLE OF UNITY OF THE CIVIL LAW VS COHESION OF COMMERCIAL LAW AND FAMILY LAW REGULATIONS (NATIONWIDE SCIENTIFIC CONFERENCE, SZCZECIN, 19 OCTOBER 2018)

The Nationwide Scientific Conference "The principle of unity of the civil law vs cohesion of commercial law and family law regulations," organised by the Civil and Commercial Law Department of the Law and Administration Faculty of the University of Szczecin in cooperation with the Institute of Legal Sciences of the Polish Academy of Sciences, was held in the Senate Hall of the University of Szczecin on 19 October 2018. Held under the patronage of the President of the City of Szczecin, the conference was attended by 50 participants from 16 research centres who presented 10 papers and 8 communiqués.

The first to take the floor was the Dean of the Law and Administration Faculty of the University of Szczecin dr hab. prof. US Zbigniew Kuniewicz, who

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welcomed the conference participants, including His Magnificence Rector of the University of Szczecin prof. zw. dr hab. Edward Włodarczyk and Vice President of the City of Szczecin dr hab. prof. US Daniel Wacinkiewicz, to whom he subsequently gave the floor. The conference was divided into 3 panels moderated by prof. dr hab. Andrzej Kidyba, dr hab. prof. US Zbigniew Kuniewicz and prof. dr hab. Adam Olejniczak respectively, and ended with a discussion led by dr hab. prof. US Marek Andrzejewski.

The first speaker was dr hab. prof. INP PAN Monika Tarska from the Institute of Legal Sciences of the Polish Academy of Sciences, who presented a paper titled "Unity of the civil law vs legal regulation of commercial companies." The speaker began with a historical background of the entry into force of the Civil Code in 1965, which introduced the principle of unity of the civil law, and the subsequent entry into force of the Commercial Companies Code. In her speech, she highlighted the following groups of issues: the essence, scope and applicability of the freedom of contract principle in the area of commercial companies regulations; relationship of civil law provisions on legal transactions, in particular contracts, with issues concerning commercial companies contracts and invalidity of contracts; the concept of a legal transaction and a corporate body, invalidity of a legal transaction, challenge ability of a resolution adopted by a meeting of partners and general meeting and the so-called non-existent resolutions; the legal and property status of spouses in a situation where one of them is a participant in a company; synchronisation of the provisions of the Act on the National Court Register concerning the registration proceedings with the systemic provisions of the Commercial Companies Code.

The second speaker was dr hab. prof. UW Łukasz Błaszczak from the University of Wrocław, who presented a paper titled "The issue of acceptability of an action pursuant to Article 189 of the Code of Civil Procedure for annulment of resolutions vs the autonomous regime of challenging resolutions under the Commercial Companies Code." He pointed out that the case law and the doctrine lack unanimity concerning the scope of applicability of the provisions of the Civil Code on requirements for and effects of defectiveness of legal transactions, particularly Article 58 of the Civil Code, to resolutions. He also discussed the topic of the so-called non-existent resolutions, as well as highlighted the lack of unanimity of the jurisprudence and the doctrine in this respect. His further deliberations concerned the issue of legal interest, and the speaker expressed the view

that the jurisprudence errs in linking legal interest with actual interest and that it is wrong to assume that if an entity has economic interest, then it automatically has legal interest. He also discussed the provision laid down in Article 17 Point 4^2 of the Code of Civil Procedure as a possible ground for initiating an action for annulment of a resolution, and concluded by assessing the acceptability of an action for declaring a resolution annulled or non-existent in the context of the constitutional principle of equality.

The next paper titled "Analysis of applicability of private law to the public sector as an inspiration for the development of the civil law methodology" was presented by dr hab. prof. UAM Rafał Szczepaniak from the Adam Mickiewicz University in Poznań. The speaker noted that a number of civil law institutions are used also in the public law sector, which opens a discussion on the principle of unity of civil law at different levels. Law is principally divided into the private law and public law sectors, with civil law relationships occupying a vast area. There are institutions in civil law with a dominant technical component which would enable their intersectoral application. However, there are also institutions in which the axiological component dominates – such as a contract and ownership – and their application to the public sector leads to a significant distortion of their essence, hence these institutions cannot be understood merely as specific tools. The speaker presented the issue of open pension funds and a judgement of the Constitutional Tribunal passed in this context in 2015. He drew attention to the phenomenon of constitutionalisation of civil law, which enriches the civil law methodology by demonstrating the limits of civil law, which is linked also with the protection of fundamental rights. In summary of his speech, prof. R. Szczepaniak postulated the need to isolate the public sector's civil law as a civil law branch equal to other civil law branches. The last speaker to take the floor in the first panel was dr hab. prof. UMK Konrad Zacharzewski from the Nicolaus Copernicus University in Toruń, who presented the principle of unity of civil and commercial law in stock exchange law following implementation of the MiFID 2 Directive of 2014.

The second panel started with a speech of dr hab. Grzegorz Kozieł from the Maria Curie-Skłodowska University in Lublin titled "Acquisition of a shareholding in an EEIG established in the Republic of Poland funded from assets jointly held in the regime of joint property of spouses in the context of becoming a member of that grouping." The speaker began with pointing out that although EEIGs

are not typical business operators in the strict sense of this term, they are entered into the register of entrepreneurs of the National Court Register and are allowed to conduct business activity for and in the interest of their members. Acquisition of a shareholding in an EEIG for funds from joint spousal property entails inclusion of that shareholding in the joint property. Consequences of such acquisition in the area of membership in the EEIG can be perceived in a non-uniform manner, especially depending on whether the shareholding in the EEIG is acquired by both spouses (i.e. it is acquired jointly) or by one of them. The speaker noted the absence of cohesion in this area as regards family law and commercial law regulations, which should be removed by means of introducing a comprehensive regulation regarding consequences of acquisition of "share rights" in commercial companies and other similar organisational entities, including in particular EEIGs and mutual insurance institutions.

The next paper was presented by dr Robert Słabuszewski from the Jacob of Paradies University in Gorzów Wielkopolski. In his presentation, the speaker raised the issue of division of joint property of spouses who are shareholders in commercial companies. According to dr R. Słabuszewski, interests in a partnership and units of participation in capital companies may be part of joint spousal property, which should, however, be clearly distinguished from holding the status of a shareholder in a given company. Analysing methods of division of assets known in civil law, the speaker evaluated their applicability to division of interests as well as shares and holdings between the spouses. He also discussed the impact of restrictions on the trade in participation rights on admissibility and manner of their division. He explained the method of establishing the value of the right being divided (in terms of status, price and method of valuation).

The paper presented by dr Aleksandra Sikorska-Lewandowska from the Nicolaus Copernicus University in Toruń concerned the legal nature of resolutions of capital company bodies and the issue of their challenge ability in the light of the provisions of the Commercial Companies Code and the Civil Code. The speaker began with discussing the theory of capital company bodies and pointing out that, due to their specific nature, resolutions adopted by such bodies belong to the category of corporate legal actions. In accordance with the current case law and views of the doctrine, on the grounds of the principle of unity of civil law, one must reject applicability of the provisions of the Commercial Companies Code on challenging resolutions of general meetings *per analogiam* with chal-

lenging resolutions of supervisory boards and management boards. According to the speaker, this leads to application of different regimes of challenging resolutions of capital company bodies and linking the challenge ability of resolutions of supervisory boards and management boards with their legal nature in the absence of such linking in the case of resolutions of shareholder meetings.

The second panel was closed with communiqués. Dr Paweł Lewandowski from the University of Warmia and Mazury in Olsztyn raised the issue of seconding a member of the supervisory board of a limited liability company to seat in the management board. The communiqué by dr Tomasz Kozak from the European University of Law and Administration in Warszawa concerned the liability of the spouse of a partner in a partnership following cessation of joint spousal property. The communiqué delivered by mgr Maria Wysocka from the University of Szczecin covered the issue of legal nature of membership and participation in capital companies. Mgr Krzysztof Kubasik from the University of Szczecin delivered a communiqué concerning a contract for the provision of services between a member of the management board and a limited liability company in the context of the principle of unity of civil law.

The third panel, moderated by prof. dr hab. Adam Olejniczak from the Adam Mickiewicz University in Poznań, was started by speech of dr Mariusz Zelek from the Adam Mickiewicz University in Poznań, who presented a paper titled "Fault in civil, criminal, family and copyright law – input to the discussion on the notion of fault in Polish law". The speaker noted that the Polish legal system often refers to fault as a circumstance relevant to the existence of specific legal consequences while at the same time not providing a legal definition of the term. He gave the examples of family law (fault in marital breakdown), civil law (fault as a circumstance of liability for damages) and criminal law (fault as a circumstance that legitimises and limits criminal liability). He highlighted that although the said terms refer to a negative assessment of one's behaviour, a closer analysis shows material differences in the construction and elements of fault in the respective areas. This in turn, according to the speaker, demands one to consider whether fault can be perceived as a universal category or in fact there are "different faults" in respective fields of law.

Next to take the floor was dr Dominika Mróz-Krysta from the Jagiellonian University, who discussed the issue of return of expenses incurred from joint spousal property on personal property of one of them in the context of the right

of retention under Article 461 § 2 of the Civil Code. The speaker pointed out that the issue had arisen from a specific civil case. She then proceeded to giving the facts of the case according to which a divorced spouse suing for settlement of expenses incurred from the joint property on the other spouse's personal property used the plea of retention provided for in Article 461 § 1 of the Civil Code. The personal property component on which expenses had been incurred was a real property satisfying the family's housing needs. The court made the eviction of the divorced spouse from the real conditional on settlement of the expenses incurred from the joint spousal property on that real property. According to the speaker, such ruling makes one formulate a question whether it is possible to use the analogy with Article 461 § 2 of the Civil Code which provides for exceptions from the right of retention.

The next speaker to take the floor was dr Maciej Domański from the University of Warsaw, who presented the issue of the defectiveness of concluding a marriage in the light of traditional civil law sanctions concerning defectiveness of legal actions. The speaker pointed out that the jurisprudence noticeably lacks research into the specific nature of family law relationships and events. In his speech, he analysed the provisions of the Family and Guardianship Code in the area of sanctions connected with faulty conclusion of a marriage (annullability of marriage, *matrimonium non existens*) in reference to similar civil law sanctions concerning defectiveness of legal transactions.

The last part of the third panel included communiques. Dr Ewa Lewandowska from the University of Warmia and Mazury in Olsztyn presented the issue of concluding a marriage of convenience as an unsolved practical problem. The next speaker was dr Jerzy Akińcza, also from the University of Warmia and Mazury in Olsztyn, who discussed the model of a partnership as the basis for settling property in civil partnerships. The next communique was presented by dr Katarzyna Malinowska-Woźniak from the University of Szczecin, who raised the issue of the scope of the spouse's consent referred to in Article 37 of the Family and Guardianship Code for the other spouse to make a legal transaction. The last speaker was mgr. Adriana Tomczyk from the University of Szczecin, who discussed the issue of annulling a donation to the beneficiary spouses remaining in a statutory property regime.

After the end of the third panel, a discussion began, moderated by dr hab. prof. US Marek Andrzejewski from the University of Szczecin. The papers deliv-

ered during the conference inspired the participants to speak. Dr hab. prof. INP PAN Monika Tarska presented her thoughts as the first one and pointed out that it is not correct to use the term "corporate shareholding" to refer to all rights and obligations of a partner in a partnership. The Commercial Companies Code cannot take precedence over the Family and Guardianship Code. Prof. Monika Tarska opposed the concept of the multiplication of the company share in a partnership. In her opinion the legislator's intervention in the field of normative regulation of partners' participation in commercial companies is now needed.
Dr Robert Słabuszewski pointed out that the notion of a company share is an acronym and does not change the way the concept of all rights and obligations in a partnership is understood. He also stated that in his opinion, the possibility of joining the company by a partner's spouse is always subject to the control of other partners due to the regulation contained in Article 10 of the Commercial Companies Code. In turn, dr hab. Grzegorz Kozieł stated that he agrees with the prof. M. Tarska on the need for legislative changes with regard to the participation of spouses in partnerships.

Another speaker was a prof. of the University of Gdańsk, dr hab. Małgorzata Balwicka-Szczyrba, who referred to dr E. Lewandowska's speech on the apparent marriage. She suggested that consideration should be given to whether the existence of a formal element when the marriage is celebrated, such as the presence of the head of the Registry Office or a priest, does not prevent to declare apparency of the declaration of marriage.

The next speaker was professor of the John Paul II Catholic University of Lublin, dr hab. Andrzej Herbet, who stated that the unity of civil law is necessary and of fundamental importance. Hence the topic of the conference is very relevant. The differences in the detailed approach result from petrifying the legal status of general regulations. This has been confirmed by the need to search for definitions of fundamental concepts, such as the right of membership, which was aptly pointed out by mgr M. Wysocka. Consequently, it is necessary to revise the basic structures of civil law. On the other hand, an action for determination under Article 189 of the Code of Civil Procedure cannot concern the determination of non-existence of a resolution, but an action can be brought for determination of non-existence of a legal relationship whose source is a defective resolution. The legal nature of the judgment declaring the resolution as invalid is fundamental. However, prof. A. Herbet did not agree with the view expressed by the Supreme

Court that the judgment declaring the resolution as invalid is of constitutive nature, because in such case no other court in other proceedings won't be able to declare this invalidity, including the registration court.

His own reflections were also presented by prof. of the Adam Mickiewicz University, dr hab. Rafał Szczepaniak, who pointed out that he agrees with prof. A. Herbet that the conclusions of the application of private law in public law are that a public entity, when performing activities regulated by private law, must still comply with the rules set out by public law.

Next, prof. of the University of Szczecin, dr hab. Zbigniew Kuniewicz, took the floor and stated that he agrees with prof. A. Herbet on the imperfection of the general part of civil law. He also noted that there is an inconsistency between the regulation contained in Article 21 of the Commercial Companies Code and the provisions of the Act on the National Court Register. He questioned the need for the legislator to indicate the reasons for the non-existence of resolutions. Referring to the concept of the resolution as an intra-corporate act, presented by dr A. Sikorska-Lewandowska, he pointed out the need to search for solutions using basic civilistic constructions, rather than creating new ones.

Summarizing the speeches of the speakers, dr Mariusz Zelek drew attention to the necessity of expanding the catalogue of entities in the Civil Code, in particular due to the regulation of tortious liability because of the so-called fault of the authority. He also noted that the obligation to contracting under private law exists, but failure to do so results in public law sanctions only. In turn, dr Jerzy Akińcza, while taking the floor during the discussion, stated that the increasing appropriation of private law by public law is unacceptable. He added that the direct application of Article 189 of the Code of Civil Procedure to determine the non-existence of resolutions, and not only to determine the non-existence of legal relationships arising from them, does not violate the legal order. Next, dr Ewa Lewandowska pointed out in her statement that she was considering the issue of non-existence of marriage as a result of marriage of convenience, but in her opinion, since the parties made some statements and third parties got acquainted with them, we cannot speak about the non-existence of such a legal relationship. Dr Grzegorz Sikorski referred to the issue of delegating a member of the Supervisory Board to perform functions in the Management Board of a limited liability company. In his opinion, the conclusion of such a provision in the articles of association does not violate the principle of freedom of agreement, and moreover,

it is a good solution in a situation where in a limited liability company the management board is appointed by the shareholders' meeting, because the shareholders obtain time to supplement the composition of the management board. Dr hab. Konrad Zacharzewski, prof. of the Nicolaus Copernicus University, also spoke. He pointed out that diligence is a duty under contract, but the concept of diligence may have a universal meaning. In addition, he stated that *causa amore* is not the cause of the marriage, and therefore the legislator may sanction a marriage of convenience in various ways, e.g. in such a way that it will not have any effect on the acquisition of citizenship.

At this point, the discussion ended and prof. Z. Kuniewicz took the floor. Summing up the conference he thanked for interesting and substantive speeches and inspiring voices during the discussion. He announced another conference organized by the Law and Administration Faculty of the University of Szczecin and invited participants to take part in it.

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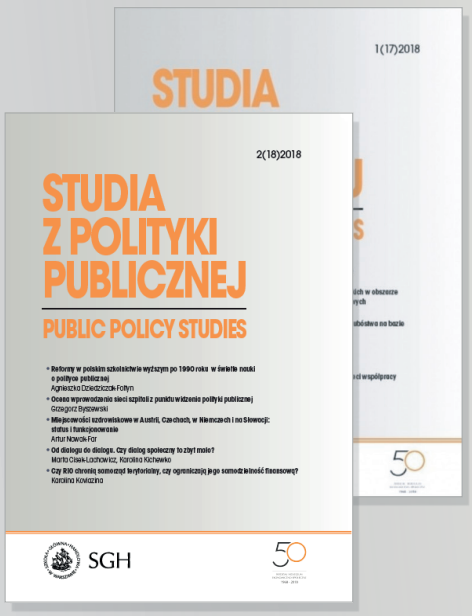

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