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# REHABILITATION OF NAZISM AS A CRIME IN THE CRIMINAL CODE OF THE RUSSIAN FEDERATION

KATARZYNA LASKOWSKA*

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Abstract

The paper discusses with the crime of rehabilitation of Nazism contained in the 1996 Criminal Code of the Russian Federation. It presents the rationale for its introduction into the legislation, the scope of the legal regulation, and its evaluation in terms of its content and edition. For the purpose of the publication, research questions were posed, the answers to which demonstrated the political and populist nature of the regulation and its imprecise casuistic approach, which brings few benefits to Russia's criminal policy.

Keywords: Nazism, rehabilitation of Nazism, criminal code of the Russian Federation

## INTRODUCTION

The elaboration of this study was prompted by the Russian military invasion of Ukraine on 24 February 2022. According to the President of the Russian Federation, V.V. Putin, the official purpose of the invasion was the need to denazify Ukraine, which in reality led to the killing of country's residents, regardless of their political views.[1] The fight between Russian soldiers and "Ukrainian Nazis" became the dominant slogan of the war for many months. Prior to the outbreak of the war, many Poles were unaware of the scope of the concept of Nazism used by Russian

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[1] Mirski, A., *Rosja spuściła neonazistów ze smyczy. Tak Putin "denazyfikuje" Ukrainę*, https://wiadomosci.onet.pl/swiat/tak-rosjanie-denazyfikuja-ukraine-zabijaja-wszystkich/hznvr8t (accessed on 13.09.2022).

propaganda. They were certainly also not aware that the Russian Criminal Code has for several years criminalised the offence of rehabilitation of Nazism.

The purpose of this paper is to discuss the criminal law regulation of the crime of rehabilitation of Nazism in the light of the 1996 Criminal Code of the Russian Federation[2] (CC RF). This analysis covers the law and legal literature on the offence mentioned in the title.

The following research questions were posed in view of the proposed evaluation:

1. What was the rationale for introducing the crime of rehabilitation of Nazism into the 1996 Criminal Code of the Russian Federation?
2. What is the scope of legal regulation of the crime of rehabilitation of Nazism?
3. How should outlawing of the rehabilitation of Nazism be evaluated?

## RATIONALE FOR OUTLAWING THE REHABILITATION OF NAZISM

The first attempt in Russia to enact a provision establishing liability for an attack on historical memory concerning events of World War II was made in 2009. The Act was tabled by the "United Russia" party. It did not become law due to the many controversies it caused both in Russia and abroad. One of the reasons for this was the use of the wording "distortion of the Nuremberg Tribunal's verdict" which was to be a constituent element of one of the offences. Such wording was deemed legally vague, since it did not include any indication as to the ways in which the verdict delivered by the Tribunal could be distorted. In 2010, the Act was once again submitted to the Duma, again unsuccessfully. Two more drafts of anti-Nazi legislation were later submitted, neither of which was passed.[3]

The crime of rehabilitation of Nazism (Article 354.1) was introduced to the Russian Criminal Code by the Act of 5 May 2014 on the amendment of certain legislative acts of the Russian Federation.[4] The provision entered into force on 16 May 2014. It should be noted that the timing of its adoption in May was no coincidence. Fast track proceedings during that month were linked to the traditional enactment of legislation concerning World War II in Russia around 9 May, i.e. Victory Day.[5]

The authors pointed primarily to the situation in Ukraine as rationale for the draft Article 354.1 CC RF. According to them, "the policy of ideologisation, revising history" in that country has led to "fascism developing to its full extent and no

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[2] Ugolovnyy kodeks Rossiyskoy Federatsii ot 13.06.1996 g., N 63-FZ, http://www.consultant.ru/document/cons_doc_LAW_10699/ (accessed on 6.09.2022), hereinafter referred to as "CC RF".

[3] Gad'yan, A.S., 'Reabilitatsiya natsizma: nuzhna li novaya ugolovno-pravovaya norma?', in: *O nekotorykh voprosakh i problemakh sovremennoy yurisprudentsii. Sbornik nauchnykh trudov po itogam mezhdunarodnoy nauchno-prakticheskoy konferentsii*, No. 2, Chelyabinsk, 2015, p. 43.

[4] Federal'nyy zakon, *O vnesenii izmeneniy v otdel'nyye zakonodatel'nyye akty Rossiyskoy Federatsii* ot 05.05.2014 g., N 128-FZ, http://www.consultant.ru/document/cons_doc_LAW_162575/ (accessed on 13.09.2022).

[5] Maksimova, M.A., Nazmutdinova, D.M., 'Reabilitatsiya natsizma: prichiny problem prakticheskogo primeneniya stat'i 354.1 uk RF', in: *Nedelya nauki SPBPU. Materialy nauchnoy konferentsii s mezhdunarodnym uchastiyem*, Sankt-Peterburg, 2018, p. 443.

longer being associated with propaganda, but with the commission of crimes, coup attempts, the destruction of human dignity and homicides".[6] Thus, according to the drafters, the Act was prompted by "the resurgence of the idea of Nazism in Ukraine".[7]

One of the reasons for introducing the provision was also the importance of historical memory in Russia.[8] It is worth noting that Article 44(3) of the 1993 Constitution of the Russian Federation[9] stipulates the obligation of care for the preservation of historical and cultural heritage and protection of historical and cultural monuments. The abovementioned provision implies the need to protect historical memory, including protection enshrined in the criminal law.[10] This memory is considered sacred in Russia as "a thread connecting different generations", the unifying factor of Russian society's values. Undermining this element or interfering with it arouses opposition within the population.[11] There is a sense of duty in society to pass on information about the heroism of Russians from generation to generation. It is carried out through patriotic upbringing and propaganda.

Another justification for outlawing the rehabilitation of Nazism was the intensification of pro-Nazi activity in Russia,[12] the formation and resurgence of nationalist groups "who blamed the USSR and its successor – Russia – for the outbreak of World War II". They operate systemically and pose a threat to Russian statehood.[13] It is emphasised that out of the 78 extremist organisations banned in the country, some 20 support Nazi ideology, in particular: The Right Sector, the National Socialist Workers' Party of Russia and the Russian National Union.[14] The problem of a threat in the form of Nazism and fascism resurgence is constantly being identified, as indicated in point 11 of the Strategy for Countering Extremism in the Russian Federation until 2025.[15] It has been underlined many times in Russia that Nazism and fascism are used for "political profiteering", and therefore the revival and activity of these harmful ideologies must not be allowed. In 2016, events in Ukraine and other European countries were pointed out in this context.[16]

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[6] Melanich, V.G., 'Ugolovnaya otvetstvennost' za reabilitatsiyu natsizma', in: *Transformatsiya prava i pravookhranitel'noy deyatel'nosti v usloviyakh razvitiya tsifrovykh tekhnologiy v Rossii, stranakh SNG i Yevropeyskogo Soyuza: problemy zakonodatel'stva i sotsial'noy effektivnosti*, Saratov, 2019, p. 199.

[7] Maksimova, M.A., Nazmutdinova, D.M., 'Reabilitatsiya…', op. cit., p. 443.

[8] Makeyeva, I.S., 'Sotsial'naya obuslovlennost' vvedeniya ugolovnoy otvetstvennosti za reabilitatsiyu natsizma v Rossii', *Vestnik Ural'skogo yuridicheskogo instituta MVD Rossii*, 2021, No. 1, p. 146.

[9] Konstitutsiya Rossiyskoy Federatsii ot 12.12.1993 g. (as amended), http://www.consultant.ru/document/cons_doc_LAW_28399 (accessed on 20.09.2022).

[10] Gad'yan, A.S., 'Reabilitatsiya…', op. cit., p. 44.

[11] Makeyeva, I.S., 'Sotsial'naya…', op. cit., pp. 146–147.

[12] Ibidem, p. 147.

[13] Popova, L.Ye., 'Ugolovno-pravovaya bor'ba s popytkami reabilitatsii natsizma', *Vestnik nauchnykh konferentsiy*, 2016, No. 5-2, p. 91.

[14] Makeyeva, I.S., 'Sotsial'naya…', op. cit., p. 147.

[15] Ukaz Prezidenta RF ot 29 maya 2020 g., No. 344, *Ob utverzhdenii Strategii protivodeystviya ekstremizmu v Rossiyskoy Federatsii do 2025 goda*, https://www.garant.ru/products/ipo/prime/doc/74094369/ (accessed on 20.09.2022).

[16] Popova, L.Ye., 'Ugolovno-pravovaya…', op. cit., p. 91.

The need to introduce the provision also stemmed from political tensions in the world with regard to revision of the consequences of World War II and, in particular, the verdicts of the Nuremberg trials.[17] Russians believe that Western European states seek to portray their country as an empire of evil, with traditions of tyranny and slavery, as a rationale for isolating Russia.[18] They believe that many countries today want to "take credit for the victory over fascist Germany".[19] They stress that Russia's Western partners are "attacking the historical memory of World War II, which for the Soviet people was the Great Patriotic War".[20] According to V.N. Dodonov, rehabilitation of Nazism constitutes an "assault on historical justice" and a "distortion of historical events".[21]

However, even today, in an age of intensive scientific research, it is still difficult to determine what information about the USSR's operations during World War II is true. Complete and reliable historical knowledge with regard to certain military operations is still lacking. It should be agreed that we should now "speak of the activities of the USSR officially recorded in the verdict of the Nuremberg Tribunal".[22]

Russians point out that – in view of rehabilitation of Nazism – perpetrators: use mass media, including social networks, where they invent historical myths distorting the historical truth; deliberately remove disputed historical facts and commit errors in their interpretation, drawing false conclusions on this basis; introduce new nomenclature that allows for their own interpretation of historical events and manipulate historical events and figures in an unjustified manner.[23] Therefore, Russians oppose "the mounting campaign to rewrite the history of World War II" and, as propaganda puts it, "the cynical efforts of political elites of many Western and Eastern European countries aimed at destroying historical memory",[24] as well as actions restoring the reputation of Nazi criminals and their accomplices.[25] Thus, in the Russians' opinion, the provision was a reaction against the "heroisation" of Nazism, Nazi criminals, lies about the history of World War II, information about the victors of that war and a way to counteract the activity of such movements in

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[17] Makeyeva, I.S., 'Sotsial'naya…', op. cit., p. 147.

[18] Gribanov, Ye.V., Yablonskiy, I.V., 'Ugolovnaya otvetstvennost' za reabilitatsiyu natsizma: istoriko-pravovyye osnovaniya i kharakteristika', *Obshchestvo i pravo*, 2017, No. 1, p. 145.

[19] Sementsova, I.A., Fomenko, A.I., 'Okhrana nashey pobedy v Velikoy Otechestvennoy Voyne ugolovno-pravovymi sredstvami (o sovershenstvovanii st. 354.1 uk RF)', *Nauka i obrazovaniye: khozyaystvo i ekonomika; predprinimatel'stvo; pravo i upravleniye*, 2020, No. 6, p. 102.

[20] Redkov, S.K., Busheva, F.F., 'Yuridicheskiy analiz st. 354.1 uk RF »Reabilitatsiya natsizma«', *Na puti k grazhdanskomu obshchestvu*, 2020, No. 1, p. 25.

[21] Pikin, I.V., 'K voprosu ob ugolovnoy otvetstvennosti za reabilitatsiyu natsizma', *Nauchnyy vestnik Kryma*, 2022, No. 4, p. 2.

[22] Rovneyko, V.V., 'Problemy ugolovno-pravovoy otsenki reabilitatsii natsizma kak prestupleniya mezhdunarodnogo kharaktera', *Vestnik udmurtskogo universiteta. Seriya: Ekonomika i pravo*, 2021, No. 31, p. 885.

[23] Oganov, G.K., Borovikov, V.S., 'Istoricheskaya obuslovlennost' ustanovleniya ugolovno-pravovogo zapreta reabilitatsii natsizma', in: *Sbornik izbrannykh statey po materialam nauchnykh konferentsiy GNII NATSRAZVITIYE*, Sankt Peterburg, 2019, p. 522.

[24] Makeyeva, I.S., 'Sotsial'naya…', op. cit., p. 145.

[25] Levandovskaya, M.G., 'Ugolovnaya otvetstvennost' za reabilitatsiyu natsizma (po st. 354.1 UK RF)', *Voprosy rossiyskogo i mezhdunarodnogo prava*, 2018, Vol. 8, No. 7A, p. 142.

Russia".[26] It was intended to protect the "Russian cultural code"[27] and "prevent the falsification of historical facts". Russians point to Prof. D.M. Feldman's statement on television (TV Centre) about the execution of thousands of Polish soldiers in Katyn, as an example of falsifying history. It resulted in a notification of law enforcement authorities in Moscow that he had committed the crime of rehabilitation of Nazism.[28]

In order to justify outlawing the rehabilitation of Nazism, Russia has also taken action on the international arena. On 21 November 2014, on Russia's initiative, the UN General Assembly Committee adopted a resolution on combating glorification of Nazism, neo-Nazism and other practices that contribute to fuelling contemporary forms of racism, racial discrimination, xenophobia and related intolerance.[29] Several years after the entry into force of Article 354.1 CC RF, i.e. on 18 December 2019, a resolution on combating glorification of Nazism was again passed, on the initiative of that country, at the plenary of the 74th Session of the UN General Assembly. The document was supported by 133 participating states which, according to the Russians, points to the international nature of the issue.[30]

## CLARIFYING THE NAME "CRIME OF NAZISM REHABILITATION"

Clarification must begin by establishing the scope of the concept of Nazism. According to Russian authors, Nazism is: "the ideology underlying policies and practices of the National Socialist German Workers' Party in Germany from 1919 to 1945";[31] "the ideology and practice of the Nazi regime in Germany in 1933–1945";[32] German fascism;[33] "one of the names for German fascism"; "one of the types of fascism",[34] however "the most radical (extreme)" type.[35]

From the definitions of Nazism cited above and other definitions analysed by the author of this publication, it is clear that all scholars consider it to be a manifestation of fascism. Many authors equate fascism with Nazism.[36] So what is fascism, then? According to S.I. Ozhegov's Dictionary of the Russian Language, it is "the ideology of militant racism, anti-Semitism and chauvinism, political currents based on it, as well as the open terrorist dictatorship of one dominant party, the repressive regime created by it, aimed at suppressing progressive social movements, destroying

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26 Popova, L.Ye., 'Ugolovno-pravovaya…', op. cit., p. 91.

27 Redkov, S.K., Busheva, F.F., 'Yuridicheskiy…', op. cit., p. 25.

28 Gad'yan, A.S., 'Reabilitatsiya…', op. cit., pp. 43 and 45.

29 Andreyeva, A.V., 'Sotsial'naya obuslovlennost' ustanovleniya ugolovnoy otvetstvennosti za reabilitatsiyu natsizma v RF', *Vestnik Moskovskogo universiteta MVD Rossii*, 2015, No. 8, p. 112.

30 Makeyeva, I.S., 'Sotsial'naya…', op. cit., p. 144.

31 Levandovskaya, M.G., 'Reabilitatsiya…', op. cit.

32 *Bol'shoy slovar' innostrannykh slov*, https://gufo.me/dict/foreign_words/%D0%BD%D0%B0%D1%86%D0%B8%D0%B7%D0%BC (accessed on 13.09.2022).

33 *Natsizm*, https://slovarozhegova.ru/word.php?wordid=16218 (accessed on 13.09.2022).

34 Maraeva, A.V., 'Voprosy tolkovaniya termina "Reabilitatsiya natsizma" primenitel'no k st. 354.1 uk RF', *Vestnik Moskovskogo universiteta MVD Rossii*, 2019, No. 5, p. 154.

35 Ivanov, A.Yu., 'Ponimaniye termina "natsizm" primenitel'no k stat'ye 354.1 Ugolovnogo kodeksa Rossiyskoy Federatsii', *Voprosy rossiyskoy yustitsii*, 2020, No. 9, p. 75.

36 Ibidem, p. 74.

democracy and unleashing war".[37] By contrast, according to the definition contained in the 1995 Decree of the President of the Russian Federation on Measures to Ensure Coordinated Action by State Authorities in the Fight Against Manifestations of Fascism and Other Forms of Political Extremism in the Russian Federation,[38]

> "fascism is an ideology and practice that affirms the superiority and exclusivity of a particular nation or race, and aims to incite national intolerance, justifying discrimination against representatives of other nations, denying democracy, establishing a cult of the leader, using violence and terror to suppress political opponents and any form of dissent, in order to justify war as a means of solving problems between states."[39]

The definitions cited confirm the perception of Nazism as a manifestation of fascism. One must also agree with the assertion that, both in the USSR and today, the terms "Nazism" and "fascism" are treated in Russia as synonyms.[40] Some regard Nazism as "a form of social organisation that combines socialist ideas with extreme nationalism and racism".[41] They even claim that Nazism contains "elements of socialism, nationalism, racism, anti-Semitism and totalitarianism".[42] Others reflect on the links with extremism and terrorism exhibited by Nazism. While they perceive links with extremism, they do not observe links with terrorism.[43]

Continuing reflections on the concept of Nazism, it must be stated that, according to Russian scholars, "it involves the assertion of the superiority of a racial, national or ethnic group, as well as the necessity of the total or partial destruction of 'inferior' groups, as a condition for the survival and prosperity of the 'superior' nation (nationality), accompanied by military aggression and genocide".[44] An essential feature of Nazism is the "exceptional character and superiority of one race (nationality) over others" which triggers the need to suppress the inferior races (nationalities), as a condition for the survival and prosperity of the "superior" ones. This is carried out through the pursuit of a genocidal objective expressed in the aim of total or partial destruction of a "different" group of people (based on race, nationality or ethnicity). It may involve the destruction of as many members of a particular group as possible or the destruction of selected representatives of a political, religious or intellectual elite. The implementation of this goal of Nazism transforms the ideology into a crime against humanity or into a crime against peace

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37 *Fashizm*, https://slovarozhegova.ru/word.php?wordid=33745 (accessed on 13.09.2022).

38 Ukaz Prezidenta RF ot 23 marta 1995 g., No. 310, 'O merakh po obespecheniyu soglasovannykh deystviy organov gosudarstvennoy vlasti v bor'be s proyavleniyami fashizma i inykh form politicheskogo ekstremizma v Rossiyskoy Federatsii', *Sobraniye zakonodatel'stva RF*, 1995, No. 13, St. 1127.

39 Ivanov, A.Yu., 'Ponimaniye…', op. cit., p. 74.

40 Ibidem, p. 73.

41 Andreyeva, A.V., 'Sotsial'naya…', op. cit., p. 112.

42 Ivanov, A.Yu., 'Ponimaniye…', op. cit., p. 74.

43 Ignatenko, V.V., 'Nekotoryye problemy zakonodatel'noy reglamentatsii reabilitatsii natsizma', in: *Aktual'nyye problemy rossiyskoy pravovoy politiki. Sbornik dokladov XVII nauchno-prakticheskoy konferentsii prepodavateley, studentov, aspirantov i molodykh uchenykh,* Taganrog, 2016, p. 145.

44 Maraeva, A.V., 'Voprosy…', op. cit., p. 154.

and security of humanity.[45] Thus, the basis of Nazism is formed by ideas of the superiority of one nation over another and the waging of aggressive war.[46]

In turn, academics in the areas of philosophy, political science, politics and sociology define Nazism as an "ideology", a "political regime", "the practice of implementing a well-defined state- or quasi-state policy", as well as "various manifestations of the activity of individual and collective subjects". They perceive it both as "a certain ideology and as any actions to implement it".[47]

As shown by the above discourse, the concept of Nazism can be treated both narrowly and broadly.[48] Nazim has not, however, been clearly specified or defined in Russian law.[49]

The next step is to explain the concept of rehabilitation of the phenomenon in question. According to S.I. Ozhegov's Dictionary of the Russian Language, rehabilitation means "restoration of former reputation, former rights".[50] In turn, according to Article 5(34) of the Code of Criminal Procedure of the Russian Federation of 2001,[51] rehabilitation is "a procedure for the restoration of the rights and freedoms of a person who has been unlawfully or unjustly prosecuted, and compensation for the harm suffered". In Russian legislation, the term means actions that restore the law.[52] Thus, the meaning of rehabilitation adopted in the designation of the crime under Article 354.1 of the CC is different from its legal meaning.[53] According to the provision, rehabilitation constitutes "socially dangerous behaviour of the subject of the crime".[54] It denotes an unlawful act and therefore has a negative connotation.[55] Furthermore, it is important to remember that the term "rehabilitation" refers to a specific person and not an ideology.[56]

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[45] Ivanov, A.Yu., 'Ponimaniye…', op. cit., pp. 74–75.

[46] Ignatenko, V.V., 'Nekotoryye…', op. cit., p. 144.

[47] Ivanov, A.Yu., 'Ponimaniye…', op. cit., p. 73.

[48] Sementsova, I.A., Fomenko, A.I., 'Okhrana…', op. cit., p. 102.

[49] Yefimov, M.A., 'K voprosu ob opredelenii ponyatiya "reabilitatsiya natsizma" v ugolovnom kodekse Rossiyskoy Federatsii', in: *Vestnik nauchnykh trudov yuridicheskogo fakul'teta "Yurist"*, Kazan', 2015, p. 3, https://elibrary.ru/download/elibrary_25257107_36033151.pdf (accessed on 20.09.2022).

[50] *Reabilitirovat'*, https://slovarozhegova.ru/word.php?wordid=26757 (accessed on 20.09.2022).

[51] Ugolovno-protsessual'nyy kodeks Rossiyskoy Federatsii ot 18.12.2001 g., N 174-fz (ed. Ot 07.10.2022), http://www.consultant.ru/document/cons_doc_law_34481/ (accessed on 20.09.2022).

[52] Melanich, V.G., 'Aktual'nyye voprosy reabilitatsii natsizma (st. 354.1 uk RF)', in: *Pravo i pravookhranitel'naya deyatel'nost'v Rossii, stranakh SNG i Yevropeyskogo soyuza: zakonodatel'stvo i sotsial'naya effektivnost'. Materialy V Mezhdunarodnoy nauchno-prakticheskoy konferentsii prepodavateley, prakticheskikh sotrudnikov, studentov, magistrantov, aspirantov, soiskateley,* Saratov, 2018, p. 216.

[53] Ignatenko, V.V., 'Nekotoryye…', op. cit., p. 144.

[54] Melanich, V.G., 'Aktual'nyye…', op. cit., p. 216.

[55] Sementsova, I.A., Fomenko, A.I., 'Okhrana…', op. cit., p. 102.

[56] Pesterova, Yu.S., Poshelov, P.V., 'K voprosu o yuridicheskikh defektakh stat'i 354.1 ugolovnogo kodeksa Rossiyskoy Federatsii', *Sibirskoye yuridicheskoye obozreniye*, 2017, Vol. 14, No. 3, pp. 47–48.

The above analysis leads to the conclusion that the name of the crime (rehabilitation of Nazism) is incorrect, inappropriate,[57] unfitting.[58] Some propose changing it to: Public justification of Nazism.[59]

## REGULATORY SCOPE OF THE CRIME OF NAZISM REHABILITATION

The crime of rehabilitation of Nazism is included in Article 354.1 CC RF in Section XII entitled: "Crimes against peace and security of humanity" in Chapter 34 under the same title.

Under Article 354.1(1) CC RF, it shall be punishable

> "to publicly deny facts established by the verdict of the International Military Tribunal[60] for the trial and punishment of the major war criminals of European Axis powers, to praise the crimes established by this verdict, and to knowingly disseminate untrue information about the operations of the USSR during World War II and about the veterans of the Great Patriotic War".

The crime shall be punishable by a fine of up to three million roubles or up to the amount of the convicted person's three years' salary or other income, or by forced labour for up to three years, with deprivation of the right to hold certain positions or carry out certain activities for up to three years, or by imprisonment for the same period with deprivation of the right to hold certain positions or carry out certain activities for up to three years.

The object of the crime in Article 354.1(1) CC RF is peace and peaceful functioning of states.[61] Others consider the object to be the historical memory of the nation (Ye.V. Chervonnykh), international peace (E.Y. Badaliantz), the security of humanity (A.Y. Ivanov).[62] Some point out that since Nazism "deforms historical evaluations, threatens the peaceful functioning of states", the object of protection should be peace and security of humanity.[63]

The first element of the objective side of the crime consists in publicly denying facts established by the verdict of the International Military Tribunal (IMT) for the trial and punishment of major war criminals from the European Axis, and praising the crimes established by this verdict. In a general sense, denial is understood as

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[57] Melanich, V.G., 'Aktual'nyye…', op. cit., p. 216.

[58] Ignatenko, V.V., 'Nekotoryye…', op. cit., p. 144.

[59] Chernyavskiy, A.V., 'Ponyatiye reabilitatsii natsizma v ugolovnom zakonodatel'stve Rossii', *Nauchnyy elektronnyy zhurnal Meridian*, 2021, No. 3, p. 4; Sementsova, I.A., Fomenko, A.I., 'Okhrana…', op. cit., p. 103; Maraeva, A.V., 'Voprosy…', op. cit., p. 155; Yegorova, N.A., 'Reabilitatsiya natsizma: ugolovno-pravovoy analiz', *Kriminologicheskiy zhurnal Baykal'skogo gosudarstvennogo universiteta ekonomiki i prava*, 2015, Vol. 9, No. 3, p. 501.

[60] The Nuremberg International Military Tribunal (called "the Nuremberg Tribunal") was established in 1945 on the initiative of France, the USA, the United Kingdom and the USSR. Its purpose was to try German war criminals from the period of World War II for war crimes, crimes against peace and humanity.

[61] Duyunov, V.K., 'Glava 46. Prestupleniya protiv mira i bezopasnosti chelovechestva', in: Duyunov, V.K. (ed.), *Ugolovnoye pravo Rossii. Chasti obshchaya i osobennaya*, Moskva, 2017, p. 736.

[62] Pikin, I.V., 'K voprosu…', op. cit., p. 3.

[63] Ignatenko, V.V., 'Nekotoryye…', op. cit., p. 144.

"denying the existence of something" "opposing something". It can only be expressed verbally during public appearances, through publication of material in the media, through publication of a book. In the context of the provision in question, denying facts established by the verdict of the IMT may include denial, challenging the legality, the validity as well as the integrity of that verdict. More specifically, in the Article under analysis, only denying facts established in the verdict is punishable; conversely, denying the competence of the IMT, the proper legal evaluation of the alleged offences and *corpora delicti* or the integrity of the sanctions imposed – shall not be punishable. It should also be emphasised that this refers to the denial of known historical facts, unsupported by research, and also to the deliberate dissemination of false information. "Denying the commission of any of the Nazi crimes established in the verdict of the IMT signifies, in effect, justifying that crime".[64]

Article 354.1(1) CC FR is a blanket provision. It includes an excerpt from the IMT verdict on the trial and punishment of major war criminals of the European Axis at the Nuremberg Trials, as well as the Charter of the Tribunal which specifies the crimes under its jurisdiction.[65] These consist of the following groups of offences: (a) crimes against peace (e.g. planning, preparation, initiation or execution of a war of aggression or a war in violation of treaties); (b) war crimes (e.g. a violation of the laws and customs of war: homicides, torture, pillaging of public or private property; unnecessarily destroying towns or villages); (c) crimes against humanity (e.g. murder, extermination, enslavement, exile or other atrocities against civilians).[66]

It should be recalled at this point that the European Axis was a bloc of Nazi states established on 27 September 1940 after Germany, Italy and Japan signed a tripartite pact (Rome-Berlin-Tokyo Axis) on the demarcation of spheres of influence and mutual military aid.[67] As Italy and Germany were the only European countries forming this axis, the provision applies solely to them. Some Russian lawyers ask the question: why are "Bulgarian, Hungarian, Slovak, Yugoslav, Ukrainian, Byelorussian, Estonian, Latvian and Lithuanian satellite allies and auxiliaries" not mentioned in the provision?[68]

Another constituent element of the crime under Article 354.1(1) CC RF includes praising the crimes established in the IMT verdict. In colloquial language, praising means considering something as "good, proper, acceptable", "justified", "allowed".[69] In the context of the analysed act, it consists in condoning, i.e. justifying the "reputation" of the crime, belittling its gravity, scale and cruelty, pointing out the illegality and lack of integrity of the criminal prosecution of crimes established by the IMT verdict.[70]

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64 Yegorova, N.A., 'Reabilitatsiya…', op. cit., p. 497.

65 Meretukov, A.G., 'Ugolovno-pravovyye aspekty protivodeystviya reabilitatsii natsizma', in: *Ugolovnaya politika i kul'tura protivodeystviya prestupnosti. Materialy Mezhdunarodnoy nauchno-prakticheskoy konferentsii,* Krasnodarskiy universitet MVD Rossii, Krasnodar, 2016, p. 236.

66 International Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed in London on 8 August 1945. (Polish Journal of Laws of 1947, No. 63, item 367).

67 Duyunov, V.K., 'Glava 46…', op. cit., p. 736.

68 Redkov, S.K., Busheva, F.F., 'Yuridicheskiy…', op. cit., p. 25.

69 Yegorova, N.A., 'Reabilitatsiya…', op. cit., p. 497.

70 Meretukov, A.G., 'Ugolovno-pravovyye…', op. cit., p. 237.

The public nature of both presented behaviours means communications available to an unspecified circle of people (speeches at a rally or lecture, putting up posters),[71] committing the crime in a public, visible manner, either verbally or in writing, using various technical means (e.g. a microphone). This does not include mass media.[72]

The next element of the analysed crime is deliberate public dissemination of untrue information about the operations of the USSR during World War II and about veterans of the Great Patriotic War. It consists in communicating to others manifestly untrue[73] information about facts, i.e. information that is untrue, and the disseminator is aware of that fact.[74] Untrue information does not include images, literature and films. Untrue information cannot be information that is not clearly positive or negative.[75] It is not punishable to disseminate negative evaluations, because pure value judgments cannot be criminalised, e.g. the claim that the activity of the Stalinist USSR during World War II was as negative as that of Germany.[76] This also applies to new results of historical research. The emergence of such results should not be regarded as a violation or denial of the IMT[77] verdict. Only publicly disseminating untrue information is therefore punishable.[78]

The subject of the crime shall be a natural person who has reached the age of 16. The subjective side involves intentional guilt with direct intent. The crime is of a formal nature.

Under Article 354.1(2) CC RF, commission of the aforementioned acts: "(a) by a person taking advantage of their official position; (b) by a group of persons, a group of persons acting in arrangement or an organised group; (c) with the use of mass media or information and telecommunication networks, including the internet; (d) involving falsifying prosecution evidence" shall be punishable. The crime shall be punishable by a fine of two to five million roubles or up to the amount of the convicted person's salary or other income for a period from one to five years, or by a penalty of forced labour for up to five years, with deprivation of the right to hold certain positions or carry out certain activities for up to five years, or by imprisonment for the same period with deprivation of the right to hold certain positions or carry out certain activities for up to five years.

Re (a). The commission of a crime by a person taking advantage of their official position. This signifies its perpetration by a public official holding specific powers in a body or institution, who takes advantage of their position for illegal purposes, including through a show of influence, using their authority for illegal actions.[79] Taking advantage of one's official position

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71 Duyunov, V.K., 'Glava 46…', op. cit., p. 737.

72 Dmitrenko, A.P., 'St. 354.1', in: D'yakov, S.V., Kadnikov, N.G. (ed.), *Kommentariy k ugolovnomu kodeksu Rossiyskoy Feleratsii. Nauchno-prakticheskiy (postateynyy)*, Moskva, 2016, p. 1010.

73 Yegorova, N.A., 'Reabilitatsiya…', op. cit., p. 498.

74 Duyunov, V.K., 'Glava 46…', op. cit., p. 737.

75 Ignatenko, V.V., 'Nekotoryye…', op. cit., p. 145.

76 Yegorova, N.A., 'Reabilitatsiya…', op. cit., p. 499.

77 Ignatenko, V.V., 'Nekotoryye…', op. cit., p. 145.

78 Yegorova, N.A., 'Reabilitatsiya…', op. cit., p. 499.

79 Dmitrenko, A.P., 'St. 354.1…', op. cit., p. 1010.

> "is expressed not only in the deliberate use by the above persons of their official powers, but also in exerting influence over other persons, based on the importance and authority of the position held, so that those persons carry out public actions aimed in particular at denying facts established by the verdict of the International Military Tribunal, denying acknowledgement of the crimes established by that verdict, knowingly disseminating untrue information about the activities of the USSR during World War II, etc."[80]

Re (b). The commission of a crime by a group of persons, a group of persons upon arrangement or an organised group. According to Article 35(1) CC RF, a crime is deemed to have been committed by a group of persons, if at least two persons participated in its commission without prior arrangement. This means that the crime was committed by two or more persons spontaneously, with each member of the group being a perpetrator of the crime or some elements thereof. A crime committed by a group of persons acting upon arrangement denotes such an offence committed by persons who jointly planned the crime in advance (Article 35(2) CC RF). The existence of a prior arrangement distinguishes it from a crime committed by a group of individuals as well as by an organised group. Pursuant to Article 35(3) CC RF, a crime committed by an organised group denotes such a criminal act committed by a permanent group of persons that was formed earlier in order to commit one or more crimes. As is apparent from Article 35(2) and (3) CC RF, the common features in mentioned forms of criminal activity include: a group composed of an unlimited number of persons; the intention to commit a crime; a prior arrangement aimed at committing a criminal offence. The difference is that in a group of persons acting upon arrangement, the participants agree in advance on the purpose of committing a crime, whereas in an organised group, they join together in advance in order to commit one or more criminal offences. Joining together implies dividing tasks and allocating specific actions to participants, thus forming the unity of a group of people with the aim of committing one or more crimes.[81]

Re (c). Committing a crime using mass media or information and telecommunication networks, including the internet. This means influencing the formation of opinions, views and the evaluation of ideologies via the above means.[82] It consists in publishing texts, photographs and information in the media about the activities of Nazi criminals justifying and glorifying the Nazis and their actions.[83] On the internet, this is done by

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[80] Chervonnykh, Ye.V., 'Ugolovno-pravovaya kharakteristika prestupleniy, predusmotrennykh stat'yey 354.1 "Reabilitatsiya natsizma" uk RF, i otdel'nyye problemy yeye pravoprimeneniya', *Problemy pravookhranitel'noy deyatel'nosti*, 2015, No. 4, p. 25.

[81] For more see: Laskowska, K., 'Rosyjski kodeks karny wobec przestępczości zorganizowanej', in: Dukiet-Nagórska, T. (ed.), *Zagadnienia współczesnej polityki kryminalnej*, Bielsko-Biała, 2006, p. 177.

[82] Grigor'yev, D.Ye., 'Rasprostraneniye kriminogennoy informatsii po st. 354.1 uk RF', in: Gorokhov, A.A. (ed.), *Molodezh' i nauka: Shag k uspekhu. Sbornik nauchnykh statey 4-y Vserossiyskoy nauchnoy konferentsii perspektivnykh razrabotok molodykh uchenykh. V 5-ti tomakh*, Kursk, 2020, p. 75.

[83] Sheveleva, K.V., Protsenko, V.V., 'Problemy reglamentatsii otvetstvennosti za proyavleniya natsizma', *Pravoporyadok: istoriya, teoriya, praktika*, 2021, No. 3, p. 81.

> "posting textual information in electronic magazines, newspapers, on websites, blogs and social networks, both as separate publications (articles) and as comments under existing other communications; posting pre-prepared images (drawings, photographs) or creating images using features of websites that deny the facts of crimes committed by the Nazis and their accomplices (e.g. the aggressive nature of the war), accepting the crimes committed by the Nazis and their accomplices portrayed as heroes, defiling the symbols of Russia's military glory; posting pre-prepared videos on video hosting sites and other sites with similar content; posting files of any type on resources intended for temporary and/or permanent file storage; distribution of material via email systems, personal correspondence systems available on certain websites and social networks, in 'chat rooms' or via instant messaging systems; distribution of material via decentralised file-sharing networks – 'torrents', etc."[84]

Re (d). Committing a crime by falsifying prosecution evidence. This means the creation of false documents and objects pointing to unlawful activities of the USSR during World War II.[85] It should be recalled that under Article 74(1) of the 2001 Code of Criminal Procedure of the Russian Federation, "evidence in a criminal case is any information on the basis of which the court, the prosecutor and/or the investigator establishes, in the manner provided for by this Code, the existence or absence of circumstances to be proved in the course of criminal proceedings, as well as other circumstances relevant to the criminal case". In cases involving falsifying prosecution evidence related to the rehabilitation of Nazism we may talk about actions such as:

> "public disclosure of non-existent materials (in the absence of an original source); public disclosure of materials, in whole or in part, that do not reflect the original source; use of information 'out of context' that entirely or partially distorts commonly known facts confirmed by the original source; falsification of the original source, etc."[86]

However, it must be emphasised that evidence does not exist outside a criminal case, and that information pointing to the fact that a crime has been committed does not yet constitute proof of its commission.[87] Furthermore, prosecution evidence is procedural in nature, thus, should such wording be included in a criminal provision?[88] The doubts raised by this wording demonstrate that it is not an appropriate definition of prohibited behaviour.

All the alternative actions indicated above must be public in nature, i.e. they must be addressed to an unspecified circle of people. Thoughts and beliefs about history, as well as expressing them during conversations e.g. within the family circle, do not give rise to liability on the basis of the discussed article.[89]

The subject of the crime shall be a natural person who has reached the age of 16. A person taking advantage of their official position shall also be a subject of the crime. The subjective side shall be characterised by intentional guilt in the form of direct intent.[90]

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[84] Chervonnykh, Ye.V., 'Ugolovno-pravovaya…', op. cit., p. 23.
[85] Duyunov, V.K., 'Glava 46…', op. cit., p. 737.
[86] Chervonnykh, Ye.V., 'Ugolovno-pravovaya…', op. cit., p. 26.
[87] Yegorova, N.A., 'Reabilitatsiya…', op. cit., p. 499.
[88] Redkov, S.K., Busheva, F.F., 'Yuridicheskiy…', op. cit., p. 26.
[89] Levandovskaya, M.G., 'Ugolovnaya…', op. cit., p. 145.
[90] Ibidem, p. 145.

On the basis of Article 354.1(3) CC RF, it shall be punishable to "disseminate information expressing manifest disrespect to the public about the days of military glory and memorable dates of Russia related to the defence of the Motherland, as well as to desecrate the symbols of Russia's military glory, to insult the memory of the defenders of the Motherland, i.e. to degrade the honour and dignity of a veteran of the Great Patriotic War, committed in public". The crime shall be punishable by a fine of up to three million roubles or up to the amount of the convicted person's three years' salary or other income, or by forced labour for up to three years, up to 360 hours or corrective labour of up to one year or compulsory work for up to three years with deprivation of the right to hold certain positions or carry out certain activities for up to three years, or by imprisonment for the same period with deprivation of the right to hold certain positions or carry out certain activities for up to three years.

The object of the crime is the authority of the Russian Federation.

The first element of the objective side of the analysed offence is the dissemination of information expressing manifest disrespect to the public about the days of military glory and memorable dates of Russia related to the defence of the Motherland, committed in public. Dissemination of information involves communicating it orally and in writing, even to one person,[91] making the information available, public and known to many people.[92]

The second element of the offence in question, i.e. desecration of the symbols of Russia's military glory, insulting the memory of the defenders of the Motherland, i.e. degrading the honour and dignity of a veteran of the Great Patriotic War, committed in public, shall be understood to signify immoral, cynical actions (e.g. offensive inscriptions, drawings, symbols on gravestones or cemetery buildings, throwing rubbish into a grave, destroying or damaging flowers, wreaths) committed on monuments related to military history (burial sites of soldiers, museums, historical monuments) and actions discrediting national military orders and awards, works of art dedicated to Russia's military history (e.g. public burning), etc.[93]

It should be noted that there is no precisely defined concept of symbols of military glory in Russian legislation. In practice, these most often include: battle flags, ship flags, military awards, monuments to defenders of the Motherland, soldiers' uniforms,[94] orders, medals, museums or objects related to courage and victories during the war,[95] as well as soldiers' graves, armed forces rituals.[96] In turn, the Military Glory Days (days of Russian arms' glory) and memorable dates of Russia in Russian history are specified in Article 1 of the 1995 Law on Military Glory Days and Memorable Dates of Russia.[97] These are recognised as "military glory days (victorious days) of Russia that

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[91] Dmitrenko, A.P., 'St. 354.1…', op. cit., p. 1010.

[92] Rozenko, S.V., 'Reabilitatsiya natsizma: novyye osnovaniya ugolovnoy otvetstvennosti', *Yuridicheskaya nauka i pravookhranitel'naya praktika*, 2014, No. 3, p. 83.

[93] Chervonnykh, Ye.V., 'Ugolovno-pravovaya…', op. cit., p. 25.

[94] Duyunov, V.K., 'Glava 46…', op. cit., p. 737.

[95] Gribanov, Ye.V., Yablonskiy, I.V., 'Ugolovnaya…', op. cit., pp. 148–149.

[96] Chervonnykh, Ye.V., 'Ugolovno-pravovaya…', op. cit., p. 23.

[97] Federal'nyy zakon ot 13 marta 1995 g., No. 32-FZ, *O dnyakh voinskoy slavy i pamyatnykh datakh Rossii*, http://www.consultant.ru/document/cons_doc_LAW_5978/247d10b68af90f6af20e0682d454c46231efc7d9/ (accessed on 13.09.2022).

played a decisive role in Russian history and the memorable dates of the Motherland associated with the most important events in the history of the state and society".[98] Literature emphasises that the demonstration of Nazi symbols in the street on military glory days or on remembrance days, irrespective of the fact that it is an administrative violation of the law, should be qualified under Article 354.1(3) CC RF on account of the disrespect for these days thus expressed.[99]

Some researchers question the relevance of introducing Article 354(3) CC RF. They point to the lack of established historical periods in which information expressing a clear lack of respect for the public about the days of military glory and memorable dates in Russia associated with the defence of the Motherland is disseminated, as well as the lack of definition of the concept of "symbols of military glory" sanctioning criminal liability. They therefore pose the question: does this article concern only the "Nuremberg Legacy" or does it cover the most wide-ranging sphere of social relations?[100]

The subject shall be a natural person who has reached the age of 16. The subjective side shall be characterised by intentional guilt in the form of direct intent. Motives and objectives are not relevant with regard to criminal liability.[101] Rehabilitation of Nazism is a formal offence.[102]

Under Article 354.1(4) CC RF, commission of "offences referred to in paragraph 3 of this Article committed by a group of persons, a group of persons acting upon arrangement or an organised group or with the use of mass media or information and telecommunication networks, including the internet" shall be punishable. The crime shall be punishable by a fine of two to five million roubles or up to the amount of the convicted person's salary or other income for a period from one to five years, or by a penalty of forced labour for up to five years, with deprivation of the right to hold certain positions or carry out certain activities for up to five years, or by imprisonment for the same period with deprivation of the right to hold certain positions or carry out certain activities for up to five years.

As these elements have been discussed when describing Article 354.1(2) and (3) CC RF, they will not be presented again here. One may only point out that, apart from disseminating the information at issue in the media, other ways of presenting it include:

> "establishing various public and religious associations, other organisations that declare appreciation of Nazi ideology or specify Nazi and fascist leaders as their spiritual leaders, glorifying Nazi criminals and their accomplices (Vlasovists, Cossack formations and other collaborators fighting on the side of the Nazis); distributing printed material produced for educational institutions (e.g. history textbooks that distort known facts about the course and consequences of World War II); organising rallies and meetings at which Nazism, Nazi

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[98] Chuchayev, A.I. (ed.), *Ugolovnyy kodeks Rossiyskoy Federatsii. Kommentariy s putevoditelem po sudebnoy praktike,* Moskva, 2019, p. 1496.

[99] Poshelov, P.V., 'Ob"yekt prestupleniya predusmotrennogo ch. 3 st. 354.1 uk RF', *Voyennaya yustitsiya*, 2020, No. 8, p. 14.

[100] Sheveleva, K.V., Protsenko, V.V., 'Problemy…', op. cit., p. 82.

[101] Dmitrenko, A.P., 'St. 354.1…', op. cit., p. 1011.

[102] Chervonnykh, Ye.V., 'Ugolovno-pravovaya…', op. cit., p. 24.

criminals and their accomplices are publicly justified (e.g. speeches and slogans justifying Nazi policies against the Jews); taking action to restore the rights of Nazi criminals and their accomplices, awarding them state or public decorations, establishing other state or public incentives, naming streets and squares, settlements and other geographical sites, enterprises, institutions and organisations, techniques of combat units, establishing holidays in their honour; desecrating symbols of Russia's military glory, expressed in destruction, littering, painting graffiti on monuments related to Russia's military history (burial sites of soldiers, museums, historical buildings, etc.)".[103]

The subject of the crime shall be a natural person who has reached the age of 16. The subjective side shall be characterised by intentional guilt involving direct intent.

## EVALUATING PROVISIONS ON THE CRIME OF REHABILITATION OF NAZISM

Having analysed the crime of rehabilitation of Nazism in the Russian Criminal Code, it is necessary to evaluate this offence. The rationale, name and scope of the act in question will be evaluated.

It should be noted that since the introduction of the provisions in question into the Criminal Code, they have been debated both among lawyers and the general public.[104] On this basis, two positions have emerged: for and against the regulation.

Supporters of the current solution praise the legislator's decision, stressing the need to protect historical memory. They treat the legislator as a custodian of historical memory and appreciate the accuracy of its predictions of trends in international politics, its judgment of the situation in the country, and its care for the interests of the nation.[105] They note that "the criminal law has for the first time instituted liability for distorting the historical understanding, traditional for Russian society, of Nazism and its anti-human essence".[106] It has banned propaganda without a credible scientific basis, but not true historical science.[107] In the view of supporters, by outlawing the rehabilitation of Nazism, "the state has expressed a negative attitude towards all manifestations of Nazism, as well as attempts to revise history, as actions aimed at endorsing and propagating the idea of Nazism".[108] A.V. Zigarev believes that the discussed criminalisation sends a clear message to society that acts are prohibited and subject to severe penalties.[109] The Article introduced into the Criminal Code was seen as a manifestation of the sound idea of informing about the events of World War II "which is an idea dear to most citizens",[110] especially

[103] Chervonnykh, Ye.V., 'Ugolovno-pravovaya…', op. cit., p. 24.
[104] Ignatenko, V.V., 'Nekotoryye…', op. cit., p. 144.
[105] Makeyeva, I.S., 'Sotsial'naya…', op. cit., pp. 146 and 147.
[106] Andreyeva, A.V., 'Sotsial'naya…', op. cit., p. 114.
[107] Yegorova, N.A., 'Reabilitatsiya…', op. cit., p. 479.
[108] Maraeva, A.V., 'Voprosy…', op. cit., p. 153.
[109] Gad'yan, A.S., 'Reabilitatsiya…', op. cit., p. 43.
[110] Tabatchikova, A.V., 'Reabilitatsiya natsizma: problema primeneniya printsipov deystviya ugolovnogo zakona v prostranstve', in: *Evolyutsiya rossiyskogo prava. Materialy XVII Mezhdunarodnoy nauchnoy konferentsii molodykh uchenykh i studentov*, Yekaterinburg, 2019, p. 540.

as Russians to this day remember the consequences of the "bloody and destructive war waged against the ideas of Nazism".[111]

Opponents of introducing the crime at issue into the Criminal Code point out that law-making should take into account not only political tensions and the significance of certain historical events for the state, but also a rational analysis of the need for a legal response to certain behaviour and the absence of political opportunism. They stress that outlawing the rehabilitation of Nazism is not in line with the fundamental principles of criminalisation, is not an appropriate response to the public threat and the prevalence of the act.[112] Indeed, it is not justified by the number of perpetrators, the number of established crimes or the convictions for those offences. Since 2014, only a few crimes and convictions under Article 354.1 CC RF have been recorded each year.[113] This provision is described by its opponents as "an extreme politicisation of law-making".[114] Others point to its impact as regards the ban on historical research or the order to prosecute for convictions.[115] They regard it as a manifestation of censorship and a restriction of freedom of expression, and thus as an attack on freedom and freedom of scientific research.[116]

In the context of the above considerations, it is necessary to point out the inappropriateness of the name of the crime[117] with regard to the scope of the acts criminalised under Article 354.1(1) and (3) CC RF. Paragraph 1 does not define the concept of Nazism, does not show links with the dissemination of untrue information about the actions of the USSR during World War II. In turn, paragraph 3 shows no connection at all with the rehabilitation of Nazism. The outlawed behaviour may be deemed defamatory and insulting, but not necessarily.[118]

An analysis of the scope of the regulation indicates that Nazism violates several interests protected by criminal law (interests of the individual, of society, of the state).[119] According to some scholars, the provision is included in the right place, i.e. in Section XII, Chapter 34 of the Criminal Code concerning crimes against peace and security of humanity, i.e. alongside crimes such as genocide, waging an aggressive war, sale of weapons of mass destruction, that is acts being a subject of concern

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111 Ignatenko, V.V., 'Nekotoryye…', op. cit., p. 144.

112 Makeyeva, I.S., 'Sotsial'naya…', op. cit., p. 146.

113 Rostokinskiy, A.V., Danel'yan, S.V., Meshcheryakova, T.F., 'Ob osobennostyakh privlecheniya k ugolovnoy otvetstvennosti za reabilitatsiyu natsizma', *Obrazovaniye i pravo*, 2021, No. 12, p. 229. The first person convicted under this article was Perm resident V. Luzgin, who in 2014 posted an article on social media stating that "the Communists and the Germans invaded Poland together on 1 September 1939, starting World War II" and also that "Communism and Nazism collaborated closely". He was sentenced to a 200,000 rouble fine in 2016. See: Dyachenko, A.V., 'Obosnovannost' kriminalizatsii reabilttatsii natsizma v svete ogranicheniya prav na svobodu slova', *Voprosy rossiyskoy yustitsii*, 2020, No. 9, p. 886.

114 Rostokinskiy, A.V., Danel'yan, S.V., Meshcheryakova, T.F., 'Ob osobennostyakh…', op. cit., p. 228.

115 Ignatenko, V.V., 'Nekotoryye…', op. cit., p. 144; Dyachenko, A.V., 'Obosnovannost'…', op. cit., p. 888.

116 Tabatchikova, A.V., 'Reabilitatsiya…', op. cit., p. 540.

117 Sementsova, I.A., Fomenko, A.I., 'Okhrana…', op. cit., p. 102.

118 Dmitrenko, A.P., 'St. 354.1…', op. cit., p. 1011.

119 Levandovskaya, M.G., 'Ugolovnaya…', op. cit., p. 143.

for the entire international community.[120] They consider it appropriate that the provision should be included in the part of the Criminal Code which protects social relations safeguarding the security of the international.[121] Others believe that this does not correspond to the object of criminal law protection under the provision.[122] According to the latter, a more appropriate place would be Chapter 29 entitled "Crimes against the fundamentals of the constitutional system and state security" or Chapter 24 entitled "Crimes against public security". This proposal is appropriate in view of the fact that the historical memory protected by the provisions on the rehabilitation of Nazism (covering events from World War II) does not correspond to an object of criminal law protection such as peace and security of humanity.[123] Some believe that Article 354.1 CC RF should be placed in Chapter 25 entitled "Crimes against human health and public morality".[124]

The crime under Article 354.1 CC RF fulfils the constituent elements of a number of provisions already known in criminal legislation concerning breach of peace, violation of peaceful coexistence of population groups holding different political views, discrimination and defamation on account of belonging to such groups, e.g.: crimes of an extremist nature – Article 214(2) (vandalism), Article 280 (public call for extremist activity) and Article 282 CC RF (incitement to hatred or enmity).[125] It is worth noting that many solutions with regard to Nazi propaganda, ideology and symbolism are contained in the Act on Counteracting Extremist Activity of 2002,[126] in several provisions of the 1996 Criminal Code and in the 2001 Code of Administrative Offences.[127] Such a "proliferation" of regulations on extremist activity means that, depending on the attitude towards a particular group of citizens, selected provisions can be used as "instruments of propaganda and political combat wielded by those in power, depending on subjective perception and interpretation of history and new ideological dogmas, under threat of punishment".[128] Another problem is the conflict between the norm stipulated in Article 354.1 of the 1996 Criminal Code and that of Article 20.3 of the 2001 Code of Administrative Offences (propagating or publicly displaying Nazi symbols or symbols of extremist organisations). This signifies that painting a swastika may entail liability for vandalism, a crime of an extremist nature or crimes against peace and security of humanity.[129]

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120 Gad'yan, A.S., 'Reabilitatsiya…', op. cit., p. 43.

121 Pikin, I.V., 'K voprosu…', op. cit., p. 3.

122 Maksimova, M.A., Nazmutdinova, D.M., 'Reabilitatsiya…', op. cit., p. 443.

123 Gad'yan, A.S., 'Reabilitatsiya…', op. cit., pp. 43–44.

124 Melanich, V.G., 'Aktual'nyye…', op. cit., p. 216.

125 Rostokinskiy, A.V., Danel'yan, S.V., Meshcheryakova, T.F., 'Ob osobennostyakh…', op. cit., p. 228.

126 Federal'nyy zakon ot 25 iyulya 2002 g., N 114-FZ, "O protivodeystvii ekstremistskoy deyatel'nosti", https://base.garant.ru/12127578/ (accessed on 21.09.2022).

127 Kodeks Rossiyskoy Federatsii ob administrativnykh pravonarusheniyakh ot 30.12.2001 g., N 195-FZ (red. ot 20.10.2022), http://www.consultant.ru/document/cons_doc_LAW_34661/ (accessed on 20.09.2022).

128 Rostokinskiy, A.V., Danel'yan, S.V., Meshcheryakova, T.F., 'Ob osobennostyakh…', op. cit., p. 231.

129 Ibidem, p. 229.

Furthermore, the scope of criminal law protection of "tangible historical memory" is regulated by the acts dedicated to the topic (Act on Cultural Heritage Sites (Historical and Cultural Monuments) of the Nations of the Russian Federation of 2002 and the Federal Act on the Victory Banner of 2007)[130] and Articles 243, 243.1., 243.2, 244 CC RF, whereas "intangible" historical memory is also regulated by appropriate acts (the Act of the Russian Federation of 1993 on Preserving the Memory of Those Who Lost Their Lives in Defence of the Motherland; Federal Act of 1995 on Perpetuation of the Victory of the Soviet People in the Great Patriotic War 1941–1945; Federal Act of 1995 on Military Glory days and Dates of Commemoration of Russia; Federal Act of 1995 on Veterans; Federal Act of 2006 on the Honorary Title of the Russian Federation "City of Military Glory").[131] This means that provisions relating to certain elements of rehabilitation of Nazism are present in legislation (apart from Article 354.1 CC RF). For example, crimes indicated in the verdict of the IMT may serve as a means of committing crimes under Article 280 (public call for extremist activity), Article 282 (incitement to hatred or enmity), Article 354 CC RF (public calls for aggressive war), whereas the desecration of symbols of Russia's military glory, committed in public, exhibits all the elements of Article 214(2) CC RF (vandalism).[132]

The legislator (and – in case-law – the Supreme Court) failed to clarify some crucial concepts in the provisions of Article 354.1 CC RF, e.g.: Nazism, nationalism, fascism. It also failed to provide interpretation of behaviour related thereto. By failing to clarify these concepts "the legislator blurs the boundaries of criminal law and of freedom of expression", "does not allow boundaries to be defined between the exercise and abuse of rights and freedoms and the prohibition of their rehabilitation in the scope of countering manifestations of Nazism".[133] For the sake of clarity of the provision, these concepts should be described and included, for example in a footnote to the Article in question.[134]

Some believe that the provision concerning rehabilitation of Nazism should not be limited only to the facts established by the verdict of the IMT, but should

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[130] Federal'nyy zakon ot 25.06.2002 g., No. 73-FZ, *Ob ob"yektakh kul'turnogo naslediya (pamyatnikakh istorii ikul'tury) narodov Rossiyskoy Federatsii*, http://www.consultant.ru/document/cons_doc_LAW_37318/ (accessed on 20.09.2022) and Federal'nyy zakon ot 07.05.2007 g., No. 68-FZ, "O Znameni Pobedy", http://www.consultant.ru/document/cons_doc_LAW_68106/ (accessed on 20.09.2022).

[131] Zakon RF ot 14.01.1993 g., No. 4292-1, *Ob uvekovechenii pamyati pogibshikh pri zashchite Otechestva*, https://base.garant.ru/1583840/ (accessed on 20.09.2022); Federal'nyy zakon ot 19.05.1995 g., No. 80-FZ, *Ob uvekovechenii Pobedy sovet·skogo naroda v Velikoy Otechestvennoy voyne 1941–1945 godov*, https://base.garant.ru/1518946/ (accessed on 20.09.2022); Federal'nyy zakon ot 13.03.1995 g., No. 32-FZ, *O dnyakh voinskoy slavy i pamyatnykh datakh Rossii*, https://base.garant.ru/1518352/ (accessed on 20.09.2022); Federal'nyy zakon ot 12.01.1995 g., No. 5-FZ, *O veteranakh*, https://base.garant.ru/10103548/ (accessed on 20.09.2022); Federal'nyy zakon ot 09.05.2006 g., No. 68-FZ, *O pochetnom zvanii Rossiyskoy Federatsii "Gorod voinskoy slavy"*, https://base.garant.ru/189454/ (accessed on 20.09.2022).

[132] Gad'yan, A.S., 'Reabilitatsiya…', op. cit., p. 44.

[133] Levandovskaya, M.G., 'Ugolovnaya…', op. cit., p. 145.

[134] Melanin, V.G., 'Ugolovnaya…', op. cit., p. 199; Sementsova, I.A., Fomenko, A.I., 'Okhrana…', op. cit., p. 102.

apply to all cases of justifying and propagating Nazism.[135] They question the scope of protection covering only information relative to World War II, and leaving out other battles and wars that have also caused the loss of many lives in Russian history. Furthermore, they believe that, under scientific pluralism, researchers should be allowed to voice different views, especially since, due to the distance in time separating us from historical events, the latter may be interpreted in different ways.[136]

It is interesting to note that, despite "pumping up" the provision with prohibited behaviours, penalties of varying severity are provided for: a fine, forced labour, compulsory labour and certain prohibitions, as well as prison terms (3 and 5 years). Some ask why the sanction in Article 354.1(3) CC is lower than the sanctions in paragraphs 1 and 2. They call for a more severe punishment – imprisonment,[137] which "will lead to the proper formation of a negative attitude in children towards Nazi ideology, symbols, and principles".[138]

Many lawyers have serious reservations concerning the criminalisation of rehabilitation of Nazism and the technical drafting of the provision. They accuse it of having "deep ideological meaning but no practical significance",[139] of being topical but imperfect. It may create great difficulties for law enforcement,[140] foster error and lead to convicting innocent people.[141] According to G.M. Reznik, "the provision can be applied selectively, leading to a massive risk of abuse".[142] This law represents a "politicised, opportunistic, legally unjustified, excessive criminalisation of those torts which have long been prohibited and punished as extremist crimes, hooliganism, vandalism".[143] It is regulated in a vague, evaluative manner and contains technical errors.[144] In the opinion of L.V. Inogamova-Helai, Article 354.1 CC RF is an example of competition, even conflict, of criminal law norms,[145] and, according to K. Moskalenko, it is "an example of legal illiteracy".[146] In the opinion of A.A. Kondrashova, the provision has shortcomings regarding the conceptual apparatus and evaluative terms that allow for "arbitrary application of the law in law enforcement practice, primarily in the interest of law enforcement authorities and as part of selective law enforcement".[147]

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[135] Rovneyko, V.V., 'Problemy…', op. cit., p. 889.

[136] Gad'yan, A.S., 'Reabilitatsiya…', op. cit., p. 45.

[137] Kirichenko, V.S., 'Gosudarstvennaya politika Rossii v bor'be s reabilitatsiyey natsizma', in: *Zazhgi svoyu zvezdu. Materialy XII Mezhdunarodnoy nauchno-prakticheskoy konferentsii molodykh uchenykh, posvyashchennoy Dnyu Rossiyskoy nauki*, Moskva, 2017, pp. 1–2, https://www.elibrary.ru/download/elibrary_28842306_94073922.pdf (accessed on 21.09.2022).

[138] Pikin, I.V., 'K voprosu…', op. cit., p. 7.

[139] Gad'yan, A.S., 'Reabilitatsiya…', op. cit., p. 45.

[140] Redkov, S.K., Busheva, F.F., 'Yuridicheskiy…', op. cit., p. 27; Gad'yan, A.S., 'Reabilitatsiya…', op. cit., p. 45.

[141] Gribanov, Ye.V., Yablonskiy, I.V., 'Ugolovnaya…', op. cit., p. 144.

[142] Gad'yan, A.S., 'Reabilitatsiya…', op. cit., p. 43.

[143] Rostokinskiy, A.V., Danel'yan, S.V., Meshcheryakova, T.F., 'Ob osobennostyakh…', op. cit., pp. 230–231.

[144] Gad'yan, A.S., 'Reabilitatsiya…', op. cit., p. 43.

[145] Rovneyko, V.V., 'Problemy…', op. cit., p. 889.

[146] Gad'yan, A.S., 'Reabilitatsiya…', op. cit., p. 43.

[147] Rovneyko, V.V., 'Problemy…', op. cit., p. 889.

Some recognise the problematic nature of the solution adopted. However, they approve of the norm's incompatibility with the rules of legal technique and with the principles of criminalisation established in the doctrine. They consider that these allegations "fade when compared to the value of the interest protected by the law".[148] According to others, the provision should be removed because the forms of rehabilitation of Nazism provided for by the legislator have no legal justification, and criminal liability for them becomes a mechanism for punishing people holding different views and expressing them publicly.[149]

In addition to changing the name of the crime, some researchers propose removing paragraph 3 from the provision and supplementing the provision with a footnote stating that this article does not apply to the results of historical research or scientific discussions, provided that they do not entail deliberate distortion of information obtained.[150]

The analyses performed made it possible to provide answers to the questions posed in the introduction to this paper.

The rationale for the introduction into the legal order of the article criminalising the discussed behaviour convinces the reader of the need to care for the truth about the events and the heroism of the Russians during World War II, as well as the need to prevent and combat Nazism (especially in Russia and other European countries). However, it also indicates its nature as both political (fighting internal and external enemies) and populist (playing on the emotions of Russians, who glorify the heroism of the victims of the period, the steadfastness of the defenders and the victory, consolidated over the years).

The scope of the legal regulation in question is broad. However, the provision – composed of four parts – is, one may say, a collection of diverse behaviours, not entirely related to the rehabilitation of Nazism. Discussion and misunderstanding is already caused by the name of the crime which does not designate the essence of the threat.

The content of the article refers to a sensitive issue for Russians (the events of World War II) and they readily agree to protect the memory of these events through criminal sanctions. For this reason, supporters of the regulation take a positive view of the legislator's concern for historical memory. In contrast, opponents point in particular to shortcomings regarding the conceptual framework of the act in question, inadequacy of the regulation to the threat posed by the act, excessive casuistry, and impediment of scientific research. Thus, the solution is far more frequently subject to harsh criticism by lawyers – a point of view which is also shared by the author of this paper.

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[148] Makeyeva, I.S., 'Sotsial'naya…', op. cit., p. 147.
[149] Dyachenko, A.V., 'Obosnovannost'…', op. cit., p. 888.
[150] Ignatenko, V.V., 'Nekotoryye…', op. cit., p. 146.

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# BREAKING A CAR WINDOW TO RESCUE A CHILD OR ANIMAL LOCKED INSIDE: A DOGMATIC ANALYSIS OF THE LEGAL GROUNDS FOR EXCLUDING CRIMINAL LIABILITY

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Abstract

The purpose of the article is to analyse possible grounds, within the criminal sphere, for legalisation of behaviour involving damage to someone else's property motivated by the desire to save a child or an animal left in a locked warming car. It is quite common to treat this type of event as one matching the features of the state of superior necessity. However, such an approach may raise some doubts of a dogmatic nature. From the point of view of the statutory shape of the existing countertypes, one can look for the possibility of assuming in such cases (when the owner of the damaged property and the perpetrator of leaving a living creature in such conditions is the same person) the occurrence of an assault justifying, after meeting all the required conditions in the form of directness, lawlessness and reality, taking steps within the right to necessary defence. The adoption of such a concept has its own tangible practical significance, as it makes it unnecessary to refer to the principle of subsidiarity and proportionality, which guarantees broader protection from criminal liability for those who damage other people's property in order to take out a living creature left in a locked car in a situation of danger to its life or health.

Keywords: state of superior necessity, necessary defence, countertype, danger, assault, intense excesses, extensive excesses, child, animal, damage to property

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Each summer the media remind us how dangerous leaving a child or an animal unattended in a locked car is. It is a commonly known fact that cars are warming very fast in such conditions, which poses a direct threat to people and animals locked even for a relatively short period, e.g. for the time of shopping. However, numerous appeals are not always successful and such situations still, which should be regretted, keep occurring in the surrounding social reality. Such a state automatically raises a question about the way in which one should behave when they see a child or an animal left in a warmed car. From the point of view of criminal law, the question first of all is whether the potential act of breaking a car window and rescuing a person/animal endangered may constitute grounds for criminal liability for the commission of an offence of damage to somebody else's property under Article 288 § 1 or § 2 PC (when the value of the window exceeds PLN 500[1]), or a misdemeanour under Article 124 § 1 MC (when the value of the car window does not exceed PLN 500[2]). After the analysis of the statement made by the Police, the answer seems to be quite obvious: such conduct (in certain circumstances) is treated as an example of the state of superior necessity.[3] Practitioners' opinions, e.g. on law firms' websites or legal advice forums, are similar. Obviously, the message to the public encouraging people to take adequate steps in such circumstances should be absolutely approved of.[4] Without doubt, rescuing the life/health of a man, as well as of an animal, even if it results in damage to somebody's property is socially justified, and thus, as a rule, should not have consequences in the form of criminal liability. At the very beginning, it should be pointed out that the article only aims to assess the criminal law related aspects of such events, and therefore, as a rule, the civil law related aspects are not discussed, because that would require a separate analysis.

A priori, the opinions presented in the area seem to raise no doubts. Indeed, the essence of the state of superior necessity consists in the fact that we sacrifice a certain legal good for the purpose of rescuing another good, under the condition that this conduct is the only objectively existing way of eliminating danger, and the legal good sacrificed does not exceed the value of the good rescued. There are no doubts that leaving a living creature in a warmed car constitutes a danger that must be recognised as real and direct.[5] Also the subjective element is matched, as a rule. Thus, it concerns the aim of a perpetrator's action. The rescuer breaks a car window in order to free a child/animal from it, i.e. in order to eliminate a danger resulting from staying in a warmed vehicle.

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1 It should be emphasised that after the planned amendment concerning the value of property damaged enters into force, the value limit will be PLN 800. Act of 7 July 2022 amending Act: Penal Code and some other acts (hereinafter referred to as "the 2022 Amendment").

2 PLN 800 after the 2022 Amendment enters in force.

3 The statement made by the spokesman of the National Police Headquarters, insp. M. Ciarka, available at: https://www.wnp.pl/parlamentarny/wydarzenia/komenda-glowna-policji-o-bezpieczenstwie-na-czas-wakacji-w-dobie-epidemii,82581.html (accessed on 1.02.2023).

4 The issue of obligations in this area is discussed later in the article.

5 Obviously, it must be pointed out that not every instance of leaving a child/animal in a car on a hot day will automatically mean posing a direct and real threat to their safety. It would be hard to recognise that e.g. leaving a car by a driver (e.g. a parent) for a short time in order to open a gate or to pay a bill at a petrol station means that.

With regard to the principle of proportionality dividing the state of superior necessity into a countertype or a circumstance excluding guilt, it should be highlighted that in case of rescuing a child from a warmed car by means of breaking a window in it, as a rule, we would deal with a circumstance excluding lawlessness (countertype). It is so because it should be assumed that human life/health is more precious than the ownership rights protected, inter alia, by Article 288 PC. As it a priori seems, as a rule, it should be similarly assumed in case of rescuing an animal, although this may raise some doubts of a dogmatic nature. The problem of evaluating legal goods (their social importance) is certainly a very complex and attitudinal issue. A. Zoll is right to state that the establishment of the hierarchy of legal goods goes far beyond a criminal law expert's competence. The author rightly states that the comparison of various legal goods is based on certain discretion due to the lack of unambiguous and sharp criteria on which such assessment should be based.[6] One criterion for establishing a hierarchy of legally protected values that is indicated is the statutory penalty for an act endangering a given legal good. At the same time, it is rightly pointed out that the use of this criterion requires prudence due to the fact that many offences are related to a complex object of protection.[7] It has its own measurable importance in the context of this discussion. Leaving an animal in a warming car certainly might be classified as an offence of ill treatment of animals (if a perpetrator's premeditation can be proved) in accordance with Article 35 § 1a of the Act on the protection of animals ("APA"). The act carries a penalty of deprivation of liberty for up to three years. On the other hand, damage to a car window, assuming the loss does not exceed PLN 500,[8] constitutes a forbidden act under Article 288 § 1 PC carrying a penalty of deprivation of liberty for a period from three months to five years. Therefore, adopting the above criterion, one can conclude that the right of ownership in relation to a loss exceeding PLN 500[9] is protected by criminal law to a greater extent than the wellbeing of animals.[10] Obviously, in the context of a car window damage, one can tend towards the interpretation of an incident as the case of lesser significance (petty crime) under Article 288 § 2 PC, however, in this case another attitudinal element occurs: this time, in relation to the classification of an actual event. It seems, however, that it is the only direction of interpretation justifying the adoption of the state of superior necessity in such cases as the countertype. The issue is not practically unimportant because if a hierarchy of legal goods is adopted on the basis of the indicator resulting from the statutory penalty, sacrificing the right of ownership (breaking a window) in order to rescue the life/health of an animal, we would deal with a circumstance excluding guilt, which completely changes the criminal assessment of the incident. The recognition

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6 Zoll, A., *Okoliczności wyłączające bezprawność czynu*, Warszawa, 1982, p. 112.

7 Mozgawa, M., in: Mozgawa, M. (ed.), *Prawo karne materialne. Część ogólna*, Warszawa, 2016, p. 275.

8 After the 2022 Amendment enters into force.

9 After the 2022 Amendment enters into force.

10 The situation would be different in case of damage not exceeding PLN 500 (PLN 800 after the 2022 Amendment enters into force), because the different sanctions in this case (Article 35 § 1a APA and Article 124 § 1 MC) clearly show that wellbeing of animals is more valuable, thus sacrificing the former in order to rescue the latter would constitute a countertype situation.

that leaving an animal in a warmed car constitutes especially cruel ill treatment does not solve the problem, either, because of the fact that the act carries a similar penalty of deprivation of liberty as damage to property under Article 288 § 1 PC. One can head in a still different direction looking for arguments for the "establishment of countertypes" of such states of superior necessity. A person rescuing an animal from a warmed car rescues not only its wellbeing (life/health) but also the right of ownership of the animal's owner. This creates an interesting situation in which a rescuer simultaneously violates the right of ownership (breaking a car window) and rescues the right of ownership (rescuing an animal from a car) of the same person, provided that the same person is a car owner and an animal owner. In such a case the hierarchy would be based on the value of the loss (made and imminent). If the market value of an animal exceeded the value of a broken window, the state of superior necessity would be a countertype. If the market values were equal or a broken window was more expensive (by nature, as a rule, obviously it would not be), the state of superior necessity might be treated as a circumstance excluding only guilt, although it should be highlighted that the economic value of an animal should not be treated as the only criterion in this hierarchy. Thus, it is evident that, as a matter of fact, approaching such events as a state of superior necessity being a countertype is not so unambiguous as it might seem, and potential assessment in the area may be intuitive in nature. One cannot disagree with A. Zoll, either. Although statutory penalty is undoubtedly connected with abstractive understanding of the level of social harmfulness of a given forbidden act carrying a penalty, one cannot unambiguously state that it directly reflects the scale of this level because sanctions are often influenced by many different factors of political and criminal nature.[11]

Recognising the state of superior necessity in such cases results in the necessity of respecting the principle of subsidiarity. In a nutshell, breaking a car window must be the only way to eliminate danger. It is not possible to indicate unambiguous interpretation of this condition because each event must be assessed *in concreto*. First of all, it is necessary to start acting by checking whether a car is really locked. One can also impose a requirement that a rescuer should look for the car owner (e.g. by informing the security staff of the shopping centre, who can announce information about the problem) before breaking a window. If there are other people around, one may impose a requirement that a rescuer should shout a loud question if there is the car owner nearby. Thus, everything depends on circumstances or the scene of accident. However, the time of reaction is a key determinant, because a delay increases the danger for a child/animal locked in a car. Nevertheless, it can be assumed that the evaluative approach to the implementation of the principle of subsidiarity is a successive inconvenience when somebody refers to the state of superior necessity in such cases.

As a result, a question is raised whether this type of event can be resolved based on other legal constructions. In spite of a rather common assumption of the state of superior necessity in real states under discussion, this case is not so obvious as a priori it can seem. From the dogmatic point of view, one can consider and analyse

[11] Zoll, A., *Okoliczności wyłączające…*, op. cit., p. 112.

the possibility of adopting the exclusion of lawlessness of conduct in such situations based on the normative construction of necessary defence (alter ego defence).

The initial prerequisite for taking steps within the countertype of necessary defence is the occurrence of an assault on whatever good protected by law. There is no statutory definition of the concept of an assault. A. Marek assumes that an assault is a type of human conduct that creates a hazard to a good protected by the law.[12] W. Wolter adopts a similar stance and states that an assault is only human conduct that creates a hazard to a legal good.[13] One should agree with the opinion that the conduct that is an assault may take the form of action as well as omission.[14] It is also rightly indicated that the subjective aspect of an assault concerns both premeditation and involuntariness.[15] It is also important that within necessary defence there is a possibility to defend not only one's own legal good – although, according to some empiric research conducted in the past, such situations dominate in practice[16] – but also legal goods of other people and legal goods of the general public. Only marginally, but it is worth pointing out that unlike in the former legal state (Penal Code of 1969) the legislator is right to make no distinctions stipulating an assault on whatever good protected by the law.[17] This way, criminal law does not narrow the scope of legal goods, an assault on which validates the right to take a defence action.[18]

An assault justifying taking steps within necessary defence must meet three criteria jointly. The first of them is lawlessness. It should be understood as given conduct that is in conflict with the binding legal system.[19] It is indicated in the doctrine that it may concern criminal lawlessness as well as other types of violation of law (e.g. the civil one). It should be highlighted that the requirement of lawlessness of action results in the fact that only a man can be the source of assault, because only human conduct can be assessed from the point of view of its compliance or

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[12] Marek, A., *Obrona konieczna w prawie karnym. Teoria i orzecznictwo*, Warszawa, 2008, p. 32.

[13] Wolter, W., *Nauka o przestępstwie*, Warszawa, 1973, p. 165.

[14] Mozgawa, M., in: Mozgawa, M. (ed.), *Prawo karne materialne…*, op. cit., p. 261.

[15] Zoll, A., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny. Część ogólna. Tom I. Cześć I. Komentarz do art. 1–52*, 5th edition, Warszawa, 2016, Article 25, thesis 17; Mozgawa, M., 'Obrona konieczna w polskim prawie karnym (zagadnienia podstawowe)', *Annales Universitatis Mariae Curie-Skłodowska*, Lublin, 2013, No. 2, p. 177.

[16] According to the findings of some research into files concerning necessary defence carried out based on the analysis of cases in the period from 1 September 1998 to 1 January 2000, in 72.5% of cases necessary defence occurred only in relation to the protection of one's own legal good, and only in 10.1% of cases necessary defence was related to the protection of someone else's legal good; The remaining cases were related to the protection of both one's own and another person's legal good. Bachmat, P., 'Instytucja obrony koniecznej w praktyce sądowej i prokuratorskiej', *Prawo w Działaniu*, 2008, No. 3, p. 57.

[17] Under Article 22 para. 1 PC of 1969, social goods are distinguished from an individual's goods literally; nevertheless, necessary defence was applicable in relation to each of them. However, § 2 stipulates that necessary defence in particular occurs when a perpetrator acts to restore order or public peace.

[18] Marek, A., Satko, J., *Okoliczności wyłączające bezprawność czynu. Przegląd problematyki. Orzecznictwo (SN 1918-99). Piśmiennictwo*, Kraków, 2000, p. 19.

[19] Mozgawa, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz aktualizowany*, LEX/el. 2022, Article 25, thesis 9.

a lack of compliance with the binding legal order. On the other hand, the fault on the part of a perpetrator is of no importance, thus, necessary defence against the conduct of people who cannot be faulted (e.g. non compos mentis persons and minors) is possible.

The second criterion for an assault is its directness. According to A. Marek, directness of an assault should be understood as an immediate hazard endangering a legal good.[20] A. Zoll indicates that the so-called test of attempt may be useful when the occurrence of directness is assessed. As this author points out, like in case of (successful) attempt, an assault is direct when a perpetrator's conduct poses a real threat to a good subject to legal protection.[21]

The last criterion for an assault, which is not directly expressed in a provision but results from the essence of necessary defence, is its reality. Thus, it concerns an objective occurrence of an assault and not just a representation of it created by a defender. The latter case may be assessed in terms of an error concerning a countertype. In this context, the Appellate Court in Wrocław is right to state that a perpetrator's erroneous, imaginary representation of an assault that, in his opinion, justifies the defence of an endangered good may be assessed in the categories of Article 29 PC, which regulates the issue of an error in the circumstances excluding the lawlessness of an act. Such an error excludes the fault of a person acting in the erroneously imagined necessary defence, however, provided that it is justified. A justified error in the circumstances excluding lawlessness of an act is an error that cannot be a reason for allegations that a perpetrator might have avoided it.[22]

Transferring the above comments onto the ground of actual situations under consideration in this paper, it is necessary to try to answer a question whether the conduct of a person leaving a child/animal in a warming car on a hot day meets the above-mentioned criteria. Firstly, one should assess the cases of leaving a child in a car (in the indicated conditions). There should be no doubts that such conduct matches the general framework of an assault. It is due to the fact that this is human behaviour that poses a threat to a good protected by the law (in this case, to a child's life and health). This type of act also contains an element of lawlessness, namely criminal lawlessness. Due to the main theme of the article, it will only outline possible grounds for criminal liability of a person leaving a child/animal in a warmed car because their deeper analysis would require a separate work.

With regard to leaving a child in a car, first of all, it is necessary to draw attention to Article 160 PC. The provision in § 1 defines an offence of exposing a man to a direct hazard of losing life or of serious detriment to health. It is necessary to approve of the opinion expressed by A. Zoll, who states that exposing a man to a hazard referred to in Article 160 §§ 1–3 occurs in case a perpetrator infringes the rules of dealing with another man based on our knowledge and experience, rules developed to determine the level of threat tolerated because of the weight of action undertaken. As this author highlights, a perpetrator must violate the rule

[20] Marek, A., in: *Kodeks karny. Komentarz*, 5th edition, Warszawa, 2010, Article 25, thesis 16.

[21] Zoll, A., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny*…, op. cit., Article 25, thesis 19.

[22] Judgment of the Appellate Court in Wroclaw of 10.07.2019, II AKa 105/19, LEX No. 2726876.

of conduct that protects the safety of human life and health against a threat on the way on which a perpetrator in fact posed it.[23] It may be assumed that leaving a small child alone in a car warming quickly, as a rule, exposes him/her to the danger indicated in the provision. In principle, in such situations we can speak about an aggravated offence specified in Article 160 § 2 PC, where the aggravating circumstance consists in a perpetrator's features in the form of an obligation to care about a person exposed to a hazard determined in § 1. There are no doubts that in such cases, it is a parent or a guardian who leaves a child in a car, i.e. a person who is obliged to take care of a child. It should be added that in case of this offence, the legislator also introduces a clause stipulating penalisation of involuntariness based on Article 160 § 3 PC. However, as it is rightly assumed that an assault justifying necessary defence may be a premeditated act as well as unintentional one, the object of a perpetrator's conduct is in this context not important for the purpose of validating the right to necessary defence.

The lack of possibility of attributing the features of the above-mentioned offence does not automatically deprive this type of conduct of criminal lawlessness. There is also liability for misdemeanour based on Article 106 MC. In accordance with the provision, whoever is obliged to care about or guard a minor under the age of seven or another person unable to recognise or defend against a danger, and lets them stay in circumstances dangerous for human health, is subject to the penalty of a fine or a reprimand. The provision does not mention a threat of the occurrence of consequences specified in Article 160 § 1 PC, but only a danger for human health. And this danger does not have to meet the requirement of directness. As a result, it is reasonable to assume that leaving a child unattended in a car on a hot day may be treated as an example of an act matching the features of this misdemeanour.

On the other hand, with regard to an act of leaving an animal in a warming car, criminal lawlessness of this type of assault can be looked for based on the formerly quoted provision of Article 35 § 1a APA. As the provisions of the statute stipulate, one of the forms of ill treatment of animals is the exposition of a pet or a farm animal to the operation of atmospheric conditions that endanger their life or health (Article 6 § 2 (17) APA). For the occurrence of the offence, it is necessary to indicate premeditation on the part of a perpetrator. It can be assumed that the act of consciously leaving an animal in such conditions would match the features of recklessness (although intention of this act cannot be excluded, which moves the scope of the objective element onto the area of direct intention). It should be emphasised, however, that even in case of the lack of premeditation on the part of a perpetrator, the exclusion of lawlessness of this type of assault will not, what is obvious, occur, but only the features creating the objective element of the offence will be disassembled.

As a matter of formality, it should be reminded that the possible lack of criminal lawlessness does not mean a lack of another form of violation of law (e.g. civil or administrative). Thus, with respect to the act of leaving a small child unattended by a parent, civil lawlessness might be looked for in the provisions of Family and

[23] Zoll, A., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny*…, op. cit., Article 160, thesis 8.

Guardianship Code.[24] On the other hand, in the context of animals, one might indicate Article 1 § 1 APA, which clearly stipulates that a man should protect, respect and look after animals. Therefore, it can be assumed that an act of leaving an animal in a situation that is dangerous for it (even if it were not *in concreto* treated as a form of ill treatment) would constitute a form of lawlessness that is administrative in nature.

With regard to other features of an assault justifying action within necessary defence, directness and reality, it should be assumed that, in case of an act of leaving a child/animal in a warming car, they will also be matched, although obviously, like in case of lawlessness, every actual state should be assessed *in concreto*. As it was indicated at the beginning, not every act of leaving a living creature in a car will constitute a direct threat to its life or health. However, if a perpetrator walks away from a car leaving a child/animal unattended (with no possibility for taking care of them), as a rule, the features seem to be matched. Obviously, it is not possible to determine the required time of leaving a living creature unattended. Some situations will be obvious,[25] others will be relative and whatever attempts to indicate clear criteria seem to be doomed to failure.[26] Thus, as in every case, the state of superior necessity or necessary defence, the implementation of their features must always be referred to a particular event. A. Marek is right to state that, with regard to the directness of an assault, the determination of this prerequisite must be based on the objective assessment of the situation and not on subjective suppositions. The assessment must be carried out *ex ante*, taking into account all circumstances at the time of an event, and not *ex post*, through the prism of the consequences.[27]

Thus, the essence of necessary defence consists in combating an assault that meets the above-listed criteria. According to J. Lachowski, defence must be addressed to a perpetrator of an assault and not any other person. He adds that necessary defence is aimed at "neutralising a perpetrator" of an assault, and not avoiding it.[28] With regard to this statement, it should be said that there are obviously no doubts that necessary defence cannot be addressed to a person who is not a perpetrator of an assault. Nevertheless, it does not seem necessary to aim defence actions directly at a perpetrator, i.e. to aim them against an assailant; it is sufficient to aim them at an assailant's legal goods (including, e.g. his right of ownership, which is of special importance from the point of view of cases analysed based on this paper). Thus, it is about defending against an assault committed by its perpetrator by infringing his legal goods and not necessarily physical combat with him; although in practice

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[24] In accordance with Article 95 § 1 FGC, parental authority concerns in particular parents' obligation and right to take care of a child and his/her property and to raise them with respect for their dignity and rights.

[25] E.g. an act of leaving a child/animal in a car in the sun on a hot day and going to a shopping centre.

[26] Certainly, important criteria will include e.g. a place where a car is parked (shadowed or exposed to the sunshine), the distance between the parked car and the place where a driver goes and the type of this place (it makes a difference whether he goes to a big shopping centre for a long time or if he pops into a small corner shop close to the parked car).

[27] Marek, A., in: *Kodeks karny…*, op. cit., Article 25, thesis 16.

[28] Lachowski, J., in: Konarska-Wrzosek, V. (ed.), *Kodeks karny. Komentarz*, 3rd edition, Warszawa, 2020, Article 25, thesis 6.

necessary defence is usually connected with incursion into the bodily integrity of a perpetrator of an assault. It is rightly indicated that defensive measures may be aimed at a perpetrator of an assault and his goods, as well as the measures he uses, i.e. for example one may destroy his weapon or kill his dog that he uses during an assault on a legal good.[29] Thus, within necessary defence, it is possible to infringe only an assailant's right of ownership if the features of his assault result in the need to act this way on the part of a person defending against an assault. Distinguishing necessary defence from superior necessity, I. Andrejew is right to maintain that in case of an action in the state of superior necessity, this action is not delivered against a perpetrator of an assault but against the legal goods of another person. Figuratively speaking, if a defender uses somebody else's cushion to shelter from an assailant, which results in the damage to this cushion, it is a state of superior necessity, *a contrario*, if this cushion belongs to an assailant, a defender's conduct should be considered in terms of necessary defence.[30]

The above comments mean that there are legislatively laid down prerequisites for treating an act of leaving a child/animal in a car in the circumstances in which it can warm quickly as a lawless, direct and real assault on a good protected by the law. Interpreting the essence of necessary defence as a measure consisting in combating an assault matching the above-mentioned features by infringing a legal good owned only by an assailant, one can propose a thesis that the cases under consideration herein should be treated as the implementation of this countertype. If a window in a car is broken in order to rescue a child/animal that are in a situation of direct threat to their life/health, as a matter of fact, such conduct constitutes fighting off an assault resulting from a perpetrator's conduct by sacrificing a legal good owned by a an assailant (a person who left a living creature in such conditions). Obviously, those prerequisites will be met if an owner of a damaged car is a person who left a child/animal in it (in conditions endangering their life/health).

It should be also pointed out, as is indicated in the doctrine, that fighting an assault off within necessary defence is possible throughout the whole period of a hazard to a legal good resulting from an assaulter's conduct. Therefore, the right can be exercised the moment an assaulter actively infringes/directly aims to infringe a legal good as well as when he creates and maintains a state of hazard to a good protected by the law.[31] In the context analysed herein, this observation and, at the same time, the analogy to admissibility of self-defence in relation to persistent offences is of considerable importance, because, as a matter of fact, in the event of leaving a child/animal in a warming vehicle, the perpetrator induces a state of direct persistent threat to the value protected by the law. Discontinuation of this danger by the infringement of an assailant's good (breaking a window in a car) occurring in his absence does not negate the essence of necessary defence.

The assumption that the cases discussed herein should be treated as necessary defence results in rather far-reaching consequences and differences in the relation

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[29] Góral, R., *Obrona konieczna w praktyce*, Warszawa, 2011, p. 61.
[30] Andrejew, I., *Polskie prawo karne w zarysie*, Warszawa, 1983, p. 170.
[31] Marek, A., in: *Kodeks karny*…, op. cit., Article 25, thesis 13.

to the practice of identifying them as a state of superior necessity. Firstly, rather commonly in the doctrine,[32] as well as in case law,[33] it is assumed that necessary defence, unlike a state of superior necessity, is independent in nature. This means that it can always be referred to when there is an (direct, lawless and real) assault on a good protected by the law and thus a perpetrator's legal good can be infringed even if there are other means of avoiding an assault.[34] A. Zoll presents a bit different conception: he notices relative subsidiarity (relative independence) of necessary defence deriving it from the concept of social profitability as one of the features linking all types of countertype conduct.[35] The conception is sometimes adopted in jurisdiction.[36]

However, assuming the independence of necessary defence, it is necessary to state that a person breaking a car window in order to rescue a child or an animal in such situations does not have to consider whether there are any other objectively available and efficient *in concreto* methods of rescuing a living creature locked in a warming car. It may be assumed that such a solution 'accelerates the proceeding' and provides a stronger sense of legal security to a person rescuing a child/animal in such cases. It is not unimportant for the efficiency of such actions. In other words, the adoption of necessary defence is more favourable for a person reversing a state of hazard (in necessary defence terminology: a person fighting off an assault). He does not have to consider whether there are other forms of rescuing a living creature from a warmed car, and thus is not exposed to a charge of exceeding the limits of actions constituting possible intense excesses (the infringement of subsidiarity in a state of superior necessity).

The assumption of the occurrence of necessary defence in such cases also has a measurable importance in the context of the principle of proportionality. Such a solution would make the above-mentioned current doubts in the area invalid.

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[32] Mozgawa, M., in: Mozgawa, M. (ed.), *Prawo karne materialne*…, op. cit., Article 25, thesis 13; Marek, A., *Kodeks karny*…, op. cit., Article 25, thesis 7; Krukowski, A., *Obrona konieczna na tle polskiego prawa karnego*, Warszawa, 1965, p. 70.

[33] The Supreme Court in one of its judgments directly indicated that necessary defence, as it results from the content of Article 25 § 1 PC, is independent in nature, and not "relatively independent and subsidiary". However, conventional regulations (Article 2(2)(a) Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Journal of Laws of 1993, No. 61, item 284, as amended) indicate that the right to effective defence must not exceed the limits resulting from axiological and humanistic aspects as human life is a good of the biggest value, thus, the regulation of this Convention does not negate the independence of necessary defence as it concerns the issue of proportionality of the method of defence adopted in relation to the hazard of a given assault, which constitutes a separate requirement for the institution of necessary defence approached in a negative way in Article 25 § 2 PC; the Supreme Court ruling of 15.04.2015, IV KK 409/14, OSNKW 2015, No. 9, item 78; also see the Supreme Court judgment of 14.05.1984, II KR 93/84, OSNPG 1985, No. 5, item 63; the Supreme Court judgment of 4.02.1972, IV KR 337/71, OSNKW 1972, No. 5, item 83; the Supreme Court ruling of 27.04.2017, IV KK 116/17, LEX No. 2284193; the Supreme Court judgment of 9.04.2002, V KKN 266/00, LEX No. 52941.

[34] Filar, M., Berent, M., in: Filar, M. (ed.), *Kodeks karny. Komentarz*, 5th edition, Warszawa, 2016, Article 25, thesis 11.

[35] Zoll, A., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny*…, op. cit., Article 160, theses 51 and 52.

[36] See judgment of the Appellate Court in Kraków of 28.03.2007, II AKa 23/07, KZS 2007, No. 4, item 24.

It is so because on the basis of necessary defence there is a condition of relative proportionality. In a nutshell, a defender may infringe an assaulter's good of a value higher than that of a rescued good, or use a form of defence that is more intense than the force used by an assailant, but he must maintain proportion and prudence in the choice of a defence method. It is also important from the point of view of the cases considered herein because to some extent it also protects a legal interest of the owner of a damaged car (provided he is a perpetrator of the act of leaving a child or an animal in it). If a person fighting off an assault (the one breaking a window) e.g. broke all the car windows unnecessarily or in another way (intentionally) damaged it, which would not be *in concreto* necessary for the purpose of rescuing a child/animal, such conduct might constitute an example of intense excesses – the infringement of a condition of relative proportionality required for the lawfulness of necessary defence.

In the present doctrine of criminal law, the dominating stance is that necessary defence is a right that a defender cannot exercise in case of encountering an assault and not an obligation to fight it off. It is rightly believed that the right of necessary defence is one of fundamental natural and legal human right.[37] By the way, it should be reminded that former opinions about necessary defence noticed *sui generis* obligation to protect legal goods resulting from the theory of substitution referring to a *nota bene* right statement that the state authorities are not always and everywhere able to ensure the protection of legal goods.[38] The reference to this issue seems to be interesting in the cases considered on the basis of the paper. It is true that every person has a statutory (legal) obligation to aid another person whose life and heath is directly endangered (may suffer serious injury). This obligation results from the provision of Article 162 § 1 PC, which penalises the offence of a failure to aid another person.[39] Thus, a person who notices a small child left in a car warming in the sun, on the one hand, has an obligation to provide aid, and on the other hand, he has the right to use measures resulting from the normative construction of necessary defence to fulfil this obligation. This does not mean, however, that in such cases necessary defence becomes an obligation; and this is due to the fact that aid may also be provided in another way than the infringement of an assailant's legal good (his property by means of breaking a car window). The other methods include e.g. notification of appropriate services about an event, which alone means, as a rule, the fulfilment of a legal obligation under Article 162 § 1 PC and, at the same time, does not match any features of whatever forbidden act carrying a penalty, which is a primary prerequisite for quoting whatever countertype construction.

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[37] Marek, A., *Obrona konieczna w prawie karnym*, Warszawa, 1979, p. 19.

[38] Świda, W., *Prawo karne*, Warszawa, 1978, pp. 144–145.

[39] In accordance with this provision, whoever fails to provide aid to a person in danger of losing life or health or suffers a serious injury although he can provide aid without a risk that he or another person may lose life or health or suffer a serious injury is subject to a penalty of deprivation of liberty for a period of up to three years. On the other hand, in accordance with § 2, whoever fails to provide aid in the form of surgery or in circumstances in which a specialist institution or qualified staff can provide immediate assistance does not commit an offence.

However, the issue may be looked at from a different perspective. One may consider whether, in such cases, there is (or not) a completely different countertype occurring in the form of an action within one's obligations or probably entitlements in line with the principle: what is ordered/allowed cannot be forbidden at the same time. Some prerequisites for the above-mentioned countertype are pointed out in the doctrine. Firstly, there must be a provision ordering or at least allowing for a particular action. Secondly, if this provision makes the performance of a given action depend on certain circumstances or a performer fulfil some conditions, they must indispensably occur. And thirdly, a given action must be within the competence of a given entity and this entity must be competent to deal with a given matter as well as in a given location.[40] Referring these prerequisites to the situation concerning rescuing a small child from a warmed car by breaking a window in it, and applying probably a bit more widening interpretation, however more favourable for a perpetrator, one can state that theoretically they will occur. Article 162 § 1 PC, as it was mentioned above, stipulates the provision of aid to a person who is in danger of losing life or health (being seriously injured). Obviously, the provision does not determine in what way this aid is to be provided. If one interprets this prerequisite narrowly – an action should be determined in statute – then, there is a lack of its implementation and it is hard to speak about this countertype. However, if it is interpreted more widely – as the existence of legal and factual grounds in a given case – it is possible to conclude that the prerequisite will occur (obligation to provide aid to another person and, at the same time, actual place where this person is – a small child locked in a warming car in direct danger of losing life or health, i.e. being seriously injured). One can assume that the second condition will also be fulfilled. There is a circumstance that validates the provision of aid: another person being in danger of losing life or health (being seriously injured). Finally, the third requirement: a person taking steps must be the right one to perform this action, which also seems to validate itself in case of a person noticing a small child in a warming car. However, in the context of reference made to this countertype, what raises many doubts is a statement that obligations being fulfilled within it should be official in nature, which successively leads to a conclusion that only people performing public functions, in particular public officers can adduce this prerequisite. Of course, the acceptance of this requirement causes that an ordinary citizen might not adduce this circumstance excluding lawlessness in such situations. The situation would be totally different in case of police officers called to the scene. Police officers breaking a window in a car in order to rescue a small child would act within the scope of their official duties. On the other hand, it is noticed that the countertype is possible, but only in relation to exercising entitlements, also in relation to persons who do not perform public functions.[41] In conclusion, although theoretically there are grounds for justifying the adoption of a countertype of action within one's obligations/entitlements in such cases, it seems, however, that for guarantee reasons the interpretation should be rejected, simply due to the fact

[40] Mozgawa, M., in: Mozgawa, M. (ed.), *Prawo karne materialne*…, op. cit., p. 291.
[41] Marek, A., *Prawo karne*, Warszawa, 2005, p. 181.

that such events are more similar to other countertypes (necessary defence, state of superior necessity). In addition, attention should be drawn to the fact that a person acting within this countertype, like in case of any other, performs an action that matches the features of a certain type of forbidden acts (in this situation it is damage to property). Thus, exclusion of lawlessness of such conduct should be based on definite legal grounds, determining strict procedure, prerequisites and features of a given entity taking action. However, the above-presented interpretational acrobatics do not seem to fulfil this condition.

The above comments seem to constitute a quite strong argument for treating the cases considered based on this paper in terms of necessary defence. It should be emphasised, however, that the conception has one serious defect: stratification of legislative grounds for the exclusion of liability in twin cases. In practice, if a window in a locked warming car is broken in order to rescue a child or an animal, the case constitutes a countertype of necessary defence only when a perpetrator of an assault is at the same time an owner of a damaged car. In such cases all features of necessary defence are matched (of course, assessment *in concreto* is always necessary). The situation will be different in case somebody else owns this car (e.g. it is a company car, or a hired or leased one) and somebody else is a perpetrator of the act of leaving a living creature in it. Then, due to the fact that not an assailant's but somebody else's legal good (the right of ownership) is sacrificed, as a rule, the conditions for the state of superior necessity will occur. Problems also arise in a situation when an assailant and another person are joint owners of a car; although in such cases it is possible to defend a concept of necessary defence occurrence (indeed, there is an infringement of a legal good of an assault creator) in case of possible damages claimed by the second owner from the co-owner who is an assailant.[42]

It is obvious, what was emphasised in the earlier parts of the paper, that a person acting within the frame of necessary defence is entitled to wider rights and possibilities of acting (lack of subsidiarity, relative proportionality) than the one who acts within the frame of superior necessity. Both normative constructions (necessary defence and superior necessity) can finally lead to the exclusion of criminal liability in case of this type of conduct. The differentiation of their grounds, application and consequences or even structural aspects of this exclusion (legitimation, possible lack of fault depending on the assessment of the proportion of goods: sacrificed and infringed ones in the context of superior necessity) leads to the occurrence of this stratification in such cases.

The above-presented differentiation resulting from the current legal regulations raises one more doubt. A question is asked about the objective element of the conduct consisting in the act of breaking a car window in order to rescue a living creature concerning the issue whether an entity who acts as a rescuer is aware of the scope of features of the act performed. The axis of the problem is the assessment of the ownership of a damaged car. It is hard to require that a rescuer should be able to assess who has the right of ownership he infringes: an assailant (a person who left

[42] The issue of civil liability goes beyond the frames of this paper, thus this possibility is only signalled.

a child/animal in a locked warming car) or a person irrelevant from the point of view of the danger posed. The adoption of *sui generis* general intent, i.e. the intention of action excluding criminal liability within the scope of this measure, which *in concreto* has been implemented, seems to be the simplest solution. In a nutshell, if there are conditions of necessary defence, we presume the existence of the intention to act within the scope of this normative construction, and if there are prerequisites for superior necessity, a rescuer should be attributed an intention to act within its scope. Regardless of doubts concerning the construction of general intent, one should add that in this case this intent does not concern a circumstance influencing attribution of criminal liability (does not concern the features of a forbidden act like e.g. in case of a theft) but a circumstance excluding this liability. Thus, if pragmatism and the practice of justice administration are taken into account, the conception in this context does not only seem to be well grounded but also the only applicable.

Summing up, there are no doubts that rescuing a child/animal left in a warming car by breaking the car window in when a living creature is in danger of losing life or health constitutes socially desired conduct, and a person acting this way should not, as a rule, be subject to criminal liability. Nevertheless, from the legislative point of view, this type of conduct seems to raise certain doubts concerning the area of its legitimisation. For the above-quoted reasons, it seems that this type of actual state should be resolved based on the provisions stipulating necessary defence when the same person is a perpetrator of the act of leaving a living creature and an owner of a damaged car. On the other hand, in case these are different persons, the provisions applicable to the state of superior necessity, as a rule treated as a countertype, should be applied. At the same time, it would be hard to formulate any proposals *de lege ferenda* due to the deeply rooted in tradition and, as a rule, properly developed normative construction of both, in this context, legal constructions concerning necessary defence and superior necessity.

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# CRIMINAL LIABILITY FOR (SELF)-LIBERATION OF A PERSON LEGALLY DEPRIVED OF LIBERTY UNDER GERMAN, SWISS, AUSTRIAN AND THE PRINCIPALITY OF LIECHTENSTEIN'S LAW

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Abstract

The subject of the article are the regulations concerning the escape of a person legally deprived of liberty, that are in force in countries with a Germanic legal tradition. The analysis of German, Swiss, Austrian and the Principality of Liechtenstein's law is conducted against a background of Polish solutions. The aim of the study is to present similarities and differences between the solutions adopted in particular German-speaking countries, as well as between these solutions and the regulations contained in the Polish Penal Code.

Keywords: offence of liberation (and self-liberation) of a person deprived of liberty, offence of facilitating escape of a person deprived of liberty, offence of instigating to escape

## INTRODUCTION

The subject matter of the article are the regulations concerning, in general, escape of a person legally deprived of liberty, that are binding in the countries with a German legal tradition. The analysis of German, Swiss, Austrian and the Principality of Liechtenstein's law is conducted against a background of Polish solutions. The aim

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of the study is to present similarities and differences between the solutions adopted in particular German-speaking countries, as well as between these solutions and the regulations contained in the Polish Penal Code.[1] I am interested in criminal liability, thus, the possibilities of imposing criminal penalties. The issue of disciplinary liability is beyond the scope of this article.

Before I present the analysis of foreign laws, I will outline the above-mentioned background and indicate the provisions that regulate this area in Poland.[2] In accordance with Article 242 § 1 PC, a person who self-liberates when deprived of liberty as a result of a court sentence or an legal order issued by another state authority is subject to a penalty. It is the so-called offence of self-liberation. It consists in the fact that a person legally deprived of the freedom of movement, e.g. a convict in prison or a person remanded in custody in order to serve the penalty of deprivation of liberty or held in pre-trial detention, acts to regain liberty, simply speaking, escapes. A perpetrator who self-liberates by conspiring with other people, uses violence or threatens to do so, or damages the place of confinement is subject to a stiffer penalty (Article 242 § 4 PC). Pursuant to Article 242 § 1a PC, the same penalty as for the offence under § 1 shall be imposed on anyone who, being deprived of liberty as a result of a court sentence or an legal order issued by another state authority and being unsupervised outside a prison or pre-trial custody in connection with performing work, wilfully leaves the designated place of work or wilfully remains outside that place.[3] On the other hand, Article 242 §§ 2 and 3 PC specifies an offence of failure to return to the place of isolation. A person who is temporarily released from prison or pre-trial custody without supervision, or a psychiatric hospital with basic security measures, having used the break in serving the penalty of deprivation of liberty, fails to return to the place of detention within three days after the deadline set is subject to a penalty. While the offence of self-liberation was laid down in the two former Polish Penal Codes in a similar way as it is at present, the offence under Article 242 §§ 1a, 2 and 3 was introduced to the Polish legal order in the current Penal Code.[4] On the other hand, Article 243 PC lays down a penalty for a person who liberates or facilitates the escape of somebody who is deprived of liberty as a result of a court sentence or an legal order issued by another state authority. The above-indicated provisions are placed in Chapter XXX PC titled "Offences against the administration of justice".

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1 Act of 6 June 1997 – Penal Code, consolidated text, Journal of Laws of 2022, item 1138, as amended; hereinafter "PC".

2 Due to the space limits of the article, it is not possible to discuss these issues more thoroughly here. For more literature on the topic see Poniatowski, P., *Przestępstwa uwolnienia osoby prawnie pobawionej wolności (art. 242 i 243 k.k.)*, Warszawa, 2019, passim.

3 On this new type of offence, see Poniatowski, P., 'Samowolne oddalenie się z miejsca pracy przez skazanego zatrudnionego poza terenem zakładu karnego w systemie bez konwojenta (uwagi na tle uchwały SN z 8.04.2021 r., I KZP 9/20)', *Państwo i Prawo*, 2022, No. 12, pp. 85–87.

4 It was connected with more and more common permissions granted to prisoners to leave a correctional facility (e.g. in order to work or in connection with being granted leave).

## CRIMINAL LIABILITY FOR (SELF)-LIBERATION OF A PERSON DEPRIVED OF LIBERTY IN GERMAN LAW

The provisions concerning the conduct under consideration are placed in Chapter 6 of the Penal Code of 18 May 1871[5] titled "Resistance to state authority" (*Widerstand gegen die Staatsgewalt*).

In accordance with § 120 StGB (*Gefangenenbefreiung*), whoever liberates a prisoner or aids and abets the escape of a prisoner is subject to imprisonment for up to three years or a fine (subsection 1). If a perpetrator, being a public officer or a person under special obligation of public service, is obliged to prevent escape of a prisoner, he is subject to a penalty of imprisonment for up to five years or a fine (§ 120 subsection 2 StGB). Public officers are: (a) civil servants and judges, (b) other persons performing official functions, (c) persons who have been assigned public tasks in a public authority or another institution, or have been authorised to provide public administration services regardless of the organisational form within which the obligations are fulfilled (§ 11 subsection 1(2) StGB). Under § 120 subsection 3 StGB, attempt to commit this offence is subject to punishment.[6]

A prisoner (*Gefangene*) is a person who – as a result of policing or penal powers of the state to deprive a citizen of liberty – has been deprived of liberty in a legal way (i.e. in a formally proper although not necessarily substantively just way) and in the public interest, and in consequence thereof is under the authority of a competent authority, e.g. a person serving an imprisonment sentence, awaiting trial in custody, awaiting extradition, arrested to be coerced or in connection with public disorder.[7] It concerns instances of deprivation of liberty not only in criminal but also civil cases, e.g. arrest of a witness who groundlessly refuses to testify in a civil case – § 390 Zivilprozessordnung (ZPO),[8] arrest of a debtor – §§ 888 and 890 ZPO.[9] On the other hand, a person who has been deprived of liberty by a private individual in the course of citizen's arrest is not a prisoner (§ 127 subsection 1 Strafprozeßordnung – StPO[10]).[11] It should be pointed out that in accordance with § 120 subsection 4 StGB, a prisoner within the meaning of subsections 1 and 2 is also a person who, based on the authority's order, is deprived of liberty in

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[5] Strafgesetzbuch (source: https://www.gesetze-im-internet.de/stgb/index.html; accessed on 30.01.2023); hereinafter "StGB".

[6] Offences in Germany are divided into crimes (*Verbrechen*) and misdemeanours (*Vergehen*) (§ 12 StGB). A crime attempt is always subject to punishment, while misdemeanour attempt – including offences under § 120 – only when this is stipulated in a special provision (§ 23 subsection 1 StGB).

[7] Kühl, K., Heger, M., *Strafgesetzbuch. Kommentar*, C.H. Beck, 2014, p. 696. Also see Maier, G., *Aktuelles Strafrecht für Ausbildung, Prüfung und Praxis*, Vol. I, Karlsfeld, 1999, pp. 20–21; Eser, A., in: Eser, A. et al., *Schönke/Schröder Strafgesetzbuch Kommentar*, C.H. Beck, 2014, p. 1457; Hilgendorf, E., in: Arzt, G. et al., *Strafrecht. Besonderer Teil. Lehrbuch*, Bielefeld, 2015, p. 1239.

[8] German Civil Procedure Code (source: https://www.gesetze-im-internet.de/zpo; accessed on 30.01.2023).

[9] Kühl, K., Heger, M., *Strafgesetzbuch…*, op. cit., p. 696.

[10] German Penal Procedure Code (source: https://www.gesetze-im-internet.de/stpo; accessed on 30.01.2023).

[11] Kühl, K., Heger, M., *Strafgesetzbuch…*, op. cit., p. 697.

a suitable institution. It concerns, for example, accommodation of the accused in a psychiatric hospital for the purpose of observation in accordance with § 81 StPO, or a person subject to a preventive measure in the form of placement in a psychiatric hospital (*Unterbringung in einem psychiatrischen Krankenhaus* – § 63 StGB) or a closed detoxification centre (*Unterbringung in einer Entziehungsanstalt* – § 64 StGB).[12]

The above-mentioned § 120 StGB stipulates liability of an instigator and aider and abettor because self-liberation is not (with the exception of a case determined in § 121 subsection 1(2) StGB, which will be discussed later) penalised[13]; and in accordance with general principles of liability, the persons are criminally liable when they deliberately instigate another person (instigator) or aid and abet (aider and abettor) the commission of a forbidden act (§§ 26 and 27 StGB).[14] A perpetrator of an offence under § 120 StGB may be any person, also a fellow-prisoner of a person liberated or instigated to escape or aided in the escape.[15]

In the German doctrine, attention is drawn to the fact that the state of 'being a prisoner' (*Gefangenenstatus*) lasts until release from prison, ordering a break in sentence service or liberation resulting from escape.[16] The state is not interrupted by non-custodial forms of serving a sentence in an open correctional institution (*offener Vollzug*), working outside prison without supervision (*Freigang*), being on short leave without supervision (*Ausgang*) or permits to leave prison temporarily (*Urlaub*).[17] In the context of the features of offences (liberating, aiding and abetting the escape of a prisoner), the issue of the use of the above-mentioned relaxed forms of isolation is problematic (there is a lack of an equivalent of Article 242 §§ 1a, 2 and 3 PC in StGB). It is emphasised that liberation consists in the removal, even momentary, of the official authority over a prisoner, which requires the existence of actual or social relationship in the form of a prisoner's submission to the authority (*Herrschaftsverhältnis*).[18] Therefore, liberation must involve overcoming security measures, e.g. opening locked areas or eliminating direct supervision. If there are no such security measures because a prisoner is allowed to leave prison, it is not

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[12] See Fischer, T., *Strafgesetzbuch mit Nebengesetzen*, München, 2015, p. 940; Maier, G., *Aktuelles Strafrecht…*, op. cit., p. 21.

[13] Attention is drawn in German literature to the lack of penalisation of self-liberation (*Selbstbefreiung*) – see, inter alia, Fischer, T., *Strafgesetzbuch…*, op. cit., p. 941; Eser, A., in: *Schönke/Schröder Strafgesetzbuch…*, op. cit., p. 1459.

[14] See Barton, S., in: Leipold, K., Tsambikakis, M., Zöller, M.A. (eds), *AnwaltKommentar StGB*, Heidelberg – München – Landsberg – Frechen – Hamburg, 2015, p. 1048; Wolter, J., in: Wolter, J. (ed.), *Systematischer Kommentar zum Strafgesetzbuch*, Vol. II, *§§ 46–122 StGB*, Köln, 2012, nb. 9 to § 120. A forbidden act (*rechtswidrige Tat*) is only such conduct that matches the features determined in the penal act (§ 11 subsection 1(5) StGB).

[15] Fischer, T., *Strafgesetzbuch…*, op. cit., p. 940.

[16] Ibidem, p. 940.

[17] Ibidem, p. 940 and § 10 subsection 1, § 11 and § 13 of the German Penalty Execution Code (Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung; https://www.gesetze-im-internet.de/stvollzg; accessed on 30.01.2023). The statute also stipulates supervised forms of a prisoner's stay outside prison: external employment under supervision – *Außenbeschäftigung* (§ 11 subsection 1(1)), short-time leave under supervision – *Ausführung* (§ 11 subsection 1(2)), escorting a prisoner when necessary – *Ausführung aus besonderen Gründen* (§ 12).

[18] Barton, S., in: *AnwaltKommentar StGB*, op. cit., pp. 1047–1048.

possible to speak about liberation.[19] The issue is even more complicated if we take into account that a prisoner may legally stay outside prison without supervision or under supervision. According to one (strict) opinion, the state of being under the official authority is maintained only when a prisoner uses relaxed forms of isolation under the supervision of responsible people. According to another opinion, the state also occurs when a prisoner is not under supervision. An in-between opinion requires that a prisoner is under official authority, i.e. at least is under supervision referred to in § 11 of the German Penalty Execution Code, which does not have to physically restrict a prisoner but creates a psychological barrier to a prisoner's escape.[20] It is emphasised in literature that instigating a prisoner who, using relaxed forms of isolation, is under no supervision to stop coming back to prison remains unpunished because in such a situation there is a lack of a prisoner's subordination to the authority, which was mentioned above. Thus, in such a case, liability under § 258 subsection 2 StGB can be considered (the provision stipulates a penalty for a person who purposefully or consciously completely or partially prevents the execution of a penalty or another measure imposed on a person).[21]

§ 121 StGB specifies the offence of 'prison mutiny' (*Gefangenenmeuterei*). Prisoners who group together (a group, gathering – *Zusammenrottung* – must consist of at least two prisoners[22]) and jointly: (1) force others to particular conduct (§ 240)[23] or physically attack officers in the institution where they are, another public official (e.g. a judge or a prosecutor, or a police officer[24]) or another person who has been assigned supervision tasks, care or investigation (e.g. a hospital employee obliged to guard a prisoner hospitalised, an entrepreneur for whom a prisoner works or an expert physician or an expert witness[25]); (2) escape rapidly; or (3) rapidly aid and abet the escape of one of them or another prisoner, are subject to a penalty of imprisonment for a period from three months to five years (§ 121 subsection 1 StGB).[26] Rapid action should be interpreted as breaking out of confinement, i.e. escape connected with breaking physical security measures that separate prisoners from liberty, e.g. damaging locks, cutting fences etc.[27] Under § 121 subsection 3 StGB, in particularly serious cases, prison mutiny should be subject to a penalty of imprisonment for six months up to ten years. A particularly serious case usually occurs when a perpetrator or another participant

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19 Barton, S., in: AnwaltKommentar StGB, op. cit., p. 1048.

20 See Wolter, J., in: *Systematischer Kommentar…*, op. cit., nb. 5 to § 120.

21 Barton, S., in: *AnwaltKommentar StGB*, p. 1048.

22 Kühl, K., Heger, M., *Strafgesetzbuch…*, p. 699; Eser, A., in: *Schönke/Schröder Strafgesetzbuch…*, op. cit., p. 1461; Wolter, J., in: *Systematischer Kommentar…*, op. cit., nb. 5 to § 121.

23 § 240 StGB stipulates a penalty for a person who unlawfully, by means of force or threat of severe harm, forces another person to action, omission or suffering.

24 Maier, G., *Aktuelles Strafrecht…*, op. cit., p. 27.

25 Ibidem, p. 28.

26 Attempt of this offence is subject to punishment (§ 121 subsection 2 StGB).

27 See Maier, G., *Aktuelles Strafrecht…*, op. cit., p. 28; Eser, A., in: *Schönke/Schröder Strafgesetzbuch…*, op. cit., p. 1462. The use of a copied key by prisoners will not be classified as "rapid" – Fischer, T., *Strafgesetzbuch…*, op. cit., p. 942; Wolter, J., in: *Systematischer Kommentar…*, op. cit., nb. 11 to § 121. It may also concern the use of violence against other persons than those referred to in § 121 subsection 1(1) StGB (including against fellow-prisoners) – Fischer, T., *Strafgesetzbuch…*, op. cit., p. 942.

of a crime: (1) carries firearms; (2) carries another weapon or a dangerous object in order to use it when committing an offence; or (3) poses a threat of losing life or being seriously injured to another person by his/her brutality.[28] It should be pointed out that in accordance with § 121 subsection 4 StGB, a prisoner within the meaning of subsections 1–3 is also a person placed in a prevention custody centre.[29]

All this means that German law penalises self-liberation only in case of rapid escape of prisoners during prison mutiny.

## LIABILITY FOR (SELF)-LIBERATION OF A PERSON DEPRIVED OF LIBERTY IN SWISS LAW

As far as Swiss regulations are concerned, the provisions given consideration here can be found under Title 17 Book 2 (Special Part) of the Criminal Code of 21 December 1937[30] – "Crimes and misdemeanours against the administration of law" (*Verbrechen und Vergehen gegen die Rechtspflege*).

In accordance with Article 310(1) sStGB (*Befreiung von Gefangenen*), a person who by means of threat or deceit liberates another arrested person, a prisoner or another person deprived of liberty based on an official order, or aids and abets their escape is subject to imprisonment for up to three years or a fine. In its judgment of 3 July 1970, the Swiss Federal Supreme Court stated that the offences specified in Article 310(1) sStGB, i.e. liberation, and aiding and abetting the escape must involve the use of violence, threat or deceit.[31] The Court also emphasised that aiding and abetting the escape that occurred without the use of violence, threat or deceit should bear liability under Article 305 sStGB (the offence of criminal support). Moreover, according to the Court, assistance given to a prisoner after their liberation is not subject to Article 310 sStGB, because it should concern the escape (*zur Flucht*), and this ends the moment a prisoner overcomes all barriers used to ensure their isolation.[32] With regard to deceitful acts, it should be indicated that in the case resolved by the Supreme Court,

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[28] Serious injury (*Schwere Körperverletzung*) is defined in § 226 StGB in a similar way as in Article 156 § 1 of the Polish PC.

[29] Prevention custody (*Sicherungsverwahrung*) is a type of preventive measure (Title 6 Chapter 3 StGB – *Maßregeln der Besserung und Sicherung* – Measures of correction and protection) used beside a penalty for a perpetrator of an offence who was sentenced in the conditions determined in § 66 StGB. The condition for adjudication of the measure is based on comprehensive assessment of the perpetrator and his offences, and recognition that due to his inclination to commit serious offences, in particular those that cause serious psychical and physical harm to the aggrieved, he poses threat to the public (§ 66 subsection 1(4) StGB). The measure may be also ruled in situations referred to in §§ 66a and 66b StGB.

[30] Schweizerisches Strafgesetzbuch/Code pénal Suisse/Codice penale svizzero/Cudesch penal svizzer. Further comments will refer to the German version of the Code (source: https://www.fedlex.admin.ch/eli/cc/54/757_781_799/de; accessed on 30.01.2023); hereinafter "sStGB".

[31] Case No. BGE 96 IV 72; http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F96-IV-72%3Ade&lang=de&type=show_document#idp313728 (accessed on 30.01.2023).

[32] Thus Delnon, V., Rüdy, B., in: Niggli, M.A. (ed.), *Basler Kommentar. Strafrecht II. Art. 111–392 StGB*, Wiprächtiger, H., Basel, 2013, pp. 2753–2754.

a woman accused of aiding and abetting the escape of a prisoner placed in hospital committed the offence with the use of deceit consisting in cheating a nurse that she was a prisoner's relation.[33] What draws attention is the fact that the causative acts specified in Article 310 sStGB do not include instigating escape.

A person under arrest (*Verhaftete*) is one deprived of liberty without a valid sentence but based on an order issued by a law enforcement or security body; it concerns in particular persons brought to justice or in custody awaiting trial; a person deprived of liberty as a result of a citizen's arrest is not under arrest within the meaning of Article 218 Schweizerische Strafprozessordnung (Swiss Criminal Procedure Act).[34] A prisoner (*Gefangene*) is a person who has been tried and validly sentenced, and is subject to the execution of a penalty or another measure, as well as a person in custody (during a preparatory proceeding – custody awaiting trial or after it awaiting the execution of a penalty of deprivation of liberty – prevention custody).[35] On the other hand, "another person deprived of liberty based on an official order" is a person isolated in connection with a criminal case or a case of a different nature, e.g. a perpetrator of a forbidden act who is subject to preventive isolation measures.[36]

If the perpetrators of liberation or aiding and abetting the escape are participants of a gathering, each of them is subject to imprisonment for up to three years or a fine; if members of a gathering use violence against persons or objects, they are subject to a penalty of imprisonment for up to three years or a fine of at least 30 daily rates[37] (Article 310(2) sStGB). Article 260 sStGB (which penalises participation in a dangerous gathering) defines a gathering (*Zusammenrottung*) as a smaller or bigger number of people ganging together (depending on circumstances) who appear to form a united force.[38] For example, one of the judgments indicated that three prisoners accommodated in one cell do not constitute a gathering.[39]

It should be pointed out that the state of deprivation of liberty must occur in the moment of liberating (or aiding and abetting the escape). The state is not interrupted when an arrested person or a prisoner is brought to a doctor, a court or hospital. However, the state does not occur (thus, the commission of the offence discussed is not possible) when a prisoner is on leave without supervision or works outside a semi-open prison.[40]

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[33] Judgment of 22 November 1960 (case No. BGE 86 IV 217; http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F86-IV-217%3Ade&lang=de&type=show_document; accessed on 30.01.2023).

[34] See Delnon, V., Rüdy, B., in: *Basler Kommentar…*, op. cit., p. 2751.

[35] Ibidem.

[36] Ibidem.

[37] Such a solution means the minimum fine increased tenfold because under Article 34 para. 1 sStGB, if statute does not stipulate otherwise, the smallest number of daily rates is three and the largest one is 180.

[38] See judgment of the Federal Supreme Court of 16 February 1982 (case No. BGE 108 IV 33; http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F108-IV-33%3Ade&lang=de&type=show_document; accessed on 30.01.2023).

[39] Cited after: Trechsel, S., Affolter-Eijsten, H., in: Trechsel, S., Pieth, M. (eds), *Schweizerisches Strafgesetzbuch. Praxiskommentar*, Zürich, 2013, p. 1419.

[40] Delnon, V., Rüdy, B., in: *Basler Kommentar…*, op. cit., p. 2751.

Like in the case of Germany, self-liberation goes unpunished under sStGB.[41] It is worth mentioning here that in 2015 L. Reimann, member of the National Council (the lower house of the Federal Assembly of Switzerland), filed a proposal concerning the introduction of penalty for self-liberation. The motive behind the proposal was a considerable number of escapes from prison in Switzerland (according to the 2009 statistical data, ca. 2,600 escapes were recorded annually). The introduction of a penalty for prisoner's self-liberation was expected to have a deterrent effect. S. Sommaruga, member of the Federal Council (the Swiss government), opposed the proposal and indicated that the number of escapes cited was overestimated because it included situations when convicts avoided imprisonment, in particular filed to return to prison on time after being temporarily released from isolation. In fact, the escapes that have most unfortunate consequences are those from closed correctional facilities, but they accounted for 18 in 2014, and only 3 in 2015. In addition, a person who self-liberates does not avoid consequences. An escape is often connected with posing a threat to life and health of the prison personnel, the use of threat or damaging property, or a theft. In such cases other criminal code provisions will be applicable. A fugitive also suffers the consequences of the penalty execution code, e.g. loses the eligibility for parole and exposes oneself to disciplinary penalties and the loss of convenient forms of serving the sentence. S. Sommaruga also indicated that the introduction of penalty for self-liberation might be recognised as being in conflict with the principle *nemo se ipsum accusare tenetur* (Article 113 of the Swiss Criminal Procedure Code[42]) in a situation when a person temporarily remanded in custody escapes. It is due to the fact that the accused has the right to refuse to cooperate in a criminal proceeding (Article 113(1) Swiss CPC) and an escape from custody may be treated as a form of exercising this law. Eventually, in 2017, the National Council rejected the proposal (65 votes for and 122 votes against).[43]

Swiss law lays down an offence of 'prison mutiny' (*Meuterei von Gefangenen*). However, it is constructed differently than in German StGB. In accordance with Article 311(1) sStGB, if prisoners or other persons accommodated in a place of isolation based on an official order gather together (*sich zusammenrotten*) with the intention of attacking an officer of the institution in which they stay or another person who has been assigned the task to guard them, or of forcing, with the use of violence or threat, an officer of the institution where they stay or another person assigned to guard them to a particular action or omission, or with intention of escaping rapidly (meaning readiness to use violence[44]), are subject to imprisonment for up to three years or a fine of at least 30 daily rates. In judicature, a gathering of five prisoners is treated as gathering,[45] but

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41 Delnon, V., Rüdy, B., in: *Basler Kommentar…*, op. cit., p. 2750; Trechsel, S., Affolter-Eijsten, H., in: *Schweizerisches Strafgesetzbuch…*, op. cit., p. 1419.

42 Schweizerische Strafprozessordnung/Code de procédure pénale suisse/ Codice di diritto processuale penale svizzero/Cudesch da procedura penala svizzer (source: https://www.fedlex.admin.ch/eli/cc/2010/267/de; accessed on 30.01.2023).

43 See https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20153753 and https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=40233 (accessed on 30.01.2023).

44 Delnon, V., Rüdy, B., in: *Basler Kommentar…*, op. cit., p. 2760.

45 Ibidem, p. 2759.

similar interpretation of a gathering of two persons is out of the question.[46] Under Article 311(2) sStGB, a perpetrator who uses violence against persons or objects is subject to imprisonment for up to five years or a fine of at least 90 daily rates. It should be noticed that the offence under paragraph 1 is one posing danger. Prisoners' gathering with a particular intention is enough to treat it as the commission of this offence. An attack on an officer, forcing him to a particular action or an escape does not have to occur.

It should be added that Title 18 Book 2 sStGB – "Offences against official and professional duties" (*Strafbare Handlungen gegen die Amts- und Berufspflicht*) – contains Article 319 (*Entweichenlassen von Gefangenen*) in accordance with which, a public officer who aids and abets the escape of an arrested person, a prisoner or another person deprived of liberty based on an official order or lets such a person escape is subject to a penalty of imprisonment for up to three years or a fine. A public officer (*Beamte*) is a civil servant, or public administration or justice administration employee, as well as a person who holds an office temporarily or has been temporarily employed in public administration or justice administration, or performs official functions temporarily (Article 110(3) sStGB).

## CRIMINAL LIABILITY FOR (SELF)-LIBERATION OF A PERSON LEGALLY DEPRIVED OF LIBERTY IN THE LAW OF AUSTRIA AND THE PRINCIPALITY OF LIECHTENSTEIN

In the Austrian Penal Code,[47] the offence under discussion is specified in § 300, which is placed in Chapter 21 of the Special Part – "Offences against the administration of justice" (*Strafbare Handlungen gegen die Rechtspflege*). In accordance with the provision, whoever frees a prisoner who has been deprived of liberty based on a judgment or order issued by a court or an administrative authority, or instigates such a person to escape or aids and abets the escape of this person is subject to a penalty of imprisonment for up to two years (§ 300(1)) provided that he is not subject to a penalty for an offence under § 196 or 299.[48] However, a prisoner who instigates another person to liberate him or aid and abet his escape is not subject to a penalty under para. 1 (§ 300(2)). An attempt to commit this offence is subject to punishment in accordance with general rules (§ 15 subsection 1 öStGB). It should be highlighted that in its judgment of 19 May 2008 (case No. 2007/18/0016), the Supreme Administrative Court of Austria indicated, in the context of § 300 öStGB, that an offence against the administration of justice is especially harmful to public

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46 Trechsel, S., Affolter-Eijsten, H., in: *Schweizerisches Strafgesetzbuch…*, op. cit., p. 1420.

47 Strafgesetzbuch of 23 January 1974 (source: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296; accessed on 30.01.2023); hereinafter "öStGB".

48 The solution is an example of statutory subsidiarity. In case of concurrence of § 300 with § 196 or § 299, the latter provisions have priority over others. Paragraph 196 öStGB stipulates a penalty for a person who liberates a minor from a correctional measure ruled by the authority, instigates them to self-liberate from the measure or aids and abets the liberation, and § 299 öStGB specifies the offence of criminal support.

interests because, if it is successful, it results in frustrating the execution of the most severe crime prevention measures that can be used by the state and, thus, eventually weakens the preventive effects of the sanctions used by the state.[49]

As shown, the criminal law in Austria does not penalise self-liberation. What is more, öStGB does not stipulate penalties for escape in conjunction with prison mutiny. As a result, like in the German Penal Code, it was necessary to introduce a separate penalty for the so-called instigating perpetrator (*Bestimmungstäter*) and the so-called contributing perpetrator (*Beitragstäter*),[50] because their conduct is punishable if it concerns forbidden acts carrying a penalty (*strafbare Handlung*; see § 12 öStGB).

It should be added that in accordance with § 313 öStGB, in case a public officer commits an offence intentionally by making use of the opportunities given by the service he is involved in, the maximum penalty of imprisonment or a fine to be ruled may be raised by 50%. Although the provision is placed in Chapter 22 of the Special Part of the Austrian Penal Code – "Offences consisting in the violation of professional duties, corruption and similar offences" (*Strafbare Verletzungen der Amtspflicht, Korruption und verwandte strafbare Handlungen*), it seems that it might be applicable in situations when a public officer obliged to guard a prisoner liberates him or aids and abetts his escape.

The Penal Code of the Principality of Liechtenstein contains identical provisions (§ 300 – *Befreiung von Gefangenen*, placed in Chapter 21 of the Special Part – "Offences against the administration of justice" and § 313).[51]

## CONCLUSIONS

The above analysis allows for formulating the following conclusions:

(1) Unlike the Polish Penal Code, foreign penal acts in question in general do not stipulate an offence of self-liberation. The only exception is § 121 of the German StGB, which determines an offence of prison mutiny (*Gefangenenmeuterei*). However, it is an exception that is entirely different from not only Article 242 § 1 but also Article 242 § 4 of the Polish PC. The lack of criminal penalty for self-liberation of a person deprived of liberty is deeply rooted in the German legal tradition.[52] For ages, attention has been drawn in the German doctrine to the fact that there are humanitarian factors that do not allow for punishment of natural human desire to regain liberty.[53] It is also emphasised that when considering penalty for

[49] See https://www.ris.bka.gv.at/JudikaturEntscheidung.wxe?Abfrage=Vwgh&Dokumentnummer=JWT_2007180016_20080519X00 (accessed on 30.01.2023).

[50] We cannot speak about an instigator and an aider and abettor here because the Austrian Penal Code is based on the concept of uniform perpetration (*Einheitstätersystem*). See Kardas, P., *Teoretyczne podstawy odpowiedzialności karnej za przestępne współdziałanie*, Kraków, 2001, p. 110 et seq.

[51] Strafgesetzbuch of 24 June 1987 (source: https://www.gesetze.li/konso/1988.37; accessed on 30.01.2023).

[52] E.g. the 18th and 19th century Austrian and Prussian law binding in the partitioned Polish territories did not stipulate criminal liability for escape from prison (except the escape in conjunction with prison mutiny known in the Prussian law) (see Poniatowski, P., *Przestępstwa…*, pp. 30–32).

[53] See Mayer, M., *Die Befreiung von Gefangenen*, Leipzig, 1906, p. 12, and also Helm, M., *Das Delikt der Gefangenenbefreiung*, Berlin, 2010, pp. 238–248 and the literature referred to therein.

self-liberation, it is necessary to take into account the effectiveness of a criminal ban and a motivational function of criminal law related to it.[54] From this perspective, penalising conduct from which an average sensitive and resistant person cannot be dissuaded because of their survival instinct is not believed to be functional.[55] It is also possible that a ban will be ineffective due to the length of penalty that a prisoner must serve. A few more years (as punishment for escape) imposed on a person imprisoned for many years do not make a great difference.[56] Doubts concerning penalising self-liberation were also raised in Poland at the time of drafting a penal code in the Second Republic of Poland and also later in relation to the 1969 Penal Code.[57] However, there are no signs indicating that Poland is going to follow the above-mentioned foreign solutions. In my opinion, it is right. Even if we agree that the provision penalising self-liberation is not effective, i.e. it cannot prevent escapes due to the natural human striving for liberty (although an assumption that a ban on escape has not stopped anybody to attempt it should be proved, which in my opinion is not possible), penalising self-liberation should fulfil a certain symbolic function. In fact, it does not concern a disturbance of the proper functioning of the administration of justice in a particular case but the general public interest of public order, which consists in the protection of the state's authority and execution of its obligations.[58] From the point of view of criminal law, not the provisions of disciplinary nature, letting self-liberation of prisoners go unpunished might evoke a feeling in society that the state's bans do not have to be complied with and, as a result, might contribute to slow descending into anarchy in social life. In addition, convicts sentenced to an isolation penalty have a difficulty with fulfilling a duty to return to prison after a temporary release without supervision or a break in executing the penalty of deprivation of liberty. If penalisation of self-liberation were to be abolished, it would be logical to abandon penalisation of conduct specified in Article 242 §§ 1a, 2 and 3 PC. Both cases concern a desire to be at large. It should be pointed out that over the last several years over 100,000 permissions to leave the place of isolation (the so-called systemic or random passes etc.) have been granted and a few thousand prisoners have been leaving prison to work outside.[59] Abolishing the penalisation of self-liberation (and, as a logical result, also the failure to return to the place of isolation) the Polish state would eliminate an essential, as it seems, factor motivating prisoners to fulfil the obligation to submit to the penalty imposed on them. In this light, the arguments for the lack of penalty cited during the discussion in Switzerland are not convincing.[60] However, things look differently in Switzerland. Abandoning

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[54] See Helm, M., *Das Delikt…*, op. cit., p. 242 and the literature referred to therein.

[55] Ibidem. It is worth indicating that the survival instinct of a person deprived of liberty may incite them to different conduct, i.e. to remaining in the place of isolation as long as possible, e.g. due to financial, family, accommodation or health related problems.

[56] Ibidem.

[57] See Poniatowski, P., *Przestępstwa…*, op. cit., pp. 366–367.

[58] For more, see ibidem, pp. 367–369.

[59] See ibidem, pp. 256 and 259.

[60] The argument concerning the possible infringement of the principle *nemo se ipsum accusare tenetur* seems to be in particular inaccurate if the accused escaping from custody awaiting trial

penalisation of some type of conduct (which would possibly take place based on the Polish law) is, from the social point of view, different from desisting from penalisation of an act that has already been unpunished. In the former case, the conviction of the public that the given conduct is not blameworthy would be much stronger.

(2) Article 242 § 4 PC stipulates aggravated type of the offence of self-liberation. The circumstances that increase blameworthiness of an act (acting in conspiracy with other persons, using violence or threatening that it will be used, and damaging the places of confinement) were to some extent also incorporated into a description of an offence under § 121 of the German StGB, but their nature is different. The provision speaks about 'grouping together' and 'rapid' escape in the context of prison mutiny, however these are not the features of aggravated self-liberation, because as such it is not punished. These are features of a basic type of an offence of a special nature.

(3) The foreign legal acts analysed have no equivalent to the offences under Article 242 §§ 1a, 2 and 3 PC. It should be admitted that it shows a consistent attitude: there is no penalty for self-liberation, so there should be no penalty for failure to return to a place of isolation after a temporary release from it. In both situations, a perpetrator naturally strives to be at large.

(4) Polish law does not recognise an offence described in Article 311 of the Swiss Penal Code (*Meuterei von Gefangenen*). It is worth mentioning, however, that there was a similar type of a forbidden act in Article 150 § 3 of the 1932 Penal Code.[61] Under that provision, whoever is involved in conspiracy with other convicts in order to liberate from confinement following a set plan and in anticipation of the use of violence, threat or damage of the place of confinement is subject to a penalty. These were *sui generis* preparatory activities the penalisation of which was rightly, as it seems, abandoned (this type of conduct probably poses too abstract threat to the functioning of the administration of justice and the security of people and property to deserve punishment).

(5) In all the above-presented legislations, there is, like in Article 243 of the Polish PC, an offence consisting in liberating a person deprived of liberty and aiding and abetting the escape of them. In Germany, Austria and the Principality of Liechtenstein, there is a penalty for instigating to escape (in Poland this type of conduct is subject to punishment under general rules – Article 18 § 2 PC). In Switzerland, liberating as well as aiding and abetting the escape must involve violence, threat and deceit to be subject to a penalty under Article 310(1) sStGB. Aggravated types of this offence are specified in the German and Swiss codes. In the Polish code no circumstances qualifying this type are determined. It is

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were punished. This way one might also justify other active conduct connected with the implementation of the principle, e.g. false allegations. Apart from that, such an attitude to the matter presupposes that custody awaiting trial is investigative in nature while its function in Switzerland (as well as in Poland) is totally different (see Article 221 of the Swiss Criminal Procedure Code).

[61] Regulation of the President of the Republic of Poland of 11 July 1932 – Penal Code, Journal of Laws of 1932, No. 60, item 571.

a right solution. The circumstances increasing social harmfulness of liberating a person deprived of liberty or aiding and abetting their escape in a particular case should influence the severity of a penalty imposed by a judge at his/her discretion. In practice, the occurrence of these circumstances will often result in the infringement of some other provisions, thus, there will be their concurrence under Article 243 PC, which may influence the penalty imposed if it is cumulative in nature. It is worth mentioning that in Austrian law and the law of the Principality of Liechtenstein, a prisoner who instigates another person to liberate him or aid and abet his escape goes unpunished. Thus, it is evident that a prisoner who escapes or intends to escape from a place of confinement can do this with total impunity. In Poland, such a regulation would not be possible as Penal Code stipulates a penalty for self-liberation.

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# SUPPORT FOR HOUSEHOLDS DUE TO THE CHANGE IN THE DIGITAL TERRESTRIAL TELEVISION BROADCASTING STANDARD – AN ATTEMPT TO EVALUATE THE ADOPTED NORMATIVE SOLUTIONS

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Abstract

The Act on supporting households in bearing the costs related to the change of the digital terrestrial television broadcasting standard was passed by the government on February 24, 2022, and a month later, on March 23, 2022, it was amended, because it became necessary to clarify the issue of the circle of people entitled to receive state support, which is absolutely fundamental from the point of view of this act. The content of the article will therefore be to determine the content of the normative set by interpreting the regulations of the aforementioned Act, so it takes into account all functional relationships of the standards under study and is based on all available sources of information. At the same time, when analysing statutory regulations, the author will reflect on their compliance with the principle of specificity of law, interpreted by the Constitutional Tribunal from the constitutional principle of a democratic state ruled by law.

Keywords: DVB-T2, digital receiver, digital television, principles of correct legislation, the principle of specificity of the law

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## METHODOLOGICAL ASSUMPTIONS

In this paper we strive to provide answers to two fundamental questions. Firstly, was the adoption of the Act on the Support to Households in Bearing the Costs Associated with the Change in the Digital Terrestrial Television Broadcasting Standard ("Act on the Support to Households") actually justified by the need to assist households in need of such support, or was it rather a classic example of demagoguery where normative solutions are used for pure political expediency. Our second question, on the other hand, is posed because the analysed Act had to be amended almost immediately after its adoption. Therefore, some serious doubts arise as to whether it was passed in compliance with all basic rules of proper law-making, in particular with the principle of legal determinacy. As we all know, the principle is directed at lawmakers and imposes on them an obligation to devise legislation which is correct, precise and clear. In search of the replies, it is necessary to conduct an in-depth analysis of the solutions adopted in the Act, with a particular emphasis on those measures which required an immediate adjustment. In particular, we will try to determine whether clarifying the category of individuals eligible for state support – absolutely fundamental from the point of view of this piece of legislation – should be seen as the necessary intervention of the lawmaker to protect those to whom the legal norm is addressed against the lawmaker being replaced in the task of shaping the substantive content of the law by enforcement bodies, or whether in practice such a rapid amendment meant that when adopting the initial Act lawmakers breached their obligation to construct legal provisions in a correct, precise and clear manner.

Considering the above, the outline adopted for this papier should help find replies to the question about the quality of laws enacted by Polish lawmakers. Because the adoption of the Act on the Support to Households in Bearing the Costs came as a consequence of a series of measures intended to change the way television signals are broadcast, it is necessary to present in a chronological order the elements of the normative context, i.e. legal solutions adopted both at the EU and the national level. Next, it is essential to explain the reasons for the adoption of the legislation to limit the effects of the change in the digital terrestrial television broadcasting standard, and to analyse the course of relevant legislative proceedings. Reflections on the quality of the adopted Act from the perspective of its compliance with the principle of legal determinacy would not be possible without discussing the essence of that principle and an endeavour to put it in the context of the legislative proceedings which took place in the case of the act in question. The last part of the paper complements discussed issues and seems necessary in the context of the selected research method. It is an attempt to outline the actual and potential effects of the Act.

Our approach to the topic dictates the choice of research methods. In this study, we will predominantly follow the normative set method, which helps to better see the rules and norms of the axio-normative order in their full complexity, both from the point of view of their formalised (legal norms) and informal ones (informal rules, norms and institutions) aspects. With this approach, we are able to organise and enhance our knowledge about the goals of actions of the human as a social being and the ways in which such goals are achieved by means of legal institutions

and extra-legal norms, and in particular about why and how individuals and groups of interest exert their pressure on the course of legislative proceedings. Under such a holistic approach it is essential to determine several categories of entities involved in devising solutions which make up for the pattern of action (normative set). These are: the source, the disponent, the beneficiary and the user (maleficiary). The categorisation is not disjunctive; a single entity may hold one or more roles (if not all of them). Only as a complement we will use the dogmatic method, i.e. the analysis of existing legal solutions. The latter is supported by the analysis of the case-law and the literature review, vital to define the relationship between the determinacy of laws and the frequency of their modifications.

## INTRODUCTION

At present, Poland, like other EU Member States, has been implementing the change in the broadcasting mode for the digital terrestrial television, replacing the existing DVB-T/MPEG-4 standard with the more efficient DVB-T2/HEVC. The beginnings of the process can be traced back to 2012, i.e. the time of the World Radiocommunication Conference[1] (WRC-12), organised by the International Telecommunication Union (ITU). The conference took the decision to assign another batch of the UHF "television" band – the 700 MHz frequency band – to the ITU Region 1, for the broadcasting service[2] and for the mobile service (broadband services provided by mobile systems), commencing in 2015. The ITU Region 1 covers Europe, including the countries of the former USSR, Africa and the Middle East countries, and the reassignment of the 700 MHz band to the region followed in the steps of provisions which had already been adopted for the rest of the world. Therefore, the 700 MHz band was to be globally harmonised for mobile networks.[3] In November 2015, one of the subsequent editions of the conference (WRC-15) concluded international negotiations on the use of the 700 MHz band for wireless broadband services. Thus, the reassignment of the 700 MHz band was finally harmonised across all ITU regions. Moreover, the WRC-15 decided to maintain the exclusive use of the 470–694 MHz frequency band for broadcasting purposes in Region 1. In parallel, works on the development of technical conditions for the deployment of mobile networks in the 700 MHz band in the European Union were under way, together with the process of relevant policy decision-making. On 11 March 2013,

[1] The purpose of the conferences is to review and, if necessary, revise the Radio Regulations, international agreements which govern the use of the radio frequency spectrum, and orbits of geostationary and non-geostationary satellites. Conferences are held every two to four years.

[2] According to Article 1.38 of the Radio Regulations annexed to the Constitution and Convention of the International Telecommunication Union (ITU) of 22 December 1992 (Journal of Laws 1998, No. 35, item 196) – the broadcasting service is a radio communication service whose transmissions are intended for direct reception by the public at large. The service may include audio, television or other types of transmission.

[3] The mobile network is a public telecommunications network where the network termination does not have a fixed location, https://stat.gov.pl/en/metainformation/glossary/terms-used-in-official-statistics/3649,term.html (accessed on 9.06.2022).

pursuant to Article 4(2) of the Radio Spectrum Decision,[4] the European Commission granted the mandate to the European Conference of Postal and Telecommunications Administrations (CEPT) to develop harmonised technical conditions for the 700 MHz band to be used for wireless broadband electronic communications services in the EU and for other applications in support of the priorities defined in the EU radio spectrum policy. Under this mandate, CEPT submitted the reports 53[5] (in 2014) and 60[6] (in 2016), which have paved the way for the technical harmonisation of the 700 MHz band for terrestrial wireless broadband services in Europe.

In its communication "A Digital Single Market Strategy for Europe",[7] the European Commission set out the vision of universal access to high quality connectivity for businesses and citizens. The strategy heralded specific legislative proposals of the Commission, including the coordinated release of the 694–790 MHz band.

Building on the CEPT reports, and considering the legislative works on the decision to change the use of the 700 MHz band in the EU, on 28 April 2016, the European Commission issued the Implementing Decision on the 694–790 MHz frequency band.[8] It provided harmonised technical conditions to allow the use of the 700 MHz band for terrestrial wireless broadband electronic communications services and for other applications, in line with the priorities of the EU-wide spectrum policy. In contrast, the shift in digital terrestrial television broadcasting required further steps to be taken both by the European Union and by individual Member States.

Considering the above, the change in digital terrestrial television broadcasting in Poland is a consequence of Decision (EU) 2017/899 of 17 May 2017 on the use of the 470–790 MHz frequency band in the Union, adopted by the European Parliament and the Council.[9] Under this decision, EU Member States were required to make the 700 MHz band (694–790 MHz band) available for broadband services by 30 June 2020 or, where justified, by 30 June 2022 at the latest.[10] Therefore, at present

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[4] Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community, OJ L 108, 24.4.2002, p. 1.

[5] Report A from CEPT to the European Commission in response to the Mandate. To develop harmonised technical conditions for the 694–790 MHz ('700 MHz') frequency band in the EU for the provision of wireless broadband and other uses in support of EU spectrum policy objectives. Report approved on 28 November 2014 by the ECC.

[6] Report B from CEPT to the European Commission in response to the Mandate. To develop harmonised technical conditions for the 694–790 MHz ('700 MHz') frequency band in the EU for the provision of wireless broadband and other uses in support of EU spectrum policy objectives. Report approved on 01 March 2016 by the ECC.

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe of 6 May 2015. (COM(2015) 192 final).

[8] Commission Implementing Decision (EU) 2016/687 of 28 April 2016 on the harmonisation of the 694–790 MHz frequency band for terrestrial systems capable of providing wireless broadband electronic communications services and for flexible national use in the Union (notified under document C(2016) 2268). For details of the decision see: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016D0687 (accessed on 9.06.2022).

[9] OJ L 138, 25.5.2021, p. 131.

[10] Under second paragraph second sentence of Article 1 of the Decision 2017/899 of the European Parliament and the Council "In the case of such a delay, the Member State concerned

any broadcast programmes need to fit into a narrower frequency range (470–694 MHz instead of 470–790 MHz). In addition, the transition to the DVB-T2/HEVC standard[11] has been justified by the need to improve service quality, e.g. by the introduction of universal HD-quality broadcasting of all television programmes or the launch of ultra-high definition 4k UHD television. It needs to be stressed here that in accordance with Article 288 of the TFEU, the decision is binding in its entirety on its addressees as a legislative act adopted by the European Parliament and the EU Council under the ordinary legislative procedure. It is addressed to all Member States, including Poland.

Under Article 5(1) of the said decision, until 30 June 2018, Member States should adopt and make public their national plans and schedules ("national roadmaps"), including detailed steps for fulfilling their obligations. In line with Article 5(2) of this decision, Member States should include in their national roadmaps information on measures, including any support measures, to limit the impact of the forthcoming transition process on the public and on wireless audio PMSE use, and to facilitate the timely availability of interoperable television broadcasting network equipment and receivers in the internal market. Based on the decision, in 2018, the Polish Ministry of Digitalisation, in cooperation with the Office of Electronic Communications (UKE), the National Broadcasting Council (KRRiTV) and the Institute of Communications – National Research Institute, developed the National Action Plan (NAP) for the reassignment of the 700 MHz band in Poland (updated in 2019).[12] The Plan stated that under Article 1(1) of Decision (EU) 2017/899 of the European Parliament and of the Council, on 28 December 2018, Poland notified the European Commission of the need to delay the date of making the 700 MHz band available for terrestrial systems capable of providing wireless broadband electronic communications services until 30 June 2022. Futhermore, it informed the Commission that the delay would not have a negative impact on other Member States. Poland's claim for deferring the availability of frequencies in the 700 MHz band for terrestrial systems capable of providing wireless

shall inform the other Member States and the Commission accordingly and shall include those duly justified reasons in the national roadmap adopted pursuant to Article 5 of this Decision".

[11] The DVB-T is a standard for digital transmission of audio-visual data compressed with MPEG-2 or a more recent MPEG-4 (H.264) standard. This standard has superseded analogue transmission, in operation in Poland for several decades, in fact since the beginnings of the television. The last analogue transmissions took place in July 2013. From then on, all terrestrial TV users relied on digital transmissions in the DVB-T standard. The DVB-T2 is characterised by better bandwidth utilisation and a much more efficient HEVC (H.265) data compression standard. The more recent DVB-T2 standard features a larger multiplex capacity, i.e. the package of various TV and radio contents and all kinds of other services transmitted digitally under a single frequency. The DVB-T standard allows approximately 24.88 Mbps to be transmitted in a single bandwidth of 8 MHz. On the other hand, the DVB-T2, allows up to 40 Mbps in the same bandwidth. For more information on the differences between the DVB-T and DVB-T2 standards see https://www.komputerswiat.pl/poradniki/telewizory/sygnal-dvb-t2-w-polsce-od-marca-2022-r-co-to-oznacza-dla-posiadaczy-telewizorow/p5g463k (accessed on 16.06.2022).

[12] The key element of the NAP is the schedule of planned actions, including legislative measures, international agreements, changes in the frequency assignment plan, changes in radio reservations and licenses, as well as the technical transition, i.e. the change of frequencies used by TV transmitters. See https://www.gov.pl/web/cyfryzacja/aktualizacja-krajowego-planu-dzialan-zmiany-przeznaczenia-pasma-700-mhz-w-polsce (accessed on 9.06.2022).

broadband electronic communications services beyond 30 June 2020 was motivated by unresolved cross-border coordination issues resulting in harmful interference. The failure by the Russian Federation, the Republic of Belarus and Ukraine to provide information on the shutdown of terrestrial televisions operating in their respective territories in the 700 MHz band by 30 June 2020 effectively prevented the uninterrupted deployment of the 700 MHz band for terrestrial systems capable of providing wireless broadband electronic communications services in Poland by the required date, i.e. by 30 June 2020. It should be noted here that in line with the above-mentioned Article 5(2) of Decision 2017/899 of 17 May 2017, the National Action Plan stated that the transition to the DVB-T2/HEVC broadcasting standard may require from the recipients to replace television sets which did not meet technical requirements. What is more, it noted that viewers would be informed of the planned frequency changes by broadcasters (e.g. in the form of information in news tickers). However, no details were provided on measures to support the replacement of TV sets.

Moreover, the NAP envisaged other measures to achieve the change of the broadcasting standard; the relevant amendment of the Telecommunications Law Act and implementing regulations to be issued by the Minister of Digitalisation were of particular relevance. Among them, the most noteworthy is the Regulation of the Minister of Digitalisation on technical and operational requirements for digital receivers issued in 2019,[13] based on Article 132(3) of the Telecommunications Law Act.[14] These measures were to prepare the Polish telecommunications market for the transition to the DVB-T2 standard and HEVC /H.265/ MPEG-H image compression. For the sake of completeness of our argument, it should be noted that the change of the broadcasting and reception system for television programmes was also included in the 2017–2022 Regulatory Strategy of the National Broadcasting Council[15] and in the Strategic Guidelines of the UKE President for 2017–2021.[16]

## THE NEED TO PASS THE LEGISLATION TO LIMIT THE EFFECTS OF THE TRANSITION TO A NEW DIGITAL TERRESTRIAL TELEVISION BROADCASTING STANDARD

The measures discussed above were intended to achieve a specific deliverable, namely the change in the television broadcasting standard. This shift will bring some major benefits, including the tidying up of the broadcasters' market and some tangible financial gains for the state budget; in fact, the President of the Office of Electronic Communications will carry the procedure to select from the band occupied by

[13] Regulation of the Minister of Digitisation of 7 October 2019 on technical and operational requirements for digital receivers (consolidated text, Journal of Laws of 2021, item 515).

[14] Telecommunications Law Act of 16 July 2004 (consolidated text, Journal of Laws of 2021, item 576).

[15] The document is available at: https://www.gov.pl/web/krrit/strategie-krrit (accessed on 16.06.2022).

[16] This document in the form of a multimedia presentation is available on the UKE website https://uke.gov.pl/akt/strategia-prezesa-uke-w-latach-2017-2021,10.html (accessed on 16.06.2022).

TV broadcasters the frequencies to be made available to telecommunications which provide broadband services. This could correspond to additional budget revenues of approximately PLN 1.5 billion.[17] On the other hand, following the transition to the DVB-T2 broadcasting standard some households will either need to replace their television set with a newer model, compatible with the changed standard, or to retrofit their TV set with a DTT STB. It should be stressed here that under Article 5(2) of Decision 2017/899, the Council of the EU, together with the European Parliament, has imposed on EU Member States the obligation to take appropriate support measures to "limit the impact of the forthcoming transition process on the public". Considering the above, the promoters of the Act believed that it was necessary to enact the legislation to support households in order to ensure that they continue to receive free digital terrestrial television after the change of the broadcasting standard. The Explanatory Memorandum to the Act states that as many as 30% of households receive television exclusively by terrestrial means and do not use paid-TV services available on digital platforms.[18] At the same time, it specifies that the support would consist in subsidised purchases of TV set-top boxes to enable at least the reception of terrestrial digital television in the DVB-T2/HEVC standard. The maximum subsidy amount was set at PLN 100, to be used as a one-off allowance. Lawmakers excluded the option of using only some part of the allowance, and to spend the outstanding amount in another transaction, e.g. by purchasing two STBs, each subsidised with PLN 50. If the STB purchase price exceeded the amount of the allowance, the eligible individual would have to cover the excess. On the other hand, if the STB was purchased for less than PLN 100,00 the eligible individual would be entitled to apply for the reimbursement of the difference. The Act stipulated that the allowance for the purchase of the TV STB could be used until the end of 2022.

Bearing in mind the above, the category of sources, i.e. the actual initiators of solutions introduced into general use, should include, first of all, the EU lawmakers, comprising the three institutions of the European Union – the European Commission,[19] which, by exercising its right of legislative initiative, drafted the Decision 2017/899 of 17 May 2017 on the use of the frequency band 470–790 MHz in the Union, as well as the European Parliament and the Council of the European Union, which adopted the text under the ordinary legislative procedure. Indeed, the provisions

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[17] These are, of course, estimates, but they are corroborated by the experience of other countries which have already successfully reassigned required frequencies. The Federal Republic of Germany has received therefrom around €6.5 billion, and Slovakia around €100 million.

[18] There are 3 digital TV platforms in Poland: Polsat Box, Canal+, Orange TV. In addition, it is possible to receive TV channels on a top-up or prepaid basis via satellite – with Canal+ Pre-Paid TV, HD and Smart HD+ Pre-Paid TV.

[19] It should be noted that, in accordance with the law-making model adopted in the EU, the road to the adoption of binding acts of secondary law, including decisions, usually starts with an earlier adoption of non-binding acts, including the so-called *sui generis* acts – strategic documents which define the directions to be taken in order to regulate a specific area of social life. With regard to the use of the 470–490 MHz frequency this seems to be the Communication of the European Commission of 6 May 2015 entitled "Strategy for the European Digital Single Market", in which the Commission highlighted the importance of the 694–790 MHz ("700 MHz") frequency band for "ensuring the provision of broadband services in rural areas" in order to ensure access and connectivity, and stressed the need for a "coordinated release of the 700 MHz band (…) while accommodating the specific needs of audiovisual media distribution".

of the decision, binding on EU Member States, including Poland, caused the Polish lawmaker to react by adopting the legislation to limit the effects of the change in the digital terrestrial television broadcasting standard. It should be remembered that the EU legal framework provides for the principle of direct applicability under which both regulations and decisions become automatically binding across the Union on the date of their entry into force. Moreover, the category of initiators should encompass the Minister of Digitalisation, who in response to the adoption of the said decision of the EP and the Council, produced the so-called *National Action Plan for the Reassignment of the 700 MHz Band in Poland*. While specifying the next steps to be taken to achieve the pre-defined goal, the Plan assumed that some users would need to replace TV sets which were not compliant with requirements, but did not provide for any measures to support such replacements. These steps were taken by the Minister only when the Act to limit the effects of the change in the digital terrestrial television broadcasting standard was being drafted. In consequence, the Minister of Digitisation could be perceived as a constitutive source, i.e. the one which moved the legislative initiative into the right direction, but only when they started to draft the Act on the Support to Households. Earlier on, when the *National Action Plan for the Change in the Reassignment of the 700 MHz band in Poland* (2017–2018) was developed, the Ministry played the role of an "anti-source" as back then it did not plan to introduce any protective measures to mitigate the negative effects of the broadcasting change for TV viewers. A similar role can be attributed to the Polish Chamber of Electronic Communications (PIKE) and the National Chamber of Ethernet Communications (KIKE), which, when consulted on the Act, stressed that it may lead to a major breach of the basic principles in force in the European Union (prohibition of new state aid and the obligation to maintain technological neutrality) and that it could generate costs disproportionate to its possible effects.[20] One should point here to the crucial importance of the so-called resolutive sources. These are entities which stayed passive throughout the legislative procedure, did not define any direction of works nor did they put forward any specific proposals, but made statements which turned out to be decisive for the completion of the law-making process. The category includes stakeholders involved in the public consultations on the Act on the Support to Households, namely the Polish Chamber of Commerce for Electronics and Telecommunications (KIGEiT) and the Polish Information Processing Society (PIT), which from the onset suggested that the TV set should be added to the list of products eligible for support,[21] or the Polish Chamber of Digital Broadcasting (PIRC) and 'Sygnał' Association, which highlighted that the Act should either precisely define the final amount of the allowance or establish the modalities of its calculation.[22]

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[20] For a detailed argument please see the writs available at: https://legislacja.rcl.gov.pl/docs//2/12354770/12842189/12842192/dokument545631.pdf and https://legislacja.rcl.gov.pl/docs//2/12354770/12842189/12842192/dokument545627.pdf (accessed on 17.06.2022).

[21] For more information see https://legislacja.rcl.gov.pl/docs//2/12354770/12842189/12842192/dokument545625.pdf and https://legislacja.rcl.gov.pl/docs//2/12354770/12842189/12842192/dokument545629.pdf (accessed on 17.06.2022).

[22] For more information see https://legislacja.rcl.gov.pl/docs//2/12354770/12842189/12842192/dokument545633.pdf and https://legislacja.rcl.gov.pl/docs//2/12354770/12842189/12842192/dokument545634.pdf (accessed on 17.06.2022).

## THE COURSE OF THE LEGISLATIVE PROCEEDINGS CONCERNING THE ACT ON THE SUPPORT TO HOUSEHOLDS IN BEARING THE COSTS ASSOCIATED WITH THE CHANGE IN THE DIGITAL TERRESTRIAL TELEVISION BROADCASTING STANDARD

At the government level the legislative proceedings on the draft act were completed in January 2022, after approx. one month of effective works (as they were initiated on 31 December 2021 they had already been underway in 2022) and on 1 February 2022, the draft act was adopted by the Council of Ministers, which at the same time decided to classify it as urgent; in accordance with Article 123 of the Constitution of the Republic of Poland this meant that the Act had to be processed expediently by the Polish Sejm.[23] The quality of the public consultation process deserves a separate remark. The letter to the consulting entities was sent on 23 December 2022, i.e. one day before Christmas. At the same time, the letter stated that the deadline for those stakeholders to submit their comments was 7 January 2022. As you can see, in theory, it was a two-week period, but excluding the holiday time, consultants had only 4 days (3–5 and 7 January, as 6 January was the Epiphany) to voice their opinion. Given such a short time, it would be unreasonable to expect any in-depth review of solutions proposed in the Act. Eventually, 8 stakeholders presented their positions, all of them included above in the category of resolutive sources and the so-called anti-sources (one of them – the Zielona Góra Agreement – did not submit any comments), which can still be considered a success, given such a speedy consultation process.

The Act was submitted to the Speaker of the Sejm on 4 February 2022 and was numbered 1989.[24] Already on 8 February 2022, the first reading took place and the decision was made to refer the Act to the Digitisation, Innovation and Modern Technologies Committee. At the same time, the Sejm decided that the Committee was to present a report and its recommendation at the latest on the following day. They processed the task in an extremely expedient manner; within a few hours the meeting was organised remotely, the Act was examined and the unequivocal recommendation was given for the Sejm to adopt the Act. On the same day, the second reading was held, amendments were tabled and it was decided to refer the Act back to the Committee. At a fast pace of work the third reading was held on the same day, allowing the Act to be passed by an overwhelming majority of 424 votes in favour, 16 against and 17 abstentions. MPs representing virtually all parliamentary groups and clubs voted in favour, with the exception of the Confederation Party. The following day, i.e. on 9 February, pursuant to Article 121(1) of the Polish Constitution, the Speaker of the Sejm sent the Act to the Senate and the President. After some short works of less than one week, the Senate introduced 9 amendments to the adopted

[23] For information on the legislative process at the government level see https://legislacja.rcl.gov.pl/projekt/12354770 (accessed on 16.06.2022).

[24] For information on the legislative process in Parliament see https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?nr=1989 (accessed on 16.06.2022).

Act which was next sent to the Digitalisation, Innovation and New Technologies Committee of the Sejm. The latter recommended that the Sejm should approve some selected amendments and reject the remaining ones. The final wording of the Act was determined on 24 February 2022 as the Sejm followed the recommendation issued by the Committee. Pursuant to Article 12(1) of the Constitution of the Republic of Poland, the following day (25 February 2022), the Speaker of the Sejm forwarded the adopted Act to the President of the Republic of Poland for signature and the latter did so on the same day. The Act entered into force on 3 March 2022, the day following its publication in the Journal of Laws.[25] In the case of the Act, the entire legislative process took just three weeks in total. Is it at all possible to make some in-depth reflection on regulated issues at such a short notice? Can a legislation devised under such hasty procedure be free of basic defects caused by the violation of the so-called principles of proper legislation, including the principle of legal determinacy? Some further developments regarding the Act may provide answers to these questions. For it turns out that almost immediately after its entry into force, some amendments were needed. This beard the question: would they be necessary if sufficient time had been spent on more thorough public consultation and review at further law-making stages. Indeed, there is hardly any doubt that they would not.

In the Explanatory Memorandum to the draft Act amending the Act on the Support to Households, the Council of Ministers, as its promoter, stated that changes were required so soon because of the need to determine the group of individuals entitled to receive state support, i.e. the allowance for the purchase of the digital receiver. The authors of the amendment believed that it was necessary to specify the eligibility criteria for the allowance to purchase the digital receiver, based on two conditions: the poor financial standing of the household and the inability to buy the equipment without jeopardising its basic subsistence needs. According to the promoters, the assessment of the household's eligibility for the allowance should take into account the value of the basic digital receiver with or without a picture display (the TV set or the STB, respectively). With this in mind, a variable amount of the allowance was proposed: PLN 100.00 for the STB, and PLN 250.00 for the TV set, because of a major price discrepancy between the former and the latter, on the one hand, and because of the freedom of the eligible individual to choose the equipment they would wish to buy. The promoter of the amendment believed that this would prevent the providers of set-top boxes and economically linked services from setting the STB price/service value ratio in such a way that the allowance, even if formally used to purchase the device, would rather be, economically speaking, a subsidy to their service.

The Act on the Support to Households in Bearing the Costs entered into force on 3 March 2022. Meanwhile, because of the arguments discussed above and with a complete disregard to the steps required in the government legislative process, including opinions or public consultations, already on 15 March, the Council of Ministers adopted the document amending the Act on the Support to Households.

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[25] The Act of 24 February 2022 on the Support to Households in Bearing the Costs Associated with the Change in the Digital Terrestrial Television Broadcasting Standard (Journal of Laws 2022, item 501).

Yet again, the Council classified it as an urgent act within the meaning of Article 123(1) of the Constitution of the Republic of Poland, and decided to send it to the Sejm.[26] The following day, it was registered under No. 2089.[27] While for the initial Act on the Support to Households in Bearing the Costs the legislative process, starting from the moment when the right of legislative initiative was exercised, took just three weeks, in the case of the amending Act the procedure was even more expedient. After the number was assigned to the Act, it took nine days for it to be signed by the President of the Republic of Poland. First, the Sejm needed a week to pass the amending Act. This time, 437 MPs voted in favour, with only the Confederation Party consistently voting against. The Senate did not table any amendments, so the day after its receipt, its Speaker sent the amending Act to the President of the Republic of Poland for signature, who signed it the following day (25 March 2022). The amending Act entered into force the day after its publication, i.e. on 29 March 2022.[28] Undoubtedly, such a fast pace of work was caused, on the one hand, by the relatively narrow scope of the new Act (only 9 amendments) and, on the other hand, by the need to quickly amend the initial Act to enable a wider group of beneficiaries to use the solutions enacted thereunder. Still, it is difficult to resist the temptation to say that if sufficient attention had been paid at the stage of the government legislative process and later on, during parliamentary works, such immediate amendment regarding the key issue in the substantive scope of the Act would not have been necessary.

The category of "disponents", i.e. representatives of public authorities who formalise, modify or complement rules, ensure their dissemination or establish derogations therefrom should first of all include the Council of Ministers, which, under the urgent legislative procedure, submitted to the Sejm both the Act on the Support to Households in Bearing the Costs and, a few weeks later, under the very same procedure, an Act amending the Act on the Support to Households in Bearing the Costs. The choice of the urgent procedure for this type of legislation is quite surprising. As the practice so far shows, the Council of Ministers only rarely has exercised the right provided for in Article 123(1) of the Constitution of the Republic of Poland to qualify its Act as urgent.[29] Nonetheless, disponents encompass also other actors involved in the legislative proceedings. As far as the parliamentary stage is concerned, these proceedings were extremely fast and, in the case of the amended Act, lasted 20 days (including seven days at the Senate) and in the case of the amending Act only nine days (the proceedings in the Senate took only one day – the Senate passed the resolution to

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[26] For information on the legislative process at the government level see https://legislacja.rcl.gov.pl/projekt/12357652/katalog/12861886#12861886 (accessed on 16.06.2022).

[27] For information on the legislative process in parliament see https://www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?nr=2089 (accessed on 16.06.2022).

[28] The Act of 23 March 2022 amending the Act on the Support to Households in Bearing the Costs Associated with the Change in the Digital Terrestrial Television Broadcasting Standard (Journal of Laws 2022, item 689).

[29] For more on the application of urgent legislation in parliamentary practice see Borski, M., Przywora, B., 'Postępowanie z projektem pilnym jako przykład szczególnego trybu ustawodawczego w polskim porządku prawnym – próba oceny z perspektywy praktyki parlamentarnej', *Przegląd Sejmowy*, 2016, No. 4, item 135, pp. 11–26.

adopt the Act in full). The role of the President of the Republic of Poland is mentiond only for the purpose of a chronicle's account. Both in the case of the amended Act and the amending Act, he did not use available time to ponder his decisions and simply signed them on the day of their receipt.

## PRINCIPLE OF LEGAL DETERMINACY OF LAW AS A RULE OF PROPER LEGISLATION

The principle of legal determinacy is considered as one of the rules of proper (sound) legislation,[30] which stems from the principle of a democratic state of law defined in Article 2 of the Constitution. These principles are qualified as the so-called formal aspects of the rule of law and are seen as a specific counterbalance to the widely accepted principle of the lawmaker's freedom to shape the substance of the law. It may be assumed that these principles set the law-making standard which, if followed, will be conducive to the acceptance of the substance of laws construed by the lawmaker. Therefore, as one of those rules, the principle of legal determinacy is binding on the authority endowed with law-making powers. Moreover, it should be noted that the said principle refers to vertical relations, understood as relations between the state and the citizen, who, as the one addressed by specific regulations, has the right to expect that they will be transparent and legible. In the view of the Constitutional Court:

> "By its nature, the requirement to preserve the determinacy of the legal provision is a system-wide directive which imposes on the lawmaker the obligation of its optimization in the law-making process. The lawmaker should strive for the maximum possible implementation of the requirements underlying that principle. Therefore, they have the statutory obligation to create legal provisions which are as specific as possible in a case at hand, both in terms of their substance and their form."[31]

As G. Koksanowicz rightly pointed out, "The essence of the legal determinacy principle boils down to requiring the authority endowed with law-making powers to construct provisions in a correct, precise and clear manner".[32]

These three criteria, to be taken into account by the lawmaker at the law-making stage, make up the so-called legal determinacy test. Once implemented, the test helps to assess whether a specific legal provision is consistent with the requirements determined in the rules of proper legislation. It needs to be borne in mind that, as rightly stated by the Constitutional Court, the weight of each criterion in the review

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[30] For a detailed analysis of this concept see, inter alia, Wronkowska, S., 'Zasady przyzwoitej legislacji w orzecznictwie Trybunału Konstytucyjnego', in: Zubik, M. (ed.), *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, Warszawa, 2006, pp. 671–689, and Zalasiński, T., *Zasada prawidłowej legislacji w poglądach Trybunału Konstytucyjnego*, Warszawa, 2008, p. 50 et seq.

[31] Cf. the ruling of the Constitutional Court of 18 March 2010, reference K 8/08, OTK ZU 2010, No. 3, item 23.

[32] Koksanowicz, G., 'Zasada określoności przepisów w procesie stanowienia prawa', *Studia Iuridica Lublinensia*, 2014, No. 22, p. 474.

of the constitutionality of a specific provision will also depend on such factors as the type of regulated matter, the category of its addressees, and above all, the degree to which the envisaged regulation cand interfere with constitutional freedoms and rights.[33] As a result, it is essential for the lawmaker to formulate the provision of law in a correct manner. The Constitutional Court has explained that the correctness shall be understood as the correct wording of the provision in terms of its language and its logic. Once this requirement is met, the provision can be assessed for its clarity and precision. The clarity requirement implies the obligation to devise provisions which are clear and understandable to their addressees. According to the Constitutional Court, the vagueness of provisions should be seen as a signifying the lawmaker's insufficient care to see the provision addresses as subjects of law.[34] Furthermore, "The clarity of a provision shall ensure that it will communicate with its addressees, i.e. that such provision remains understandable based on the common language. In practice, the vagueness of the provision entails uncertainty in the legal situation of the norm addressees and leaves the task of shaping the norm to implementing bodies".[35] In the context of the aforementioned rulings of the Constitutional Court we need to share the view of G. Koksanowicz, who noted that:

> "Thus, the directive to formulate the provision in a clear manner obliges the lawmaker to devise provisions which are understandable to their addressees who have the right to expect that a reasonable lawmaker will draft norms which will not raise doubts as to the obligations imposed or rights granted thereunder".[36]

The precision comes as the final element of the legal determinacy test. Undeniably, only the provisions which are precise and clear may be deemed to meet the requirement of legal determinacy. According to the established view of the Constitutional Court, the precision of the legal provision manifests itself in the specificity it shows in governing the rights and obligations so that their substance is obvious and enables their enforcement. In its ruling, the Constitutional Court stated that:

> "The precision of the legal provision should be understood as the possibility of decoding, based thereon, unambiguous legal norms (and consequences) by means of interpretation rules adopted within the specific legal culture. In other words, the presumption of legal determinacy should be understood as a requirement to formulate rules in such a manner so as to ensure a sufficient degree of precision in determining their meaning and their legal consequences".[37]

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[33] Cf. the ruling of the Constitutional Court of 4 November 2010, reference K 19/06 OTK ZU 2010, No. 9, item 96.

[34] Cf. the ruling of the Constitutional Court of 26 May 2008, reference SK 25/07 OTK ZU 2008, No. 4, item 62.

[35] Cf. the ruling of the Constitutional Court of 18 March 2010, reference K 8/08 OTK ZU 2010, No. 3, item 23.

[36] Koksanowicz, G., 'Zasada określoności przepisów…', op. cit., p. 474.

[37] Cf. the ruling of the Constitutional Court of 18 March 2010, reference K 8/08, OTK ZU 2010, No. 3, item 23.

In the context of the reflections presented so far, it would be interesting to assess the provisions of the Act on the Support to Households in Bearing the Costs against their compliance with the principle of legal determinacy. In order to make such review, it is necessary to determine why it was necessary to adopt the amending Act less than 2 weeks after the original Act entered into force. It follows from the Explanatory Memorandum to the amending Act that it was adopted, among other reasons, to introduce a more precise definition of the group of individuals eligible for state support provided under the Act.[38] This became particularly urgent after the Sejm adopted the Senate's amendment to Article 2(1) of the said Act, which replaced the term "television set-top box" with the term "digital receiver". As the initial Act of 2 March 2022 provided for an imprecise definition of "the digital receiver", it became necessary to add the phrasing "with an image display or without such display" in Article 2(1). This specific amendment, as noted by its promoters, was in fact a clarification which was added to ensure that the norm was clear.[39] There is no doubt that Article 2(1) of the original Act was not formulated correctly, as even the lawmakers themselves acknowledged that it required clarification, claiming that otherwise the norm would not be clear. Considering this statement there is no need to examine the same provision in terms of its clarity and precision, as it would anyway fail the legal determinacy test. Because the subjective scope of the initial Act needed further specification, the wording of its Article 3 was modified as well. When justifying the change, the lawmaker stressed that the amended provision "specifies the conditions" for individuals to be able to apply for the allowance to purchase the receiver. The lawmakers' goal, which, as it may be believed, they had pursued already by adopting the original Act, had been achieved only after this "specification". Therefore, it may be assumed that the previous wording of Article 3 was imprecise and did not allow the addressees' rights and obligations to be regulated in such a way that "their substance was obvious and enabled their enforcement". Only after the amendment did it become clear that the allowance to purchase the digital receiver could be sought solely when two conditions have been met cumulatively. First, the household had to be of a poor financial standing, and second, the purchase would have to jeopardise basic life needs of individuals in the household. Hence, lawmakers made it clearer that what they did not mean was a scenario where the household had no available funds to buy the relevant device, but rather the case when without the assistance provided for in the Act and because of the need to give up another basic life need, the household could be forced to do without its access to terrestrial television.[40] It is also interesting to note that due to the breach of the legal determinacy principle, caused by an imprecise

[38] See the Explanatory Memorandum to the draft Act of 23 March 2022 amending the Act on the Support to Households in Bearing the Costs Associated with the Change in the Digital Terrestrial Television Broadcasting Standard, Paper 2089, https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=2089 (accessed on 17.06.2022).

[39] Ibidem.

[40] Ibidem.

wording of Article 3 of the initial Act, one more provision had to be amended, i.e. Article 15(1)(3).[41]

In order to sum up this part of the discussion, it would be interesting to refer to the case-law of the Constitutional Court. In its ruling of 27 November 2007, the Court clearly stated that when legal provisions are imprecise and vague, as a result, they often lack determinacy as no precise legal norms can be construed based thereon. In practice, the provision vagueness means that the norm addressees' legal situation is uncertain. Thus, it is up to the implementing body to specify the norm.[42] It seems that in the case of the reviewed Act, lawmakers came to similar conclusions. Therefore, they rushed to amend the imprecise provisions and, undoubtedly, prevented many difficulties which would otherwise arise if such provisions were applied. As a result, while the amendment should be assessed as a positive step, a strong criticism should be voiced that such effort was needed at all, especially in such a short time after the adoption of the initial Act. In our view, it is undeniable that if legislative works, both at the government level and in Parliament, had been more diligent, e.g. carried out with proper public consultations and evaluation procedure, and if the promoter of the Act had defined the purpose of this legislation clearly from the onset, no amendment would have been necessary at all, and the originally construed Act would have met the basic requirements underlying the rules of proper legislation.

## ACTUAL AND POTENTIAL EFFECTS OF THE LAW

So far, in our discussion we focused mainly on the legal status in force prior to the adoption of the Act on the Support to Households in Bearing the Costs, and the assessment of the normative regulation from the point of view of the lawmaker's compliance with the basic rules defined as the principles of proper legislation, with particular emphasis on the principle of legal determinacy. We have also reflected on the origins of the Act, by showing which entities and why sought to pass the legislation, and how state authorities processed the Act. However, in order to propose a more comprehensive evaluation of the said Act and rationality behind its solutions, we should now discuss its effects, in particular benefits for its beneficiaries and costs incurred by maleficiaries following the enactment of specific normative solutions.

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[41] The provision stipulated that "The application for the allowance to purchase the digital receiver contains (…) the declaration of the eligible individual that due to the financial standing of their household they are unable to cover, on their own, the purchase costs of the digital receiver". After the amendment, its wording has been changed as follows: The application for the allowance to purchase the digital receiver contains (…) "the declaration of the eligible individual that due to the poor financial standing of their household they are unable to cover, on their own, the purchase costs of the digital receiver in order to secure its reception of digital terrestrial television in the DVB-T2/HEVC standard, without jeopardising basic living needs of their household".

[42] Cf. the ruling of 27 November 2007, reference SK 39/06 OTK ZU 2007, No. 10, item 127.

At first glance, the beneficiaries of the adopted normative solutions seem to be simply individuals who reside in the Republic of Poland. However, after further reflection, we may notice that their category encompasses only part of the better-off households. Less affluent households tend to fall into the category of maleficiaries. In order to confirm this conclusion, first we need some introductory remarks. Pursuant to Article 3 of the Act, the allowance to purchase the digital receiver is available to all adults registered for permanent or temporary stay in the territory of the Republic of Poland for more than 30 days. Therefore, such individuals may also include foreigners, as well as the citizens of Ukraine who meet the above criteria. It should be remembered, though, that an application may be filed solely by one adult from each household comprised of adults and minors. The relevant application may be lodged in two ways: either in electronic form or through a designated postal operator, i.e. Poczta Polska S.A. (National Polish Postal Office). In order to file the electronic application, the requesting individual needs to hold the so-called trusted profile. In the application, the eligible individual provides only basic data: first and last name, PESEL identification number, date of birth, household address, mobile phone number and e-mail address. Moreover, the individual makes the declaration that they still have not received any allowance to purchase the digital receiver for their household, and the statement that due to their household poor financial they are unable to cover the purchase costs of the digital receiver in order to ensure the household's access to digital terrestrial television in the DVB-T2/HEVC standard, without jeopardising its basic subsistence needs. Eligible individuals who submit their application via Poczta Polska S.A. will receive the printed confirmation that the allowance has been granted and, optionally, an e-mail message if they decide to provide their e-mail address. In order to file the application, the eligible individual should present to the employee of Poczta Polska S.A. their ID document with at least their first and last name, the PESEL number and the photo. Once they have placed their handwritten signature on the application, the employee will feed the data provided therein into the ICT system. The option to submit the application by the employee of Poczta Polska S.A. as an intermediary should be assessed as a very positive step as a significant number of Polish residents still suffer from digital exclusion. The question remains whether the household which, after filing the relevant application, has received the allowance under the Act can still be classified as beneficiary. In this context, the lawmaker's claim may seem as a bad joke:

> "The draft act will affect the economic and social standing of households. The allowance is a tool intended to provide financial support to households to cover the costs incurred due to the change in the digital terrestrial television broadcasting standard. Thanks to the subsidy, eligible individuals will keep their uninterrupted access to free terrestrial digital television without the need to replace the TV set and to pay related costs".

Please note that the allowance is granted in the amount of PLN 250.00 for the TV set, and PLN 100.00 for the STB, without any income-related criteria. To put it simply, better-off households which are eligible for the allowance will take it as an extra bonus because they have planned to buy a new TV set anyway. Meanwhile,

very low-income households will still not be able to afford to replace their TV set as the allowance will cover at most 10–15% of the price of a new TV. This assumption is to some degree confirmed by statistics: by 20 June 2022, as much as 86% of all applications were submitted to get the support for the purchase of the set-top box. Please note also that the program will be valid until the end of this year and the proportions may change once the allowance becomes widely known and more affluent individuals realise that this is an option for them to replace their TV set. Therefore, it seems that the allowance which is supposedly granted to prevent exclusion from access to free digital terrestrial television is yet another example of free distribution, which was not well thought-out and which instead of supporting the least well-off group serves political expediency as the ruling party has been struggling to keep its voters.

The fact that the lawmaker has not chosen to tie the radio and TV subscription fee to the subsidised purchase of the digital receiver seems curious as well. The temptation must have been great as this could help to solve, at least in part, the problem of citizens who fail to pay these dues. In other words, if they wished to get a subsidy to buy the receiver (TV set or STB), the eligible individual would have to declare that they had a TV set and that they would regularly pay the radio and television subscription fee. Perhaps such solution could be disastrous for the image of the ruling party, and moreover, a number of households would buy a TV set anyway, but after realizing that this would mean some serious expenditure they would decline to apply for the allowance. This is probably why, in the Explanatory Memorandum, the promoter excluded the idea, by claiming that "the solution of that kind would narrow the group of allowance beneficiaries and would exclude households which have not yet owned a TV set but wish to receive free digital terrestrial television in the new standard".

Because a significant part of households have filed their allowance applications via the designated operator – Poczta Polska S.A.,[43] it should be determined whether the operator, as the sole entity authorised to receive applications, would get some kind of remuneration. After all, its employee needs to spend time to receive the application and to feed it into the IT system. The Act includes some explicit provisions in this respect, specifying in Article 24(1) that during the program deployment the designated operator will receive a special-purpose subsidy from the state budget to cover the total costs of relevant tasks. Pursuant to paragraph 2 of the same provision, such subsidy will be calculated based on the task performance cost, to be defined by the minister competent for digitalisation, and understood as the product of the actual unit cost of each task and the number of completed tasks. As you can see, the lawmaker tended to the interest of the national postal operator by providing them with some additional funding. However, some serious doubts emerge whether this move will nserve as a guise for an informal "recapitalisation". In our view,

[43] As of 20 June 2022, 3,2382,020 individuals filed their request via the postal operator, i.e. 82% of all applicants for the subsidy. Cf. https://dane.gov.pl/pl/dataset/2766,wnioski-o-dofinansowanie-do-zakupu-odbiornika-cyfr/resource/39247/table?page=1&per_page=20&q=&sort= (accessed on 24.06.2022).

the special-purpose subsidy from the state budget could easily be inflated, and therefore strengthen the advantage of the "national" postal operator over private businesses on the competitive postal market. Hence, our impression is that Poczta Polska S.A. could become one of the biggest beneficiaries of the adopted regulations.

Furthermore, the group of beneficiaries should definitely include businesses dealing with the sale of digital receivers. Under Article 7(1) of the Act, if such company wishes to gain the right to receive payments based on the allowance grant certificate, they first need to be entered into the register of companies selling digital receivers, kept the minister competent for digitalisation. The register is updated on an ongoing basis and is made available by competent minister in the Public Information Bulletin (BIP) on the relevant website. This category comprises solely of businesses with the registered office in the territory of the Republic of Poland, in another Member State of the European Union or in a Member State of the European Free Trade Association (EFTA), registered as active VAT payers or as payers exempt from VAT. In order to be entered into the register, the company needs to provide data specified in the Act This data should be updated on an ongoing basis, on pain of deletion. Any false declaration made upon the provision of data required for registration is subject to criminal liability. The registration is of course subject to review by the minister competent for digitalisation who checks whether the data provided by the company are true and correct. In practice, the registration in the subsidy program is possible only for businesses from the White List of VAT Payers, i.e. for VAT payers, including businesses whose registration as VAT payers has been reinstated and entities for which no VAT registration or deletion decision has been made by the head of the competent tax authority. According to the statistics, as of 20 June 2022, 1,134 companies have joined the subsidy program and made available a total of 3,726 points of sale where customers could buy their subsidised digital receivers.[44]

To sum up our discussion on the actual and potential effects of the Act on the Support to Households in Bearing the Costs, a remark should be made on the situation of telecommunications companies which are undeniably affected by the change in digital broadcasting methods. There is no doubt that because of this transition they had to suffer some significant costs. While it is true that the provisions of the Act do not explicitly impose such expenditure, telecoms may still be perceived as its maleficiaries. On the other hand, at least some of them can be classified as beneficiaries. Finally, it seems that some households which have used free digital terrestrial television so far but do not wish to invest in new TV sets or set-top boxes, have chosen to purchase the cheapest service packages on digital platforms such as Cyfrowy Polsat or Canal Plus. Yet, to corroborate this assumption, further adequate statistical research is required.

[44] See https://dane.gov.pl/pl/dataset/2766,wnioski-o-dofinansowanie-do-zakupu-odbiornika-cyfr/resource/39245/table?page=1&per_page=20&q=&sort= (accessed on 24.06.2022).

## CONCLUSION

Our institutional analysis of the provisions of the Act on the Support to Households in Bearing the Costs would not have been possible without the discussion on normative regulations which created the need for such support to Polish households and entailed the change in digital terrestrial television broadcasting methods. That is why it was necessary to analyse the EU legislation to which the Polish lawmaker had to react. A specific remark should be made in this respect regarding the specific law-making modalities, as they differ from the classic Kelsen's Grundnorm. Today, law-making process has become more complex and elaborate than in Kelsen's model. More often than not the rules for the support to specific categories of individuals are dictated by international legal acts (including the soft law), EU legislation or domestic regulations. With this in mind, and considering the support provided to households because of the need to shift to a new broadcasting system, as discussed in this paper, we believe that an alternative law-making model can be suggested here, different from Kelsen's approach and based on the assumption that the law-making is not only a "top-down" process, where constitutional provisions are made more specific, but also a "side-centre/bottom-up" venture, where the EU legislation is implemented and its provisions further developed, and statutory acts in force are drafted based on domestic regulations.[45]

Whatever the law-making model, by formalising social rules, the lawmaker should strive to act in line with certain standards applicable in the democratic state of law. Among those "standards", we can cite the principle of legal determinacy which, as one of the rules of proper (sound) law-making, requires that the lawmaker construes correct, precise and clear legal provisions. It is not the first time that the Polish lawmaker has breached that rule, and the provisions of the Act on the Support to Households in Bearing the Costs are a case in point, as they had to be amended almost immediately after their entry into force.

Setting aside a multitude of errors made by the lawmaker at the law-making stage, we believe that the adopted normative regulations need to be assessed against the lawmaker's initial purpose, i.e. the support to less wealthy households which had to bear costs in order to keep their uninterrupted access to TV programmes offered as part of the free DTT. As the Act has been binding for less than four months it is perhaps too early to make some final judgment on its effects. Still, we can already draw certain conclusions, based on available data. First of all, the vast majority of applications have been filed so far to get the allowance for the purchase of a set-top box (as much as 85% of all applications). Hence, it seems that although no income-criteria have been set, the allowance has been used (at least until today) by those households which strive to keep the continued TV signal reception as such rather than those which wish to improve the quality of their digital TV signal. So far, the statistics discussed above do not suggest that Poles have used the rather imprecise provisions to improve the reception quality of their digital TV and that

[45] I have discussed this idea further in: Borski, M., *Publiczne formy wspierania opiekunów osób z niepełnosprawnościami*, Oficyna Wydawnicza Humanitas, Sosnowiec, 2018, pp. 44–45.

they have bought very expensive TV models. Some would claim that the purchase of a costly, state-of-the-art TV set could be considered as abuse of the law, even more so as the beneficiary had to make the statement that they were unable to make the purchase without jeopardising the basic subsistence needs of their household.[46] It seems, though, that such claim is not corroborated by adopted normative solutions.

Finally, let us underline that ¾ of all households have filed the application with traditional means, i.e. via the designated operator. Only 25% chose to use electronic forms, via gov.pl portal. It does not say much for good e-administration, and means that the least well-off are still most exposed to digital exclusion.

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[46] See https://businessinsider.com.pl/wiadomosci/pani-janina-kupila-telewizor-rzad-mial-zwrocic-jej-250-zl-jednego-nie-przewidziala/nrmjncv (accessed on 25.06.2022).

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# REASONS FOR FAILING TO HANDLE ADMINISTRATIVE CASES ON TIME

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Abstract

The article deals with the issue of administrative authorities' justification of a failure to meet deadlines for handling cases in general administrative proceedings, tax proceedings and simplified complaint proceedings. To that end, the author uses the dogmatic-legal method, performs a critical analysis of the literature on the subject matter and interprets the relevant judgments of administrative courts. The aim of the article is to draw attention to the importance of correct, exhaustive and true justification of the reasons why administrative bodies procrastinate and set new deadlines for handling administrative cases.

The research area has been divided into two main parts, i.e. the analysis of the correct indication of the reasons for a delay and the diagnosis of incorrect justifications for failures to handle cases on time. The author emphasises that the reasons for a failure to deal with an administrative case on time should reflect the facts concerning the case as accurately as possible, especially when a given reason is an element of an evidence-based proceeding. Criticism was levelled at reasons not related to the course of proceedings, such as staffing problems of the authority and the multitude of cases, as well as reasons stated in too general terms, such as the complicated nature of a matter. In conclusion, the author proves that precise indication of reasons for failures to handle a case within the time limits sticks to the principle of striving for objective truth and influences the general assessment of administrative bodies.

Keywords: time limits for handling cases, reasons for failing to deal with a case within a set time limit, general administrative proceeding, tax proceeding, simplified complaint proceeding

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## EFFICIENCY AND PUNCTUALITY OF HANDLING ADMINISTRATIVE CASES: GENERAL OBSERVATIONS

Efficiency and punctuality of handling cases in public administration, as a typical system of communicating vessels,[1] is one of the most important elements of its functioning. Contemporary clients of public administration bodies are usually interested in the possibly fastest and most efficient handling of their cases, although sometimes slow and even lengthy functioning of an institution is in the interest of a client (e.g. in case of the statute of limitations concerning tax liabilities). Efficient and fast handling of cases is, from the clients' point of view, equally important as a favourable resolution of the matter.

Efficiency, speed and punctuality of the functioning of administration is important in case of performing general tasks and in resolving individual cases subject to administrative decisions. It proves itself in case of the implementation of the principle of administration efficiency,[2] through which general efficiency of the performance of public tasks is perceived. It has not changed for years, because citizens assess the entire state based on general opinions as well as individual experience, in particular in the areas concerning the fulfilment of social needs, personal problems, law and order, culture of administrative work and officials' ethics.[3] The assessment of the state as such, its economic, political and social system[4] and the assessment of the government in the minds of the majority of ordinary citizens is shaped under the influence of the impressions that those citizens get when they come into direct contact with people who, in their eyes, are representatives of the state authority and implementers of the state policy.[5] Thus, what is important for the relations between citizens and administrative bodies is the atmosphere created inter alia by an official's personal involvement,[6] which determines positive assessment of the state machinery functioning through the prism of efficiency and punctuality of the performance of tasks.

However, for the purpose of analysing punctuality of handling administrative cases and reasons for failures to handle them on time, based on the present research, it should be assumed that an administrative case is a set of legal and physical circumstances aimed at using a norm of substantive administrative law by granting a particular entitlement or imposing a particular obligation on a party to an administrative proceeding. Thus, an administrative case should be understood as a definite type of an administrative proceeding conducted in relation to an individual entity in the area of a definite subject matter. An administrative case within the

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1 Knosala, E., *Prawne układy sterowania w administracji publicznej*, Wydawnictwo Uniwersytetu Śląskiego, Katowice, 1998, p. 11.

2 For more see: Zimmermann, J., *Prawo administracyjne*, Wolters Kluwer, Warszawa, 2010, p. 92.

3 See Jełowicki, M., *Nauka administracji. Zagadnienia wybrane*, PWN, Warszawa, 1987, p. 145 et seq.

4 For more see: Zacharko, L. (ed.), *Organizacja prawna administracji publicznej*, Wydawnictwo Uniwersytetu Śląskiego, Katowice, 2013, passim.

5 Kowalewski, S., *Nauka administracji*, PWN, Łódź, 1971, p. 91.

6 Knosala, E., *Rozważania z teorii nauki administracji*, Śląskie Wydawnictwa Naukowe, Tychy, 2004, p. 89.

substantive meaning is composed of subjective and objective elements.[7] Such a case should be handled either by reaching an agreement or by unilateral resolution by an administrative body.[8] In the analysis of an administrative case punctuality, it is also necessary to remember about a complaint proceeding (by means of appealing in accordance with Article 237 § 4 Code of Administrative Procedure[9]), which ends with a technical act in the form of a notification.[10]

Bearing in mind a dogmatic legal method and a critical analysis of secondary sources, as well as an analysis of numerous judgments of administrative courts, one should interpret and draw conclusions concerning time limits and reasons for failing to meet them in general administrative proceedings, tax proceedings and simplified complaint proceedings in order to draw attention to the significance of the correct, exhaustive and true justification of the reasons why administrative bodies procrastinate and set new deadlines for handling administrative cases, as well as to supplement courts' opinions. The analysis does not cover the issue of punctuality of performing tasks imposed on public administration that are not connected with administrative proceedings, because it should always be done without delay and there are no provisions stipulating strict deadlines in such cases. The efficiency of public administration bodies' functioning is an indicator of the efficiency of the functioning of the state.

## BINDING TIME LIMITS FOR ADMINISTRATIVE PROCEEDINGS

The expeditiousness of administrative proceedings is in the interest of a citizen as well as in the social interest.[11] Appeals are made to save people's time and means because both administrative bodies and parties to a proceeding incur the costs of it.[12] The provisions regulating general administrative proceedings as well as those concerning tax proceedings[13] oblige public administrative bodies to act insightfully and promptly, using the simplest possible measures leading to the resolution of a case (Article 12 § 1 CAP and Article 125 § 1 TL).

The principle of expeditiousness and simplicity of an administrative proceeding is especially significant not only from the point of view of the general social perception of the efficiency of public authorities' functioning but first of all due to the protection of an individual against the lengthiness of a proceeding and

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[7] The Supreme Administrative Court judgment of 19.01.2017, I FSK 925/15 (https://orzeczenia.nsa.gov.pl/doc/812F52A7D1, accessed on 7.02.2022).

[8] Jendrośka, J., *Ogólne postępowanie administracyjne i sądowoadministracyjne*, Kolonia Limited, Wrocław, 2005, p. 87.

[9] Act of 14 June 1960: Code of Administrative Procedure (consolidated text, Journal of Laws of 2022, item 2000), hereinafter referred to as "CAP".

[10] For more see: Hrynicki, W.M., *Skargi, wnioski, petycje i inne interwencje obywatelskie*, Wolters Kluwer, Warszawa, 2022, passim.

[11] Ochendowski, E., *Postępowanie administracyjne i sądowoadministracyjne*, Dom Organizatora TNOiK, Toruń, 2000, p. 100.

[12] Służewski, J., in: Służewski, J. (ed.), *Polskie prawo administracyjne*, PWN, Warszawa, 1992, p. 230.

[13] Act of 29 August 1997: Tax Law (consolidated text, Journal of Laws of 2021, item 1540, as amended), hereinafter referred to as "TL".

procrastination of the issue of a resolving decision. Delayed handling of a case may prove to be aimless, result in a loss to an individual, or cause that the issued decision is deprived of value it might have had if it had been issued on time.[14]

The conduction of a proceeding lengthily undermines an individual's trust in the state and law, as well as the authority of the state institutions.[15] However, the principle of proceeding expeditiousness cannot result in the abandoning of handling a case in a respectful, insightful, lawful and objectively honest way in accordance with the principle of the parties' active participation in a proceeding. The competition between those principles must be subordinated to the principle of rationality. The principle of trust is believed to be a fastener that links all general rules of a proceeding,[16] and proceeding expeditiousness cannot justify breaching other principles and public decency.[17]

The legislator laid down some general time limits for handling cases in Code of Administrative Procedure and Tax Law. They are as follows:

– promptness (Article 35 § 2 CAP and Article 139 § 2 TL) and lack of unnecessary delay (Article 35 § 1 CAP and Article. 139 § 1 TL, and Article 237 § 1 CAP),
– basic time limit of one month (Article 35 § 3 CAP and Article 139 § 1 TL, and Article 237 § 1 CAP),
– two-month time limit for especially complex cases or in tax appeal proceedings (Article 35 § 3 CAP and Article 139 § 1 and § 3 TL),
– three-month time limit for cases in which there was a trial or a party filed a motion to resolve a matter concerning a tax appeal proceeding in the form of a trial (Article 139 § 3 TL).

The differentiation of time limits for handling cases results from the use of criteria based on the different nature of cases and the level of their complexity.[18] They are maximum limits,[19] which is highlighted in judgments of administrative courts and which the phrase "not later than" used by the legislator indicates, and an administration body should not carry out a proceeding in the way postponing its conclusion until the end of the time limit.

Promptness and a lack of unnecessary delay constitute relatively determined administrative time limits.[20] Cases that should be promptly handled include ones

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[14] Golęba, A., in: Knysiak-Sudyka, H. (ed.), *Kodeks postępowania administracyjnego. Komentarz*, Wolters Kluwer, Warszawa, 2019, p. 358.

[15] See Kotulska, M., 'Czas a postępowanie administracyjne', in: Niczyporuk, J. (ed.), *Kodyfikacja postępowania administracyjnego na 50-lecie K.P.A.*, Wydawnictwo WSPA, Lublin, 2010, pp. 424–425.

[16] Cf. Skrenty, Ż., 'Zaufanie obywateli do organów władzy publicznej w świetle orzecznictwa sądowego i poglądów doktryny', *Studia Lubuskie*, 2013, No. IX, pp. 97–112.

[17] Dzwonkowski, H., Dzwonkowski, M., in: Dzwonkowski, H. (ed.), *Ordynacja podatkowa. Komentarz*, C.H. Beck, Warszawa, 2020, p. 890.

[18] Kędziora, R., *Kodeks postępowania administracyjnego. Komentarz*, C.H. Beck, Warszawa, 2017, p. 262.

[19] E.g. judgment of the Voivodeship Administrative Court in Wrocław of 7.06.2022, II SAB/Wr 1562/21 (https://orzeczenia.nsa.gov.pl/doc/90A2ADC1EF, accessed on 7.02.2022).

[20] Wiktorowska, A., in: Wierzbowski, M., Szubiakowski, M., Wiktorowska, A. (ed.), *Postępowanie administracyjne – ogólne, podatkowe, egzekucyjne i przed sądami administracyjnymi*, C.H. Beck, Warszawa, 2004, p. 70.

the actual and legal state of which may be at once reliably established the moment a proceeding is initiated based on the existing evidence, however, it does not concern only simple and routine cases.[21] Acting without unnecessary delay means a ban on groundless retention of cases and refraining from initiating proceedings, and an obligation to conduct proceedings without unnecessary pauses and lengthiness.[22] Both conditions (promptness and a lack of unnecessary delay) do not mean that a case should be dealt with immediately.[23] The identical phrases "without unnecessary delay" used in Article 35 § 1 and Article 237 § 1 CAP with regard to a simplified complaint proceeding should be interpreted in the same way.[24]

Promptness in a tax proceeding determines the method of dealing with a case and, as a rule, does not allow whatever delay in handling a case,[25] thus, whatever stoppage (even substantiated). On the other hand, the phrase "without unnecessary delay" concerns a tax evidence proceeding and means in fact that it is admissible to postpone the handling of a case, extend the time limit, but only if it is justified and necessary.[26] Nevertheless, from the point of view of the present considerations, the differentiation presented is not significant, and promptness and a lack of unnecessary delay should be classified as a type of time limit that obliges an administrative body to act as quickly as possible, eliminating whatever stoppages, pauses, postponing, and at the same time does not eliminate the obligation to be thorough and earnest.

The maximum one-month time limit for a general administrative proceeding is set for cases requiring the conduction of an explanatory proceeding and cases dealt with in an appeal proceeding (Article 35 § 3 CAP). Also simplified proceedings (Article 35 § 3a CAP) and complaint cases (Article 237 § 1 CAP) should be conducted within this time limit. In tax proceedings, only cases requiring the conduction of an evidence proceeding and ones before the first instance bodies (Article 139 § 1 TL) should be handled within the maximum one-month time limit.

On the other hand, especially complex case in a general administrative proceeding (Article 35 § 3 CAP) as well as in a tax proceeding (Article 139 § 1 TL) are dealt with within the maximum two-month time limit. The assessment of the level of a case complexity is within the competence of the body conducting a proceeding, which has the best view of the actual as well as legal state of the case. What may determine the especially complex nature of a case is, for example, a number of parties to the proceeding, a complex nature of the rights or obligations shaped by an administrative decision, difficulties in establishing the legal state in which

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[21] Adamiak, B., Borkowski, J., *Kodeks postępowania administracyjnego. Komentarz*, C.H. Beck, Warszawa, 2017, p. 285.

[22] Orzechowski, R., in: Borkowski, J., Jendrośka, J., Orzechowski, R., Zieliński, A. (ed.), *Kodeks postępowania administracyjnego. Komentarz*, Wydawnictwo Prawnicze, Warszawa, 1989, p. 128.

[23] Cf. Przybysz, P., *Kodeks postępowania administracyjnego. Komentarz*, Wolters Kluwer, Warszawa, 2017, p. 186.

[24] Kledzik, P., *Postępowanie administracyjne w sprawie skarg i wniosków*, Pressom, Wrocław, 2012, p. 76.

[25] Dzwonkowski, H., Damaz, M., in: Dzwonkowski, H. (ed.), *Ordynacja podatkowa. Komentarz*, C.H. Beck, Warszawa, 2020, p. 949.

[26] Szymański, T., in: Mariański, A. (ed.), *Ordynacja podatkowa. Komentarz*, C.H. Beck, Warszawa, 2021, p. 741.

a legal relationship under assessment in an administrative proceeding was shaped.[27] Moreover, cases in tax appeal proceedings are dealt with within the maximum two-month time limit, and ones that are especially complex in this proceeding are dealt with within the maximum three-month time limit.

## REAL REASONS FOR FAILURES TO HANDLE CASES PUNCTUALLY (WITHIN THE SET TIME LIMIT)

Failure to handle an administrative (tax/complaint) case within the set time limit should be incidental in nature and should be justified well. It cannot be assumed that the legislator introduced deadlines that cannot be met, because it would mean that the legislator was irrational. Groundless procrastination of a case may have a negative influence on the rights and obligations of the parties to a proceeding. The authorities' obligation to deal with a case prevents the so-called silence of the authorities in an administrative proceeding, which may have a negative influence on the parties' interests equal to a refusal decision.[28] Finally, a failure to handle a case punctually may violate the provisions of the law or be justified by the existence of other legal norms.

An unjustified failure to handle a case within a given time limit may lead to an administrative body's inaction or its lengthy functioning. While inaction is relatively easy to identify because it constitutes a failure to handle a case within the time limit laid down in a legal provision or set by an administrative body (Article 37 § 1(1) CAP and Article 140 TL), the lengthiness of a proceeding is highly evaluative in nature and occurs when a proceeding is carried out longer than necessary to resolve a case (Article 37 § 1(2) CAP). The Supreme Administrative Court stated that a proceeding conducted lengthily is one carried out in an inefficient way by means of performing superficial activities causing that formally an administrative body is not inactive, and also by increasing the number of the evidence proceeding activities over the amount that is necessary based on the nature of a case.[29] The Voivodeship Administrative Court in Wrocław, added that a proceeding conducted this way should be assessed as negligent[30] and lengthy provided that there are unjustified pauses between an administrative body's particular activities leading to considerable and unacceptable, from the point of view of procedural economics,

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[27] Kędziora, R., *Kodeks…*, op. cit., p. 263.

[28] Klonowiecki, W., *Strona w postępowaniu administracyjnym*, Towarzystwo Naukowe KUL, Lublin, 1938, p. 74.

[29] The Supreme Administrative Court judgment of 27.08.2013, II OSK 549/13 (https://orzeczenia.nsa.gov.pl/doc/E547CC06DB); the Supreme Administrative Court judgment of 21.11.2017, I FSK 2223/15 (https://orzeczenia.nsa.gov.pl/doc/05EBE610DC); similarly judgment of the Voivodeship Administrative Court in Szczecin of 2.06.2022, II SAB/Sz 43/22 (https://orzeczenia.nsa.gov.pl/doc/83E8E5F1), the judgment of the Voivodeship Administrative Court in Gdańsk of 2.06.2022, III SAB/Gd 11/22 (https://orzeczenia.nsa.gov.pl/doc/571620D84C, accessed on 7.02.2022).

[30] Judgment of the Voivodeship Administrative Court in Wrocław of 31.05.2022, IV SAB/Wr 43/22 (https://orzeczenia.nsa.gov.pl/doc/3824E47B, accessed on 7.02.2022).

lengthening of the proceeding period.[31] In literature, it is also highlighted that the lengthy conduction of proceedings should be understood as their inefficiency, performance of activities after a long lapse of time, or performing superficial activities that let an administrative body show it is formally not inactive.[32]

Thus, the necessity of properly justifying a failure to handle an administrative case within the time limit seems to be extremely important, and rich administrative courts' judgments in this area support a conclusion that the problem is significant from the point of view of public administration bodies' practice.[33] However, the multiplicity of court judgments requires systemising and developing. The right justification of a failure to handle a case within a set time limit also results from the principle concerning the need to inform a party to a proceeding about significant actual and legal circumstances of a case (Article 9 CAP and Article 121 § 2 TL), as well as the principle of acting in a way that lets people have confidence in public authorities' bodies (Article 8 § 1 CAP and Article 121 § 1 TL).[34] Failing to stick to these principles may result in inaction or lengthiness of proceedings.

Based on the above considerations, it is necessary to assume that:

(1) in spite of the lack of a clear obligation, the reasons for failing to meet a deadline for handling a case should be provided as precisely as possible and be really related to the circumstances of a given case;
(2) the reasons that are not related to the circumstances of a given case should not be recognised as the factors justifying a failure to handle a case within the obligatory time limit;
(3) the reasons that to some extent are related to the circumstances of a given case but are expressed in a too general way should not be recognised as the factors justifying a failure to handle a case within the set time limit, either.

In the first area of the considerations, it should be emphasised that the factors justifying a delay in handling a case should be strictly related to a given case. In other words, the reasons for failing to meet a deadline for handling a case should be substantiated by the circumstances of this particular case (they should be set in the reality of a given case). Indication of those obstacles should be detailed, thorough, exhaustive and clear to a party to the proceeding. An administrative body

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[31] Judgment of the Voivodeship Administrative Court in Wrocław of 26.05.2022, IV SAB/Wr 295/22 (https://orzeczenia.nsa.gov.pl/doc/7F13897932, accessed on 7.02.2022).

[32] Tarno, J.P., *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, Wydawnictwo LexisNexis, Warszawa, 2012, p. 44; similarly Dzwonkowski, H., Damaz, M., in: Dzwonkowski, H. (ed.), *Ordynacja podatkowa. Komentarz*, C.H. Beck, Warszawa, 2020, p. 955.

[33] According to "Information about administrative courts functioning in 2021", voivodeship administrative courts heard 13,635 complaints about inaction of administrative bodies and lengthy conduction of proceedings, of which 48.6% were upheld (file:///C:/Users/USER1/Downloads/2021%20(3).pdf). On the other hand, in 2020 voivodeship administrative courts heard 8,311 complaints about the same matters, of which 46.29% were upheld (file:///C:/Users/USER1/Downloads/2020.pdf), accessed on 7.02.2022.

[34] Judgment of the Voivodeship Administrative Court in Opole of 14.04.2022, II SAB/Op 9/22 (https://orzeczenia.nsa.gov.pl/doc/D5A954231A, accessed on 7.02.2022).

should inform what steps it took and for what particular reason it cannot conclude an evidence proceeding and issue a decision.[35]

An appeal should be made for making the reasons correspond to an evidence proceeding carried out, which was highlighted by administrative courts indicating, for example, that undertaking the first procedural step after a complaint has been filed (…), indicates an administrative body's inertness and no concentration of evidence proceeding activities.[36] Increasing the number of the evidence proceeding activities above the needs resulting from the essence of the case,[37] as well as inefficient collection of evidence[38] cannot justify a failure to handle a case within the time limit. The principle of the expeditiousness of a proceeding and the resulting obligation to handle a case promptly cannot lead to the infringement of legal provisions, abandoning some forms of a proceeding, violation of the parties' procedural rights etc. in the name of this expeditiousness.[39]

A party to a proceeding should be without delay notified about the reason for a failure to handle a case within the time limit.[40] It should happen the moment any obstacles to continue a proceeding occur without waiting until the deadline for handling it expires.[41] It should be also emphasised that postponing a deadline for handling a case, an administrative body is obliged to explain the reasons for that in a way that can be verified.[42]

It should be pointed out that the reasons strictly related to the circumstances of a given case are not the only ones that can justify a failure to handle a case punctually. Such a conclusion would be inappropriate, because it would not take into account extraordinary situations resulting in an administrative body's temporary inability to operate (e.g. flood, fire, evacuation, war). However, at the time of standard (typical) functioning of public administration bodies that is not disrupted by external factors (independent of an administrative body), the reasons for delay in handling a case should be strictly related to this case.

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[35] Cf. Pater, I., Pater, J., 'Środki prawne służące stronie na bezczynność organu podatkowego', *Monitor Podatkowy*, No. 4, 2001, pp. 29–34.

[36] Judgments of the Voivodeship Administrative Court in Wrocław of 31.05.2022, II SAB/Wr 63/22 (https://orzeczenia.nsa.gov.pl/doc/23D434B05C) and IV SAB/Wr 38/22 (https://orzeczenia.nsa.gov.pl/doc/843B6B66C1); judgment of the Voivodeship Administrative Court in Poznań of 16.01.2019, II SAB/Po 17/18 (https://orzeczenia.nsa.gov.pl/doc/930AE9DEDB), accessed on 7.02.2022.

[37] Judgment of the Voivodeship Administrative Court in Wrocław of 26.05.2022, I SAB/Wr 183/22 (https://orzeczenia.nsa.gov.pl/doc/5F8F9E0033, accessed on 7.02.2022).

[38] Judgment of the Voivodeship Administrative Court in Wrocław of 10.05.2022, II SAB/Wr 1484/21 (https://orzeczenia.nsa.gov.pl/doc/3F6AD32399, accessed on 7.02.2022).

[39] Adamiak, B., in:, Adamiak, B., Borkowski, J. (eds), *Kodeks postępowania administracyjnego. Komentarz*, C.H. Beck, Warszawa, 2017, p. 105.

[40] Judgment of the Voivodeship Administrative Court in Wrocław of 31.05.2022, IV SAB/Wr 48/22 (https://orzeczenia.nsa.gov.pl/doc/E1D56DD689, accessed on 7.02.2022).

[41] Dzwonkowski, H., Damaz, M., in: Dzwonkowski, H. (ed.), *Ordynacja podatkowa. Komentarz*, C.H. Beck, Warszawa, 2020, p. 952.

[42] Judgment of the Voivodeship Administrative Court in Łódź of 14.05.2020, I SAB/Łd 1/20 (https://orzeczenia.nsa.gov.pl/doc/92B09B87FA, accessed on 7.02.2022).

## INAPPROPRIATE REASONS FOR A FAILURE TO HANDLE A CASE WITHIN THE OBLIGATORY TIME LIMIT

Unfortunately, as numerous administrative courts' judgments indicate, it happens that public administration bodies justify a failure to meet a deadline for handling a case by facing problems unrelated to a given proceeding, thus not directly affecting a proceeding, and factors that an administrative body can influence in fact. Therefore, it is necessary to identify inappropriate reasons unrelated to the circumstances of a given case quoted by administrative bodies as ones for a failure to handle a case punctually. Most often they include staffing problems (including holiday seasons, insufficient staffing levels) and being overloaded with work.

Broadly understood staffing problems occurring in an administrative institution (including a holiday season) should not constitute a reason for a failure to handle an administrative case within a time limit. Clerks on leave, regardless of the type: resulting from Employment Code[43] or other legal acts[44] regulations, and even individual terms of work and pay, should be planned and granted by managers of administrative institutions in a way ensuring continuity of proper functioning of a given administrative body. An employee's leave or any other staffing problems, especially related to clerk staffing levels, should not be a formal reason for a failure to handle a case on time. A staffing policy towards persons performing tasks of a public administration body and their supervisors should be shaped in the way ensuring the right staff able to perform their tasks at every stage of their fulfilment.

Courts' judgments also confirm this inference. Staffing problems and insufficient staffing levels cannot justify lengthiness and inaction of an administrative body,[45] because state institutions are obliged to organise work and employ such resources that can ensure the performance of tasks assigned to them. The issue of potential staffing problems does not exclude a possibility of stating that an administrative body indulged in inaction, because the state of inaction is an objective situation and is a consequence of an administrative body's failure to undertake procedural activities within the statutory time limits.[46] Problems with work organisation in an institution, reflected in the form of e.g. difficulties in recruiting employees, or temporary staffing problems resulting from employees' leave of absence cannot limit the rights of a party to a proceeding or constitute justification of the infringement of those rights.[47] Potential staffing problems should be predicted in the process of planning the work of a public administration body and the plan alone should forecast mechanisms of functioning when they occur and methods and ways of

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[43] Act of 26 June 1974: Employment Code (consolidated text, Journal of Laws of 2022, item 1510 as amended).

[44] E.g. Act of 21 November 2008 on civil service (consolidated text, Journal of Laws of 2022, item 1691).

[45] Judgment of the Voivodeship Administrative Court in Poznań of 14.06.2022, II SAB/Po 90/22 (https://orzeczenia.nsa.gov.pl/doc/359A1D28E2, accessed on 7.02.2022).

[46] Judgment of the Voivodeship Administrative Court in Poznań of 1.06.2022, II SAB/Po 244/21 (https://orzeczenia.nsa.gov.pl/doc/02AAB146B1, accessed on 7.02.2022).

[47] Judgment of the Voivodeship Administrative Court in Gorzów Wielkopolski of 8.06.2022, II SAB/Go 37/22 (https://orzeczenia.nsa.gov.pl/doc/6C9E0648, accessed on 7.02.2022).

their elimination. Proper organisation of tasks and employment of appropriate staff are parts of the public mission, which cannot be accomplished to the detriment of an individual.[48] Inertness resulting from insufficient staffing levels is not the fault of particular employees but it can be a consequence of the lack of the appropriate strengthening of organisational units.[49]

Against the background of this inference, one should agree with the statement that a man in an administrative organisation cannot be automatically treated as a supine element of a big system that has no will, feelings and interests because these would limit the steering ability of the system.[50]

Overload of cases is a more complicated situation but also inadmissible as a reason for failing to handle a case within the time limit. It should be admitted that work overload can take place in every administrative body, especially when regulations change. However, public authorities should act in such a way that lets them prepare to changes and reduce the risk of being dysfunctional. It is true that work overload can occur at the initial stage of the change in regulations that influence the heavy workload in public administration, but it should be eliminated as quickly as possible by undertaking all possible organisational activities, both personal and material. Overload of cases must not be a permanent reason for a failure to handle cases punctually. Therefore, while heavy workload can occasionally be quoted as a factor that prevents punctual handling of an administrative case, it cannot be a reason regularly quoted by an administrative body in decisions (notifications) informing a party about a failure to handle a case and assigning new time limits.

Administrative courts also criticised quoting overload of cases as a reason for lengthening the time necessary to deal with an administrative case. An administrative body cannot justify lengthiness by a big number of applications because state authorities are obliged to organise work in the way and employ such resources that will enable them to perform all assigned tasks.[51] Big inflow of cases cannot limit the rights of a party to a proceeding or justify the infringement of them.

It should be noticed that overload of cases as a reason which is not directly related to a proceeding conducted is often a real reason for a failure to perform a particular activity within a proceeding, which would help conclude it. Thus, overload of cases only causes a failure to perform some activities necessary in a proceeding and having influence on the handling of a case. Thus, the justification of a failure to

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[48] Judgment of the Voivodeship Administrative Court in Wrocław of 31.05.2022, IV SAB/Wr 48/22 (https://orzeczenia.nsa.gov.pl/doc/E1D56DD689, accessed on 7.02.2022).

[49] Judgment of the Voivodeship Administrative Court in Poznań of 9.06.2022, II SAB/Po 62/22 (https://orzeczenia.nsa.gov.pl/doc/9F939EABCC, accessed on 7.02.2022).

[50] Knosala, E., *Organizacja administracji publicznej. Studium z nauki administracji i prawa administracyjnego*, Wyższa Szkoła Zarządzania i Marketingu, Sosnowiec, 2005, p. 19.

[51] Judgment of the Voivodeship Administrative Court in Poznań of 9.06.2022, II SAB/Po 62/22 (https://orzeczenia.nsa.gov.pl/doc/9F939EABCC); judgment of the Voivodeship Administrative Court in Gorzów Wielkopolski of 8.06.2022, II SAB/Go 37/22 (https://orzeczenia.nsa.gov.pl/doc/6C9E0648); judgment of the Voivodeship Administrative Court in Poznań of 1.06.2022, II SAB/Po 244/21 (https://orzeczenia.nsa.gov.pl/doc/02AAB146B1), accessed on 7.02.2022.

handle a case based on overload of cases seems inappropriate, insufficient and not reflecting the true reason for a delay to justify a failure to handle a case.

The Voivodeship Administrative Court in Wrocław stated that a big number of applications influences the efficiency of an administrative body, but it is inadmissible in the state of justice that this situation has not been improved recently.[52] The Voivodeship Administrative Court in Poznań also stated that a big number of cases do not exclude a possibility of recognising that an administrative body indulged in inertness, but can be taken into consideration in the assessment whether lengthiness of a proceeding took place with a flagrant breach of law. The increase in the number of cases must result in delays in their resolution. These are objective difficulties causing the lengthening of proceedings and they cannot be ignored in the evaluation of the functioning of an administrative body.[53]

Decisions (notifications) informing about the reasons for failing to handle a case within the time limit and assigning a new deadline that refer only to an overload of cases should be recognised as one that informs a party to the proceeding in an insufficient and unsatisfactory way. Whenever an administrative body refers to the overload of cases, it should also inform what measures were taken to solve a problem and which activities are really still delayed and must be performed. Promptness of administrative activities also depends on decision makers planning employment and remuneration levels,[54] and there are special requirements for management staff.[55]

Another area under consideration with regard to inappropriate reasons for failing to handle a case on time includes causes connected with the circumstances of a given case but they should not be quoted as those reasons due to a high level of generalisation. They most often include legal norms that prevent punctual handling of a case as well as the fact that an evidence proceeding is conducted or a case is complex in nature.

Other legal norms that are allegedly in conflict with the norms assigning time limits are pretexts that should never constitute reasons for failing to handle an administrative (tax related) case. The norms include Article 10 § 1 CAP in relation to general administrative proceedings, Article 200 TL in relation to tax proceedings and time limits for serving letters assigned for both types (Article 39 and the subsequent CAP and Article 144 and the subsequent TL), respectively.

Tax authorities in particular relatively often justify a failure to handle a case on time quoting an obligation to assign a seven-day time limit for a party to respond in connection with the collected evidence (Article 200 § 1 TL). Such conduct should be recognised as inadmissible for two reasons.

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[52] Judgment of the Voivodeship Administrative Court in Wrocław of 26.05.2022, I SAB/Wr 2754/21 (https://orzeczenia.nsa.gov.pl/doc/779A57C213, accessed on 7.02.2022).

[53] Judgment of the Voivodeship Administrative Court in Poznań of 1.06.2022 r. II SAB Po 244/21 (https://orzeczenia.nsa.gov.pl/doc/02AAB146B1, accessed on 7.02.2022).

[54] Gruszczyński, B., Kabat, A., in: *Ordynacja podatkowa. Komentarz*, Babiarz, S., Dauter, B., Gruszczyński, B., Hauser, R., Kabat, A., Niezgódka-Medek, M., Wolters Kluwer, Warszawa, 2015, p. 696.

[55] Leoński, Z., *Nauka administracji*, C.H. Beck, Warszawa, 2002, p. 111.

Firstly, an administrative body justifying a failure to handle a case on time quoting the obligation imposed by the provision of Article 200 § 1 TL to assign a seven-day time limit for a party to respond in connection with the collected evidence assumes that the legislator irrationally shaped the provisions regulating tax proceedings and did not take into account a period long enough to deal with a tax related case. However, as it was mentioned above, the legislator rationally assigned a longer two or three-month periods for especially complex cases and appeals. Thus, the legislator decided that in uncomplicated cases settled without delay but not later than within a month, and in more difficult cases settled within two or three months, there is a real possibility of ensuring a party's right to take actively participation in a proceeding by assigning a seven-day time limit to respond in connection with the issue of evidence collected. Thus, a tax authority cannot *ergo* assume that the legislator conflicted the provisions regulating time limits for resolving tax related cases with the obligation to ensure a possibility of responding in connection with the evidence collected.

Secondly, justifying a failure to meet a deadline for handling a case by quoting the need to comply with Article 200 § 1 TL is not understandable for a party to a proceeding, because what happens is really a specific type of attempt to shift the moral responsibility for unpunctuality on the legislator or a party. Thus, a tax authority often sends an untrue message to a party: "*we have done everything within the case but the obligation under Article 200 § 1 TL or the party's activity prevented the conclusion of the proceeding on time*". Such a deduction is not only unfair but it is not transparent and in fact does not explain the reason for a delay. The Supreme Administrative Court stated that Article 200 § 1 TL, which contains a definite specification of the norm laid down in Article 123 TL, constitutes a statutory guarantee of the exercise of the rights of a party to a tax proceeding within the area of his full participation in this proceeding.[56] Thus, the provision of Article 200 § 1 TL cannot be in conflict with the obligation to handle a case on time. The Supreme Audit Office also pointed out that indicating the obligation to enable a party to exercise his rights under Article 200 § 1 TL as a reason for lengthening the time limit for handling a case is an activity that is not earnest in nature and misinforms a taxpayer about the real reason for postponing the deadline for concluding a proceeding.[57]

It should be pointed out that, in fact, it is not the obligation to assign a seven-day time limit to respond in connection with the evidence collected that constitutes the reason for failing to meet the deadline for handling a case but there are usually other reasons that occur before the fulfilment of the obligation under Article 200 § 1 TL (most often related to the evidence proceeding conducted). Therefore, the delayed fulfilment of the obligation under Article 200 § 1 TL is a kind of consequence of other causes of lengthening a tax proceeding and not just a reason for failing to handle a case on time alone. It should be also taken into account that the assignment

[56] Judgment of the Supreme Administrative Court of 5.07.2011, I GSK 417/10 (https://orzeczenia.nsa.gov.pl/doc/C47F283059, accessed on 7.02.2022).

[57] Public address after the Supreme Audit Office – Department in Poznań audit, LPO-4101-21-03/2013/P/13/039 of 17.12.2013, conducted in the Tax Office in Poznań-Nowe Miasto (C:/Users/USER1/Downloads/P-13-039-LPO-03-01.pdf, accessed on 7.02.2022).

of a seven-day time limit for responding in connection with the evidence collected also means that, in the opinion of the tax authority, the evidence collected in the course of a proceeding is complete and there is no other evidence significant from the point of view of legal and tax related actual state about which a tax authority may learn in the standard course of activities.[58] Thereby, the real reasons for failing to handle a case on time usually consist in delays in the conduction of a tax proceeding that result in the postponed exercise of the right under Article 200 § 1 TL. The former usually have connotations with the phenomena described above, i.e. organisational problems including overload of cases and staffing problems. The latter, on the other hand, result from a far-reaching tax proceeding the duration of which can be lengthened by cooperation with other administrative bodies, including tax authorities in other countries. However, regardless of what causes delays in the fulfilment of an obligation under Article 200 § 1 TL, the obligation resulting from this provision is not the reason for failing to handle a case on time. The real reasons for that are different.

Administrative bodies should not justify a failure to handle a case on time by referring to evidence proceedings in progress or a complex nature of a case without the indication of sufficient details that still must be examined or explained. An evidence proceeding constitutes an extremely important part of an administrative proceeding and as such it cannot be an obstacle to punctual handling of a case, even if this case is complicated. It is one of the basic stages of a process of applying a substantive law norm,[59] and it aims to exhaustively examine all actual circumstances of a given case in order to create its real picture and have grounds for applying legal provisions.[60] Only such findings may constitute a guarantee that the principle of objective truth will be stuck to.[61] For example, in a tax proceeding, the scope of an evidence proceeding is determined mostly by the scope of a tax related case (i.e. its subject matter, namely a tax) within which an occurrence of tax liabilities will be examined.[62]

The Voivodeship Administrative Court in Olsztyn was right to point out that the legislator admitted a possibility of compromising the principle of prompt (within the set time limits) handling of a case that gives priority to other procedural principles, especially the principle of thorough explanation of a case, and collection and exhaustive examination of the whole evidence, which constitute a necessary requirement for appropriate application of substantive law.[63] On the other hand, the Voivodeship Administrative Court in Wrocław, stated that in cases concerning

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[58] Miśkiewicz, M., Mariański, A., in: Mariański, A. (ed.), *Ordynacja podatkowa. Komentarz*, C.H. Beck, Warszawa, 2021, p. 909.

[59] Wróblewski, J., *Sądowe stosowanie prawa*, PWN, Warszawa, 1972, p. 52.

[60] Dawidowicz, W., *Ogólne postępowanie administracyjne. Zarys systemu*, PWN, Warszawa, 1962, p. 108.

[61] Dzwonkowski, H., Gorąca-Paczuska, J., in: Dzwonkowski, H. (ed.), *Ordynacja podatkowa. Komentarz,* C.H. Beck, Warszawa, 2020, p. 1053.

[62] Miśkiewicz, M., Mariański, A., in: Mariański, A. (ed.), *Ordynacja podatkowa. Komentarz*, C.H. Beck, Warszawa, 2021, p. 857.

[63] Judgment of the Voivodeship Administrative Court in Olsztyn of 10.05.2018, I SAB/Ol 6/18 (https://orzeczenia.nsa.gov.pl/doc/602DB5099A, accessed on 7.02.2022).

a complicated actual state, in which it is necessary to examine a lot of evidence, an administrative body is obliged to conduct a proceeding efficiently, which not always means quickly, in order to determine an actual state and resolve a case properly[64]; and as the legislator differentiates time limits based on the levels of complexity of cases, not every delay means that an administrative body was inactive or conducted a proceeding lengthily (…), however, undoubtedly, even in complicated cases an administrative body should act incisively and quickly.[65] At the same time, the Court once again criticised administrative bodies for undertaking inefficient activities that are not aimed at collecting necessary evidence, do not explain important circumstances and do not lead to the conclusion of a proceeding.

In the light of that, it should be emphasised that particular elements of an evidence proceeding may in fact constitute real reasons for failing to handle a case on time and even, as it was indicated above, that it usually happens, especially when a case is complicated. For example, it may concern the need to question many witnesses, audit or make some checks on a business partner of the party to a proceeding, or to wait for some important information from another state administration body. Such detailed reasons, constituting *de facto* an element of an evidence proceeding, may be indicated as reasons for failing to handle a case within the time limit, because they sufficiently inform a party to a proceeding about an obstacle in the way to conclude a case, and first of all they are true. On the other hand, a general indication of "an evidence proceeding" or "a complicated nature of a case" as reasons for failing to handle a case within the time limit without the provision of relevant details is unclear for a party to the proceeding and makes an impression that an evidence proceeding is in conflict with handling a case within the statutory time limit, which is not in accordance with the legislator's intention. It is not desired and even should not be admissible to indicate the reasons at such levels of generalisation that in fact do not explain real causes of a delay to a party to a proceeding but just satisfy the formal requirement of notifications. Therefore, it is necessary to postulate that the reasons given in decisions (notifications) on the lengthening of a time limit for handling a case are thoroughly specified.

## CONCLUSIONS

Summing up, it is necessary to emphasise that efficiency and punctuality of handling administrative cases constitute significant factors through the prism of which society assesses not only administrative authorities but also the entire state. The statutory time limits for handling administrative (tax or complaint) proceedings laid down by the legislator are not always sufficient to conclude a proceeding avoiding its lengthening, nevertheless the reasons for delays should be specified strictly and thoroughly.

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[64] Judgment of the Voivodeship Administrative Court in Wrocław of 26.05.2022, IV SAB/Wr 295/22 (https://orzeczenia.nsa.gov.pl/doc/7F13897932, accessed on 7.02.2022).

[65] Judgment of the Voivodeship Administrative Court in Wrocław of 7.06.2022, II SAB/Wr 1562/21 (https://orzeczenia.nsa.gov.pl/doc/90A2ADC1EF, accessed on 7.02.022).

It should be emphasised that a failure to handle an administrative (tax or complaint) case within the time limit should be justified by providing real reasons actually occurring in this proceeding. Appropriate indication of reasons for a delay should be set in real circumstances of the given case, thus, the reasons given to a party to the proceeding should not go beyond the context of the given case, which was repeatedly confirmed by administrative courts.

In the light of the above, it is absolutely necessary to eliminate situations, in which administrative bodies quote inappropriate reasons for failing to handle a case punctually, those that go beyond the scope of a given proceeding and cannot be influenced by an administrative body, as well as those that are strictly related to a given proceeding but presented in a too general way, in fact, do not inform a party to a proceeding about the reasons for a delay. The first group of inappropriate reasons includes in particular staffing problems in an administrative body involved and overload of cases. On the other hand, the second group of reasons includes events of referring to legal norms that are allegedly in conflict with the obligation to handle a case within the given time limit, the fact of conducting an evidence proceeding and a complicated nature of a case. All these reasons do not provide sufficient information about the real causes of a delay, which usually consists in an element of an evidence proceeding.

In conclusion, administrative bodies that justify a delay should give real reasons occurring in a given proceeding. Those reasons should reflect the actual state as thoroughly as possible, and the reasons alone should be strictly connected with the case. Giving general reasons should be avoided, especially when an administrative body can influence them. Giving reasons for a delay in a detailed way is in conformity with the principle of striving for objective truth and influences a general appraisal of an administrative body.

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# PRIORITY CRITERIA FOR THE PROVISION OF MEDICAL ASSISTANCE VERSUS PROTECTION OF HUMAN DIGNITY

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Abstract

The article deals with the potential infringement of human dignity through the choice of priority criteria for the provision of medical assistance in an emergency situation, when the treatment can only be provided for one person. The lack of sufficient equipment during the SARS-Cov-2 pandemic is a key example, but examples of acute shortage of medical personnel and various types of equipment are also analysed. The assumption made in the article is that selection guidelines need to be established for medical personnel.

The text presents the concept of violation of human dignity and the issue of inability to provide assistance to an adequate number of patients. Then, with the use of the dogmatic-legal method, the proposed patient selection criteria such as age, social position, physical condition, and occurrence of comorbidities are analysed.

As a result of the analysis, it is concluded that, due to the protection of human dignity, it is unacceptable to take away the assistance already provided for a patient (disconnection from the apparatus) in order to save the health of another patient. The criterion of assessing the patient's health condition is unquestionable, whereas the choice of other decisive factors, such as a person's social standing, may lead to unjustified discrimination and inequality.

Keywords: human dignity, pandemic, hierarchy of legal goods

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## INTRODUCTION

It seems obvious that there are borderline cases in which a man is forced to choose between two equally undesirable types of conduct. Such circumstances include all types of natural catastrophes but also those caused by people. Local events or hypothetical scenarios do not attract much interest and do not provoke deeper reflection. However, when a real situation concerns most countries of the world and poses a threat to health and life of many people, we start observing problems that were not noticed before. The pandemic caused by SARS-Cov-2 virus at the turn of 2020 undoubtedly changed the social views on many aspects of life.

In the course of an epidemic, it is much easier to imagine a situation in which medical personnel are forced to choose one of two patients that need treatment because they cannot rescue both (limited amount of medical equipment is a widely commented example of such situations).[1] A medic is faced with a choice then:[2] should he/she choose to rescue a person with a higher chance of survival, a person who needs specialist equipment to survive, a younger person, or perhaps a person who used to be his patient?[3]

This text presents issues concerning the selection of a person who should be provided with assistance taking into account the proposal to develop criteria for this choice. It is a controversial issue because Poland, like other European countries, ensures legal protection of human dignity, and therefore laying down fixed "priority" criteria for the provision of medical assistance may raise doubts connected with potential infringement of human dignity.[4]

The case regarding lack of a respirator analysed in the doctrine is only one of many scenarios of the situation in which a medic is forced to choose a patient for whom he will provide assistance. The problem concerning inability to provide assistance for everybody who needs it is not new, and it is not going to disappear with the end of the pandemic; it will remain relevant for a long time.[5] This document analyses two types of situations: failure to provide assistance to a patient due to the shortage of medical personnel (medics may deal with a limited number of patients at the same time), and due to insufficient amount of equipment (a patient is provided with a medic's assistance but it is insufficient due to the need to use specialist equipment). The lack of both: personnel and medical equipment may pose a threat to a patient's life and health. Therefore, most of these situations are treated similarly and the possibility of providing assistance to one person constitutes the main issue at hand.[6]

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1 Giezek, J., 'Kolizja obowiązków spoczywających na pracownikach opieki medycznej w dobie pandemii COVID-19', *Palestra*, 2020, No. 6, p. 29.

2 Not only physicians but also other representatives of medical professions may face such dilemmas and that is why they are referred to in this paper as medics or medical personnel.

3 J. Giezek gives various examples of reasoning in this regard: Giezek, J., 'Kolizja obowiązków spoczywających na pracownikach…', op. cit., pp. 39–40.

4 Tarapata, S., 'Problem rozstrzygania prawnokarnej kolizji dóbr w trakcie wykonywania świadczeń zdrowotnych', *Palestra*, 2020, No. 6, p. 187.

5 Kulesza, J., 'Kolizja obowiązków pomocy (art. 162 k.k.)', *Prokuratura i Prawo*, 2007, No. 2, pp. 28–29.

6 The type of necessary medical equipment is not taken into consideration in this article.

It is obvious that such situations should not occur in a perfectly governed state (as well as a hospital managed in a model way), and shortages and problems with medical services result from organisational negligence, which J. Giezek highlights.[7] This observation is accurate and it is necessary to emphasise the role of resources managersin the healthcare system. Nevertheless, it is difficult to imagine states or institutions fully be prepared for such critical situations, even if they do not concern a world pandemic but a sudden increase in demand for particular medical services.[8] Thus, the discussion regarding the application of law at the time of the pandemic is not aimed at analysing errors in health care management (which is an important issue but deserves a separate analysis conducted by specialists[9]) and preventive activities, but at attempting to answer the question how to respond to the already existing crisis-related situation.

## SITUATION ASSESSMENT FROM THE PERSPECTIVE OF CRIMINAL LAW

As a rule, refusal to provide assistance to one of the patients may result in the criminal liability of a medic who is obligated to provide assistance. Medical personnel may be liable for an act of failure to provide assistance laid down in Article 162 PC because, according to the representatives of the doctrine, as people with specialist medical knowledge, they are obligated to provide assistance in a wide range of areas.[10] On the other hand, if a medic has to guarantee that a consequence in the form of harm to the health of his/her patient will not occur, he may be subject to criminal liability under Article 160 § 2 PC.[11] In addition, a medic may be responsible for the future fate of their patient who has been refused assistance. As COVID-19 is a potentially lethal disease, in the context of possible penal consequences, it should

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[7] Giezek, J., 'Kolizja obowiązków spoczywających na pracownikach…', op. cit., pp. 34–35.

[8] It may concern shortage of specialist personnel in every field (e.g. obstetrics or cardiology), life rescue equipment, or access to relevant infrastructure making it possible to operate on a patient in sterile conditions.

[9] For example, reference can be made to: Kubiak, R., 'Odpowiedzialność karna za błąd medyczny popełniony w zespołowym działaniu', *Medycyna Praktyczna*, 2012, No. 2; Skowronek, R., Chowaniec, C., 'Odpowiedzialność karna lekarza w zespołowym działaniu – ocena medyczno-sądowa skrajnie odmiennych przypadków klinicznych zakończonych zgonem pacjentów', *Medycyna Praktyczna*, 2016, and Kubiak, R., 'Odpowiedzialność karna za błąd organizacyjny w ochronie zdrowia. Część I: Niedomogi kadrowe', in: *Medycyna Praktyczna*, http://www.mp.pl/social/article/288749, 5.01.2022 (accessed on 11.10.2022); Kubiak, R., 'Odpowiedzialność karna za błąd organizacyjny w ochronie zdrowia. Część II: Nieodpowiednie warunki techniczne i sanitarne', in: *Medycyna Praktyczna*, http://www.mp.pl/social/article/291000, 7.02.2022 (accessed on 11.10.2022); Kubiak, R., 'Odpowiedzialność karna za błąd organizacyjny: Część III: brak procedur bądź ich nieprzestrzeganie', in: *Medycyna Praktyczna*, http://www.mp.pl/social/article/297361, 5.05.2022 (accessed on 11.10.2022).

[10] Giezek, J., in: Gruszecka, D., Lipiński, K., Łabuda, G., Muszyńska, A., Razowski, T., Giezek, J., *Kodeks karny. Część szczególna. Komentarz*, Warszawa, 2021, Article 162, p. 316.

[11] Zoll, A., in: Wróbel, W. (ed.), *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117–211a*, Warszawa, 2017, Article 162, p. 425; Kędziora, R., *Odpowiedzialność karna lekarza w związku z wykonywaniem czynności medycznych*, Warszawa, 2009, pp. 143–144.

be assumed that depriving sick person of proper care (including access to medical equipment) is connected with exposing them to the risk of losing life. Thus, it is potentially possible that the described act can be recognised as one causing serious harm to health or unintentionally causing death.

It is obvious that not every action performed by medical personnel may be recognised as a criminal offence. As indicated in the doctrine, when assessing behaviour, it is necessary to evaluate its various aspects. It is also important whether a potential perpetrator can be attributed a consequence in accordance with the established rules of objective attribution of an effect.[12] In the case discussed herein, the predictability of an effect does not raise doubts, however, other criteria can be differently evaluated. What is important in case of the activities within health care, is first of all taking appropriate precautions, which may differ depending on patient's health condition and the borders of admissible risk. Thus, the behaviour consisting in failure to provide assistance would have to contribute to the occurrence of a negative effect as well as be in conflict with the rules of dealing with a given legal good. The latter issue is described in more detail in the other part of the article. A separate issue that needs assessment within the given case is the possibility of avoiding an effect (e.g. in the form of a patient's death) if all the precautions are taken. However, this requires an analysis of a patient's health condition and circumstances in each individual case.

Obviously, in the case analysed herein, a member of medical personnel does not refuse to provide assistance to a patient because of ill will but because he/she needs to make the choice of providing assistance to one of the two patients. The problem of choosing one good at the expense of another is nothing new in the criminal law dogmatism, because rules of excluding liability of perpetrators of forbidden acts in extraordinary situations are laid down in statute. These scenarios definitely include state of absolute necessity and conflicting duties.

The state of absolute necessity may also be applicable in case of refusal to treat one of the patients and providing a respirator for another one, however, both the rescued an sacrificed goods are human life and health. Sacrificing a legal good of the same quality in accordance with Article 26 § 2 PC, cannot lead to the exclusion of lawlessness of an act but to the exclusion of an infringement perpetrator's guilt.[13] A perpetrator's act remains illegal, which may entail relevant consequences, although a perpetrator cannot be charged with culpable conduct.[14] Thus, the application of the state of absolute necessity will not always be favourable to a person making a choice as in the case discussed the conflict concerns the same type of legal good.

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[12] Giezek, J., 'Teorie związku przyczynowego oraz koncepcje obiektywnego przypisania', in: Dębski, R. (ed.), *Nauka o przestępstwie. Zasady odpowiedzialności. System Prawa Karnego. Tom 3*, Warszawa, 2017, p. 482 et seq.

[13] Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz aktualizowany*, LEX/el. 2022, Article 26; Giezek, J., in: Gruszecka, D., Lipiński, K., Łabuda, G., Giezek, J., *Kodeks karny. Część ogólna. Komentarz*, Warszawa, 2021, Article 26, p. 255.

[14] J. Lachowski draws attention to the possibility of effective use of necessary defence; Lachowski, J., *Stan wyższej konieczności w polskim prawie karnym / Jerzy Lachowski.*, Warszawa, 2005, pp. 122 and 176.

The concept of conflicting duties referred to in Article 26 § 5 PC does not solve the problem connected with the choice of a patient who is provided with a medical service because a medic is obliged to rescue both patients. According to J. Majewski's opinion widely shared in the doctrine, the occurrence of conflicting duties is often superficial and in reality only one duty incriminates a given person.[15] In case of providing assistance to patients, the simplest example of this reasoning is a scenario in which providing assistance to one patient is not possible (e.g. due to his specific needs). Thus, a medic cannot be charged with a failure to fulfil an obligation it was impossible to comply with. In accordance with this interpretation, conflicting duties will not occur when the subject of the obligation has access to clear criteria for choice, a specific hierarchy of obligations. Then, potentially conflicting duties consist in performing the duty with a higher priority.[16]

Both, the concept of conflicting duties and the state of absolute necessity assume a lack of a perpetrator's criminal liability, although on different grounds. According to J. Majewski's conception, conflicting interests occur seemingly, and a perpetrator's conduct will be lawful. If a perpetrator does not sacrifice a good of a higher value than the good rescued, in accordance with Article 26 § 2 PC, he will not be liable. Both conceptions assume evaluation of goods and lack of a perpetrator's liability. In the case at hand, unfortunately, it does not constitute a sufficient guideline on the desired conduct, because the rescued and sacrificed goods are a patient's health and life; it is not possible to predict with certainty which good is going to be sacrificed: a patient's life or "only" health.[17] For the person obligated, other guidelines concerning the method of choosing between duties would be useful.

Potentially, it is also possible to make a choice in the conditions for an error in judgement on the circumstance excluding criminal liability, which is stipulated in Article 29 PC. It may take place when a medic takes a decision based on a criterion that is not commonly accepted or because of misconception that such a criterion does not exist.[18] The issue concerning "justification" of an error may depend on the type of the final criterion and circumstances, including a common belief in medics' appropriate conduct in a given healthcare institution.

It is worth pointing out that in relation to the pandemic caused by SARS-Cov-2 virus, the Polish legislator decided to introduce a solution that excludes liability for acts connected with the exposure of patients to a loss of health in the circumstances discussed above. This liability at the time of a pandemic or a state of epidemic threat has been considerably limited under Article 24 of the Act of 24 October 2020 amending some acts in connection with combating crisis situations related to the occurrence of COVID-19 (Journal of Laws, item 2112) to cases of a flagrant failure to exercise obligatory caution. The solution may be recognised as too general or

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15 Kulesza, J., 'Kolizja obowiązków pomocy…', op. cit., p. 29.

16 Majewski, J., *Tak zwana kolizja obowiązków w prawie karnym*, Warszawa, 2002, pp. 150–151.

17 In some situations a person who has not been provided with sufficient assistance will survive but may suffer from ill health. It is also unknown whether a person who has been provided with medical assistance would or survive without it or not.

18 Giezek, J., in: Gruszecka, D., Lipiński, K., Łabuda, G., Giezek, J., *Kodeks karny. Część ogólna. Komentarz*, Warszawa, 2021, Article 29, p. 289 et seq.

adopted too hurriedly, however, as J. Potulski rightly observes, it is an expression of the will of the legislator who wishes to avoid application of criminal law towards people who provide assistance.[19] On the other hand, E. Plebanek believes that the solution is useless because of the existing criminal law regulations that exclude liability in atypical situations.[20] For sure, the solution does not resolve a dilemma faced by a medic who must choose a patient, because it does not indicate what criteria should be applied to make that choice and its action is considerably limited. Nevertheless, the concept of the so-called "good Samaritan laws" ensures that no choice made at the time of an epidemic or an epidemic threat will result in criminal liability, which may improve the comfort of rescuers' work.

## PRELIMINARY THOUGHTS ON THE SHAPE OF THE CRITERION FOR CHOICE

In public discourse there is an on-going debate on the criteria for choosing a patient that should be rescued. The proposal to determine the priority of access to medical care needs a moment's reflection because at first glance it carries negative connotations of dividing patients into better and worse ones. Meanwhile, the adoption of clear criteria for choice would facilitate acting in difficult situations. There are reasons why in crisis situations medics apply the so-called triage, i.e. division of patients into those who need assistance immediately and those who can be provided with assistance a few hours later.[21] This hierarchical division of patients is not based on any discretionary criteria but on determining the needs-based order of providing assistance.[22] The application of triage optimises the process of providing medical assistance and really makes it possible to rescue more people. This worked-out procedure may be helpful in solving the above-mentioned dilemma as it indicates the category of urgency awarded to a patient after a medical interview and initial assessment of the situation. A triage nurse, medical rescuer or triage physician carries out the evaluation.[23] In spite of the hierarchy of patients, under normal circumstances, triage does not infringe human dignity. The category of urgency is not applicable to a patient personally but their health condition and

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[19] Potulski, J., 'Polski model »Klauzuli dobrego samarytanina«', *Studia prawnicze KUL*, 2021, No. 3, p. 175.

[20] Plebanek, E., 'Wyłączenie odpowiedzialności karnej za niewłaściwe leczenie w czasie pandemii COVID-19 a klauzula dobrego Samarytanina', *Palestra*, 2021, No. 1–2, https://palestra.pl/pl/czasopismo/wydanie/1-2-2021/artykul/wylaczenie-odpowiedzialnosci-karnej-za-niewlasciwe-leczenie-w-czasie-pandemii-covid-19-a-klauzula-dobrego-samarytanina (accessed on 22.02.2023), p. 63.

[21] § 6 subsections 7–9 Regulation of the Minister of Health of 27 June 2019 concerning Hospital Emergency Ward stipulates that a patient admitted to a hospital emergency ward shall be awarded one of five "urgency categories" marked with a relevant colour.

[22] In accordance with Article 33a para. 2 of the Act of 8 September 2006 on the State Medical Rescue (consolidated text, Journal of Laws of 2021, item 2053, as amended), the category awarded shall influence the period of waiting for the provision of the medical service.

[23] Article 33a para. 1 Act of 8 September 2006 on the State Medical Rescue (consolidated text, Journal of Laws of 2021, item 2053, as amended).

the assistance they need. The red category can be interpreted as the "worst" health condition but, on the other hand, it ensures the fastest provision of assistance, i.e. it "privileges" a patient. This simple comparison shows that in case of choosing the order of assistance provision, it is necessary to take into consideration more than the method of marking. Dividing patients into groups within this meaning does not infringe their dignity but helps to determine the order in which assistance should be provided.

The issues discussed in the article concern not only the choice of order but also a person who will be provided with this assistance because, under these assumptions, it is not possible to provide assistance to both patients. The triage system does not prevent such problems entirely, as there is always a possibility that there are two patients who should be provided with assistance at the same time or who need access to the same medical equipment.

In the meantime, it is worth determining a few rather obvious statements: in the situation discussed, two patientscannot be provided with assistance at the same time; it is necessary to choose a patient who can be provided with assistance. A choice made by a member of medical personnel in various scenarios concerns two people with a few different characteristics: these are age, present health condition, and probability of survival without appropriate personnel support. A decision should be taken quickly, and it concerns the potential future of both patients.

The lack of any criteria for acting in a crisis situation may have numerous negative consequences. For most people, the prospect of deciding about the life and death of two people is difficult to imagine. What is more, we should consider a quite real possibility of a medic being prosecuted after taking a decision with tragic consequences. For medical personnel who must face many different problems during a pandemic, additional fear that they could be charged with a medical error may be a paralysing factor. It is easy to imagine that such a person, trying to avoid potential accusations, provides only necessary assistance, which may be insufficient. On the other hand, acting in compliance with established guidelines may be recognised as observing necessary precautions, which influences the imputation of an effect, and thus, also a possibility of the decision-maker's criminal liability.[24]

Therefore, the issue of determining criteria for providing assistance to patients is very important, not only for pragmatic reasons. The choice is unavoidable and leaving the decision to the medics discretion does not eliminate doubts. What constitutes the main axis of the problem is not the question *whether* it is necessary to determine those criteria but the question *how* to determine them, how thoroughly they should be described, and how much discretion should be left to medical personnel.

Illustrative solutions to the lack of access to medical assistance are connected with patients' health condition, their characteristics (such as age or gender) or objective circumstances (such as time of arriving at hospital or another place of assistance provision). It would also be possible to draw lots to choose one of those

[24] Giezek, J., 'Teorie związku przyczynowego…', pp. 498–499.

who need assistance.[25] In practice, there may also be other, more individualised criteria, such as patient's job, family situation or good opinion of society. Various comparisons of the two patients' situations also take place: is it better to rescue a younger person or the one that was first to request assistance (was admitted to hospital earlier)? Perhaps the life of a social activist or a scientist working on tasks related to combating a pandemic should be worth rescuing first of all. In the caste system cultures, it is also important to which social group a patient belongs.

In the context of developing the criteria for choice, a question is raised who could be the authority responsible for determining them. J. Giezek is right to point out that lawyers are not more competent to do that than other people.[26] If those criteria were to comply with ethical requirements, it would be more appropriate to ask philosophers or moral philosophers to determine them, and medics to specify "rules of conduct". Lawyers, on the other hand, may assess whether the proposed criteria are in compliance with the legal system, in particular constitutional norms and legal principles. The crucial issue here is not only the assessment of formal legitimacy, but also recognition whether the proposed solutions result in unjustified discrimination against a certain social group or not.

## PROTECTING HUMAN DIGNITY VERSUS DETERMINING THE CRITERION FOR CHOOSING A PATIENT

*Prima facie*, determination of strict criteria for the choice of a person who is provided with medical assistance infringes the principle of protecting human dignity. One of the reasons for such doubts may be an assumption that criteria, due to their nature, establish a hierarchy of people and divisions into better and worse ones. When analysing the infringement of human dignity caused by determining the criteria for the choice of priority assistance we must specify what this infringement may consist in and how to assess the infringement of human dignity principle, as well as what are the possible criteria for choice. It is also necessary to consider two issues at the same time, i.e. the very presence of criteria for the choice of a patient to be provided with medical assistance, and the shape of those criteria.

While the concept of human dignity alone does not have a single established meaning in the legal system, the concept of the infringement of human dignity can be specified based on court judgments and doctrinal opinions. It is commonly believed that the infringement of human dignity occurs when a person's individual value is negated and when a person is objectified and not subjectified.[27]

In accordance with the established meaning, the infringement of human dignity by public institutions may consist in such development of legal regulations that

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[25] Tarapata, S., 'Problem rozstrzygania prawnokarnej kolizji…', op. cit., p. 184.

[26] Giezek, J., 'Kolizja obowiązków spoczywających na pracownikach…, op. cit., p. 29.

[27] The Constitutional Tribunal judgment of 15 October 2002, case No. SK 6/02 (OTK ZU, No. 5/A/2002, item 65); the Constitutional Tribunal judgment of 7 March 2007, case No. K 28/05, OTK-A 2007, No. 3, item 24; Piechowiak, M., *Filozofia praw człowieka. Prawa człowieka w świetle ich międzynarodowej ochrony*, Lublin, 1999, pp. 343–345.

deprives individuals of their own subjectivity. This does not mean, however, that each action of the state without a citizen's consent constitutes the infringement of their dignity.[28] To be recognised as one infringing human dignity, a regulation should be related not only to a person's humiliation but also to depriving a person of the possibility of choice and a top-down way of deciding about his/her fate without relevant justification. The concept of a regulation infringing human dignity is very difficult to define and in most cases the assessment of a regulation consists in listing the reasons for infringing human dignity and presenting an individual analysis of regulations.

In case of choosing a person who is to be provided with medical assistance, the infringement of dignity may occur when one of the persons encounters a temporary obstacle in the way of a hospital or another medical service provider's employees fulfilling their duties. It is also important that a person is not cast aside and their symptoms are not ignored even if the provision of assistance is delayed. Abandoning the provision of assistance completely and potentially causing patient's death would, for sure, constitute a threat to patient's dignity.

A top-down way of determining priority of medical assistance provision may be equivalent in meaning to the statement that it is admissible to sacrifice the life of a certain category of citizens; and such a possibility was ruled out as a result of the judgment of the Constitutional Tribunal of 30 September 2008, in which it was recognised that Article 122a Act of 3 July 2002: Aviation Law (on a possibility of shooting down an aircraft with passengers on board) is unconstitutional and infringes Article 30 of the Constitution, i.e. the principle of the protection of human dignity. The judgment concerned the possibility of shooting down a passenger airplane hijacked for the purpose of a terrorist attack. According to J. Kulesza, it is important that the Tribunal emphasises there is no possibility of weighing the value of life, which is important not only in connection with the provision analysed at that time but also in the context of other legal solutions, including the state of necessity.[29] It might seem that the judgment should end discussions concerning the issue of sacrificing the life of a group of people for the sake of rescuing others. However, the situation analysed in the judgment concerned a reversal of a threat to the life of many people by causing the death of others. In its judgment, the Tribunal referred to a hypothetical situation concerning a hijacked airplane with passengers on board; in such a situation, innocent passengers involuntarily become related to the object of an illegal assault.[30] They do not pose a threat to others but if there is no response, e.g. on the part of the state authorities, other people will be actively attacked. In case of providing medical services, it is not the first patient who is a direct source of threat to the second patient's life, but rather the health condition of the second

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[28] For example, the Constitutional Tribunal stated that the obligation to fasten seat belts in a vehicle does not infringe citizens' rights (the Constitutional Court judgment of 9 July 2009, SK 48/05, OTK-A 2009, No. 7, item 108).

[29] Kulesza, J., 'Zakres swobody organów administracji publicznej w podjęciu decyzji o zniszczeniu cywilnego statku lotniczego. Glosa do wyroku TK z dnia 30 września 2008 r., K 44/07', *Państwo i Prawo*, 2009, No. 9, pp. 126–127.

[30] Judgment of Bundesverfassungsgericht of 15 February 2006, 1 BvR 357/05, BVerfGE 115, 118.

patient when it is impossible to provide him with assistance. The need to provide assistance to one patient is not a source of health problems of another patient but can affect the increase in danger by limiting the possibility of providing assistance.

In case of earlier provision of assistance to one person, it can be stated that it was impossible to provide assistance to another patient in the same way as in case of the lack of medical equipment (or its damage). Barring the intervention, the situation might develop in a way that results in one person (or group) posing a kind of threat to the health and life of another person (or group).[31] W. Zontek cittes examples of an injured Himalayan climber who may pull his partner down a precipice, a hijacked airplane or conjoined twins of which only one sibling can survive separation. In the above-mentioned situations, a threat to health and life is not caused by human activities but stemms from them. On the other hand, in the situation, analysed in this article, where it is impossible to provide medical assistance for everyone, the direct threat to both patients does not consist in other patients but a disease and, indirectly, the lack of properly organised medical assistance.[32] This is what results in a difference between the above-mentioned example of a hijacked passenger airplane and patients during a pandemic. Two conclusions may be drawn from this comparison: the judgment of the Constitutional Tribunal should not be directly applied to the situation of patients during a pandemic and, what is more, if one of the patients is not a source of threat, the concept of necessary defence cannot be applied in the situation.

Inter alia, S. Tarapata refers to the above-analysed judgment of the Constitutional Tribunal of 2008, and discusses a situation in which a patient was disconnected from a respirator. The author believes that, due to the judgment of the Constitutional Tribunal, a medic should not have deprived the patient of the respirator.[33] It is difficult to disagree with this thesis but for other reasons than the judgment issued. A medic taking away assistance provided earlier (connection to a respirator) in fact causes a patient's death or poses this threat.[34] Causing death by itself does not automatically mean the infringement of human dignity of the person involved. If it were so, all cases of causing death would be classified as deprivation of human dignity.[35] However, in case of a potential act of taking away a respirator from a sick person, there is a possibility of infringing human dignity because the patient involved is treated as a temporary inconvenience in the application of the equipment. A person connected to medical equipment would not be treated differently than a temporary technical defect or the necessity for moving the equipment, which can

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[31] Zontek, W., *Modele wyłączania odpowiedzialności karnej*, 2017, pp. 297–298.

[32] Shortages in hospital equipment are discussed in the earlier part of the paper.

[33] Tarapata, S., 'Problem rozstrzygania prawnokarnej kolizji…', op. cit., p. 188.

[34] Ibidem, pp. 188–189. A situation in which patient gives or refuses to give consent to be disconnected from a respirator in order to provide assistance to another person should be assessed differently. In such a case, the issue concerning consent to expose patient to risk should be analysed, and this is not the subject matter of this paper.

[35] This does not mean that causing death cannot also constitute the infringement of dignity, but it is not equivalent in meaning. The judgment of Bundesverfassungsgericht of 28 May 1993 – 2 BvF 2/90 und 4, 5/92 Rn. 158, Kirchhof, P., 'Genforschung und die Freiheit der Wissenschaft', in: *Gentechnik und Menschenwurde an den Grenzen von Ethik und Recht*, Köln, 2002, p. 18.

be "eliminated" in a relatively short time. From the point of view of the other patient, eventually classified for treatment with the use of a respirator, the equipment would be completely available provided that "the defect is eliminated", the equipment is transported or the former patient is disconnected. The only inconvenience would be related to the need to wait for the availability of the equipment. It would lead to equalising purely technical activities like the elimination of a defect with the disconnection of a patient from a respirator, which poses a real threat to his health and life. Such an instrumental action would be connected with the infringement of the constitutional obligation to protect life and human dignity.

A similar analysis was carried out under German law during the initial period of the pandemic caused by the SARS-Cov-2 virus. As early as in March 2020, the German Ethics Council (Deutsches Ethikrat) recognised the application of triage *ex post*, i.e. after the treatment of the first patient started, as inadmissible. T. Hörnle states in her analysis that acting against this directive might result in a criminal proceeding against the decision-maker because the conduct matches the features of the crime of murder.[36] Various proposals for excluding criminal liability due to the collision of obligations occurred in the German doctrine but, as it should be expected, a medic would have to fulfil all the conditions laid down in law.[37]

R. Poscher compares various situations in which the protection of one person's life was weighed and chosen at a cost to someone else's protection of life. As in the Polish legal system, in accordance with the values adopted in the German system, it is inadmissible to sacrifice one person's life in order to protect the other (as confirmed by the judgment of the Federal Constitutional Court on an act of shooting down an airplane). However, the author draws attention to the fact that the Court limits the weighing of the value of life and does not ban such activities completely.[38] It is possible to determine certain criteria for admitting a sacrifice of one person's life in order to protect the other.[39] According to the author, it is not possible, however, to state that the conflict of interests in the form of life and health of two patients infringes human dignity.[40] The infringement of human dignity must show other characteristic aspects than only the choice of a patient who is going to be provided with assistance; the infringement of dignity takes place when an individual's subjectivity is negated, and this depends on many factors.[41]

The development of the criteria for the choice of a patient to be provided with medical assistance as such should not be recognised as the infringement of human dignity. It constitutes a general directive, which not only facilitates activities of decision-makers but also, by establishing similar criteria, enables the state to indirectly supervise particular resolutions. Of course, the influence will be general

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[36] Hörnle, T., 'Ex-Post-Triage – strafbar als Totungsdelikt?', in: Hörnle, T. (ed.), *Triage und die Pandemie*, 2021, p. 152.

[37] Ibidem, p. 165.

[38] Poscher, R., 'Die Abwägung von Leben gegen Leben. Triage und Menschenwurdegarantie', in: Hörnle, T. (ed.), *Triage und die Pandemie*, 2021, p. 51.

[39] Ibidem, p. 60.

[40] Ibidem, p. 81.

[41] Ibidem, p. 67.

in nature because it is not possible to predict every situation. Thus, determining the criteria should be negative in nature, i.e. excluding the criteria for infringing human dignity, which would constitute a form of legal protection of this value.

## PROPOSED CRITERIA FOR CHOOSING PATIENTS

A greater interpretational problem occurs in relation to the type of the criterion applied. As it was mentioned above, there are groups of criteria concerning patient's health condition and social position related aspects as well as actual circumstances.

First of all, it is necessary to definitely exclude the criteria concerning patients' personal characteristics such as their financial status, a position held or profession studied. None of these characteristics bears real relation to the provision of medical assistance. In addition, distinguishing some social groups this way leads to unjustified discrimination against others, thus, is in conflict with the constitutional principle of equality.[42] It cannot be justified by the usefulness of one individual for the society, because it is not a strict condition and subject to change due to the current demand in the state. Moreover, it is practically unrelated to the assistance provided. For various reasons, different social groups are recognised as inevitable for the functioning of the state. During the pandemic, the most appreciated professions included not only representatives of medical personnel but also scientists working on the development of new vaccines, employees of hygiene protection services, and even security services.[43] However, is the work of IT personnel and biologists not equally useful for the state? Creating a hierarchy of usefulness for the state among people holding various posts may lead to unjustified discrimination and result in taking away subjectivity from people holding "lower" positions: uneducated, unemployed and poor or homeless people. Such a criterion would infringe the constitutional principle of equality by differentiating people based on an inadequate criterion.[44] When it is necessary to choose a person to be provided with medical assistance, the criterion may infringe the principle of human dignity by assuming that less appreciated people do not deserve protection. Such an opinion negates not only an individual's subjectivity but also an assumption that every person deserves protection.

Specific opinions concern representatives of medical professions, who after their successful treatment might rescue other people. Thus, it might seem that they should be entitled to priority assistance due to the fact that they are potentially able to rescue other people and this way contribute to improving of the entire situation. It is very easy to

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[42] Judgment of the Constitutional Tribunal of 9 March 1988, U 7/87, OTK 1988, No. 1, item 1, should be recognised as important in this matter.

[43] Tarapata, S., 'Problem rozstrzygania prawnokarnej kolizji…', op. cit., p. 184.

[44] In accordance with a commonly adopted opinion, the principle of equality means equal treatment of people in comparable situations. Groups of entities may be differentiated based on "significant features", thus, the differentiation of the legal situation is admitted but not every type of differentiation is justified. Garlicki, L., Zubik, M., in: Derlatka, M., Działocha, K., Jarosz-Żukowska, S., Łukaszczuk, A., Sarnecki, P., Sokolewicz, W., Trzciński, J., Wiącek, M., Wojtyczek, K., Garlicki, L., Zubik, M., *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II, wyd. II*, Warszawa, 2016, Article 32.

refer such reasoning to the situation of an epidemic threat, although in case of the lack of medical resources, it seems to be rather inadequate. On the other hand, even at the time of an epidemic threat, priority assistance to people with medical qualifications would be unjustified in relation to other patients. It would be necessary to substantiate which group of medics should be given the right to priority assistance and what is the link between their qualifications and providing assistance to a larger number of patients, since not every person with medical qualifications can actively combat a pandemic. The reasoning would be unjustified also because of the fact that various professional groups are involved in health protection activities. In case of a pandemic, one can mention scientists developing vaccines, who do not always have medical education. Granting priority assistance to all professional groups that could potentially contribute to combating a pandemic would raise doubts. Moreover, such reasoning cannot be referred to a non-pandemic scenario, in which the limitation of access to medical treatment results from other factors (e.g. insufficient amount of equipment).

Privileges aimed at compensating the additional risk to some social groups seems to be something different. During pandemic, this concerns, first of all, representatives of medical professions: physicians, nurses or rescuers but also employees of healthcare institutions, including administrative staff. They have everyday contact with infected people, thus, they are more at risk others. In addition, these are medics who have real influence on the reduction of negative effects of an epidemic, because they can rescue many people's health and life. Due to a considerably increased risk of being infected during a pandemic, the differentiation of the situation of those people in comparison with other patients-representatives of other professions should be recognised as justified, especially if other people are able to minimise the risk of infection (at least by avoiding social contacts). However, it is necessary to emphasise the extraordinary character of such a privilege. In non-pandemic scenarios in which an issue with insufficient availability of medical resources or assistance provided by medical personnel may occur, one group's privileges raise justified doubts. In spite of the fact that medics rescue people, under "normal" circumstances they should not have more privileges of access to medical services than other representatives of professions who carry the same risk (fire fighters, police officers or representatives of other services). On the other hand, in a global pandemic scenario, the employees of healthcare institutions constitute a group that is exposed to risk most of all. That is why the choice of a medic as a person entitled to priority assistance should not be treated as the infringement of the principle of human dignity protection. The choice is first of all justified by the reality at the time of a pandemic. In this case differentiating between patients' situation is admissible due to extraordinary circumstances and the necessity of carrying additional risks.

When access to medical services is most difficult, an age criterion is taken into account. Under this criterion people exceeding a certain age limit are not going to be treated.[45] The underlying assumption is that older people are usually in poorer

[45] The criterion was taken into account unofficially, and some physicians' statements suggested that patients aged 80+ should not be provided with assistance. https://www.corriere.it/cronache/20_marzo_09/coronavirus-scegliamo-chi-curare-chi-no-come-ogni-guerra-196f7d34-617d-11ea-8f33-90c941af0f23.shtml (accessed on 9.08.2022), and offi-

health than younger people, and the frequency of chronic diseases occurrence increases with age. This assumption, although true, is not always legitimate. Nobody knows what age limit should be taken into account. Also, it cannot be excluded that an older person may have more chances for recovery than a young one.

The other group of criteria proposed also raises certain doubts. Based on them, a medic should provide assistance to patients on a first come, first served basis. The group of criteria concerning objective circumstances may include not only the order of reported cases but also other formal requirements for the provision of assistance, e.g. health insurance. The criteria within this group also seem to be inadequate. It is emphasised that earlier arrival at hospital does not mean that a given patient requires more attention; it can simply result from a shorter way to that facility. Adopting such a criterion would mean that patients residing closer to hospitals or being able to get to hospital faster (e.g. by their car or taxi without the need to wait for an ambulance) are in privileged situation.[46]

There is one more issue to be considered: obligation to rescue a person with a better prognosis. If this is a patient admitted to hospital later, and a patient connected to a respirator earlier is in a worse condition, the establishment of such a strict obligation would mean that the first patient would have to be disconnected and deprived of appropriate medical assistance. Such an obligation would mean the necessity of posing a threat to the disconnected patient and a medic's potential liability for negative effects of their decision, which can be excluded in case a legal obligation of such conduct is stipulated. There are various opinions on the issue in the doctrine; inter alia, disconnection of a patient is admissible if there are inherent reasons for disconnection (continued therapy is not going to succeed).[47] S. Tarapata states that such an obligation would be inadmissible due to the above-mentioned judgment of the Constitutional Tribunal of 2008.[48] However, as it was mentioned earlier, this judgment does not concern the situation directly under analysis, because a patient connected to a respirator does not pose a threat to another patient. Nevertheless, it is rightly pointed out that law should not legitimise posing a threat to citizens. Such an assumption would mean that only the life of a patient in better health is worth rescuing while a more sick person should be deprived of assistance. At first glance it is evident that such a regulation may infringe the rights of a weaker patient. In particular, the life of one patient is in a top-down way recognised to be of lesser value than the life of the other, which may infringe the principle of equality and human

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cial directives suggest taking a patient's age into account but in conjunction with other features. Faggioni, M.P., González-Melado, F.J., Pietro, M.L.D., 'National health system cuts and triage decisions during the COVID-19 pandemic in Italy and Spain: ethical implications', *Journal of Medical Ethics*, 2021, Vol. 47, No. 5, DOI: 10.1136/medethics-2020-106898, p. 303; Monahan, C. et al., 'COVID-19 and ageism: How positive and negative responses impact older adults and society', *The American Psychologist*, 2020, Vol. 75, No. 7, DOI: 10.1037/amp0000699, p. 5; Riccioni, L. et al., 'The Italian document: decisions for intensive care when there is an imbalance between care needs and resources during the COVID-19 pandemic', *Annals of Intensive Care*, 2021, Vol. 11, DOI: 10.1186/s13613-021-00888-4, pp. 3–4.

46 Tarapata, S., 'Problem rozstrzygania prawnokarnej kolizji…', op. cit., p. 188.

47 Kulesza, J., 'Kolizja obowiązków pomocy…', op. cit., p. 33.

48 Tarapata, S., 'Problem rozstrzygania prawnokarnej kolizji…', op. cit., p. 188.

dignity protection. The first patient, the moment the second one appears, becomes an unnecessary "burden", hampering medical personnel's work.

Thus, a medic is not obliged to provide assistance to a patient at a cost to the one for whom he has already provided assistance, and should not become subject to such an obligation. Quite conversely, there are grounds for stating that a medic is obliged to protect the life of "his" patient, i.e. a person for whom he was first to provide assistance.

The problem resulting from insufficient amount of equipment and human resources in fact translates into doubts whether certain particular criteria are admissible. Compliance with the principle of human dignity protection requires that the choice of order for providing assistance to patients should not negate the individuality of particular people. Human dignity may be infringed if one person is deprived of subjectivity. In this approach, the "withdrawal" or giving up the already made attempts to provide medical assistance may infringe human dignity (especially in case of the connection to medical equipment), because a patient is treated like a temporary technical defect. The issue of the choice based on a characteristics that has no medical justification is another matter. In this approach, it is clear that the profession and social position of a patient should not affect the order of providing medical assistance, but it is rather due to the possibility of discrimination and the infringement of the principle of equality and not dignity protection. The choice of a younger person or a person holding a higher social position does not have to mean the infringement of another person's dignity, provided that a sick person is treated with respect and offered another type of available assistance.

Undoubtedly, priority assistance should depend on medical factors, including the current health condition and a prognosis. As a rule, these factors are changeable to such an extent that they should be assessed by a medic on a case-by-case basis. Although, sometimes, medical assistance is provided first of all for patients who urgently need it, it concerns only simple cases in which the order of assistance provision does not pose a fatal risk. In the analysed case, during a pandemic, only one person can be chosen and provided with assistance, leaving the other one without care. From a medic's perspective it seems that providing assistance to a person in a better health condition is a more rational choice, because they are sure to save at least one person (provided that both patients are in a very serious condition endangering life). This does not exclude the provision of assistance to another person, although it may take place later or with the use of different measures.

Due to the spectre of possible actual situations, definite directives cannot be formulated *in abstracto*, but must be adjusted to particular circumstances. Therefore, it is a supervising physician who should assess a patient's health condition (on his own or together with other medical personnel). One can allege that the solution duplicates issues connected with the lack of any criterion, because it is again a medic who must take a critical decision. That is why, it is advisable to develop a legal state minimising the risk of criminal and civil liability of medics for their choice. In addition, one can call for the issue of guidelines for medics or provide training in the subject matter in order to facilitate the provision of medical assistance in critical situations. Co-decisions made in specific circumstances by a few medics

of various specialisations would also be a practical solution. On the other hand, imposing strict legal criteria will not fulfil its task, because they surely will not cover all possible situations.

It seems that, among all proposed criteria for determining priority assistance provision, a patient's health condition is the most appropriate one. The criterion is objective enough and it does not differentiate people based on factors independent of them (objective circumstances) or potentially humiliating ones (a social status criterion). On the other hand, it is a criterion that is closely related to assistance provision and although it is independent of patient's actions, it does not diminish the importance of an individual. A similar approach appears in the German doctrine, where it is also emphasised that the adoption of non-medical criteria may be connected with the risk of discrimination and nepotism.[49] In the Polish doctrine, the adoption of non-medical criteria is admitted in case of the same health condition of both patients; however, it raises doubts (J. Kulesza gives an example of choice between a young person starting a career and an older one with acclaimed input into the development of society).[50]

Apart from the above-described criteria, it is necessary to indicate one possibility that the legislator has at their disposal. A regulation might explicitly ban criteria based on age or social position, which would considerably reduce the risk of human dignity infringement. A regulation might be in the form of a ban on non-medical criteria, which would be the simplest solution, although, in essence, the same as an obligation to apply medical criteria.

## CONCLUSIONS

Extraordinary, crisis-related circumstances often force choices that are ethically difficult and this way show what systemic solutions are necessary for appropriate functioning of the state. The pandemic highlighted the need for directives on acting in critical situations. It is especially important in case of medics who have to take decisions quickly and without access to complete data that they could need.

The establishment of a criterion alone does not determine its non-compliance with the constitutional principle of human dignity protection. Only particular specification of a criterion that leads to objectifying a given person may be recognised as being in conflict with the principle of human dignity protection. Each criterion humiliating a given social group or an individual to some extent may cause forbidden objectification. That is why similar criteria should be expressly excluded. The choice based on utilitarian criteria will infringe human dignity.

A criterion should also be related to the nature of assistance provided. Within this sense, patient's financial status or profession should not affect the provision of

[49] Hörnle, T., 'Ex-Post-Triage – strafbar als Totungsdelikt?…', op. cit., p. 179; Poscher, R., 'Die Abwägung von Leben gegen Leben…', op. cit., pp. 74 and 81.

[50] Kulesza, J., 'Kolizja obowiązków pomocy…', op. cit., p. 31.

assistance. Similarly, patient's age does not indicate how efficient assistance can be and if it is necessary.

In crises, it is not possible to fully exclude the risk of infringing human dignity or assessing a person through the prism of purely physical aspects of existence. At the level of general regulations, the state cannot approve of this type of assessment and it is obliged to prevent potential irregularities. What can minimise the above-mentioned risk are rules of conduct in particular circumstances, concerning the choice of a patient to be provided with assistance and laid down in regulations. However, they cannot legitimise the infringement of human dignity of any patients by recognising that some social groups do not deserve medical assistance. Departure from classification of patients based on their age or social position is the only way to comply with the principle of patients' dignity protection. That is why, apart from indicating the advantages of applying the criterion of a patient's health condition, introducing ban on the application of non-medical criteria can be recommended. It is necessary to exclude criteria that are only seemingly related to patient's health condition (like age or gender) because these aspects are not always really correlated.

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# DIVORCE VERSUS THE BEST INTEREST OF THE CHILD AS A SUBJECT OF EXAMINATION CONDUCTED IN OZSS: A LEGAL AND PSYCHOLOGICAL PERSPECTIVE

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Abstract

The article is a review of the issues concerning the concept of "the best interest of the child" as a negative condition for granting a divorce in the light of a diagnosis made in the Opiniodawcze Zespoły Specjalistów Sądowych (OZSS) on family courts' request. It presents legal and psychological views on the best interest of the child in the context of a divorce treated as a crisis in the family. Comments are also presented on the scope of examination conducted by the OZSS experts on the impact of a divorce on the best interest of the child and selected problems related to their specificity. Based on the selected literature on the subject matter, case law and the work practice of the OZSS experts in the field of psychology, subjective views on the methodology of examining the impact of a divorce on the best interests of children are also presented. The main thesis of the article is the opinion that commissioning the OZSS experts by family courts to examine negative conditions for granting a divorce is controversial.

Keywords: divorce vs. the best interest of the child, examination carried out by Opiniodawcze Zespoły Specjalistów Sądowych, positive and negative legal conditions for granting a divorce, psychological effects of a divorce on children

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## LEGAL VIEW ON THE EFFECT OF A DIVORCE ON THE BEST INTERESTS OF THE CHILD

It is not possible to define the concept of 'the best interest of the child', as it happens in case of every term that is axiological in nature, in psychology and the study of law. In practice, many legal regulations concerning the broad meaning of the best interests of children contain direct references to psychological knowledge of children's needs and development. In the Preamble to the Convention on the Rights of the Child,[1] a universal principle is laid down, specifying that to ensure full and harmonious development of their personality, a child should grow up in family environment, in an atmosphere of happiness, love and understanding; the child should be fully prepared to live an individual life in society. In general, the Convention introduces a series of children's rights that correlate with human rights, and States Parties (including Poland) pledged to respect and ensure them. Protection of the best interest of the child in Poland is constitutional in nature; it is laid down in Article 72 Constitution of the Republic of Poland.[2] In essence, it consists in an obligation to defend children against violence, cruelty, exploitation, and moral corruption.

Thus, in the axiological dimension, the best interest of the child is a core value protected by law. As it is the case with every man, a child first of all has the right to dignity, life and health. These three values (dignity, life and health) are thoroughly referred to in numerous legal norms, which also cover the best interest of the child within its broad meaning. In the Polish legal system, it is in particular protected by: (1) Act of 25 February 1964: Family and Guardianship Code[3]; (2) Act of 9 June 2011 on supporting a family and the system of foster care,[4] (3) Act of 29 July 2005 an preventing violence in a family[5]; and (4) Act of 17 November 1964: Civil Procedure Code.[6] From the point of view of the present paper, the provisions of FGC are of crucial importance.

There is no definition of the best interest of the child in the Family and Guardianship Code. There were numerous attempts to develop one in the doctrine. Even though a presentation of those attempts would go beyond the scope of this article, the readers should be referred to relevant literature.[7] Based on FGC, the best interest of the child is described as a series of child's interests protected in case of a family crisis. The Code introduces the concept of "the child's best interest"

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1 Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989, Journal of Laws of 1991, No. 120, item 526.

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

3 Consolidated text, Journal of Laws of 2020, item 1359, hereinafter referred to as "FGC".

4 Consolidated text, Journal of Laws of 2022, item 447.

5 Consolidated text, Journal of Laws of 2021, item 1249.

6 Consolidated text, Journal of Laws of 2021, item 1805, hereinafter referred to as "CPC".

7 See e.g. Kołodziejski, S., 'Dobro wspólnych nieletnich dzieci – jako przesłanka odmowy orzeczenia rozwodu', *Palestra*, 1965, No. 9, p. 30; Marciniak, J., *Treść i sprawowanie opieki nad małoletnim*, Warszawa, 1975, p. 19; Stojanowska, W., *Rozwód a dobro dziecka*, Warszawa, 1979, p. 27; Radwański, Z., 'Pojęcie i funkcja »dobra dziecka« w polskim prawie rodzinnym i opiekuńczym', *Studia Cywilistyczne*, Vol. XXI, 1981, p. 18.

as a protective category for which it is necessary to determine, on a case-by-case basis, whether a given solution will at least not make the child's legal situation worse. The "the best interest of the child" encompasses at the same time protection of their fundamental rights, inter alia, by interference into the guardians' parental authority,[8] the possibility of changing place of residence, upbringing,[9] determination or deprivation of the right to maintain contact with relatives[10] or interference into parents' right to divorce. In all the above-mentioned circumstances, a court must assess to what extent a particular solution is in conformity with the best interests of the child.

Pursuant to FGC, before granting a divorce, a court must first of all recognise the occurrence of one positive condition, i.e. an irretrievable breakdown of marriage, and next, exclude the occurrence of three negative conditions, i.e. first of all, a conflict between the divorce and the best interest of the child and determination whether there is no recrimination under Article 56 § 3 FGC[11] or whether a divorce will be in conflict with the principles of community life. In accordance with Article 56 § 2 FGC, regardless of an irretrievable breakdown of marriage, a divorce is inadmissible if it can result in detriment to the spouses' juvenile children's best interest or if, for other reasons, a divorce would be in conflict with the principles of community life. The regulation is applicable only to situations in which, in spite of the lack of any bond between the parents (i.e. an irretrievable breakdown of their marriage), formal maintenance of their marriage will be a more favourable solution for the interests of the child than a divorce. On the other hand, in accordance with Article 440 CPC, if a court is convinced that there is a chance of maintaining a marriage, it shall suspend a divorce proceeding. However, such suspension can take place only once during a divorce proceeding.

In practice, it is only rarely that the application of the negative condition for a divorce under Article 56 § 2 FGC takes place. According to research findings, the above-mentioned condition is applied in ca. 4% of cases, in which a petition for divorce has been dismissed.[12] M. Domański analysed cases in which a petition for divorce was dismissed based on the negative condition under Article 56 § 2 FGC. He points out that recognising such a condition is always individual in nature, and depends on particular circumstances and a court evaluation. In practice, it is not possible to determine objective criteria for the circumstances justifying application of Article 56 § 2 FGC. Even if they occur, these circumstances can be often linked to a situation in which a court recognises lack of an irretrievable breakdown of marriage. Thus, it is difficult to assume an intrinsic conflict between a divorce and the best interest of the child in such situations, even if there is a positive condition

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[8] E.g. by means of parental custody limitation or the issue of care orders: Article 107 FGC; Article 109 FGC.

[9] Article $112^3$ FGC concerns foster care.

[10] Thus, Article $113^2$ FGC.

[11] Granting divorce is inadmissible if a spouse who files a divorce petition is the only guilty of the marriage breakdown. It is the so-called principle of recrimination.

[12] Thus: Domański, M., 'Oddalenie powództwa o rozwód w sprawach, w których małżonkowie mieli wspólne małoletnie dzieci, w świetle orzecznictwa sądów powszechnych', *Prawo w Działaniu. Sprawy Cywilne*, 2013, No. 14, p. 196.

for a divorce under Article 56 § 1 FGC. This fact has a considerable impact on the scope of examination conducted in Opiniodawcze Zespoły Specjalistów Sądowych (Consultative Teams of Court Experts, hereinafter referred to as "OZSS"). More on this issue can be found in the later part of this article.

What is important, based on M. Domański's research findings we can conclude that, in analysed cases, the court decides that a divorce will be against the child's best interest mainly on the basis of the suggestions it receives from the examinations in OZSS.[13] On the other hand, courts' assessments were always strongly connected with the opinions of OZSS and were of moral nature. Assessment that a divorce is against the child's best interest regardless of an irretrievable breakdown of marriage most often results from a negative ethical opinion on spouses' attitudes, e.g. (1) former suppression of a breakdown of marriage in order to formalise adoption; (2) no preparation of a child to parents' divorce or child's lack of knowledge about its consequences; (3) highly negative influence of post-divorce circumstances on the best interest of the child (issues concerning intensification of conflicts after a divorce is granted, disturbance to the family *status quo*). The circumstance referred to in § 2 raises most controversies, which will be discussed below.

A divorce by itself already endangers the best interest of the child. That is why, at the first stage of minimising the risk to this interest, the court must determine whether the guardians' marriage really ended and whether this circumstance is irretrievable. Thus, a breakdown of marriage is analysed with regard to its quality (assessment of non-retrieval) and quantity (time) from the perspective of predicting the crisis irretrievability. When the positive condition is met (a breakdown is irretrievable), the court takes into account negative conditions. When it is recognised that, in spite of a complete breakdown of marriage, a divorce in such circumstances is going to worsen child's situation, granting a divorce shall be inadmissible.[14] However, the assessment is in the nature of a forecast and must be supported by reliable evidence and arguments.

D. Wybrańczyk, in her monograph concerning child's legal situation during a divorce,[15] points out that the condition under Article 56 § 2 FGC is absolute in nature; there are no exceptions to it. This means that statute awards the best interest of the child a supreme rank. Based on the prevalent opinion in the doctrine, the author points out that in conformity with this condition, one can never compare the so-called ideal situation of a child living in a successful marriage to a situation of a child after a potential divorce, but an actual situation of a child before a divorce to the potential change after a divorce is granted. Extending the opinion, it is worth adding that it is necessary to compare the situation of a child in the course of divorce proceedings to the situation when it potentially ends with a formal ruling. Obviously, we are simply determining a certain degree of probability. A divorce should also be granted when the situation of a child does not worsen nor improve afterwards. It is worth mentioning

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[13] The author refers to RODK because this abbreviation was used due to the former status of OZSS at the time of the research conducted.

[14] See Stojanowska, W., *Rozwód a dobro dziecka…*, op. cit., p. 112.

[15] Wybrańczyk, D., *Sytuacja prawna małoletniego dziecka rozwodzących się rodziców*, Warszawa, 2022, p. 87.

one of the principles of Commission on European Family Law that assumes that granting a divorce does not infringe a child's interests more than forcing spouses to maintain their marriage.[16] By the way, there was a widely criticised opinion in the doctrine that a divorce cannot be granted due to the age of the parties' juvenile children. According to that opinion, a divorce should be admissible only if a child was (1) under 4.5 years old or (2) 13+ or at the age of a secondary school student.[17]

After the amendments to the Code after 1965, the Supreme Court issued relevant directives concerning the interpretation of Article 56 § 2 FGC.[18] They highlighted a few circumstances in which negative conditions for granting a divorce would occur due to the best interest of the child. These might occur:

(1) if, as a result of a divorce, the bonds between a child and a parent who would not be with him/her were considerably weakened, to a degree that might have a negative impact on the fulfilment of this parent's parental duties;
(2) when the facts do not allow the court to decide on child's situation in a way that would ensure that their material and moral needs are met at least to the same extent they were fulfilled by spouses. It should concern in particular situations when joint custody of parents is necessary and to some extent performed, and the relationship between spouses does not hold promise for maintaining this custody after a divorce is granted;
(3) if spouses' tough attitudes to the exercise of their parental authority were recognised, in particular when one of them demands to have exclusive parental authority and wants to deprive the other of any possibility of participating in their child's upbringing. Especially in a situation when the existing *status quo* might be more favourable for children than a divorce. However, this should not concern situations in which a conflict between parents was destabilising the best interests of children more strongly than the below-mentioned risk of a conflict over parental authority;
(4) a child's age, health and sensitivity or their relationship with parents may also be important. In case of such circumstances, the Supreme Court recommends basing an assessment on a psychological opinion on children.

Unfortunately, the Supreme Court recommendations of 1968 do not mention that the circumstances against which the negative condition under Article 56 § 2 FGC should protect do not protect a child against informal and permanent separation of parents. It is important due to the scope of examination conducted by OZSS. For example, the fact that parents are not divorced does not mean that there is no conflict between parents over parental authority, limitation of contacts or intentional negative influence of one parent on a child's bond with the other parent. The further part of this article presents opinions on whether it is possible for OZSS to implement the above-mentioned directives in its examination, and for the court to formulate an appropriate request concerning relation between the best interest of the child and a potential divorce of their parents.

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[16] Wybrańczyk, D., *Sytuacja prawna…*, op. cit., p. 87.

[17] Thus: Wisłocki, J., 'Dziecko a rozwód', *Palestra*, 1957, No. 2, pp. 43–50.

[18] 'Announcement of the First President of the Supreme Court of 27 March 1968', *Monitor Polski*, 1968, No. 14, item 95.

Attention is drawn in case law to the fact that an actual breakdown of marriage and a formal divorce granting are not identical occurrences. For example, the Appellate Court in Rzeszów, in its judgment of 8 April 2010, case No. I ACa 83/10,[19] stated that:

> "The condition under Article 56 § 2 FGC aims to protect a child against negative consequences of their parents' divorce, but is not able to protect them against a breakdown of their marriage. In order to recognise this condition in the course of a court proceeding, it is necessary to examine the influence of a breakdown of marriage on a child, determine conditions in which granting a divorce may result in more negative consequences for a child than those resulting from an irretrievable breakdown of marriage of the child's parents (…)".

Thus, court judgment take into account contemporary knowledge on the influence of a divorce on the child's psyche. As a rule, it is assumed that children remaining in their parents' dysfunctional relation resulting from an irretrievable breakdown of their marriage is an even more negative circumstance than a formal divorce. Referring to the further part of the above-mentioned judgment the content of which corresponds to the present scientific knowledge, it is necessary to add that: "(…) it is in the best interest of the child to be raised in a family in which the father and mother roles are performed properly, and not to be separated from any of the parents; thus, it concerns a truly functioning family, and not only maintained formally by the law".

In practice, the concept of "the best interest of the child" consists in the category of interest and its legal protection.[20] The law protects the interests of a child in many dimensions, depending on the context and subject matter of a regulation. Decoding the content of the best interest of the child is usually objective in nature and cultural norms shape it in a given social and legal system. The objectivism of defining various "interests" of the child also bears consequences for their legal situation, i.e. the lack of or partial legal capacity depending on their age. In practice, these are adults who, based on culture and legal norms representing it, collectively determine what is in the interest of the child and what constitutes their best interest. Subjective understanding of "the best interest of the child" is, as a rule, ignored in legal solutions. And it does not concern ignoring the context or specificity of individual situations with regard to the protection of the best interest of the child but certain universal values. It has consequences for the issue of a divorce versus the best interest of the child. Firstly, the best interest of the child, perceived subjectively by a parent, a guardian or a child, will be subject to legal protection only if it is not in conflict with its objective understanding laid down in legal norms. Secondly, the law in particular protects children against subjective interpretation of the concept of their best interest by creating frameworks of a universal and objective assessment.

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[19] Lex No. 1643024.

[20] This is how the best interest of the child is described in Article 3(1) Convention of the Rights of the Child: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Thirdly, the examination carried out by OZSS on a court request in family-related cases is to help determine objective criteria of the protection of the best interest of the child. For this purpose, the principle of independence and professionalism of court experts was laid down in Article 2(2) and Article 11(1)(1) of the Act of 5 August 2015 on Consultative Teams of Court Experts.[21] In the course of examination, in order to ensure objective insight into the situation of a child and his/her family, experts remain independent of the influence of third parties and are obliged to perform their tasks with due diligence in accordance with up-to-date recommendations of knowledge and science, and following the principles and ethics of the profession, impartially.

## PSYCHOLOGICAL AND SOCIOLOGICAL VIEWS ON THE RELATION BETWEEN A DIVORCE AND THE BEST INTEREST OF THE CHILD

A divorce is undoubtedly a crisis situation in a family, destabilising all its members psychologically. It usually results from earlier conflicts, the resolution of which failed for various reasons. Break-up and formal separation of spouses is the only solution that lets the dysfunctional relation end. According to T. Szlendak, marriage is a system of resources exchange, and a divorce takes place when at least one party experiences a sense of injustice within this system.[22] Thus, a decision to divorce may be unilateral or bilateral. A divorce alone generates subsequent family crises, especially if one partner is not motivated to divorce. When both parties agree that there are grounds for separation, the risk of intensifying a divorce-related tensions in a family decreases. Children always suffer psychologically when the sense of security and acceptance in a family is destroyed. Parents' separation is in general an undesired event for their juvenile children. There is agreement in literature that a divorce alone is an event that is much less unfavourable for the best interest of the child than upbringing in a family in which there is a bitter conflict.[23]

Five stages of a divorce process are distinguished in psychology. According to P. Rydzewski,[24] they are: (1) dissatisfaction phase: partners realise the level of their problems in the relationship; (2) conflict phase: they realise that the problems and difficulties in their resolution intensify, conflicts mount and the awareness of an irretrievable breakdown grows; during this phase, juvenile children usually suffer most; (3) decision phase: a divorce becomes the only real possibility; it was found that divorcing parents impose more sanctions and penalties, and their behaviour towards their juvenile children is negative[25]; (4) post-divorce stress phase: what dominates is stress, sense of loss, depressive disorders affecting family members

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[21] I.e. Journal of Laws of 2018, item 708.

[22] Szlendak, T., *Socjologia rodziny. Ewolucja, historia, zróżnicowanie*, Warszawa, 2015, p. 285.

[23] E.g. the authors referred to herein and the literature they refer to.

[24] Rydzewski, P., 'Rozwód – zjawisko wielowymiarowe', *Studia Demograficzne*, 1994, No. 3(117), pp. 87–95.

[25] Błażek, M., 'Rozwód jako sytuacja kryzysowa w rodzinie', in: Janicka, I., Liberska, H. (eds), *Psychologia rodziny*, Warszawa, 2014, p. 276.

as a result of a family break-up; (5) adaptation and restoration phase: adaptation to changes and a return to psychological well-being. There are no reliable data on how much time it takes to go through the particular stages. Each of them is experienced with different intensity. However, it is assumed that, in general, most family members function emotionally in a desired way after up to two years after the divorce is finalised.[26]

There is a common opinion that children of divorced parents are poorer students, their behaviour causes more pedagogical problems, they experience a worse psychological mood and poorer social competence. However, numerous research findings show that if this effect occurs, it is very weak and a overall difference between children of divorced and non-divorced parents is vague.[27] Over the last years, as the number of divorces has grown and they have become more common, their negative influence on the best interest of children has decreased. It is also known that children have a better standard of living after their parents' divorce in many dimensions of functioning than when there were serious and intense conflicts in their family. The problems with children's behaviour occur for a short period almost always after their parents' divorce, but they disappear rather quickly. When the functioning of children of divorced parents is compared to that of the children raised in families with a high level of conflict intensity, the conduct-related problems are more serious in the latter group.[28] What is important, many behaviour or learning problems of children after their parents' divorce depend to a larger extend on economic factors than on the fact of parents' separation alone. For example, in a family in which the child's economic status does not change after a divorce, e.g. when the other parent regularly pays much maintenance, the educational functioning of children does not worsen.[29]

Negative consequences of a divorce are usually mitigated in a situation when family bonds are properly developed and the intensity of conflicts between adults after a divorce is low. What is obvious, the influence of a divorce on children also depends on their age and individual characteristics. As a rule, the younger the child, the stronger is divorce impact regarding occurrence of emotional disorders; the older the child, the poorer their educational results.[30] However, regardless of child's individual features, the intensity of conflicts between parents is usually a better indicator of the potential wellbeing of a minor rather than a formal status of parents' marriage. A child's functioning in the environment of family conflicts is usually worse for their best interest than real separation of their parents.

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[26] Błażek, M., 'Rozwód jako sytuacja kryzysowa…', op. cit., pp. 268–272.

[27] See research review in: Szlendak, T., *Socjologia rodziny. Ewolucja, historia, zróżnicowanie*, Warszawa, 2015, pp. 292–295.

[28] Morrison, D., Coiro, M.J., 'Parental Conflict and Martial Disruption: Do children benefit when high-conflict marriages are dissolved?', *Journal of Marriage and Family*, 1999, Vol. 66, No. 3, p. 635.

[29] Amato, P., 'The consequences of divorce for adults and children', *Journal of Marriage and Family*, 2000, Vol. 62, No. 4, p. 1280.

[30] Błażek, M., 'Rozwód jako sytuacja kryzysowa…', op. cit., p. 274.

It is also comforting to think that adult children whose parents divorced do not build worse or better relationships in their adult life, and their families do not differ from those founded by persons who did not experience their parents' divorce.[31] What is of key importance here is the parents' attitude: they can aggravate or mitigate negative emotional consequences of their divorce for their juvenile children. There are also simple rules of communication and dialogue with children in the course of and after their parents' divorce.[32] Thus, again the wellbeing of children does not depend on the existence of formal bonds between parents (e.g. the maintenance of marriage) but on the quality of the relation and pedagogical conditions that adults are able to provide children with. It turns out that good functioning of reconstructed families is a rule rather than an exception. Most often, when divorced parents form new partnerships and stepchildren are born, the children of divorced parents function in a way that is at least not worse than in case of the children of parents who did not experience a divorce.[33]

Summing up, formal separation of parents alone (inter alia, by means of a court ruling granting a divorce), as a rule, is not a great and lasting traumatic experience for juvenile children. There is much evidence that when parents' separation is the only option to resolve a crisis in a family, it is most often a solution favourable for juvenile children. From the point of view of the examination of a family recommended by a court, a divorce-related situation is in particular connected with the best interest of the child. Having that in mind, one can refer to one of the definitions of the best interest of the child, especially useful in the present context. Based on her research, M. Arczewska established how judges of family courts most often define the concept of the best interest of the child.[34] For them, the best interest of the child, inter alia, (a) is a synonymous with security; (b) should be treated in a broader way than just satisfying child's needs; (c) a child's contacts with a parent may be an element of the implementation as well as the interference into that interest. Based on the analysis of data obtained in the course of extensive research, this author proposes a definition of the concept of the best interest of the child, which is common for professionals involved in its protection. The best interest of the child does not only mean satisfying their needs, inter alia, financial ones, but also creating conditions of safe and harmonious development in all areas, including psychic and emotional ones taking into account their individual life situation.[35]

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31 Amato, P., 'The consequences…', op. cit., p. 1279.

32 For more on the issue see Ilg, F.L., Ames, L.B., Baker, S.M., *Rozwój psychiczny dziecka od 0 do 10 lat. Poradnik dla rodziców, psychologów i lekarzy*, Gdańsk, 2007, p. 273.

33 Goldenberg, H., Goldenberg, I., *Terapia Rodzin*, Kraków, 2006, p. 47.

34 Arczewska, M., *Dobro dziecka jako przedmiot troski społecznej*, Kraków, 2017, p. 322.

35 Ibidem.

## THE BEST INTEREST OF THE CHILD VS. DIVORCE: ISSUES WITH EXAMINATION CONDUCTED BY OZSS

Statistically, the number of divorces in Poland has been at the same level over the last years, however, it showed a rising trend in the first half of 2021. The available 2021 data show that statistically 57% of divorces granted in 2020 concerned married couples with children. In most cases there was one child in a family (58%). The more children were in a family, the smaller percentage of divorces was.[36] In case of parents' divorce, a court optionally commissions OZSS to examine the situation in order to determine a most objective way to protect the best interest of the child in the circumstances of a family crisis. For many years, an increasing percentage of family cases have been referred to OZSS in order to obtain answers to specific questions. It is partly due to the positive assessment of OZSS activities and the usefulness of the opinions provided for the justice system. It is often stated in literature that the opinions developed by OZSS experts are more useful than the opinions provided by registered expert witnesses, in particular in family- and juvenile-related cases. One can risk formulating a thesis that it results from family examination conducted by (at least two) groups of specialists rather than by a single witness expert. There is also high (ca. 80%) conformity of recommendations in OZSS opinions with courts' judgment.[37]

Objective determination of child's situation is within the domain of forensic psychology. In accordance with Act on OZSS, the specialists employed there are obligated to issue opinions based on current scientific knowledge. Literature presents many established standards of conducting examination of children in family-related cases.[38] Regulation of the Minister of Justice of 1 February 2016 concerning Standards of Opinion Development Methodology in Consultative Teams of Court Experts is also binding.[39] Most often, the examination conducted in family cases consists in the analysis of guardianship and pedagogical situation concerning children, the divorce impact on their development and psychological wellbeing, the child's right to maintain contacts with parents, the place of residence, or a divorce being against the best interest of the child.[40] The scope of the above-

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[36] See *Rocznik Demograficzny*. Główny Urząd Statystyczny, Warszawa, 2021, pp. 230–249, accessed on file:///C:/Users/rosha/Downloads/rocznik_demograficzny_2021.pdf.

[37] See Włodarczyk-Madejska, J., 'Efektywność opiniodawczych zespołów specjalistów sądowych', *Prawo w Działaniu. Sprawy Cywilne*, 2018, No. 33, pp. 242–292 and the literature and review of research on OZSS effectiveness referred to therein.

[38] See Ackerman, M.J., 'Opiniowanie w sprawach o opiekę nad dziećmi', in: Ackerman, M.J. (ed.), *Podstawy psychologii sądowej*, Gdańsk, 2005, p. 39; Marten, Z., *Psychologia zeznań*, Warszawa, 2012, pp. 119–139.

[39] Official Journal of 2016, item 76, hereinafter referred to as "the Regulation".

[40] For more detailed description of the frequency of questions referred to OZSS by courts, see: Włodarczyk-Madejska, J., 'Efektywność opiniodawczych zespołów specjalistów sądowych', *Prawo w Działaniu. Sprawy cywilne*, 2018, No. 33, p. 280; Most often, because in 74.3% of analysed cases courts ask experts about (1) emotional bonds between petitioner/petitioners and a minor; next (2) a suggested resolution of the case (62.3%); (3) whether contacts/contact arrangements are advisable (37.8%). Questions about the conformity of a divorce with the best interest of the child are usually incorporated in the questions about the suggested resolution of the case. Earlier research indicates that questions directly referring to the clause of the best interest of

mentioned examination is most often individualised depending on questions asked by a court. From the OZSS point of view, the last condition may cause most difficult as regards providing accurate answers. Below, we have analysed some essential issues related to the conflict between divorce and the best interest of the child, and the OZSS examination practice.

1. First of all, in the literature on this subject matter, it has been raised many times that answering a question on whether a divorce is against the best interest of the child is not actually within the domain of OZSS. The practice of referring questions concerning specific solutions in a case instead of commissioning OZSS to obtain the so-called special information has been negatively assessed.[41] Direct criticism concerned the fact of asking OZSS questions whether a breakdown of marriage is irretrievable or if a divorce is against the best interest of the child.[42] It should be added that OZSS experts often adopt the suggestion made in the court commission and include the content of a judgment, to which courts often eagerly refer. For example, court states in the justification that "granting a divorce is inadmissible due to the best interest of the parties' juvenile daughter (…), which directly results from a convincing opinion of RODK and the court fully approves of it".[43] According to P. Ostaszewski, courts should not ask in evidence theses whether the best interest of the child is going to suffer as a result of a particular judgment, because only courts are competent to decide what the best interest of the child is.[44] Attention is also drawn to the problem in the doctrine.[45] M. Domański directly states that:

> "the practice of rewriting statutory conditions of a divorce to the evidence-related decision (…) should be negatively assessed. The conditions are in the nature of legal concepts. (…) The aim of an opinion is to provide the court with special information from the fields. It is not up to experts' to make statements concerning statutory conditions of a judgment."[46]

It is definitely better when a court, in order to exclude a negative condition for a divorce under Article 56 § 2 FGC, asks questions that require specialist psychological knowledge, which can help to make an appropriate judgment, e.g. questions about

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the child as a negative condition for a divorce occur in 36% of courts' requests addressed to the former RODK, Ostaszewski, P., 'Opinie sporządzane przez rodzinne ośrodki diagnostyczno-konsultacyjne w sprawach opiekuńczych i rozwodowych', *Prawo w Działaniu. Sprawy Cywilne*, 2013, No. 14, p. 12.

[41] Czerederecka, A., 'Kompetencje biegłego psychologa w odniesieniu do spraw rodzinnych i opiekuńczych', in: Czerederecka, A. (ed.), *Standardy opiniowania psychologicznego w sprawach rodzinnych i opiekuńczych*, Kraków, 2016, p. 33; Ostaszewski, P., 'Opinie sporządzane przez rodzinne ośrodki diagnostyczno-konsultacyjne w sprawach opiekuńczych i rozwodowych', *Prawo w Działaniu. Sprawy Cywilne*, 2013, No. 14, p. 13.

[42] Ostaszewski, P., ' Opinie sporządzane przez rodzinne ośrodki…', op. cit., p. 13.

[43] Ibidem, p. 21.

[44] Ibidem.

[45] Cf.: Czech, B., 'Wybrane prawne i aksjologiczne aspekty opiniowania w sprawach rodzinnych (problem "dobra dziecka")', *Zeszyty Naukowe Instytutu Badania Prawa Sądowego*, 1981, No. 32, p. 267; Czech, B., 'Opis a wartościowanie i ocena w opinii biegłego (na przykładzie "dobra dziecka")', in: Stanik, J.M., Majchrzyk, Z. (eds), *Etyczno-zawodowe problemy biegłego sądowego psychologa i psychiatry w praktyce sądowej*, Katowice, 1995.

[46] Domański, M., 'Oddalenie powództwa…', op. cit., p. 189.

the influence of parents' separation on a child's emotional development, child's awareness of the divorce-related situation, a child's bonds with each of the parents, or the impact of divorce-related circumstances on the emotional functioning of the parties' juvenile child. Within this scope, court experts form decidedly more competent teams. Nevertheless, as it was proved above, in practice this question is often asked in a court request. Perhaps, it should be assumed that in practice a court asks experts for specialist information that goes beyond the literal content of the condition under Article 56 § 2 FGC, which helps to establish whether a rare circumstance stipulated in the provision takes place.

2. A diagnostic issue is defined in the OZSS examination methodology as facts or circumstances requiring determination and indicated in the decision of a body requesting an opinion. In this case, a court's question "whether a divorce is going to be in conflict with the best interest of the child" becomes the same diagnostic issue. On the other hand, a diagnostic process means all activities undertaken by experts aimed at obtaining necessary knowledge to resolve a diagnostic issue. It is also necessary to adopt an appropriate examination technique, i.e. a method of collecting data, inter alia, by means of an adequate interview structure.[47] In accordance with the literature formerly referred to, it is necessary to plan examination activities to be able to determine whether granting a divorce to a juvenile child's parents is going to considerably worsen child's psychological functioning. It does not concern a comparison of child's present situation with the conditions that would exist if the parents were not in conflict but rather a comparison of a thorough assessment of child's functioning in the circumstances of an actual (present or former) conflict in a family with the assessment and a forecast of child's functioning after a real separation of parents. Experts assess past or present events, while forecasts refer to future and potential events. Undoubtedly, assessments are easier than forecasts and, as a rule, are more useful for courts. Experts should focus on such selection of examination techniques that enables them to get to know children's opinions on the former and present relationship between their parents and their feelings in selected periods. The technique should be adjusted to the age of a child involved. What is important, it seems that drawing experts' attention to the assessment of the present functioning of the child is more valuable, when there is a well-documented conflict in the case files and the circumstances of intense involvement of a child in its course are known. Predictions always bear potential errors but they should be based on rational forecasts of child's situation after a divorce. This rationality should refer to the current scientific knowledge of short-term and long-term consequences of a divorce for the functioning of children and adults. As a rule, it is known that in an absolute majority of cases, parents' separation is better for children than the functioning of a family in a strong conflict and the so-called parents' dead relationship. It is a fact that a divorce often does not resolve tensions between parents but at least, as a rule, effectively separates them physically. Thanks to that, minors do not have to continue being directly involved in adults' disputes. Unfortunately,

[47] See para. 2.10 of the Regulation.

children of divorced parents may still be indirectly involved in adults' conflicts, e.g. in the form of the fight for a child's contacts with a chosen parent or his/her permanent place of residence.

One cannot also assume that a conflict between parties will end as soon as the case is resolved before court. Experts should predict the most probable aspects of a dispute between parents and its influence on a child (e.g. contacts, parental authority), taking into account whether the situation of a minor would be better in case of a refusal to grant a divorce or after a divorce is granted. One should always keep in mind that divorce is a formal act. In practice, judges do not commission OZSS experts to carry out examination in order to determine the influence of a parents' conflict on the best interest of the child – it almost always has a negative effect – but rather the influence of 'granting a divorce' on the best interest of the child. The question may be recognised as an attempt to obtain information whether there are any circumstances in the family situation, to which the above-mentioned directives of the Supreme Court refer. Thus, what matters for a court are: (1) specific bonds between the child and parents; (2) the child's specific needs; (3) parents' dispute concerning future authority and contacts with the child; (4) the child's age and health condition; and whether these elements will not contribute to destroying the existing status quo after a divorce has been formally granted. In case of stylistically different forms of questions a court asks about a conflict between a divorce and the best interest of the child, that the application of an examination technique adjusted to the Supreme Court's recommendations by OZSS experts seems to be one of the most reasonable options.[48]

3. It is well-known that the court should assess a negative condition for a divorce which is against the best interest of the child only after confirming a positive condition, i.e. a complete and irretrievable breakdown of marriage. However, sometimes in their answer to the question about the divorce impact on the best interest of the child, experts make statements concerning the positive condition. This takes place when they justify potentially negative impact of a divorce on the child with lack of an irretrievable breakdown of marriage. In such a case, experts are likely to refer to the concept of mutual bonds and relationships. The practice is criticised in literature not due to the fact that experts go beyond the scope of the request but mainly because of the practice of courts alone. M. Domański states that:

> "(…) considering the conformity of a divorce with the best interest of the child in a situation when there is an irretrievable breakdown of marriage is aimless. In many cases experts did not speak about the consequences of a divorce but about the consequences of a breakdown of a family. It is obvious that a breakdown of a family is extremely dangerous for a juvenile child. However, if an irretrievable breakdown did not occur, granting a divorce, i.e. the »sealing« of the breakdown of a family, would be a flagrant infringement of the best interest of the child. In all cases where a breakdown is not irretrievable, a court's questions about the best interest of the child are premature and aimless".[49]

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[48] In accordance with para. 3.3.2 of the Regulation, experts are obliged to perform a diagnostic process in the area of their specialisation, relevantly to the diagnostic issue.

[49] Domański, M., 'Oddalenie powództwa…', op. cit., p. 190.

One can argue about the opinion, especially taking into account the OZSS practices. Expressing opinions about an "irretrievable breakdown of marriage", in particular within the scope of emotional and physical bonds between spouses is within the domain of an assessment and not a forecast, as it is in case of reference to the influence of a divorce on the best interest of the child. Conducting examination of spouses and their juvenile children, experts can notably help the court to determine whether the bonds between parties are broken. Forecasting whether the process is going to be irretrievable is another matter. While one can agree that referring a direct question to OZSS about the positive condition for a divorce would be erroneous, asking questions about e.g. parties' mutual relationships would be justified. Earnestly chosen examination procedure and technique in OZSS to answer such questions may be valuable for the assessment of and forecasting the influence of a divorce on the best interest of the child. Thorough recognition of spouses' relationship in the course of an interview in OZSS, in particular determination that emotional or physical bonds have not actually ended will obviously be an indicator of the negative influence of a divorce on the best interest of the child. Thus, regardless of the fact whether a court directly or indirectly asks about the negative condition for a divorce, experts should – during the examination proceeding – thoroughly examine actual bonds between parties and the nature of their present marriage. In addition, examination techniques should take into account and discover the parties' motivation to divorce, and whether the decision is unilateral or bilateral. It is sufficient to recognise that only one party is consciously motivated to divorce and stops maintaining and building marital bonds.

Examining quality of the relationship between divorcing parents is also viable, provided that it is useful for the purpose of excluding that a positive condition for a divorce is actually fulfilled. If a breakdown of marriage does not take place, it is hard to deny that parents' separation may really be in conflict with the best interest of the child. OZSS may be the place where a court can obtain specialist information about the situation between parties or a potential change in the motivation to divorce. It is possible that in the course of determining facts by a court a breakdown of marriage seemed to be irretrievable. Then, as a result of various circumstances, parties may, at least partially, restore their marital bonds.[50] The binding methodology also supports a thesis that it is necessary for OZSS to thoroughly examine the nature of the relationship between the divorcing parties in case of a question about the divorce being against the best interest of the child. Even if a court does not ask about the relationship between parents, in accordance with obligatory parts of the opinion, experts always describe (1) psychological characteristic features of persons examined, i.e. provide a description and explanation of the examined person's behavioural mechanisms that result from the integration of data obtained in the diagnostic process; (2) characteristic features of the family environment, i.e.

[50] Speaking from his work experience gained in OZSS, the author can confirm the fact that such changes in the relationship between parties occur in the course of the examination conducted on a court request. Sometimes it turns out that before a court proceeding concerning a divorce starts, some emotional or physical bonds between spouses revive what they, consciously or not, reveal in the course of the OZSS examination.

provides a description and analysis of the functioning of the family system taking into account its strengths and weaknesses. The provision of opinions in family and guardianship related cases must always include a complex diagnosis of the family system.[51] These are examination frameworks in which valuable information concerning the reality of a breakdown of marriage and its influence on the best interest of the child may occur. In addition, when in the course of examination information about the infringement of the best interest of the child is obtained, experts are obliged to take this information into account in the content of their opinion, even if this goes beyond the scope of a court request.[52] It is hard to deny that the fact that experts get to know about the lack of an irretrievable breakdown of marriage will lend weight to the assumption that the best interest of the child will be infringed in case a divorce is granted.

4. Finally, it is necessary to refer to the issue concerning a divorce being against the best interest of the child in a situation when a minor is not informed about the fact. It happens that within the examination conducted by OZSS, experts obtain information from minors that they do not know what a divorce is, and that it concerns their family. Children are sometimes completely unaware of the circumstances of a divorce and of the fact that their parents have decided to separate. Sometimes, when this is the case, experts indicate that the divorce is against the best interest of the child. In the author's opinion, this practice is not justified by the concept of the best interest of the child and the negative conditions for a divorce laid down in Article 56 § 2 FGC. To tell the truth, one can look for a link between a child's lack of knowledge and a conflict between a divorce and the principles of community life. From the ethical point of view, a child's dignity and his/her right to know what their family situation is, provided their age and emotional maturity allows it, a minor undoubtedly should be informed that the parents are divorcing. Parents on their own or with the assistance of a psychologist should ensure that their juvenile children are appropriately informed about a divorce and its potential influence on the functioning of their family at least before the term of examination by OZSS. However, the basic circumstance is a real breakdown of marriage, and persistent determination to divorce (demonstrated by one or both parents). Unfortunately, the knowledge about a divorce will not change key facts: parents are planning to divorce; it is a decision, which does not depend of a child. Formally, the decision will be assessed by a court, which can make its implementation possible. The fulfilment of the condition laid down in the methodology of OZSS examination would be an absolutely better practice.[53] In justified cases it is possible to conduct examination in more than one term. When experts find out that a juvenile child of the parties is not properly informed about the parents' divorce related situation, they should assign a subsequent term of examination so that they can appropriately prepare

[51] See the Regulation, para. 2.16, para. 2.17 and para. 8.8.1.
[52] Regulation, para. 4.4.2.
[53] See the Regulation, para. 8.8.6.

their child. However, they should not suggest in such situations that granting a divorce will infringe the best interest of the child.

It also happens that parents behave responsibly enough and do not involve children in conflicts. Minors may not experience a crisis situation in their family when they live with parents if they are not aware that their parents no longer feel mutual bonds. Learning about their plans to divorce in such circumstances will undoubtedly cause considerable stress. As a result, parents' situation will also totally change; they will live separately and their children will have to learn how to function in the family in which their parents are suddenly separated. In such a situation, it is difficult to justify a divorce by stating that a child will stop functioning in a situation of great tension. From a child's point of view, such a divorce will probably be a stronger interference in his/her best interest than the separation of their parents brought into a strong conflict. In practice, such situations are very rare but they bear additional specific difficulties in the examination conducted by OZSS experts when a court commissions them to refer to the negative condition for a divorce under Article 56 § 2 FGC. As it was mentioned above, in such circumstances parents should in advance inform a child about their plan to divorce and the consequences of that. In spite of periodical crises after the separation of 'mum and dad', having two happy parents living in separation may prove to be more important for the best interest of the child than having two unhappy parents living together and maintaining an empty relationship. Being in contact with such parents, experts should have in mind that those spouses were able to protect their juvenile child against participation in adults' conflicts, so most probably they will be able to take care of the best interest of their child also after they are granted a divorce. It is necessary to remember that a divorce does not always have to mean that a child's functioning in a tense family atmosphere ends. Sometimes, it will be an undesired change, which in the long term may be the best solution for a family.

## CONCLUSIONS

The circumstance of a divorce being against the best interest of the child, expressed in Article 56 § 2 FGC, often becomes the subject matter of OZSS examination, although theoretically it is within the domain of law rather than psychology. However, in practice, courts find it difficult to exclude the occurrence of this circumstance without referring a family to specialist examination. In this regard, the role of OZSS may be of key importance. When a diagnostic issue concerns the divorce being against the best interest of the child, experts should first of all assess the functioning of a child at present, forecast changes that will take place after a divorce is formally granted, and whether those changes are going to worsen the functioning of a minor. It is also important for experts not to compare a child's situation with the conditions that might occur if parents were not in conflict but to compare the assessment of the functioning of a child in the situation in which an actual (present or former) conflict in a family exists with the assessment and forecast regarding the functioning of a child after his/her parents really separate. The examination conducted in OZSS

should help collect specialist information for a court concerning: (1) specific bonds between a child and parents; (2) a child's major needs; (3) possible occurrence of a dispute between parents over future parental authority and contacts with a child; (4) whether a child's age and health condition make the formal granting of a divorce disrupt the existing *status quo*. Assessing those four circumstances, experts should express their opinion whether any of them results in more harm to the best interest of the child in case a divorce is formally granted than in the situation when the so-called 'dead' marriage continues to function. In practice, these are very rare and extraordinary situations.

In a situation when a court commissions OZSS to examine the whether the divorce is against the best interest of the child, due to the examination methodology, experts may also provide valuable information about a positive condition for a divorce under Article 56 § 1 FGC. The analysis of the situation in a family environment together with parents' and their juvenile children's characteristics may considerably contribute to recognition whether an irretrievable breakdown of marriage and spouses' physical and emotional bonds has taken place or not. Obtaining information about the lack of an irretrievable breakdown of marriage in conjunction with granting a divorce will constitute the infringement of the child's best interest.

A court's question referred to OZSS with regard to the divorce being against the best interest of the child is always difficult to answer. It concerns fundamental and non-defined issues such as "the best interest of the child", and is connected with the assessment and prediction of the future based on the examination of one of the most stressful circumstances in the life of both a child and an adult, i.e. a divorce. As far as this matter is concerned, it is important for courts to be more precise when asking questions and commissioning OZSS experts to obtain possibly detailed information that will help them decide whether formal separation of parents will be a solution interfering into the best interest of the child to a greater extent than the legal maintenance of marriage in which an irretrievable breakdown has taken place. On the other hand, experts should appropriately adjust their examination procedure bearing in mind the specificity of the regulation under Article 56 § 2 FGC.

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# GLOSS ON THE RULING OF THE SUPREME ADMINISTRATIVE COURT OF 25 MAY 2022, CASE REFERENCE NUMBER III OSK 2273/21

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Abstract
The glossed ruling covers two key issues concerning the application of the autonomous and comprehensive rules of the protection of natural persons with regard to the processing of personal data applied by organisational units of the Catholic Church in the territory of the Republic of Poland. The first issue concerns the possibility of further application of these autonomous, comprehensive rules after the GDPR came into force. The second issue concerns the ability to designate and grant a legal status to an independent separate supervisory authority: the Ecclesiastical Data Protection Officer. Approving the stance presented in the ruling of the Supreme Administrative Court, the gloss presents arguments confirming the fact that when the GDPR came into force, a regulation concerning the processing of personal data existed in the Catholic Church (it was primarily contained in the standards of the Code of Canon Law of 1983), which the Catholic Church, by the time specified in Article 91(1) GDPR, harmonised with the provisions of that legal act. Moreover, the mode of operation, the manner of designating or dismissing the Ecclesiastical Data Protection Officer does not have to be derived from the universally binding law. It may arise from the internal law of the Catholic Church, provided that the requirements laid down in Chapter VI GDPR, i.e. independence, fulfilment of general conditions concerning data protection supervisory authorities, secrecy, performance of tasks and exercise of the powers laid down in the GDPR (relevant competences), are met. This argument originates from the principle of autonomy and independence of churches and other religious organisations, guaranteed by the provisions of the Constitution of the Republic of Poland. The reasoning is also confirmed in recital 165

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of the GDPR preamble, which states that "This Regulation respects and does not prejudice the status under the constitutional law of churches and associations or religious communities in the Member States, as recognised in Article 17 TFEU".

Keywords: data protection, Catholic Church, GDPR, autonomous and comprehensive rules of data protection

## MAIN THESES

(1) When the GDPR entered into force, a regulation concerning the processing of personal data existed in the Catholic Church and it was primarily contained in the standards of the Code of Canon Law of 1983, which the Catholic Church harmonised with the provisions of that legal act by the time specified in Article 91(1) GDPR.
(2) The mode of operation, manner of designating or dismissing the Ecclesiastical Data Protection Officer does not have to be derived from the universally binding law; it may arise from the internal law of the Catholic Church, provided that the requirements laid down in Chapter VI GDPR, including Article 54 GDPR, are met.[1]

Having heard a cassation complaint about the judgment of the Voivodeship Administrative Court in Warsaw of 9 September 2019, case No. II SA/Wa 865/19, concerning decision of the President of the Personal Data Protection Office of March 2019 as regards a refusal to start a proceeding, during a closed session of the General Administrative Chamber on 25 May 2022, the Supreme Administrative Court dismissed the cassation complaint.[2] The Supreme Administrative Court expressed its stance on two issues. The first one referred to the moment the GDPR provisions entered into force[3] and the related possibility of applying autonomous comprehensive rules of protection of natural persons with regard to the processing of their personal data by organisational units of the Catholic Church in Poland. The second one referred to the possibility of designating and granting status of an independent supervisory authority to the Ecclesiastical Data Protection Officer. The Supreme Administrative Court resolved the two matters in the glossed ruling properly and in the way that deserves universal approval.

With regard to the first issue, it is necessary to point out that in accordance with Article 91(1) GDPR, "Where in a Member State, churches and religious associations or communities apply, at the time of entry into force of this Regulation, comprehensive rules relating to the protection of natural persons with regard to processing, such rules may continue to apply, provided that they are brought into line with this Regulation". What is of key importance in the above-cited provision is the moment of entry

1 The ruling published, inter alia, in Lex No. 3347701.
2 Lex No. 2769411.
3 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

into force of the GDPR and the application of the comprehensive rules of protection of natural persons with regard to the processing of personal data by churches and religious associations or communities at this moment. The provisions should be interpreted in the light of recital 165 to the GDPR preamble and Article 9(2)(d) GDPR. In accordance with recital 165, "This Regulation respects and does not prejudice the status[4] under existing constitutional law of churches and religious associations or communities in the Member States, as recognised in Article 17 TFEU". The provision of Article 9(2)(d) GDPR stipulates that the processing of specific categories of personal data shall not be prohibited,[5] provided that:

> "processing is carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other non-for-profit body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the data subjects".

The literal interpretation of the provision of Article 91(1) GDPR leads to a conclusion that if at the moment of entry into force of the GDPR, i.e. on 24 May 2016, in a given church and a religious association or community, there were no comprehensive rules of protection of natural persons with regard to the processing of their personal data, they have no possibility of referring to them and adjusting to the rules laid down in the GDPR.[6] Therefore, churches and religious associations or communities that did not apply such rules at the moment of entry into force of the GDPR are directly subject to the GDPR provisions.[7] It is also applicable to churches and religious associations or communities that were founded after that date. There is also a contrary stance presented in the doctrine, i.e. one stating that the time limit referred to in Article 91(1) GDPR only constitutes a confirmation of the *status quo* of churches and religious associations or communities and a directive on the expected changes. This in turn leads to a conclusion that they should not be deprived of the right to develop their internal laws. According to this stance, even the EU Regulation application date (25 May 2018) could not be the final deadline for harmonising the internal rules of a given church and a religious association or community with the GDPR provisions.

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4 Article 17 TFUE uses the phrase "The Union respects the status".

5 The category includes personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

6 Sakowska-Baryła, M., 'Komentarz do art. 91', in: Sakowska-Baryła, M. (ed.), *Ogólne rozporządzenie o ochronie danych osobowych. Komentarz*, Warszawa, 2018, accessed via Legalis, nota bene 3.

7 Zawadzka, N., 'Komentarz do art. 91', in: Bielak-Jomaa, E., Lubasz, D. (eds), *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz*, Warszawa, 2018, accessed via Lex, paras. 3 and 6; Fajgielski, P., 'Komentarz do art. 91 RODO', in: Fajgielski, P., *Ogólne rozporządzenie o ochronie danych. Ustawa o ochronie danych osobowych. Komentarz*, Warszawa, 2021, accessed via Lex, paras. 5 and 11–13; Litwiński, P., 'Komentarz do art. 91', in: Litwiński, P. (ed.), *Rozporządzenie UE w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i swobodnym przepływem takich danych. Komentarz*, Warszawa, 2021, accessed via Legalis, nota bene 2.

It would have been a breach of Articles 20 and 21 of the Charter of Fundamental Righ[8] concerning equality before the law and non-discrimination.[9] Moreover, if the deadline for GDPR application had been final, it would lead to a direct discrimination against religious associations that will be founded in the future. Taking into account the systemic interpretation of the provisions in question, one should agree with the above interpretation.[10] However, it is worth pointing out that until a given church and a religious association or community meets the requirements laid down in the GDPR, i.e. it establishes in its internal law autonomous comprehensive rules of personal data protection matching those stipulated in the GDPR, the GDPR provisions will be applicable directly. Moreover, if churches and religious associations or communities that apply autonomous comprehensive rules of personal data protection but apart from their statutory (religious) activities, i.e. activities conducted "within its scope" and as a rule regulated by internal laws, also conduct activities regulated by the law of the Member State and/or the EU (e.g. cultural, educational and social activities), the GDPR provisions shall be also directly applied to those activities. It concerns e.g. processing of personal data by churches and religious associations or communities in connection with schools awarded the rights of public schools or by charitable organisations they keep, e.g. social welfare homes, nursing care facilities etc. By analogy, the same applies to a case when the entities indicated process personal data within the business activity they are involved in.

In the complainant's opinion, substantive law, inter alia, Article 91(1) in conjunction with Article 99(1) and (2) GDPR, was breached by means of erroneous interpretation consisting in the assumption that the date of entry into force of the GDPR is the date determined in Article 99(2) GDPR, i.e. 25 May 2018, while the provision of Article 91(1) GDPR unambiguously refers to the definition of a legal term of "entry into force". Under Article 99(1) GDPR, this legal act entered into force on 24 May 2016. As a result, the mistake let the Voivodeship Administrative Court

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[8] OJ C 202, 7.6.2016, p. 1.

[9] Hucał, M., 'Reforma ochrony danych osobowych w Kościołach mniejszościowych w Polsce: projekt regulacji wewnętrznych i wspólnego organu nadzoru', in: Zieliński, T.J., Hucał, M. (eds), *Prawo do prywatności w kościołach i innych związkach wyznaniowych*, Warszawa, 2019, pp. 53–55.

[10] It is strengthened by the fact that in accordance with the information available at the Personal Data Protection Office (https://www.uodo.gov.pl/pl/138/721; accessed on 12.08.2022), the churches and other religious associations or communities that informed the President of the Personal Data Protection Office directly or via the government of the Republic of Poland about the application of autonomous comprehensive regulations concerning personal data protection include the Evangelical Methodist Church in the Republic of Poland based in Cracow (registry No. 185), which obtained a formal status of a church in the Republic of Poland after the entry into force of the GDPR. The online registry of churches and other religious associations or communities operates based on Act of 17 May 1989 on the guarantees of freedom of conscience and religion (consolidated text, Journal of Laws of 2017, item 1153) and Regulation of the Minister of Internal Affairs and Administration of 31 March 1999 concerning the registry of churches and other religious associations or communities (Journal of Laws No. 38, item 374). At present (as of 12 August 2022), 171 churches and other religious associations entered into it, https://www.gov.pl/web/mswia/rejestr-kosciolow-i-innych-zwiazkow-wyznaniowych (accessed on 12.08.2022). After the entry of the GDPR into force, successive seven churches and other religious associations entered the registry.

in Warsaw unjustifiably assume that the Catholic Church in the Republic of Poland met the time limit required to keep being able to apply autonomous comprehensive rules of protection of natural persons with regard to the processing of their personal data. What is more, in the complainant's opinion, at the time of the GDPR entry into force, the Catholic Church did not have such comprehensive rules at all and thus, it was not possible to harmonise them with the GDPR provisions. As a result, the Catholic Church in the Republic of Poland did not fulfil the requirement laid down in Article 91(1) GDPR, and delayed the introduction of the internal provisions for two years. That is why the internal regulations adopted are insignificant and organisational units of the Catholic Church in the Republic of Poland are subject to general rules laid down in the GDPR.

In its ruling, the Supreme Administrative Court rightly pointed out that contrary to the complainant's opinion,

> "before the entry into force of the GDPR, the Catholic Church had certain binding rules regarding personal data protection, e.g. in relation to parish archiving systems which, with the use of personal data, recorded such facts in the life of the religious community members as christening, marriages or deaths. (…) It does not matter whether it resulted from the application of codified rules or universally adopted common law because Article 91(1) GDPR does not determine any requirements concerning the types of the sources of law. Nevertheless, it should be highlighted that the norms laid down in canon law, including the ones concerning the protection of privacy and intimacy laid down in the Code of Canon Law[11] (in particular in Canon No. 220) were a basis for those principles."

It should be emphasised that apart from the above-mentioned Canon 220, CCL contains a series of legal norms concerning the processing of personal data. And thus, in Canons 482–491 and Canon 535, the ecclesiastical legislator obliges every parish to keep records in accordance with the regulations of the Bishops Conference and a bishop of a diocese, and obliges a parish priest to develop and retain them properly, as well as imposes an obligation to keep an archive on diocesan curiae and parishes, and regulates the rules of keeping them. Canons 1067 and 1069 concerning preparation for marriage determine rules of providing information about circumstances that are important for getting married. It is also worth pointing out non-statutory ecclesiastical documents (of different legal weight and value, and detailed subject-matter of regulation), which in practice have created an autonomous system of personal data protection applied in the Catholic Church in the Republic of Poland. For example, the norms of motu proprio *La cura vigilantissima* of 21 March 2005,[12] Regulations of the Polish Episcopal Conference concerning the christened, confirmed, married and deceased, and registries of parishioners of 26 October 1947,[13]

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[11] *Codex Iuris Canonici* auctoritate Ioannis Pauli PP. II promulgatus, 25/01/1983, *Acta Apostolicae Sedis* (hereinafter "AAS") 75(1983) pars 2, pp. 1–317; Latin-Polish text: *Kodeks prawa kanonicznego*, translation approved by the Polish Episcopal Conference, Poznań 1984 (hereinafter "CCL"). For practical reasons of clear disquisition, reference to the canon law of the Eastern Catholic churches is excluded.

[12] AAS 97(2005), pp. 353–376.

[13] Text in: Baron, J., Bączkowicz, F., Stawinoga, W., *Prawo kanoniczne. Podręcznik dla duchowieństwa*, Vol. 2, 3rd edition, Opole, 1958, pp. 597–604. The regulations have been in force since 1 January 1948.

the instruction developed by the General Inspector of Personal Data Protection and the Polish Episcopal Conference Secretariat of 23 September 2009: "Ochrona danych osobowych w działalności Kościoła katolickiego w Polsce",[14] or the General Decree of the Polish Episcopal Conference concerning apostasy and a return to the Church community of 7 October 2015.[15]

In accordance with the GDPR provision in analysis, there is no obligation to include detailed rules of natural persons' data protection with regard to their personal data processing in one legal act. P. Fajgielski makes accurate observations on the issue:

> "The term 'comprehensive rules' used in the discussed provision does not mean that a church and a religious association or community must have a uniform, comprehensive internal regulation (a single normative act of the internal law of a given church and a religious association or community) that covers the issues concerning personal data protection in this church or association, but that they have their own regulations resulting in comprehensive rules of protecting persons with regard to data processing and apply those rules. The requirement for successive application of the rules consists in their adjustment to the provisions commented on".[16]

The provision does not mean that those comprehensive rules must be determined in a Member State legislation, although there is such a possibility. As M. Sakowska-Baryła rightly notices, the addressees of the regulation contained in the provision analysed "include first of all the national legislator and relevant bodies of churches and religious associations that possess the competence to introduce relevant internal norms in order to adjust their solutions to the requirements laid down in the GDPR".[17] A two-year period between the entry into force of the GDPR (24 May 2016) and the start of its application (25 May 2018) was aimed at serving to bring the Member States' regulations and the law of churches and religious associations or communities into line with the EU new regulations, as well as to enable data controllers and processors to get prepared for the fulfilment of new obligations.[18]

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[14] https://giodo.gov.pl/data/filemanager_pl/wsp_krajowa/KEP.pdf (accessed on 12.08.2022).

[15] *Akta Konferencji Episkopatu Polski*, 2007, No. 27, pp. 101–104. The Decree has been in force since 19 February 2016. Also see Majer, P., 'Ochrona prywatności w kanonicznym porządku prawnym', in: Majer, P. (ed.), *Ochrona danych osobowych i prawo do prywatności w Kościele*, Kraków, 2002, pp. 83–123; Kacprzyk, W., *Prawo do prywatności w prawie kanonicznym i w prawie polskim. Studium prawnoporównawcze*, Lublin, 2008; Skonieczny, P., 'Pojęcie dobrego imienia (bona fama) w Kodeksie prawa kanonicznego z 1983 r. Jana Pawła II na podstawie kan. 220', *Prawo Kanoniczne*, 2009, No. 1–2, pp. 59–84; Gręźlikowski, J., 'Realizacja prawa do dobrego imienia i ochrony własnej intymności w Kościele (kan. 220 KPK) w świetle ustawy i instrukcji o ochronie danych osobowych', *Teologia i Człowiek*, 2012, pp. 229–255; Czelny, M., 'Prawo do prywatności w ustawodawstwie Kościoła katolickiego', in: *Prawo do prywatności w kościołach i innych związkach wyznaniowych…*, op. cit., pp. 373–400.

[16] Fajgielski, P., 'Komentarz do art. 91 RODO…', op. cit., para. 5.

[17] Sakowska-Baryła, M., 'Komentarz do art. 91…', op. cit., nota bene 2.

[18] For more on the issue see Hucał, M., 'Szczegółowe lub kompleksowe zasady ochrony danych osobowych stosowane przed wejściem w życie RODO na przykładzie Kościoła Ewangelicko-Augsburskiego w RP', *Studia z Prawa Wyznaniowego*, 2019, Vol. 22, pp. 255–288; Walencik, D., 'Dekret ogólny Konferencji Episkopatu Polski w sprawie ochrony osób fizycznych w związku

For this reason, the substantiation of the cassation complaint referring to Article 99 GDPR is groundless; paragraph 1 indicates the moment of the entry into force of the Regulation (24 May 2016) while paragraph 2 indicates the moment when the Regulation starts being applied, i.e. 25 May 2018. As it was shown earlier, the moment the GDPR entered into force, the Catholic Church possessed a series of regulations concerning personal data processing, first of all contained in CCL. As a result, the Catholic Church fulfilled the requirement to have autonomous comprehensive rules of protecting personal data before the entry of the GDPR into force.[19]

Successive application of autonomous comprehensive rules of protecting data by churches and religious associations or communities that applied them when the GDPR entered into force depends on their harmonisation with the GDPR provisions. This means that, as a result of the EU law, regardless of constitutional or, in case of churches and religious associations or communities, treaty (concordat) arrangements, the Member States are obliged to ensure that detailed rules of protecting natural persons with regard to the processing of their data by those entities are really implemented in accordance with the GDPR. For the meantime, however, neither a mechanism for verifying this conformity has been developed nor an entity that might do this has been indicated.

According to P. Litwiński,

> "the scope of such harmonisation should cover the entirety of the GDPR provisions because there is no provision limiting the scope of rules conformity with the provisions of the GDPR. What is important, some differences are admitted but they cannot be significant. (…) In this case, expecting complete conformity with the GDPR provisions (…) would reflect a contradiction between respect for the status granted to churches and religious associations or communities based on the constitutional law binding in the Member States and their subjection to the GDPR provisions (…). If the status of churches and religious associations or communities is respected, one cannot speak about whatever adjustment of the rules to the GDPR provisions."[20]

Undoubtedly, the new EU regulations forced the application of improved data protection standards, in particular on data security. It is due to the fact that a church and religious association or community has no right to process data in the way that goes beyond the general purpose of processing or serves that aim but uses those data in a disproportionate (excessive) manner. Undoubtedly, the provisions concerning

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z przetwarzaniem danych osobowych w Kościele katolickim', in: Zieliński, T.J., Hucał, M. (eds), *Prawo do prywatności w kościołach i innych związkach wyznaniowych*…, op. cit., pp. 15–48; Filak, A., 'Nowe regulacje ochrony danych osobowych w Kościele Ewangelicko-Augsburskim w RP', in: Zieliński, T.J., Hucał, M. (eds), *Prawo do prywatności w kościołach i innych związkach wyznaniowych*, Warszawa, 2019, pp. 117–142.

[19] Thus also Fajgielski, P., 'Komentarz do art. 91 RODO…', op. cit., para. 5; Litwiński, P., 'Komentarz do art. 91…', op. cit., nota bene 4. Private and contrary opinion on this issue is expressed in: Zawadzka, N., 'Komentarz do art. 91…', op. cit., nota bene 3.

[20] Litwiński, P., 'Komentarz do art. 91…', nota bene 3. Also see Fajgielski, P., 'Komentarz do art. 91 RODO…', para. 6; Sakowska-Baryła, M., 'Komentarz do art. 91…', nota bene 1; Morawska, K., 'Rola oraz status prawny motywów preambuły ogólnego rozporządzenia o ochronie danych – klucz do wykładni przepisów nowego prawa unijnego', in: Kawecki, M., Osiej, T. (eds), *Ogólne rozporządzenie o ochronie danych osobowych. Wybrane zagadnienia*, Warszawa, 2017, pp. 40–41.

protection of personal data in churches and religious associations or communities do not enjoy absolute legal autonomy, and like the provisions on the protection of personal data in other entities (associations, foundations and trade unions), must in general match the principles laid down in the GDPR. It is worth pointing out that the analysed GDPR provision lays down a comprehensive regulation, i.e. in-depth, absolute, entire, complete, precise principles being a complex alternative to the GDPR but at the same time adjusted thereto. They are principles that specify the general rules expressed in the GDPR provisions but also determine exceptions taking into account the specificity of a particular church and religious association or community. Thus, it does not aim to ensure full conformity with the provisions of the EU Regulation but to establish autonomous comprehensive rules of ensuring data protection in the general areas indicated by the GDPR. The Supreme Administrative Court is right to conclude that:

> "While the aim of the legislator [ecclesiastical one – D.W.] could have been to ensure complete conformity, there would have been no logical justification for the establishment of a given special regulation in the GDPR. This is so because churches and religious associations, as a rule, are subject to the commonly binding law. (…) As it can be assumed based on the content of Article 91 GDPR, the EU legislator intended to take into account the specificity of the processing of personal data in connection with religious practices and dogmatic teaching conducted by churches and other religious communities, thus, recognised respect for their distinctiveness and autonomy as well-grounded and admitted the application of different rules of personal data protection that ensure the accomplishment of the GDPR objectives (cf. judgment of the Voivodeship Administrative Court in Warsaw of 16 October 2019, Case No. II SA/Wa 907/19)".

As a result, the Supreme Administrative Court was right to recognise that the Polish Episcopal Conference issued *Dekret ogólny w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych w Kościele katolickim* in the term laid down in Article 91(1) GDPR.[21] By means of the Decree, without prejudice to the former legal regulations, the Polish Episcopal Conference harmonised the autonomous comprehensive rules of protecting natural persons with respect to the processing of their data that were applied in the Catholic Church in the Republic of Poland at the moment of the GDPR entry into force with the Regulation provisions. The Polish Episcopal Conference adopted the Decree on 13 March 2018. However, its promulgation took place, after obtaining *recognitio* of the Holy See on 30 April 2018, by means of entering it on the official website of the Polish Episcopal Conference, which was a certain novelty but is admitted in canon law. On the same day, the Decree entered into force. By the way, it is worth mentioning that the Supreme Administrative Court was right to determine that the assessment presented in the cassation complaint and the way of the Decree promulgation, which is an internal matter of the Catholic Church resulting from its right to self-organisation and self-governance, go beyond the scope of its cognition.

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[21] https://episkopat.pl/wp-content/uploads/2018/06/DekretOgolnyKEPWSprawieOchronyOsobFizycznychWZwiazkuZPrzetwarzaniemDanychOsobowychWKoscieleKatolickim.pdf (accessed on 12.09.2022); *Akta Konferencji Episkopatu Polski*, 2018, No. 30, pp. 31–45.

Going on to the assessment of the second issue resolved by the Supreme Administrative Court in the glossed ruling, it is necessary to refer to the provision of Article 91(2) GDPR, in accordance with which churches and religious associations or communities that applied comprehensive rules of protection of personal data at the moment of entry into force of the GDPR may establish a separate independent supervisory body, provided that it fulfils the requirements laid down in Chapter VI GDPR, applied *mutatis mutandis*. However, the provision does not determine whether it should be one body common to all churches and religious associations or communities or whether every entity can establish a separate body. It seems that both solutions are admissible, however, from the practical point of view and taking into account the specificity of particular churches and religious associations or communities, the second solution should be opted for. It should also be assumed that in accordance with the provision analysed, also a Member State might appoint a supervisory body. However, if an independent supervisory body were not established, the application of autonomous comprehensive rules of personal data protection by a given church and religious association or community would not be excluded. The provision does not determine the relationship between a national supervisory body and separate supervisory bodies. It does not seem, however, that a separate supervisory body should be subordinate to a national supervisory body. Their jurisdiction should be independent because the establishment of an independent supervisory body by a church and a religious association or community results in the exclusion of that church and a religious association or community from the jurisdiction of a national supervisory body.[22] Data processing in churches and religious associations or communities that do not apply autonomous comprehensive rules of personal data protection or did not establish a separate supervisory body is subject to supervision by a national supervisory body. The supervision by this body also covers data processing in churches and religious associations or communities to which the GDPR is applicable directly.

The requirements that separate supervisory bodies established by churches and religious associations or communities should fulfil include: independence, fulfilment of general conditions concerning data protection supervisory authorities, secrecy, performance of tasks and exercise of the powers laid down in the GDPR (relevant competences). It is pointed out in literature that "the GDPR does not let us expect that the state and ecclesiastical supervisory bodies will be shaped in the same way. There may also be differences between particular separate bodies",[23] i.e. the bodies designated by different churches and religious associations or communities. Nevertheless, like analogous national bodies, each separate data protection body should possess appropriate "human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers" (Article 52(4) GDPR). Separate supervisory bodies should "be appointed by means of a transparent procedure" by appropriate authorities of churches and religious associations or communities (Article 53(1) GDPR). A holder or member

[22] Litwiński, P., 'Komentarz do art. 91…', op. cit., nota bene 7; Fajgielski, P., 'Komentarz do art. 91 RODO…', op. cit., para. 12–13; Sakowska-Baryła, M., 'Komentarz do art. 91…', op. cit., nota bene 5.

[23] Łukańko, B., *Kościelne modele ochrony danych osobowych*, Warszawa, 2019, p. 223.

of such a body (it may be a single-person body or a collective one) must have "the qualifications, experience and skills, in particular in the area of the protection of personal data, required to perform its duties and exercise its powers" (Article 53(2) GDPR) and may be "dismissed only in case of serious misconduct or if the member no longer fulfils the conditions required for the performance of the duties" (Article 53(4) GDPR). The rules of appointing data protection authorities and their qualifications, selection requirements, the term of office and secrecy regulations that their holders or members must comply with shall be determined in the internal law of a given church and a religious association or community, which should possibly reflect the law of the Member State concerned,[24] *mutatis mutandis* (Article 54 GDPR). Thus, they do not have to be based on the universally binding law but must meet the requirements of Chapter VI GDPR. Finally, the provisions of the internal law of churches and religious associations or communities may include a caveat that data protection authorities of those entities shall not be competent to supervise processing operations of courts acting in their judicial capacity (Article 55(3) GDPR).

Under Article 51(1) GDPR, each Member State shall provide for one or more independent public authorities to be responsible for monitoring the application of the Regulation, in order to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the Union. In Poland, at present, the issues related to the protection of personal data are within the competence of President of the Data Protection Office (Article 34(1) Act of 10 May 2018 on the Protection of Personal Data[25]). It is also necessary to point out that Article 51(4) GDPR imposes an obligation on the Member States to notify the European Commission of the provisions of its law which they adopt pursuant to Chapter VI GDPR, by 25 May 2018 and, without delay, any subsequent amendment affecting them. There are no legal grounds, however, for imposing an obligation on churches and religious associations or communities to notify a national supervisory authority of the appointment of independent supervisory bodies or the content of internal regulations concerning the processing and protection of personal data. That is why it is postulated in literature that such an obligation is introduced. According to B. Łukańko, the consequence of the "regulatory freedom of the states and religious associations may consist in the creation of significant differences between a state authority's and individual independent ones' norms (provided that there are more than one body)" ,[26] which is confirmed in the legal solutions adopted by the churches and other religious associations functioning in the Republic of Poland.

In accordance with Article 35 of the Decree of the Polish Episcopal Conference, the Ecclesiastic Data Protection Officer is an independent authority monitoring and ensuring the compliance with the provisions on the protection of personal data within and pursuant to the functioning of the Catholic Church and its structures. The Ecclesiastical Data Protection Officer, within the area of performing his

[24] It should be remembered that the provisions of Chapter VI GDPR include numerous norms leaving much legislative freedom to the Member States, e.g. Article 51(1) and (3); Article 52 (6); Article 53(3) and (4); Article 54(1)(b)–(f).

[25] Consolidated text, Journal of Laws of 2019, item 1781.

[26] Łukańko, B., *Kościelne modele ochrony danych osobowych…*, op. cit., p. 224.

supervisory duties, is not subject to any orders issued by other entities. The function of the Ecclesiastical Data Protection Officer is an authority within the meaning of Canon 145 CCL. A person holding the position of the EDPO is obliged to refrain from any activities that cannot be reconciled with the function. The Polish Episcopal Conference is obliged to ensure conditions and measures necessary to effective fulfilment of tasks by the EDPO. The Plenary Assembly of the Polish Episcopal Conference elects the Ecclesiastical Data Protection Officer for a four-year term of office. The same person can be elected for subsequent terms (Article 36(1) of the Decree). The person performing the function of EDPO should possess appropriate knowledge, experience and skills in the area of personal data protection necessary to properly carry out his tasks (Article 36(2) of the Decree). The Ecclesiastical Data Protection Officer may be dismissed from his function only in case of serious misconduct or if he no longer fulfils the conditions required for holding the office (Article 36(3) of the Decree). He may also hand in his resignation in writing, which takes effect the moment the President of the Polish Episcopal Conference is notified of it (Article 36(4) of the Decree). The EDPO's tasks include, inter alia, monitoring and ensuring the compliance with the provisions on the protection of personal data within and pursuant to the functioning of the Catholic Church and its structures; popularising the knowledge of personal data protection in the Church; advising data controllers and processors in the Church in the field of personal data protection; providing information to data subjects about the rights they have in connection with the processing of their personal data; dealing with complaints about *the provisions laid down in the Church within the scope of the protection of personal data*; cooperating with the national supervisory authority, including sharing information and providing assistance in order to ensure the compliance with the provisions on the protection of personal data (Article 37(1) subsections 1–5 and 7 of the Decree). In order to fulfil the tasks, the EDPO has the power to demand that the data processors in the Church provide information about the data processing and protection; to check the activities of the data processors in the Church; to order that the legitimate state be restored in case he finds incorrect data processing; to order the controller to inform data subjects about their personal data breach; to undertake other measures necessary to ensure effective protection of personal data in the Church (Article 38 Decree). The Ecclesiastical Data Protection Officer shall develop annual reports on his activities, which shall be submitted to the Polish Episcopal Conference and published in *Akta Konferencji Episkopatu Polski* (Article 39 Decree). That is why the Supreme Administrative Court is right to state that the "power" within the meaning of CCL, granted to the EDPO's office, consists in the lack of its subjection to the orders of external entities within the scope of performance of supervisory tasks. "This way, the Ecclesiastical Data Protection Officer is provided with legal regulations that guarantee his independence in the performance of his function".

Thus, contrary to complainant who stated in the cassation complaint that, pursuant to Article 91(2) GDPR, only a state (public) entity that meets the requirements laid down in Chapter VI GDPR can be recognised as an independent supervisory authority. On the other hand, what is right is the stance of the Supreme Administrative Court, which believes that

> "The autonomy granted to the Catholic Church in the field of organisational matters, including the processing of personal data of its members, also entitles it to designate a body responsible for the protection of personal data within its own structure; and in this case it is the Ecclesiastical Data Protection Officer (…). Thus, the supervisory authority may be based within the Church structures, however, it must be obliged to submit reports and be provided with appropriate organisational facilities and the right to freely select personnel. With respect to this, the regulations of the Catholic Church laid down in the above-mentioned Decree contain relevant provisions under Article 33 and Article 39."

Taking into account the above-discussed provisions, the national supervisory authority, as well as administrative courts are right to recognise that the President of the Data Protection Office has no powers to deal with a complaint about the processing of personal data that is within the competence of the Ecclesiastical Data Protection Officer.[27] For those reasons, the charges in the cassation complaint were found groundless and the Supreme Administrative Court rightly decided to dismiss the case.

The arguments in justification of the Supreme Administrative Court's ruling has its source in the principle of respect for the autonomy and independence of churches and other religious organisations, which the Constitution of the Republic of Poland guarantees (Article 25(3) of the Constitution). It is also confirmed in recital 165 of the GDPR preamble, in accordance with which the regulation respects and does not prejudice the status under existing constitutional law of churches and religious associations or communities in the Member States, as recognised in Article 17 TFEU. It should be emphasised that, in the glossed ruling, the Supreme Administrative Court clearly recognised the right of the Catholic Church in the Republic of Poland to exercise the powers laid down in Article 91(1) GDPR and pass its own legal act concerning the protection of personal data, which is an updated and more detailed specification of the former norms. This way, the legitimacy of the issue of *Dekret ogólny w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych w Kościele katolickim* as a form of harmonisation of the former rules binding in the Catholic Church with the requirements of the GDPR within the time limit determined in Article 91(1) GDPR was confirmed in the judicature. Moreover, the Supreme Administrative Court analysed the Decree of the Polish Episcopal Conference and clearly pointed out that the regulation meets the requirements of Article 91(1) GDPR, and the Ecclesiastical Data Protection Officer is guaranteed independence in the performance of his function.

However, the ruling did not resolve all doubts, inter alia, those concerning the effectiveness of the legal measures that natural persons are entitled to in order to exercise their rights. The issue that remains unsolved is whether the right to autonomous regulation of personal data protection, granted to churches and religious

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[27] Thus: judgments of the Voivodeship Administrative Court in Warsaw: of 9 September 2019, case No. II SA/WA 865/19, Lex No. 2769411; of 16 October 2019, case No. II SA/Wa 907/19, Lex No. 3022683; of 21 November 2019, case No. II SA/Wa 1001/19, Lex No. 3047357, of 30 January 2020, case No. II SA/WA 1773/19, Lex No. 2976924; of 5 March 2021, case No. II SA/Wa 1325/20, Lex No. 3176741; of 14 May 2021, case No. I SA/Wa 2510/20, Lex No. 3209081; of 8 December 2021, case No. II SA/Wa 3437/21, Lex No. 3349877.

associations or communities by the Union legislator, covers only substantive legal issues or procedural ones as well. Pursuant to the GDPR provisions, a negative resolution of a complaint by the national supervisory authority shall be subject to examination by an independent court and the given person is entitled to a parallel mode of claiming the exercise of his rights before a court. In accordance with the Decree of the Polish Episcopal Conference, the appeal proceeding covers the possibility of filing an appeal defined as an application addressed to the author of a given administrative act, in this case to the Ecclesiastical Data Protection Officer, for cancelling or amending it, and then a hierarchical appeal addressed to the appropriate dicastery of the Roman Curia, and even an administrative court appeal filed to the Tribunal of the Second Section of the Apostolic Signatura. Thus, the question about the possibility of exercising the right to simultaneously bring a claim for compensation before a state court remains open, especially in the context of Article 82(6) in conjunction with Article 79(2) GDPR. And, is a state court bound by the EDPO's resolution or can it only take one into consideration, or is it completely insignificant? Apart from that, should the Member States stipulate an efficient measure of legal protection before a state court in case of the illegitimate application of procedures or a failure to exercise the rights by an independent supervisory authority of a church and a religious association or community? In addition, a question is raised whether entities operating within the structures of a church and a religious association or community that possesses comprehensive rules of personal data protection may be charged with offences connected with the processing of personal data within the state system of criminal law. On the one hand, if the provision of Article 91(2) GDPR clearly grants churches and religious associations or communities the right to appoint an independent supervisory authority, the consequences of this body's activities cannot be ignored at the state forum. On the other hand, if an act of the internal law of a church and religious association or community does not ensure effective protection within the scope of accepting claims under Article 82 GDPR, it would be difficult to assume that the requirements of Article 91(1) GDPR have been fulfilled.

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