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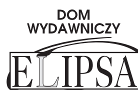

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CRIMINAL RESPONSIBILITY OF THE PERPETRATOR WITH ALTERNATING SPLIT PERSONALITY

ANNA GOLONKA*

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Abstract

The study is devoted to the issue of criminal liability of a perpetrator suffering from conversion identity disorders. Therefore, its aim is to highlight the dilemmas arising from a split personality disorder in the context of the insanity of the perpetrator of a prohibited act. Based on the example of Kenneth Bianchi (case study), the difficulties related to the diagnosis of this disorder and its consequences in relation to criminal liability are shown. In turn, the analytical-dogmatic method is used to consider the issue related to the recognition of these disorders as a specific category of causes of the condition referred to in Article 31 § 1 of the Polish Criminal Code. Regardless of this, the study also presents an approach to this issue that differs from that previously presented in the literature. The conclusions drawn on this basis also allow for filling a certain gap in the Polish literature on criminal law, which is a lack of studies on the subject matter.

Keywords: insanity, diminished sanity, Dissociative Identity Disorders (DID), alternating split personality

INTRODUCTION

The issue of criminal liability of a perpetrator suffering from mental disorders has been the subject of many studies. It is understandable that issues related to a perpetrator's insanity are first of all raised in the literature on criminal law while the characteristics of disorders that may constitute grounds for an insanity diagnosis

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are presented in psychopathology literature. On the other hand, an alternating split personality, also called "double consciousness",[1] is a disorder, which so far has received relatively little attention in the Polish literature. Criminal law seems to ignore this issue completely. Double consciousness concerns disorders, which are also referred to as "multiple personality"[2] and in specialist terminology: "dissociative (conversion) identity disorder" (hereinafter: DID). However, it is inadvisable to marginalise the issue. Contrary to the possibly erroneous assumptions that the scale of the problem is insignificant, the field-related research proves that the issue cannot be underestimated. It shows that the disorders may affect up to almost 18.3% of adults (as regards dissociative disorders) and over 3% (as regards dissociative identity disorder).[3] In the light of other studies conducted on outpatients treated in mental health centres, these values are even more alarming. They show that the percentage of adult population suffering from dissociative disorders may be even close to 41%, and a dissociative identity disorder – 7.5%.[4]

First and foremost, one should point out that even though the term "double consciousness" is reminiscent of colloquial language, it nonetheless refers to a medical condition (disease) classified nosologically. Pre-empting its closer characteristics, which shall be relevantly presented hereunder, it seems imperative to distinguish this condition from schizophrenia, which is a psychotic disorder.[5] The latter is also referred to as "split mind" (from *schízō* – 'split', and *phrḗn* – 'mind' in Greek[6]) or "simultaneous personality disorder".[7] Furthermore, schizophrenia constitutes an entirely different category of disorders,[8] a fact which is also confirmed by diagnostic classification. Similarly, it would not be correct to equate the above-mentioned disorders with dissocial disorders (classified in ICD-10 as "Disorders of adult personality and behaviour", code F60.2), which will be further supported by a relevant example.

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[1] Hacking, I., 'Double consciousness in Britain 1815–1875', *Dissociation*, Vol. 4, No. 3, pp. 134–146.

[2] Zimbardo, P., *Psychologia i życie,* Warszawa, 2012, p. 649.

[3] Cf. Tomalski, R., Pietkiewicz, I.J., 'Rozpoznawanie i różnicowanie zaburzeń dysocjacyjnych – wyzwania w praktyce klinicznej', *Czasopismo Psychologiczne – Psychological Journal*, 2019, Vol. 25, No. 1, p. 47. On the same subject matter, also: Orlof, W., Wilczyńska, K.M., Waszkiewicz, N., 'Dysocjacyjne zaburzenie tożsamości (osobowość mnoga) — powszechniejsze niż wcześniej sądzono', *Psychiatria*, 2018, Vol. 15, No. 4, pp. 229–230.

[4] Tomalski, R., Pietkiewicz, I.J., 'Rozpoznawanie…', op. cit., p. 47. Cf. also: Brand, L., Sar, V., Stavropoulos, P., Krüger, Ch., Korzekwa, M., Martínez-Taboas, A., Middleton, W., 'Separating Fact from Fiction: An Empirical Examination of Six Myths About Dissociative Identity Disorder', *Harvard Review of Psychiatry*, 2016, Vol. 24, No. 4, pp. 260–262.

[5] In the literature on psychopathology, it is suggested that schizophrenia should also be distinguished from a broader category of schizophrenia-related disorders – cf. Wciórka, J., 'Psychozy schizofreniczne', in: Bilikiewicz, A. (ed.), *Psychiatria. Podręcznik dla studentów medycyny*, Warszawa, 2009, pp. 272–275, 285–295, 307–309; and also: Hadyś, T., 'Zaburzenia psychotyczne', in: Kiejna, A., Małyszczak, K. (eds), *Psychiatria. Podręcznik akademicki,* Wrocław, 2016, pp. 147–157.

[6] Cf. the entry: "schizofrenia" in: *Encyklopedia PWN*: https://encyklopedia.pwn.pl/haslo/schizofrenia;3973032.html, accessed on 15 June 2022.

[7] Under the International Statistical Classification of Diseases and Related Health Problems, ICD-10, schizophrenia is assigned code F.20. The classification is available at: https://icd.who.int/browse10/2010/en#/F44, accessed on 20 June 2022.

[8] Wciórka, J., 'Psychozy…', op. cit., pp. 272–275.

These reservations seem necessary due to the fact that over years the doctrine of criminal law and the judicature have worked out a relatively uniform stance in relation to both schizophrenia-related disorders and the so-called "psychopathy", acknowledging that they can constitute reasons for insanity, as in case of schizophrenia; or, conversely, usually they do not even cause limitation of sanity to a considerable extent as it is the case with dissocial disorders. This position is also confirmed in courts' adjudication practice.[9]

It is also worth pointing out that the issue of personality disorders *per se* is a multifaceted one.[10] This fact has a considerable influence on the conclusions drawn in the present paper. They refer to theoretical issues related to answering the question whether dissociative identity disorders may (and under which category of reasons) determine the abolition or significant limitation of the prohibited act perpetrator's ability to recognise the meaning of that act or to control his behaviour.

ALTERNATING SPLIT PERSONALITY *AD CASU*: THE ISSUE DESCRIBED IN A NUTSHELL

Before characterising analysed disorders from the psychopathology perspective and explaining their essence, one should present the very core of the problem. To this end, the paper will refer to a particular case illustrating difficulties faced by specialists, such as expert witnesses, psychiatrists and forensic psychologists, as well as justice system bodies, in the course of each criminal proceeding. It is worth drawing attention to the factual situation presented below, as it demonstrates not only diagnostic difficulties in the context of possible simulation of dissociate identity disorders,[11] but also issues with their identification by expert forensic psychiatrists. On the other hand, from the criminal law perspective concerning an offence perpetrator's (in)sanity, this example is particularly interesting due to the rich medical documentation available *in extenso*, as well as the data collected in the course of the criminal proceeding. These provided, inter alia, really valuable (especially in the context of the issue analysed herein) biographical information. Last but not least, it is significant that the case description was provided by physicians who examined the defendant in the course of the trial many times, as well as the fact that the final conclusions turned out to be quite surprising.[12]

[9] Golonka, A., *Niepoczytalność i poczytalność ograniczona*, Warszawa, 2013, pp. 149, 491–492.

[10] Cf. e.g.: Wojtyńska, R., Małyszczak, K., 'Osobowość i zaburzenia osobowości w modelu psychologicznym', in: Kiejna, A., Małyszczak, K. (eds), *Psychiatria. Podręcznik akademicki,* Wrocław, 2016, pp. 237–257; Jasińska-Kania, A., 'Socjologiczna koncepcja osobowości', in: Krawczyk, Z., Morawski, W. (eds), *Socjologia. Problemy podstawowe*, Warszawa, 1991, pp. 78–99; Gerstmann, S., *Osobowość. Wybrane zagadnienia psychologiczne*, Warszawa, 1970, pp. 90–118.

[11] For more on the subject matter, cf. Spett, K., Szymusik, A., 'Psychopatologia szczegółowa', in: Cieślak, M., Spett, K., Szymusik, A., Wolter, W., *Psychiatria w procesie karnym*, Warszawa, 1991, pp. 352–357.

[12] Dr Ralph B. Allison and dr Martin T. Orne.

First of all, it should be pointed out that the case concerns Kenneth Alessio Bianchi, a serial killer,[13] charged with ten counts of first-degree murder, which carried a death penalty in accordance with the criminal law binding in California (USA) at the time. There are suppositions, however, that there might have been more murder victims.[14] The proceedings in the case *State v. Bianchi* (1979)[15] actually concerned charges of murder during four months in 1977–1978. The case received widespread media coverage due to extraordinary cruelty and sadism demonstrated by the perpetrator (or perpetrators)[16] who had first brutally raped women and then strangled his(their) victims. As some of the victims were found naked on hillsides in the Los Angeles area, the killer was dubbed "Hillside Strangler". The murders caused sheer panic among women in Los Angeles, especially as, in spite of intense search conducted by the LA Police Department, the murderer(s) was(were) not apprehended.[17] Only a few months later, on 11 January 1979, when two women's bodies were found in Bellingham,[18] and after their injuries and other circumstances let the police to associate them with the perpetrator's modus operandi in California, it was possible to link them to Bianchi.[19] The evidence included the then 27-year-old Bianchi's fingerprints found at the crime scene, the fact that the victims were seen in his company shortly before their disappearance, and the lack of Kenneth's solid alibi. Although Bianchi stated, inter alia, that he was attending a business meeting, and he was working in another place where he had to commute to, and within the next six weeks he presented a series of other new circumstances, each time a supposedly unshakeable alibi, none of these was a verifiable fact or they happened at a different time than Bianchi suggested. Bianchi even referred to a meeting with a person who was in fact dead, a date with a woman (who admitted during the trial that… she had simply succumbed to Bianchi's charm), and a visit to his mother and her friend, which also turned out to be a false alibi.

In the course of the proceedings the LAPD investigators collected some crucial information. The most important, for the purpose of assuming that the suspect suffered from a dissociative identity disorder, concern Kenneth Bianchi's childhood.[20]

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[13] Cf. https://pl.wikipedia.org/wiki/Kenneth_Bianchi, accessed on 25 May 2022.

[14] Ibidem.

[15] Case description according to: Orne, M.T., Dinges, D., Orne, E., 'On the differential diagnosis of multiple personality in the forensic context?', *International Journal of Clinical and Experimental Hypnosis,* 1984, Vol. 32, pp. 121–169. Facts also based on: Allison, R.B., 'Difficulties diagnosing the multiple personality syndrome in a death penalty case', *International Journal of Clinical and Experimental Hypnosis,* 1984, Vol. 32, pp. 102–117.

[16] In the course of the investigation, some doubts about the number of perpetrators were raised.

[17] The LAPD conducted the investigation because the then suspected Kenneth Bianchi had a driving licence issued in this state – cf. Orne, M.T., Dinges, D., Orne, E., 'On the differential diagnosis…', op. cit., p. 123.

[18] Bellingham – a town in the northern part of the State of Washington, US – cf. https://en.wikipedia.org/wiki/Bellingham,_Washington, accessed on 25 May 2022.

[19] Orne, M.T., Dinges, D., Orne, E., 'On the differential diagnosis…', op. cit., p. 122.

[20] The research conducted for many years irrefutably confirm that the genesis of dissociative identity disorders develop as a result of childhood trauma – cf., e.g.: Brand, B.L., Sar, V., Stavropoulos, P., et al., 'Separating Fact from Fiction…', op. cit., pp. 261–262; Ellason, J.W., Ross, C.A., Fuchs, D.L., 'Lifetime Axis I and II comorbidity and childhood trauma history in dissociative

They can be briefly summarised as follows: Bianchi was adopted when he was 3 months old. He grew up in Rochester (New York State). He was a difficult child and his adoptive mother even stated that he was "a compulsive liar from an early age"[21]. He showed no signs of mental retardation (he scored 116 in the full WAIS test). He was not particularly liked by his peers but there is no information about overt acts of aggression or violence that he could have committed at that time (apart from allegedly killing a cat and a dog, which has not been confirmed, however). His teenage rebellion took place when he was 13, and it was most probably connected with his adoptive father's death. He was not molested or subject to any form of physical or psychical violence, but he demonstrated high level of sexual activeness (bordering on promiscuity) from the age of 16, which was accompanied by inability to form stable relationships. At the age of 19 he married his high school classmate but the marriage did not last more than 8 months. When he was 26, he formed civil partnership with a young woman. Information collected in relation to his professional life turns out to be even more important. It was established in the course of the investigation that, as a young man, Bianchi was involved in theft in a shopping mall where he was employed as a security guard. When he moved to Los Angeles at the age of 24, he expanded his resumé by committing other thefts, drug trafficking, using stolen credit cards, pimping minors, contacting prostitutes, attempting blackmail, posing as a movie industry agent and even a municipal officer (namely, a California Highway Patrolman), which was the closest he ever came to his unfulfilled dream of becoming a police officer. However, as highlighted in the investigation files, in his professional life, he showed definite inconsistency rather than persistent pursuit of the chosen goal. Over a period of 9 years after finishing high school, he changed his job 12 times. At this point it seems that what turned out to be most important for the final diagnosis was his path to obtaining a degree in psychology and starting his own business as a specialist in the field ("Steve", described below). It is also not possible to ignore the deception Bianchi used in private life (e.g. he simulated suffering from cancer in order to convince his concubine that it was the reason their relationship deteriorated).

The issues turned out to be crucial to the outcome of the investigation and the conclusions drawn by the majority of clinicians who examined Bianchi.

Obviously, these concerned doubts about his mental state, and more specifically doubts about the diagnosis of the dissociative identity disorder ("multiple personality disorder", as it was generally referred to at the time).

It started with Bianchi's explanation of the lack of a confirmed alibi in the case of the two murders committed in Bellingham. It was the way in which Bianchi explained it that prompted his defence counsel, Dean Brett, to speculate that "there might be another part of Kenneth Bianchi".[22] The lawyer organised a meeting

identity disorder', *Psychiatry*, 1996, Vol. 59, pp. 255–266; Swica, Y., Lewis, D.O., Lewis, M., 'Child abuse and dissociative identity disorder/multiple personality disorder: the documentation of childhood maltreatment and the corroboration of symptoms', *Child and Adolescent Psychiatric Clinics of North America*, 1996, Vol. 5, pp. 431–447.

[21] Orne, M.T., Dinges, D., Orne, E., 'On the differential diagnosis…', op. cit., p. 125.

[22] Ibidem, p. 124 and the trial files referred to therein.

with Dr John G. Watkins, a prominent hypnotherapist.[23] It was aimed at extracting information about some supposedly forgotten facts. Dr Watkins hypnotised Bianchi (on 21 March 1979). While under deep hypnosis, "Steve" (as an alternating personality) appeared, and he not only provided a detailed description of the murders committed in Bellingham but also confirmed that he committed them together with Angelo Buono (Bianchi's adoptive cousin).[24] Of course, later, Bianchi vehemently denied knowing that there was a Steve "in him". This was the reason why the defence counsel filed a motion to the court for considering his client's insanity (insanity defence).[25] It is worth pointing out that in the course of the first hypnosis session, Steve was eager to cooperate and relatively polite, he kept his voice low and issued no threats, although he appeared to be a bit cunning (a sneering laugh). However, he showed no remorse for the rapes and murders. On the other hand, a few days later, during an interview with Dr Allison (after he suggested to Kenneth that alternating personalities are usually radically different from the basic one), Steve's behaviour changed completely. He became aggressive, posed to be a macho man, did not laugh but shouted, "hurled insults" and issued threats.[26] This peculiar evolution of Steve's personality made the clinicians examining him suspect Bianchi of simulating multiple personality, especially as, which was established in the course of the investigation, he had been deepening his knowledge of multiple personality disorders within his psychology "specialisation" (Bianchi "had a degree" in psychology).[27] In the course of one of the examinations, it was suggested to Bianchi that in case of this disorder, there are practically not two but three personalities (including two *alter*).[28] After that, "Billy" appeared. He was described as "a rather enthusiastic, cooperative and pleasant fiddler", who admitted to some deceptions and accepted full responsibility for them.[29] Moreover, in order to validate the results of the examinations, some additional methods were used in his hypnotherapy, such as: double or single hallucinations, suggested anaesthesia or source amnesia.[30] It was actually during a hypnotic regression to the age of nine when Kenneth mentioned to Dr Allison that a "Billy Thompson" was his best childhood friend.[31] On the other hand, the investigation revealed Steve's real *alter*, or more precisely, the true genesis of this identity that turned out to be Thomas Steven Walker, MA. The man was one of the candidates who responded to Kenneth Bianchi's job advertisement for a position in his private counselling practice.

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[23] It is noteworthy that this session was suggested by John Johnson, a psychologist employed in DePaul Clinic, where Bianchi was consulted at the age of 11 (ibidem, pp. 124, 132).

[24] Ibidem, p. 129 and the sources referred to therein.

[25] Ibidem, p. 130.

[26] Ibidem.

[27] This was confirmed by the evidence collected in the course of the criminal proceedings, e.g. literature on the subject matter that Bianchi collected, evidence from his interrogations, in which he admitted watching the movie "Sybil" a week before meeting Dr Watkins, and, in case of Eve White, he learned about the headaches he "started" to suffer from when his attorney, J. Brett, suggested that he might suffer from the multiple identity syndrome, ibidem, p. 132.

[28] Ibidem, pp. 141–142.

[29] Ibidem, pp. 142–143.

[30] Ibidem, pp. 134–141.

[31] Ibidem, pp. 143–144.

Mr Walker sent Bianchi copies of his diplomas confirming his qualifications, and completed post-graduate studies. Bianchi, in turn, asked the institutions that issued the documents to "forward the fully completed diplomas EXCEPT for my name [i.e. Thomas Walker] (…)", because he wanted a calligrapher to write it in a fancy script.[32] Eventually, some psychological tests conducted confirmed the clinicians' doubts about the authenticity of the multiple personality syndrome occurrence; they included: the Minnesota Multiphasic Personality Inventory (MMPI) by Dahlstrom and Welsh (1960), the California Personality Inventory (CPI) by Gough (1964), and the Rorschach (1942), as well as a differential diagnosis.[33]

Based on these tests, Dr Faerstein and Dr Allison draw concluded that: "Kenneth Bianchi is quite 'sick' in the sense of having a perverted sexual need which allows him to obtain gratification from killing women, and one may reasonably assume that this is related to the profound ambivalence".[34] Nevertheless, the main motive behind the murders was indeed sexual in the form of expected gratification. This was confirmed by other evidence, such as, e.g., his concubine's pregnancy, which significantly limited their sexual relations and coincided with the two murders in Bellingham.

On the other hand, with regard to the multiple personality diagnosis, the clinicians' conclusions were rather unanimous in stating that memory (amnestic) barriers were fundamental to Bianchi's diagnosis of DID. However, as it was eventually assumed (based on the hypnosis sessions), such disorders did not actually occur in his case.[35] It was assumed that Kenneth Bianchi "tried to erase" the crimes from his memory; for example, when "Ken" directly admitted to a psychiatrist examining him, M.T. Orne, that he "doesn't want to remember" what Steve knew about the crimes (although initially Kenneth had denied that he knew about the existence of Steve).[36] Apart from that, in the light of the diagnosis made by the clinicians examining Bianchi, the man probably suffered from a psychosexual disorder (classified in the then binding DSM-III as sexual sadism) although, as it was emphasised: "this disorder in and of itself rarely leads an individual to commit murder".[37] However, it can lead to such acts when it occurs, for example, in conjunction with the antisocial personality disorder. According to experts, this was actually the case with Bianchi,[38] as well as the reason for his "perverted sexual impulse", which along with the lack of empathy, led to the removal of moral barriers constituting a natural barriers preventing certain behaviour.

The above-presented case demonstrates exceptionally well the issues related to diagnosing DID and difficulties in distinguishing it from dissocial personality disorders.

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[32] Ibidem, pp. 147–148.
[33] Ibidem, pp. 149–158.
[34] Ibidem, pp. 159–160.
[35] Ibidem, pp. 155–158.
[36] Ibidem, p. 158.
[37] Ibidem, p. 163.
[38] Ibidem.

It is also worth highlighting that the professional, mainly American and British, literature describes numerous cases of perpetrators of prohibited acts concerning DID.[39] The need to demonstrate medical difficulties resulting from the diagnosis of conversion disorders was noticed in the Polish literature as well.[40] The analysis of those sources results in an interesting observation that *alter* does not always have to have a human form (!). Inter alia, K.M. Hendrickson, T. McCarty and J. Goodwin present examples of *animal alters*.[41] In one of the studies, they describe a case of a woman charged with, and finally convicted of, first-degree murder. The homicide was committed "by gutting".[42] The only witness present at the scene of crime testified that he first saw her kneeling next to the disembowelled victim and next she began creeping on all fours towards him, and then, when she approached the victim, she got up and walked away. The evidence proceeding confirmed that the victim's body had the impressions of the accused's teeth, as well as injuries caused by claw scratches. The accused herself did not remember the event. She was hypnotised and, while under hypnosis, she stated that she was a panther in a jungle and that she "has recently attacked and torn a warthog". She also described the scene (a jungle) and the taste of the victim's blood. Eventually, it was not possible to obtain a clear and indubitable description of the whole event. The communication with the accused was difficult because the *alter* that committed the crime was impersonal in nature and another *alter* "reported" it. There were no indications that she suffered from psychotic disorders, which in conclusion justified her sanity at the time of the crime. It is, however, the case of Billy Milligan, who was diagnosed with 24 different personalities, that was undoubtedly the most famous and had the most widespread media coverage.[43] Other examples of perpetrators suffering from DID described in the literature only confirm how difficult it is to diagnose this disorder.[44] In each of them, there is invariably a dilemma related to the sanity of the perpetrator of a crime. However, before this issue is raised in relation to the domestic system of criminal law, it seems necessary

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[39] Cf. e.g.: Stuckenberg, C.F., 'Comparing Legal Approaches: Mental Disorders as Grounds for Excluding Criminal Responsibility', *Bergen Journal of Criminal Law and Criminal Justice*, 2016, Vol. 4, No. 1, pp. 48–64; Behnke, S., Sinnott-Armstrong, W., 'Criminal Law and Multiple Personality Disorder: the Vexing Problems of Personhood and Responsibility', *Southern California Interdisciplinary Law Journal*, 2001, Vol. 10, No. 2, pp. 277–296; Hacking, I., 'Double consciousness in Britain…', op. cit., pp. 134–143.

[40] Cf. Rottermund, J., Knapik, A., Myśliwiec, A., 'Zaburzenie konwersyjne – opis przypadku', *Journal of Ecology and Health*, 2012, Vol. 16, No. 1, pp. 39–46.

[41] Hendrickson, K.M., McCarty, T., Goodwin, J., 'Animal alters: case reports', *Dissociation*, 1990, Vol. 3, No. 4, pp. 218–221.

[42] Ibidem, pp. 219–220.

[43] It is worth pointing out that the case of Billy Milligan also inspired movie producers, e.g. of the "Split" (2016), directed by M. Night Shyamalan – cf. https://www.imdb.com/title/tt4972582/trivia?item=tr3410045, accessed on 21 May 2022, and writers, e.g. Keyes, D., *Człowiek o 24 twarzach* [original title: *The minds of Billy Milligan*], Warszawa, 2015 (ISBN: 9788380320413).

[44] Cf. e.g.: Perr, I.N., 'Crime and multiple personality disorder: A case history and discussion', *The Bulletin of the American Academy of Psychiatry and the Law*, 1991, Vol. 19, No. 2, pp. 203–214 and a description of the case in which the perpetrator (ultimately diagnosed with the Dissociative Identity Disorder) had been formerly diagnosed with 15 different disorders, including psychoses.

to indicate the essence of the disorders in question from the psychopathological point of view, based on the current state of medical knowledge. It will allow for a more reliable approach to the criminal and legal issue raised in this paper.

ALTERNATING SPLIT PERSONALITY: THE ESSENCE OF DISSOCIATIVE IDENTITY DISORDERS

First of all, it should be pointed out that the issue of dissociative identity disorders was discussed in the Polish literature on psychiatry over half a century ago, and it was described as alternating split personality (in Latin: *personalitas duplex alternans*), which "classically occurs in twilight states".[45] On the other hand, the International Statistical Classification of Diseases and Related Health Problems – 10, Rev., ICD-10,[46] which is currently binding in Poland, classifies the disorder as a separate nosological unit marked with a diagnostic code No. F44.8.[47] Thus, DID is included within dissociative (conversion) disorders (F44), and more precisely, "other dissociative (conversion) disorders – multiple personality (F44.81)". This way, ICD-10 clearly distinguishes those disorders from other personality disorders, especially from those classified as dissocial personality disorders (F60.2) and occurring in the form of amoral, antisocial, asocial, psychopathic or sociopathic personality.

It is also worth highlighting that in June 2018, the 11th, revised version of the former classification entered into force.[48] It establishes significant changes in the classification of personality disorders, including e.g. direct differentiation of personal disorders and "other features related to them" from dissocial (antisocial) disorders.[49] Moreover, within the former category, ICD-11 distinguishes not only dissocial personality disorders but also intrusive thoughts-related dissociative disorders as another form of multiple personality disorders.[50]

On the other hand, the American DSM-5 (Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition)[51] determines 10 subcategories of identity disorders

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45 Bilikiewicz, T., *Psychiatria kliniczna*, Warszawa, 1973, p. 38, and also: Falicki, Z., Wandzel, L., *Psychiatria sądowa dla studentów Wydziału Prawa*, Białystok, 1990, p. 37.

46 On maintaining the application of ICD-10 in Poland and an implementation period for the next revised version of ICD, see the Minister of Health's reply of 14.04.2021 to a petition of the Citizens' Initiative as an "E-petition" [PET/IV/38/21] of 12 April 2021 (the Minister's of Health reply no.: DLU.055.10.2021.EW).

47 Polish language version of the Classification is available at: http://lista.icd10.pl//, accessed on 20 June 2022.

48 Classification ICD-11 is available at: https://icd.who.int/browse11/l-m/en, accessed on 21 June 2022. For more on the differences between ICD-10 and ICD-11, cf. Krawczyk, P., Święcicki, Ł., 'ICD-11 vs. ICD-10 – przegląd aktualizacji i nowości wprowadzonych w najnowszej wersji Międzynarodowej Klasyfikacji Chorób WHO', *Psychiatria Polska*, 2020, Vol. 54, No. 1, pp. 7–8.

49 Cf. Gaebel, W., Zielasek, J., Reed, G.M., 'Zaburzenia psychiczne i behawioralne w ICD-11: koncepcje, metodologie oraz obecny status', *Psychiatria Polska*, 2017, Vol. 51, No. 2, pp. 174–177.

50 Ibidem, p. 182.

51 Currently binding classification developed by the American Psychiatric Association.

depending on the factors determining possible changes in human personality.[52] Thus, Dissociative Identity Disorder (DID) assumes recognition of the following symptoms: the presence of two or more distinct identities (or personality states), each of which has "its own relatively stable pattern of perceiving, relating to and thinking about the environment and oneself", amnesia, i.e. oblivion, memory lapses concerning e.g. events, people, dates or places, problems with adaptation and difficulties in functioning in the main areas of life, caused by the disorder. Another requirement for the above-mentioned symptoms is that they should not be part of standard cultural background or religious practices, they should not result from the use of drugs, and they should not constitute a symptom of another disorder (e.g., one manifested by seizures involving oblivion of events).[53] Thus, in case of people suffering from DID, not only "every personality has their own separate identity, name and specific patterns of behaviour",[54] but also they are usually very distinctive in many ways (e.g., they may differ in gender, sexual orientation, IQ, and age; what is significant, one of them is almost always a child).

In this part of the paper, one should address another issue, namely certain similarities (once again, despite full classification distinction), characterising both behaviour of a perpetrator suffering from dissocial personality disorder, and quite frequently also acts committed by a perpetrator with a diagnosed DID. It should be pointed out here that, understandably, these characteristics do not concern any parameterisation of a perpetrator's *modus operandi* (since this is not possible *in abstracto*), but rather certain features of a perpetrator determined based on the acts committed, which may be of critical importance in the context of diagnostic difficulties, and in particular justify a (not necessarily inaccurate) conviction that a perpetrator's personality is irregular. There can be no doubt that a person suffering from dissocial disorders, the so-called psychopath,

> "is an impulsive, irresponsible, hedonistic, »two-dimensional« person who lacks the ability to experience standard, emotional components of interpersonal behaviour, i.e. the sense of guilt, remorse, empathy, and a genuine emotional attitude towards the wellbeing of other people (…), that his social and sexual relationships with others remain superficial and exploitative. A psychopath's judgements are shallow and he seems incapable of postponing satisfying his immediate needs regardless of the consequences for him and other people".[55]

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[52] Cf. Ruben, D.H., *Behavioral Guide to Personality Disorders (DSM-5)*, Springfield – Illinois, 2015, pp. 3–6.

[53] McDavid, J.D., 'The Diagnosis of Multiple Personality Disorder', *Jefferson Journal of Psychiatry*, 1994, Vol. 12, No. 1, pp. 29–42, as well as: Tomalski, R., Pietkiewicz, I.J., 'Rozpoznawanie i różnicowanie…', op. cit., pp. 43–51.

[54] Zimbardo, P., *Psychologia i życie…*, op. cit., p. 649.

[55] Cf. Cierpiałkowska, L., Soroko, E., *Zaburzenia osobowości. Problemy diagnozy klinicznej*, Poznań, 2014, p. 217 (based on Hare's characteristics). Cf. also: Hare, R.D., *Psychopaci są wśród nas*, Kraków, 2021, pp. 52–79; Radochoński, M., *Osobowość antyspołeczna*, Rzeszów, 2000, p. 121.

The above-described case of Kenneth Bianchi is the most striking example of this phenomenon. Yet another characteristic of such perpetrators is their inclination to breach the legal order.[56] This similarity also applies to perpetrators who suffer from DID and for whom at least one of the alternating personalities in almost each case demonstrates a high level of aggression with a tendency to behave in the way going beyond the adopted moral and legal norms, and sometimes even commits brutal and sadistic acts.[57] This may be explained by the genesis of DID, associated with past traumatic experiences (usually in childhood), in particular various forms of physical and psychic abuse.[58]

SANE OR INSANE: THE ISSUE OF CRIMINAL LIABILITY OF PERPETRATORS SUFFERING FROM DISSOCIATIVE IDENTITY DISORDERS

The above-presented case of Kenneth Bianchi, as well as other cases concerning perpetrators suffering from DID, which were mentioned in the context of diagnostic difficulties, demonstrate that it is necessary to ask a fundamental question about sanity, or rather the possibility of recognising DID as grounds for a perpetrator's insanity. It should be reminded that in the light of Article 31 § 1 CC, criminality of an act is excluded (due to the circumstances excluding fault), when the person concerned is incapable of recognising the significance of the act or controlling their conduct due to a mental illness, mental deficiency or other mental disturbance. This, in turn, renders it necessary to consider two issues. Firstly, the issue that can be considered *in abstracto* at all, namely determining whether dissociative identity disorders, bearing in mind the above-indicated diagnostic criteria, can be recognised as mental illness or "other mental disturbance", referred to in Article 31 § 1 CC. The second issue is whether, in case of a perpetrator with a diagnosed DID when the prohibited act was committed by his *alter*, it should necessary to exclude on a case-by-case basis the (fully) retained ability to recognise the significance of the act or to control one's conduct if the basic personality is not aware of this behaviour.

With regard to the first dilemma, it seems crucial to indicate what a "mental illness" is within the meaning of Article 31 § 1 CC. Unfortunately, this concept

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[56] Radochoński, M., *Osobowość…*, op. cit., p. 121; Lewis, D.O., Yeager, C.A., Swica, Y., Pincus, J.H., Lewis, M., 'Objective Documentation of Child Abuse and Dissociation in 12 Murderers With Dissociative Identity Disorder', *American Journal of Psychiatry*, 1997, Vol. 154, No. 12, pp. 1703–1709.

[57] Webermann, A.R., Brand, B.L., 'Mental illness and violent behavior: the role of dissociation', *Borderline Personality Disorder and Emotion Dysregulation*, 2017, Vol. 44, No. 2, pp. 1–13. Available (together with the list of studies) at: https://bpded.biomedcentral.com/articles/10.1186/s40479-017-0053-9, accessed on 13 June 2022, and also: Saks, E.R., 'Multiple Personality Disorder and Criminal Responsibility', *Southern California Interdisciplinary Law Journal*, 2001, Vol. 10, No. 2, pp. 186–188.

[58] Cf. Helios, J., Jedlecka, W., *Dysocjacja jako hard case w systemie prawa,* Wrocław, 2015, pp. 21–30.

is not included in the dictionary of psychopathological terminology. According to professional literature, the term "mental illness" covers

> "(…) all mental disorders that are of interest to psychiatry due to the need for treatment; a psychical illness is usually distinguished for practical reasons related to the introduction of the rules of medical, social or legal proceeding (rights or limitations, privileges), differentiated in relation to people meeting the established criteria for a mental illness (e.g. in Poland, people suffering from mental illnesses have wider access to free healthcare services than most people with mental disorders, but only people suffering from mental illnesses can be treated without their consent). (…) Classifying certain disorders as mental illnesses is often connected with stereotypes and prejudices; that is why more and more often there are proposals to give up the use of this term and adopt a less burdensome term deprived of negative connotations: mental disorder".[59]

Therefore, the most convincing position is that as "(…) the term »disorder« is used for the entire classification",[60] it should be used in general "(…) to avoid serious doubts about the term »disease« or »illness«".[61] On the other hand, the latter is used only "for the purpose of indicating the existence of a set of clinically recognisable symptoms or behaviour connected in most cases with distress and disturbance to personal functioning".[62] At the same time, the basic division of mental illnesses into psychotic and non-psychotic disorders remains relevant.[63] Taking into account the essential characteristics of an "illness", namely its relatively permanent nature, dynamic course, as well as a certain process related to its development,[64] and at the same time the typical DID symptoms, in particular quantitative changes in consciousness in the form of memory lapses (amnesia),[65] one can reasonably assume that it is a sign of a mental illness rather than a certain (most often but not necessarily) short-term state. Without question, in this case, it concerns a non-psychotic disorder.[66] However, it is worth noting that some authors proposed to consider DID within the category of "other mental disturbance" within the meaning of Article 31 § 1 CC.[67]

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[59] Hajdukiewicz, D., *Zagadnienia psychiatrii sądowej. Cz. 1. Podstawy prawne i medyczne*, Warszawa, 2016, p. 21; Brand, B.L., Sar, V., Stavropoulos, P., et al., 'Separating Fact from Fiction…', op. cit., pp. 261–262.

[60] Pużyński, S., 'Choroba psychiczna -- problemy z definicją oraz miejscem w diagnostyce i regulacjach prawnych', *Psychiatria Polska*, 41(3), pp. 299–308.

[61] Ibidem.

[62] Ibidem.

[63] Cf. Bilikiewicz, A., Lewandowski, J., Radziwiłłowicz, P., *Psychiatria – repetytorium,* Warszawa, 2003, p. 18; Hajdukiewicz, D., *Zagadnienia psychiatrii sądowej*…, op. cit., p. 20.

[64] Cf. *Encyklopedia popularna PWN. Edycja 2011*, Warszawa, 2011, p. 179.

[65] Hajdukiewicz, D., *Zagadnienia psychiatrii sądowej*…, op. cit., p. 299, similarly: Falicki, Z., Wandzel, L., *Psychiatria sądowa*…, op. cit., p. 56. Differently: T. Przesławski, who classifies the twilight state as qualitative disorders of consciousness, idem, *Psychika. Czyn. Wina,* Warszawa, 2008, pp. 100–101.

[66] Cf. Bilikiewicz, A., Lewandowski, J., Radziwiłłowicz, P., *Psychiatria – repetytorium,* Warszawa, 2003, p. 18; Hajdukiewicz, D., *Zagadnienia psychiatrii sądowej*…, op. cit., p. 20.

[67] Thus, e.g. Helios, J., Jedlecka, W., *Dysocjacja*…, op. cit., pp. 86–87.

On the other hand, with regard to psychological consequences,[68] it is important to determine whether a perpetrator's ability to recognise the significance of an act or to control his conduct has been prevented or limited (and to what extent), and whether this person (the basic identity) is capable of controlling the behaviour of his *alter*. The representatives of clinical psychiatry who specialise in the treatment of people suffering from dissociative identity disorders indicate that it is possible at a certain stage of "integration", which is defined as "(…) combining *alter ego* into one coherent whole together with one hierarchy of values and a shared stock of memories".[69] Then, at least the dominant personality has the ability to understand the behaviour of the *alter* and to "control" it; and when the process of "fusion" also includes the basic personality, it seems that one can rationally assume the offender's sanity is maintained. Another thing is that, undoubtedly, "Not focussing on many personalities but on the memory barriers dividing them is the key to understand DID"[70]; and overcoming a specific barrier to "remembering",[71] with which we have to deal in case of this illness, is a success.

CONCLUSIONS AND PROPOSALS *DE LEGE FERENDA*

In conclusion, the above-presented dilemmas make conversion identity disorders an issue that deserves attention not only from the judicial-psychiatric but also criminal law perspective. According to the research mentioned in the Introduction and supported with examples, neither the importance of the issue, nor the scale of the phenomenon is as trivial as it might seem on the surface. At the same time, they allow for concluding that, to a considerable extent, dissociative identity disorders may be a source (genesis) of insanity or diminished sanity. In this regard, recognition of the disorders as a "mental illness" or "other mental disturbance", referred to in Article 31 § 1 CC, depends on the adopted interpretation of the terms. In view of their highly indefinite nature – from the psychopathological (as in case of a "mental illness") and criminal law perspective (as in case of "other disruptions to psychical activities"[72]) – the category of reasons for

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[68] The term, in other words "psychological part" of the statutory description of insanity, is used to refer to the "ability to recognise the significance of an act or to control one's behaviour" – cf. e.g.: Gałecki, P., Szulc, A., *Psychiatria*, Wrocław, 2020, p. 421; Budyn-Kulik, M., in: Mozgawa, M. (ed.), *Prawo karne materialne. Część ogólna*, Warszawa, 2020, p. 332; Barczyk, A., *Psychologia, psychiatria i prawo wobec podsądnych zaburzonych psychicznie*, Mysłowice, 2006, p. 26; Tarnawski, M., *Zmniejszona poczytalność sprawcy przestępstwa*, Warszawa, 1976, p. 70. In the literature on criminal law, they are also referred to as psychological consequences or "psychological effect" – cf. Lachowski, J., in: Konarska-Wrzosek, V. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, pp. 197–198.

[69] Cf. Oxnam, R.B., *11 x ja – moje życie z osobowością mnogą*, Kraków, 2008, p. 71.

[70] Ibidem, p. 277.

[71] Ibidem, p. 283.

[72] The criminal law-related aspect of the features concerns covering the so-called pathological and (optionally also) the so-called physiological aspects with it; for more on the issue, cf. Golonka, A., *Niepoczytalność…*, op. cit., pp. 123–150, as well as: idem, '»Other disturbances of mental function« as a cause of the insanity of the offender in light of the Polish Criminal Code – questions and concerns', *Journal of Forensic, Legal & Investigative Sciences*, 2016, Vol. 2, Issue 1, pp. 2–5.

insanity attributed to these disorders will depend on particular meaning assigned to them. It seems that apart from the above-mentioned need to "classify" them under an appropriate category of reasons, i.e. stating that the disorders constitute a "mental illness" or "other mental disturbance", it is also necessary to assess the state of a perpetrator's consciousness, including his basic personality and his *alter*, conducted *in concreto*. Naturally, it does not concern the obvious fact that in each case the conclusion regarding the incapability to recognise the significance of an act or to control one's conduct, based on the expert psychiatrists' opinions, is related to a particular perpetrator and an act he commits. Rather, it concerns the fact that, unlike in case of e.g. psychotic disorders, which as a rule constitute (or more precisely, can be recognised as) the reason for such incapability as far as the DID is concerned, it is not possible to draw such a conclusion. At the same time, unlike in the case of the absolute majority of personality disorders, in particular ones the etiopathogenesis of which does not show changes in the CNS, also (full) sanity of a perpetrator suffering from DID cannot be "assumed". The specificity of the disorders in which *alter* differences and qualitative changes in consciousness are important allows for drawing such a conclusion. It is not possible to exclude even a scenario that an alternating personality (at the same time "responsible" for the criminal act) will suffer from a psychotic disorder and a prohibited act (of course, attributed to a given person and not his *alter*) will be also committed in this state. Other circumstances are no less important, including the pivotal issue of person's awareness regarding the existence of his *alter*, as well as acts committed by the alternating personality. When the awareness is maintained (even with limited control and influence on the behaviour of his *alter*), it seems reasonable to assume reduced sanity.

On this occasion, it is worth proposing to abandon the use of the term "mental illness" since, as it was indicated above, it actually constitutes a legal rather than psychiatric term (and, at the same time, it is believed to be stigmatising[73]), and to substitute it with an adequately defined term referring to mental disorders. The present wording "or other disruptions" raises doubts, as it could suggest that a mental illness is a "disruption" to psychical activities. Meanwhile, in the literature on psychiatry, it is emphasised that a mental illness is one "the symptoms of which are psychotic disorders", and in relation to other disruptions, "psychiatrists most often use the term of mental disorders; they include, inter alia, personality disorders, neurotic disorders, use of psychoactive substances and addictions, milder forms of dementia, and eating disorders)".[74] Therefore, determining the origin of insanity (psychiatric reasons) requires, at minimum, referring to psychotic disorders or other psychiatric disorders. At the very least, relying solely on this "scheme" for determining insanity does not seem to be satisfactory. It has been emphasised in psychopathology for years that this science in fact covers symptoms and syndromes,[75] and "the description of nosological units is a construction that

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[73] Cf. Świtaj, P., 'Rola diagnozy psychiatrycznej w procesie stygmatyzacji osób z zaburzeniami psychicznymi', *Postępy Psychiatrii i Neurologii*, Vol. 18, Issue 4, 2009, pp. 377–386.

[74] Pierzgalska, K., Woźniak, A., 'Zagadnienia prawne dotyczące postępowania leczniczego', in: Jarema, M. (ed.), *Psychiatria,* Warszawa, 2016, pp. 641–642.

[75] Cf. Spett, K., Szymusik, A., 'Psychopatologia szczegółowa', in: Cieślak, M., Spett, K., Szymusik, A., Wolter, W., *Psychiatria w procesie karnym*, op. cit., pp. 145–146.

constitutes an abstract model of a certain fragment of reality. In clinical diagnosis, the model plays a special role, because it introduces an objective procedure to describe disorders, determines the exponents of individual illnesses, and moreover, indicates the mechanism explaining human functioning under particular biological and psychological conditions".[76] It may, therefore, be suggested that Article 31 § 1 CC should be amended in this regard and the provision should be given at least such wording: "*A person who because of a psychotic disorder, intellectual development disorder or another mental disorder diagnosed in accordance with the current state of knowledge is, in the course of an act, unable to recognise its significance or to control his conduct does not commit a crime*." The proposal takes into account terminology adopted in ICD-11 for the purpose of classifying intellectual development disorders,[77] and at the same time is not limited to the classification-related diagnosis (i.e. based only on the Classification of Diseases and Health Problems),[78] also allowing it to be supplemented with the functional diagnosis (ICF).[79] Moreover, it aims to approach causes of insanity in a way that also covers syndromes and co-occurring disorders. Finally, what is most important from the criminal law perspective, it will help to avoid difficulties that may arise due to the need to assign a particular disorder to one of the categories of the reasons for insanity (i.e. a mental illness or "other mental disturbance", as it is in the present legal state). Dissociative identity disorder, which is discussed in this paper, demonstrates the issues in this regard.

In the current legal state, however, significantly diminished sanity (Article 31 § 2 CC) does not raise any of such issues. Although the criminal law literature sometimes points to the fact that sanity is also determined based on a combined method and that it is necessary to infer the psychiatric (biological) component from Article 31 § 1 CC,[80] with the justification referring to the statutory systematics,[81]

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[76] Panasiuk, J., 'Dysocjacja czy neurodegeneracja Problemy diagnozy, leczenia i terapii', *Logopedia Silesiana*, 2017, Vol. 6, p. 28.

[77] Cf. ICD-11; 6A00.0-6A00.4: https://icd.who.int/devct11/icd11_mms/en/beta, accessed on 7 February 2023.

[78] For justification on distinguishing psychotic disorders, cf. Gaebel, W., Zielasek, J., Reed, G.M., 'Zaburzenia psychiczne i behawioralne…', op. cit., pp. 171–178.

[79] Cf. Kurzeja, T., *ICD-11 nowa, międzynarodowa klasyfikacja chorób.* The article is available at: https://ppp.edu.pl/2019/07/14/icd-11-nowa-miedzynarodowa-klasyfikacja-chorob/, accessed on 7 February 2023; Łoza, B., Heitzman, J., Kosmowski, W., 'W kierunku nowej klasyfikacji zaburzeń psychicznych', *Psychiatria Polska*, 2011, Vol. 45, No. 6, pp. 789–796, as well as: "Międzynarodowa Klasyfikacja Funkcjonowania, Niepełnosprawności i Zdrowia" (*International classification of functioning, disability and health, ICF),* published by WHO in 2001, available at: https://www.who.int/standards/classifications/international-classification-of-functioning-disability-and-health, accessed on 7 February 2023.

[80] Zoll, A., in: Zoll, A. (ed.), *Kodeks karny. Część ogólna. Tom I. Część I. Komentarz do art. 1–52,* Warszawa, 2012, p. 531; Gierowski, J.K., Paprzycki, L.K., in: Paprzycki, L.K. (ed.), *Nauka o przestępstwie. Wyłączenie i ograniczenie odpowiedzialności karnej. System Prawa Karnego. Tom 4*, Warszawa, 2013, p. 543; Budyn-Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz aktualizowany*, *LEX/el.*, 2022, Article 31, thesis 12; Warylewski, J., *Prawo karne. Część ogólna,* Warszawa, 2020, p. 409. For a different approach to the determination of the method of regulation, cf. Królikowski, M., Zawłocki, R., *Prawo karne,* Warszawa, 2020, p. 299; Gardocki, L., *Prawo karne*, Warszawa, 2021, p. 144.

[81] Zoll, A., in: *Kodeks karny. Część ogólna*…, op. cit., pp. 543–544.

it is, nonetheless, also true that Article 31 § 2 CC is actually "silent" on the matter.[82] Therefore, it is more reasonable to assume that in this instance the legislator refrained from indicating category of disorders resulting in significant limitation of the ability to recognise the significance of an act or to control one's conduct. Thus, it may be assumed that the criminal law-related nature of this state is constituted only by the consequences in the psychological sphere,[83] without the need to interpret them narrowly, which is desired in relation to insanity due to the consequences in the area of criminal liability (exclusion of criminality of an act).[84]

Such an approach justifies the conclusion that, in the light of the current state of knowledge, dissociative identity disorders can undoubtedly constitute the reason for significant limitation of the ability to recognise the significance of an act or to control one's conduct. On the other hand, refraining from their classification as a category of reasons laid down in Article 31 § 1 CC leads to a conclusion that DID *per se* does not result in the elimination of sanity, unless this is justified by the co-occurrence of another psychiatric disorder resulting in the inability to recognise the significance of an act or to control one's conduct (e.g. a psychotic disorder).

The issue of simulating DID is another matter. The analysis of literature allows to conclude that the case described in this paper was not an isolated one.[85] This not only exacerbates the difficulties in diagnosing a perpetrator suffering from DID but also quite often becomes, rather wrongly, a seedbed for polemics on the insanity of a perpetrator of a crime.[86] The issue presented in this way gives rise to a final reflection that alternating split personality is a serious disorder that may cause considerable difficulties in the judicial practice and becomes a real challenge to the theory of criminal law.

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[82] Article 31 § 2 CC stipulates that: "If at the time of the commission of an offence the ability to recognise the significance of the act or to control one's conduct was diminished to a significant extent, the court may apply an extraordinary mitigation of the penalty" (consolidated text, Journal of Laws of 2022, item 1138, as amended).

[83] Cf. Golonka, A., *Niepoczytalność…*, op. cit., pp. 252–256.

[84] Ibidem, pp. 130–150.

[85] Cf. Dinwiddi, S.H., North, C.S., Yutzy, S.H., 'Multiple personality disorder: Scientific and medicolegal issues', *The Bulletin of the American Academy of Psychiatry and the Law*, 1993, Vol. 21, No. 1, pp. 74–75.

[86] Cf. e.g. Behnke, S., Sinnott-Armstrong, W., 'Criminal Law and Multiple Personality…', op. cit., pp. 277–296.

Bilikiewicz, A., Lewandowski, J., Radziwiłłowicz, P., *Psychiatria – repetytorium*, Warszawa, 2003.
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INTERVENTION-RELATED SELF-DEFENCE

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ABSTRACT
The scholarly and research-focused article examines the content of Article 25 §§ 4 and 5 CC, which was transferred to the new Article 231b §§ 1 and 2 CC of Chapter XXIX of the Criminal Code by means of Act of 20 February 2015 amending the Criminal Code Act and Certain Other Acts. The regulation concerns the intervention-related self-defence, wherein a person acting in self-defence and repelling an attack on another's good protected by law, while simultaneously protecting public security or order, is granted the same legal protection as public officials. The article analyses the genesis and development of this defence, its legal nature, objectives, conditions for application, the scope of criminal law protection for a person acting within the intervention-related self-defence, the exclusion of this protection, and the relationship between Article 231b § 1 and Article 217a CC. The primary scientific objective is to evaluate the legitimacy of its introduction to the Criminal Code and the correctness of defining the premises for its application and its scope. The aim of the considerations is to demonstrate that this measure, despite the negative assessment of its introduction to the Criminal Code in the doctrine, can play a vital role in ensuring security and public order.

Keywords: attack, crime, criminal law protection, intervention, public official, public order, public security, self-defence

INTRODUCTION

The Act of 20 February 2015 amending the Criminal Code Act and Certain Other Acts[1] introduced Article 231b, containing provisions of Article 25 §§ 4 and 5 CC, previously repealed. It ensures the same legal protection for an individual acting in self-defence, repelling an attack on another's good protected by law, while also

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[1] Journal of Laws of 2015, item 396, hereinafter referred to as the 2015 Amendment.

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protecting security and public order, as for a public official. Given the regulation's transfer from one Chapter of the Criminal Code to another, it is crucial to assess this legislative step, understand its nature and grounds for its maintenance, and clarify doubts about its components. The primary scientific aim of this article is to evaluate the rationale for this measure introduction to the Criminal Code, and the accuracy of defining prerequisites for its application and scope. The objective is to demonstrate that, despite negative assessment of its introduction in doctrine, the measure can play a significant role in ensuring security and public order. The research hypothesis presumes that the introduction of this type of self-defence is justified and was correctly regulated in Chapter XXIX of the Criminal Code. Its verification is conducted mainly using a formal dogmatic method analysing the legal text alongside hermeneutic and reasoning methods. The research findings are original, as they summarise and assess the doctrine's *acquis*. While the research primarily covers national law, it could be useful elsewhere as it concerns an original measure that goes beyond traditional interpretation of self-defence. This paper holds significant scientific relevance due to its in-depth dogmatic analysis and extensive theoretical thought. It also has practical importance, showing directions of interpretation for prerequisites applying the measure and its other elements, potentially contributing to its uniform application.

GENESIS AND DEVELOPMENT OF INTERVENTION-RELATED SELF-DEFENCE

As mentioned above, this measure was not regulated in the Criminal Code by means of the 2015 Amendment, but was introduced to the Criminal Code by Act of 26 November 2010 amending Criminal Code Act and Act on the Police,[2] which added the following two paragraphs to Article 25:

> "§ 4. A person who uses self-defence to repel an attack on someone else's good protected by law and protects security or public order shall be entitled to legal protection stipulated for public officials.
> § 5. The provision of § 4 shall not be applicable if an attack perpetrator's act addressed against a person repelling it infringes only reverence and dignity of that person."

The 2015 Amendment transferred the provisions in extenso to Chapter XXIX titled "Offences against operations of the state institutions and local self-government" and placed there as a new editorial unit: Article 231b §§ 1 and 2. The explanatory memorandum of the bill indicated that: "Article 25 stipulates the lack of criminal liability (countertype) or consequences of exceeding the limits of the countertype concerning a person acting in self-defence and not with regard to an aggressor's liability and its grounds. That is why it is proposed to transfer the regulation to an

[2] Journal of Laws of 2010, No. 240, item 1602, hereinafter referred to as the 2010 Amendment.

adequate section of the system of Criminal Code, i.e. to introduce a new provision under Article 231b CC".[3]

In literature, the change of the placement of the provision is assessed divergently. The authors who dispute this legislative step believe it was unnecessary and merely technical.[4]

Its positive assessments are linked, inter alia, to challenges faced during legislative work on the 2010 Amendment bill, questioning the grounds for placing the provision in Article 25 CC and suggesting to place it in Chapter XXIX Criminal Code.[5] It was recognised that Article 25 defined a countertype of self-defence and exceeding its limits, i.e. it concerned criminal liability of a person repelling an attack and not an aggressor's criminal liability.[6] With this in mind, it is emphasised that the authors of the bill were correct in recognising that the regulation should not be placed in Article 25 CC.[7] The current location of the norm is viewed by some as superior to its former placement in Article 25 CC, which was seen as a technical legislative error, since it failed to define the characteristics and consequences of exceeding the self-defence limits.[8]

Recognising the validity of this reasoning, it is still important to note that, from a legislative perspective, the placement of Article 231b in Chapter "Offences against operations of the state institutions and local self-government" is unfortunate.[9]

Taking into account that the regulation provides offers legal protection to persons acting in self-defence and in public interest equivalent to that of public officials, the placement of the regulation within the chapter that includes provisions concerning offences against, inter alia, such persons is appropriate. The placement of intervention-related self-defence in Article 231b CC is more than a straightforward legislative manoeuvre; as discussed below, it provides crucial interpretive guidance on the legal nature of the regulated measure.

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[3] Justification for the governmental bill amending Act: Criminal Code and certain other acts (print no. 2393), p. 27, https://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=2393, accessed on 15 January 2023.

[4] Mozgawa, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2019, p. 775; Guzik-Makaruk, E.M., Pływaczewski, E.W., in: Filar, M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, p. 1394.

[5] *Opinion of the Criminal Law Codification Committee on the bill amending Criminal Code Act and Act on the Police* (version of 26 March 2010), p. 3; Sakowicz, A., 'Opinia prawna o zmianie ustawy – Kodeks karny oraz ustawy o Policji z dnia 8 czerwca 2010 r.', (print 2986), p. 6.

[6] Zoll, A., 'Prace nad nowelizacją przepisów części ogólnej kodeksu karnego', *Państwo i Prawo*, 2012, No. 11, pp. 8–9.

[7] Wiak, K., 'Zmiany w części szczególnej Kodeksu Karnego wprowadzone nowelizacją z 20 lutego 2015 r.', *Studia Prawnicze KUL*, 2015, p. 65.

[8] Majewski, J., *Kodeks karny. Komentarz do zmian 2015,* Warszawa, 2015, pp. 43–44 and 471; Zoll, A., in: Zoll, A. (ed.), *Kodeks karny. Część ogólna. Komentarz do art. 1–116 k.k.*, t. I, Warszawa, 2012, p. 474; Barczak-Oplustil, A., Iwański, M., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny. Część szczególna. Komentarz do art. 212–277d*, Vol. II, Part II, Warszawa, 2017, p. 288.

[9] Janczukowicz, K., 'Kodeks karny. Omówienie zmian wprowadzonych ustawą z dnia 20 lutego 2015 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (Dz.U.2015.396)', *LEX/el.*, 2015.

LEGAL NATURE OF INTERVENTION-RELATED SELF-DEFENCE

In literature on both the repealed Article 25 §§ 4 and 5 CC[10] and Article 231b CC,[11] the measure is identified as intervention-related self-defence. This terminology is justified by the fact that it pertains to a person who intervenes in defence of another's attacked good protected by law. The word 'intervention' means an act of 'getting involved in a situation' or 'exerting influence in order to make something happen'.[12]

The change of its placement in the Criminal Code does not alter the essence of the measure, because it still involves action in necessary defence of the good protected by law that does not belong to the intervening individual and the protection of security or public order. The unchanged wording of Article 231b CC compared to Article 25 §§ 4 and 5 CC indicates that the provision relocation does not affect its legal nature. The new placement of the provision in Chapter XXIX CC confirms prioritisation of the intervening person's legal protection, should they commit a criminal act in the course of defensive activities. It is not a new countertype and the form of self-defence is constrained by: firstly, the limitation to repelling an attack on someone else's, not the intervening person's, good protected by law; and secondly, the requirement that a defensive activity also protects public security or order. The repealed Article 25 §§ 4 and 5 CC also did not provide grounds for recognising it as a new type of self-defence, and its erroneous interpretation as such in literature, i.e. as intervention-related necessary defence, was a defence of those who do not undertake activities to defend themselves, but rather act for the benefit of others or a collective entity, attributing a special social dimension to their conduct.[13]

AIMS OF INTERVENTION-RELATED SELF-DEFENCE

The purpose of introducing this measure to the Criminal Code, which also serves as its aim, is clearly articulated in the explanatory memorandum for the 2010 Amendment bill, in which it is emphasised that it is being introduced "to support those citizens who, despite not being obligated to respond to observed breaches of

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[10] Palka, P., 'Interwencyjna obrona konieczna (art. 25 § 4 i 5 k.k.)', *Przegląd Policyjny*, 2012, No. 3, p. 125; Berent, M., Filar, M., in: Filar, M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, p. 126.

[11] Szwarczyk, M., in: Bojarski, T. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, p. 686; Sosik, R., *Obrona konieczna w polskim i amerykańskim prawie karnym. Studium prawnoporównawcze*, Lublin, 2019, p. 261; Mozgawa, M., in: Mozgawa, M. (ed.), *Kodeks karny…*, op. cit., p. 775; Hałas, D., in: Grześkowiak, A., Wiak, K. (eds), *Kodeks karny. Komentarz*, Warszawa, 2019, p. 1209; Barczak-Oplustil, A., Iwański, M., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny…*, Vol. II, Part II, 2017, p. 289; Giezek, J., in: Giezek, J. (ed.), *Kodeks karny. Część ogólna. Komentarz,* Warszawa, 2021, p. 898.

[12] Szymczak, M. (ed.), *Słownik języka polskiego*, Vol. I, Warszawa, 1979, p. 802.

[13] Kilińska-Pękacz, A., 'Rozszerzenie ochrony przysługującej funkcjonariuszom publicznym na inne osoby', *Jurysta*, 2012, No. 3, p. 20; Kilińska-Pękacz, A., 'Nowe ujęcie obrony koniecznej po nowelizacjach kodeksu karnego z lat 2009–2010', *Studia z Zakresu Prawa, Administracji i Zarządzania UKW*, 2013, Vol. 3, p. 97.

law and intervene in defence of security and public order",[14] and "The axiological basis for the proposed solutions in the area is the assumption that persons who, not being legally obligated to do this, intervene in defence of the law, often overcoming fear and exposing themselves to the aggressive reaction of an offender, respond to hooliganism or other criminal conduct, should be entitled to enhanced legal protection. Therefore, if these persons truly act for the protection of security and public order, an attack on them should be legally regarded as an attack on a public official".[15] In addition, the authors of the bill intend to raise "the sense of security in society and the authority of law by encouraging citizens to overcome fear and a sense of helplessness in the face of aggressive conduct in public space and by demonstrating that the legislator appreciates civic-minded attitudes shown in public interest. At the same time (…) to have advantageous influence in the general preventive area by discouraging potential perpetrators of offences, especially those who commit offences in public spaces (e.g. acts of vandalism, battery, thefts), from committing them as they are aware that more and more people may actively and efficiently resist their acts, as well as that those people will be under special legal protection in such situations".[16] Critics argue that this rationale would only hold if the regulation concerned a person defending one's own property as well as that of others. In both cases the defender is simultaneously preserving security and public order. Therefore, it should not matter whether the defender is protecting their own or someone else's good protected by law when considering the right to apply necessary defence and the legal status of a person acting in self-defence.[17]

In the doctrine, it is rightly believed that the measure constitutes a specific call to citizens to intervene when someone else's good is endangered[18], potentially mobilising people to act for security and public order.[19]

The assertion that its introduction is aimless is not convincing, because the subjective and objective content of Article 25 §§ 4 and 5 CC is laid down in § 1 of this Article, and the goal of stirring society to a more eager response in defence of security or public order was not achieved, as no records demonstrated a noticeable rise in heroic attitudes motivated by the sense of obligation towards public property, despite the increased scope of legal protection.[20] Similarly, claims that the regulation does not de facto introduce any new content, and is another instance of the legislator's populism, contributing to the already extensive code-related casuistry, are unsubstantiated. Empirical research suggests that the application of self-defence of one's own good prevails in practice.[21] Indeed, empirical studies on self-defence show that 70% of

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[14] *Uzasadnienie rządowego projektu ustawy o zmianie ustawy – Kodeks karny oraz ustawy o Policji* (Sejm print No. 2986), https://orka.sejm.gov.pl/Druki6ka.nsf7wgdruku/2986, accessed on 15 January 2023, p. 1.

[15] *Uzasadnienie rządowego projektu…*, op. cit., p. 2.

[16] *Uzasadnienie rządowego projektu…*, op. cit., pp. 4–5.

[17] Sakowicz, A., *Opinia prawna…*., op. cit., p. 4.

[18] Lach, A., in: Konarska-Wrzosek, V. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2020, p. 1133.

[19] Kilińska-Pękacz, A., *Rozszerzenie ochrony…*, op. cit., p. 20.

[20] Berent, M., Filar, M., in: Filar, M. (ed.), *Kodeks karny…*, op. cit., p. 126.

[21] Mozgawa, M., 'Obrona konieczna w polskim prawie karnym (zagadnienia podstawowe)', *Annales Universitatis Mariae Curie – Skłodowska*, 2013, No. 2, pp. 183 and 189.

cases involved defending one's own good, and only 10% were about protecting someone else's good.[22] The Criminal Law Codification Committee stated that: "There is a misguided belief (…) that stricter criminal liability for those infringing on the good of persons protecting common good or other persons' good would encourage people to this type of activity. If someone overcomes fear and engages in the so-called intervention-related defence, they surely deserve recognition. However, strengthened legal protection should not be considered a specific reward. A criminal sanction is not a reward for the aggrieved but a manifestation of the justice system fulfilling its role and responding to a committed offence. Also, from this point of view, there are no grounds for differentiating sanctions for an attack on a person acting in self-defence and an attack on a person applying intervention-related necessary defence".[23]

It is difficult to agree with this opinion because a person who acts in defence of security or public order certainly deserves special protection. Article 25 §§ 4 and 5 CC ensures that they are not liable for an act committed while repelling a direct unlawful attack on the good protected by law, including that of others. However, it does not guarantee any other protection should the aggressor commit a criminal act in the course of defensive activities. For instance, if a perpetrator violates bodily integrity, they commit an offence under Article 217 § 2 CC, which is prosecuted based on private accusation (Article 217 § 3 CC). Therefore, if the aggrieved wants a perpetrator to be held liable, they must initiate a criminal proceeding by filing a complaint, unless a prosecutor initiates an investigation or inquiry due to public interest (Article 60 § 1 CPC). Article 231b § 1 CC alleviates these difficulties because the act aligns with the features of an offence under Article 222 § 1 CC and then a proceeding will be carried out ex officio. In this way, such a person is provided with comprehensive protection, which they undoubtedly merit due to their public-spirited attitude.

PREMISES FOR INTERVENTION-RELATED SELF-DEFENCE

Article 231b § 1 CC explicitly concerns:
(1) an action in self-defence;
(2) repelling an attack on someone else's good protected by law;
(3) the protection of security or public order.

All the conditions must be present concurrently.

1. ACTION IN SELF-DEFENCE

The basic requirement for applying Article 231b § 1 CC is a self-defensive act by a person subject to this provision. It is highlighted by a clear emphasis on verba legis, a person "who in self-defence repels an attack". Article 231b § 1 CC does not

[22] Bachmat, P., 'Instytucja obrony koniecznej w praktyce prokuratorskiej i sądowej', *Prawo w Działaniu*, 2008, No. 3, p. 57.

[23] *Opinia o projekcie o zmianie ustawy – Kodeks karny oraz ustawy o Policji – wersja z dnia 26 marca 2010 roku*", unpublished.

amend the provisions concerning self-defence in any way,[24] except for restricting an attack to someone else's legal good. The explanatory memorandum of the 2010 Amendment bill underlines this point, stating that the provision under Article 231b § 1 CC "does not alter the essence of the limits of the countertype of self-defence in any way, but rather stipulates the enhancement of protection for persons acting in the specific form of self-defence, which is intervention-related necessary defence, i.e. applied by persons acting not in self-defence but in defence of another person or a collective entity, lending their conduct a special social dimension. Thus, it involves cases where a person undertaking self-defence has not been compelled to do so, especially by the situational compulsion in which they found themselves, because neither their person nor their property, nor their other goods have been subject to a criminal attack. Instead, they intervened against a lawless assault without any particular interest and no legal obligation".[25]

This means that all the self-defence characteristics laid down in Article 25 §§ 4 and 5 CC must align, with the single change noted above, that an assault cannot be aimed at the defender's good protected by law. The attack can be initiated against an individual or a private or public good.[26] A person must repel a direct lawless attack on the good protected by law and the defensive action should be a measure necessary to repel the attack. The defence should be proportional to the danger created by an attack (arg. ex Article 25 § 2 CC). The requirement of acting in self-defence is fulfilled when the intervening person's conduct is motivated by a desire to repel a lawless assault.[27] Given that reference to self-defence must align with all its components, the notion that the nature of an attack referred to in the provision needed further clarification by adding the phrase 'direct lawless' before the word 'attack' cannot be supported.[28] The requirement of an action in self-defence should be interpreted within the limits laid down in Article 25 § 1 CC. Therefore, Article 231b § 1 CC is not applicable if the defence limits are exceeded, either intensively or extensively. A defender's act that exceeds the limits of self-defence is unlawful and it is challenging to justify granting such a person special legal. In literature attention is drawn to the fact that a perpetrator of an attack may provoke an intervening person to exceed the necessary defence limits in order to avoid strict liability under Article 231b § 1 CC,[29] but it does not change the above assessment.

Pursuant to Article 22 § 2 CC of 1969, which extended self-defence to include actions of a person intervening to restore peace or public order even if it does not result from their professional duty, the Supreme Court decided that: "Involvement in the defence of life or health of another person, as well as intervention to restore peace or public order, is a socially desired action. Generally, if these actions exceed

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[24] Grześkowiak, A., in: Grześkowiak, A., Wiak, K. (eds), *Kodeks karny. Komentarz*, Warszawa, 2012, p. 205.

[25] *Uzasadnienie rządowego projektu…*, op. cit., p. 2.

[26] Szwarczyk, M., in: Bojarski, T. (ed.), *Kodeks karny…*, op. cit., p. 687.

[27] *Uzasadnienie rządowego projektu…*, op. cit., p. 3.

[28] Sakowicz, A., *Opinia prawna…*, op. cit., p. 5.

[29] Zontek, W., in: Wróbel, W. (ed.), *Nowelizacja prawa karnego 2015. Komentarz*, Kraków, 2015, p. 837.

the limits of necessary defence, they should constitute grounds for the application of Article 22 § 3 CC".[30] However, as rightly pointed out in doctrine, this view cannot be applicable to the current legal state, because the former regulation was different in nature.[31]

2. REPELLING AN ATTACK ON SOMEONE ELSE'S GOOD PROTECTED BY LAW

The target of an attack defined in Article 231b § 1 CC compared to Article 25 § 1 CC is narrower in scope. While the latter provision covers any good protected by law – a defender's or anyone else's – the former provision limits it to another's good, not someone acting in necessary defence. This person cannot be one that has the right to the good protected by law. It must be a third person repelling an attack, i.e. someone who is not a holder of the good protected by law. This is indicated in the requirement laid down in Article 231b § 1 CC stipulating that an attack should be launched on "whatever someone else's good protected by law". The phrase "someone else's" means "something belonging to someone else".[32] A person must act for the benefit of another person or a collective entity.[33] That is why the regulation is criticised for unjust differentiation within the protection of a person acting in necessary defence, since as a result a person repelling an attack on someone else's good protected by law is granted stronger protection than the one defending their personal property.[34] It is also emphasised that this distinction is difficult to justify.[35] It is not right because a person defending their own good undertakes defensive activities to protect it against damage and this motivates them to act. In contrast, an intervening person has an entirely different motivation: their intention consists in the desire to prevent the violation of legal order. They show public-spirited attitude and deserve special appreciation. This is a key feature differentiating them from a person defending their own interest.

The doctrine admits situations where a person repelling an attack on another's good protected by law and protecting security and public order at the same time defends their own interest.[36] However, it is unclear how the good protected by law co-held by an intervening person should be treated. It might seem that if an intervening person is not the sole holder of the property, it cannot be recognised as someone else's. Yet, it is rightly argued in literature that an opposing view would exclude the possibility of applying this defence for common goods of security and

[30] The Supreme Court judgement of 26 February 1976, Rw 72/76, OSNKW 1976, No. 4–5, item 65.

[31] Kulesza, J., in: Paprzycki, L.K. (ed.), *Nauka o przestępstwie. Wyłączenie i ograniczenie odpowiedzialności karnej. System Prawa Karnego. Tom 4*, Warszawa, 2013, p. 248.

[32] Zgółkowa, H. (ed.), *Praktyczny słownik współczesnej polszczyzny,* Vol. 7, Poznań, 1996, p. 297.

[33] Grześkowiak, A., in: Grześkowiak, A., Wiak, K. (eds), *Kodeks karny…*, op. cit., 2012, p. 205.

[34] Sakowicz, A., *Opinia prawna…*, op. cit., pp. 3–4.

[35] Zoll, A., in: Zoll, A. (ed.), *Kodeks karny…*, op. cit., 2012, p. 474.

[36] Mozgawa, M., in: Mozgawa, M. (ed.), *Kodeks karny…*, op. cit., p. 776.

public order.[37] In this context, the stance negating such a possibility is difficult to support.[38]

The requirement that the good defended by an intervening person should be someone else's excludes persons repelling an attack on their own good protected by law from the subjective scope of this protection. Thus, there is no doubt as to who is entitled to the legal protection laid down in Article 231b § 1 CC. Hence, the proposal *de lege ferenda* to explain the concept of 'an intervening person' as 'a person who applies intervention-related self-defence' in the glossary of statutory terms used in the Criminal Code (Article 115 CC) is not justified.[39] Despite the unnecessary nature of such a definition, the proposed term is problematic, since it is used in the Fiscal Penal Code and has a fixed meaning, i.e. a party to a fiscal penal proceeding; it refers to one of the parties to a fiscal penal proceeding (Article 120 § 1 FPC) and it cannot be attributed two different meanings within the same branch of law. Of course, it is rightly indicated that it concerns criminal law sensu largo, including fiscal penal law.[40] Moreover, the proposed definition de facto does not clarify anything, and its definiens stems directly from Article 231b § 1 CC.

Clearly, the conduct of a person whose attack an intervening person repels must exhibit features of an offence, because when an act is irrelevant from the criminal law perspective, that person must not be held liable for an offence in the same way as if committed against a public official. Regarding the assessment of such conduct, there is no need, as it is suggested in the doctrine,[41] to refer mutatis mutandis to Article 231b § 1 CC.

3. PROTECTING SECURITY OR PUBLIC ORDER

In order to apply Article 231b § 1 CC, a person acting in self-defence should also act in way that protects security or public order. The explanatory memorandum of the 2010 Amendment bill underlines the requirement: "that their conduct should, in an objective sense, act for the protection of security or public order. This condition will also be fulfilled when a person repelling an unlawful attack the moment they fight it back does not realise that their actions aim at protecting of security or public order, but when assessed objectively, the conduct demonstrates such characteristics".[42] Contrary

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[37] Kulesza, J., in: Paprzycki, L.K. (ed.), *Nauka o przestępstwie*…, op. cit., p. 249.

[38] Giezek, J., in: Giezek, J. (ed.), *Kodeks karny*…, 2021, p. 901; ibidem, 'W obronie granic obrony koniecznej', in: Kalisz, T. (ed.), *Prawo karne w wykonawcze w systemie nauk kryminologicznych. Księga pamiątkowa ku czci Profesora Leszka Boguni*, Wrocław, 2011, pp. 65–66.

[39] Narodowska, J., Banaszkiewicz, A., Duda, M., 'Wzmocniona ochrona osoby podejmującej obronę konieczną interwencyjną w świetle nowelizacji art. 25 kodeksu karnego', in: Pikulski, S., Romańczuk-Grącka, M., Orłowska-Zielińska, B. (eds), *Tożsamość polskiego prawa karnego*, Olsztyn, 2011, pp. 107–108.

[40] Nazar-Gutowska, K., Piórkowska-Flieger, J., 'Recenzja książki, S. Pikulski, M. Romańczuk-Grącka, B. Orłowska-Zielińska (red.), Tożsamość polskiego prawa karnego, Olsztyn, 2011', *Ius Novum*, 2012, No. 2, p. 183.

[41] Kulesza, J., in: Paprzycki, L.K. (ed.), *Nauka o przestępstwie*…, op. cit., p. 248.

[42] *Uzasadnienie rządowego*…, op. cit., p. 3.

to what literature states,[43] it is not necessary that the conduct of a person repelling an attack should be motivated to protect security or public order. Article 231b § 1 CC does not support such a conclusion. The condition is met even if intervening person is not even aware at the time of repelling the attack that they are acting for the protection of security or public order, but objectively it occurs.[44]

Literature emphasises that anyone acting in self-defence at the same time protects public order, which is confirmed by the lack of proportionality condition, making the requirement to protect security or public order redundant.[45] In addition, it suggests that actively opposing lawlessness is always, not only within the intervention for third parties, an act in the public interest. Hence, every person repelling an unlawful attack, even if protecting personal interest, acts for the protection of security and public order.[46] This view is correct and, in addition, highlighting the fulfilment of this condition in Article 231b § 1 CC emphasises that an intervening person acts in that interest.

The concepts of 'public security' and 'public order' are undefined and not sufficiently specific.[47] They do not have an unambiguous meaning[48] and they are defined differently. It is rightly emphasised in literature that these terms are vague, imprecise, incomplete, ambiguous and inaccurate, and thus difficult to define and differentiate.[49] Their ambiguity lies in the legislator's intention to use them to cover actual states that cannot be precisely described, and attempts to define them would impede the use of normative texts due to their illegibility. Therefore, they allow for flexible law application, adjustment to changing situations, and this way for relative stability of the law in force.[50]

Given that these concepts constitute a normative foundation of more severe punishment for a perpetrator fighting back against a person intervening to defend someone else's good protected by law, it is necessary to outline their limits, at least in a general way. Literature treats the concepts of security and public order objectively as particular states and subjectively as a specific state of social awareness, or in material, formal, and institutional sense, as well broadly and narrowly.[51] Doctrine presumes a generic difference between the concepts; however, public security

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[43] Lachowski, J., in: Królikowski, M., Zawłocki, R. (eds), *Kodeks karny. Część szczególna. Komentarz. Art. 222–316*, Vol. II, Warszawa, 2017, p. 184.

[44] Narodowska, J., Banaszkiewicz, A., Duda, M., *Wzmocniona ochrona…*, op. cit., p. 102.

[45] Zontek, W., in: Wróbel, W. (ed.), *Nowelizacja…*, p. 837.

[46] Giezek, J., in: Giezek, J. (ed.), *Kodeks karny…*, op. cit., 2021, p. 900;

[47] Palka, P., 'Przestępstwa przeciwko działalności instytucji państwowych oraz samorządu terytorialnego w ochronie bezpieczeństwa i porządku publicznego', *Studia Prawnoustrojowe*, 2013, No. 22, p. 33.

[48] Ura, E., 'Zagadnienie teoretyczne ochrony bezpieczeństwa i porządku publicznego', in: Łętowski, J., Pruszyński, J.P. (eds), *Prawo. Administracja. Gospodarka. Księga ku czci Profesora Ludwika Bara,* Wrocław–Warszawa–Kraków–Gdańsk–Łódź, 1983, p. 499 et seq.

[49] Osierda, A., 'Prawne aspekty pojęcia bezpieczeństwa publicznego i porządku publicznego', *Studia Iuridica Lublinensia*, 2014, No. 23, p. 90.

[50] Wyrzykowski, M., *Pojęcie interesu społecznego w prawie administracyjnym,* Warszawa, 1986, pp. 49–50.

[51] Widacki, J., Sarnecki, P., 'Pojęcie bezpieczeństwa i porządku publicznego', in: *Ustrój i organizacja Policji w Polsce oraz jej funkcje i zadania w ochronie bezpieczeństwa i porządku publicznego*, Warszawa–Kraków, 1997, pp. 10 and 11.

is considered a higher level of public order.[52] Due to their ambiguity, as rightly emphasised in literature, they should be specified by law-applying entities whom the legislator grants considerable discretion to apply and define them.[53]

Public security is a state where there is no threat to the functioning of the state organisation and the fulfilment of its interests, enabling its standard and free development; it signifies a lack of danger for any local community and society at large.[54] It is a state where there is no threat to the functioning of the state organisation and its interests are fulfilled, allowing for its standard and free development.[55] Public security means particular society's freedom from whatever threats to its members' goods.[56] It represents a situation within a state where individuals and society as a whole face no hazards, regardless of their sources. The limits of security are determined by legal regulations and any violation of those limits constitutes danger.[57] It is a certain positive state concerning the protection of life and health of people, their property, and the environment.[58] Literature correctly posits that public security is a desired actual state in a country that, regardless of damage caused by people, natural forces and technology, enables the operation all government, social and private organisations, while preserving the life, health and property of the country's inhabitants.[59]

Public order is a particular societal order.[60] It is an actually existing social relationship regulated by a series of legal and other norms, which are socially accepted, guaranteeing undisturbed and peaceful functioning of individuals within society. It encompasses all social relations regulated by law and other norms used in public space.[61] Public order represents a certain desired state of public security, order, and peace that enables standard development of social life through compliance with the legal order in force and non-legal norms related to the provision of public order.[62] It allows for the standard functioning of state and society, established by legal and non-legal norms. Public order implies compliance with legal, ethical, moral and religious norms, and principles of community life, leading to harmonisation of individuals and human communities.[63] In criminal law, the concept is accurately defined as "the

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52 Pływaczewski, E., *Przestępstwo czynnej napaści na funkcjonariusza publicznego*, Toruń, 1985, p. 16.

53 Osierda, A., 'Prawne aspekty…', op. cit., p. 91.

54 Mroczko, F., 'Problemy bezpieczeństwa i porządku publicznego', *Zeszyty Naukowe Wałbrzyskiej Wyższej Szkoły Zarządzania i Przedsiębiorczości. Refleksje społeczno-gospodarcze*, 2010, No. 14, p. 35.

55 Bonisławska, B., 'Współczesne zagrożenia dla bezpieczeństwa publicznego', *Zeszyty Naukowe Wyższa Szkoła Ekonomii i Innowacji. Administracja*, 2012, No. 1, p. 115.

56 Pieprzny, S., *Ochrona bezpieczeństwa i porządku publicznego w prawie administracyjnym*, Rzeszów, 2007, pp. 24–45.

57 Pieprzny, S., *Policja. Organizacja i funkcjonowanie*, Wrocław, 2007, p. 27; Osierda, A., 'Prawne aspekty…', op. cit., p. 105.

58 Osierda, A., 'Prawne aspekty…', op. cit., p. 99.

59 Kijak, Z., 'Pojęcie ochrony porządku publicznego w ujęciu systemowym', *Zeszyty Naukowe Akademii Spraw Wewnętrznych*, 1987, No. 47.

60 Pieprzny, S., *Ochrona bezpieczeństwa…*, op. cit., pp. 24–45.

61 Mroczko, F., 'Problemy bezpieczeństwa…', op. cit., p. 35.

62 Osierda, A., 'Prawne aspekty…', op. cit., p. 99.

63 Ibidem, p. 106.

existing state of social relations and facilities ensuring security, peace and order in public places, regulated by legal norms and principles of community life".[64]

According to doctrine, it is rightly assumed that pursuant to Article 231b § 1 CC, public security and public order are associated with the protection of values and interests that may not necessarily be found in public places but are oriented towards the common interest, i.e. the state and society's, as much as towards an individual's one.[65]

SCOPE OF LEGAL PROTECTION FOR A PERSON ACTING IN INTERVENTION-RELATED SELF-DEFENCE

A person acting in intervention-related self-defence is entitled to the same legal protection as public officials, although they are not granted the status of a public official.[66] When the scope of protection is disputed, attention is drawn to the fact that the protection of public officials' goods is inherently linked to their role, as a perpetrator infringing upon a public official's goods also disrupts the proper functioning of the government administration bodies, other state bodies and local self-government. Therefore, expanded legal protection for a public official compared to a person without this status is based on different axiological premises.[67] Indeed, while an attack on an intervening person does not disrupt the functioning of the state or local government bodies, it should not hinder providing that person with the legal protection public officials are entitled to as they act for security or public order.

Special protection for an intervening person may involve holding their attacker liable for an offence laid down in Chapter XXIX Criminal Code, e.g. infringement of public official's bodily integrity (Article 222 § 1 CC), active attack on a public official (Article 223 §§ 1 and 2 CC), or another offence against a public official's good protected by law, even accidental, such as the killing of a public official (Article 148 § 3 CC). Insulting a public official (Article 226 § 1 CC) is not taken into account, as this act infringes upon the aggrieved's dignity and therefore, in line with Article 231b § 2 CC, the application of its § 1 is excluded. In this context, the view that Article 226 § 1 CC may also be applicable is erroneous.[68]

Liability for this type of offence requires the aggressor's awareness that an intervening person is repelling their attack on someone else's good protected by law and protecting public security or order.[69]

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[64] Kubala, W., 'Porządek publiczny – analiza pojęcia', *Wojskowy Przegląd Prawniczy*, 1981, No. 3, p. 23; idem, 'Przedmiot ochrony przepisów dotyczących przestępstw przeciwko porządkowi publicznemu', *Ruch, Prawniczy, Ekonomiczny i Socjologiczny*, 1978, No. 2, p. 53.

[65] Palka, P., 'Przestępstwa przeciwko działalności instytucji…', op. cit., p. 43.

[66] Lachowski, J., in: Królikowski, W., Zawłocki, R. (eds), *Kodeks karny*…, Vol. II, 2017, op. cit., p. 183.

[67] Sakowicz, A., 'Opinia prawna …', op. cit., pp. 4–5.

[68] Lachowski, J., in: Królikowski, W., Zawłocki, R. (eds), *Kodeks karny*…, Vol. II, 2017, op. cit., p. 184.

[69] Zontek, W., in: Wróbel, W., *Nowelizacja*…, op. cit., p. 838.

EXCLUSION OF INTERVENTION-RELATED SELF-DEFENCE

Enhanced legal protection, in line with Article 231b § 2 CC, is not applicable to a person meeting the conditions laid down in Article 231b § 1 CC when verba legis "an act committed by a perpetrator of an attack targeting an intervening person infringes their reverence or dignity". "The aim of this regulation, as indicated in the explanatory memorandum for the 2010 Amendment bill, is to rationally narrow the scope of protection for persons engaging in intervention-related self-defence, compared to the protection afforded to public officials when a perpetrator's conduct infringes only one or both goods jointly, thus in particular when it is only an insult but a perpetrator has not breached bodily integrity of the intervening person, and thus has not caused them any health-related".[70]

The specific actions negating this legal protection are defined by identifying the goods of the protected individual. Thus, it is clear that this refers to acts specified in the provisions of Chapter XXVIII Criminal Code "Offences against reverence and bodily integrity", although not exclusively. They could also be acts where reverence or dignity of this person is a primary (closer, direct) object of protection, or where this good is a secondary (additional, further, indirect) object of protection.

The doctrine correctly posits that exclusion can sometimes serve the interest of the intervening person who, in case of such a minor infringement of his goods, may prefer to avoid initiating criminal proceedings, which entails an obligation to participate in these proceedings.[71]

RELATIONSHIP BETWEEN ARTICLE 231B § 1 AND ARTICLE 217A CC

Infringing on bodily integrity under the conditions laid down in Article 231b § 1 CC constitutes an offence under Article 222 § 1 CC. Article 217a CC criminalises physically assaulting or infringing on the bodily integrity of a person who intervenes to protect safety of people, public security or order. This raises a question about the relationship between these provisions. The remits of both provisions mutually exclude each other due to their special nature. If an intervening person's bodily integrity is infringed in the course of repelling a direct unlawful attack on someone else's good protected by law, i.e. while acting within the limits of self-defence to protect public security or order, the aggressor is liable for an offence under Article 222 § 1 in conjunction with Article 231b § 1 CC. However, if an intervening person exceeds the limits of necessary defence but acts to protect public security and order, and the aggressor infringes on their bodily integrity, the act aligns with the characteristics of an offence under Article 217a CC.[72] The opinion that there is a cumulative concurrence of provisions under Articles 222 or 223 and 217a CC is misguided.[73]

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[70] *Uzasadnienie rządowego projektu…*, op. cit., p. 4.
[71] Giezek, J., in: Giezek, J. (ed.), *Kodeks karny…*, op. cit., p. 889.
[72] Zontek, W., in: Wróbel, W. (ed.), *Nowelizacja…*, op. cit., p. 840.
[73] Szwarczyk, M., in: Bojarski, T. (ed.), *Kodeks karny…*, op. cit., p. 688.

CONCLUSIONS

1. The Act of 20 February 2015 amending Criminal Code Act and Certain Other Acts transferred the entire content of Article 25 §§ 4 and 5 to Chapter XXIX of the Criminal Code, placing it in a new Article 231b § 1 and 2 CC. This provision ensures that a person acting in self-defence, repelling an attack on someone else's goods protected by law, while simultaneously protecting public security or order, receives the same legal protection as a public official (intervention-related self-defence).
2. This legislative action is appropriate; the former placement of the regulation under Article 25 CC was incorrect as it deals with a countertype of self-defence and exceeding its limits, regulating the issue of criminal liability of a person repelling an attack, and not the criminal liability of a perpetrator of an attack.
3. Despite the fact that the content of Article 25 §§ 4 and 5 was transferred to Article 231b §§ 1 and 2 CC, the essence of the regulation remains unchanged. It continues to be intervention-related self-defence, as its normative content remains the same, and its placement in the chapter retaining provisions specifying offences against the operations of the state and local government bodies emphasises the scope of the legal protection for an intervening person should they become subject to a criminal act in the course of their intervention.
4. It is entirely justified to ensure protection for an intervening person, as they act to protect public security or order. Thus they deserve this protections and have the right to expect that the state will react appropriately in case their goods are infringed or endangered during intervention.
5. A person acting in self-defence and repelling an attack on someone else's good protected by law and protecting public security or order is entitled to special legal protection. However, an attack cannot target the intervening person's good protected by law.
6. Special legal protection of a person acting in intervention-related self-defence means they are entitled to the same level of protection as a public official. A perpetrator of an attack on this person could face criminal liability for such actions as infringing a public official's bodily integrity (Article 222 § 1 CC), actively attacking a public official (Article 223 § 1 and 2 CC), or committing another offence that, even incidentally, harms a public official's good, such as the killing of a public official (Article 148 § 3 CC). Insulting a public official (Article 226 § 1 CC) is not taken into account, as this act infringes only on the dignity of the aggrieved, and as per Article 231b § 2 CC, such protection is not applicable when a perpetrator's act targeted at a person repelling an attack infringes solely on the dignity of that person.

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A LEGAL GOOD UNDER ART. 62(1) OF THE ACT ON COUNTERACTING DRUG ADDICTION OF 2005

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Abstract

The focus of this article is the regulation of Article 62(1) of the Act on Counteracting Drug Addiction of 29 July 2005, often referred to in literature as 'possession for personal use'. The fundamental issue related to the subject matter pertains to the definition of the legal good in Art. 62(1) of the Act. Contrary to initial impressions, identifying this interest is neither simple nor unequivocal, as there may be doubts over whether such a good protected by law exists and, if so, whether it should be protected under criminal law. The article also explores the correlation of this legal good and the need to protect it with other legal goods protected by the Constitution (e.g. individual freedom). Additionally, the article also examines the significance of the consent of a holder of a given good for the exclusion of unlawfulness or the absence of any attack on the legal good. Behaviour undertaken with the consent of the holder, allegedly "violating" the legal good, is after all, an act that conforms to the norm from the outset, and therefore does not involve any element of unlawfulness. As such, it does not constitute a criminal act. There are doubts whether in the case of possession and use of drugs, there is a threat to the legal good or whether such conduct is lawful from the very beginning, given the consumer's consent. The article critiques the existing criminal law regulations, and its key argument is the thesis that drug addiction is an issue of exclusively medical and social concern, rather than one of criminal law.

Keywords: legal good, drug possession, criminal law, constitution

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I

In the Constitution of the Republic of Poland of 2 April 1997,[1] the legislator emphasises the need to protect extremely important goods such as freedom, equality and inherent human dignity. The legislator also declares that Poland, as a democratic state governed by the rule of law, will uphold the fundamental rights of the individual, guaranteeing, inter alia, freedoms and human rights, protection of human dignity, private life and health. In Article 31(3), the same legislator also commits to observe the principle of proportionality with regard to limiting the exercise of constitutional freedoms and rights. The various legal instruments for the protection of these rights and freedoms have been concretised in the wake of the Constitution. In axiological terms, the protection of rights and freedoms, i.e. values that are so important for society that they deserve legal protection, has become the main objective of legal norms.[2] This is particularly evident in criminal law. The norms of criminal law have been established by the State in order to protect certain goods of such importance that their protection involves punishability. It is a truism to state that it is this last element, i.e. criminal punishment, that distinguishes criminal law from other branches of law and marks a person's life with the most severe sanction, a deliberately inflicted hardship that deprives a person of what he or she values most.[3] For this reason, criminal law as an *ultima ratio* is used as a last resort when the good protected by law cannot be safeguarded in another way. Accepting the above statement generates certain consequences. On the one hand, one would expect that when the legislator criminalises certain behaviour, it does so in order to protect certain values, which, when given legal protection, become legal goods.[4] On the other hand, one can formulate an appeal for the legislator not to specify punishments for acts that are not directed against these socially precious values and not to make them subject to criminal liability.[5] Legal good should thus be constituted by those values that have become generally accepted and are currently the prevailing world-view among citizens after the fundamental changes following social transformations that have occurred since the beginning of the Third Republic of Poland.[6] The explanatory memorandum to the Criminal Code of 6 June 1997[7] stipulated that the new law must adopt a new

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

[2] Considerations on social groups and protection of their common goals: Makarewicz, J., *Wstęp do filozofii prawa karnego w oparciu o podstawy historyczno-rozwojowe*, Lublin, 2009, p. 51 et seq. Contemporary works e.g. Grześkowiak, A., in: Grześkowiak, A., Wiak, K. (eds), *Kodeks karny. Komentarz*, Warszawa, 2021, p. 273, marginal ref. 7; Warylewski, J., *Prawo karne. Część ogólna*, Warszawa, 2020, p. 81; Bojarski, M. (ed.), *Prawo karne materialne, część ogólna i szczególna*, Warszawa, 2020, pp. 103–104.

[3] Tkaczyk-Rymanowska, K., *Podstawy prawa karnego materialnego i prawa wykroczeń*, Warszawa, 2014, p. 13.

[4] Tarapata, S., *Dobro prawne w strukturze przestępstwa. Analiza teoretyczna i dogmatyczna*, Warszawa, 2016, p. 17.

[5] Ibidem, p. 17. Similarly, Kaczmarek, T., in: Dębski, R. (ed.), *System prawa karnego. Tom 3. Nauka o przestępstwie. Zasady odpowiedzialności*, Warszawa, 2013, p. 274.

[6] Introduction of the concept of the legal good into criminal justice considerations is attributable to German academics. In Poland, legal good is a topic that appears in the works of W. Wolter. Details: Gruszecka, D., *Ochrona dobra prawnego na przedpolu jego naruszenia, analiza karnistyczna*, Warszawa, 2012, p. 20 et seq.

[7] Criminal Code of 6 June 1997, Journal of Laws of 1997, No 88, item 553, as amended.

axiology appropriate for a democratic state based on the rule of law, in which criminal law serves the protection of fundamental values and is not merely an instrument of penal policy.[8] This last element should be raised in particular in the context of drug regulations which, as perhaps no other regulations, are a prominent manifestation of penal populism tributary to the ruling political option. One must fully agree with the statement[9] that the reasons for criminalising drug possession have a stereotypical, emotional trait that the legislator camouflages with seemingly rational reasons.[10] This leads to treating people possessing drugs as second-class citizens, without the right to decide their own fate, simply because they indulge in an addiction that is officially unaccepted by the legislator.[11]

With regard to the subject matter of the title of this article, it is necessary to limit our discussion to a few selected issues. First of all, it should be made clear that the focus of the article is the provision of Article 62(1) of the Act on Counteracting Drug Addiction of 29 July 2005,[12] often referred to in the literature as "possession for personal use".[13] Due to the nature of the regulation, I omit consideration of the possession of a substantial quantity of drugs under Article 62(2) of the Act. This regulation requires a separate analysis precisely because of the description of the causal activity. Secondly, the basic problem concerning the indicated subject matter relates to defining the legal good under Article 62(1) of the Act. Contrary to appearances, defining it is not a simple or unequivocal matter. Thirdly, it is necessary to point out the correlation of this legal good, if such a good exists, and the need for its protection, in relation to other legal interests safeguarded by the Constitution. Finally, the relevance of consent of the possessor of a good to the question of excluding unlawfulness or stating the absence of any attack on the legal good. Behaviour undertaken with the consent of the holder, allegedly "violating" the legal interest, is after all an act that conforms to the norm from the very beginning, and therefore does not involve any element of unlawfulness. As such, it is therefore not a criminal act. In the case of possession and use of narcotic drugs, is there a threat to the legal good, or is such conduct legal behaviour from the very beginning, in view of the consumer's consent?[14]

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[8] Makarewicz, J., *Wstęp…*, op. cit., p. 92 et seq.; Wolter, W., *Nauka o przestępstwie*, Kraków, 1973, p. 35 et seq. Currently inter alia: Wróbel, W., Zoll, A., *Polskie prawo karne. Część ogólna*, Kraków, 2010, p. 41; Kaczmarek, T., in: Dębski, R. (ed.), *System prawa karnego…*, op. cit., p. 273; Marek, A., *Prawo karne*, Warszawa, 2011, p. 5 and p. 108 et seq.

[9] Klinowski, M., 'W sprawie posiadania narkotyków w orzecznictwie Sądu Najwyższego', *Państwo i Prawo*, 2012, No. 4, p. 105.

[10] Identically: Davenport-Hines, R., *Odurzeni. Historia narkotyków 1500–2000*, Warszawa, 2006, p. 618.

[11] Budyn, M., 'Kryminalizacja eutanazji, posiadania narkotyków oraz eksploatacji prostytucji – przejawy usprawiedliwionego paternalizmu państwa?', *Annales Universitatis Mariae Curie-Skłodowska. Sectio G*, 2002, Vol. XLIX, pp. 130 and 154.

[12] *Ustawa o przeciwdziałaniu narkomanii z dnia 29.07.2005 r.*, Journal of Laws of 2020, item 2050, as amended.

[13] For example: Resolution of a panel of 7 judges of the Supreme Court of 27 January 2011, I KZP 24/10; Klinowski, M., 'W sprawie posiadania…', op. cit., p. 106; Kornak, M., 'Glosa do uchwały SN z dnia 27 stycznia 2011 r., I KZP 24/10', *LEX/el.*, 2011, thesis 9.

[14] Dogmatic-philosophical analysis *sensu stricto* of the concept of legal good has an extensive literature. See in particular Tarapata, S., *Dobro prawne…*, op. cit., p. 15 et seq.; Gruszecka, D., *Ochrona dobra…*, op. cit., p. 11 et seq. and both Polish and German literature collected therein.

II

In criminal law, every sanctioned norm defining a type of prohibited act is always established for a specific purpose. This purpose is to protect goods that are of importance to community life. The issue of determining correctly the object of protection is relevant for proper interpretation of the provision and appropriate legal qualification of the act. The type of object of protection also bears an influence on the assessment regarding the degree of social harmfulness of the act,[15] constitutes an important factor in imposing penalties and means of punishment, and allows for the application of a number of institutions of substantive criminal law (e.g. recidivism, probation) or procedural law (e.g. granting aggrieved party status).

Decoding a norm in the above-mentioned scope is generally not, as M. Sagan[16] rightly argues, an overly intricate issue, although there are sometimes situations where fundamental divergences of opinions occur in doctrine and case-law, as is the case in particular in the context of the Act on Counteracting Drug Addiction. Academia distinguishes between general, generic and individual subjects of crimes.[17] Both doctrine and case law emphasise not only the significance of correctly identifying the object of protection of a specific criminal law provision, stipulate however that it is insufficient in terms of criminal liability to refer only to a general or generic object of protection but it is important to identify the individual object of protection of the criminal norm.[18] According to the position of the Supreme Court, in order to determine the object of protection it is necessary to refer not only to the content of an act but also to its title, preamble, general provisions, and even to the explanatory memoranda to the drafts of such acts, if the criminal law provisions are grouped in one chapter but have not been given a title indicating even the generic object of protection.[19] Attention is also drawn to the fact that some provisions entail a dual object of protection, and the mere fact that an offence is directed against a general good does not preclude a natural person from being regarded as the aggrieved party where the prohibited act directly infringes their legal good at the same time as infringing the general good.[20]

The purpose of the Act on Counteracting Drug Addiction, according to Article 2(1)(3) and (4) of that Act, is, inter alia, to reduce health and social harm as well as to combat unauthorised possession of substances whose use may lead

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[15] Judgement of the Supreme Court of 11 April 2011, IV KK 382/10.

[16] Sagan, M., 'Glosa do uchwały SN z dnia 27 października 2005 r., ref. I KZP 32/05', *Prokuratura i Prawo*, 2006, No. 5, p. 158.

[17] Gardocki, L., *Prawo karne*, Warszawa, 2021, p. 93; Marek, A., *Prawo karne*, op. cit., p. 108 et seq.; Królikowski, M., Zawłocki, R., *Prawo karne*, Warszawa, 2020, pp. 9–10; Dukiet-Nagórska, T., Sitarz, O. (eds), *Prawo karne. Wykład akademicki*, Warszawa, 2021, p. 157.

[18] Sakowicz, A. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2020, p. 224; Gostyński, Z., in: Gostyński, Z. (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warszawa, 2003, p. 427; Resolution of the Supreme Court of 21 October 2003, I KZP 29/03.

[19] Resolution of the Supreme Court of 27 October 2005, I KZP 32/05.

[20] Ruling of the Administrative Court in Szczecin of 3 April 2019, II AKa 242/18; resolutions of the Supreme Court of: 21 October 2003, I KZP 29/03; of 15 September 1999, I KZP 26/99, and also Sakowicz, A. (ed.), *Kodeks...*, op. cit., p. 224.

to drug addiction (i.e. a phenomenon which is, on all accounts, detrimental not only to public health, but also to the health of individuals and social interaction). Considering the above, it is therefore sometimes argued that the individual object of protection in Article 62(1) of the Act on Counteracting Drug Addiction is the life and health of individuals.[21] On the other hand, another claim cited as a possibility, is that health on a supra-individual level constitutes the object of protection.[22] As argued by M. Kulik, drug addiction is a social phenomenon bringing with it threats in various aspects, it is therefore not legitimate to limit the object of protection only to the well-being of the individual. Moreover, in the aforementioned provision, the legislator themselves stated that the purpose of the Act is to limit social harm.[23]

The approach of M. Bojarski and W. Radecki, pursuant to which the object of protection here is the public good of preventing the phenomenon of drug addiction resulting from uncontrolled possession and use of narcotic drugs that may lead to addiction,[24] is in opposition to the above stance. This form of legal good is also referred to in a number of court rulings.[25] Thus, the legal good is not the personal good of human life and health, but the prevention of drug abuse and counteracting this phenomenon, as well as life and public health in its social dimension.[26] There are also rulings expressing a different position, which basically state that human life and health may also be an object of protection, but from the point of view of the threat posed to them by narcotic drugs.[27] In one of its resolutions, the Supreme Court stated that the primary general objective of the Act on Counteracting Drug Addiction is prevention of the phenomenon as well as helping, treating and rehabilitating addicts. The object of protection is therefore not the regulation of trade in narcotic drugs motivated by the protection of the State's economic interests. Indeed, the motives for criminalising acts are similar to those for criminalising offences against

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[21] District Court in Puławy in its judgement of 19 November 2019, II K 34/19. Similarly: Ważny, A. (ed.), *Ustawa o przeciwdziałaniu narkomanii. Komentarz*, Warszawa, 2019, p. 438.

[22] Kulik, M., in: Mozgawa, M., *Pozakodeksowe przestępstwa przeciwko zdrowiu. Komentarz*, Warszawa, 2017, p. 546.

[23] Ibidem.

[24] Bojarski, M., Radecki, W., *Przewodnik po pozakodeksowym prawie karnym*, Wrocław, 1998, p. 250. Similarly, also Chruściel, T., Preiss-Mysłowska, M., *Ustawa o przeciwdziałaniu narkomanii. Komentarz*, Warszawa, 2000, p. 286; Zachuta, A., 'Przestępstwo ciągłe – czyn ciągły i ciąg przestępstw', *Przegląd Sądowy*, 2003, No. 3, pp. 88–89. In criminal law textbooks, the criminal provisions of the Act on Counteracting Drug Addiction are sometimes discussed together with the provisions of the Criminal Code on offences against life and health (e.g. Gardocki, L., *Prawo karne*, op. cit., p. 256 et seq.; Marek, A., *Prawo karne*, op. cit., p. 449 et seq.).

[25] See, inter alia, judgements: Administrative Court in Warsaw of 29 January 2003, II AKa 510/02; Administrative Court in Katowice of 20 June 2002, II AKa 185/02 and of 12 February 2004, II AKa 15/04; Administrative Court in Kraków of 19 October 2004 r., II AKa 213/04; Administrative Court in Białystok of 20 March 2001, II AKa 34/01 and 20 September 2001, II AKa 127/01.

[26] Adopting health as an incidental object of protection was also advocated by T. Srogosz, in whose opinion one may possibly speak about the protection of public health – but not individual health – in terms of a legal good. Srogosz, T., *Ustawa o przeciwdziałaniu narkomanii. Komentarz*, Warszawa, 2008, p. 368.

[27] Judgements: Administrative Court in Wrocław of 28 February 2001, II AKa 303/00 and of 30 December 2003, II AKa 481/03; Administrative Court in Lublin of 19 April 2004, II AKa 75/04.

life and heath specified in the Criminal Code.[28] An interesting stance was presented by S. Kosmowski, who asserts that too broad an object of protection – such as social health – should not be formulated with respect to a legal norm. In the author's opinion, the public interest can be the object of protection, but with regard to the observance of administrative law norms for dealing with substances whose use may lead to drug addiction.[29] T. Srogosz seems to present a similar view, invoking public interest, though understood as a certain kind of state monopoly on any kind of trade in narcotic drugs (including their possession), i.e. emphasising the nature of the legal good as being within the scope of administrative law.[30]

According to M. Kulik,[31] the concept – which is quite widespread in the literature – that public health is the legal good protected by the provision, is an expression of a certain compromise between the above-mentioned positions.[32] In a resolution adopted in 2005, the Supreme Court clearly stated that the object of protection is public health, understood as the state of health of the general public (general good) in the aspect of drug addiction prevention.[33] The argument of public health is also raised in the case law of the Constitutional Tribunal.[34] A similar position is taken by courts of general jurisdiction.[35] The problem is that no normative definition of this notion exists, and it is therefore unclear what the above formulation implies. Is it in

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[28] Substantiation of the resolution adopted by a panel of seven judges of the Supreme Court on 21 May 2004, I KZP 42/03.

[29] Kosmowski, S., 'Podstawowe problemy stosowania przepisów kryminalizujących nielegalny obrót narkotykami', *Problemy Prawa Karnego*, 2004, No. 25, p. 19.

[30] Srogosz, T., *Ustawa…*, op. cit., p. 368 et seq. A. Ważny makes an identical assertion in the context of Article 53 of the Act: Ważny, A., *Ustawa…*, op. cit., p. 344. Critical opinions: Górowski, W., Zając, D. (eds), 'Komentarz do wybranych przepisów ustawy o przeciwdziałaniu narkomanii', in: *Przestępstwa narkotykowe i dopalacze. Komentarz*, Lex KIPK, 2019.

[31] Kulik, M., in: Mozgawa, M., *Pozakodeksowe…*, op. cit., p. 547 and the extensive literature indicated therein. A supporter of this theory is also: Ważny, A., *Ustawa…*, op. cit., p. 438. The latter, however, argues that the life and health of each individual is also an object of protection. I do not share this position, as discussed in the text. The term "public health" has a normative character and is found in legal acts, e.g. in Article 1 of the Sanitary Inspection Act of 14 March 1985, Journal of Laws of 1985 No 12 item 49, as amended or in the most recent Public Health Act of 11 September 2015, Journal of Laws of 2015, item 1916, as amended.

[32] See for example Zontek, W., in: Górowski, W., Zając, D. (eds), *Komentarz…*, op. cit., marginal ref. 1; Kurzępa, B., in: Ważny, A., *Ustawa…*, op. cit., p. 438.

[33] Resolution of the Supreme Court of 27 October 2005, I KZP 32/05. For example, M. Sagan expressed a critical opinion on this resolution, asserting, inter alia, that the preventive aspect should not be linked with the object of protection, but with the legislator's motive for establishing the punishability of a given type of a prohibited act. He also stated that the result of a proper interpretation of a legally relevant notion should not contain superfluous phrases, whose omission does not affect the essence, characteristics or linguistic meaning of the notion. Sagan, M., 'Glosa…', op. cit., p. 164.

[34] Judgement of the Constitutional Tribunal of 4 November 2014, SK 55/13; decision of the Constitutional Tribunal of 17 March 2015, S 3/15.

[35] District Court in Puławy in its judgement of 19 November 2019, II K 34/19; Regional Court in Wrocław, in its judgement of 17 November 2021, III K 106/21. Moreover: Administrative Court in Katowice in its judgement of 24 April 2008, II AKa 102/08: "the object of protection of the provision in question is social (public) health which also substantiates that no threat is posed to this legal good in the situation of possessing such a negligible amount of the drug (small residue) as is difficult to determine".

substance the sum of the states of health of individuals?[36] Does the criminalisation of "possession" require the existence of a threat to the health of many people?[37] In the Public Health Act of 11 September 2015,[38] the legislator has only specified tasks within the scope of public health that include, inter alia:

> "monitoring and assessing population health, public health risks and public health related quality of life; providing health education (...); health promotion; shaping health and social attitudes conducive to the prevention of high-risk behaviour; preventing addictions and their consequences for health and society; preventing diseases (...); international cooperation in public health research".[39]

Bearing in mind the above, it should therefore be pointed out that in defining the notion of public health (which in case-law is equated with the notion of social health),[40] two features of the notion are apparent: health in the aspect of population health and risk avoidance, and a certain system of activity by public institutions in view of maintaining and improving people's health,[41] *including the prevention of addictions and the consequences for health and society that they entail.* Therefore, not only the designatum of "health"[42] is crucial in defining public health, but also a certain set of actions taken at the level of whole communities in view of strengthening people's health, and not only individual efforts to this end.[43] The doctrine emphasises that when speaking of public health, one should bear in mind "the health of a larger number of people".[44] The notion cannot therefore be applied to an individual or to

[36] M. Szydło argues, that it is not. Szydło, M., in: Safjan, M., Bosek, L. (eds), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa, 2016, p. 788, marginal ref. 103. W. Górowski and D. Zając argue that it is. Górowski, W., Zając, D. (eds), *Przestępstwa…*, op. cit., marginal ref. 8.

[37] The attribute of "many persons" has a fairly well-established interpretation, see for example Bogdan, G., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117–211a*, Warszawa, 2017, p. 436, and rulings indicated therein. Wąsek, A., *Kodeks karny. Część szczególna. Tom I. Komentarz do artykułów 117–221*, Warszawa, 2006, p. 423. Also e.g. judgement of the Administrative Court in Katowice of 18 October 2001, II Aka 372/01; Judgement of the Administrative Court in Lublin of 2 February 2004, II Aka 421/03.

[38] The Institute of Public Health of the Jagiellonian University proposes an interesting definition of public health, drawing on the definition proposed in 1920 by Yale University Professor Ch.E.A. Winslow, based on the Constitution of the WHO of 22 July 1946. Text at: https://izp.wnz.cm.uj.edu.pl/pl/blog/czym-jest-zdrowie-publiczne/, accessed on 10 September 2022.

[39] Article 2 of the Public Health Act of 11 September 2015, Journal of laws of 2015, item 1916, as amended.

[40] See for example the Resolution of the Supreme Court of 27 October 2005 I KZP 32/05.

[41] Similarly Sagan, M., 'Glosa…', op. cit., p. 165.

[42] Definition of health adopted by the WHO at the time of its inception in 1948: health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity; in: Sygit, B., Wąsik, D., *Prawo ochrony zdrowia*, Warszawa, 2016, p. 13. According to M. Kacprzak, health is not only the absence of disease or infirmity, but also a feeling of good health and such a degree of biological, mental and social adaptation as is achievable for the individual under the most favourable conditions. Health criteria are therefore subjective (an individual's experience of their body, e.g. feeling energetic or tired), objective (based on physiological phenomena, e.g. heart function) and social (factors that enable or hinder carrying out certain roles, e.g. employee, parent, etc.). Cited after: Sygit, M., *Zdrowie publiczne*, Warszawa, 2017, pp. 23–24.

[43] Similarly Sagan, M., 'Glosa…', op. cit., p. 166.

[44] Szydło, M., in: Safjan, M., Bosek, L. (eds), *Konstytucja…*, op. cit., p. 788, marginal ref. 103.

the sum total of the health of individuals. This is because it refers to a certain state whose occurrence is very likely to result in a simultaneous threat to the health of a number of people. Such probability should be established on the basis of the current state of knowledge and life experience.[45] However, it is impossible to agree with the thesis advanced by M. Szydło that such threats may be not only external, but also of an internal nature, i.e. originating from the individuals themselves, who may wish to voluntarily create a threat to their own health (e.g. by abusing alcohol or using drugs). This is a tenuous thesis to defend, given that the protection of every person's health, within the meaning of Article 68(1) of the Constitution, is a constitutional human right, however, under Article 31(1) of the Constitution, freedom, in its various manifestations, including the right to decide on one's personal life and the protection of privacy (e.g. Article 47 of the Constitution) is also such a right.

Of course, looking at the gradual development of health systems in the world over the past centuries, it should be underlined that health care in its entirety, including medical care, was and is treated in most countries as a public good. For many years, the guiding principle in developing health systems worldwide has been to consider health as a public good rather than an individual good. At the initiative of the WHO, a list of essential public health activities was compiled in the 1990s which included prevention, monitoring and addressing diseases affecting the community, health promotion, health education as well as legislation concerning health care.[46] Authors can be found in the literature who claim that an object of protection thus defined seems too broad a notion.[47] It cannot be denied that they have a point. The main objective of the Act on Counteracting Drug Addiction is combating the supply of drugs, their illegal production and distribution, and not protecting the personal good of specific individuals.[48] However, addressing the issue of drug supply, that requires counteraction by the State, is one thing, and "consuming" drugs is another. The Act serves the purpose of protection against drug addiction as a certain negative social phenomenon that society has an interest in preventing. When invoking the necessity to introduce criminal liability for drug possession on account of the requirement to align national legislation with EU and international regulations,[49] it is often underlined that the reason for introducing it was the will to prosecute perpetrators already at the stage of preparation to pass on a narcotic drug or psychotropic substance to another person. Indeed, it has not always been possible in practice to apprehend the perpetrator directly when carrying out a specific act

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[45] Ibidem, p. 788, marginal ref. 103.

[46] Sagan, M., 'Glosa…', op. cit., p. 166.

[47] See for example Kulik, M., in: Mozgawa, M., *Pozakodeksowe*…, op. cit., p. 549.

[48] Judgement of the Administrative Court in Warsaw of 29 January 2003, II AKa 510/02, Regional Administrative Court 7/2003, item 71; Klinowski, M., 'Granice odpowiedzialności za posiadanie narkotyków', *Prokuratura i Prawo*, 2011, No. 3, p. 101.

[49] However, as K. Krajewski rightly argues, it is possible to provide solutions that meet international requirements but allow for the decriminalisation of behaviour typical of drug users. Therefore, the argument justifying the criminalisation of drug possession as essential under international law must be deemed misconceived. Further literature on this topic: Krajewski, K., 'Problematyka kryminalizacji posiadania środków odurzających i psychotropowych w świetle regulacji prawnomiędzynarodowych', *Państwo i Prawo*, 1997, No. 1, p. 58 et seq.

with the participation of another person, the introduction of Article 62 of the Act on Counteracting Drug Addiction was therefore intended to "facilitate the work" of law enforcement authorities.[50] However, contrary to the legislator's intention, this was not reflected in the legislation. In addition, very serious doubts arise as to whether the criminalisation of behaviour, and therefore encroachment on the sphere of individual freedoms and rights guaranteed by the Constitution, can be justified by the need to facilitate the work of law enforcement authorities.

The claim that public health is a legal good under Article 62(1) of the Act on Counteracting Drug Addiction generates further consequences. Firstly, it is difficult to equate the rather enigmatic notion of "public health" with the attribute of "life and health of many people" that already exists under the provisions of the Code. Indeed, in the first case, we are talking about a certain "health status" of the human population,[51] whereas in the second case, we are talking about a much more concrete group of persons, precisely described in the case-law. From what moment, then, can we assert that the perpetrator's behaviour is detrimental to such a good? If one person is in possession of a narcotic drug, is that already an act which may be detrimental to "public health"? Or do there have to be two, ten or at least a hundred such persons for this to be the case? Under Article 62(1) of the Act on Counteracting Drug Addiction, the act of drug possession by any individual is criminalised, which may give rise to the supposition that one should nevertheless assume the health of each individual to be the object of protection, this in turn means that we are entering the sphere of individual rights and freedoms. If I am in possession of a portion of a drug that law enforcement officials somewhat "incidentally" seize during a search of my residence, my behaviour does not appear to harm the legal good of public health. One must indisputably assume that the State has an interest in preventing serial, collective, self-inflicted acts against people's own health or lives (e.g. suicides carried out in the context of membership in certain groups), but it does not, after all, do so on the basis of criminal law. However, it is difficult to find an argument supporting State interference in an individual's decision to act against their own health by causing self-harm (e.g. suicide). After all, such behaviour, as a manifestation of individual freedom, is not criminalised at all or legally "regulated" in any manner. Not every activity of an individual that is contrary to the interests of society and may be an expression of some kind of social pathology (e.g. alcohol abuse, prostitution, suicide) is an object of interest to the legislator, particularly to the criminal law legislator. This follows from the principle of subsidiarity, referred to in the introduction, in the light of which certain behaviour may be objectionable from the point of view of respecting good morals, for example, but certainly does not require criminalisation.[52] Admittedly, it is difficult to describe prostitution as a constitutionally protected subjective right, since it is not an expression of values embedded in society that need to be protected, but as long as the person directly

[50] Tkaczyk-Rymanowska, K., 'Refleksje na temat art. 62 ustawy o przeciwdziałaniu narkomanii na tle karnoprawnym i konstytucyjnym', *Ius Novum*, 2021, No. 1, p. 48.

[51] Sagan, M., 'Glosa…', op. cit., p. 167.

[52] Zoll, A., in: Bojarski, T. (ed.), *System prawa karnego. Źródła prawa karnego. Tom II*, Warszawa, 2011, item 35.

involved in this type of activity, who provides services voluntarily, does not infringe the rights of third parties, there should be no question of restricting their right to provide such services for financial reasons, with due respect for the right to privacy. Drug users should be regarded in an identical manner. Of course, carrying out certain activities (e.g. driving) under the influence of narcotic drugs is a different matter, however, in this case the object of protection is different. Another issue is that of the supply of drugs, their availability, production or circulation, which should be controlled by the State on a similar basis to alcohol or other stimulants. Non-medical use of drugs alone, and possession associated therewith, should not be covered by the criminal law prohibition, subject to the age requirement, the prohibition of consumption in public places, and passing them to another person.[53]

It is impossible to agree with the position that human health is the object of protection under Article 62(1) of the Act on Counteracting Drug Addiction. Such an approach would mean accepting excessive legislative interference with individual freedom and the right to decide about one's private life. Excessive paternalism, characteristic of authoritarian governments,[54] which allows for pseudo-protective treatment of individuals, in reality interferes with their actions, restricts their freedoms, invoking motivations such as the person's good or the need for protection. Individuals subjected to paternalistic care are deemed incapable of managing their own behaviour and therefore in need of support and control.[55] The problem with paternalism is that the person whose freedom is restricted "for the sake of their

[53] There are a number of inconsistencies in the Act regarding the perpetrator of the offence. Anyone in possession of any amount of a drug is subject to criminal liability. Therefore, since even the smallest dose of a drug gives rise to liability, psychotherapists, who are contacted by people who have used such drugs or are under their influence, and perhaps have a "fix" in their pocket, should notify law enforcement. They do not benefit from the protection guaranteed by medical confidentiality. This is an absurd situation that develops the drug market even further and drives drug users underground for fear of criminal liability. Similar arguments: Krajewski, K., 'Prawo karne wobec narkotyków i narkomanii: ustawodawstwo polskie na tle modeli regulacji dotyczących narkotyków', *Alkoholizm i narkomania*, 2007, Vol. 20, No. 4, pp. 426–428 and 434.

[54] The Polish People's Republic was a "welfare" State, it treated its citizens in a paternalistic way, but it had fairly liberal drug laws that did not criminalise possession. Obviously, this was propaganda-driven: "We take pride in the fact that we do not have the scourge of drug addiction, which, especially in the countries of the capitalist West, has assumed the dimensions of an extremely dangerous phenomenon" – these were the words used by Edward Gierek in June 1980, at the plenum of the Central Committee of the Polish United Workers' Party on health, to dispel growing concerns in the country about the problem of drug addiction. https://histmag.org/Dzieci-z-dworca-ZOO-na-polskim-podworku-problem-narkomanii-w-PRL-22073, accessed on 30 September 2022. Officially, there was no drug problem, although the reality was quite different. Health service statistics reported patients addicted to drugs and chemical substances, and police data referred to the phenomenon of home-made opiates. This issue is presented in the EMCDDA report: Rychert, M., Palczak, K., Zobel, F., Hughes, B., *Przeciwdziałanie narkomanii i narkotykom w Polsce*, EMCDDA, 2014, p. 9 et seq.

[55] J.S. Mill, in his 1861 essay "On Liberty", stated that no one has the right to tell another mature human being that they are not allowed to lead their lives how they see fit. Valid reasons may justify admonishing, reasoning, persuading or pleading, but under no circumstances forcing or punishing. Liberal supporters of Mill admit interference to protect the interests of individuals, at the expense of encroaching on their freedom, in exceptional cases, in order to protect others such as children, older persons or the mentally ill. According to Mill, the only situation when limitations may be imposed upon the individual is when we want to protect others from

own good" does not necessarily recognise this as an action for their benefit. Drug possession for use is a typical "victimless crime".[56] The State is not in a position to accurately determine what an individual expects and what gives them satisfaction. It is rightly argued that forcing a fully informed person to make certain decisions, even for their own good or benefit, is a limitation of their status as an independent subject. The possibility of choice, regardless of the wisdom or pertinence of that choice, is a good in itself.[57] Indeed, freedom also manifests itself in the fact that it is the person to whom such freedom is given who decides on its exercise.[58] The ability to decide autonomously and to make use of and interpret certain phenomena according to one's own experience and view of the world is both a right and a proper condition of adulthood.[59] There can be no argument with the above reasoning. After all, if a person is aware of their behaviour and its consequences, I doubt whether anyone should usurp the right to force them to change a decision they have made. It is therefore easy to conclude that the problem of drug addiction, non-medical possession for use and use of narcotic drugs lies essentially outside the scope of the law and, in particular, outside the scope of criminal law. When regulating a matter by law, the legislator must take into account not only the educational function of the law, but also its stabilising function, i.e. protecting social interests and safeguarding, changing or stimulating certain community relations. While it is possible to legislate and try to enforce compliance with norms, if those norms prescribe behaviour that is not in keeping with community life in a particular era, such legislative activity will prove ineffective in the long term. It should be made clear that, in contradiction to populist tendencies, the criminal law is not able to impose desirable behaviour on society through the threat of severe sanctions. Criminalisation in situations where it is known that legal provisions will not be applied poses additional dangers, both in terms of the constitutional principle of equality before the law – when various extra-legal considerations determine who and when is held accountable – and in terms of making criminal law a law of symbolic application.[60] Before deciding on criminalisation, one should always consider whether other, more lenient measures are being employed to protect the legal good in question. Other measures are primarily those available under other branches of the law, as well as in the scope of social and

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the consequences of certain behaviours. https://www.google.pl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwj1w8vysrD6AhVvtIsKHSHiAwQQFnoECAgQAQ&url=https%3A%2F%2Fwww.lo13.wroc.pl%2Fdl%2Fmill.pdf&usg=AOvVaw2ZEaqljYV35yYcAyI-eJca, accessed on 25 September 2022; Vogt, M., *Historia filozofii*, Warszawa, 2007, p. 363; Kozerska, E., in: Kozerska, E., Sadowski, P., Szymański, A. (eds), *Idea wolności w ujęciu historycznym i prawnym, wybrane zagadnienia*, Toruń, 2010, p. 8.

[56] Falandysz, L., 'O koncepcji tzw. przestępstw bez ofiar', *Państwo i Prawo*, 1978, No. 8–9, p. 107 et seq. Cited after: Księżopolska, A., 'Problem tzw. »przestępstw bez ofiar«', *Studenckie Zeszyty Naukowe*, 2003, Vol. 6, No. 9, p. 9.

[57] Wróbel, W., Zoll, A. (eds), *Polskie prawo*…, op. cit., p. 169.

[58] Frankiewicz, A., in: Kozerska, E., Sadowski, P., Szymański, A. (eds), *Idea wolności*…, op. cit., p. 411.

[59] Gmurzyńska, E., *Rola prawników w alternatywnych metodach rozwiązywania sporów*, Warszawa, 2014, p. 128 et seq.

[60] Zoll, A., in: Bojarski, T. (ed.), *System prawa*…, op. cit., point 36.

health policy.[61] If such measures are not employed, they should be implemented, however, if they are employed, it would be justified to verify how they are enforced and whether introducing certain adjustments increasing the effectiveness of the protection a given good would not suffice. The decision to criminalise must be based on a reasonable belief that the use of measures outside the criminal law is ineffective in protecting the good.[62] In the case of drugs, the experience of Poland, but also that of many other countries, shows that the effectiveness of criminal law regulation is questionable.[63] Of course, the law also has an educational role to play, but this function should be carried out primarily by families, schools, workplaces, educational, welfare and cultural institutions, social organisations, churches, etc. Courts fulfil their educative role only by means of punishment, coercion, authority; they act in the majesty of the law and on behalf of the State. It is precisely the law that should protect the individual from State interference in a sphere that should remain a sphere of individual choice. The consequences of interference in the sphere of human freedom may consist in a change in public attitudes or beliefs, but if imposed "by force" such interference may also lead to an escalation of social conflict over a particular controversial regulation. Such is the case, for example, with regard to the possession of at least some categories of narcotic drugs.[64]

It is difficult to agree with the standpoint that public health is an object of protection under Article 62(1).[65] As K. Grabowski rightly argues, the notion of public

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[61] Grabowski, K., 'O pewnych cechach szczególnych przestępstw narkotykowych', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2014, No. 2, p. 112. Invoking literature as well as social and health policy objectives, the author argues that such exhaustion of less painful methods has not occurred. On the determinants and objectives of social and health policy: Orczyk, J., *Polityka społeczna*, Poznań, 2008, p. 17 et seq. and p. 143 et seq. On the need for integrated action in this area: Denys, A. (ed.), *Zagrożenia zdrowia publicznego. Wybrane zagadnienia*, Warszawa, 2014, p. 143 et seq. (in particular p. 147 et seq.) and Jamrozik, P., 'Edukacja młodzieży w zakresie zapobiegania zażywaniu substancji psychoaktywnych (narkotyki, dopalacze, alkohol)', in: Tokarski, Z. (ed.), *Zagrożenia zdrowia publicznego. Rola edukacji w prewencji chorób. Część 4*, Warszawa, 2016, p. 169 et seq.

[62] Zoll, A., in: Bojarski, T. (ed.), *System prawa…*, op. cit., point 33.

[63] See Krajewski, K., *Sens i bezsens prohibicji. Prawo karne wobec narkotyków i narkomanii*, Zakamycze, 2001, p. 19 et seq. and p. 81 et seq. as well as the literature indicated therein.

[64] Cf. 2011 CBOS survey results. (https://www.google.pl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjD-uuKyLL6AhXRs4sKHT0jBzIQFnoECAgQAQ&url=https%3A%2F%2Fwww.cbos.pl%2FSPISKOM.POL%2F2011%2FK_089_11.PDF&usg=AOvVaw0TKBRz6bbkXeAiSdpQYQ6l) and 2020 study results (https://medycznamarihuana.com/cbos-nie-chcemy-karania-za-posiadanie-marihuany-ale-wciaz-nie-jestesmy-za-jej-legalizacja/). The number of people that are against punishment for the possession of so-called soft drugs is growing. Besides, the perception of drugs in society varies, even depending on the social group of people who use them. There is a kind of social acceptance for artistic bohemians to use such substances or abuse alcohol (except when driving under their influence). According to M. Budyn, this approach originates from the French bohème, indulging in absinthe and opium. This is yet another example of the social hypocrisy and irrational attitude of the legislator. Budyn, M., 'Kryminalizacja eutanazji…', op. cit., p. 151. Similarly: Davenport-Hines, R., *Odurzeni…*, op. cit., p. 12.

[65] A. Stasiak points out, citing the example of Portugal, which introduced decriminalisation at a time when Poland was tightening its drug laws, that, until 2011, the only opportunity to see a doctor in the course of criminal proceedings for drug possession was a psychiatric examination of accountability, often lasting less than 10 minutes. More alternatives to punishment are now available to courts and public prosecution services, however their use is not generalised.

health is a concept that is ambiguous and difficult to grasp. Firstly, the need to protect public health may justify very extensive criminalisation. Secondly, public health is an abstract notion with no concrete references and therefore difficult to measure.[66] All this has the effect of turning the criminal law into an instrument for the protection of practically all types of good, thus contradicting its subsidiary nature. Using the same logic as in the case of public policy, discussed in the following section, it would have to be argued that adopting a supportive standpoint would require demonstrating that possession of substances whose use can cause addiction leads, *in abstracto*, to negative social consequences. The legislator has used the attribute "possesses", however, it is difficult to always perceive threats in the mere fact of possessing. Of course, possession can (and most often does) involve the use of drugs by their user, however, it should be made clear that the purpose of the provision was and is not the prosecution of users but combating drug supply and prosecuting dealers who sell drugs in small portions[67] which could suggest to law enforcement authorities that they are only users and leave them, as holders of small quantities, outside the scope of criminal interest. Besides, offenders who possess a narcotic drug in order to use it, act only to the detriment of their own health and good. The argument for the criminalisation of such behaviour is that, through the negative impact on their own health, such holders have a negative impact on public health. However, public health is not a simple sum of the state of health of individuals. As K. Krajewski rightly points out, such reasoning would lead to absurd conclusions, as it could imply an obligation for each individual to keep themselves in good health because this affects the state of public health. Furthermore, if this were the case, there would be no obstacle to criminalising alcohol consumption, cigarette smoking, but also consumption of excessive amounts of unhealthy food (fast food, salt, sugar, fatty foods), due to the risk of lifestyle diseases, motorcycling and many other "unhealthy" behaviours. Therefore, invoking German literature that questions the relevance of singling out this type of object of protection, the author argues that the all-too-enigmatic notion of public health cannot effectively fulfil its function of narrowing the limits of criminal liability.[68] One must agree with the above standpoint. After all, criminalisation of behaviour is not a way of preventing disease and health risks, nor does it have a noticeable impact on the

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Data collected by the author show that Article 70a, which imposes the obligation to include an addiction therapist in the proceedings when there is a reasonable suspicion that the perpetrator is an addict or substance abuser, was used only 1,287 times in 2015. In that year, there were 21,630 people suspected of drug possession. The author therefore poses the legitimate, rhetorical question, where in all this is public health protection? Stasiak, A., *Karanie za posiadanie marihuany to opresyjny i nieskuteczny nonsens. Świat od tego odchodzi*, article of 13 February 2022, available at: https://oko.Press/karanie-za-posiadanie-marihuany-to-opresyjny-i-nieskuteczny-nonsens-swiat-od-tego-odchodzi/, accessed on 6 October 2022.

[66] Grabowski, K., 'O pewnych cechach…', op. cit., pp. 107–108.

[67] Minister Żochowski concluded that as a result of lack of penalisation of possession dealers would go unpunished but would only have to do a few more rounds. *Diariusz Sejmowy*, 61 sitting of the Sejm on 28 September 1995, p. 65. Cited after: Krajewski, K., *Sens i bezsens…*, op. cit., p. 419.

[68] Krajewski, K., 'Glosa do wyroku SN z dnia 21 stycznia 2009 r., II KK 197/08', *Państwo i Prawo*, 2009, No. 11, pp. 132–133.

number of addicts or drug users. On the contrary, according to K. Krajewski, there are strong indications that repressive criminal policies only escalate the problem.[69] Unfortunately, in October 2000, the inauspicious amendment to the previous 1997 Act[70] led to the beneficial permissive-medicinal model being replaced with a restrictive-repressive model, and the previously applicable clause stipulating unpunishability for possessing drugs in insignificant amounts, for personal use, being replaced by full punishability in all cases of possession.[71] This puts occasional users, addicts and those who benefit financially from the trade in small quantities of drugs on an equal footing.[72] The current Act of 2005[73] is very different from the Act on the Prevention of Drug Addiction of 1985 which was elaborated on the tide of the freedom movements of the 1980s, presented an extremely liberal approach to drug possession and did not penalise this type of act at all. Over the next two decades, this approach has transformed into one of the most restrictive approaches in Europe.[74] One can only regret that this has happened. However, this fact is the crowning argument in support of the thesis that "possession for personal use" stipulated in Article 62(1) of the Act on Counteracting Drug Addiction, in the wording of the current Act, in the context of the alleged justification of the need to protect "public health", is merely a secondary ideology added to the established legislation and an attempt to justify a regulation that is questionable from a legislative and constitutional point of view.[75] This is all the more so as, when the legislation was drafted, the legal interest of public health was not mentioned as a *ratio legis* of the provisions introduced.[76]

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[69] Interview with K. Krajewski: https://www.youtube.com/watch?v=2DVbhFBXRWI (4.10.2022). J. Vetulani's statements are in a similar vein: https://www.youtube.com/watch?v=nfm8wiNqAOA, accessed on 4 October 2022.

[70] Act on Counteracting Drug Addiction of 24 April 1997, Journal of Laws of 1997 No 75 item 468 as amended, in particular amendments made in 2000. (Journal of Laws of 2000 No 103 item 1097).

[71] Krajewski, K., 'Prawo karne…', op. cit., p. 434.

[72] Identically e.g. Kornak, M., 'Glosa…', op. cit., thesis 1.

[73] Ustawa z 31.01.1985 r. o zapobieganiu narkomanii (Journal of Laws of 1985, No 4, item 15).

[74] Wiszejko-Wierzbicka, D., in: Kuźmicz, E., Mielecka-Kubień, Z., Wiszejko-Wierzbicka, D. (eds), *Karanie za posiadanie. Artykuł 62 ustawy o przeciwdziałaniu narkomanii – koszty, czas, opinie*, Warszawa, 2009, p. 7.

[75] It is, of course, necessary at this point to mention the provision of Article 62a of the Act on Counteracting Drug Addiction introduced by the amendment of 1 April 2011 to the Act on Counteracting Drug Addiction and Certain Other Acts (Journal of Laws of 2011, No 117, item 678). While it allows for the discontinuation of proceedings in the case of possession of an insignificant amount of a drug for personal use, it is still not an institution that decriminalises drug possession, and its application is subject to the assessment of law enforcement authorities. It should be underlined that this discontinuation is of an optional nature. For more details on Article 62a of the Act on Counteracting Drug Addiction: Tkaczyk-Rymanowska, K., *Karnoprawne aspekty posiadania narkotyków. Ujęcie statystyczne*, Rzeszów, 2020, pp. 41–46 and statistical data on the application in practice of the provision in question, presented in that publication, pp. 62–161.

[76] Górowski, W., Zając, D. (eds), *Przestępstwa*…, op. cit., marginal ref. 4. This is also claimed by: Grabowski, K., 'O pewnych cechach…', op. cit., p. 113, citing documentation from the legislative procedure.

III

In the doctrine, one may also encounter the claim that the good protected by the Act on Counteracting Drug Addiction, also by the provision of Article 62(1) thereof is public policy.[77] The term frequently appears in the legal order[78] but there is no legal definition in the legislation giving it a uniform content and scope of meaning. It is a vague, catch-all notion, which allows for flexibility in the application of the law, adapting the content of the notion to the changing social situation, but at the same time it is dangerous, especially in the context of criminal law. This type of concept is concretised by the competent authorities applying the law, who have a wide margin of discretion in using these concepts and in defining their content.[79] The definition of "public policy" – recognised in the literature – as a set of legal and extra-legal norms (moral, ethical, customary, etc.) whose observance determines the normal coexistence of human individuals within an organised State was formulated in the inter-war period.[80] According to these theories, public policy is peace, i.e. public security, and the social order that is shaped under peaceful conditions.[81] Attention began to be drawn to the fact that political, religious, ethical, moral elements etc. have an influence on shaping public policy norms. These are therefore views that have emerged against the background of a collective life that varies depending on the time, the place and the setting. It should be made clear that in the literature definitions relating to the sphere of public policy are strictly linked with the notion of public policy under administrative law.[82] In the context of criminal law, these notions were more broadly characterised by W. Kubala and L. Falandysz: "Public policy, analysed as the generic object of protection under criminal law, should be understood as the state of social relations and structures that is desirable from the point of view of State interests, ensuring the proper functioning of power and governance and guaranteeing security and peace in public areas; this state

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[77] Kulik, M., in: Mozgawa, M. (ed.), *Pozakodeksowe…*, op. cit., p. 550; Górowski, W., Zając, D. (eds), *Przestępstwa…*, op. cit., marginal reference. 4. Claims also appear in the literature that every violation of the law is in a sense a violation of public policy. Kaczmarek, J., *Przestępstwo wzięcia i przetrzymywania zakładnika. Aspekty prawne i kryminologiczne*, Warszawa, 2013, p. 115 et seq. The above leads to the conclusion that the notion of public policy is only an interpretative guideline and that it is hazardous to justify the criminalisation of certain acts on its basis.

[78] Góra, T., Łabuz, P., 'Pojęcie bezpieczeństwa publicznego i porządku publicznego', *Policja*, 2021, No. 1, pp. 10–18.

[79] Osierda, A., 'Prawne aspekty pojęcia bezpieczeństwa publicznego i porządku publicznego', *Studia Iuridica Lublinensia*, 2014, No. 23, p. 91.

[80] A brief overview from a historical perspective of the notion of public policy as defined under criminal law: Czeszejko-Sochacka, K., 'Przestępstwo wzięcia zakładnika jako przestępstwo przeciwko porządkowi publicznemu', *Państwo i Prawo*, 2013, No. 9, p. 70 et seq.

[81] Bojarski, M., in: Gardocki, L. (ed.), *System Prawa Karnego, Tom 8. Przestępstwa przeciwko państwu i dobrom zbiorowym*, Warszawa, 2013, p. 757, marginal ref. 23.

[82] See Osierda, A., 'Prawne aspekty…', op. cit., p. 92 et seq. in which the author presents a number of academic definitions of public policy. However, their basis is the notion presented in the text above, elaborated in the inter-war period by W. Kawka.

is regulated by legal norms and principles of social co-existence".[83] Public policy is not equivalent to legal order or to principles of social co-existence, although attention is drawn to the breadth of this definition, in which security aspects are also included in public order. According to another definition, public policy is a certain public order, the totality of collective life relations, but also a certain system of norms, legal and customary rules, regulating the coexistence of people in general or only their behaviour in public places; this gives rise to a certain fundamental objection, because the term treats public order as an abstract system of norms and not as a concrete fragment of the reality of human coexistence that is in compliance with such norms. In this sense, "public policy" is understood as public order, encompassing the totality of collective life relations in all their manifestations.[84] The notion of public policy is pertinently summarised by A. Osierda, who assumes that nowadays public policy is the observance of legal norms, but also of moral, customary and religious norms as well as rules of social coexistence leading to the harmonisation of individuals and human communities.[85]

In the case law of the Constitutional Tribunal it is clearly assumed that public policy, although far from being defined in terms of content, encompasses shaping the state of affairs within the State in a manner enabling the normal coexistence of individuals in that State. When restricting individual rights and freedoms, the legislator should be guided by the concern to ensure harmonious coexistence of members of the community, which includes both protecting the interests of individuals and protecting certain social goods.[86] It follows from the above that when interpreting the notion of public policy the Constitutional Tribunal invoked interpretations elaborated – already in the inter-war period – on the basis of certain legal norms and extra-legal assessments, namely certain assessments of a social and philosophical nature, often with a moral and religious underpinning.[87] Unfortunately, lack of precise articulation of public policy as an object of protection generates practical consequences, foremost of which are the danger of "loosening" the boundaries of criminal liability and the arbitrariness of recognising certain goods as objects of protection. Treating public policy as an abstract system of norms, rather than as a fragment of reality in compliance with such norms, extends liability to behaviour which, although contrary to certain principles, does not lead to disruption of the normal course of public life, particularly where there is no "public" element at all or where surrounding people are not affected by the act. However, if one also focuses attention on the indefinite number of – predominantly customary – rules of behaviour, it is difficult to specify any limit of criminal liability. There is no doubt that non-medical use of narcotic drugs on a large scale has far-reaching

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[83] Kubala, W., 'Porządek publiczny jako rodzajowy przedmiot ochrony przepisów prawa karnego', *Palestra*, 1981, No. 7–9, p. 56.

[84] Falandysz, L., 'Pojęcie porządku publicznego w prawie karnym i karnoadministracyjnym', *Palestra*, 1969, No. 2, pp. 64 and 67.

[85] Osierda, A., 'Prawne aspekty…', op. cit., p. 106.

[86] Judgement of the Constitutional Tribunal of 12 January 1999, P 2/98; Judgement of the Constitutional Tribunal of 7 February 2001, K 27/00; Judgement of the Constitutional Tribunal of 8 October 2007, K 20/07.

[87] Safjan, M., Bosek L. (eds), *Konstytucja…*, op. cit., p. 787, marginal ref. 99.

consequences, not only for health but also for society. It is not an individual problem, as it affects both a person's closest relations and society as a whole, disrupting the harmonious coexistence of its members, and therefore undermining the social order thus defined.[88] In one of its judgements, the Tribunal concluded that public life should be organised so as to protect individuals from the phenomenon of social structure destruction associated with drug addiction.[89] It is argued that one of the most important constitutional principles is to shape the legal order in such a way as to enable the elimination of threats to entire social groups, but also to eliminate external threats to the health of individuals and situations conducive to the voluntary destruction of one's health. Criminalising behaviour that poses even a merely abstract threat to public policy or public health is, therefore, in the view of the Constitutional Tribunal, the duty of State authorities.[90] Such a claim has its consequences. Indeed, it obliges the legislator to establish appropriate norms and safeguards that provide sufficient guarantees for compliance with and enforcement of these norms. The problem is that recourse to criminal law can only be justified when the desired objective cannot be achieved in any other way. The Constitution imposes an obligation on the legislator to select, from among possible measures, those least burdensome for the subjects to whom they are to be applied, or burdensome to the extent necessary to achieve the objective pursued, but not more.[91] The question, then, is whether indeed criminal law as the *ultima ratio* is the appropriate tool for protecting public policy against drug addiction (which is a medical and social problem[92]) or whether it is an example of unacceptable interference by the legislator in constitutional rights and freedoms, including the right to privacy and self-determination.[93] The justification for criminalisation must always be the value that the regulation introduced is intended to protect. Furthermore, it must never go beyond the principles of a democratic state of law. As argued in the literature, non-democratic criminal law emphasises first and foremost the proscriptive function of the criminal law norm and criminalises an act not because it poses threats to the fundamental principles of the proper functioning of society, but because it is linked with violating the obligation to obey the orders of authority.[94] In a democratic State

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[88] Krajewski, K., *Sens i bezsens*…, op. cit., p. 58.

[89] Judgement of the Constitutional Tribunal of 4 November 2014, SK 55/13 with reasons, p. 30 (including critical opinions by: Kulesza, J., 'Glosa do wyroku…', op. cit. , pp. 132 et seq., and Jezusek, A., 'Glosa do wyroku…', op. cit., p. 194 et seq.).

[90] Reasons for Judgement of the Constitutional Tribunal of 4 November 2014, pp. 31–32.

[91] Judgement of the Constitutional Tribunal of 25 February 1999, K 23/98.

[92] The thesis that the issue related to consumer drugs use is purely a social and medical one is advanced in the paper: Tkaczyk-Rymanowska, K., 'Narkomania – problem społeczny, medyczny i prawny', in: *V Ogólnopolska Społeczna Konferencja Naukowa "Analiza polskiego społeczeństwa"*, abstracts edited by Iwaniuk, M., Szymczyk, P., Lublin, 2021, p. 20 (unpublished paper).

[93] More details on this topic Tkaczyk-Rymanowska, K., 'Refleksje…', op. cit., p. 47 et seq. A "proportionality test" was conducted therein, on the grounds of Article 31(2) of the Constitution, which led to the conclusion that the regulation of Article 62(1) of the Act is unconstitutional (pp. 56–61).

[94] Zoll, A., 'Odpowiedzialność karna za czyn niesprowadzający zagrożenia dla dobra prawnego', in: Majewski, J. (ed.), *Formy stadialne i postacie zjawiskowe popełnienia przestępstwa*, Toruń, 2007, p. 12.

under the rule of law, the violation of a norm, understood as an order of authority, is not a sufficient basis for punishment, it only marks its limit. The violation of such a norm is a necessary condition for imposing legal consequences (not necessarily under criminal law) that consist in interference in the sphere of freedom, though it is not a sufficient justification for such interference.[95]

Criticism should be directed towards understanding public policy as a status protected by a set of appropriate regulations. The character of such interpretation is questionable, as it is not clear whether it concerns legal order in general.[96] A fundamental flaw in the notion of public policy is describing this category of goods in a normative and abstract way as a certain system of norms (legal, ethical, customary), rather than as a concrete social arrangement in compliance with these norms. Adopting a broad notion of public policy is possible, however, such an extended interpretation of it as an object of protection raises concerns with respect to guaranteeing such protection. The word "public" encompasses the most relevant meaning, although this meaning is somewhat neglected in the doctrine, which is obviously not tantamount to "social" or "legal". "Public" means "concerning society as a whole or a certain community; accessible to all or intended for all; connected with a certain office or non-private institution; taking place in front of witnesses, in an overt manner".[97] Can we therefore adopt the thesis that the notion of public policy includes the overt behaviour of people, in compliance with social norms, in places accessible to an unspecified number of people?[98] If so, then it should be made clear that public policy is therefore not the norms and principles alone, but a specific fragment of actual human coexistence. Is it therefore possible to attack or threaten the legal good of public policy in the absence of a "public" element? It seems that possessing a drug fix in private, outside a public place (e.g. in one's own flat, in a car), in the absence of co-participants aware of such "possession", in conditions

[95] Ibidem, p. 14.

[96] Given the impossibility of assigning specific content – which would always be proportionate to the society development level – to the notion of public policy, the terms "untamed horse" or "chameleon" that appear in academic papers are extremely illustrative and apt. Bałos, I., 'Stosowanie klauzuli porządku publicznego a drażliwe zjawiska społeczne', *Monitor Prawniczy*, 2013, No. 3, p. 137.

[97] https://sjp.pwn.pl, accessed on 29 September. Under the Code of Petty Offences or the Criminal Code, the attribute "public" is composed of two elements: "public place" or "publicly/in public". "Public policy", which is a legal good, appears apart from these as the title of Chapter XXXII of the Criminal Code. They are therefore not identical notions, although the first two appear to be a part of public policy. For if I publicly incite to a certain behaviour or perform certain acts in a public place, I thereby undermine a certain order, public policy.

[98] L. Gardocki is of the opinion that if public policy is understood as a certain order and peace prevailing in public places, then the good thus defined becomes the object of protection of selected provisions. Gardocki, L., *Prawo karne*, op. cit., p. 324. He also wrote about the definition of public policy *sensu stricto* as order in a public place, in the context of the regulation of Chapter XXXII of the Criminal Code. Bojarski, M., in: Gardocki, L. (ed.), *System Prawa…*, op. cit., p. 757, marginal ref. 22. On the contrary, M. Bojarski argues differently in another of his publications, taking the view that public policy is "a system of public law structures and social relations emerging and shaped in public places and in non-public places, whose aim and task is, in particular, to protect life, health, property (…)". For the reasons stated in the text I do not agree with the adoption of such a broad definition. Bojarski, M. (ed.), *Prawo karne…*, op. cit., p. 742.

of total absence of the "public" element, does not pose a threat to the legal good of public policy. A public place and the presence of public are not in themselves sufficient to assume a threat to public policy if the offender's behaviour does not directly affect surrounding people. In other words, if the drug remains "hidden" from third parties, there seem to be no grounds for holding the perpetrator criminally liable on the basis of the notion of legal good thus constructed.[99] However, should the legislator have doubts (incidentally – unfounded ones) about the complete decriminalisation of drug possession for use, administrative liability could at least be considered. The prohibition of "possession" would only apply in the situation of possessing a drug in a "public" setting. This too would, unfortunately, generate a multitude of doubts similar to the current prohibition under criminal law, but it would be a far more favourable regulation for users than the current one. It would represent a complete paradigm shift: drug use would be moved from the criminal law sphere to the social and health sphere, if more harm reduction programmes were launched at the same time. Above all, a change in policy would protect possessors from the stigma and series of problems associated with an entry in the National Criminal Register, and perhaps also prompt addicted users to reach out for official help without the fear of facing criminal liability.[100]

IV

In the light of the above considerations concerning the potential legal goods protected by the provision of Article 62(1) of the Act on Counteracting Drug Addiction, another problem emerges connected with the unlawfulness of this type of act. An attack on legal good is a prerequisite for the act to be considered contrary to a sanctioned norm. The most frequent case of absence of threat to the good

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[99] By way of example, it can also be pointed out that the Act of 25 February 2011 on chemical substances and their mixtures, (Journal of Laws 2011, No 63, item 322) does not provide for criminal liability for the unlawful possession of a chemical substance, that is often more dangerous and whose potential possession leads to much graver negative consequences. Criminalisation covers behaviour related to production, trade, etc.

[100] Attention should be drawn to the regulations already signalled in this article, applicable in Portugal, a country viewed as a contemporary drug policy model. Details on the Portuguese model where drug possession has been decriminalised, the conditions for such decriminalisation, the situation of users when law enforcement discloses drug possession: interview with K. Krajewski: https://www.youtube.com/watch?v=2DVbhFBXRWI, accessed on 5 October 2022. Moreover: Kowalik, M., *Portugalia: zamiast kar za narkotyki pomoc dla uzależnionych*, article of 6 January 2022, available at: https://krytykapolityczna.pl, accessed on 7 October 2022; Kijek, K., 'W Portugalii nie ścigają za ćpanie. Tam ludzie jak chcą, to biorą. A ścieki pokazują całą prawdę', *Gazeta Wyborcza*, 27.09.2021, article available at: https://wyborcza.pl/duzyformat/7,127290,27611122,w-portugalii-nie-scigaja-za-cpanie-tam-ludzie-jak-chca-to.html, accessed on 6 October 2022. A similar option was offered in one state in the USA. In Oregon, instead of facing court, residents caught with drug amounts within the legal limit will have a choice: a fine (100 USD) or a visit to a drug clinic for a health assessment – Sochaczewski, J., *Oregon jak Portugalia. Pierwszy stan w USA, gdzie legalnie można posiadać narkotyki*, article available at: https://www.national-geographic. pl/artykul/oregon-jak-portugalia-pierwszy-stan-w-usa-gdzie-legalnie-mozna-posiadac-narkotyki, accessed on 6 October 2022.

is when the behaviour is not subject to evaluation as it lies within the scope of human freedom.[101] Under this premise, one would have to assume that the act of a perpetrator consisting in possessing the drug does not constitute an attack on any of the above-mentioned legal goods. Indeed, a perpetrator may possess a drug for a variety of purposes: to take the drug and become intoxicated, to hide it in a drawer, etc. It is therefore questionable whether the perpetrator's act poses a threat to the goods of public health and public policy. Indeed, it is not unlawful to commit an act that does not harm any legal good.[102] Intermediate standpoints can also be found in the literature: that the act of possessing a drug may harm a legal good, as it poses a threat – in abstract terms – to the goods of health or public policy, however, the consent of the drug holder makes their behaviour legal from the very beginning.[103] Proponents of this view argue that the unlawfulness of the behaviour is precluded by the holder's consent to the violation of the good at their disposal, in this case – health. This argument could be analysed if the health of the individual were the good legally protected by Article 62(1) of the Act on Counteracting Drug Addiction, however, as indicated above, such reasoning would inadmissibly interfere with the freedom of the individual, would be contrary to the purpose of the Act on Counteracting Drug Addiction, as stated in Article 2 thereof, and unconstitutional.[104] The consent of the holder of a legal good to the "violation" thereof or posing a "threat" thereto results in the absence of an attack on the legal good in a situation where there is no third party involved, and the person disposing of and violating the potential legal good is the interested "possessor" himself, who is not the offended party, does not recognise himself as such and is not interested in the interference of law enforcement authorities. Acts that pose an abstract threat to a legal good, which acts stipulated in Article 62(1) of the Act on Counteracting Drug Addiction[105] are considered to be, although very distant from the possible actual threat to the good (only the question is: what good? freedom of individuals only from drug addiction, since the criminal law legislator does not show such concern about possible alcohol addiction?), should also have certain limits in terms of such "distance". It would be absurd to prohibit cigarette smoking because it can cause diseases that prevent members of society from fulfilling social roles or limit their fulfilment, thereby adversely affecting the so-called social order. It would also be irrational to impose alcohol prohibition[106] arguing that the use or abuse of alcohol

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[101] Wróbel, W., Zoll, A., *Polskie prawo…*, op. cit., p. 168.

[102] Gruszecka, D., *Ochrona dobra…*, op. cit., p. 65.

[103] The opposite claim is made by: Piaczyńska, A., 'Przestępstwo udzielenia środków odurzających lub substancji psychotropowych', *Prokuratura i Prawo*, 2010, No. 11, p. 145.

[104] Tkaczyk-Rymanowska, K., 'Refleksje…', op. cit., p. 56 et seq.

[105] Budyn, M., 'Kryminalizacja…', op. cit., p. 147 et seq.; Piaczyńska, A., *Przestępstwo…*, op. cit., p. 144; Zontek, W., 'Jak posiadać, żeby nie posiadać? Kilka refleksji nad orzecznictwem sądowym ostatnich lat w sprawach narkotykowych', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2010, No. 1, p. 53.

[106] The USA has rehearsed the issue of alcohol prohibition, and its consequences proved dramatic. This topic is discussed in academic literature, but also in journalism, for example by: Krajewski, K., 'Czy zalegalizować narkotyki (wokół debaty amerykańskiej)', *Ruch Prawny, Ekonomiczny i Socjologiczny*, 1997, No. 2, year LIV, p. 124 et seq.; Krajewski, K., *Sens i bezsens…*, op. cit., p. 19 et seq.; Davenport-Hines, R., *Odurzeni…*, op. cit., p. 19 et seq.; Hari, J., *Ścigając*

by the public can lead to a number of diseases and behaviours that may also disrupt certain social relations. It would also be absurd to ban the possession of household chemicals, which, after all, in case of improper use, can lead to a number of health complications, including deaths.[107] Indeed, glue, paint, varnish or solvent can all be narcotic substances. The criminal law prohibition of the possession of substances that are mostly widely known and used in medicine is similarly absurd. It should not be the object of interest of criminal law as this causes more harm than good.[108]

Although offences related to an abstract threat are not a homogeneous category, they are characterised by an *a priori* assumption on the part of the legislator that a certain category of behaviour poses a threat to a legal good; this threat is not an attribute of the offence and the courts are relieved of the need to specifically prove this threat in every case.[109] A threat posed to a legal good should only be the motive for the legislator's action and this should be the measure of compliance of the regulation of Article 62(1) of the Act on Counteracting Drug Addiction with Article 31(3) of the Constitution. However, as has been rightly argued in academia, in order to establish such compliance, it is not sufficient to refer to the mere threat posed to abstractly defined social relations, but it is necessary to indicate the concrete value that is threatened by the behaviour that violates the sanctioned norm.[110] When introducing the criminalisation of a certain type of behaviour, the legislator is obliged to justify it on the basis of its social harmfulness. Such harmfulness arises when it is established that a certain category of acts threatens a good that has a certain socially recognised value. However, this is not a sufficient condition for introducing a criminal law prohibition. It must also be established that it is possible to influence the behaviour of the norm addressees by the prohibition and threat of punishment in the event of non-compliance.[111] From there, it is a straightforward matter to conclude that the envisaged prohibition and the penalty for its violation are intended to be a proportionate response in the light of Article 31(3) of the Constitution. If we considered regulations related to "supply-side" activities in the broadest sense, this claim would be defensible. However, possession for use in itself, under Article 62(1) of the Act on Counteracting Drug Addiction, cannot benefit from such defence. All

krzyk. Dzieje wojny z narkotykami, Wołowiec, 2018, p. 15 et seq.; Walton, S., *Odlot. Kulturowa historia odurzenia*, Warszawa, 2017, p. 13 et seq.; Winnicka, E., *Zbuntowany Nowy Jork, wolność w czasach prohibicji*, Kraków, 2019, p. 15 et seq.; Kowalik, T., Słowiński, P., *Dragi i wojna. Narkotyki w działaniach wojennych*, Warszawa, 2019, p. 491 et seq. (in particular p. 502 et seq.).

[107] In the 1960s and 1970s, experiments with commonly available substances used in the household were popular. One of these was the famous "Tri" liquid, designed to remove stains from textiles, but used for inhalation as a euphoric-hallucinogenic agent. https://histmag.org/Dzieci-z-dworca-ZOO-na-polskim-podworku-problem-narkomanii-w-PRL-22073, accessed on 30 September 2022.

[108] Further literature on this topic: Tkaczyk-Rymanowska, K., 'Narkomania…', op. cit., abstract, p. 20.

[109] Zoll, A., 'Odpowiedzialność karna…', op. cit., p. 15. I believe that it is possible to provide counter-evidence to such an assumption, demonstrating that in a particular case there was no threat to a potential good; this will affect the assessment of the degree of social harm of the act and the consideration of the individual's behaviour as not punishable and therefore not criminal.

[110] Ibidem, p. 16.

[111] Ibidem, p. 18.

the more so as the legislator has indicated "possession" of the drug and not its "offering", as the causative action, therefore it is not justified to invoke public policy or public health considerations as legislative motives.[112]

It is impossible to rid the world of all possible risks, and the belief that it is possible to win the so-called fight against drug addiction by means of criminal law norms is an approach that is by all measures illusory, as demonstrated both by history and the experience of other countries.[113] In view of this, it would be appropriate to consider a path that carries some risk, but at the same time is an expression of tolerance, compromise, respect for the freedom of individuals and their autonomy as subjects capable of making informed and rational decisions. Sacrificing this freedom in the name of a false sense of security only leads to abuses and wasting energy on activities that produce no results (apart from generating police statistics). The excessive paternalism, embodied in the criminalisation of drug possession, in a form that imposes a certain hierarchy of values, certain moral principles, regardless of an individual's preferences, is difficult to accept. Just as it is obvious that there is one legal system in the country, it is also obvious that there can be many ethical, moral systems. The constant control of individuals, of what they may or may not possess, treats citizens like children, which may raise fears that they will eventually begin to behave in such a way. Deprived of the right to decide for themselves, they will lose the capacity to view the situation independently, rationally and to make decisions, and will become entirely "dependant" on the protective parent. If we want to move in this direction, it is still important to remember that in the proper process of raising children and caring for them, there comes a point when these children must be allowed to grow up.[114]

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[112] There are statements in doctrine and case-law that equate drug possession with drug use, such an interpretation to the disadvantage of the perpetrator is unconstitutional. In a democratic state under the rule of law, legislative defects cannot be remedied by the doctrine or the judiciary. On this issue: see Supreme Court Resolution of 27 January 2011, I KZP 24/10 and polemic by M. Derlatka and M. Klinowski: Derlatka, M., 'Glosa do uchwały SN z 27 stycznia 2011 r., I KZP 24/10', *Państwo i Prawo*, 2011, No. 12, p. 131 et seq., and Klinowski, M., 'W sprawie posiadania…', op. cit., p. 101 et seq. Fortunately, the Supreme Court changed its mind in 2019: "since the Act (…) does not criminalise (…) the actual use of drugs by the perpetrator, it is not possible to consider that the use of a narcotic drug constitutes an offence. The intention of the legislator was to make possession of a narcotic drug punishable at the time the offender was found to be in physical possession of such a drug. The use of drugs itself is not criminalised by the current laws in Poland." Judgement of the Supreme Court of 23 October 2019, IV KK 577/18.

[113] Similarly critical views on the policy of "deterrence" under criminal law for example Davenport-Hines, R., *Odurzeni…*, op. cit., pp. 614–615. This author proposes interesting forms of social campaigns aimed at the group most at risk of drug abuse i.e. young people. Similar campaigns are already being carried out in Poland, see for example spots at: http://konkurs.kampaniespoleczne.pl/kk_kampanie.php?Edycja=2016&kk_id=893&kk_kat=3&action=details, accessed on 6 October 2022 or https://kampaniespoleczne.pl/to-tylko-narkotyki/, accessed on 6 October 2022.

[114] Budyn, M., 'Kryminalizacja…', op. cit., p. 127.

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ADMINISTRATIVE PENALTY PROCEEDINGS IN THE LIGHT OF THE PROPOSED CHANGES TO THE FISCAL PENAL CODE

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Abstract

This study explores the assumptions of the Bill of 13 April 2022 amending the Act – Fiscal Penal Code and Certain Other Acts in the scope of administrative penalty ticket proceedings conducted in cases of fiscal petty offences. The primary focus of the analysis is the presentation of the proposed changes (ultimately withdrawn) regarding the extension of the catalogue of bodies authorised to conduct administrative penalty proceedings to include the Municipal Police and the Trade Inspection Authority, and to define their competence. Furthermore, the article presents the positions submitted by various entities as part of public consultations on the draft in question. The publication concludes with the author's evaluation of the currently applicable legal regulations concerning the issue under discussion.

Keywords: administrative penalty proceedings, fiscal petty offences, Municipal Police, Trade Inspection Authority

INTRODUCTION

Administrative penalty proceedings as well as the proceedings concerning consent to the voluntary submission to penalty are governed by the provisions of Section 2 of the Penal Fiscal Code[1] entitled "Liability with the consent of the offender". Both types of proceedings are characterised by the offender's consent to be held liable for the offence under the penal fiscal provisions. Both may be considered as the

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[1] The Penal Fiscal Code Act of 10 September 1999, i.e. Journal of Laws of 2002, item 859, as amended, hereinafter "the PFC".

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manifestations of the consensual methods used to terminate penal fiscal proceedings where the conflict caused by the fiscal offence or the fiscal petty offence is resolved (i.e. the dispute is settled) by way of an understanding which, in the penal fiscal proceedings, is based on balancing the interest of the individual (offender) with the public financial and legal good (interest) undermined or threatened because of the prohibited act included in one of the listed categories. Legally speaking, these proceedings were introduced in the Penal Fiscal Code in order to unburden the judiciary which would no longer need to examine cases of lesser gravity as they could be settled without court involvement or the need for traditional, lengthy proceedings, which would enable courts to focus on more serious cases. Therefore, the proceedings in question are in fact special forms of penal fiscal proceedings intended to make the procedure less formal and to streamline the examination of offences under the penal fiscal law by speeding up the criminal response and by avoiding several, often time-consuming, procedural steps, and thus, to comply with the principle of procedural economy.[2]

Administrative penalty proceedings were first introduced to the penal fiscal proceedings in the provisions of Articles 136–141 of the applicable Penal Fiscal Code,[3] in contrast to the proceedings concerning the consent to the voluntary submission to penalty which have a long-established legal tradition. The latter were provided for in all subsequent normative acts which governed the penal fiscal legislation, starting from the Penal Fiscal Act of 2 August 1926,[4] the Penal Fiscal Act of 18 March 1932,[5] the decree of the President of the Republic of Poland on the Penal Fiscal Law of 3 November 1936,[6] the decree of 11 April 1947 on the Penal Fiscal Law,[7] the Penal Fiscal Act of 13 April 1960,[8] the Penal Fiscal Act of 26 October 1971,[9] and finally the provisions of the Penal Fiscal Code of 1999.

Administrative penalty proceedings apply in cases concerning prohibited acts of the least gravity, defined as fiscal petty offences. In essence, under these proceedings, the non-judiciary procedural body or its authorised representative proposes, in a specific set of circumstances, to impose the penalty of a specific amount as the criminal fine, and in the next step issues a relevant procedural decision (imposition of the criminal fine) provided that the offender consents that their liability for the fiscal petty offence will be settled in such a manner.[10]

Administrative penalty proceedings are mostly characterised by its moderate formalism. They are less formal for the following reasons:

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[2] Wilk, L., Zagrodnik, J., *Kodeks karny skarbowy. Komentarz*, Legalis, 2021, thesis 1 to Chapter II.

[3] Tużnik, M., 'Postępowanie mandatowe w postępowaniu karnym skarbowym', *Ius Novum*, 2011, No 3, p. 55; Sawicki, J., Skowronek, G., *Prawo karne skarbowe. Zagadnienia materialnoprawne, procesowe i wykonawcze*, Warszawa, 2021, p. 361.

[4] Journal of Laws of the Republic of Poland, No. 105, item 609, as amended.

[5] Journal of Laws of the Republic of Poland, No. 34, item 355, as amended.

[6] Journal of Laws No. 84, item 581, as amended.

[7] Journal of Laws No. 32, item 140, as amended.

[8] Journal of Laws No. 21, item 123, as amended.

[9] Journal of Laws No. 28, item 260, as amended.

[10] Wilk, L., Zagrodnik, J., *Kodeks karny skarbowy*…, op. cit., thesis 1 to Chapter 15; Skowronek, G., *Kodeks karny skarbowy. Komentarz*, Legalis, 2020, thesis 1 to Chapter 15.

1) no formal decision is issued to initiate such proceedings;
2) no minutes are taken of any steps in the proceedings;
3) they are not adversarial, and the authority disclosing the offence is authorised to impose the penalty as criminal fine.[11]

Administrative penalty proceedings are a facultative mode of procedure. In other words, the decision to rely on administrative penalty proceedings is left at the discretion of the penalty-imposing body. The Penal Fiscal Code does not provide for the situation where the authorised body or its representative would be required to settle the case by imposing the fine as an obligation to settle the case under administrative penalty proceedings would be contrary to their substitutive nature.[12]

CATALOGUE OF BODIES AUTHORISED TO CONDUCT ADMINISTRATIVE PENALTY PROCEEDINGS AND THEIR HIGHER-LEVEL AUTHORITIES

Administrative penalty proceedings may be conducted by financial bodies in preparatory proceedings (head of the tax office, head of the customs and revenue office and the Head of the National Revenue Administration) or their authorised representatives, as well as by non-financial bodies in preparatory proceedings (Border Guards, Police and Military Police[13]) provided that this is stipulated in specific provisions (see Article 136 § 1 of the PFC).[14] However, it should be stressed that under the current legal framework there is no specific provision that would grant such powers to non-financial bodies in preliminary proceedings.[15]

The Bill of 13 April 2022 amending the Penal Fiscal Code Act and Certain Other Acts,[16] submitted on the initiative of the Ministry of Finance, proposes to broaden the catalogue of bodies authorised to conduct administrative penalty proceedings by adding non-financial bodies in administrative penalty proceedings, i.e. the Trade Inspection Authority and the Municipal Police. These bodies would be granted such powers solely for the purpose of administrative penalty proceedings, and therefore

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[11] See also Zgoliński, I. (ed.), *Kodeks karny skarbowy. Komentarz*, Warszawa, 2021, p. 882; Lisek, E., Mazalewska, M., 'Postępowanie mandatowe', in: Dziembowski, R., Pieńkowska, M., Opalska, A. (eds), *Prawo karne skarbowe. Wybrane zagadnienia teorii i praktyki*, Olsztyn, 2016, p. 87.

[12] Tużnik, M.R., 'Postępowania szczególne w postępowaniu karnym skarbowym w świetle noweli z dnia 27 września 2013 r.', *Ius Novum*, 2015, No. 3, p. 61; Światłowski, A., *Jedna czy wiele procedur karnych*, Sopot, 2008, pp. 190–191.

[13] Considering their competences, other non-financial bodies in preliminary proceedings included in the list, i.e. the Internal Security Agency and the Central Anti-Corruption Bureau, are not authorised to impose the penalty in the form of the criminal fine (Article 134, § 1, points 3 and 5 of the PFC).

[14] Sawicki, J., Skowronek, G., *Prawo karne skarbowe...*, op. cit., p. 362.

[15] See the Regulation of the Council of Ministers of 28 April 2011 on the imposition of penalty in the form of the criminal fine for fiscal misdemeanours (Journal of Laws of 2018, item 1160).

[16] Numbered as UD269 in the list of legislative and programming works of the Council of Ministers, Sejm of the 9th term.

could not be defined as bodies in preliminary proceedings as they would not be empowered to conduct the latter.

The explanatory memorandum to the Bill notes that the aim of the amendment would be to enhance the prosecution of selected types of fiscal petty offences. In fact, in order to effectively combat crime, including economic crime, some closer cooperation is required between agencies and bodies involved in counteracting and combating such illegal acts. According to the Promoter of the Bill, the proposed amendment would broaden the group of bodies authorised to prosecute fiscal petty offences under administrative penalty proceedings, namely the breaches of obligation to issue transaction receipts, which is reasonably justified considering the scope of such prohibited acts and their financial impact on the state budget.[17]

On the legislative level, the amendment would entail the addition, in Article 53 of § 38a of the PFC,[18] which stipulates that the Trade Inspection Authority and the Municipal Police shall become non-financial bodies in administrative penalty proceedings, and of § 39b[19] in the same Article, which complements the aforesaid regulation and stipulates that the higher-level authority for non-financial bodies in administrative penalty proceedings, tasked with the assessment of the regularity of administrative penalty proceedings in cases concerning fiscal petty offences, shall be the head of the revenue chamber of the relevant territorial jurisdiction. Please note that the head of the revenue chamber is also the head of the tax authority and the head of the customs and revenue authority and as such has adequate resources to monitor the regularity of administrative penalty proceedings conducted by such new bodies.

Furthermore, the Ministry of Finance stresses that the proposed regulation would help shorten the time between the disclosure of the prohibited act and the appropriate criminal response, as no additional bodies would have to be involved.

The Promoter of the Bill highlights that since 2020 the bodies of the National Revenue Administration acting as financial bodies in preliminary proceedings, i.e. heads of tax authorities and heads of customs and revenue authorities imposed 2,789 criminal fines for fiscal petty offences under Article 62 § 5 and 4 of the PFC. In 2021, their number rose to 10,474.

These statistics show the massive scale of prohibited acts, i.e. the failure to register sale transaction in cash registers or to issue transaction receipts. The gravity of individual offences is not significant but taken together, because of unpaid public dues, they generate a considerable decrease in revenue.

According to the Ministry, there is no doubt that assuming control over these areas is a preventive measure, as it prompts the belief that whatever the scale and type of irregularities, there is always a possibility of inspection and the resulting consequences. Hence, it is important to step up efforts to fight such conducts and to increase the numbers of inspections concerning the issuance of proper receipts

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[17] Explanatory Memorandum to the Bill of 13 April 2022 amending the Penal Fiscal Code Act and Certain Other Acts, numbered UD269, Sejm of the 9th term, p. 7.

[18] Article 1(1)(a) of the Bill.

[19] Article 1(1)(b) of the Bill.

and dealing in excise goods, even in places where such operations are done on a smaller scale.

The Promoter of the Bill assumes that, once established, the catalogue of non-financial bodies in administrative penalty proceedings will help reduce "the shadow economy" in the unregistered course of trade. On the one hand, armed with new powers, such bodies will be able to settle cases by simply imposing the penalty as the criminal fine. On the other hand, if the fiscal offender refused to accept the fine, the case would be referred to the competent bodies of the National Revenue Administration, which, under general terms, would take appropriate action to hold such offender liable under penal fiscal provisions.

In the opinion of the Ministry of Finance, the introduction of the recommended amendment supplements the package of regulations devised to tighten the trade transaction registration system in a comprehensive manner. Therefore, it would be wrong to consider that the amendment is solely intended to extend the powers of other authorities and, as a result, to restrict the freedom of economic transactions, or that it duplicates the authorisations conferred to the bodies of the National Revenue Administration in the form of new powers granted to the Trade Inspection Authority and the Municipal Police.[20]

Moreover, the extension of the catalogue of bodies authorised to conduct administrative penalty proceedings would require some modified wording of the provisions which directly govern these proceedings. This would affect the provisions of Article 117 § 3,[21] Article 136,[22] Article 137 § 4[23] and Article 139 § 3 of the PFC.[24]

The first of the regulations in question stipulates that the criminal fine penalty may be imposed for fiscal petty offences by authorised representatives of the non-financial body in administrative penalty proceedings, along with the bodies in preliminary proceedings or their representatives.

In their amended wording, the provisions of Article 136 § 1 of the PFC, which list the bodies in administrative penalty proceedings, stipulate that such list should include financial bodies in preliminary proceedings or their authorised representative, authorised representatives of the non-financial body in administrative penalty proceedings, as well as non-financial bodies in preliminary proceedings, provided that this is laid down in specific provisions.

Meanwhile, Article 136 § 2 of the PFC, which empowers the Council of Ministers to adopt delegated legislation in the form of regulation, stipulates that the modalities under which the authorisation is issued to impose the penalty as criminal fine for the fiscal petty offence applies equally to officials of financial bodies in preparatory proceedings, non-financial bodies in preparatory proceedings and non-financial bodies in administrative penalty proceedings. The term 'official' used in the provisions of Article 136 § 2 of the PFC will remain unchanged, still referring to officials of various bodies and meaning public officials without any reference to

[20] Explanatory Memorandum to the Bill…, op. cit., pp. 7–8.
[21] Article 1(2) of the Bill.
[22] Article 1(3) of the Bill.
[23] Article 1(4) of the Bill.
[24] Article 1(5) of the Bill.

their employment status. Therefore, the term will still refer to officials on duty and to employees who provide work.

Moreover, amendments have covered Article 137 § 4 of the Penal Fiscal Code, which, according to its wording, stipulates that, in addition to the authorised body in preliminary proceedings or its representative, the alleged fiscal offence will be determined, and the conditions of admissibility of administrative penalty proceedings and, in particular, the legal consequences of refusal to accept the criminal fine will also be explained by the authorised representative of the non-financial authority in administrative penalty proceedings.

Meanwhile, according to the assumptions to the said Bill, the provisions of Article 139 § 3 of the PFC are added in order to define the mode of procedure for non-financial bodies in administrative penalty proceedings when the offender refuses to accept the criminal fine. In such a case, after the material evidence of the fiscal petty offence has been secured, to the extent necessary, against their loss, disfigurement or destruction, non-financial bodies in administrative penalty proceedings will transfer cases for further examination to competent financial bodies in preliminary proceedings. The proposed provision will by default grant to non-financial bodies in administrative penalty proceedings the power to secure, to the extent specified therein, the material evidence of a fiscal petty offence if the perpetrator of the fiscal petty offence refuses to accept the criminal fine.[25]

COMPETENCE OF NON-FINANCIAL BODIES IN ADMINISTRATIVE PENALTY PROCEEDINGS AND BENEFICIARIES OF AMOUNTS COLLECTED FROM FINES IMPOSED IN ADMINISTRATIVE PENALTY PROCEEDINGS BY THE MUNICIPAL POLICE OFFICERS

As a result of the proposed modifications regarding the addition of non-financial bodies in administrative penalty proceedings to the catalogue of bodies authorised to conduct administrative penalty proceedings, the competences of the former were defined in a new Chapter 15a, entitled "The competence of non-financial bodies in administrative penalty proceedings", as added to the provisions of the Penal Fiscal Code.

The relevant scope of that Chapter would encompass two provisions, namely Article 141a of the PFC and Article 141b of the PFC.

The first one was intended to define the power of new non-financial bodies in administrative penalty proceedings to prosecute fiscal offenders under such administrative penalty mode. The proposed provisions granted the Trade Inspection Authority and the Municipal Police the power to prosecute perpetrators of specific fiscal petty offences defined in Article 62 § 5 of the PFC in the scope referred to in Article 62 § 4 of the PFC, Article 65 § 4 of the PFC, and Article 91 § 4 of the PFC, i.e. failure to register business operations, in particular failure to use cash registers

[25] Explanatory Memorandum to the Bill…, op. cit., p. 9.

to record sale transaction, or failure to issue a receipt from the cash register, dealing in stolen excise goods or dealing in contraband goods.

Therefore, it was proposed that such bodies be granted with powers to prosecute prohibited acts of minor social harm under administrative penalty proceedings. In the case of dealing in so-called illegal excise goods or goods which have not been subject to obligatory custom clearance, this would apply solely to acts where the amount of public dues which may decrease in consequence, does not exceed the threshold defined by law.

It should be noted that failure to register a sale transaction in the cash register or to issue a receipt from the cash register as a proof of the sale transaction is subject to liability for the fiscal petty offence defined in Article 62 § 5 of the PFC, within the scope referred to in Article 62 § 4 of the PFC, as an incident of lesser gravity.

Meanwhile, the new Article 141b of the PFC stipulated that the proper conduct of administrative penalty proceedings by non-financial bodies in administrative penalty proceedings should be supervised by the higher-lever authority with territorial jurisdiction over the non-financial bodies in administrative penalty proceedings, i.e. the head of the revenue chamber.[26]

The last of the amended provisions regarding administrative penalty proceedings were included in Article 187 of the PFC where a new § 1a was added which stipulated that the amounts collected from penalties imposed under administrative penalty proceedings by the Municipal Police officers subsidiary to the local government body would be allocated to such unit.[27]

COMMENTS SUBMITTED IN PUBLIC CONSULTATIONS TO THE BILL OF 13 APRIL 2022 AMENDING THE PENAL FISCAL CODE ACT AND CERTAIN OTHER ACTS

Under public consultations, several stakeholders made comments to the Bill, including the National Chamber of Commerce, the Polish Chamber of Liquid Fuels, the Polish Trade and Distribution Organisation, and the Association of Polish Cities.

The National Chamber of Commerce (KIG) posited that introducing possibility for the Trade Inspection Authority to conduct administrative penalty proceedings in cases of lesser gravity would help unburden the tax administration system. The KIG believed that cases concerning failure to register sale transactions in the cash register, failure to issue the sale receipt, aiding and abetting in dealing in illegal excise goods, or failure to pay customs duties, if these are acts of lesser gravity subject to a penalty for petty fiscal offence, could be settled on the local level.

On the other hand, the National Chamber of Commerce expressed its reservations regarding the amendment to Article 11(2) of the Municipal Police Act of 29 August 1997[28] concerning powers of the Municipal Police to conduct observations and to

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[26] Ibidem, pp. 9–10.

[27] Article 1(7) of the Bill.

[28] I.e. Journal of Laws of 2021, item 1763.

record, using technical equipment, images of incidents in public spaces (Article 4(1b) of the Bill). Considering how the Municipal Police used speed cameras in the past, The KIG believed that, reasonable doubts existed that the solution in question could be misused and could serve other purposes than those assumed by the Promoter of the Bill.[29]

As an aside to the present considerations, it should be stressed that amendments included in Article 11(2) of the Municipal Police Act excluded from the list of tasks in the course of which the Municipal Police is empowered to observe and record images of incidents in public spaces, the power to identify, prevent and detect some selected types of fiscal petty offences defined in the Penal Fiscal Code and to prosecute the offenders. As indicated by the Promoter of the Bill in the explanatory memorandum, this exclusion was put forward because of the legal framework which defines powers of relevant agencies entrusted with detection and prosecution of prohibited acts. In fact, the said legal framework limits the power to observe and record images of events in public spaces exclusively to offences and fiscal offences, and defines such authorisation as a special power subject to specific requirements. Therefore, it would be unreasonable to grant such power to the Municipal Police in order to combat acts of much lesser gravity.[30]

Moreover, the National Chamber of Commerce is of the opinion that the transfer of powers to conduct proceedings to non-financial bodies in administrative penalty proceedings needed to be combined with an in-depth training of the relevant procedural staff. However, the training should go beyond a simple presentation of relevant provisions to relevant officers. The latter need hands-on knowledge on how to conduct such cases, focusing on pro-fiscal measures and on the rights of businesses and citizens. This was particularly relevant for the modalities of observation, which until that date had been the reserved powers of specialised agencies.

In its analysis of the contents of Article 1(7) of the Bill, the National Chamber of Commerce assessed that the Promoter of the Bill was driven by disproportionately small benefits and used the pathological mechanism, known from the time when the Municipal Police managed speed cameras, and revenue from speed tickets was used to feed local governments' budgets. This gave rise to a number of abuses by municipalities and the Municipal Police. For reasons which are hard to understand, the Promoter of the Bill now reintroduced that widely criticised mechanism in the proceedings on fiscal petty offences. The National Chamber of Commerce noted that this was a wrong and that such a solution would distort the role of the Municipal Police within the public order supervision system in municipalities.[31]

Critical comments to the proposition to add the Municipal Police and the Trade Inspection Authority to the list of bodies authorised to conduct administrative penalty proceedings in cases concerning fiscal petty offences were also made by the Polish Chamber of Liquid Fuels. It noted that if sanctions under the Penal Fiscal Code

[29] https://legislacja.rcl.gov.pl/docs//2/12359803/12879992/12879995/dokument568645.pdf, accessed on 26 January 2023.

[30] Explanatory Memorandum to the Bill…, op. cit., p. 14.

[31] https://legislacja.rcl.gov.pl/docs//2/12359803/12879992/12879995/dokument568645.pdf, accessed on 26 January 2023.

were to be imposed by more institutions this could pose a threat to many businesses which were already subject to inspections by numerous institutions. Businesses were concerned that because of market-tightening measures, inspections and obligations had grown in size and number, as had the variety of sanctions for failure to meet the requirements. As a result, penalties were most often imposed on businesses who operated in a legal and fair manner. They did highlight that the existing sanction system affected righteous taxpayers who are liable even for the tiniest errors and mistakes (often formal mishaps and spelling mistakes). For these reasons, businesses had concerns regarding the proposal to grant further inspection powers to bodies and institutions (Trade Inspection Authority, Municipal Police), including the right to impose sanctions provided for in the Penal Fiscal Code, as envisaged in the Bill under discussion. Please note that several institutions and state bodies, including law enforcement authorities. already hold wide inspection powers in this respect, and existing solutions and the multitude of inspection bodies with relevant powers seem to be sufficient. Entrepreneurs did not challenge the need to typify incidents and irregularities under the penal legislation but had reservations regarding the broadened scope of bodies empowered to conduct such proceedings (and to impose sanctions).[32]

Similar comments were formulated by the Polish Trade and Distribution Organisation (POHiD), which stated that granting powers to impose the criminal fine to authorities other than the bodies of the National Revenue Administration, instead of improving detection rates of fiscal petty offences would create additional uncertainty for trading entities as they would need to have extra knowledge on how to identify inspectors from outside the National Revenue Administration, and about their scope of powers. In the POHiD's opinion, tax authorities already had means and resources to ensure better detection rates of fiscal petty offences; therefore, it was not necessary to introduce new bodies in order to perform relevant prevention duties; on the contrary, it would add to the chaos and uncertainty among inspected entities.[33]

In turn, in its negative opinion to the said Bill, the Association of Polish Cities stressed that the relevant scope of actions went beyond the statutory scope of powers granted to the Municipal Police (City Police officers), which, in accordance with the Municipal Police Act of 29 August 1997 were limited to the protection of public peace and order, and such scope did not include penal-fiscal powers.

In the opinion of the Association of Polish Cities, the amendments in question would add a number of procedural obligations in respect of administrative penalty proceedings in fiscal cases, which was different from administrative penalty proceedings conducted so far by the Municipal Police, based solely on the Codes of

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[32] https://legislacja.rcl.gov.pl/docs//2/12359803/12879992/12879995/dokument568648.pdf, accessed on 26 January 2023.

[33] https://legislacja.rcl.gov.pl/docs//2/12359803/12879992/12879995/dokument568650.pdf, accessed on 26 January 2023.

Proceedings on Petty Offences,[34] which in turn could interfere with the course of action of the Municipal Police.[35]

On 22 September 2022, based on all the comments to the Bill of 13 April 2022 amending the Penal Fiscal Code Act and Certain Other Acts, made in negotiations with external stakeholders and in public consultations, the Management of the Ministry of Finance took the decision to withdraw this piece of legislation, claiming that the works on the Bill amending the Penal Fiscal Code, the Municipal Police Act and the Act on the Trade Inspection Authority, intended to grant the Municipal Police and the Trade Inspection Authority powers to impose criminal fines for selected fiscal petty offences were cancelled because in order for them to be effectively enforced, the Penal and Fiscal Code would first need to be modified as proposed by the Bill amending the Penal and Fiscal Code and Certain Other Acts of 3 March 2022,[36] for which legislative works had been suspended by the Ministry of Justice.[37]

CONCLUSIONS

When assessing administrative penalty proceedings in cases concerning fiscal petty offences, as proposed in the Bill of 13 April 2022 amending the Penal Fiscal Code Act and Certain Other Acts, I believe that the amendments discussed above, i.e. adding the Municipal Police and the Trade Inspection Authority to the catalogue of bodies authorised to conduct administrative penalty proceedings would have an negative impact on the goals set forth for administrative penalty proceedings under the penal fiscal procedure. In fact, these goals would be distorted because administrative penalty proceedings would be reduced to the sole "patching up" of the local budget, while in principle, as a special mode of procedure, they are intended to enforce the principle of procedural speed and economy.

Additionally, it should be highlighted that the officers of the Municipal Police and the Trade Inspection Authority have not been properly trained to conduct administrative penalty proceedings. We are not convinced by the Promoter of the Bill's argumentation that

> "there should be no increase in expenditure by local government units to cover the training costs of municipal police officers and possible extra jobs. The training for municipal police staff would be provided free of charge by experts from the National Revenue Administration. Petty offences will be prosecuted by the Municipal Police officers under administrative penalty proceedings as part of disclosures made within the scope of their

[34] Code od Proceedings on Petty Offences of 24 August 2001, i.e. Journal of Laws of 2022, item 1124.

[35] https://legislacja.rcl.gov.pl/docs//2/12359803/12879992/12879995/dokument569512.pdf, accessed on 26 January 2023.

[36] Numbered as UD357 in the list of legislative and programming works of the Council of Ministers, Sejm of the 9th term.

[37] https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy-kodeks-karny-skarbowy-oraz-niektorych-innych-ustaw2, accessed on 26 January 2023.

statutory duties; therefore, it is not assumed that the Municipal Police officers would be specially deployed to disclose and prosecute the said fiscal petty offences. In consequence, it is not expected that the employment in the Municipal Police will go up following the addition of this new duty".[38]

Indeed, it is hard to assume that the said goals would be achieved "free of charge", i.e. even if the new non-financial bodies in administrative penalty proceedings were trained without any costs, such trainings would anyway consume the working time of the National Revenue Administration units, diverting them from the performance of their key statutory tasks, including the conduct of administrative penalty proceedings.

The proposed amendments which we have discussed and which eventually did not enter into force could open the way for further reflexions on how the group of bodies authorised to conduct administrative penalty proceedings in cases concerning fiscal petty offences is broadened. Some years ago, we formulated the *de lege ferenda* postulate on the granting of powers to conduct administrative penalty proceedings to the Police, the Military Police and the Border Guards; therefore, now, it would be interesting to reconsider this suggestion as the examination of cases under administrative penalty proceedings by such bodies would be faster and more economical, and would ensure compliance with the principle of procedural speed and economy. Moreover, it would not require any special training for such group of bodies in order for them to be able to effectively conduct administrative penalty proceedings in cases concerning fiscal petty offences.[39]

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[38] https://www.zpp.pl/storage/library/2022-05/1245fde00709e5d19fe50093e0d2b35d.pdf, accessed on 30 January 2023.

[39] See Tużnik, M.R., *Postępowania szczególne w postępowaniu karnym skarbowym*, Warszawa, 2013, p. 368.

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REVIEW OF THE RESOLUTIONS OF THE SUPREME COURT CRIMINAL CHAMBER CONCERNING SUBSTANTIVE CRIMINAL LAW PASSED IN 2022

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Abstract

The scholarly and research-focused article aims to analyse resolutions and rulings of the Supreme Court Criminal Chamber concerning substantive criminal law passed in 2022 as a response to the so-called legal questions. The subject of the analysis covers such issues as: the crime of failure to report a crime (Article 240 § 1 of the Criminal Code); suspension of the statute of limitations for criminal offenses due to the COVID-19 pandemic; a student of the Faculty of Public Order of the Academy of Internal Affairs in Szczytno as a person not serving in the state security bodies; and revocation of a driving licence in the event its holder who is a member of a military unit performing tasks outside the country commits an act consisting in driving a motor vehicle under the influence of alcohol (Article 135(1) of the Road Traffic Act).

The fundamental objective of this scientific research is to evaluate the legitimacy of this body's interpretation of the regulations encompassing legal issues referred to the Supreme Court for resolution. The primary research theses aim to demonstrate that the so-called legal questions referred to the Supreme Court play an important role in ensuring the uniformity of common and military courts' judgements, given that the body's stance relies on in-depth reasoning. The research findings present an original perspective developing the interpretation found in the analysed resolutions in a creative way. While the research primarily focuses on national aspects, the article holds significant importance for the scientific community. This is due to its detailed dogmatic analysis and substantial theoretical discourse. Moreover, its practical utility is evident as it enriches the Supreme Court's arguments and addresses circumstances that justify diverse opinions.

Keywords: serving in the state security bodies, statute of limitations, driving license revocation, reporting a crime, suspension of the statute of limitations

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CRIMINAL CODE

1. OFFENCE OF FAILURE TO REPORT A CRIME (ARTICLE 240 § 1 CC)

The offence specified in Article 240 § 1 CC consists in a person's failure to without delay notify the body authorised to prosecute crimes of the fact of having reliable information about the punishable preparation, attempt or commission of a prohibited act referred to in Article 118, 118a, 120–124, 127, 128, 130, 134, 140, 148, 148a, 156, 163, 166, 189, Article 197 §§ 3–5, Article 198, 200, 252 CC, or a terrorist crime.

Against the background of this provision, a question was raised whether the term "without delay" used therein refers only to the time of obtaining the reliable information about the prohibited act, or whether it may refer to the moment when the obligation to denounce was updated, and also whether the phrase "having reliable information" concerns the state of knowledge of the subject or object of that act.

The doubts were related to the fact that, pursuant to Act of 23 March 2017 amending Criminal Code Act, Act on the Procedure for Dealing with Juvenile Offenders, and Criminal Procedure Code Act,[1] the obligation to denounce concerned, inter alia, crimes of rape in the qualified types (Article 197 §§ 3 and 4 CC), sexual exploitation of helplessness or insanity (Article 198 CC) and paedophilia (Article 200 CC). The question was whether the obligation applied to the crimes committed before the date of the Act's entry into force, i.e. 13 July 2017, of which the person obliged learned before the date and failed to report them after the date.

When solving the issue, the Supreme Court, in its resolution of 1 July 2022, I KZP 5/22 (OSNK 2022, No. 9, item 32), rightly assumed that **the phrase "having reliable information" used in Article 240 § 1 CC should be understood as the state of knowing of the subject of the act at the time of its commission; the term "without delay" refers not to the moment of getting to know about a prohibited act added to the catalogue of crimes listed in Article 240 § 1 CC by means of Act of 23 March 2017 amending Criminal Code Act, Act on the Procedure for of Dealing with Juvenile Offenders and Criminal Procedure Code Act (Journal of Laws of 2017, item 773), but the moment when the denunciation obligation was updated, which took place on 13 July 2017; the only object of a crime under Article 240 § 1 CC is specified with the use of the verb "fails to notify".** The stance was approved of in the doctrine.[2]

There is no doubt that the notification without delay must take place as soon as possible after obtaining information from a reliable source about the commission of a prohibited act referred to in Article 240 § 1 CC.[3] However, the mere possession of such

[1] Journal of Laws of 2017, item 773.

[2] Wilk, A., 'Glosa do uchwały Sądu Najwyższego – Izba Karna z dnia 1 lipca 2022 r. I KZP 5/22', *Orzecznictwo Sądów Polskich*, 2023, No. 1, pp. 48–59; Mozgawa, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz zaktualizowany*, LEX/el., 2023, thesis 6 to Article 240.

[3] Mozgawa, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2019, p. 796; Żylińska, J., 'Prawny obowiązek zawiadomienia o niektórych przestępstwach (art. 240 k.k.)', *Prokuratura i Prawo*, 2015, No. 10, p. 54.

information does not match the features of the crime under this provision. This takes place when there is a legal obligation to report it to a body authorised to prosecute crimes. In the issue discussed, the moment is when the denunciation obligation was updated, and this is the date when the amendment entered into force. The Supreme Court was right to point out that the present participle "having" used in Article 240 § 1 *in principio* CC specifies the state of the perpetrator's knowledge, which, in fact, must coexist with omission, which is prohibited by law, but obtaining information about the crime before the statutory denunciation obligation entered into force in no way waves this obligation. Failure to comply with it before its entry into force was irrelevant from the criminal law perspective. The Court rightly highlighted that such interpretation does not infringe the prohibition of retroactive effect of the criminal law act, but it could be the case if the provision regulated the conduct consisting in obtaining information about a prohibited act commission and having it before the entry into force of the amended Article 240 § 1 CC. In the right opinion of the Supreme Court, the adopted interpretation is consistent with the *ratio legis* of extending the catalogue of prohibited acts, inter alia, by adding acts infringing sexual freedom. In the explanatory memorandum for the Amendment bill, it is emphasised that

> "the wellbeing of a child is one of the most important constitutional principles of the Republic of Poland, because it directly results from the principle of common good and the principle of human dignity. In this context, the omission of prohibited acts against which minors should be protected, especially sexual crime that endangers them, from the list laid down in Article 240 CC does not seem to be justified. In accordance with Article 19(1) of the Convention on the Rights of the Child, States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child against all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child".[4]

There is an important argument consisting in the fact that many cases of sexual abuse of minors took place before the entry of the above-mentioned amendment into force, and the assumption that failure to report them to law enforcement bodies without delay after its entry into force does not exhaust the features of a crime under Article 240 § 1 CC may evoke the sense of impunity in the perpetrators of acts that drastically affect the wellbeing of children and, as a result, create a real danger that they will continue their criminal practices causing irreparable harm to juvenile victims.

In this state of affairs, the view expressed in the literature is inaccurate; thus, it cannot be said that the term "without delay" used in Article 240 § 1 CC only refers to the moment of obtaining reliable information about a prohibited act and the lack of notification "without delay" takes place only in relation to the moment of obtaining reliable information; as the information had been updated in the conscience of the perpetrator before the amendment to Article 240 § 1 CC entered into force, after

[4] Justification for the Bill amending Criminal Code Act and Act on the Procedure of Dealing with Juvenile Offenders introduced by the President of the Republic of Poland (Sejm print No. 846, https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=846p, accessed on 22 January 2022).

the occurrence of the formal obligation to report acts in this category, he did not have the possibility of notification without delay after obtaining reliable information about the possible crime commission.[5]

ACT OF 2 MARCH 2020 ON SPECIAL SOLUTIONS FOR PREVENTING, COUNTERACTING AND COMBATING COVID-19, OTHER CONTAGIOUS DISEASES AND CRISIS SITUATIONS THEY EVOKE (JOURNAL OF LAWS OF 2020, ITEM 374, AS AMENDED)

2. SUSPENSION OF THE STATUTE OF LIMITATIONS FOR CRIMINAL OFFENCES DUE TO THE COVID-19 PANDEMIC (ARTICLE 15ZZR PAR. 6)

By means of Act of 31 March 2020 amending Act on special solutions for preventing, counteracting and combating the COVID-19 pandemic, other contagious diseases and crisis situations they evoke, and some other acts,[6] Article 15zzr was added to Act of 2 March 2020 on special solutions for preventing, counteracting and combating the COVID-19 pandemic, other contagious diseases and crisis situations they evoke.[7] Its par. 6 in conjunction with par. 1, stipulating the suspension of the statute of limitations for criminal offences, fiscal offences and misdemeanours, and other misdemeanours at the time of the state of epidemic threat or the state of epidemic announced in connection with the COVID-19 pandemic.

In the light of this provision, a legal question was referred to the Supreme Court for resolution: Does the suspension of the statute of limitations for criminal offences, fiscal offences and misdemeanours, and other misdemeanours at the time of the state of epidemic threat or the state of epidemic announced in connection with the COVID-19 pandemic, which was laid down in Article 15zzr par. 6, added to Act of 2 March 2020 on special solutions for preventing, counteracting and combating the COVID-19 pandemic, other contagious diseases and crisis situations they evoke by means of Act of 31 March 2020 amending Act on special solutions for preventing, counteracting and combating the COVID-19 pandemic, other contagious diseases and crisis situations they evoke, and some other acts, concern only the statute of limitations for prohibited acts committed after 31 March 2020 (the date when the amendment entered into force) or also the statute of limitations for other such acts committed before the date?

The Supreme Court, in the resolution of seven judges of 14 September 2022, I KZP 9/22 (OSNK 2022, No. 11–12, item 39) explained that: **The suspension of the statute of limitations for criminal offences, fiscal offences and misdemeanours, and other misdemeanours from 31 March 2020, which is laid down in Article 15zzr par. 6 added to Act of 2 March 2020 on special solutions for preventing, counteracting**

[5] Królikowski, M., 'Problemy z nowym zakresem obowiązku zawiadomienia o przestępstwie', *Forum Prawnicze*, 2021, No. 4, p. 19.
[6] Journal of Laws of 2020, item 568.
[7] Journal of Laws of 2020, item 374, as amended.

and combating the COVID-19 pandemic, other contagious diseases and crisis situations they evoke by means of Act of 31 March 2020 amending Act on special solutions for preventing, counteracting and combating the COVID-19 pandemic, other contagious diseases and crisis situations they evoke, and some other acts, concerns the statute of limitations for those prohibited acts regardless of whether they were committed before or after the date of 31 March 2020. The stance is right and well justified, and it is important mainly because the issue used to be treated differently both in the Supreme Court judgements and in literature. The resolution presents opinions that the provision is applicable:

(1) not only to acts committed after the provision entered into force, i.e. 31 March 2020, but also to acts committed before the date[8];

(2) not only to crimes, fiscal crimes and misdemeanours, and other misdemeanours committed after 31 March 2020.[9] Justifying this opinion, the Court indicated that the legislator did not introduce a regulation ruling the application of the norm in relation to acts committed before its entry into force as was done in case of e.g. Article 7 of the Act of 20 April 2021 amending Criminal Code Act and certain other acts,[10] as well as Article 68(5) of the Act of 14 May 2020 amending certain acts concerning protective activities in relation to the expansion of SARS-CoV-2 virus,[11] which stipulated that the running of the limitation for the imposition of a penalty and the limitation for the penalty execution in cases concerning crimes, fiscal crimes and misdemeanours, and other misdemeanours starts on the day the statute enters into force. It is argued that, in this case, a provision excluding the application of Article 4 § 1 CC was not laid down, and as an act that is unfavourable for a perpetrator, because in fact it prolongs the time limit, as it is rightly emphasised in the doctrine,[12] its application to acts committed before its entry into force is not possible without the exclusion of application of Article 4 § 1 CC.[13] It is added that, despite certain admissibility of retroactive enforceability of a legal act sometimes, in the case considered it cannot take place due to the worsened situation of an individual and the extension of his criminal liability in time.[14]

Justifying its stance, the Supreme Court referred to:

– the linguistic interpretation and indicated that the content of Article 15zzr par. 6 Act of 2 March 2020 proves it covers acts committed before and after its entry into force. The term "the statute of limitations does not run" referring to the

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[8] The Supreme Court judgement of 3 March 2022, IV KK 726/21, LEX No. 3372327; the Supreme Court judgement of 11 March 2022, II KK 34/22, LEX No. 3372328.

[9] The Supreme Court judgement of 11 June 2021, III KK 173/21, LEX No. 3228386.

[10] Journal of Laws of 2021, item 1023.

[11] Journal of Laws of 2020, item 875.

[12] Wróbel, W., *Zmiana normatywna i zasady intertemporalne w prawie karnym*, Kraków, 2003, p. 546.

[13] Lipiński, K., 'Modyfikacje terminów przedawnienia karalności przestępstw, przestępstw i wykroczeń skarbowych oraz wykroczeń w związku z epidemią COVID-19', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2020, No. 2, pp. 43–44; idem, in: Giezek, J. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2021, p. 805.

[14] Kluza, J., 'Zawieszenie terminów przedawnienia karalności czynów zabronionych w czasie pandemii koronawirusa', *e-Palestra*, 2020.

running of the limitation term without differentiating the situation subject to whether it started running or not;

- the internal systemic interpretation, emphasising that the statutory provisions stipulating the suspension of the running of the statute of limitations use phrases identical to that in Article 15zzr, par. 6, i.e. "the statute of limitations does not run" (Article 104 § 1 CC) and are normatively neutral in nature in the sense that they cover, in the event of a specific legal obstacle, both situations: where the obstacle occurred at the moment of a prohibited act commission and where a prohibited act was committed earlier than the obstacle would have been updated;
- teleological interpretation, namely, the opinion that the reasons for purposefulness of the introduction of the suspension of the statute of limitations in the period of the state of epidemic threat or the state of pandemic occur to the same extent in case of both types of acts: committed before and after 30 March 2020. As the Constitutional Tribunal emphasises,

> "The legislator's decision to extend the limitation periods is also justified by the principle of proportionality (Article 31(1) of the Constitution). The legislator is obliged to react to the changing circumstances of the actual situation and if, as a result, punishing perpetrators still turns out to be necessary, it cannot be abandoned. The length of the periods of limitation does not affect the fact of punishment alone or the type of penalty that can be imposed. The provisions stipulating limitation are not of a guarantee nature and are not established in view of a perpetrator of a prohibited act but for the purpose of punishment. Retroactive extension of the limitation periods is assessed in the light of the principle of the rule of law, but it is not connected with the infringement of the acquired rights or the protection of trust in regulations determining that the commission of prohibited acts is punishable. For these reasons, they do not fall within the scope of the guarantee principle *lex severior poenali retro non agit*. It would be also difficult to find regulations excluding the possibility of extending the limitation periods in the norms of international law".[15]

The provision interpreted by the Supreme Court was repealed by means of Article 46(20) of the Act of 14 May 2020 amending some acts in the field of protective measures applicable in connection with the spread of the SARS-CoV-2 virus,[16] and it became invalid on 16 May 2020, but the opinion did not lose its relevance because the effect provided for in Article 15zzr Act of 2 March 2020 takes place *ex nunc* and not *ex tunc,* and therefore does not result in reversing the effect in the form of suspension of the running of limitation coming into effect retroactively. Anyway, as a rule, after the period of suspension of the limitation period ends, it continues running and the time of suspension is not included in the running period.[17] Thus, if the statute of limitations does not run at the time of suspension, the time when an obstacle specified in the statute existed is deducted from the period necessary

[15] The Constitutional Tribunal judgement of 25 May 2004, SK 44/03, OTK ZU 5A, 2004, item 46.

[16] Journal of Laws of 2020, item 875.

[17] Zgoliński, I., in: Konarska-Wrzosek, V. (ed.), *Kodeks karny. Komentarz,* Warszawa, 2020, p. 593.

for the statute of limitations to take effect.[18] The time of suspension is not included in the limitation period; therefore, it does not extend the period of limitation by the time of its rest.[19]

ACT OF 18 OCTOBER 2006 ON REVEALING INFORMATION ABOUT DOCUMENTS OF STATE SECURITY BODIES IN THE PERIOD 1944–1990 AND THE CONTENT OF THOSE DOCUMENTS (JOURNAL OF LAWS OF 2021, ITEM 1633)

3. STUDENT OF THE FACULTY OF PUBLIC ORDER OF THE ACADEMY OF INTERNAL AFFAIRS AS A PERSON NOT SERVING IN THE STATE SECURITY BODIES (ARTICLE 2 PAR. 1 (6))

In accordance with Article 2 par. 1(6) of the Act of 18 October 2006 on revealing documents of the state security bodies of the period 1944–1990 and the content of those documents,[20] the Academy of Internal Affairs was a state security body. In the light of this provision, a doubt arose

> "whether the semantic scope of the phrase 'work or service in the state security bodies' within the meaning of Article 2 par. 1 (6) and par. 3 in conjunction with Article 3a in conjunction with Article 7 par. 1 Act on lustration means that in order to meet the requirement indicated, it is sufficient to establish that the lustrated person was a full-time student of the Faculty of Public Order in Szczytno, a branch of the Academy of Internal Affairs in Warsaw, in the period from 1 October 1989 till 31 July 1990, and at the same time remained in the corps of Milicja Obywatelska [the Citizens' Militia], started studying at Franciszek Jóźwiak 'Witold' Higher Officers' School in Szczytno and graduated from Higher Officers' School in Szczytno, or whether the semantic scope of the phrase 'work and service in the state security bodies' within the meaning of Article 2 par. 1 (6) and par. 3 in conjunction with Article 3a in conjunction with Article 7 par. 1 of the above-mentioned statute means that in order to recognise the lustrated person as one who worked or served in the state security bodies, it is necessary to additionally establish that at that time the lustrated person undertook whatever activities aimed at combating the democratic opposition, trade unions, associations, churches and religious associations, and violating the right to freedom of speech and assembly, violating the right to life, freedom, property and security of the citizens or indulged in conduct connected with the breach of human and civil rights for the benefit of the communist totalitarian system."

The doubts arise, inter alia, from the different statements of the Supreme Court concerning this issue. The Court stated that:

– "The education of the lustrated person (being a student of the same educational institution, regardless of the change of its name or structure) cannot be recognised

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[18] Marszał, K., 'Spoczywanie terminu przedawnienia w prawie karnym', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1966, No. 2, pp. 81–82.

[19] Stefański, R.A., 'Spoczywanie biegu przedawnienia', in: *Kodeks karny*, in: *Interdyscyplinarność – w nauce najciekawsze rzeczy dzieją się na styku różnych dziedzin. Księga jubileuszowa Profesor Małgorzaty Król-Bogomilskiej,* Warszawa, 2021, p. 242.

[20] Journal of Laws of 2021, item 1633.

as service in the state security bodies within the meaning of the statute if the alleged service (alleged, because it was connected with 'full-time employment' in the educational institution) in fact consisted in learning the policing job";[21]

– "Sources of law applicable in the analysis of Feliks Dzierżyński Higher Officers' School of the Ministry of the Interior do not allow for recognising this School as a central institution of the Security Service within the meaning of Article 2 par. 1 (5) of the Act of 18 October 2006 on revealing information about documents of the state security bodies in the period 1944–1990 and the content of these documents (consolidated text: Journal of Laws of 2007, No. 63, item 425, as amended). Due to the fact that the School does not meet the criteria laid down in Article 2 par. 3 either, it does not meet any of the requirements for recognising it as the state security body within the meaning of Article 2 par. 1 *in principio* of the above-mentioned statute".[22]

The Court also recognised that "the specificity of the Academy of Internal Affairs means that it cannot be compared to a classical university. Therefore, the circumstance that the lustrated person was at the same time a holder of an ID of WUSW in G. [the Voivodeship Office of Internal Affairs] does not mean that the recognition of his service in the Academy of Internal Affairs is inaccurate".

Resolving this doubt, the Supreme Court, in the resolution of seven judges of 2 June 2022, I KZP 9/21 (OSNK 2022, No. 7, item 25), stated that: **A student of the Faculty of Public Order in Szczytno, a branch of the Academy of Internal Affairs, in the period from 1 October 1989 till 31 July 1990, as a result of this fact, is not a person who served in the state security bodies within the meaning of Article 2 par. 1 (6) in conjunction with Article 3a in conjunction with Article 7 par. 1 of the Act of 18 October 2006 on revealing information about documents of the state security bodies of the period 1944–1990 and the content of those documents (consolidated text: Journal of Laws of 2021, item 1633).** This stance is right and based on rational arguments.

Prima vista, it might seem that in the context of linguistic interpretation, mentioning the Academy of Internal Affairs *expressis verbis* in Article 2 par. 1 (6) of the statute referred to herein as the state security body should not raise any doubts, that the scope of this concept should also cover the Faculty of Public Order of the Academy of Internal Affairs in Szczytno, being its integral part. However, it is rightly indicated in case law that this interpretation leads to results difficult to accept in the light of constitutional principles, as well as from the point of view of systemic coherence of the law, and the elementary sense of justice.[23] In addition, as it is indicated in

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[21] Judgement of the Appellate Court in Poznań of 2 June 2021, II AKa 44/21, LEX No. 3189578; judgement of the Appellate Court in Poznań of 27 May 2021, II AKa 16/21, LEX No. 3189580; judgement of the Appellate Court in Warszawa, of 24 October 2014, III AUa 128/13, LEX No. 1770727; judgement of the Appellate Court in Gdańsk of 18 November 2009, II AKa 322/09, KZS 2010, No. 4, item 67.

[22] Judgement of the Appellate Court in Warszawa, of 14 May 2010, II AKa 108/10, LEX No. 832778; judgement of the Appellate Court in Gdańsk of 18 November 2009, II AKa 322/09, KZS 2010, No. 4, item 67.

[23] Judgement of the Appellate Court in Gdańsk of 16 June 2021, II AKa 87/21, LEX No. 3301505.

the judicature: "The provision of Article 2 of the Act on revealing information about documents of the state security bodies of the period 1944–1990 and the content of those documents, which is of a guarantee nature, should not be interpreted in a broadened way, and all doubts concerning the legal nature (status) of particular organisational units of the Ministry of the Interior as the state security bodies before the Security Service was dissolved and the Office of State Protection was founded (Articles 129–130 of the Act on the Office of State Protection (UOP)) should be resolved in favour of the vetted person".[24] The aim of the lustration, as the Constitutional Tribunal emphasised, is to protect the newly born democracy, and therefore it should focus on threats to fundamental human rights and the process of democratisation. The main purpose of the Lustration Act is to disclose the fact of work or service in the state security bodies or cooperation with them in the years 1944–1990, or to establish that such facts do not apply to a given person. Already the Preamble to the Lustration Act suggests that in this way the legislator strives to ensure the transparency of public life, to eliminate blackmail with the use of facts from the past that may be considered compromising, and to make these facts be subject to public scrutiny. The Lustration Act, in accordance with the principles of functioning of the state based on the rule of law must be founded, inter alia, on the assumption that lustration can only serve to eliminate or considerably reduce the threat to the establishment of a sustainable and free democracy that a vetted person may pose by using a particular position to get involved in activities infringing human rights and blocking the democratisation process. The purpose of submitting a lustration declaration is to make the people who were officers, employees and collaborators of the state security bodies in the past reveal the fact of that work, service or cooperation in the name of the transparency of public life. This is to eliminate a danger e.g. connected with possible blackmail on people due to undisclosed facts concerning their past.[25]

Carrying out a historical analysis, the Supreme Court rightly demonstrated that General Franciszek Jóźwiak 'Witold' Higher Officers' School in Szczytno had a task of preparing staff for the needs of the Citizens' Militia by means of educating students in the field of administrative law and the protection of public security and public order. It was dissolved on 30 September 1989 pursuant to the Regulation of the Council of Ministers of 10 June 1989 concerning the dissolution of higher officers' schools supervised by the Minister of the Interior.[26] On the other hand, pursuant to Regulation No. 50/89 of the Minister of the Interior of 21 June 1989 concerning the establishment of branches of the Academy of Internal Affairs,[27] inter alia, the Faculty of Public Order was established in Szczytno. This means that the dissolution of this Higher Officers' School was a purely formal step, because the scientific and didactic faculty, as well as the infrastructure and the area of training were maintained, only in a new organisational form.

[24] Judgement of the Appellate Court in Lublin of 21 March 2013, III AUa 83/13, LEX No. 1298964.

[25] The Constitutional Tribunal judgement of 11 May 2007, K 2/07, OTK-A 2007, No. 5, item 48.

[26] Journal of Laws of 1989, No. 37, item 204.

[27] Unpublished.

ACT OF 17 DECEMBER 1998 ON THE RULES OF USING OR MAINTAINING ARMED FORCES OF THE REPUBLIC OF POLAND OUTSIDE THE COUNTRY

4. REVOCATION OF A DRIVING LICENCE IN THE EVENT ITS HOLDER WHO IS A MEMBER OF A MILITARY UNIT PERFORMING TASKS OUTSIDE THE COUNTRY COMMITS AN ACT CONSISTING IN DRIVING A MOTOR VEHICLE UNDER THE INFLUENCE OF ALCOHOL (ARTICLE 135 PAR. 1 RTL)

In accordance with Article 7 par. 1 of the Act of 17 December 1998 on the rules of using or maintaining armed forces of the Republic of Poland outside the country,[28] persons who are members of military units performing tasks outside the country are subject to disciplinary, criminal and order-related regulations that are in force in the Republic of Poland. In this context, a question was raised whether revocation of a driving licence pursuant to Article 135 par. 1(1(a)) of the Act of 20 June 1997: Road Traffic Law[29] may be applied to a person who is a member of a military unit performing tasks outside the country and committed an act consisting in driving a motor vehicle being in the state under the influence of alcohol abroad (Article 178a § 1 CC).

The Supreme Court, in its ruling of 16 November 2022, I KZP 14/22,[30] assumed that: **Revocation of a driving licence applied in accordance with Article 137 par. 1(1) in conjunction with Article 135 par. 1(1(a)) of the Act of 20 June 1997: Road Traffic Law takes place based on the rules of criminal procedure law. This results from the content of the above-mentioned provisions that directly stipulate that the measure is applied in the preparatory proceeding and the body entitled to apply it is a public prosecutor.**

The Court admitted revocation of a driving licence and, justifying this stance, focused on the nature of the proceeding in case of revocation of a driving licence, and revocation of a driving licence due to justified suspicious that the driver of a motor vehicle is in the state of insobriety or after the consumption of alcohol or a drug that has a similar effect (Article 135 par. 1(1(a)) RTL). The Court recognised that both the proceeding and the revocation of a driving licence are of criminal procedure law nature, which the following circumstances confirm:

– a decision to revoke a driving licence is issued by a public prosecutor in the course of a preparatory proceeding or by a court after the case is referred to it (Article 137 par. 1(1) RTL);
– the period of revocation of a driving licence is put towards the penal measure that consists in banning a driver from driving motor vehicles (Article 63 § 4 CC).

With regard to this solution, the Supreme Court referred to its stance in the

[28] Journal of Laws of 2021, item 396, as amended.
[29] Journal of Laws of 2022, item 988, as amended, hereinafter referred to RTL.
[30] http://www.sn.pl/orzecznictwo/SitePages/Najnowsze_orzeczeniaIOZ.aspx?Izba=Karna, accessed on 10 February 2022.

resolution of 25 February 2009, I KZP 33/08,[31] issued on the basis of the invalid legal state, because Act of 20 February 2015 amending Criminal Code Act and certain other acts[32] regulated the issue *expressis verbis* in Article 63 § 4 CC, which stipulates that: "the period of revocation of a driving licence or another relevant document shall be put towards a penal measure referred to in Article 39(3)";
– by analogy, a preventive measure consisting in the order to refrain from driving a particular type of vehicles is put towards a ban on driving (Article 276 CPC);
– the aim of revocation of a driving licence, in this case, is to protect the execution of the possible penal measure in the form of a ban on driving motor vehicles.

Such a nature of the revocation of a driving licence does not raise any doubts; more precisely, it is a procedural coercive measure.[33] At the same time, the Supreme Court, for unknown reasons, approved of the opinion being in conflict with what it stated earlier and which is expressed in the literature that the revocation of a driving licence in such a situation is a penal measure.[34]

What is decisive in relation to a person who is a member of a military unit performing tasks outside the country and who commits an act consisting in driving a motor vehicle being in the state of insobriety (Article 178a § 1 CC) is not the nature of the revocation of a driving licence but the fact that the substantive basis for its application is a penal provision that is in force in the Republic of Poland. If a perpetrator who is a member of a military unit performing tasks outside the country commits an offence that is specified in Article 178a § 1 CC, it means that he violates a criminal provision that is in force in the Republic of Poland, and therefore meets the condition for criminal liability under Article 7 par. 1 of the Act on the rules of using or maintaining the Armed Forces of the Republic of Poland outside the country. This is an argument for the application of revocation of this person's driving licence, which results from the application of a Polish criminal provision, i.e. Article 178a § 1 CC.

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[31] Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa, 2009, No. 5, item 32.

[32] Journal of Laws of 201, item 396.

[33] Stefański, R.A., 'Zatrzymanie prawa jazdy jako środek przymusu w postępowaniu karnym', in: *System Prawa Karnego Procesowego. Środki przymusu,* Grzegorczyk, T., Świecki, D. (eds), Vol. IX, Warszawa, 2021, p. 1406.

[34] Mezglewski, A., in: Mezglewski, A., Nowikowska, M., Kurek, J., *Prawo o ruchu drogowym. Komentarz*, Warszawa, 2020, p. 492.

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DISABILITY PENSION GRANTED DUE TO THE REDUCTION OF PROSPECTS FOR SUCCESS IN THE FUTURE

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Abstract
The aim of this article is to interpret the conditions for, and the content of, a claim for an appropriate disability pension granted due to the reduction of prospects for success in the future (referred to as the third disability pension condition under Article 444 § 2 of the Civil Code). The chosen subject of analysis is primarily justified by the relative lack of attention this disability pension has received in legal literature compared to pensions granted due to other conditions specified in Article 444 § 2 CC. The authors focus on resolving some of the interpretative doubts in the civil law related to the phrase "reduction of the prospects for success in the future". The derivative conception of legal interpretation serves as the foundation for their analyses. The article posits that a claim for a pension due to the reduction of prospects for success in the future is available to every natural person (including a conceived child) who has suffered a bodily injury or health disorder resulting in a loss of the ability to work (in the broad sense of the term), including the ability to perform household chores and, consequently, the material or financial benefits such work would provide. According to the authors, the provision's apparent role is to resolve interpretative doubts regarding the pecuniary benefits that the aggrieved party would likely obtain in the future. This likelihood is higher than low or small, but lower than the probability bordering on certainty (or at least very high), which is the usual requirement for lost benefits in order to be granted a disability pension. This result of the interpretation is fully justified in both functional and systemic interpretative directives,

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as the legislator, to a certain extent, favours the interests of the person who suffered personal injury over those of the entity responsible for the damage.

Keywords: disability pension, reduction, prospects, success, future

INTRODUCTION

The subject matter of the present paper covers the conditions for and the content of a claim for an appropriate disability pension granted in the event of the reduction of prospects for success in the future (the so-called third disability pension condition; Article 444 § 2 CC).

The choice of the subject is primarily justified by the fact that, in the legal literature, a disability pension granted in the event of the reduction of prospects for success in the future has been given much less attention than a pension granted in case of other entitlements laid down in Article 444 § 2 CC, i.e. a disability pension granted in the event of total or partial loss of capacity to work and earn money or due to the increased needs of the injured person. In this context, A. Szpunar many times spoke about a "stepmother's" style of treatment of the third disability pension condition.[1] However, it must be admitted that, since he expressed his opinions, there has been a significant increase in the number of doctrinal statements, which are still relevant today. Relatively, in comparison with other entitlements to a disability pension, little interest in a pension granted in the event of the reduction of prospects for success in the future would not have to be a problem in itself if the stance of the doctrine were uniform and clear. However, the way of understanding the third condition for a disability pension is not established; quite the contrary, different (at least to some extent) meanings of "the reduction of prospects for success in the future" are proposed. As a result, depending on the adopted stance, a set of events (actual states) relevant to the claim considered herein is shaped differently. The greater complexity of the reduction of prospects for success in the future as an entitlement to a disability pension (in comparison with other entitlements) constitutes the justification for this state of affairs.[2] Taking into consideration the needs of practice is also what supports the idea of analysing this issue. The above-presented state of doctrinal considerations on the third condition for a disability pension, and more precisely its non-exhaustively indicated reasons, seem to make

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[1] See Szpunar, A., 'Glosa do wyroku SN z 28 stycznia 1963 r., 2 CR 193/62', *Nowe Prawo*, 1964, No. 4, p. 419; Szpunar, A., 'Czyny niedozwolone w Kodeksie cywilnym', *Studia Cywilistyczne*, 1970, Vol. XV, p. 97; Szpunar, A., 'Uwagi o rencie na rzecz poszkodowanego', in: *Studia z prawa prywatnego. Księga pamiątkowa ku czci Profesor Biruty Lewaszkiewicz-Petrykowskiej*, Łódź, 1997, p. 344; Szpunar, A., *Odszkodowanie za szkodę majątkową. Szkoda na mieniu i osobie*, Bydgoszcz, 1998, p. 152 et seq.

[2] See Szpunar, A., in: *Materiały dyskusyjne do Projektu Kodeksu Cywilnego Polskiej Rzeczypospolitej Ludowej. Materiały Sesji Naukowej 8–10 grudnia 1954 r.*, Warszawa, 1955, p. 347; Rezler, J., *Naprawienie szkody wynikłej ze spowodowania uszczerbku na ciele lub zdrowiu (według prawa cywilnego)*, Warszawa, 1968, p. 97; Śmieja, A., in: Olejniczak, A. (ed.), *System Prawa Prywatnego, Prawo zobowiązań – część ogólna*, Vol. 6, Warszawa, 2018, p. 749; Sobolewski, P., in: Osajda, K. (ed.), *Kodeks cywilny. Komentarz. Zobowiązania. Część ogólna*, Warszawa, 2022, Article 444, Ref. No. 73.

it the most difficult to prove and the least reliable entitlement to a compensatory pension.[3] The stance of the doctrine corresponds harmoniously to rare and often divergent, at least in terms of details, judicial decisions.[4] Legal uncertainty in this area generates increased transaction costs (e.g. increased cost of an evidence proceeding or costs of legal representation), which could probably be at least partially avoided if the interpretation of a relevant fragment of Article 444 § 2 CC were stable.

The outlining of the subject matter of the analysis and arguments for undertaking it allows for moving on to highlighting its purpose. The aim of the analysis is to try to solve some interpretative doubts occurring in civil law concerning the phrase "reduction of prospects for success in the future". It is necessary to emphasise the word 'some' used above, because detailed analysis of the issue would require at least an extensive study if not a monograph. In particular, historical and legal issues[5] as well as comparative-legal ones[6] will remain outside the scope of the analysis. The procedural issue concerning the statement in the judgement admitting the claim for a disability pension due to the reduction of prospects for success in the future will not be discussed either (the issue is important first of all with regard to minors and consists in a question whether a court can grant a disability pension for the future, determining the date from which it will be payable, or whether it can only

[3] See Szpunar, A., in: *Materiały dyskusyjne*…, op. cit., p. 347; Kaliński, M., *Szkoda na osobie i jej naprawienie*, Warszawa, 2021, p. 267.

[4] It is difficult to indicate judgements that entirely focused on the third condition for a disability pension; the subject matter discussed in the present paper occurred almost always, if not marginally, at least beside considerations on other issues (in particular, a disability pension granted for the loss of capacity to work and earn money); for latest judgements see and cf. in particular: judgement of the Appellate Court in Kraków, of 9 March 2022, I ACa 911/20; judgement of the Appellate Court in Warszawa, of 14 April 2021, V ACa 576/20; judgement of the Appellate Court in Szczecin of 25 February 2021, I ACa 272/20; judgement of the Appellate Court in Poznań of 28 January 2021, I ACa 850/19; judgement of the Appellate Court in Białystok of 6 April 2020, III APa 110/19; judgement of the Appellate Court in Szczecin of 11 December 2019, I ACa 696/18; judgement of the Appellate Court in Warszawa, of 6 September 2019, VI ACa 197/19; judgement of the Appellate Court in Warszawa, of 18 March 2019, VI ACa 1032/17; judgement of the Appellate Court in Warszawa, of 11 May 2017, I ACa 361/16; judgement of the Appellate Court in Warszawa, of 19 December 2016, VI ACa 1575/15; judgement of the Appellate Court in Szczecin of 2 March 2016, I ACa 1117/15; judgement of the Appellate Court in Szczecin of 21 May 2015, I ACa 55/15; judgement of the Appellate Court in Białystok of 21 March 2014, I ACa 853/13; judgement of the Appellate Court in Poznań of 15 January 2014, I ACa 1096/13; judgement of the Appellate Court in Łódź of 3 December 2013, I ACa 637/13; judgement of the Appellate Court in Kraków, of 18 June 2013, I ACa 507/13; judgement of the Appellate Court in Szczecin of 23 April 2013, I ACa 639/12; judgement of the Appellate Court in Poznań of 27 March 2013, I ACa 156/13; judgement of the Appellate Court in Lublin of 26 March 2013, III APa 1/13.

[5] The source of the present regulation is Article 161 KZ, which is based on § 1236 ABGB in its primary version. Up to now, the examples of events relevant in relation to the third condition for granting a disability pension provided in the past by R. Longchamps de Berier affect discussion on the issue (Longchamps de Berier, R., *Uzasadnienie projektu Kodeksu zobowiązań z uwzględnieniem ostatecznego tekstu Kodeksu*, Warszawa, 1934, p. 206), which A. Szpunar rightly points out (Szpunar, A., 'Glosa do wyroku…', op. cit., p. 419; Szpunar, A., 'Czyny niedozwolone…', op. cit., p. 97; Szpunar, A., 'Uwagi o rencie…', op. cit., p. 344; Szpunar, A., *Odszkodowanie za szkodę*…, op. cit., p. 152 et seq.).

[6] A sceptical opinion on the role of comparative studies for the subject of the analysis undertaken in the present paper: Kaliński, M., *Szkoda na osobie*…, op. cit., p. 271.

determine the liability of the defendant in the event of another court dispute in the future).[7] It should be emphasised that reference to other conditions for a disability pension will be made only to the extent deemed necessary and, what is more, in a rather narrow scope. On the one hand, the subject of the analysis justifies it; on the other hand, there are reasons for emphasising in literature that all conditions for granting a disability pension are closely correlated; each of them at least to some extent depends on the others, and each of them to some extent determines the others.[8]

The analysis in the present paper is conducted with the use of a dogmatic legal method, which is understood as interpretation of the text of a normative act in accordance with a specific conception of interpretation; possibly drawing particular legal conclusions based on the rules (directives) of inference adopted in the legal culture.[9] The conception of derivation constitutes this chosen conception of interpretation.[10] The application of the derivation conception should clarify some issues and, in particular, make it possible to observe some previously overlooked aspects of the topic considered.[11]

GROUNDS FOR CLAIMING A DISABILITY PENSION DUE TO THE REDUCTION OF PROSPECTS FOR SUCCESS IN THE FUTURE

1. Attempting to determine the grounds for claiming a disability pension due to the reduction of prospects for success in the future and, in the next step, to determine the scope (set) of events, states of affairs or phenomena (actual states) relevant to them, it is first of all necessary to carry out linguistic interpretation of the phrase (fragment of a normative act) "reduction of prospects for success in the future" (Article 444 § 2 CC). To maintain readability of the analysis, it is necessary to determine the meaning of particular phrases: "prospects", "success in the future",

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[7] For a more detailed approach, see Burian, B., 'Roszczenie małoletniego o rentę z tytułu uszkodzenia ciała lub rozstroju zdrowia', in: *Aktualne zagadnienia prawa prywatnego*, Marszałkowska-Krześ, E. (ed.), Wrocław, 2012, *passim* and the literature exhaustively indicated therein.

[8] See, in particular, Szpunar, A., 'Glosa do uchwały siedmiu sędziów Sądu Najwyższego z dnia 17 czerwca 1963 r., III CO 38/62', *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych*, 1965, No. 9, item 196, p. 414; Szpunar, A., 'Roszczenie małoletniego o rentę wypadkową', *Nowe Prawo*, 1968, No. 4, p. 531; Szpunar, A., 'Czyny niedozwolone…', op. cit., p. 94; Szpunar, A., 'Uwagi o rencie…', op. cit., p. 344; Szpunar, A., *Odszkodowanie za szkodę…*', op. cit., p. 147.

[9] With regard to philosophical and theoretical legal problems connected with the choice of the specific conception of interpretation, see Mularski, K., 'Kilka uwag o granicach prawa i dyskusji nad tymi granicami', in: Szczepaniak, R. (ed.), *Problemy pogranicza prawa cywilnego*, Warszawa, 2022, p. 83 et seq.

[10] For a friendly presentation in a nutshell for a reader who is not savvy about the theory of law, see Zieliński, M., *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa, 2017, *passim*.

[11] It is necessary to highlight, however, that the conception is of little, if at all, use for considering the terms such as "harm" (maybe the term is one of the so-called primary terms of civil law as a specific branch of law).

and "reduction [of the prospects for success in the future]"; although, some threats will be intertwined with each other.

Dictionaries of the (general, universal) Polish language provide a few categorically different meanings of the term "prospects" [in Polish: *widoki*]. Taking into account the context in which the term is used by the legislator in Article 444 § 2 CC (it should be emphasised that the term is not used in any other provision of the Civil Code) leads to the conclusion that the word means "hopes for something or the possibility that something will happen"[12] or, similarly, "possibilities of fulfilling some expectations".[13] Within the meaning that we are interested in, prospects can be good, excellent, better or they can be gloomy, bleak and poor. One can have prospects for "good luck", as well as "promotion, money, work, future, success, changes and victory".[14] On the basis of the semantic rules of the general Polish language, it has not been decided whether the meaningful use of the term requires that the subject whom, to put it simply, the prospects concern should be aware of them. To tell the truth, the terms referring to mental states ("hopes", "expectations") suggest that; however, the examples of the word uses provided in dictionaries contradict that; from the point of view of an external observer, it can be sensibly stated that someone has prospects e.g. for a promotion, although that person has no hopes for that nor expects that. The examples of the term uses also show that what someone has prospects for does not constitute a uniform ontic category; and it concerns events (e.g. a promotion), state of affairs (e.g. work understood as the state of employment), as well as phenomena (e.g. changes).

The above findings allow us to see that the term "prospects" is in fact a two-argument predicate taking the form "*X* has prospects for *Z*". Referring this predicate to the context of Article 444 § 2 CC raises no doubts that a variable *X* runs through a set of natural persons (except for Article 446[1] CC, only a natural person can incur bodily harm) and a variable *Z* concerns some (not determining which) future events, states of affairs or phenomena. Reconstructing the predicate in the language of modal logic, one can say that *X* has prospects for *Z* when and only when it is possible that *X* obtains (in the broadest sense of the word) *Z*. It is not possible to overlook that such interpretation of "prospects" is extremely broad; in fact, it concerns everything that may happen in the future.

The legislator does not determine "prospects" alone but "prospects for success in the future". In the light of the above findings, the phrase "for the future" should be recognised as an obvious statutory *superfluum* added to the text of a normative act most probably for stylistic and maybe also didactic reasons.[15] Thus, it is sufficient to focus on "success" [in Polish: *powodzenie*]. If the meanings that are impossible due to

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[12] See *Słownik języka polskiego PWN*: https://sjp.pwn.pl/sjp/widoki;2535769.html. Thus, also *Uniwersalny słownik języka polskiego*, Vol. 4, T–Ż, Dubisz, S. (ed.), Warszawa, 2003, p. 415.

[13] See *Wielki słownik języka polskiego PAN*: https://wsjp.pl/haslo/podglad/40384/widoki, accessed on 4 April 2023.

[14] Ibidem: https://wsjp.pl/haslo/podglad/40384/widoki, accessed on 4 April 2023.

[15] For more with regard to the conditions that must be fulfilled in order to recognise a particular fragment of a text of a normative act as a *superfluum* (rejecting an assumption that a legislator is linguistically rational) see: Mularski, K., 'Kilka uwag o zbędnych fragmentach aktów normatywnych', in: *Prawo wobec wyzwań współczesności*, Tom V, Poznań, 2008, p. 15 et seq.

the context in which the term "success" is used in Article 444 § 2 CC are excluded, it means "a successful turn of events, a triumph, a desired result" (probably also, in a narrower sense, "popularity, being in demand".[16] Similarly, people speak about "success at work", i.e. "the achievement of intended goals in some activities". Dictionaries provide numerous examples of the use of the term discussed herein. Apart from quantifiers specifying the size or scale of it ("great, outstanding, extraordinary, some, little" etc.), success may be "financial", "economic" or "life-related". It can concern many different spheres: economic activities, trade, breeding, business, career, love, education, undertakings, sport, personal matters, affairs of the heart, finance, fight for something, life, games, elections, competitions, home, work, school, society, treatment, search, and performance of various activities. It may be illuminating to juxtapose the term "success" with terms recognised as synonymous; they include, inter alia, success and wealth, success and prosperity, success and fame, success and triumph, success and happiness, success and recognition, and success and perseverance.[17]

The reflection concerning the meaning of the term "success" determined by the semantic rules of the general Polish language allows for drawing the following conclusions. Firstly, success is always, generally speaking, referred to something beneficial (positively assessed); whereby dictionaries do not determine an entity that should make this assessment (whether the benefit should be recognised from the perspective of an entity generally involved or from the point of view of possible common social beliefs determining what can be recognised as someone's success) nor the axiology (the system of values, ideology) from the perspective of which the assessment should be made. Secondly, success is quite clearly associated with (gainful, professional) work; however, it certainly cannot be identified with it and can in fact concern any events, states of affairs or phenomena (provided that they are positively assessed form some perspective). Thirdly, the interpretation of "success" is in fact the interpretation of one of the variables of the above-reconstructed predicate: *X* has prospects for *Z*.

The above findings concerning the meaning of "prospects for success in the future" allow for moving on to the analysis of the reduction of those prospects. First of all, it should be pointed out that the term "reduction" confirms the formerly adopted modal characteristics of prospects for success: only what could have occurred or happened may be reduced, as well as confirms the pleonastic nature of the phrase "in the future": it is not possible to reduce something that has already occurred. However, another issue is more important, i.e. the categorisation of explicitly elliptical reduction in the terms corresponding to the formerly adopted considerations. As usual, the semantic rules of the general language are a starting point.

The term "reduction" [in Polish: *zmniejszenie*] does not have its dictionary-based characteristics, but a dictionary provides the meaning of its meaning basis, i.e. the

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[16] See *Słownik języka polskiego PWN*: https://sjp.pwn.pl/sjp/powodzenie;2506707.html, accessed on 4 April 2023. Also see Dubisz, S. (ed.), *Uniwersalny słownik języka polskiego. Tom 3. P–Ś*, p. 469.

[17] See *Wielki słownik języka polskiego PAN*: https://wsjp.pl/haslo/podglad/46071/powodzenie/4918545/w-pracy.

verb "reduce". It means "to cause the size, scope, number, intensity of something or distance between some objects to become smaller".[18] Referring the meaning determined by the rules of the general language to the former findings, one can state, with very strong conviction, that the reduction of prospects for success means reduced probability of success. If the axiology attributed to the legislator (who, inter alia, in particular protects life by establishing an interpretative directive in Article 444 § 1 CC, which rules that doubts as to the scope of indemnity of "one-off" injuries resulting in the recognition of harm to the person should be solved in favour of the injured) is taken into account, there are no longer any doubts that *a maiori ad minus* decrease in the probability of success also means a situation in which the formerly existing probability falls to zero (somebody loses whatever prospect for success). Giving up mathematical formalisation, the reduction of prospects for success takes place when the achievement of success was possible (and thus, the probability of achieving it was higher than 0 and lower than 1[19]), but the probability of achieving it decreased (also in case it decreased to 0 and made someone's success impossible).

The meaning of the term "reduction of prospects for success [in the future]" is also determined by the close and the closest linguistic context in which the term is used.

Firstly, not prejudging the scope of injuries indemnified by a disability pension under Article 444 § 2 CC and, in particular, not determining whether the injuries exceed the scope of damage within the sense given to this term by Article 361 § 2 CC, one can state that the injuries are undoubtedly ones of a financial nature. Such a result of the interpretation, regardless of the undisputed stance of the doctrine and case law, is determined, inter alia, by the meaning of words used by the legislator in Article 444 § 2 CC, which speaks about "the injured" and "the obliged to redress the damage". The term "success" and, as a result, its scope is subject to considerable limitation. Thus, it may concern only economic or financial success. This stance, although its justification differs in some details, is presented in the doctrine in an almost uniform way.[20]

Secondly, also the term "disability pension" is important for the interpretation process. Refraining from analysing details unimportant in the present paper, we can

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[18] See *Wielki słownik języka polskiego PAN*: https://wsjp.pl/haslo/podglad/4781/zmniejszyc. Also see *Słownik języka polskiego PWN*: https://sjp.pwn.pl/szukaj/zmniejszenie.html (04.04.2023) ("uczynić coś mniejszym lub mniej intensywnym" – make something smaller or less intensive); Dubisz, S. (ed.), *Uniwersalny słownik języka polskiego. Tom 4. T–Ż*, Warszawa, 2003, p. 1039.

[19] If the occurrence of success were certain, we would not speak about events, states of affairs or phenomena only possible. One can point out that approaching the issue in this way is not only in conformity with standard philosophical assumptions (the assumption that the occurrence of a given event, especially one that is understood as a man's success, is certain would require that very strong rather unintuitive ontic assumptions should be adopted) but also elementary life experience (or rather cultural one). It quite often happens that people who were foretold success in life for various reasons did not experience that. Maybe, the decrease in the probability of achieving success is never going to reach zero and can only go in this direction (e.g. someone incurred severe and permanent harm to health but later won a lottery organised by a foundation taking care of disabled people).

[20] In fact, the authors of all the works quoted herein present this stance; it is in conformity with the uniform case law.

say that it is a temporary benefit granted (being aware of its blur) for a longer period, quite often (probably usually) for life, the amount of which may change over time subject to circumstances (Article 907 § 2 CC). Assuming that the legislator rationally relates the language of a normative act to the extra-linguistic reality, one should also assume that, based on Article 444 § 2 CC, there can only be such relevant success that would consist in obtaining specific financial benefits for a long time, even (although not necessarily) for life. It excludes the relevance of success understood as a single or repeated (even economic or financial success[21]) in a particular field or sphere. In consequence, it is necessary to assume that among the standard ontic categories, only states of affairs or phenomena, but not events, can obtain relevance on the basis of the fragment of Article 444 § 2 CC analysed in this paper. And in this case, the same view is almost uniformly adopted in the doctrine. It is usually said that the damage that is indemnified by the claim discussed in this paper should be p e r m a n e n t[22] or (quite closely if not synonymously) continuous[23] in nature. Statements in accordance with which a disability pension does not correspond to the nature of damage in the form of the loss of prospects for success[24] may be kindly interpreted as an accurate recognition of the fact that the content and scope of the term "success" determined by the semantic rules of the general language (the scope that may of course include consequences, not necessarily financial ones, of single events) is narrowed by the close and direct linguistic context of Article 444 § 2 CC.

2. The result of the linguistic interpretation should be now confronted with the systemic rules of interpretation. Giving up burdening the paper with broader theoretical and legal explanations, we need to remind that the set of norms established by the legislator is a coherent one, inter alia, within the meaning that the norms laid down by the legislator are not contradictory or in conflict with each other. If it is

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[21] Maybe differently, suggesting legal relevance of the chances for obtaining benefits resulting from single (incidental) events: Strugała, R., in: Gniewek, E. (ed.), *Kodeks cywilny. Komentarz*, Warszawa, 2021, Article 444, Ref. No. 12. *Expressis verbis* against indemnification of the loss of prospects for single opportunities: Kaliński, M., *Szkoda na osobie*…, op. cit., p. 273 et seq.

[22] See Rezler, J., *Naprawienie szkody*…, op. cit., p. 69; Szpunar, A., 'Czyny niedozwolone…', op. cit., p. 93 et seq.; Szpunar, A., 'W sprawie ustalenia renty z tytułu uszkodzenia ciała', *Nowe Prawo*, 1979, No. 3, p. 19; Szpunar, A., 'Uwagi o rencie…', op. cit., p. 344; Szpunar, A., *Odszkodowanie za szkodę*…', op. cit., pp. 145 and 152; Bieniek, G., *Odpowiedzialność cywilna za wypadki drogowe*, Warszawa, 2007, p. 140; Drela, M., 'Renta deliktowa', in: Drela, M. (ed.), *Renta w prawie polskim*, Wrocław, 2016, pp. 28 and 44; Wałachowska, M., in: Fras, M., Habdas, M. (eds), *Kodeks cywilny. Komentarza. Tom III. Zobowiązania. Część ogólna (art. 353–534)*, Warszawa, 2018, Article 444, Ref. No. 21; Jantowski, L., in: Balwicka-Szczyrba, M., Sylwestrzak, A. (eds), *Kodeks cywilny. Komentarz*, Warszawa, 2022, Article 444, Ref. No. 7.

[23] See Szpunar, A., 'Glosa do uchwały…', op. cit., p. 414; Szpunar, A., 'Czyny niedozwolone…', op. cit., p. 94; Szpunar, A., *Odszkodowanie za szkodę*…, op. cit., p. 146; Drela, M., 'Renta deliktowa', op. cit., p. 30 referring to E. Bagińska. In case law, see in particular the Supreme Court resolution (7) of 17.06.1963, III CO 38/62; the Supreme Court judgement of 17.06.2009, IV CSK 37/09, *Orzecznictwo Sądów Polskich*, 2010, No. 9, item 93. On "successive repetition in the future": the Supreme Court resolution (7) of 17.06.1963, III CO 38/62; Burian, B., 'Roszczenie małoletniego…', op. cit., p. 25 et seq.; Drela, M., 'Renta deliktowa', op. cit., p. 28. Very similarly: Strugała, R., op. cit., Ref. No. 11.

[24] See clearly Kaliński, M., *Szkoda na osobie*…, op. cit., p. 267.

assumed, and in fact this assumption is not contentious in the contemporary Polish legal culture, that damages are compensatory in nature (are aimed at redressing legally relevant injuries incurred by the aggrieved), the meaning of "prospects for success in the future" should be determined in such a way that it does not make the scope of the term cover injuries that are subject to claims constructed based on legal provisions other than those under Article 444 § 2 CC.

Taking the above into account, it is necessary to recognise that "prospects for success in the future" does not cover injuries classified as non-pecuniary damage (harm) and subject to compensation based on a claim under Article 445 § 1 CC.[25] A different result of the interpretation would immediately result in double compensation for the same harm and would infringe the compensatory aim of damages. The thesis adopted here is also uniformly represented in the doctrine and case law[26] and is fully coherent with the uniformly accepted opinion that the permanent nature of the effects of the infringement of someone's personal interest (including health) is one of the most important criteria (factors) determining the amount of harm and, as a result, the amount of financial compensation. Of course, it may happen that the blurred boundaries of the meaning of damage to property and harm can overlap in the context of damage consisting in the reduction of prospects for success in the future.[27] Then, assigning harm (in fact, its fragment or element raising classification doubts) to damage compensated by a disability pension under the third condition or to harm compensated by damages becomes, as it seems, secondary within the sense that the obligation to take it into account is more important than the type of classification applied. The question whether the disability pension under the third condition or the (adequately increased) compensation will be the means of indemnification of the fragment or element of the impairment that raises classification doubts seems to be within the limits of a court's discretion.

3. For the sake of order, it should be pointed out that at this stage of the analysis, the functional rules of interpretation do not seem to be helpful; they will be used later in the process of specifying the above-achieved preliminary result of the interpretation.

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[25] It should be pointed out that Article 444 § 2 CC does not solve the problem unambiguously. The provision, determining the "the aggrieved" and "the obliged to compensate damage", suggests that only damage to property is relevant, however, does not per se exclude the interpretation that it also concerns an entity who incurred harm, because in some provisions of the Civil Code the term "damage" covers not only damage to property but also harm.

[26] See Rezler, J., *Naprawienie szkody*…, op. cit., p. 97; Bladowski, B., Gola, A., *Szkoda i odszkodowanie*, Warszawa, 1984, p. 70; Drela, M., 'Renta deliktowa', op. cit., pp. 28 and 44; Wałachowska, M., op. cit., Article 444, Ref. No. 57, 61; Kaliński, M., *Szkoda na osobie*…, op. cit., pp. 270 and 274; Banaszczyk, Z., Kaliński, M., in: Dukiet-Nagórska, T., Liszewska, A. (eds), *System Prawa medycznego. Tom III. Odpowiedzialność prawna w związku z czynnościami medycznymi*, Warszawa, 2021, p. 147; Radwański, Z., Olejniczak, A., Grykiel, J., *Zobowiązania – część ogólna*, Warszawa, 2022, p. 279. In case law, see in particular the Supreme Court resolution (7) of 17.06.1963, III CO 38/62. Double compensation for the same damage (to a small extent) seems to be admitted (inaccurately if the attribution of this opinion is accurate) by E. Bagińska in: Bagińska, E. (ed.), *System Prawa Medycznego. Odpowiedzialność prywatnoprawna. T. 5*, Warszawa, 2021, p. 711.

[27] See in particular Kaliński, M., *Szkoda na osobie*…, op. cit., p. 274. Cf. also Szpunar, A., in: *Materiały dyskusyjne*…, op. cit., p. 347.

4. The above-presented result of the interpretation is preliminary or general in nature in the sense that it still does not say much (or at least it does not say everything), inter alia, about the states of affairs or phenomena that should be treated as designates of "success" within the meaning attributed to it in Article 444 § 2 CC. Also, it does not say anything about the probability of those states of affairs or phenomena in the future, leaving a huge space between the impossibility and the necessity of achieving success by the aggrieved. In order to provide more detailed findings in the field, it will be necessary to refer more decisively to the *acquis* of the doctrine and case law, which have been deliberately omitted in most of the former analyses.[28]

Let the observation, which corresponds to the elementary life experience and is probably indisputable, that a man's success understood through the economic and financial prism is first of all, if not exclusively, connected with work, be the starting point for further analysis.[29] Obviously, work should be broadly understood, i.e. as any type of activity (not in conflict with the norms binding in the system), which provides economic or financial benefits for a worker in the long term or even life-long perspective. Thus, of course, it concerns employment based on an employment contract but also self-employment, farming, artistic and sports activities (but not accidental ones), running income-generating websites or Internet services, regular participation in various types of income-generating contests or competitions[30] etc. This approach fully corresponds to the clearly majority stance in the doctrine, where the reduction of prospects for success [in the future] is primarily understood (although again not exclusively) as a decrease in (also deprivation of) chances for gaining economic or financial benefits from work in its broad meaning.[31] Most of the statements refer to work not as such but to its specific manifestation or aspects, which are invariably positively assessed. Thus, it concerns, inter alia, success understood as achieving (extraordinarily) good results or accomplishments at work,

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[28] The opinions of the doctrine and case law are not in fact established in a particular interpretative conception; they find their basis more in linguistic intuition (in literature, e.g., general language dictionaries are not referred to as a basis for the purpose of legitimating proposed results), systemic or moral entities providing arguments. Quite often, arguments are limited to the provision of cases in which a provision was applied (the so-called argument of typical cases) or a statement that the scope of the provision is not limited to those cases. It was also common to specify the relationship between the scope of application of the claim based on the reason for sets of actual states discussed herein and the conditions for claims for other reasons (especially the loss of ability to work) producing a difficult to eliminate blur of the language of the interpretation process and the meta-language used for classifying its results; the issue will be discussed again in the further part of the paper. Of course, this does not make the *acquis* of the doctrine worth rejecting, but prompts using it in an adequate (to the planned objective and methodology of the paper) way.

[29] In an inspiring way about socially useful work: Karoń, K., *Historia antykultury*, Warszawa, 2018, *passim*.

[30] As regards the last example, see Śmieja, A., op. cit., p. 750; Kaliński, M., *Szkoda na osobie*…, op. cit., p. 270 et seq.

[31] For a very clear approach see e.g. Sobolewski, P., op. cit., Article 444, Ref. No. 73, 74; also see Bladowski, B., op. cit., p. 69; Drela, M., 'Renta deliktowa', op. cit., p. 37; Strugała, R., op. cit., Ref. No. 11.

professional promotion, or having especially well remunerated work.[32] A similar idea was probably assumed in an enthymematic way in the so-called reasoning from typical cases, where the disfigurement of an actor is usually indicated as a factor preventing him from playing main roles.[33]

A question arises at this point whether success understood in terms of finance (property) may result only from work in the broad meaning of the word or whether other types of states of affairs or phenomena may be taken into account. It seems that (single or incidental) events are excluded from the scope of legally relevant success and a sufficiently broad understanding of work is adopted, the space for designates of success other than work will become extremely limited, or perhaps there will be no space like that at all. Even very untypical or unusual life paths that come to mind, which a man can choose, and which do not constitute (or rather do not seem to constitute) work in its broad meaning, are very difficult to associate with economic or financial benefits that such choices might bring.[34] Taking into account the cultural tradition, within work in the broad meaning, one should distinguish work meaning doing the household chores in general and taking care of children in particular in order to emphasise that the reduction of prospects for doing it may also be relevant on the basis of a disability pension condition considered in the paper.[35]

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[32] Speaking about benefits gained from extraordinary skills or talents, we usually have more or less explicit opinions that a disability pension based on the third condition should compensate just (and only) the benefits that the aggrieved would gain thanks to his extraordinary skills and talents. Anyway, the element of extraordinary skills or talents is agreeably emphasised in the entire doctrine. See Szpunar, A., 'Glosa do uchwały…', op. cit., p. 415; Szpunar, A., 'Roszczenie małoletniego…', op. cit., p. 531; Bladowski, B., op. cit., p. 69; Szpunar, A., 'Uwagi o rencie…', op. cit., p. 344; Szpunar, A., *Odszkodowanie za szkodę…*, op. cit., p. 152 et seq.; Bieniek, G., *Odpowiedzialność cywilna…*, op. cit., p. 142; Matys, J., 'Szkoda na osobie – uwagi na tle art. 444 KC', *Monitor Prawniczy* 2004, No. 10, p. 459; Burian, B., 'Roszczenie małoletniego…', op. cit., pp. 12 et seq., 23, 28 et seq., 39 et seq.; Olejniczak, A., in: Kidyba, A. (ed.), *Kodeks cywilny. Komentarz. Zobowiązania. Część ogólna. Tom III*, Warszawa, 2014, Article 444, Ref. No. 22, Ref. No. 23; Śmieja, A., op. cit., p. 750; Wałachowska, M., op. cit., Article 444, Ref. No. 32, 57, 59; Kaliński, M., *Szkoda na osobie…*, op. cit., pp. 268 et seq., 270; Strugała, R., op. cit., Ref. No. 12; Bagińska, E. (ed.), *System Prawa Medycznego…*, op. cit., p. 711; Długoszewska-Kruk, I., in: Załucki, M. (ed.), *Kodeks cywilny. Komentarz*, Warszawa, 2023, Article 444, Ref. No. 8. In case law see in particular the Supreme Court resolution (7) of 17.06.1963, III CO 38/62; the Supreme Court judgement of 19 October 1963, II CR 976/62, *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych*, 1964, item 222; also see e.g. the judgement of the Appellate Court in Szczecin of 21.05.2015, I ACa 55/15.

[33] See Longchamps de Berier, R., *Uzasadnienie projektu…*, op. cit., p. 206; repeated many times later (e.g. Szpunar, A., 'Renta dla okaleczonego dziecka', *Nowe Prawo*, 1962, No. 9, p. 1136; Szpunar, A., 'Roszczenie małoletniego…', op. cit., p. 531 et seq.; Rezler, J., *Naprawienie szkody…*, op. cit., p. 97; Szpunar, A., 'Uwagi o rencie…', op. cit., p. 344; Szpunar, A., *Odszkodowanie za szkodę…*, op. cit., p. 152 et seq.; Bladowski, B., op. cit., p. 69; Safjan, M., in: Pietrzykowski, K. (ed.), *Komentarz KC. T. I*, Warszawa, 2020, Article 444, Ref. No. 27.

[34] For example, joining a contemplative order by definition is (or at least should be) connected with poverty; similarly, the choice of a volunteer fighting in a war, even a just war, may give only honour and fame that is difficult to calculate and express in terms of pecuniary advantages.

[35] In this sense, an example, given for about a hundred years, of the disfigurement of a young woman, which reduced her prospects for good marriage (in the sense of financial state ensured by a husband), is still relevant, provided that, which will be discussed later, it can be assumed that the success of the aggrieved could be most probably connected with such a life path. In this context, especially see Longchamps de Berier, R., *Uzasadnienie projektu…*, op. cit.,

Not decidedly prejudging whether success understood in terms of finance (property) may be associated with something different than work in the broad sense of the word, in particular, not decidedly prejudging whether other forms of work, apart from doing household chores and taking care of children, should or should not be distinguished, in the light of the above, it seems that one should recognise the accuracy of those opinions expressed in the doctrine that associate "success in the future" exclusively with work (in its broad sense), and more precisely with economic (financial) benefits that this work provides.[36]

At this point, it is necessary to return to the issue of the difference between the damage indemnified by a compensatory pension due to the reduction of prospects for success in the future and the harm that is indemnified by redress. In a series of statements in the doctrine, one can find suggestions that the third disability pension condition should cover harm. It can be clearly noticed when the legal relevance (pursuant to Article 444 § 2 CC) is attributed not to the economic or financial consequences of the reduction of prospects for success but to the reduction of prospects for success treated, so to speak, as all the life chances of the aggrieved. In this context, we first of all speak about "general worsening of life opportunities".[37] Sometimes, categories or types of actual states are indicated in a more detailed way. We mean, for example, the inability to acquire education (possible to acquire or desired by the aggrieved)[38]; however, it is one of the circumstances leading to the reduction of prospects for success rather than the reduction of prospects for success itself. The same can be said about the recognition of inability to do a job requiring particularly high level of trust as detriment[39] (provided that this trust is not associated with financial benefits) in case of a job that was earlier chosen[40] or dreamed of[41] (with the same proviso).

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p. 206 and next Szpunar, A., 'Renta dla okaleczonego dziecka', op. cit., p. 1136; Kaliński, M., *Szkoda na osobie*…, op. cit., p. 270 et seq.; Sobolewski, P., op. cit., Ref. No. 74. A different approach suggests that the actual state is only relevant on the basis of Article 445 § 1 CC, Rezler, J., *Naprawienie szkody*…, op. cit., p. 97.

[36] See in particular Rezler, J., *Naprawienie szkody*…, op. cit., p. 97 et seq.

[37] See Szpunar, A., 'Renta dla okaleczonego dziecka', op. cit., p. 1136; Szpunar, A., 'Glosa do uchwały…', op. cit., p. 415; Szpunar, A., 'Czyny niedozwolone…', op. cit., p. 97; Szpunar, A., 'Uwagi o rencie…', op. cit., p. 354; Matys, J., op. cit., p. 459. Ambiguously: Szpunar, A., 'Roszczenie małoletniego…', op. cit., p. 533; Burian, B., 'Roszczenie małoletniego…', op. cit., p. 25 et seq. Unambiguously differently, rightly, inter alia, Rezler, J., *Naprawienie szkody*…, op. cit., p. 97; Bieniek, G., *Odpowiedzialność cywilna*…, op. cit., p. 142. In case law see in particular the Supreme Court resolution (7) of 17.06.1963, III CO 38/62.

[38] See inter alia Matys, J., op. cit., p. 461; Śmieja, A., op. cit., p. 750; Safjan, M., op. cit., Article 444, Ref. No. 29; Jantowski, L., in: Balwicka-Szczyrba, M., Sylwestrzak, A. (eds), *Kodeks cywilny. Komentarz*, Warszawa, 2022, Article 444, Ref. No. 11. Also see, similarly, Wałachowska, M., op. cit., Article 444, Ref. No. 58.

[39] See in particular Kaliński, M., *Szkoda na osobie*…, op. cit., p. 268 et seq.

[40] See in particular Szpunar, A., 'Uwagi o rencie…', op. cit., p. 344; Szpunar, A., *Odszkodowanie za szkodę*…, op. cit., p. 152 et seq.; Matys, J., op. cit., p. 459.

[41] See in particular Wałachowska, M., in: Fras, M., Habdas, M. (eds), *Kodeks cywilny*…, op. cit., Article 444, Nb 32; similarly, earlier: Szpunar, A., *Renta dla okaleczonego dziecka*…, op. cit., p. 1136.

Determination of the meaning of the term "prospects for success [in the future]" allows for returning to the issue of probability of success in the future the moment a person suffers an injury. As it was stated above, the probability may oscillate between the values from 0 up to 1 (probability bordering on certainty) depending on the actual state. Elementary legal intuition embedded in, generally speaking, the principles of civil liability to pay compensation suggests that the adoption of the requirement of probability bordering on certainty (or at least a very high one) will deprive the claim discussed of whatever practical significance. Extremely rarely, if ever, achieving success within the meaning adopted is almost certain. On the other hand, the acceptance of the result of the interpretation allowing for taking into account claims for indemnifying an injury, which almost certainly would never have occurred, would make the considered disability pension condition a kind of a pleasant extra allowance added to the compensation (redress) that the injured would be always entitled to regardless of other circumstances.

Finding a balance between the above-outlined extremes, which might be recognised as the appropriate result of the interpretation of Article 444 § 2 CC within the scope analysed in the present paper, seems to be a matter that is not legitimised by the linguistic directives of interpretation or the systemic reasoning. In fact, it should be pointed out that in the discussion on this issue (conceptualised in a little different way), on the one hand, arguments from Article 361 § 2 CC are quoted (as a disability pension is a form of compensation for damage to property, and damage to property covers, inter alia, the loss of benefits, thus, the lost benefits that a disability pension indemnifies should be understood in the same way as in case of Article 361 § 2 CC, which would require a very high, if not bordering on certainty, probability of their occurrence in the future)[42] on the other hand, arguments from the meta-linguistic classification of an injury indemnified by a disability pension due to the third condition as the so-called remote damage or lost prospects[43] are referred to; however, the reasoning is burdened at least with the *petitio principii* error. It is so because before the interpretation of Article 444 § 2 CC with regard to "the

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[42] A considerable part of the doctrine recognises Article 444 § 2 CC as the implementation, specification, application etc. of Article 361 § 2 CC and repeatedly emphasises that the provision neither extends nor limits the concept of damage under Article 361 § 2 CC. See, clearly, Szpunar, A., 'Renta dla okaleczonego dziecka', op. cit., p. 1131; Rezler, J., *Naprawienie szkody*…, op. cit., pp. 65 et seq., and 69; Szpunar, A., 'Roszczenie małoletniego…', op. cit., p. 529; Szpunar, A., 'Czyny niedozwolone…', op. cit., p. 93; Szpunar, A., 'Uwagi o rencie…', op. cit., p. 343 et seq.; Burian, B., 'Roszczenie małoletniego…', op. cit., pp. 9 et seq., 20, and 23; Drela, M., 'Renta deliktowa', op. cit., pp. 30 et seq., and 33. Also see Bieniek, G., *Odpowiedzialność cywilna*…, op. cit., pp. 140 et seq., and 143; Bagińska, E., 'Kompensacja utraconej szansy – problem związku przyczynowego czy szkody?', in: Olejniczak, A., Haberko, J., Pyrzyńska, A., Sokołowska, D. (eds), *Współczesne problemy prawa zobowiązań*, Warszawa, 2015, p. 51. In case law see in particular the Supreme Court resolution (7) of 17.06.1963, III CO 38/62.

[43] For different interpretation of damage indemnified by a disability pension analysed in the paper within the meaning of Article 361 § 2 CC, see Kaliński, M., *Szkoda na osobie*…, op. cit., p. 267, 273; Strugała, R., op. cit., Article 444, Ref. No. 11, 16. Thus, as it seems, recognising the relevance of the term "remote damage", Banaszczyk, Z., Kaliński, M., op. cit., p. 157. Also see, against the background of the opinion about the relevance of the loss of prospects: Bagińska, E., 'Kompensacja utraconej szansy…', op. cit., p. 48; Bagińska, E. (ed.), *System Prawa Medycznego*…, op. cit., p. 711.

reduction of prospects for success [in the future]" is conducted, it is not possible to state whether the damage indemnified by a disability pension is a "standard" damage (in the form of *lucrum cessans*) at least because Article 444 § 2 CC may constitute a special provision (content modifier) of Article 361 § 1 CC; moreover, the requirement for "standard" lost benefits to meet a probability bordering on certainty does not result from the text of the statute but is accepted by the legal culture, which happens to differentiate the required level of probability depending on the class or type of actual states.[44] Accordingly, the classification of the injury indemnified by a disability pension due to the third condition for the specific meta-linguistic category (remote damage, lost prospects) also requires that the result of the interpretation of Article 444 § 2 CC (apart from attributing the strictest possible meaning to these categories) should be obtained earlier.

In view of the inadequacy of linguistic and systemic reasoning, the resolution of the issue can only be based on functional assumptions attributed to the rational legislator from the axiological point of view; thus, in fact, it is moral in nature. Without going into the extremely extensive literature on the subject, it can be said without any risk that the legislator not only establishes norms that ensure special (in comparison with the universe of other legally relevant injuries) protection of one who suffered damage to the person but also (at least) an interpretative directive ordering to resolve interpretative doubts as to the scope of indemnity in favour of the injured. As a result, it can be assumed with strong conviction that the rational from the axiological point of view legislator who recognises human health as the interest deserving special protection, prefers the interest of the injured to the interest of other entities (obliged to redress the damage). This leads to the conclusion that the probability of achieving success by the aggrieved does not have to be so high that it borders on certainty. On the other hand, the relationship between the preferences is not absolute in nature (otherwise, the only condition for claims concerning damage to the person would be the fact of suffering it and their amount would not be limited in any way). It contradicts the recognition of not only the probability close to 0 (minimal, inconsiderable), but also low, small, not big one. Within the framework adopted herein, which, as it must be admitted, is still quite wide, where the probability higher than low, small or not big seems to be sufficient, a court seems to have adjudication discretion, the more narrowing, the closer the probability of achieving success in a given actual state is getting to certainty.

What facilitates the movement within the scope of the above-mentioned adjudication discretion is the *acquis* of the doctrine, which comes to conclusions that are actually very similar (unfortunately, probably identical) to the above-adopted ones; however, they are justified differently (or not justified at all). An assumption that should be adopted as a starting point is that the overwhelming majority of people start work (within the broad meaning of the word) at a certain moment of their lives, thus, the probability of starting it (or continuing it) by the injured person can be determined without the risk of an error as very high, if not bordering on certainty. Only particular psychological characteristics of the injured person

[44] Cf. Kaliński, M., *Szkoda na osobie*…, op. cit., p. 268.

might lead to a different conclusion (e.g. disability or mental retardation of such a kind or degree that would make work impossible, provided that the matter is looked at reasonably). Then, if no circumstances support the adoption of different conclusions, a court's possibilities end on drawing a conclusion that the injured person would start work in the future (or probably continue it). It will primarily happen in case of minors, and in particular small children.[45] However, if the injured person had characteristic features that allow for foreseeing with higher than small, small, low or very low probability what sort of work the injured person would start, a court would be able to recognise financial consequences of the inability to start or continue this work as damage. With regard to minors who will soon be adults, the chosen education will mainly constitute this circumstance; one cannot exclude a minor's career plans if the efforts he made gave them the quality of seriousness.[46] For example, it is difficult to recognise a minor's declaration that he would like to be a nuclear physicist as a basis for determining the nature of his future job if he is studying in the class specialising in humanities and his marks in sciences in former years were barely sufficient to pass. It is necessary to look differently at a winner of physics competitions who, still being a secondary school student, won an international award of an internship in the MARIA reactor research programme in the nuclear power plant in Świerk. The same can be said about the injured people who have already worked about the course of their future work and probable promotions.[47] In general, it concerns such features or properties (talents, skills, aptitudes etc.) of the injured persons that make it possible to assume that the probability that they would achieve success in the future in the job corresponding to those features or properties is higher than statistical.[48]

On the other hand, one should be very sceptical about the opinion that those predictions should take into account the nature of the social environment of the injured minor, especially if it could negate the possibility of working at all, and

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[45] See, similarly, Rezler, J., *Naprawienie szkody…*, op. cit., p. 89; Burian, B., 'Roszczenie małoletniego…', op. cit., pp. 34 et seq., and 39 et seq.; Bagińska, E., 'Kompensacja utraconej szansy…', op. cit., p. 60. In the context of the first disability pension premise, see e.g. Bieniek, G., *Odpowiedzialność cywilna…*, op. cit., p. 142.

[46] See, similarly and in fact in some cases identically, Szpunar, A., 'Renta dla okaleczonego dziecka', op. cit., p. 1135; Szpunar, A., 'Glosa do wyroku…', op. cit., p. 418; Szpunar, A., 'Glosa do uchwały …', op. cit., p. 416; Matys, J., op. cit., p. 459; Rzetecka-Gil, A., *Kodeks cywilny. Komentarz. Zobowiązania – część ogólna*, Article 444, Ref. No. 23; Burian, B., 'Roszczenie małoletniego…', op. cit., pp. 25 et seq., and 39 et seq.; Olejniczak, A., in: Kidyba, A. (ed.), op. cit., Article 444, Ref. No. 22; Wałachowska, M., op. cit., Article 444, Ref. No. 60; Banaszczyk, Z., Kaliński, M., op. cit., *2.1.1.6 Szkoda ewentualna*. In case law see the Supreme Court judgement of 6.03.1963, ISNCP 1964, item 37; the Supreme Court judgement of 11.08.1977, I CR 380/77.

[47] See, inter alia, Szpunar, A., 'Renta dla okaleczonego dziecka', op. cit., p. 1135; Rezler, J., *Naprawienie szkody…*, op. cit., p. 81; Bieniek, G., *Odpowiedzialność cywilna…*, op. cit., p. 142; Bieniek, G., Gudowski, J., in: Gudowski, J. (ed.), *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna*, Warszawa, 2018, Article 444, Ref. No. 30. In case law see e.g. the Supreme Court judgement of 29 October 1962, *Nowe Prawo*, 1963, No. 7, p. 76; the Supreme Court judgement of 31 October 1966, II CR 372/66.

[48] See Burian, B., 'Roszczenie małoletniego…', op. cit., p. 34 et seq. (indicating the social environment only as one of many circumstances influencing determination of a job that would probably be done in the future by a minor).

doing a job corresponding to his particular features or properties in particular. To put it simply, such an approach would flagrantly contradict the axiology attributed to the legislator.[49]

CONTENT OF THE CLAIM FOR A DISABILITY PENSION DUE TO THE REDUCTION OF PROSPECTS FOR SUCCESS IN THE FUTURE

1. Determining conditions for a claim for a disability pension due to the reduction of prospects for success in the future allows for determining its content. To make the analysis clearer, it is necessary to recall that in the predicate "X has prospects for Z", the variable X runs through the set of natural persons (including conceived children, Article 446[1] CC), and the variable Z runs through the set of states of affairs or phenomena, the occurrence of which was possible in relation to a particular natural person. Work (within its meaning), including doing household chores, provided it is long-term or even life-long one, is by far the most important, if not the only, state of affairs (phenomenon). In order to establish whether the damage caused the reduction of prospects for success understood in this way, it is necessary to determine with probability higher than low, small, little or not big that the injured person would work; the circumstance of the actual state can allow for more detailed specification of the type of work that would be possible in the future. On this basis, it is possible to determine the most important parameters of the claim content, i.e. its amount and period for which an injured person is entitled to it.

2. It seems there are no doubts that the a m o u n t of a disability pension should as precisely as possible correspond to the size of damage it is to compensate.[50] This general statement is filled with content mainly in the abundant literature and case law concerning the first condition for a disability pension, i.e. a full or partial loss of working and earning capacity. At this point, it is of course not possible to quote the rich *acquis* of the Polish civil law. Limiting references to the literature to the third condition for a disability pension, it seems sufficient to state that, in relation to the injured persons who suffered harm consisting in the inability to obtain financial benefits from work, one cannot say about this work anything more detailed than that the injured person would most probably do the job, and the disability pension should correspond to an average remuneration in the country (possibly in a particular region), established based on commonly available data published by authorised

[49] See Mularski, K., in: Gutowski, M. (ed.), *Kodeks cywilny. Tom II. Komentarz. Articles 353–626*, Warszawa, 2022, Article 444, Ref. No. 10, p. 972 et seq. In the context of a financial status of the injured person as a supposed condition for establishing the size of harm, and as a result the amount of pecuniary compensation, also see idem, Article 445, Ref. No. 17, p. 992 et seq.

[50] In the context of the third condition for a disability pension, see, identically or very similarly, Szpunar, A., 'Uwagi o rencie…', op. cit., pp. 345 and 348; Szpunar, A., *Odszkodowanie za szkodę…*, op. cit., p. 146.

entities (e.g. the Central Statistical Office).[51] It also seems that there are no doubts that due to the exemption of a compensatory pension from income tax, its amount should correspond to the average net salary.[52] However, in case of such actual states in which it is possible to establish with sufficient probability that the injured person would do a particular job, it would be necessary to determine an average pay for people doing this job; with the exception of extraordinary circumstances that may indicate that the injured person would be involved in professional activities deserving especially high income.[53] With regard to such activities specified in more detail, it is necessary to consider whether the financial benefits obtained as a result of performing them do or do not include elements that are to compensate broadly understood costs incurred by the person involved in a particular activity, which should not be compensated by a disability pension (because the injured person is not going to incur them).[54] Moreover, it cannot be excluded that the nature of such a detailed activity will speak in favour of granting a disability pension that will differ in terms of the amount of individual instalments not only in comparison with a yearly payment (or several years' one) but also in relation to shorter periods.[55]

If doing household chores were distinguished from work within its broad meaning, and there were grounds for recognising that as the job the injured person would start or continue, it would be necessary to determine (which, taking into account the progress in the contemporary demographic studies, seems to cause no difficulties) how wealthy an average household/homestead, in which the injured would most probably work (continue to work), is; and on the basis of that establish the amount of an adequate pension. Extraordinary circumstances of a given actual state may of course lead to different conclusions and the adoption of a higher level of the wealth of a household/homestead.[56]

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[51] Identically or in a very similar way Rezler, J., *Naprawienie szkody…*, op. cit., p. 80; Szpunar, A., 'Czyny niedozwolone…', op. cit., p. 93; Szpunar, A., *Odszkodowanie za szkodę…*, op. cit., p. 155; Bieniek, G., *Odpowiedzialność cywilna…*, op. cit., pp. 143, 148, and 252. Also see, emphasising the necessity for adopting equal chances of minors Mularski, K., in: Gutowski, M. (ed.), *Kodeks cywilny…*, op. cit., Article 444, Ref. No. 10 (p. 972). Expressed differently, against calculating an average pension corresponding to the average remuneration, the Supreme Court resolution (7) of 17.06.1963, III CO 38/62.

[52] One can note at this point that the adopted result of the interpretation means the elimination of the way of calculating compensation for the so-called loss of chances that is adopted in some other legal systems (see the broadest approach in: Bagińska, E., 'Kompensacja utraconej szansy…', op. cit., pp. 44, 47, 52, 56, and 62.

[53] See, inter alia, Bieniek, G., *Odpowiedzialność cywilna…*, op. cit., p. 148; Burian, B., 'Roszczenie małoletniego…', op. cit., p. 34 et seq. In case law see the Supreme Court judgement of 8 November 1977, I CR 380/77.

[54] See, against the background of the cost of overnight accommodation, the so-called catering and expatriation allowance, Rezler, J., *Naprawienie szkody…*, op. cit., p. 75; also see Burian, B., 'Roszczenie małoletniego…', op. cit., p. 34 et seq.

[55] Thus, accurately, Drela, M., 'Renta deliktowa', op. cit., p. 45.

[56] For example, the injured was planning to get married to a very rich man who died in the same accident in which she incurred damage to the person and the nature of injuries practically excludes the possibility of marrying someone with the same financial status.

3. With regard to the d u r a t i o n of the obligation relationship under which a debtor is obliged to provide disability benefits, the only thing that can be said is that it should correspond to the probable period when the given activity would be performed. The issue was given a lot of attention in the context of the first condition for a disability pension and was primarily connected with a thought about the probable end of professional activeness (retirement). Consolidating the comments only within the views of the doctrine concerning the reduction of prospects for success in the future, one can state that a disability pension should also take into account the time of probable cessation of the injured person's activeness. Being unable to pursue a particular activity, a person was not able to acquire the right to retirement benefits; the loss of them also has a nature of legally relevant harm.[57] However, it must be noted that some activities that constitute work within its broad meaning do not result in the acquisition of the right to retirement benefits; then, it would be possible to determine the moment of the obligation relationship expiry.[58]

RELATIONSHIP BETWEEN A DISABILITY PENSION DUE TO THE REDUCTION OF PROSPECTS FOR SUCCESS IN THE FUTURE AND A DISABILITY PENSION DUE TO FULL OR PARTIAL LOSS OF CAPABILITY TO HAVE GAINFUL EMPLOYMENT

The interpretation of the "reduction of prospects for success in the future" makes it possible to determine the relationship between the content and scope of this phrase and the content and scope of Article 444 § 2 *in principio* CC, which constructs the so-called first condition for a disability pension. In order to use this opportunity, it is also necessary to determine the content and scope of "full or partial loss of capability to have gainful work", or at least the choice of a particular result of the interpretation of this term from the different (at least in details) interpretation results proposed in the doctrine. However, it is not possible to oversee that, in case of the adoption of sufficiently broad, identical to the adopted in the present paper, interpretation of the term "work" under Article 444 § 2 CC as any kind of sufficiently permanent lawful human activity bringing specific financial benefits, the scopes of both conditions are convergent. In view of the dominant but not uniform (and, by the way, not resulting from the linguistic interpretation of the term "loss") stance in the contemporary Polish civil law studies, according to which the condition of the loss of capability to have gainful work cannot, at least as a rule, be applied to minors, in fact, the only difference between the two conditions for a disability pension would consist in the fact that a disability pension due to the third condition would indemnify damage suffered by minors.[59] It cannot be overlooked that such

[57] Thus, accurately, inter alia, Rezler, J., *Naprawienie szkody…*, op. cit., p. 94.

[58] See Bieniek, G., *Odpowiedzialność cywilna…*, op. cit., p. 141.

[59] Very similarly, on [only] "theoretically independent" nature of the condition, Rezler, J., *Naprawienie szkody…*, op. cit., p. 65; Bieniek, G., *Odpowiedzialność cywilna…*, op. cit., p. 148 et seq.;

conclusions, in line with J. Rezler's opinions expressed a long time ago, undermine at least the assumption of the linguistic and legislative rationality of the legislator, who would construct a claim that, as a rule, has no prospect for success in finding application of its conditions in practice.[60]

The defence of the assumption of the legislator's rationality might look as follows. Firstly, it might force us to modify the interpretation result adopted in this paper and significantly broaden the content (and as a result the scope) of the term "reduction of prospects for success in the future". Secondly, it would not be impossible to introduce changes to the most commonly accepted interpretation of the term "loss of capability to have gainful work" so that it included, for example, only such lost benefits that the injured person might almost certainly (or at least very probably) obtain; and other lost benefits of lesser (but still higher than low, small or not big) probability of obtaining them would be compensated by means of meeting the third condition for a disability pension.[61] Then, maybe, a disability pension meeting the third condition, in accordance with the stance expressed many times, would indemnify the benefits, the obtaining of which would depend on special talents or aptitudes of the injured person (however, these benefits can still be recognised as being within the scope of a typical, standard course of the injured person's professional career; therefore, the first condition for a disability pension would still constitute adequate legal grounds). It would also be able to limit the scope of "gainful work" to the employment relationship and, possibly, business activity;

Bieniek, G., Gudowski, J., in: Gudowski, J. (ed.), *Kodeks cywilny…*, op. cit., Article 444, Ref. No. 59; Kaliński, M., *Szkoda na osobie…*, op. cit., pp. 267, 269, 273 et seq. It is pointed out (although whatever verification of the thesis would require examination of abundant case law pursuant to Article 444 § 2 CC), that in practice the third condition for a disability pension does never constitute independent grounds for granting a compensatory pension; see Rezler, J., *Naprawienie szkody…*, op. cit., pp. 97 and 99, and recently Kaliński, M., *Szkoda na osobie…*, op. cit., pp. 267, 273 et seq. In case law, against the independence of the third condition for a disability pension: the Supreme Court judgement of 3 December 1970, I PR 427/70; clearly differently: the Supreme Court resolution (7) of 17.06.1963, III CO 38/62. Less unambiguously, indicating that the analysed condition is independent in nature, although "most often" is related to the first condition for granting a pension: Matys, J., op. cit., p. 459; Olejniczak, A., in: Kidyba, A. (ed.), op. cit., Article 444, Ref. No. 21. In a different direction, clearly trying to limit the scope of application of the first and third conditions for granting a disability pension, see, in particular, Bagińska, E. (ed.), *System Prawa Medycznego…*, op. cit., p. 711. As regards opinions unambiguously indicating independence of the analysed condition for a disability pension, see Szpunar, A., 'Renta dla okaleczonego dziecka', op. cit., p. 1133; Szpunar, A., 'Glosa do uchwały…', op. cit., p. 415; Szpunar, A., 'Roszczenie małoletniego…', op. cit., p. 532; Szpunar, A., 'Czyny niedozwolone…', op. cit., pp. 94 and 97; Szpunar, A., 'Uwagi o rencie…', op. cit., pp. 344 and 353; Szpunar, A., *Odszkodowanie za szkodę…*, op. cit., p. 147; Bieniek, G., *Odpowiedzialność cywilna…*, op. cit., p. 140 et seq.; Burian, B., 'Roszczenie małoletniego…', op. cit., p. 11; Drela, M., 'Renta deliktowa', op. cit., pp. 30, 37; Śmieja, A., op. cit., p. 749; Safjan, M., op. cit., Article 444, Ref. No. 27; Strugała, R., op. cit., Article 444 CC, Ref. No. 11; Sobolewski, P., op. cit., Ref. No. 75; Długoszewska-Kruk, I., op. cit., Article 444, Ref. No. 8.

[60] With a strong conviction, it can be assumed that if the third condition for granting a disability pension were waived, the dominant result of the interpretation of the first condition for a pension would change and its scope would also cover minors.

[61] Cf., in relation to an example of a young footballer at the beginning of his career, Kaliński, M., *Szkoda na osobie…*, op. cit., p. 272 (in a slightly polemic reference to Mularski, K., in: Gutowski, M. (ed.), *Kodeks cywilny…*, op. cit., Article 444, Ref. No. 10 (p. 972); cf. also Rezler, J., *Naprawienie szkody…*, op. cit., p. 97 et seq.

it would exclude obtaining financial benefits from sports, artistic etc. activity from the scope of the term.[62] Thirdly, an attempt to look at a disability pension due to the reduction of prospects for success in the future in a different way is probably not excluded. It seems that the role of a disability pension granted for this reason should not (and at least does not have to) be limited to the grounds for minors' claims and, in situations difficult to imagine, persons' whose success in the future would not be associated with work within its broad meaning. The legislator seems to decide that, at least in relation to a certain category of damage causing bodily injuries or health disorders, a lower than standard level of probability of their occurrence is required for the purpose of constituting grounds for their indemnification. In addition, the fragment of the provision analysed in the present paper quite clearly expresses the specific axiology that prefers, to a greater than standard extent, interests of the person who suffered personal injury to the interests of other entities (obliged to redress harm).

CONCLUSIONS

The analysis carried out in the present paper lets us state that every natural person (including a conceived child) is eligible to claim a disability pension due to the reduction of prospects for success in the future, provided that they suffered bodily injuries or health disorders, which deprived them of the capability to work within the broad meaning of the word, including doing household chores, and as a result they lost financial benefits that this work would bring. In order to determine the causal relationship between the harm to the person (an event causing that harm) and financial consequences of inability to stat work, it is sufficient to determine the level of probability that is higher than low, small or not big that the injured person would start work. In a set of actual states in which there are no grounds for predicting what type of work the injured person would start in the future, which concerns primarily minors in general, and small children in particular, a court shall determine a disability pension amount corresponding to the average (net) remuneration in the country. However, if the circumstances of the case indicated a specific type of work, a disability pension should correspond to an average remuneration paid for the job that would probably be done by the injured person. The injured person's special skills or talents (or the lack of them) might justify granting a disability pension lower or higher than the average remuneration within the given type of work. Work should be understood broadly as any sufficiently permanent activity that is in compliance with the norms of the system and brings financial benefits, doing household chores. The "reduction of prospects for success in the future" understood in this way, as a rule, with the exception of situations when a minor is injured, matches the meaning and scope of the "loss of capability to have gainful work" commonly (although not uniformly) accepted in the doctrine. The role of the provision seems to be to resolve interpretation doubts concerning financial benefits

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[62] Clearly in this direction, recently, Strugała, R., op. cit., Article 444, Ref. No. 11.

that an injured person would obtain in the future with its probability higher than low, small or not big, but lower than probability bordering on certainty (or at least very high), which is usually required in relation to lost benefits in case of a disability pension due to the loss of capability to have gainful work. The role also seems to consist in clear indication of values cherished by the legislator and determination of preferences in the set of values that are in conflict with each other. The legislator, to a certain extent, prefers the interests of a person who suffered personal injury to the interests of an entity liable for damage.

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STEPPARENTS' UPBRINGING OBLIGATION TOWARDS THEIR STEPCHILDREN

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Abstract

The article explores the issue of reconstructed families, focusing specifically on the roles of individual family members and the processes that occur within such families. Due to the complexity of the above processes, the article concentrates on the deliberations about the stepparent's upbringing process towards the stepchild, determining its content, scope and role. The article analyses of the stepparent's duty towards the stepchild, highlighting its normative sources, and assesses this duty in relation to the parental authority of the spouse and the parental authority of the other biological parent outside the reconstructed family. The deliberations presented in the article aim to support the primary thesis of the article that in order for the foster parent's current custody of the child to be effective, the stepparent's situation in terms of upbringing obligation should be made independent of the biological parent' situation, which stems from their parental authority. The article proposes introducing for example, an institution of the so-called "adoptive parent's care" that would encompass some rights and obligations typical of parental authority and independent of the parental authority of the child's biological parent. This could serve as an equivalent to the concept of parental responsibility found in English law.

Keywords: upbringing obligation, stepparent (stepfather/stepmother), stepchild, spouse, parental authority, biological parent, reconstructed family, parental responsibility

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INTRODUCTION

Thinking about reconstructed families and relationships formed inside them, we usually consider issues related to upbringing, namely stepparents' upbringing obligation towards their stepchildren. The situation of stepparents' upbringing obligation towards their foster children considerably differs from that of biological parents although the social roles they have to play are similar. In spite of the important and prominent role of a stepparent in the area of upbringing a stepchild, the legal regulations are far from a model solution that is the way in which the position of a biological parent in relation to a child is shaped. In recent years, the regulations in this area based on the provisions of family law have been considerably enriched within the field of opinions and observations concerning legal aspects of the relationships between relatives. What should be emphasised is the fact that a stepchild is recognised as a member of the family within the meaning of Articles 23 and 27 of the Family and Guardianship Code (FGC), and a stepfather/stepmother is perceived as a person obliged to satisfy a stepchild's material needs within the scope of the reconstructed family existing. To tell the truth, the interpretation of the provisions of FGC is not far from creating a norm granting foster parents the upbringing rights and obligations towards a stepchild based on FGC. However, in the doctrine and court judgements, questions are raised about the issue of a foster parent's participation in the stepchild's upbringing process within the scope of mutual assistance and cooperation in order to satisfy the needs of a new family in accordance with Articles 23 and 27 FGC. The forms of the above-mentioned assistance and cooperation may be reflected in various ways: starting with a spouse's moral support in his/her everyday concerns and problems and finishing with claims for a spouse's assistance in satisfying personal maintenance obligations towards the relatives of the spouse obliged.

Speaking about a foster parent's upbringing obligation, it is necessary to determine its content and scope, as well as compare them with a biological parent's upbringing obligation, as well as consider the introduction of new solutions to the Polish family law, which might strengthen the position of an adoptive parent in relation to a stepchild. The present article is devoted to these issues.

STEPPARENT'S UPBRINGING OBLIGATION

In accordance with Articles 23 and 27 FGC,[1] the stepchildren's belonging to a family also determines the participation of a foster parent in the process of upbringing them. A stepfather stepmother), although they are not granted parental authority, is obliged to support his/her spouse in the process of upbringing and maintaining a stepchild. Hampering contacts, inappropriate treatment of a stepchild, and limiting a spouse's possibilities of exercising rights and fulfilling obligations towards a stepchild may even

[1] See Articles 23 and 27 Act of 25 February 1964 Family and Guardianship Code (Journal of Laws of 2020, item 1359), hereinafter referred to as FGC.

lead to a divorce. A court may recognise such activities as a reason for a breakdown of the matrimonial life, and thus, for such conduct, a spouse may be recognised as the only party guilty of a breakdown of the marriage.

In its judgement of 7 March 1953 in the case C 2031/52 (OSN 1953, item 123), the Supreme Court emphasised that:

> (…) a spouse's children born in his/her former marriage become members of the family created by that spouse's new marriage. A person who marries another person who has children under age born in the former marriage, although does not have legal custody of them, should strive for their maintenance and upbringing jointly with his/her spouse. A spouse who by means of his/her conduct creates conditions making it difficult for the other spouse to fulfil the duty of taking care of physical and spiritual development of this spouse's children born in the former marriage, especially when he/she, for no justified reasons, does not agree for the stay of the children in the common house or makes the other spouse leave the children's upbringing to people outside the family, fails to fulfil those obligations. Ill-treatment of a spouse's children may constitute reasons for a breakdown of the matrimonial life because it harms parental feelings of that spouse and may make it difficult for him/her to fulfil the obligation of taking caring of the children's maintenance and upbringing.

In such situations, provided that a foster parent's relation with a stepchild is inappropriate and fails to fulfil his/her obligations towards the family founded by means of a marriage to a biological parent of that child, and as a result becomes the reason or one of the reasons for a breakdown of the matrimonial life of the parties, the reason may be the foster parent's fault, which may lead to a court's judgement ruling a divorce at fault of both parties subject to the fact whether it was an exclusive reason or a co-reason beside the biological parent's one.[2] At the same time, in the judgement of 18 November 1961, CR 325/61,[3] the Supreme Court Civil Chamber indicated that:

> (…) a stepmother may be recognised as "the closest member of the family" of the deceased (stepson) entitled to damages under Article 166 of the Code of Obligations of 27 October 1933 (Journal of Laws No. 82, item 598),[4] provided that she took care of him like of her own son from his earliest age. Regardless of whether the opinion is applicable to a 'family' referred to in Article 14 of the Family Code Act of 27 June 1950 (Journal of Laws No. 34, item 308),[5] it may constitute an interpretational hint for the interpretation of Article 166 of the Liabilities Code of 17 October 1933 (Journal of Laws No. 82, item 598) using a term 'family' in a wider meaning emphasising, from the point of view of moral harm suffered, an actual family relationships and not formal kinship level.

As court judgements indicate, mutual rights and obligations of a stepparent and a stepchild are similar to those of biological parents and their children, which also translates into successive entitlements within the family or damages related benefits resulting from this relationship.

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[2] See the judgement of the Supreme Court Civil Chamber of 7 March 1953, C 2031/52, *Orzecznictwo Sądu Najwyższego Izby Cywilnej i Izby Karnej*, 1953, No. 4, item 123, *Legalis*, No. 179783.

[3] See the judgement of the Supreme Court Civil Chamber of 18 November 1961, 2CR 326/61, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 1963, No. 2, item 32, *LEX*, No. 105715.

[4] See Article 166 Regulation of the President of the Republic of Poland: Code of Obligations of 27 October 1933 (Journal of Laws No. 82, item 598).

[5] See Article 14 of the Family Code Act of 27 June 1950 (Journal of Laws No. 34, item 308).

In addition, mutual assistance and cooperation in the area of satisfying the needs of a family by a stepparent and a stepchild, mentioned above, may take various forms and adopt various methods. It can be a spouse's moral or emotional support, financial assistance in the area of a spouse's maintenance obligations towards his/her relatives. Thus, the list of activities that can be undertaken within this assistance may be quite extensive. That is why it is necessary to organise and highlight the most important ones for family communities.[6] Article 27 FGC seems to be a determinant of those activities because it contains norms that make it possible to specify the general concept of the assistance and cooperation related obligation. Spouses' work in the area of satisfying the needs of their family should constitute such activities. The above- mentioned needs may be financial and non-financial in nature. Thus, satisfying them may take the form of provision of money or benefits in kind, e.g. doing the housework or striving to raise children.[7] Speaking about financial needs we mean, inter alia, a stepparent's maintenance obligation towards a stepchild. Article 144 FGC laying down a maintenance obligation towards relatives determines that it must be in conformity with the principles of social coexistence, which results in the need to apply the rule entirely in case of the maintenance of a stepchild also in accordance with Article 27 FGC.[8]

In literature, a maintenance obligation imposed on (legal) parents of a child is prior, as a rule, to a maintenance obligation of this child's stepparent. The obligation of a relative may occur when a child's parents' gainful employment and financial possibilities are insufficient to satisfy a child's justified, in given circumstances, needs.[9] The obligation stipulated in Article 27 FGC "concerns the entire family in its current shape, including one spouse's children raised in this family".[10]

In literature, it is postulated that the needs of a stepchild treated as a member of a family founded by spouses are satisfied together with the needs of the entire family, thus in general in accordance with Article 27 FGC.[11]

Apart from financial needs, spouses are obliged to satisfy their family needs, also in the form of non-financial benefits; however, the actual kinship is insignificant. Therefore, if there is a stepchild in a family, a stepparent's obligation, in the light of Article 27 FGC, is to assist his/her spouse in the child upbringing. Assistance in

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6 For a similar stance see Szlęzak, A., *Prawnorodzinna sytuacja pasierba*, Poznań, 1985, p. 87.

7 For a similar stance see Strzebińczyk, J., *Udział powinowatych dziecka w jego utrzymaniu i wychowaniu według KRO*, Wrocław, 1985, p. 47; for a different stance see B. Dobrzański, who points out that participation of a stepparent in upbringing a stepchild results from moral norms regulating the functioning of 'healthy' reconstructed families (Dobrzański, B., in: Dobrzański, B., Ignatowicz, J. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 1975, p. 817).

8 Strzebińczyk, J., *Udział powinowatych…*, op. cit., pp. 47–48.

9 Smyczyński, T., in: Smyczyński, T., Gajda, J., Nazar, M. (eds), *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze*, Vol. 11, Warszawa, 2014, p. 229, marginal ref. No. 36; also see Szlęzak, A., *Prawnorodzinna sytuacja…*, op. cit., pp. 69–72.

10 Dolecki, H., in: Dołecki, H., Sokołowski, T., Andrzejewski, M., Haberko, J., Lutkiewicz--Rucińska, A., Olejniczak, A., Sylwestrzak, A., Zielonacki, A. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, Lex/el., 2013, Article 27 FGC.

11 Strzebińczyk, J., *Udział powinowatych…*, op. cit., p. 49; cf. Haak-Trzaskowska, A., in: Haak, H., Haak-Trzaskowska, A. (eds), *Małżeństwo (zawarcie małżeństwa, prawa i obowiązki małżonków)*, Warszawa, 2022, commentary on Article 27, marginal ref. No. 2.

this area consisting in a spouse's personal striving to raise a stepchild constitutes an obligation imposed on a foster parent in the way relevant to the legal situation of the spouses. Thus, a stepparent's upbringing activities are not a reflection of the exercise of parental authority as the psychological and pedagogical point of view might suggest.

As it was mentioned above, the exemption from the obligation to contribute to the satisfaction of the needs of a family may take place when one of the three above-mentioned types of conduct occurs. That is why it can be assumed that upbringing activities or doing the housework will not be a spouse's duty if he/she provides a maintenance benefit accounting for a certain amount of money. Thus, e.g. by personal striving to raise children, he/she may obtain exemption from the obligation to pay money. However, this type of statement seems to be groundless. Having in mind the provisions regulating parental authority (Article 95 FGC), one should point out that a biological parent's obligation to personally strive to raise a child does not have a collateral nature and thus, one cannot get exemption from it by means of payment. The legislator does not impose any obligations on a stepparent in the provisions regulating the exercise of parental authority, but regulates upbringing obligations and relations between parents and their biological children.[12] That is why it should be considered whether it would be right in this case to apply Article 95 § 1 FGC by analogy. It seems that there are stronger arguments for the opposite stance. The legal relation of parental authority results from the ties of kinship, thus any exemptions from the consequences determined for kinship in statute should clearly result from statute and concern regulated relationships of adoption or a foster family. With regard to the obligation of personal effort to raise a child, particularly compared to other types of conduct fulfilling the obligation to contribute to satisfy the needs of a family, it is necessary to refer to the functional rules of interpretation. In the hierarchy of values that the legislator indicates, the good of a child is a superior value, thus a family in which a child is raised has a duty to protect this good. Obviously, the role of parents (spouses) cannot just mean satisfying a child's material needs but it must take into account his/her upbringing and shaping the child's personality.

According to K. Jagielski, as well as T. Sokołowski,[13] the concept of the child's upbringing should be understood as physical upbringing reflected in taking care of the proper development of the child's physical fitness and health, as well as psychological upbringing that should consist in developing the child's moral sense, personal dignity, world views and intellectual abilities by means of appropriate education. According to K. Jagielski, the components of parental authority are: concern for ensuring appropriate living conditions, protection against hazards and proper development.[14]

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[12] Szlęzak, A., *Prawnorodzinna sytuacja pasierba*, op. cit., p. 89.

[13] Jagielski, K., 'Istota i treść władzy rodzicielskiej', *Studia Cywilistyczne*, Kraków, 1963, pp. 124, 126, 128; Sokołowski, T., *Władza rodzicielska nad dorastającym dzieckiem*, Poznań, 1987.

[14] Jagielski, K., 'Istota i treść władzy rodzicielskiej', op. cit., pp. 124, 126, 128.

J. Ignatowicz, within custody of the child, distinguishes his/her upbringing (differentiating physical and spiritual upbringing), a duty to guide the child, concern for ensuring appropriate living conditions and security.[15]

T Sokołowski presents an extended division of the personal components of parental authority. According to this author, the lack of separation of the semantic scopes of individual elements in the above-presented divisions determines the following division of the elements of the custody of the child: (1) upbringing, i.e. individually developing a child's personality, his/her emotional and intellectual aptitudes; (2) directing understood as determining a child's place of residence, supervising his/her lifestyle, deciding and a child's participation in the non-family communities, selection and supervision of information; (3) taking care of the child's material environment; (4) taking care of the child's physical wellbeing; (5) coordinating the child's fitness and mental ability. The author admits hybridising the conceptual scopes of particular elements.[16]

The above-presented conceptions depict the desire to formulate possibly precise network of terms determining the scope of parental authority and its personal element. The advantage of the above-presented analytical views on the personal element of parental authority is the interpretation of the components of the custody of a child that should be treated as the development and specification of expressions included in the statutory provisions discussed, which makes it possible to clarify the meaning and determine the scope of parental authority. Due to the fact that the interpenetration of the selected components is inevitable, such views cannot be treated as classifications in the logical sense. Thus, their usefulness in the practice of family law application is limited.

Another approach to the structure of the personal element of parental authority proposed in literature and taking into account the above-mentioned interpretational difficulties within the custody of a child, according to J. Strzebińczyk, consists in: (1) purely actual actions, required for a child's good, not unambiguously included in the content of other legal-family relations between parents and children; (2) formalised parents' decisions taken mainly in a child's interest and substantially shaping his/her non-financial legal situation.[17] The above-mentioned author differentiated actual parents' actions, the variety of which undermines purposefulness of proposing their division, and actions aimed at shaping a child's legal situation.

It is stated in the doctrine and courts' judgements that the attributes of parental authority should not be limited to activities aimed at a child's good. In accordance with Article 110 FGC, it is necessary to take into account a possible misuse of parental authority, thus exercising it inconsistently with a child's good. In such a situation,

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[15] Ignatowicz, J., in: Ignatowicz, J., Nazar, M., Nowacki, J., Rodak, L., Tkacz, S., Tobor, Z. (eds), *Prawo rodzinne*, Warszawa, 2016, p. 152.

[16] Sokołowski, T., *Władza rodzicielska nad dorastającym dzieckiem*, op. cit., pp. 32–33; idem, in: Dolecki, H., Sokołowski, T., Andrzejewski, M., Haberko, J., Lutkiewicz-Rucińska, A., Olejniczak, A., Sylwestrzak, A., Zielonacki, A. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, op. cit., pp. 650–652 and 656–664.

[17] Strzebińczyk, J., in: Smyczyński, T., Holewińska-Łapińska, E., Stojanowska, W., Strzebińczyk, J. (eds), *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze*, Vol. 12, Warszawa, 2011, Chapter VII "Władza rodzicielska", p. 283.

of course, the guardianship court has grounds to intervene and issue a decision on deprivation of parental authority. As a child's good constitutes the main directive determining the way of exercising parental authority, it is a determinant of its assessment by the guardianship court and is a decisive factor in its potential decision on intervention.[18]

It is pointed out in literature that the custody of a child includes, inter alia, an obligation to provide him/her with maintenance and upbringing.[19] The provision of these measures in accordance with Article 128 FGC is within the scope of the obligation to pay maintenance, which is independent of parental authority, and places a burden on parents who do not exercise parental authority.[20] Thus, parents exercising parental authority have an obligation to take care of the conditions in which a child is raised, they are obliged to take care of food, clothes, medical treatment, and they should e.g. exercise a child's rights in these fields by making relevant claims. The obligation to only provide measures of maintenance and upbringing for a child is assessed through the prism of the obligation to pay maintenance, but the latter does not constitute an element of parental authority.

Thus, the statutory provisions are aimed at improving the fulfilment of basic functions of a family by means of improving and shaping a child's personality and are to serve self-actualisation of the adult family members. Thus, structuring a hierarchy of different forms of adult family members' activities in relation to a child and taking into account his/her good, one should state that financial benefits are always of lower significance than upbringing activities aimed at shaping a child's personality and his/her development. That is why it is hard to agree with the statement that financial benefits referred to in Article 27 FGC may exempt a foster parent from personal efforts to bring up a stepchild. The obligation to bring up a stepchild burdens a stepparent regardless of other obligations stipulated in the above-mentioned provision.

Summing up, one may state that the provisions of Articles 23 and 27 FGC are a source of a stepparent's upbringing obligation, which is just one of the duties that burden a stepparent regardless of other forms of contribution to satisfying the needs of a family stipulated in Article 27 FGC. The duty is contained in the spouses' obligation to assist and cooperate for the good of the family founded by their marriage. A stepparent's upbringing activities and efforts target a stepchild, which causes that he/she makes direct use of a foster parent's activities, however, it is necessary to have in mind that only spouses are in the legal relation within which a stepparent's obligation exists, and a stepchild's favourable situation results from the spouses' rights and obligations established by legal norms. Therefore, this

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[18] See a commentary on Article 96 Act of 25 February 1964: Family and Guardianship Code (Journal of Laws of 2020, item 1359); Osajda, K., in: Osajda, K., Domański, M., Grochowski, M., Matusik, G., Kociuk, L., Mostowiak, P., Pawliczak, J., Prucnal-Wójcik, M., Słyk, J. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, Tom V, Warszawa, 2022.

[19] Trybulska-Skoczelas, E., in: Wierciński, J., Borysiak, W., Manowska, M., Sadomski, J., Skowrońska-Bocian, E., Trębska, B., Trybulska-Skoczelas, E., Zegadło, R. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 2014, p. 699.

[20] See the Supreme Court ruling of 12/12/2000, V CKN 1751/00, *Legalis*, No. 299530.

shapes different positions of a biological parent and a foster one. The obligation of the former results from the legal relation of parental authority and a marriage, and the latter has an upbringing obligation only as a result of the legal relation of a marriage. The upbringing related situation of a foster parent is secondary in comparison to the situation of a biological parent. In other words, a foster parent may act only within the limits of parental authority determined by the scope of a biological parent's parental authority. The provisions under Articles 23 and 27 FGC only stipulate the assistance and cooperation obligations in the field of a child's upbringing and do not assign a foster parent a sphere of activities independent of the scope of a biological parent's rights and obligations.[21]

CONTENT AND SCOPE OF A STEPPARENT'S UPBRINGING OBLIGATION TOWARDS A STEPCHILD

According to Article 27 FGC, spouses have an obligation to contribute to satisfying the needs of the family they founded by their marriage. The obligations include, inter alia, the obligation to make personal efforts to bring up their children. Speaking about a child's upbringing, it is necessary to consider the interpretation and meaning of the concept of 'upbringing' in relation to a foster parent. There is no statutory definition of the term, however, its determination results from the content of Article 96 FGC, which stipulates that parents have an upbringing obligation towards a child by means of taking care of his/her physical and spiritual development and appropriate preparation to work for the benefit of society subject to his/her aptitude. The statutory provisions do not allow for formulating a clear structure pattern of parental authority due to the fact that particular obligations laid down by the legislator interpenetrate. The components of parental authority laid down in Article 96 FGC constitute elements of parents' custody of a child. In the light of that, a question is raised whether this definition is also applicable to the concept of 'upbringing' in relation to a foster parent. It turns out that it is. The obligation under Article 96 FGC determining upbringing objectives does not contain any elements that might indicate its exclusive applicability to parents who have the right to exercise parental authority. Here, it should be pointed out that each upbringing process, regardless of the person or institution involved in it, e.g. a school or kindergarten, is aimed at a child's upbringing and development. That is why a foster parent should also undertake upbringing activities in relation to a stepchild, which should make him/her achieve a given level of physical and psychological development and properly prepare them to work in the interest of society. Thus, Article 96 FGC contains arrangements that indicate the content, scope and objectives of any upbringing process.

The issue and the answer to the question whether the scope of upbringing obligation is the same for a biological parent and a stepparent cover another aspect. First of all, it is necessary to consider specifying a stepparent's upbringing

[21] Szlęzak, A., *Prawnorodzinna sytuacja pasierba*, op. cit., p. 91.

obligation through the prism of the principles applied by statute in relation to parental authority. Another question is raised here how such concepts as 'current custody', 'custody of a person and property' and 'upbringing and directing' should be interpreted.

Authors discussing the issue of parental authority adopt various stances on the matter. According to some of them, a term 'upbringing' should not be used in a different meaning than the term 'directing' because, as J. Marciniak points out, the opinion indicating the separation of upbringing from directing a child and determining different meanings of the two concepts in law is wrong.[22] The above opinion is supported M. Safjan's one according to which an upbringing process is always connected with directing, and it can be assumed that the process of directing concerns taking decisions within the scope of upbringing, e.g. an operation on a child in order to rescue his/her life of health. Thus, it should be recognised that a foster parent's upbringing obligation is connected with the process of directing, however, only in the scope concerning the upbringing sphere.[23]

The upbringing and directing processes may be linked together by custody of a person (the child) and his/her property. Parents' obligation is to bring up and direct a child by means of activities concerning him/her as well as his/her property.

At this point, it might be alleged that the above-indicated interpretation of the provisions concerning parental authority are not based on the statutory provisions, because in accordance with Articles 95 and 96 FGC, four equivalent elements of parental authority are distinguished, i.e. custody of a child and his/her property, upbringing and directing a child, and Article 98 § 1 FGC indicates the fifth element, which is representation. The above-listed elements cannot be, however, distinguished with the use of the same criterion and constitute a separate and complete division of the scope of parental authority by determining a separate scope of each of them. Namely, Article 95 FGC contains subjective elements of parents' influence, i.e. a child and his/her property, and Article 96 FGC concerns the content of parents' activities, i.e. features that allow for determining the content of parents' activities and the scope and content of their conduct within the obligations and rights they have by virtue of parental authority. The detailed content of those activities results from Article 96 second sentence FGC, which stipulates that parents are obliged (entitled) to undertake upbringing and directing activities aimed at achieving by a child an appropriate level of physical and spiritual development and getting prepared to work in the interest of society subject to aptitude.

Indicating Articles 95 and 96 FGC, one should point out that they concern the rights and obligations within the scope of parental authority, on the one hand, highlighting what parents' activities should target, and on the other hand, highlighting what features those activities should have and what their content should be. The fifth element that concerns the rights and obligations related to a child's representation does not concern, however, two of the above-mentioned

[22] Marciniak, J., *Treść i sprawowanie opieki nad małoletnim*, Warszawa, 1975, p. 48.

[23] Safjan, M., *Instytucja rodzin zastępczych. Problemy prawno-organizacyjne*, Warszawa, 1982, pp. 166–167.

typologies. Parents' activities targeting an upbringing process or directing a child are addressed to that child and his/her property, and they can take the form of legal activities as well as others. However, in order to perform those activities, parents must have the relevant competence that is referred to in Article 98 § 1 FGC, i.e. the right to represent a child.

Another aspect concerns determination of the meaning of the term 'current custody of a child'. Some activities targeting a child are conducted in the form of mutual interaction between an educator and a pupil, which presumes their everyday, permanent contact; however, other activities do not require such interaction, e.g. consent for a medical operation. It is reflected in statute where 'current custody' emphasises the significance of direct contacts between parents and children in order to achieve desired results of an upbringing process.

Yet another issue consists in the application of the above-mentioned terms to describe a foster parent's upbringing obligation and compare the above-indicated scope of upbringing obligations of a stepparent and a biological one.

The concept of the scope of obligation is not laid down in statute, but was constructed for the purpose of comparing the situation of a biological parent and a foster one. That is why it is necessary to define and designate them as an indicator of biological and foster parents' conduct ordered, because their aim is to strive to achieve a situation referred to in Article 96 FGC. In this area, their classification must meet definite criteria.

Parents conducting an upbringing process are known for undertaking various activities. The obligations they have make them treat property and a child in a specific way. In practice, the process of upbringing involves various activities. For example, a parent having his/her child's bicycle repaired exercises custody of the child's property and takes care of an element of this property, as well as fulfils the obligation to have custody of the child because he protects the child against a potential accident for technical reasons. However, this type of conduct will not make it possible to determine a difference between the duties analysed above. That is why it is necessary to look at the upbringing obligation of the child's biological parents that consists in undertaking steps that may take the form of legal actions or other activities that are not legal in nature. The former are legal actions performed on behalf of parents themselves, e.g. their consent granted to a child to perform legal action on their own; the latter are actions performed by parents on behalf of the child because the performance of them requires statutory representation. Thus, the above activities may be divided into those that require the existence of a specific competence to be valid and those that can be efficiently performed without it. Therefore, a question arises whether the upbringing competences of an adoptive parent include both types of the above-mentioned activities or only one of them.

If we do not opt for the analogous application of the provisions on parental authority to a foster parents' upbringing obligation, we will draw a conclusion that the scope of a foster parent's obligation is smaller than that of the scope of a biological parent's upbringing duty. The legal institution of statutory representation is always laid down by statute; therefore, it would be unlawful to grant a foster parent the right to act on behalf of a child in the field of legal actions based on analogy. That

is why it should be recognised that a foster parent has not been burdened with the obligation referred to in Article 96 FGC, because he/she would need to have an effective competence with the content corresponding to the structure of statutory representation. It is different in case of a biological parent, because the content of Article 98 § 1 FGC clearly indicates that parents are statutory representatives of a child who is under their parental authority. Therefore, the above-mentioned statutory representation expires in the event of deprivation of parental authority (Article 111 FGC), suspension of parental authority (Article 110 FGC), and as a result of other events resulting in its expiration, in particular in case of legal incapacitation of parents (Article 94 § 1 FGC), and parents' consent to adoption of their child in the future without indication of adoptive parents (Article 119^1 § 1 FGC). The right to represent a child does not depend on whether parents are married, whether they live with a child, whether they really have custody of a child, etc. What may be important, from the point of view of the assessment of the scope or existence of parents' statutory representation, is the modification of their parental authority by means of the court's decision. Two situations may occur here: limitation of parental authority in accordance with Article 58 § 1a FGC (or pursuant to Article 107 FGC or Article 93 § 2 in conjunction with Article 107 FGC), or pursuant to Article 109 FGC. In both cases, the decisions are different and may lay requirements for parents' rights of representation differently.[24]

Apart from cases of judicial interference in parental authority, regulations limiting the scope of its exercise may also affect the scope of statutory representation performed by parents. These include: exclusion of parental management of a child's earnings and objects given to him/her for free use (Article 101 § 2 FGC), and an object given to a chid as a gift or one inherited provided a donor or a testator made an appropriate reservation (Article 102 FGC). Parents cannot represent their child within the above-indicated scope, however, in case of a child's earnings, the guardianship court may determine other management rules (Article 21 Civil Code). As concerns objects given to a child for free use, a child's performance of activities exceeding the scope of ordinary management requires the consent of a statutory representative, who in turn must obtain the consent of the guardianship court.[25]

Parents' statutory representation also exists within the scope of activities exceeding the ordinary management of a child's property. In order to perform such activities and to give consent to a child to perform them, parents must obtain the guardianship court's consent (Article 101 § 3 FGC). In the event a child is over 13 and has not been completely incapacitated, he/she obtains limited legal capacity and may enter into legal transactions with his/her legal representative's consent (Article 17 of the Civil Code). Despite the possibility of performing legal activities

[24] See a commentary on Article 96 FGC. Osajda, K., in: Osajda, K., Domański, M., Grochowski, M., Matusik, G., Kociuk, L., Mostowiak, P., Pawliczak, J., Prucnal-Wójcik, M., Słyk, J. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, op. cit., pp. 1–184 (*Legalis*).

[25] See Article 22 Act of 23 April 1964: Civil Code (Journal of Laws of 2022, item 1360) in conjunction with Article 101 § 3 FGC; thus Strzebińczyk, J., in: Smyczyński, T., Holewińska-Łapińska, E., Stojanowska, W., Strzebińczyk, J. (eds), *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze*, op. cit., Vol. 12, p. 285.

by a child, he/she is still represented by parents.[26] The same happens in case of activities for which a minor obtains full legal capacity, with the exception of those listed herein in relation to which the provisions of Family and Guardianship Code exclude management by parents.[27] It is indicated in literature that the above principles should be adopted due to the interest of a child, who should be also represented when he/she does not show initiative in respect of this.[28]

In those circumstances, a foster parent is not competent to perform legal actions within the scope indicated and, therefore, will not be able to e.g. manage a child's property apart from performing actions that do not constitute legal transactions; like in case of custody of a child, a foster parent will not be e.g. obliged or entitled to take a stance concerning the issue of recognising this child as his/her stepchild. Despite the limited scope of duties in comparison to the scope of obligations imposed on biological parents, the duties of the most significant and greatest importance in the field of psychological and pedagogical process of a child upbringing burden a foster parent to the same extent as a biological one. As it was mentioned above, a stepfather's (or stepmother's) actions will concern custody of both a stepchild and his/her property. As far as the custody of a child's property is concerned, it will not be of much importance because a foster parent is not competent to act on behalf of a foster child because he/she is not his/her statutory representative. Therefore, this custody will be limited to the physical protection of a child's property. Of course, this type of custody is also of great importance in a stepchild upbringing process as long as a stepparent's actions that express taking care of a stepchild's property are actions of upbringing value. On the other hand, custody of a child as a person is a duty of a stepfather (stepmother) resulting from their mutual cooperation (current care). A stepparent's participation in the process of a stepchild upbringing should consist in their daily contact with one another. Custody of a child that goes beyond the scope of current care, in order to be effective, requires powers and competences resulting from parental authority, which is not vested in a stepparent. Therefore, a stepparent should act within the limits of current care of a stepchild under his/her educational influence. It is similarly indicated in Article 112^1 FGC, where current duties of a foster family concerning custody of a child are laid down. At this point, one can see a significant similarity between foster parents and adoptive parents with regard to the functions that they have to perform in the field of a child upbringing. In none of those cases is there a first-degree kinship in a direct line to a child because both foster and adoptive parents perform their basic tasks in the process of current interaction with a child, and a legal regulation only reflects the actual system of social relationships existing in families in which they live.

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[26] Grzybowski, S., in: Grzybowski, S., Czachórski, W. (eds), *System Prawa Cywilnego*, Vol. I, Wrocław–Warszawa, 1985, p. 349.

[27] See Article 20 Act of 23 April 1964: Civil Code (Journal of Laws of 2022, item 1360), cf. Pazdan, M., 'Glosa do postanowienia Sądu Najwyższego z 15.12.1999 r., I CKN 299/98', *Orzecznictwo Sądów Polskich*, 2000, No. 12, item 186; however, cf. the opposite stance: Strzebińczyka, J., in: Smyczyński, T., Holewińska-Łapińska, E., Stojanowska, W., Strzebińczyk, J. (eds), *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze*, op. cit., Vol. 12, Chapter VII "Władza rodzicielska", p. 288.

[28] Ignatowicz, J., in: Ignatowicz, J., Nazar, M. (eds), *Prawo rodzinne*, Warszawa, 2016, p. 836.

Summing up, it is eventually possible to clearly determine the scope of a foster parent's upbringing obligation in comparison to the scope of a biological parent's obligations.

First of all, it is necessary to indicate that, in terms of custody of both a child as a person and his/her property, a foster parent who has no competences resulting from statutory representation is not burdened with obligations the effectiveness of which requires such competences.

Secondly, when speaking about custody of a stepchild as a person, a stepparent should fulfil duties that exhaust the concept of current care.

Thirdly, when it comes to a stepparent's duties within the scope of custody of a child's property, they are of secondary significance and concern only such activities that are also of educational importance.

Fourthly and finally, an adoptive parent's activities should consist in a stepchild upbringing within the scope of the implementation of the obligation to assist and cooperate for the good of the family by means of contribution to meeting its needs. Thus, the obligation to manage a child will burden a stepparent to the extent that constitutes an element of the educational process.

A STEPPARENT'S UPBRINGING OBLIGATION VERSUS A SPOUSE'S PARENTAL AUTHORITY

In the earlier deliberations, only the category of obligation was analysed. In the provisions on parental authority, there is also a legal category that combined with an obligation creates a statutory representation of parental authority.

As T. Sokołowski indicates in his book *Charakter prawny władzy rodzicielskiej*, one can notice two norms of conduct in the wording of Article 95 FGC: one concerns the duties of a parent and the other concerns the duties of all other persons except a parent. Thus, the second norm concerns the rights that are subjective in nature, which parents have only in connection with the exercise of their parental authority, and the infringement of them by persons who are not competent results in the interference of the guardianship court, which is stipulated in Article 100 FGC. The situation is different in the event of a breach of the obligation by parents, because the obligation to perform and exercise parental authority constitutes their obligation towards the state, and then a guardianship court regulates only the issues arising from the administrative-legal relationship between the state and parents when it is in connection with the exercise of parental authority by parents. Thus, it should be pointed out that the subjective right is granted to parents so that they can fulfil their obligation towards the state.

However, the upbringing obligation does not rest solely with a child's biological parents. As can be seen based on the former analysis, including the content of Articles 23 and 27 FGC, it also rests with adoptive parents living with a stepchild in the same family within the meaning of the above-mentioned provisions. However, the provisions do not lay down a subjective right granted to a stepfather (stepmother) pursuant to Article 95 FGC, effective towards everyone, granted to him/her

in order to properly fulfil the obligation. Thus, it should be recognised that this right is not vested in a stepparent. This does not mean, however, that a situation in some sense favourable for a stepparent who fulfils the upbringing obligation will not occur. It functions in the sphere protected by the subjective right of a biological parent against the interference of third parties; however, the conduct of a foster parent cannot be treated as a third party's forbidden interference in the exercise of that right, because otherwise it would mean that one norm bans what another norm stipulates an obligation. In other words, the activities of a foster parent would be prohibited if their fulfilment consisted in a stepparent's personal efforts in upbringing children who are members of such a family, because pursuant to Articles 23 and 27 FGC, they constitute an obligation to assist and cooperate for the good of a family. The sphere of a stepparent's activities is inaccessible for other persons as a result of the protection arising from the content of the subjective right of a biological parent having parental authority, however, not resulting from the subjective right of a foster parent who, as we know, is not entitled to demand that other persons should refrain from interference.

It is necessary to return to the statement that the situation of a foster parent is a derivative of the legal situation of a biological parent, which results from the fact that the former can act effectively, i.e. fulfil his/her obligation only in the field defined by the scope of parental authority vested in his/her spouse. This is a result of the way in which legal responsibility for upbringing activities is developed. Only a biological parent is subject to the state's interference in case the interest of a child is endangered in the course of an upbringing process. As far as the source of this threat is concerned, it may also be the circumstance of inappropriate fulfilment of upbringing obligations by persons other than a child's parents. A foster parent's obligation is not subject to the state's sanctions because it is an obligation burdening a stepparent only in relation to his/her spouse and consists in the duty to assist and cooperate in upbringing a child. In addition, a foster parent is not entitled to any independent rights that a biological parent has in connection with the subjective rights granted to them. The only protection that a foster parent is entitled to results from his/her spouse's subjective right that prohibits interference of third parties in the sphere of a biological parent's exclusive activities.

Therefore, it can be pointed out that the legal situation of a biological parent determines the legal situation of a foster parent. That is why changes taking place in a biological parent's parental authority will affect the situation of a foster parent.

According to A. Szlęzak, who presents his stance in his book *Prawnorodzinna sytuacja pasierba,* in a situation when a biological parent has parental authority, a stepparent fulfilling his/her obligation even to a limited extent acts independently within the scope of certain rights and upbringing tasks. It is not laid down by statute what measures and methods should be used to achieve a planned upbringing objective by persons fulfilling their educational duties. The obligation to assist and cooperate alone is not limited to implementing a biological parent's instructions, but should be aimed at achieving a particular level of physical and mental development by a child, as well as preparing him/her properly for life in society. That is why a foster parent fulfilling an obligation to assist and cooperate

for the good of a family gets independence within the scope of upbringing activities and methods of conducting them. This independence has its significance and role as long as a biological parent does not exercise his/her rights granted by virtue of parental authority. A foster parent cannot oppose any of those rights and cannot definitely influence a child's situation. Therefore, in a situation when a biological parent undertakes steps aimed at changing the actual state of affairs within the scope determined by a stepparent's conduct, the only form of interference in his/her behaviour is the one by the guardianship court, which in the event of a threat to the wellbeing of a child has the right to change a legal situation of a biological parent using the measures laid down in Articles 109, 110 or 111 FGC.[29]

It is important that the law in force will be excluded as to the possibility of using the measures laid down in Articles 24 and 97 § 2 FGC in the event of disagreement between spouses over the method of carrying out the upbringing process. With regard to the measure stipulated in Article 97 § 2 FGC, it concerns persons who have even limited parental authority. A foster parent has no parental authority so the norm laid down in Article 97 § 2 FGC is not applicable to him/her. The same concerns a regulation stipulated in Article 24 FGC. However, in case of a biological parent, the legislator used the same construction in Article 97 § 2 FGC as in Article 24 FGC concerning the settlement of important family matters. In both cases, the principle of joint biological parents' resolution and a possibility of requesting the court to resolve a dispute are indicated. Thus, the directives of the two norms are the same but their hypotheses were defined differently. Significant family affairs constitute a broader catalogue, but a child's significant matters are distinguished in special provisions, i.e. Article 97 § 2 FGC.[30] A child's biological parents' application to the guardianship court, e.g. in relation to the choice of a child's further education or job should be based on Article 97 § 2 FGC and not Article 24 FGC.[31] As in case of Article 24 FGC, it is necessary to assess the consequences of the infringement of the principle laid down in Article 97 § 2 FGC. The lack of parents' co-decisions about a child's significant matters does not affect the effectiveness of legal actions taken within the performance of their parental authority towards third parties.[32]

The lack of possibility of applying the norms laid down in Article 97 § 2 FGC to a foster parent stems from the fact that Family and Guardianship Code does not grant a foster parent the rights in the sphere of upbringing, which he/she might oppose the sphere of the rights of a child's biological parent. That is why a foster parent's position in the sphere of upbringing cannot be equal. Such a situation would make it possible to apply the measure laid down in Article 24 FGC to a foster

[29] Szlęzak, A., *Prawnorodzinna sytuacja pasierba*, op. cit.

[30] Sychowicz, M., in: Piasecki, K., Ciepła, H., Czech, B., Domińczyk, T., Kalus, S., Sychowicz, M. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 2006, pp. 112–113.

[31] Gajda, J., Pietrzykowski, K., in: Pietrzykowski, K., Gajda, J. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 2021, Article 24, marginal ref. No. 5–6.

[32] Ignatowicz, J., Pietrzykowski, K., in: Winiarz, J., Gajda, J., Ignatowicz, J., Pietrzykowski, J., Pietrzykowski, K. (eds), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa, 2003, p. 816; characterising the scope of the regulation in question, the author uses the word "outside"; Strzebińczyk, J., in: Smyczyński, T., Holewińska-Łapińska, E., Stojanowska, W., Strzebińczyk, J. (eds), *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze*, op. cit., Vol. 12, p. 299.

parent. On the other hand, in a situation when a foster parent is granted the rights, the measure under Article 24 FGC will be applicable to matters concerning the methods of upbringing a stepchild between spouses in the reconstructed family.

Finally, let me add a few words about determining the moment a stepparent's upbringing obligation starts and expires. Pointing out these obligations pursuant to Articles 23 and 27 FGC, the moment a child's biological parent and a foster parent get married is the moment they start. They continue to exist in case of spouses' actual separation, although its shape and scope change, especially if a stepfather lives outside the family in which a stepchild lives. Their creation is a consequence of the marriage and the requirement of an upbringing process in the functioning family is the basic justification of their existence. Thus, their specification must be formulated in a certain way that will allow for obtaining clarity and certainty of a stepchild's legal situation. In addition, it is necessary to emphasise the fact that a foster parent's duties in the area of upbringing expire the moment the marriage between a biological parent and a foster one ends or is annulled, or the moment a stepchild turns into an adult, becomes independent, the parental authority expires and responsible and fully-fledged participation in legal transactions and social life starts.

A STEPPARENT'S UPBRINGING OBLIGATION TOWARDS A STEPCHILD VERSUS THE PARENTAL AUTHORITY OF A BIOLOGICAL PARENT LIVING OUTSIDE THE RECONSTRUCTED FAMILY

Speaking about the rights and obligations of a child's biological parent living outside his/her family, it is necessary to draw attention to the fact that having and exercising parental authority by this parent may have a significant impact on the exercise of a stepparent's rights.

With regard to this issue, a question arises whether the inclusion of the second biological parent's set of rights and obligations in the research sphere is going to modify a foster parent's legal situation.

Firstly, it needs to be pointed out, which was mentioned earlier, that a stepchild upbringing obligation burden a foster parent only when he/she is a member of a family set up by means of a marriage between a biological parent with a stepparent, and it is important that a stepchild lives in the community created by the members of a reconstructed family. Thus, speaking about a stepchild's belonging to a family pursuant to Articles 23 and 27 FGC, there must be a real situation in which a stepchild lives with such a family, the existence of which is at the same time a reflection of the legal regulation of the issue of taking current care of a child born in the previous marriage. Apart from that, the duties of a foster parent are also included in current care and in this area he/she has independence, which was mentioned above. As far as the second biological parent is concerned, even if he/she has full parental authority, he/she actually has no big influence on taking current care of a child by a biological parent and a foster one, he/she has no possibility of taking current care on his/her own, either, because of staying outside the family community in which a child lives. That is why there is hardly any fear

that there will be a collision between the activities performed by a foster parent and the other biological parent. Their activities take place in different areas, namely the second biological parent having full parental authority does not take current care of a child, which belongs to a stepparent. The same applies to a situation in which the second biological parent's parental authority is limited but does not concern current care of a child. However, in a situation when the second parent's limited parental authority does not concern current care, then he/she has the right and obligation to take current care of a child, and this can cause a conflict between a biological parent and a foster one. It should then be recognised that the activities of the second biological parent are binding for a stepparent. If necessary, a foster parent can only request the guardianship court to interfere in the exercise of parental authority (Articles 106, 107, 109, 110 and 111 FGC), or persuade his/her spouse to take steps aimed at correcting the other biological parent's activities. A foster parent alone has no rights that could be effectively exercised against the rights arising from the subjective right of the second biological parent.

The situation will be different in case the second biological parent has no rights to take current care of a child, thus his/her parental authority is suspended, is limited or does not concern current care. Then, the activities of the second biological parent constitute interference in the sphere of the subjective right of a foster parent's spouse and although a stepparent has no right to demand that infringement should be stopped, the activities of the second biological parent are not binding on him/her, either. It lets a foster parent to exercise a kind of autonomy that can only be limited by actions taken by his/her spouse.

In practice, taking day-to-day care of a child by the second parent staying outside a child's family community is limited due to the actual situation, i.e. the existence of another family in which a child lives and is raised. The mere fact that parents live separately as a result of formal separation, divorce or for other reasons weakens the bond with a child, precludes both parents from taking current care of a child, which affects the quality of the upbringing process. The research conducted into the relationship between parents and children in broken homes shows that the contacts of the second biological parent with a child weakens over time, which directly affects the reduction of the second parent's participation in a child upbringing process. Thus, it means that what constitutes the most important factors in the formation of relationships between people are the quality and frequency of contacts that take place in a family functioning effectively in a friendly atmosphere and not the existence of their biological bonds.

In the literature on the subject, it is noticed that quite often there is a visible tendency to grant both parents full parental authority after their divorce. This practice creates a fiction, because the scope of parents' rights and obligations is not the same before and after a divorce; their situation in the sphere of upbringing is not the same, either. Moreover, the conditions for such regulations of parental authority are seldom appropriate. Such a shape of the legal situation of both biological parents may constitute an effective obstacle for a foster parent to take over the parental role in a reconstructed family.

Summing up, if both parents are entitled to parental authority and only one of them stays in a family community with a child, it is obvious that the full parental authority of the second parent cannot be exercised in the area of current care of a child for factual reasons.

The situation may be different in case of alternating custody of a child. The amendment of FGC of 25 June 2015 introduced a new wording of Article 58 § 1a FGC.[33] The main aim of the authors of the bill was to emphasise the right of a child to be brought up by both parents. The current regulations do not stipulate obligatory limitation of parental authority of one parent in case they cannot reach agreement within the meaning of Article 58 § 1 FGC.[34] As a rule, both parents should maintain their full parental authority; when it is in conflict with the best interest of a child, the court may limit the authority of one of the parents to some specified rights and obligations.[35] The Supreme Court in its resolution of 18 March 1968 adopted a stance that "(…) in each case in which the exercise of parental authority is entrusted to one of the parents, the judgement adjudicating a divorce should definitely determine which types of obligations and rights towards a child within the second parent's parental authority are limited".[36]

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[33] Act of 25 June 2015 amending Family and Guardianship Code Act and Civil Procedure Code Act (Journal of Laws of 2015, item 1062). The former provision under Article 58 § 1a FGC had the following wording: "§ 1a. In the event of the lack of agreement referred to in § 1, the court, taking into account the child's right to be brought up by both parents, rules the joint exercise of parental authority and the maintenance of contact with the child after a divorce. The court may entrust the exercise of parental authority to one parent and limit parental authority of the other parent to specified obligations and rights towards the child if the wellbeing of the child requires that". After the amendment, after § 1a, § 1b was added, which stipulates: "On the agreed application of both parties, the court shall not adjudicate on the maintenance of contacts with the child".

[34] See, pursuant to Article 58 § 1 FGC: "In the judgement adjudicating on a divorce, the court shall decide about parental authority over the child of the two parents and their contacts with the child, and rule how much each of the parents should provide for the child maintenance and education. The court shall take into account a written agreement of the spouses concerning the method of exercising their parental authority and maintaining contacts with the child after a divorce, provided it is not in conflict with the child's wellbeing. Siblings should be brought up together unless the wellbeing of the child requires otherwise".

[35] See, in particular, from the perspective of the interpretation of Article 107 FGC §§ 1 and 2, stipulating that: "In the event both parents living in separation are entitles to have parental authority, the guardianship court may, due to the wellbeing of the child, determine the way of exercising it and maintaining contacts with the child. The court shall leave parental authority to both parents if they provide a written agreement on the exercise of parental authority and maintenance of contacts with the child, which is harmonised with the wellbeing of the child. Siblings should be brought up together unless the child's wellbeing requires otherwise; § 2. In the event of the lack of agreement, the court, taking into account the child's right to be brought up by both parents, shall decide on the method of joint exercise of parental authority and maintaining contacts with the child. The court may entrust the exercise of parental authority to one of the parents and limit parental authority of the other parent to specified obligations and rights towards the child provided that the wellbeing of the child requires that". Jędrejek, G., 'Uwagi do art. 58 krio', in: Jędrejek, G. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz aktualizowany*, Lex/el., 2019.

[36] The Supreme Court resolution of 18 March 1968, III CZP 70/66, *Orzecznictwo Sądu Najwyższego Izby Cywilnej, Pracy i Ubezpieczeń Społecznych*, 1968, No. 5, item 77, *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych*, 1968, No. 7, item 151, *Legalis*, No. 13450.

However, the amendment of 2015 allows for the use of a different solution, i.e. alternating custody. This solution consists in an assumption that a common child is "part of the two parents' families".[37]

Alternating custody may be ruled directly by the court or based on an upbringing plan submitted by a child's parents and approved by the court in addition to a decision on parental authority and the child maintenance costs. Of course, adjudicating on the way of exercising parental authority over a minor, the court should take into account many important aspects, in particular: the necessity of considering the interest of a child, which takes priority over the interest of parents, and the need to take into consideration personal features of the parents from the point of view of the wellbeing of a child.[38] What is also important is a child's age, parents' qualifications, their emotional bonds with a child, and a child's possible mental disorders in the event of a change of upbringing conditions.[39] However, a child's wellbeing and interest are the basic prerequisites for the application of alternating custody. The advantages of alternating custody are, inter alia: (1) the possibility of maintaining contact between a child and both parents, which has a positive impact on children's social adaptation; (2) the protection of a long-term relationship between parents and a child, which is also important for the needs of parents; (3) the reduction of the risk of a conflict between parents and the occurrence of domestic violence; (4) the fulfilment of the principle of social justice in relation to the protection of the rights of a child.[40] It should be pointed out that the application of alternating custody, firstly, creates conditions for a child's participation in everyday activeness of each parent and observing them in different situations and life roles, makes it possible to provide and adopt particular norms of conduct, values and behaviour patterns. Secondly, each parent hosting a child over a certain period may actively participate in a child's extracurricular activities without any time restrictions.[41] Alternating custody is also an adequate solution in case of proper relations between parents. Reaching agreement by parents on the issue of custody of a child also leads

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[37] By the way, it is necessary to draw attention to the fact that the Supreme Administrative Court used an unfortunate description of the position of a child in a family. The ruling of the Supreme Administrative Court of 8 November 2021, case No. I OPS 1/21, ONSA and WSA, 2022, No. 1, item 3, p. 56, *Legalis*, No. 2632176.

[38] See the judgement of the Supreme Court of 7 June 1950, case No. Ł.C. 522/50, *Państwo i Prawo*, 1950, No. 11, p. 158. The judgement of the Supreme Court of 30 August 1949, case No. Wa. C. 76/49. Published: DPP 1950/1/60.

[39] See the Supreme Court judgement of 21 November 1952, case No. C 1814/ 52, *Orzecznictwo Sądu Najwyższego Izby Cywilnej i Izby Karnej*, 1953, No. 3, item 92, *Legalis*, No. 683972; the Supremme Court judgement of 8 December 1997, case No. I CKN 319/97, *LexPolonica*, No. 346220 and the Supreme Court judgement of 16 June 1958, case No. 4 CR 383/57, *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1959, No. 3, p. 344; *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1959, No. 4, p. 266. For more see: https://e-prawnik.pl/temat/naprzemienna-opieka-nad-dziecmi-opinia-prawna.html.

[40] Kruk, E., 'Arguments for an Equal Parental Responsibility Presumption in Contested Child Custody', *American Journal of Family Therapy*, 2012, Vol. 40, No. 1, pp. 33–55.

[41] Milewska, E., *Ocena wpływu opieki naprzemiennej na małoletnie dzieci i ich relacje z rodzicami*, Warszawa, 2017.

to considerable acceleration of the proceeding concerning the dissolution of their marital relationship.[42]

Alternating custody also carries a lot of risks to the interest of a child. The basic principle of alternating custody is that there must be certain rules, bonds and mutual trust between parents in order to lead to maintaining proper contact with a minor. It is often difficult, because, after a process filled with negative emotions and stress, the people who have separated are often unable to reach agreement putting their interest above the wellbeing of a child.[43] Therefore, parents' attitude is an important condition for ensuring a child's interest properly in case of alternating custody. However, often, this condition is not satisfied. It is common practice to prevent or hinder a child's contacts with a parent, and courts do not have effective coercive means of enforcing their decisions concerning those contacts.[44] Pursuant to Code of Civil Procedure (hereinafter: CCP), a person who hinders contact with the child may be ordered to pay a specified sum of money to the person entitled to maintain contact with the child for each violation of the obligation (Article 598[15] CCP).[45] However, the sanctions are not effective. On the one hand, they are not costly; on the other hand, raising them might burden a parent's budget to the level that would be bad for a minor. The representatives of the doctrine call for

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[42] See the judgement of the District Court in Warsaw of 27 November 2017, case No. IV C 1212/17, PoSP. In the case, the court stated that as a result of a divorce, the wellbeing of the child was going to suffer, which would constitute an obstacle to adjudicating on a divorce pursuant to Article 56 § 2 FGC. On the contrary, the state of tension between the parties revealed in pleadings and oral declarations justifies the conviction that refusal to dissolve a marriage and insisting that the obligation to maintain a fiction of a relationship might endanger the appropriate development of the child. The court believed the parties' assurance that the joint exercise of parental authority based on an alternating system of care, including weekly periods of the child's stay with each parent, as well as similar holiday and festive periods would be a better solution for the child than the adjudication on the child's living only with one parent. In the court's opinion, alternating custody of the child ensures better contacts of the child with the parents and provides an opportunity for equal participation of each parent in the upbringing process, and it also ensures just division of obligations, including the costs of the child maintenance and upbringing when each of the parents covers these costs in person, especially when the child lives with them in regularly repeated periods; the statement that parents cover relevant costs in the equal proportion would be a more appropriate phrase and a resolution pursuant to the statute. In such a case, parents are obliged to cover all expenditures that exceed standard and day-to-day costs of the child maintenance in equal parts. In particular, it concerns covering the costs resulting from the decisions made jointly, e.g. to enrol the child at an educational institution or for extracurricular activities, to give the child expensive medical treatment etc.

[43] See the judgement of the District Court in Sieradz of 9 October 2013, case No. I Ca 352/13, PoSP.

[44] See, inter alia, the judgement of the Regional Court in Olkusz of 16 June 2015, case No. III RC 95/15, PoSP. The judgement of the Regional Court in Warsaw of 24 June 2018, case No. VI Nsm 2419/17, PoSP.

[45] Act of 17 November 1964: Code of Civil Procedure (Journal of Laws of 2018, item 1360). In accordance with Article 598[15] CCP § 1: "In the event a person who has custody of the child does not fulfil or inappropriately fulfils obligations resulting from the judgement of an agreement concluded before the court or a mediator concerning contacts with the child, the guardianship court, taking into account the financial situation of the person, may order the person to pay the person entitled to maintain contact with the child a certain sum of money for each infringement of the obligation".

the application of mediation; however, adapting to its provisions seems unrealistic. That is why it is necessary to amend the provisions of family law and probably even also penalise the obstruction of contact by one of the parents in order to counteract parents' pathological practices of hindering contacts with a child.

POSSIBLE MODELS OF VIABLE MECHANISMS FOR EQUAL EXERCISE OF CUSTODY OF A CHILD BY BIOLOGICAL PARENTS AND STEPPARENTS

Bearing the above in mind, one can state that there are no viable legal mechanisms in the Polish legal system that allow for equal exercise of custody of a child by biological parents who have full parental authority and by stepparents.

Hence a question arises what solutions should or could be introduced into the Polish legislation to strengthen the position of a foster parent at the expense of the second biological parent who remains outside a family community of which a child is a member and in case of alternating custody.

In the Polish legal system, parental authority is a typical basic relation resulting from consanguinity or adoption, therefore a stepparent does not actually exercise parental authority over a stepchild unless one of the spouses adopts the other spouse's child.

The situation is different under foreign legal regulations where parental authority is separated from basic family bonds and this relation is developed as an independent one based on a parental responsibility agreement. This type of agreement is characteristic of the legal system that is in force in contemporary England and Wales. In the system, parents' responsibility results from the legal relation of kinship; however, a parental responsibility agreement is an example of an exception to the rule presented above.[46]

In the English system, there is the so-called parental responsibility consisting in the exercise of custody of a stepchild by a stepparent based on a civil law agreement on parental responsibility. It takes place between persons who are not in a legal relationship of consanguinity.[47]

In the English law, like in the Polish legislation, a foster parent is a spouse of a biological parent who got married again after a divorce or the death of the other biological parent of a child. The circumstance of co-habitation with a child's biological parent and a child does not result in the acquisition of the status of a stepparent. It is important and necessary that those partners get married and a foster parent adopts a child, although in the English law it is admissible to obtain parental responsibility

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[46] Shapiro, J., 'Changing Ways, New Technologies and the Devaluation of the Genetic Connection to Children', in: MacLean, M. (ed.), *Family Law and Family Values*, Oxford, 2005, p. 93.

[47] In such a case, although an agreement is a source of parental authority, nevertheless the family status of persons competent to conclude such an agreement is not irrelevant from the point of view of the English law; Kosior, W., Łukasiewicz, J., 'Umowa jako źródło władzy rodzicielskiej nad pasierbem – ujęcie modelowe na podstawie angielskiego ustawodawstwa', *Przegląd Prawniczy Uniwersytetu Warszawskiego*, 2017, R. XVI, No. 2.

without adoption based on other legal instruments. They include: (1) obtaining a *child arrangement order* confirming that a child lives with a foster parent who provides for him/her; thus, a parent is entitled to parental rights; (2) obtaining a *parental responsibility order* at the request of a foster parent[48]; (3) concluding a constitutive responsibility agreement on parental responsibility, i.e. a *parental responsibility agreement*.

Such an opportunity is laid down by means of the 2005 amendment to the Adoption and Children Act 2002, by virtue of which Section 4a(1) was introduced to the Children Act 1989, which stipulates:

> Where a child's parent ("parent A") who has parental responsibility for the child is married to (or a civil partner of,) a person who is not the child's parent ("the step-parent") – (a) parent A or, if the other parent of the child also has parental responsibility for the child, both parents may by agreement with the step-parent provide for the step-parent to have parental responsibility for the child; or (b) the court may, on the application of the step-parent, order that the step-parent shall have parental responsibility for the child.[49]

The agreement is therefore concluded between the child's biological parent or parents having parental responsibility and the child's adoptive parent. Before such an agreement is concluded, it is necessary that the adoptive parent is married to (or in a civil partnership with) the child's biological parent having parental responsibility for the child and that this foster parent obtains the consent of all persons having parental responsibility for the child and his/her property, i.e. he/she must obtain the consent from both biological parents of the child. Therefore, both biological parents must give their consent to grant a foster parent parental responsibility, which emphasises the special nature of this agreement.[50]

As a result, the English law provides an opportunity for more than two parents to have parental responsibility for the child. Moreover, in the event of the lack of agreement between the child's biological parents, the court can grant parental responsibility for the child on the application of an adoptive parent pursuant to Section 4a(1) Children Act. By concluding parental responsibility agreement, an adoptive parent has the same rights and obligations as biological parents have towards the child. The agreement does not affect the current scope of biological parents' parental responsibility for the child, but only equalises the legal status of the adoptive parent. In addition, based on the agreement on parental responsibility, a stepparent does not become liable for child maintenance, because there is no legal relationship of consanguinity between a stepparent and a stepchild.[51]

There is a uniform template for the agreement on parental responsibility, which is laid down in the Statutory Instrument 2009 No. 2006, Children and Young

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[48] Mitchels, B., Bond, T., *Legal Issues Across Counselling & Psychotherapy Settings: A Guide for Practice*, London, 2011, p. 128.

[49] See Section 4a(1) Children Act.

[50] Black, J. et al., *A Practical Approach to Family Law*, Oxford, 2012, pp. 12–15.

[51] It is worth pointing out that an agreement on parental responsibility shall not be subject to cancellation; the only way to terminate the contractual relationship of parental authority is via the interference of the court on the application filed by each person who has parental authority or on the child's request.

Persons, England and Wales: The Parental Responsibility Agreement (Amendment) Regulations 2009.[52] The agreement should be developed in writing and contain the biological parents' declarations of giving their consent to grant a foster parent parental responsibility for the child. The persons concerned, including an adoptive parent, should sign the agreement in the court in the presence of a justice of the peace, a justice's clerk, an assistant to a justice of the peace, or a court official who is authorised by the judge to administer oaths, who will witness their signatures and sign the certificates of the witness.[53] It is also necessary to submit documents confirming that biological parents have parental responsibility for the child, i.e. a copy of the child's birth certificate and a marriage certificate with information about the biological parents' divorce in order to prove that the parents were married at the time of the child's birth. It is also possible to submit a document confirming that a biological father has parental responsibility for the child. An adoptive parent should submit a document confirming marriage to the child's biological parent. The agreement signed in the way specified above should be developed in three copies (one for each person concerned), i.e. the entitled biological parents and a foster parent and sent to the Principal Registry of the Family Division in London. After its receipt and approval, each parent is given one copy stamped with the seal of the court, supplemented with a relevant court note. The agreement takes effect the moment it is registered. In the event of granting parental responsibility for more than one child, a separate parental responsibility agreement should be developed.[54]

DE LEGE FERENDA CONCLUSIONS

In accordance with the legal norms in force, an adoptive parent's obligation is to raise a stepchild as part of the assistance and cooperation for the good of the family established by an adoptive parent and a biological one. The obligation should be fulfilled in the form of activities aimed at taking current care of the child and, to a certain limited extent, should constitute activities related to custody of the child's property. However, the regulations in force do not give the adoptive parent the rights in the upbringing sphere, which weakens his/her position in comparison to the other biological parent, as well as third parties. The statutory provisions do not stipulate the protection of a stepparent's rights directly, e.g. by means of granting him/her competences to demand that the third party stop interfering in the sphere in which he/she performs their duties, but indirectly, i.e. by means of their spouse's subjective right. Thus, it can be pointed out that the statute does not stipulate any specific protection for the fulfilment of the obligation imposed on an adoptive

[52] Department for Education, *The Children Act: Guidance and Regulations. Family Support, Day Care and Educational Provision For Young Children*, Vol. 2, London, 1991, pp. 5–6; Lowe, N., Douglas, G., *Bromley's Family Law*, Oxford, 2015, p. 372; Powell, R., *Child Law: A Guide for Courts and Practitioners*, Winchester, 2001, p. 34.

[53] A solicitor cannot witness the signatures.

[54] Kosior, W., Łukasiewicz, J., *Umowa jako źródło władzy rodzicielskiej nad pasierbem…*, op. cit., p. 318.

parent. Therefore, it seems purposeful and appropriate to make a stepparent's upbringing obligation related situation independent of the situation of a biological parent resulting from his/her parental authority. Such a solution would allow for making this obligation independent, and its fulfilment by an adoptive parent would be completely independent and protected against third parties' interference. At the same time, the right would be connected with a demand that certain authorities apply coercive measures in the event unauthorised persons infringed this area of a stepparent's rights. However, the rights and obligations of a stepparent should be limited to taking current care of the child and his/her property. Apart from that, even having such duties, a stepparent would not be entitled to statutory representation of the child. Determining a broader scope of a stepparent's rights and obligations does not seem to be necessary and required.

Thus, the proposed way of shaping an adoptive parent's rights and obligations in the field of the upbringing duties would be typical because of the characteristic features of the measure that can be called the adoptive parent's custody. It would include some rights and obligations typical of the parental authority relation and would be independent of a spouse's parental authority. In the face of an adoptive parent's situation independent of the biological parent's situation, the system based on the assumption that an adoptive parent's activities are subject to consent given by means of the court interference in the scope of his/her spouse's parental authority would stop functioning. With regard to this, there is a need to develop a different mechanism, inter alia, to provide the guardianship court with the right to define a stepparent's rights and duties in more detail, and ultimately, to deprive him/her of custody.

In this way, apart from parental authority and a foster family's care or custody, a new legal institution would come into being. Its emergence might affect the scope of application of the existing ones. Therefore, it should be considered whether the introduction of an adoptive parent's custody to Family and Guardianship Code would cause changes in the scope of a biological parent's parental authority, in particular the authority of the biological parent who lives outside the stepchild's family community.

In this situation, two solutions may be put forward. The first of them indicates the existence of an adoptive parent's custody in addition to the set of both parents' rights and obligations, with no influence on their scope. This type of situation might result in the emergence of a new entity in the sphere of family law relations, equipped with competences to act independently in the upbringing process, however, its appearance would not affect changes in the rights and obligations of biological parents. Such a solution would be similar to the statutory model allowing for parallel and independent fulfilment of the same obligations and the exercise of the same rights towards the child by several persons.

As regards disadvantages of the solution, firstly, it might not lead to the elimination of the conflicts between an adoptive parent and the second biological parent that may arise in the future in relation to the exercise of their current custody. If the second biological parent had unlimited parental authority in terms of current custody, he/she would be able to claim the right to interfere in the exercise of it by

a stepparent in spite of the fact that he/she remains outside the stepchild's family community, and even if his/her activities were in good faith, they might exert negative influence on the upbringing process in the reconstructed family. Secondly, it would lead to the conclusion that the new legislative solution would not eliminate the imperfections of the previous one.

The second solution proposed is devoid of flaws. It assumes equipping an adoptive parent with rights and obligations in the field of current custody and, at the same time, depriving the second biological parent of them. Such a solution indicates the need to strengthen the position of the entity that has the real ability to conduct the child' current upbringing process. A similar model of relation is laid down in Article 112[1] FGC concerning the regulation of rights and obligations of a foster family.

The above-discussed solution would be applicable only to the relations in a reconstructed family. In spite of this, the issue of the scope of rights and obligations of a biological parent who lives outside the child's community is of more general significance. It results from the fact that in each case when a biological parent remains outside the child's family community a question arises whether it is right that a person who does not stay with the child maintains the current custody related rights and obligations, which he/she cannot exercise. It is important in case of spouses' actual separation, as well in a situation when the child's parents are not married, live apart and the child lives permanently with only one of them. Then, it seems appropriate to introduce the court's broader right to shape parental authority and to limit its scope in relation to the parent remaining outside the child's family community. Restrictions of this type should be aimed at deprivation of current custody related rights and obligations, which can be exercised only by means of constant everyday contact with the child. On the other hand, it should be assumed that full parental authority is vested only in the parent who permanently lives with the child in a family community, while the scope of the other parent's rights and obligations does not include current custody of the child if he/she does not stay in the child's family community. Such a solution would allow for the restoration of the sense of the concept of full parental authority and, at the same time, would make it possible to describe family relations in the language of legal norms more precisely. The rest is a matter of regulating mutual relations between the members of a reconstructed family.

In view of the above-presented thoughts, which are just preliminary proposals but do not indicate any specific and checked solution in terms of strengthening the position of an adoptive parent, a question arises whether it would be possible to introduce the solutions adopted in the English law to the Polish legislation.

Analysing the English relation of parental responsibility based on an agreement, one can state that it is an example of how the modern system of values in family law can change. Apart from people being formally family members, there are also persons actually included in a family community based on close bonds, which, however, are not of great importance from the point of view of law.[55] Deliberation

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[55] Kosior, W., Łukasiewicz, J., *Umowa jako źródło władzy rodzicielskiej nad pasierbem…*, op. cit., p. 319. According to the authors, "There are ties of kinship between a stepfather or a stepmother

over the introduction of such a constitutive agreement on parental authority to the Polish legislation of course requires extremely thorough and reliable research.[56] The most important thing is to determine and examine whether such a form of a parental authority will fulfil its function in the Polish family law and whether it will have a positive effect on foster children, first of all, bearing in mind their wellbeing. If in the English law, based on an agreement of parental responsibility, parental authority is recognised as a legal relation that may have its source in a family-legal contract,[57] perhaps also in the Polish legal system such a form of agreement on an adoptive parent's care of the stepchild could fulfil its functions and facilitate taking many decisions concerning the child by an adoptive parent in a situation where biological parents who have parental authority exercise equal rights and obligations towards the child. In the Polish legal system, the so-called adoptive parent's custody mentioned above might play the role corresponding to the English solution, and it might result in making a stepparent's situation in the field of upbringing obligation independent of the situation of the child's biological parent and, at the same time, it would regulate their mutual obligations in the form of a contract.

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and a stepchild. In the light of the Polish family law, the relationship is not too significant, because apart from the ban on marriage (Article 14 FGC) and possible maintenance in some cases (Article 144 § 1 FGC), as well as possible inheritance, the relationship does not constitute grounds for the exercise of parental authority (cf. Article 95 et seq. FGC)" and formal inclusion in the family (Article 27 FGC).

[56] For the issue of introducing contracts to family law, cf. Łukasiewicz, J.M., *Ewolucja stosunku alimentacyjnego*, in: Pływaczewski, E.W., Bryk, J. (eds), *Meandry prawa – teoria i praktyka. Księga jubileuszowa prof. zw. dra hab. Mieczysława Goettela*, Szczytno, 2017, pp. 305–315.

[57] Kosior, W., Łukasiewicz, J., *Umowa jako źródło władzy rodzicielskiej nad pasierbem…*, op. cit., pp. 319–320.

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SUBMISSION OF THE POINT OF LAW WHICH RAISES SERIOUS DOUBTS IN CIVIL PROCEEDINGS FOR THE RESOLUTION BY THE SUPREME COURT

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Abstract

The institution of questions of law, as a result of which the court ruling in the case is bound by the view of the Supreme Court expressed in its resolution, is an exception to the constitutional principle of subordination of judges solely to the Constitution and statues (Article 178(1) of the Constitution of the Republic of Poland).

The point of law which raises serious doubts because divergent interpretation of the same provision exist in the case-law could be submitted when in the opinion of the appellate court each of these interpretations can be adopted in view of its significant legal arguments, and neither the position of the jurisprudence nor the doctrine of law explains which interpretation should be chosen.

The point of law submitted to the Supreme Court for resolution under Article 390(1) of the Code of Civil Procedure must meet three basic requirements. Firstly, the point of law must be of an abstract nature and concern the interpretation of legal provisions, as it is unacceptable to present to the Supreme Court a question of law simply to get an answer on how to settle the case. Secondly, the point of law needs to concern a legal doubt which needs to be clarified in order to examine the legal remedy; in other words, in order to use the right set forth in Article 390(1) of the CCP, a link must exist between the presented point of law and a decision to be made on the merits of the case, and such link needs to be demonstrated through the juridical consistency of the point of law formulated at the outset and the reasons thereto, and through the proper reference to the facts of the case in such generally defined question of law. Thirdly, the point of law to be resolved needs to concern a legal issue which raises serious

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doubts; if ordinary doubts arise, the court of second instance needs to settle them on its own. The significance of the issue or the discrepancies in the jurisprudence and literature regarding the ways of its resolutions are not per se independent premises for raising a question of law.

Keywords: points of law, Supreme Court, uniformity of the case-law

GENERAL REMARKS

The basic jurisdictional function of the Supreme Court is to supervise courts' activities by ensuring legal compliance and uniformity of the case-law by common courts and military courts.[1]

In civil proceedings, it performs supervision by assessing correctness of law interpretation and application by common courts, while the courts ruling on the merits of the case are competent for establishment of facts underlying cases heard and for the preceding evidence assessment.[2]

In respect of judicial supervision, the Supreme Court's competences are set out in Article 1 of the Supreme Court Act,[3] under which the Supreme Court is a judicial authority established to administer justice by ensuring, as part of its supervision, compliance with the law and uniformity of the jurisprudence by common and military courts when examining appeals to the highest instance, and other legal remedies, by adopting resolutions which resolve points of law and by deciding on other matters specified in statutes. These are the distinctive tasks of the Supreme Court within the judiciary organisation structure.

The uniformity is the basis for the stabilisation of existing legal order and social and economic relations, and therefore a foundation for the rule of law and legal security.[4] It ensures that the constitutional principle of citizens' trust in the State and in legislation made by that State becomes a reality. Moreover, the doctrine notes that the postulate of uniformity of the law basically propounds that the examination of cases revealing similar facts should end with similar rulings, and courts, as the norms addressees, should apply and understand such norms in a uniform way.[5]

Of course, this does not preclude the courts from issuing decisions which differ from the well-established case-law; however, whenever such departure from the well-established case law is made, the court should present strong arguments in support of its divergent interpretation of provisions.

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[1] Markiewicz, K., in: Ereciński, T., Lubiński, K., (eds), *System Prawa Procesowego Cywilnego. Tom IV. Część I. Postępowanie nieprocesowe*, Warszawa, 2021, Legalis.

[2] Decision of the Supreme Court of 23 September 2010 r., III CSK 288/08, LEX No. 970081.

[3] The Supreme Court Act of 8 December 2017, i.e. Journal of Laws of 2–21, item 1904, as amended.

[4] Piasecki, K., *Organizacja wymiaru sprawiedliwości w Polsce*, Kraków, 2005, p. 76.

[5] Szmulik, B., *Pozycja ustrojowa Sądu Najwyższego*, Warszawa, 2008, p. 285 et seq.; Banaszek, B., *Konstytucja RP. Komentarz*, Warszawa, 2009, p. 808; Trzciński, J., 'Materiały z obrad Zgromadzenia Sedziów NSA w dniu 23 kwietnia 2007 r. w Warszawie', *Zeszyty Naukowe Sądownictwa Administracyjnego*, 2007, No. 3, p. 14.

From this perspective, the role of the First President of the Supreme Court and the obligation under Article 6 of the Supreme Court Act to ensure the consistency of the legal system seem to be of particular importance. The consistency standard is discussed in the literature along with the postulate of legal uniformity.[6]

Resolutions made by the Supreme Court to settle points of law which raise doubts of the appellate court and which have emerged while hearing particular cases are one of the tools used for judicial supervision in order to ensure correctness, uniformity and consistency of the case-law.[7] These resolutions aim to clarify, by means of interpretation, those legal provisions which raise doubts or which lead to discrepancies in practicing the application of law.

The literature stresses that along with ensuring uniformity of the case law in terms of its substance, resolutions also serve to ensure "the unity in methodology", as they formulate guidelines on how to reach a specific resolution, as well as values and theoretical assumptions.[8]

Apart from legality, the rule of law, objectivity, and certainty, the uniformity of the case-law is one of the most important internal values of law. It is understood as a sign of legal certainty, which manifests itself in decisions issued based on legal norms.[9] The jurisprudence of the Supreme Court highlights: "The postulate of the uniformity of the case-law undoubtedly emphasises the certainty of judicial application of the law".[10]

The starting point for this analysis is Article 390 of the Code of Civil Procedure (CCP). Under this article, if during an appeal a point of law raising serious doubts is recognised, the court may refer it to the Supreme Court for resolution, while adjourning the case. The Supreme Court is competent to take over the case for examination or to refer the point of law for resolution to its extended panel.

The key task of the discussed institution is to ensure proper interpretation and foster uniformity in the jurisprudence of common courts.[11] Judging on a point of law means that proceedings become speedy and predictable, and the authority of the administration of justice is upheld. Without such provisions, the process would

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[6] Nowak-Far, A., 'Standard jednolitości i spójności prawa. Przykład prawa Unii Europejskiej', in: Nowak-Far, A. (ed.), *Jednolitość i spójność prawa. Perspektywa Unii Europejskiej i Federacji Rosyjskiej*, Warszawa, 2013, p. 15.

[7] Łazarska, A., in: Szanciło, T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Art. 1–505[39]. Tom I*, Warszawa, 2019, Legalis.

[8] Szczucki, K., in: *Ustawa o Sądzie Najwyższym. Komentarz*, 2nd ed., Warszawa, 2021; Grochowski, M., 'Uchwały Sądu Najwyższego a jednolitość orzecznictwa. Droga do autopojetyczności systemu prawa?', in: *Jednolitość orzecznictwa. Standard – Instrumenty – Praktyka. Tom I*, Warszawa, 2015, p. 92.

[9] Leszczyński, L., 'Jednolitość orzecznictwa jako wartość stosowania prawa', in: Grochowski, M., Raczkowski, M., Żółtek, S. (eds), *Jednolitość orzecznictwa. Standard – instrumenty – praktyka*, Warszawa, 2015, p. 10.

[10] Resolution of the full panel of the Supreme Court of 5 May 1992, KwPr 5/92, OSNKW, 1993, No. 1–2, item 1 and Leszczyński, L., 'Jednolitość orzecznictwa…', op. cit., p. 9 et seq.

[11] See Osajda, K., 'Przesłanki odmowy podjęcia uchwały przez Sąd Najwyższy w postępowaniu cywilnym', in: Gudowski, J., Weitz, K. (eds), *Aurea praxis aurea theoria. Księga pamiątkowa ku czci profesora Tadeusza Erecińskiego. Tom 1*, Warszawa, 2011, p. 427 et seq.; Wiśniewski, T., *Przebieg procesu cywilnego*, Warszawa, 2013, p. 383.

become disorganised, leading to jurisdictional chaos and destabilising legal situation of the parties concerned, and, as a result, would disrupt legal transactions.[12]

This paper intends to review conditions for the admissibility of questions of law referred to the Supreme Court, and to analyse relevant proceedings before the Supreme Court against the normative and dogmatic background as well as the substantive position expressed by the latter. Considering interests of the parties and other participants to the proceedings, uniformity of the application of law is of prime importance as a factor which serves to ensure legal certainty, equality before the law and, finally, legal security of citizens. Against this backdrop, questions of law are one of the instruments of correct and uniform application of the law. Systematising these questions boils down to shaping proper decision-making standards, both in terms of how decisions and conclusions should be formulated on doubt-raising points of law, and rulings made thereafter. Our considerations take into account the change in the model of hearing the cases in appellate proceedings, introduced by the amendment of 4 July 2019.[13] In this respect, it is first of all necessary to establish whether it is admissible to refer a point of law to the Supreme Court while examining legal remedies other than appeals, and next, to define the court authorised to present such point of law and its composition, in particular after amendments introduced by the Act of 4 July 2019 amending the Code of Civil Procedure Act and Certain Other Acts. To this end, this paper relies on the most recent pieces of jurisprudence of the Supreme Court regarding the matter under discussion.

INSTITUTION OF POINTS OF LAW

The institution of the questions of law was aptly defined by the Supreme Court in its decision of 4 October 2002 (III CZP 62/02[14]), where it stressed that while the institution had a rich tradition in Polish civil proceedings and played a major role in the development of the jurisprudence, it should be used with full awareness of its unique nature.[15] In particular, the institution of points of law may not be used to shift to the Supreme Court the task of making a jurisdictional decision which incriminates the adjudicating court.[16]

[12] Markiewicz, K., op. cit.; Sanetra, W., 'O roli Sądu Najwyższego w zapewnianiu zgodności z prawem oraz jednolitości orzecznictwa sądowego', *Przegląd Sądowy*, 2006, No. 9, pp. 18–20; Łochowski, M., 'Wiążąca sądowa wykładnia prawa, ocena prawna, wskazania co do dalszego postępowania (uwagi na tle art. 386 § 6 i art. 393-17 k.p.c.)', *Przegląd Sądowy*, 1997, No. 10. pp. 22–23; Oklejak, A., *Apelacja w procesie cywilnym*, Kraków, 1994, p. 118.

[13] The Act of 4 July 2019 amending the Code of Civil Procedure Act and Certain Other Acts, Journal of Laws of 2019, item 1469.

[14] *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2004, No. 1, item 7.

[15] See decision of the Supreme Court of 13 January 2022, III CZP 41/22, LEX No. 3303283; decision of the Supreme Court of 20 January 2022, III CZP 15/22, LEX No. 3303386; decision of the Supreme Court of 14 March 2014, III CZP 132/13, LEX No. 1482402; decision of the Supreme Court of 5 December 2019, III CZP 33/19, LEX No. 2749464; decision of the Supreme Court of 18 January 2019, III CZP 67/18, LEX No. 2609481; decision of the Supreme Court of 5 October 2016, III CZP 50/16, LEX No. 2148609.

[16] Decision of the Supreme Court of 18 February 2021, III CZP 13/20; decision of the Supreme Court of 25 January 2022, III CZP 72/22, LEX No. 3303512.

It should be emphasised that the possibility to request the Supreme Court to resolve a point of law, thereby binding lower courts adjudicating in a specific case by the Supreme Court's view expressed in its adopted resolution, constitutes an exception to the constitutional principle of judges being subject solely to the Constitution of the Republic of Poland and to statutes.[17]

Please note that pursuant to Article 178(1) of the Constitution of the Republic of Poland, judges are independent and subject to the Constitution and statutes; therefore, the provision which extends the rule and make the judge bound also by the view of another judge(s), as expressed in the resolution (Article 390(2) of the CCP), needs to be applied with caution and restraint. The independent handling of cases and determination of underlying factual and legal issues is a fundamental, inalienable duty of the judge, which arises from the exercise of their judicial authority.[18]

In fact, the provision of Article 390 of the CCP does not impose on the court of second instance the obligation to request the Supreme Court to resolve the point of law, even if such point of law raises serious doubts.[19]

The Supreme Court rightly emphasises in its case-law that it is the duty of a judge to adjudicate in cases they have been requested to examine. Therefore avoiding this obligation by leaving it to a higher court cannot be the only way to resolve complicated points of law. The consistent position of the Supreme Court is that, in practice, Article 390 of the CCP should be applied solely in truly exceptional circumstances. From this standpoint, it is entirely correct and consistent to believe that the decision of the appellate court not to exercise its right to present a point of law to the Supreme Court (Article 390(1) of the CCP) is not subject to a review in a higher instance.[20]

This solution aims to assist the appellate court examining a specific case and enable the Supreme Court to influence the correct interpretation of the law, including in other cases examined by courts. According to 390(2) of the CCP, the resolution of the Supreme Court is binding solely in the case for which the question of law has been submitted. However, given the Supreme Court's authority, the adopted resolution shapes the interpretation of law in other cases examined by courts as well.

Therefore, the institution of questions of law, established under Article 390(1) of the CCP as a derogation from the constitutional principle of the judicial independence of judges who, in exercising of their duties, are subject solely to the Constitution and statutes (Article 178, paragraph 1 of the Constitution of the Republic of Poland)

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[17] See the reasoning to the Resolution of the Supreme Court (7) of 30 March 1999, III CZP 62/98, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 1999, No. 10, item 166.

[18] Góra-Błaszczykowska, A., Karolczyk, B., Lubiński, K., in: Ereciński, T., Wiśniewski, T. (eds.), *System Prawa Procesowego Cywilnego. Tom II. Część II. Postępowanie procesowe przed sądem pierwszej instancji*, Warszawa, 2016; decision of the Supreme Court of 26 June 2014, III CZP 35/14, Biuletyn Sądu Najwyższego, 2014, No 6.

[19] Ruling of the Supreme Court of 12 September 2000, I PKN 10/00, OSNAPiUS, 2002, No. 7, item 156.

[20] Decision of the Supreme Court of 20 January 2022, III CZP 15/22, LEX No. 3303386; decision of the Supreme Court of 22 October 2010, III CZP 80/10, LEX No. 694256; decision of the Supreme Court of 19 October 2017, III CZP 47/17, LEX no 2439109.

requires strict interpretation.[21] In this respect, there is consensus regarding the narrow interpretation of the norm established under Article 390(1) of the CCP and whether replies can genuinely be provided to a point of law in isolation from the issue at stake and any teleological arguments.[22]

PREMISES FOR SUBMITTING A POINT OF LAW TO THE SUPREME COURT FOR RESOLUTION

Firstly, it needs to be noted that Article 390 of the CCP does not set any rules decisive for the Supreme Court's resolution or refusal to adopt a resolution on points of law that have risen doubts for the appellate court during the examination of specific cases. Requirements to be met by the point of law have been further defined in case-law. Analysis of numerous pieces of jurisprudence of the Supreme Court helps identify the premises for a valid submission of the question of law to the Supreme Court for resolution.

The matter must concern a point of law referring to the application of substantive or procedural law norms, rather than findings of fact or assessment of evidence in the case under examination.[23]

The jurisprudence propounds that the question of law submitted to the Supreme Court for resolution needs to be defined in general and abstract terms, so it can be resolved in isolation from the specific case. It must be purely legal in nature. Factual issues are not subject to the assessment under Article 390 of the CCP, as they are reserved for the exclusive competence of the court ruling on the case's merits.[24] Of course, the point of law submitted to the Supreme Court for resolution under Article 390 of the CCP needs to be properly linked to the facts established by the appellate court. It also needs to be formulated, considering the circumstances that make up the case facts, as established by the court.

The requirement to formulate the question of law in a general manner aims to give the Supreme Court the opportunity to provide a universal reply, which should not be used in lieu of resolving the specific case.[25]

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[21] See resolution of the seven-judge panel of the Supreme Court of 30 April 1999, III CZP 62/98, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 1999, No. 10, item 166.

[22] See also resolution of the seven-judge panel of the Supreme Court of 30 April 1999, III CZP 62/98, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 1999, No. 10, item 166.

[23] Decision of the Supreme Court of 17 December 1991, III CZP 129/91, LEX No. 612283; decision of the Supreme Court of 23 February 2018, III CZP 97/17, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2019/1/12, LEX No. 2453045; decision of the Supreme Court of 27 August 1996, III CZP 91/96, LEX No. 26246.

[24] Are also excluded matters of mixed nature, i.e. those formulated in terms of legal issues and of facts – see Włodyka, S., Przesłanki dopuszczalności pytań prawnych do Sądu Najwyższego, *Nowe Prawo*, 1971, No. 2, p. 173; Wiśniewski, T. in: Dończyk, D., Iwulski, J., Jędrejek, G., Koper, I., Misiurek, G., Orecki, M., Pogonowski, P., Sołtysik, S., Zawistowski, D., Zembrzuski, T., Wiśniewski, T., *Kodeks postępowania cywilnego. Komentarz*, Volume II, Articles 367–505, Warszawa, 2021.

[25] See decision of the Supreme Court of 15 October 2002, III CZP 66/02, LEX No. 57240.

The appellate court should point to significant discrepancies in the doctrine or jurisprudence regarding the interpretation of substantive or procedural law, which in turn raise doubts as to its correct interpretation. Moreover, the court should indicate which interpretation it believes is accurate, providing the appropriate legal argumentation, and explain why the resolution of its point of law will be of importance for the case settlement.

Secondly, it is correctly assumed in the doctrine[26] that as a point of law which is to be resolved by the Supreme Court may not relate to doubts of fact, similarly it may not relate to subsumption, i.e. the question of whether a specific legal norm should be applied in a given case. Hence, if the appellate court poses a question about the application of law (subsumption, i.e. whether a specific legal norm should apply in a specific situation or which norm should apply), its intention is in fact to have the Supreme Court relieve it of its adjudication task.

Then, a point of law submitted for resolution under Article 390(1) of the CCP cannot be reduced to a question being posed to the Supreme Court in order for it to make a subsumption, and to resolve the case as a result.[27]

Both the aim of the institution of points of law presented to the Supreme Court and the case law show beyond any doubt that if such point of law was considered in terms of subsumption (i.e. requiring the assessment of specific circumstances of the case instead of an *in abstracto* review) it could simply not be resolved. Indeed, the statement of the Supreme Court would be situational, depending on the facts established in the case, and would be devoid of general significance.[28]

Moreover, importantly, the Supreme Court may reply solely within the scope of the point of law presented for resolution; the SC may not go beyond such point of view or proceed to reinterpret it, as this would violate the principle of independent resolution of the case by the competent court, or would lead to a review of issues that actually do not raise doubts for the court of second instance.[29] The Supreme Court cannot correct the contents of the operative part of the decision where the point of law has been formulated to make it more compliant, as it would believe, with the contents of the provision to which it pertains.[30]

At the same time, it should be stressed that mere reservations from the appellate court regarding the view expressed by the court of first instance would not suffice. The decision to present a point of law should be justified with several solution variants for a specific question.[31]

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[26] See in this respect: decision of the Supreme Court of 22 October 2002, III CZP 64/02, LEX No. 77033; decision of the Supreme Court of 11 January 2022, I USK 351/21, LEX No. 3340967; decision of the Supreme Court of 17 September 2008, III CZP 84/08, LEX No. 470907; decision of the Supreme Court of 16 November 2012, III CZP 64/12, LEX no 1293792.

[27] 'Decision of the Supreme Court of 22 October 2002, III CZP 64/02', *Prokuratura i Prawo*, 2003, No. 7–8, item 37.

[28] Decision of the Supreme Court of 20 December 2012, III CZP 87/12, LEX No. 1288686.

[29] Decision of the Supreme Court of 14 March 2017, III SZP 1/17, BSN 2017, No. 3.

[30] Decision of the Supreme Court of 7 May 2015, III PZP 3/15, LEX No. 1771513.

[31] Decision of the Supreme Court of 14 December 2007, III CZP 116/07, LEX No. 345549; decision of the Supreme Court of 15 December 2021, III CZP 91/20, LEX No. 3273406; decision of the Supreme Court of 26 October 2016, III CZP 60/16, LEX No. 2152395; decision of the Supreme

Thirdly, the point of law needs a substantive link to the proper examination of the initiated legal remedy.

The question of law may pertain solely to matters requiring resolution to examine the legal remedy in a specific case properly. The doctrine posits that there needs to exist even "a causal link between the presented question of law and the decision to be made on the case's merits".[32] The link exists when resolving the specific point of law is necessary to issue the ruling to end the appeal proceedings, also on a formal level.[33] This link needs to be demonstrated through the juridical consistency of the initially formulated point of law and the reasons thereto, and through proper reference to the case facts in such a generally defined question of law.[34]

This requirement is not met if, in its argumentation, the requesting court identifies and supports only one possible solution while discrediting the alternative variant, and exercises the right to use the Supreme Court's interpretative assistance solely to confirm its position is correct.[35] The institution of points of law cannot be used to place on the Supreme Court the task of taking the jurisdictional decision that incriminates the adjudicating court.[36]

Therefore, the court presenting a point of law for resolution should explain its doubts, why it believes they are serious, and demonstrate that they are causally linked to the case resolution. It should be noted that the court needs to present its own views, and solely presenting other courts' positions will not suffice.[37]

Indeed, Article 390 of the CCP links the institution of points of law submitted to the Supreme Court for resolution with a specific case that has given rise to a question of law, leading to serious doubts and requiring a resolution before the appeal could be heard. Therefore, it excludes the possibility of submitting any points of law that are not impactful for the appeal being examined and are purely theoretical and detached from any specific needs.

Jurisprudence has explained that "It is not the Supreme Court's task to analyse theoretical issues in isolation from the circumstances of the case, as this is the domain

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Court of 5 November 2014, III CZP 79/14, LEX No. 1551372; decision of the Supreme Court of 13 January 2011, III CZP 127/10, LEX No. 738113.

[32] See Zieliński, A., in: Zieliński, A. (ed.), *Kodeks postępowania cywilnego. Komentarz*, Warszawa, 2010, p. 642. See also the jurisprudence: decision of the Supreme Court of 9 April 2002, III CZP 16/02, LEX No. 560857; decision of the Supreme Court of 14 March 2001, III CZP 53/00, LEX No. 52363; decision of the Supreme Court of 25 August 2004, I PZP 4/04, LEX No. 1615717; decision of the Supreme Court of 22 May 2009, III CZP 25/09, LEX No. 511985.

[33] See also decision of the Supreme Court of 22 November 2013, III CZP 71/13, LEX No. 1413561.

[34] Decision of the Supreme Court of 24 January 2002, III CZP 76/01, LEX No. 53308; decision of the Supreme Court of 25 October 2018, III UZP 7/18, LEX No. 2575525.

[35] Decision of the Supreme Court of 9 October 2020, III CZP 92/21, LEX No. 3066655.

[36] Decision of the Supreme Court of 18 February 2021, III CZP 13/20, LEX No. 3125994.

[37] Decision of the Supreme Court of 26 October 2011, III CZP 59/11, LEX No. 1102648; decision of the Supreme Court of 16 November 2021, III CZP 75/20, LEX No. 3275897; decision of the Supreme Court of 30 June 2020, III CZP 61/19, LEX No. 3063018; decision of the Supreme Court of 14 September 2016, III CZP 42/16, LEX No. 2152394; decision of the Supreme Court of 27 May 2010, III CZP 32/10, LEX No. 590616; decision of the Supreme Court of 29 October 2009, III CZP 79/09, LEX No. 533836.

of science. If the question is of theoretical and abstract nature and is unrelated to the case circumstances, the answer is not needed for its resolution."[38]

The Supreme Court's jurisprudence highlights that the appellate court submitting the question of law under Article 390 should properly define ("name") the legal issue underlying the question posed to the Supreme Court. The court of second instance needs to show that the point of law is linked to the case in such a way that the Supreme Court's legal answer is essential (necessary) for the appeal to be heard. To meet this requirement, the point of law must be professionally worded, has to refer to the case's legal remedy, and its resolution must be necessary to examine the appeal merits.[39]

Fourthly, the point of law at hand needs to raise serious doubts.[40] By granting the appellate court the right to submit a point of law to the Supreme Court under Article 390(1) of the CCP, the lawmaker made exercising this right conditional upon the emergence of serious legal doubts in the case and an expectation that the reply is needed to settle the case.

The Supreme Court's jurisprudence explains that "the institution of questions of law neither serves to settle a specific case in lieu of the competent court nor to confirm that the opinion presented by the court submitting the point of law is accurate". Thus, the point of law covers clear doubts concerning a specific provision (norm) or set of provisions (norms), or, more broadly and generally, doubts as to the specific legal framework (legal institution).[41]

Interestingly, some Supreme Court's jurisprudence posits that what is decisive for the admissibility of the point of law is "not its practical significance nor discrepancies emerging upon its resolution, but rather whether the court has real, serious doubts as to how it should be resolved". The importance of the issue or the discrepancies in the case-law or literature is not, as such, a premise for submitting a question of law.[42]

However, it should be noted that the normative regulation is unclear as to whether doubts justifying resolution should be of subjective nature (i.e., referring to the court which presents a point of law) or rather of objective type. It seems that the adjective "serious" added as a qualifier to doubts justifying the submission of the point of law to the Supreme Court strongly supports their objective nature. At the same time, subjective doubts must arise; otherwise, the adjudicating panel would not see the need to submit a point of law.[43]

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[38] Resolution of the Supreme Court of 23 March 2016, III CZP 102/15, LEX No. 2005761; decision of the Supreme Court of 12 June 2008, III CZP 42/08, LEX No. 420375.

[39] Decision of the Supreme Court of 7 March 2018, III UZP 1/18, LEX No. 2467695; Ruling of the Supreme Court of 9 October 2019, I NSK 63/18, LEX No. 2727400.

[40] See decision of the Supreme Court of 27 September 2012, III CZP 47/12, LEX No. 1222122; decision of the Supreme Court of 8 August 2012, III CZP 43/12, LEX No. 1217216.

[41] Decision of the Supreme Court of 12 January 2021, I USK 4/21, LEX No. 3106200.

[42] Decision of the Supreme Court of 20 September 2005, III SZP 2/05, LEX No. 2640398.

[43] See the ruling where the Supreme Court declared for the need for both objective and subjective doubts: decision of the Supreme Court of 10 August 2018, III CZP 16/18, LEX No. 2531311; decision of the Supreme Court of 10 August 2018, III CZP 15/18, LEX No. 2531310; decision of the Supreme Court of 17 January 2013, III CZP 95/12, LEX No. 1324309; decision of the Supreme Court of 20 October 2011, III CZP 56/11, LEX No. 1106991.

The qualifying adjective "serious" means that there must exist fundamental difficulties in explaining them through basic interpretation methods, especially when various interpretations of questionable provisions are possible, and each interpretation is supported by arguments which are significant in the appellate court's opinion, and moreover, when the identified point of law has no statement from the Supreme Court and no uniform, convincing position of the doctrine for the appellate court.[44]

However, if ordinary doubts arise, the appellate court must settle them independently,[45] relying on the knowledge provided by legal provisions and their understanding in the existing jurisprudence and science of law.[46]

The jurisprudence of the Supreme Court clearly emphasises that the possibility of submitting a point of law is not a tool to "reform" atypical procedural situations which go beyond standard civil proceedings and result from manifest errors made by the adjudicating court. It is up to the competent court, in the specific proceedings and instance, to find a solution.[47]

Hence, the court should explain this premise, demonstrating the link between the legal basis of the resolution, assumed based on established facts, on the one hand, and the formulated point of law, on the other hand. The Court should then include in reasons thereto legal considerations which prove that the identified doubt is "serious", i.e. its settlement encounters difficulties beyond usual legal interpretation. If the court fails to do so, it will not be admissible for the Supreme Court to take a relevant resolution.[48]

Therefore, doubts should be presented as own, independent considerations of the court which submits the point of law, along with arguments that may potentially point to divergent legal assessments.[49] The Supreme Court may only step in with its substantive and binding legal assistance when the court presenting a specific point of law clearly states that arguments exist in favour of one of possible solutions.

It is worth quoting here the statement expressed by the Supreme Court in its decision of 27 May 2010, III CZP 32/10[50]; the SC ruled that referring to some identified and detailed controversies might not be a premise for submitting a point of law because their presentation cannot be equated with the existence of a point of law raising serious doubts.

Fifthly, it should be noted that under Article 390(1) of the CCP, points of law can only be presented in order "to be resolved" rather than "to be

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[44] Decision of the Supreme Court of 20 May 2014, I PZP 1/14, OSNP, 2015, No. 11, item 150; Ruling of the Supreme Court of 10 March 2016, III BP 7/15, LEX No. 2026399.

[45] Decisions of the Supreme Court of 25 January 2007, III CZP 100/06, unpublished, of 14 October 2010, III CZP 66/10, unpublished, of 20 October 2010, III CZP 68/10, unpublished and decisions referred therein, of 26 October 201, III CZP 59/11, unpublished.

[46] Decision of the Supreme Court of 7 March 2019, III PZP 1/19, LEX No. 2634557.

[47] See decision of the Supreme Court of 28 March 2019, III CZP 92/18, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2019, No. 12, item 127.

[48] Decision of the Supreme Court of 30 June 2020, III CZP 61/19, LEX No. 3063018.

[49] Decision of the Supreme Court of 16 June 2016, III UZP 7/16, LEX No. 2086108.

[50] LEX No. 590616.

complemented".[51] As a result, if a specific point of law presented by the appellate court is formed as a question to be complemented, this circumstance will justify the Supreme Court's refusal to adopt a resolution.[52] Such questions would always start with "does", always include an alternative reply, and the requested party is expected to choose the correct answer.[53]

To recapitulate, doubts raised by a common court should each time be formulated and justified in such a way as to legitimise its hesitation in choosing a specific legal concept from among options that may be considered. It is rightly emphasised that the Court requesting clarification of a point of law in a given case should specify the essence of its doubts by detailing the reasons why it does not know how to interpret the specific provision, provide arguments which sustain the existence of such doubts in the form of possible alternative solutions to the issue at stake,[54] and then state which of the possible and discussed interpretations it believes to be correct and why.[55] Importantly, the Supreme Court will provide answers only to the extent outlined by the content of the question of law.[56]

If no doubts need to be clarified, the Supreme Court may refuse to adopt a resolution in the case presented under Article 390(1) of the CCP. Please note that even a change in the legal situation which gave rise to serious doubts of the court while hearing the appeal (complaint), as it occurs after such court made a decision to submit a question of law to the Supreme Court for resolution under Article 390(1), may justify the latter's refusal to adopt the resolution.

Further, it should be noted that the Supreme Court may adopt its resolution not because of doubts of the parties regarding the interpretation of the newly enacted provisions but because the point of law arises "while hearing the appeal", and therefore its resolution is essential for awarding the legal remedy at stake.[57]

In other words, if the court examines the appeal at a hearing and the need arises to address a question of law to the Supreme Court, it will not be acceptable to issue a decision on that matter at a closed session. This view is supported by the opinion established based on the previous legal situation, which argues that it is particularly important that the decision to present a point of law be issued

[51] Decision of the Supreme Court of 14 June 2019, III CZP 8/19, LEX No. 2684185; decision of the Supreme Court of 21 August 2014, III CZP 44/14, LEX No. 1514749; decision of the Supreme Court of 20 August 2021, V CSK 456/20, LEX No. 3398368; decision of the Supreme Court of 13 March 2015, III CZP 3/15, LEX No. 1675927.

[52] Decision of the Supreme Court of 30 March 2011, III CZP 6/11, LEX No. 829176.

[53] Decision of the Supreme Court of 9 April 2008, II PZP 5/08, OSNAPiUS, 2009, Nos. 15–16, item 203.

[54] See decision of the Supreme Court of 12 January 2001, III CZP 45/00, LEX No. 536843; decision of the Supreme Court of 29 November 2005, III CZP 102/05, LEX No. 177297; decision of the Supreme Court of 30 November 2005, III CZP 97/05, LEX No. 175459.

[55] See Decisions of the Supreme Court of 27 August 1996, III CZP 91/96, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 1997, No. 1, item 9, of 28 August 2008, III CZP 67/08, unpublished.

[56] Decision of the Supreme Court of 14 October 2010, III CZP 66/10, unpublished, of 20 October 2010, III CZP 68/10, LEX No. 677764 and the decision referred therein, of 26 October 2011, III CZP 59/11, LEX No. 1102648, of 7 May 2015, III PZP 3/15, unpublished.

[57] See also decision of the Supreme Court of 9 July 2009, III CZP 19/09, *Orzecznictwo Sądu Najwyższego Izba Cywilna – Zbiór Dodatkowy*, 2010, No. B, item 48; decision of the Supreme Court of 11 December 2014, III CZP 59/14, BSN, 2015, No. 1.

at a hearing (Article 375 of the CCP) so that the parties are not prevented from expressing their position on that matter.

In the previous legal situation it was commonly believed that the appellate court could not issue a decision to submit a point of law to the Supreme Court at a closed session, but only at a hearing.[58] The shared view was that for the Supreme Court to be able to adopt a resolution on a specific point of law, not only the aforementioned substantive requirements needed to be met, but also "the decision to submit a point of law which raises serious doubts to the Supreme Court needed to be formally correct – it should be made during a procedure pending before the court of second instance, and if such requirement was not met the Supreme Court would refuse to adopt its resolution".[59]

This position of the jurisprudence has lost some of its validity due to the change in the model of examining cases in appeal proceedings as the possibility of hearing them at a closed session was introduced. One of the goals of the lawmaker was to make the appeal procedure swifter, also by making it possible to hear cases at closed sessions (provided that such option is not excluded). The wording "while hearing the appeal" is of key importance here. This means that if the court examines the appeal at a hearing and a need arises to submit a question of law to the Supreme Court, it will be unacceptable to issue a decision on that matter at a closed session. However, issuing such a decision in a closed session is now not entirely excluded. The provisions of Article 374 of the CCP, in its amended wording of 4 July 2019[60] (effective since 7 November 2019) are a novelty as they allow the case to be examined in appeal proceedings at a closed session. This option is available when a hearing is not required. It is up to the appellate court to decide whether the case can be heard in a closed session.[61] Please note, however, that the lawmaker has granted the party the discretion to decide whether their case will be examined by the court of second instance at the hearing. Therefore, we should share the view of the doctrine which argues that if such a request is made, there is no risk to the external or internal transparency of the proceedings, and thus it is the party (the requesting party or other parties) who has a decisive say on whether the hearing should be held or not.[62]

Therefore, it cannot be ruled out that in such a case the court of second instance will conclude that the Supreme Court needs to be addressed "while hearing the appeal" in a closed session.[63] The term "may", included in Article 374, indicates

[58] Decision of the Supreme Court of 21 April 2016, III CZP 7/16, LEX No. 2066987.

[59] Decision of the Supreme Court of 14 June 2019, III CZP 9/19, LEX No. 2685576.

[60] The Act of 4 July 2019 amending the Code of Civil Procedure Act and Certain Other Acts, Journal of Laws of 2019, item 1469.

[61] Manowska, M., in: *Apelacja w postępowaniu cywilnym. Komentarz. Orzecznictwo*, 5th ed., Warszawa, 2022, pp. 193 et seq.; Michalska-Marciniak, M., in: Zembrzuski, T. (ed.), *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian*, Vol. 1, Warszawa, 2020, pp. 845 et seq.

[62] Ruling of the Administrative Court in Białystok of 21 April 2020, I ACa 210/20, LEX no 3030515, and M. Michalska-Marciniak, M. in: *Kodeks postępowania cywilnego…*, op. cit., pp. 845 et seq.

[63] Partyk, A., in: Piaskowska, O.M. (ed.), *Kodeks postępowania cywilnego. Postępownie procesowe. Komentarz aktualizowany*, LEX/el., 2021, Article 390.

that the appointment of a closed session is not obligatory and the decision is left at the discretion of the presiding judge. The circumstances of a case are decisive. In addition, the presiding judge's decision that a hearing is unnecessary is not binding on the court of second instance. In other words, the court may change the order of the presiding judge and decide to hold a hearing.[64]

The next practical question concerns the court authorised to submit a point of law to the Supreme Court. As a matter of fact, the point of law may be submitted to the Supreme Court not only during and appeal hearing but also when it emerges while hearing other legal remedies: complaint or petition against the decision of the court officer.

As follows from the provisions of Article 390 § 1 of the CCP, and as confirmed by the Supreme Court's case-law, the point of law may only be presented by the court of second instance; thus, no such right is vested on the court of first instance. However, due to the requirement to properly apply provisions on appeal proceedings, as laid down in Article 397(3) of the CCP, it can be posited that the court of second instance may present a point of law to the Supreme Court that has arisen during a complaint hearing. It should be noted, though, that if such a point of law is submitted, it must closely relate to the issue resolved in the complaint proceedings, rather than to the crux of the case.

Please note that after the 2019 amending Act[65] entered into force, a request to resolve a point of law which raises serious doubts may be made to the Supreme Court in pending complaint proceedings under Article 390(1) of the CCP, in conjunction with Article 397(3) of the CCP, or under Article 390(1) of the CCP in conjunction with Article 394-1a(2) or Article 394-2(2) of the CCP. In line with Article 397(3) of the CCP, provisions on appellate proceedings should apply accordingly to proceedings pending as a result of a complaint. Hence, since 7 November 2019 a point of law may be submitted to the Supreme Court for resolution also by the court of first instance examining the complaint in a different composition, based on Article 394(1a)(1) and (2) of the CCP.[66]

In light of the aforementioned provisions, the point of law submitted for resolution to the Supreme Court needs to arise when the complaint is being heard. This applies not only to complaints made to the court of second instance (appeal through devolution) but also to horizontal complaints.[67]

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[64] See also Kłos, M., in: Marciniak, A. (ed.), *Kodeks postępowania cywilnego. Tom 2. Komentarz. Art.* 205^{1}*–*424^{12}, Warszawa, 2019, p. 932; Wiśniewski, T., in: Dończyk, D., Iwulski, J., Jędrejek, G., Koper, I., Misiurek, G., Pogonowski, P., Sołtysik, S., Zawistowski, D., Zembrzuski, T., Wiśniewski, T., *Kodeks postępowania cywilnego. Komentarz. Tom II. Artykuły 367–*505^{39}, Warszawa, 2021, Article 374, Article 375, pp. 82–83.

[65] The Act of 4 July 2019 amending the Code of Civil Procedure Act and Certain Other Acts, Journal of Laws of 2019, item 1469, as amended.

[66] The Act of 4 July 2019 amending the Code of Civil Procedure Act and Certain Other Acts, Journal of Laws of 2019, item 1469, as amended.

[67] Decision of the Supreme Court of 25 February 2021, III CZP 18/20, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2021, No. 7–8, item 55; Dziurda, M., 'Przedstawianie zagadnień prawnych na podstawie art. 390 § 1 k.p.c. w czasach epidemii i nowelizacji', *Przegląd Sądowy*, 2021, No. 11–12, pp. 21–42. See also Ereciński, T., in: Ereciński, T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Postępowanie rozpoznawcze. Tom 3*, Warszawa, 2016, gloss to Article 390, comment 1;

The matter has been subject to review in one of the latest pieces of jurisprudence of the Supreme Court, i.e. its decision of 20 August 2021 (III CZP 40/20),[68] one of many issued recently to respond to requests made to the Supreme Court for the interpretation of regulations, in particular those regarding the amended legal provisions on complaints, introduced by the Act of 4 July 2019 amending the Code of Civil Procedure Act and Certain Other Acts.[69]

In the reasons for this decision, the Supreme Court discussed whether an answer can be provided to a submitted point of law formulated in respect of a horizontal complaint heard by the court of first instance at a closed session. Relying on the well-established case-law, the SC highlighted that "the point of law may be submitted to the Supreme Court solely by the *ad quem* court, i.e. the court to which the remedy has been addressed, instead of the *a quo* court".[70] It further stated that "given that in the said situation the court of first instance plays the role of an *ad quem* court, no obstacles exist for it to present a point of law under Article 390(1), in conjunction with Article 397(3) of the CCP". The Supreme Court is of the following opinion: "Moreover, it is undeniable that the court ruling in complaint proceedings is competent to submit a point of law to the Supreme Court for resolution not only when assessing the merits of the complaint but also when examining its admissibility, despite the fact that Article 390(1) of the CCP uses the wording 'when hearing' the appeal, and not also, respectively, the complaint (Article 397(3) of the CCP)".

Regarding the court's composition, it was rightly emphasised that "If, in connection with the assessment of the complaint admissibility, a point of law arises that needs to be submitted to the Supreme Court for resolution, such point of law should not be presented by a single judge at a hearing set to draw consequences from the complainant's failure to meet the conditions of admissibility of their complaint (Article 373(1) of the CCP), but rather by the three-member panel which has proceeded to examine the complaint, with the claim admissibility being considered first (Article 397(1) of the CCP).[71] This position was consistently upheld in subsequent Supreme Court decisions.[72] More specifically, the constitutional value of collegial adjudication and the exceptional nature of provisions on single-judge panels were detailed by the Supreme Court in its resolution of 1 July 2021,

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Wiśniewski, T., 'Rozstrzyganie zagadnień prawnych przez Sąd Najwyższy', *Państwo Prawne*, 2019, No. 1, p. 34.

[68] LEX No. 3212830.

[69] Journal of Laws, item 1469; the amendment was introduced based on the explanatory memorandum to the amending bill in order to speed up the proceedings, decrease their costs and reduce organisation issues (see also print of the Sejm of the 8th term No. 3137; point IV.27b); see in this respect: Resolution of the Supreme Court of 1 July 2021, III CZP 36/20, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2021, No. 11, item 74.

[70] See also decision of the Supreme Court of 15 March 2018, III CZP 109/17, LEX No. 2467067.

[71] See decision of the Supreme Court of 8 March 2019, III CZP 89/18, unpublished; decision of the Supreme Court of 14 June 2019, III CZP 33/18, LEX No. 2681229; decision of the Supreme Court of 25 February 2021, III CZP 18/20, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2021, No. 7–8, item 55.

[72] Resolution of the Supreme Court of 25 January 2022, III CZP 4/22, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2022, No. 9, item 85; decision of the Supreme Court of 21 January 2022, III CZP 10/22, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2022, No. 6, item 63.

III CZP 36/20.[73] The Supreme Court explained that single-judge adjudication in any appeal procedure – whether in appellate or complaint proceedings – constituted a departure from the principle of collegial adjudication on remedies at law, specific to the Polish civil procedure. Exceptions to the model should be made through clear legal provisions, and these requirements are not met by Article 397(1) of the CCP whose wording enhances the obligation to adjudicate in a three-member panel, as compared to Article 367(3) of the CCP on appeal proceedings.[74]

Furthermore, it should be underlined that a point of law may be submitted in any case, whether an appeal of the highest instance is admissible therein or not. A point of law can be effectively presented to the Supreme Court solely under valid proceedings. According to the well-established case-law, if one condition for the invalidity of proceedings is met, the Supreme Court refuses to adopt a resolution.[75]

In summary, the resolution of points of law by the Supreme Court has two main functions: on the one hand, it serves to exercise judicial supervision over common courts, and on the other hand, it helps dispel serious legal doubts at the appeal proceedings stage, and cannot go beyond them.[76] Therefore, before a resolution is adopted, the content of the issue at hand is assessed to determine how clear the articulated problem is, and arguments presented in the reasons are reviewed.[77]

Questions of law are an important instrument in the practice of solving difficult cases, unifying jurisprudence, and deciding on vital issues regarding the interpretation or validity of legal provisions. However, as such, they are specific in nature and, rather than being commonly used, should be applied with caution. The institution should not be perceived as a departure from the principle of judicial independence but more as a stabilising element intended to strengthen the sense of legal certainty and security, if not trust in law, at least in the process of its application.

It is the duty of the court submitting a point of law to the Supreme Court to demonstrate that serious legal doubts have emerged in the case at hand and that they need to be clarified before its settlement, necessitating a review of existing case-law and jurisprudence. Only upon establishing that neither doctrine nor case-law adequately explain existing legal controversies may the Supreme Court decide to resolve such altercations by way of resolution. Furthermore, the reply given by the Supreme Court should not be used by the court of second instance as support for formulating its unambiguous position on what it believes to be the proper interpretation of provisions applied to examine complaints.[78]

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[73] *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2021, No. 11, item 74.

[74] See also resolution of the Supreme Court of 7 December 2021, III CZP 87/20, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 2022, No. 7–8, item 67, and decision of the Supreme Court of 29 April 2022, III CZP 77/22, LEX No. 3361825.

[75] Decision of the Supreme Court of 30 March 2011, III CZP 131/10, LEX No. 795783.

[76] Marcianiak, A. (ed.), *Kodeks postępowania cywilnego. Tom II. Komentarz do art. 205[1]–424[12]*, Warszawa, 2019.

[77] See resolution of the seven-judge panel of the Supreme Court of 30 April 1999, III CZP 62/98, *Orzecznictwo Sądu Najwyższego Izby Cywilnej*, 1999, No. 10, item 166; decision of the Supreme Court of 16 September 2021, III CZP 108/20, LEX No. 3225666.

[78] See also decision of the Supreme Court of 18 June 2015, III CZP 30/15, LEX No. 1747847; decision of the Supreme Court of 24 May 2002, III CZP 30/02, *Prokuratura i Prawo – wkładka*, 2003, No. 3, item 38, decision of the Supreme Court of 29 November 2005, III CZP 102/05, LEX

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NEW PROCEDURE FOR ELECTRONIC DELIVERIES IN ADMINISTRATIVE PROCEEDINGS

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Abstract

This study focuses on the new procedure of electronic deliveries in administrative jurisdictional proceedings, as regulated by the provisions of the Code of Administrative Procedure. The primary research objective was to describe *de lege lata* the modes of individual deliveries, indicating their mutual hierarchy, while also addressing several issues related to the relationship between the Code and the Act on Electronic Deliveries. Both normative acts necessitate co-existence, and thus determining which of them and in which situational variants will be qualified as *lex generali*. This task is by no means facilitated by the fact that the characteristics of the framework regulation can be found in the Code, while the Act "model" regulates the rules of communication involving public entities. The main thesis presented in the study underscores the need for a systemic interpretation of the provisions of the latter Act. The author also believes that the definition of the scope of exclusions from the application of the Act was not designed appropriately. The issues raised have not been the subject of articles thus far.

Keywords: Electronic delivery, informatisation of administration, public law, electronic communication, administration

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1. INTRODUCTION

On 5 October 2021, pursuant to Article 61 of the Act of 18 November 2020 on electronic deliveries,[1] an amendment to the Code of Administrative Procedure[2] entered into force, including, among others, adaptation of the delivery procedure in the Code of Administrative Procedure to the legal framework set out in the Act.[3] The explanatory memorandum of the draft bill explains[4] that its main *ratio* consists in defining the rules for the exchange of correspondence with public entities in relation to other public entities and non-public entities, including natural persons, in such a way that the default way of exchanging correspondence will be the public service of registered electronic[5] delivery provided on the basis of the eIDAS Regulation[6] as regards qualified services of registered electronic delivery.[7] These changes undoubtedly fit into the broader trend of digitalisation[8] of the public administration, including implementation of the *e-government*[9] idea, as an expression of social and technological changes stemming from the development of ICT.[10]

First of all, however, it should be noted that the new inter-temporal solutions designed by the legislator related to the sequential model of implementing registered electronic deliveries will be fully applicable (applicable to all public entities) from 1 October 2029.[11] This means that during the transitional period,

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1 Consolidated text, Journal of Laws of 2022, item 569, as amended.

2 Act of 14 June 1960 – Code of Administrative Procedure (consolidated text, Journal of Laws of 2022, item 2000; hereinafter referred to as: "KPA").

3 The study also takes into account changes that entered into force on 7 July 2022 pursuant to Article 1 of the Act of 8 June 2022 amending certain acts in order to automate the handling of certain matters by the National Revenue Administration (Journal of Laws of 2022, item 1301; hereinafter referred to as "the KAS amendment").

4 Sejm Paper No. 239, p. 6.

5 Hereinafter referred to in this document also in the abbreviated form: "PURDE".

6 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC; OJ L 257, 28.08.2014, p. 73; hereinafter referred to as "eIDAS".

7 For the regulation, see also: Marucha-Jaworska, M., *Rozporządzenie eIDAS. Zagadnienia prawne i techniczne*, Warszawa, 2017, pp. 19–44.

8 For "computerisation" see opinions and definitions collected by Pietrasz, P., *Informatyzacja polskiego postępowania przed sądami administracyjnymi a jego zasady ogólne*, Warszawa, 2020, pp. 24–35, and Wilbrandt-Gotowicz, M., in: Wilbrandt-Gotowicz, M. (ed.), *Doręczenia elektroniczne, Komentarz*, Warszawa, 2021, p. 30.

9 For issues with a common definition of the term "e-government", see also: Błażewski, M., *Antywartości jako bariery rozwoju e-administracji*, in: Błaś, A. (ed.), *Antywartości w prawie administracyjnym*, Warszawa, 2016, pp. 262–263.

10 Information and communications technology. See also: Kurczewska, K., 'Zastosowanie zasad public governance w prawie publicznym jako wyraz zachodzących zmian społecznych i technologicznych', in: Niżnik-Dobosz, I. (ed.), *Zastosowanie idei public governance w prawie administracyjnym*, Warszawa, 2014, pp. 283–289.

11 See Article 155 of the Act and Wilbrandt-Gotowicz, M., in: *Doręczenia*…, op. cit., p. 742 et seq.; Pietrasz, P., 'Zasady doręczania pism i wnoszenia podań drogą elektroniczną w postępowaniu podatkowym prowadzonym przez samorządowy organ podatkowy w tzw. okresie przejściowym', *Samorząd Terytorialny*, 2022, No. 5, p. 8. This problem is also pointed out by G. Sibiga (*Postponing changes to the Code of Administrative Procedure until 5 October 2021 does*

public administration bodies and their clients will have to function in a "dual legal regime" of electronic deliveries consisting in the parallel functioning of the so-called old and new delivery procedure.[12] As far as electronic deliveries are concerned, it should also be clarified that the Act envisages a much broader scope of the 'deliveries' concept than the Code of Administrative Procedure.[13] This is because it covers bilateral communication between a public entity and a natural person or other non-public entity, thus encompassing not only issues related to deliveries and the principle of officiality within the meaning of the Code of Administrative Procedure, but also the procedure for communication of an external entity with the authority, which in administrative jurisdiction takes the form of a procedure for submitting applications.[14]

This study focuses only on the new procedure of electronic deliveries in administrative jurisdictional proceedings regulated by the Code of Administrative Procedure. It covers modes of individual deliveries along with their hierarchy, as well as a number of issues related to the relationship between the Code of Administrative Procedure and the Act on Electronic Deliveries. Both normative acts need to co-exist. We should, therefore, determine which one of them and in which situational variants will be qualified as *legi generali*, and which one will constitute *lex specialis.* This is not an easy distinction as the framework regulation can be found in the Code of Administrative Procedure,[15] while the Act regulates the rules of communication

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not resolve legal doubts and further conduct of administrative proceedings based on transitional provisions, https://legalis.pl/przesuniecie-zmian-w-kpa-na-1-10-2021-r-nie-rozwiazuje-watpliwosci-prawnych-i-dalszego-prowadzenia-postepowania-administracyjnego-na-podstawie-przepisow--przejsciowych/, accessed on 15 October 2022). Intertemporal issues related to the amendment to the Code of Administrative Procedure, including adaptation of the delivery procedure in the Code of Administrative Procedure to the legal framework set out in the Act is discussed in detail in the article: Cebera, A., *Podwójny reżim prawny doręczeń elektronicznych w postępowaniu administracyjnym jurysdykcyjnym w okresie przejściowym po nowelizacji k.p.a.*, in print.

[12] Pursuant to Article 158(1) of the Act, during the period from the day the Act enters into force until the day preceding the obligation to apply this Act, as referred to in Article 155, the applicable provisions are Article 39, Article 39[1], Article 40(4) and Article 46 (4)–(9) of the Act amended in Article 61 (the Code of Administrative Procedure) in the current wording, in relation to deliveries by public entities as referred to in Article 105 of the Act (public entities as referred to in the Act of 17 February 2005 on Computerisation of Public Entities) to non-public entities within the meaning of this Act, made in the ICT system of the public authority.

[13] It should also be emphasised that the electronic delivery under the Act, as opposed to the electronic delivery procedure regulated by the Code of Administrative Procedure as it existed prior to 5 October 2021, is universal in the sense that, as a rule, all public entities within the meaning of Article 2(6) of the Act, and therefore not only public administration bodies, but also, for example, courts or prosecutor's offices – will deliver correspondence with proof of mailing and receipt in a standardised manner, i.e., subject to the exceptions provided for in the Act, using the public service of registered electronic delivery to an electronic delivery address.

[14] In relation to provisions of the Act of 29 August 1997, The Tax Ordinance Act (Journal of Laws 2021, item 1540 as amended; referred to as: o.p.) Pietrasz, P., 'Zasady doręczania pism i wnoszenia podań drogą elektroniczną w postępowaniu podatkowym prowadzonym przez samorządowy organ podatkowy w tzw. okresie przejściowym', *Samorząd Terytorialny*, 2022, No. 5, p. 10.

[15] See also Kmieciak, Z., 'Polska kodyfikacja postępowania administracyjnego a technika prawotwórstwa', *Państwo i Prawo*, 2020, No. 6, p. 57; Cebera, A., Firlus, J.G., 'Jakość techniczno-legislacyjna regulacji kodeksowej na przykładzie przepisów normujących nakładanie lub

with the participation of public entities.[16] In view of the above, in order to apply both the Code of Administrative Procedure and the Act, we suggest that the latter be interpreted systemically, i.e. taking into account specific regulations, including those contained in acts regulating individual proceedings with the participation of public entities.[17]

2. INDIVIDUAL DELIVERY MODES

2.1. INDIVIDUAL DELIVERIES – OVERVIEW

It should be emphasised that there is no need to apply the delivery provisions if a given procedural act is not subject to externalisation, e.g. an internal official letter,[18] or where it should be externalised, but according to applicable law this does not have to be done in writing. It may be the case that a specific procedural act is communicated orally to a party or a participant in proceedings with the rights of a party (e.g. Article 109 § 2 of the Code of Administrative Procedure). Then, there is no delivery because this term is applicable only to documents. However, if delivery is needed, it is necessary to determine which provisions will apply – those relating to individual deliveries or public announcements (Articles 49–49b of the Code of Administrative Procedure). The amendment adjusting the delivery procedure to the provisions of the Act covers only the former, which is justified by its material scope covering the regulation of the model of the public service of registered electronic delivery and the public hybrid service.[19] Therefore, only individual deliveries will be analysed further, and only to the extent that the amendment affected their form or importance.

We should also note that the amendment did not modify the essence of the principle of officiality *per se*.[20] The authorities conducting administrative proceedings are still obliged to deliver letters to the parties and other participants ex officio, but with different emphasis on how they should perform this procedural activity.[21] The provisions

wymierzanie administracyjnych kar pieniężnych oraz tryb europejskiej współpracy administracyjnej', in: Jakimowicz, W., Krawczyk, M., Niżnik-Dobosz, I. (eds), *Fenomen prawa administracyjnego. Księga jubileuszowa Profesora Jana Zimmermanna*, Warszawa, 2019, passim.

[16] In this spirit, cf. Sejm Paper, No. 239, p. 10.

[17] In this spirit, Wilbrandt-Gotowicz, M., in: *Doręczenia*…, op. cit., p. 65.

[18] The term "official and non-official letter" is used in the sense proposed by M. Kamiński (Kamiński, M., in: Woś, T. (ed.), *Postępowanie administracyjne*, Warszawa, 2017, pp. 238 et seq.; see also Kamiński, M., in: Łaszczyca, G., Matan, A. (eds), *Czynności procesowe w postępowaniu administracyjnym ogólnym, Tom II, Część 3,* Warszawa, 2021, pp. 37–38).

[19] Hereinafter referred to in this study also in the abbreviated form: "PUH".

[20] For more on the officiality rule see: Łaszczyca, G., *Zasada oficjalności doręczeń i zasada jednego doręczenia. Podmioty doręczające,* in: Łaszczyca, G., Matan, A. (eds), *Czynności procesowe w postępowaniu administracyjnym ogólnym. Tom III. Część 3*, Warszawa, 2021, pp. 696–698.

[21] Similarly, Kościuk, D.J., 'Realizacja zasady oficjalności doręczeń w postepowaniach administracyjnych po wejściu w życie ustawy o doręczeniach elektronicznych', *Przegląd Ustawodawstwa Gospodarczego*, 2021, No. 8, p. 41.

of the Code of Administrative Procedure applicable before 5 October 2021 allow to distinguish basic and supplementary modes of individual deliveries, with a strictly defined hierarchy. When it is impossible to use the basic mode (e.g., to deliver to an electronic delivery address), it is necessary to use the 1st degree supplementary mode and deliver using the public hybrid service. Only when it is impossible to deliver using the latter, the authority is entitled to deliver documents using registered mail. In the new normative space, what used to be the default basic mode has, therefore, become the *ulima ratio* mode. Thus, it can be used only when it is impossible to use other delivery methods. In the next part of this analysis, we will discuss not only delivery methods, but also factual and legal reasons for withdrawing from delivery modes placed higher in the hierarchy in favour of lower degree procedures.

2.2. BASIC MODES OF INDIVIDUAL DELIVERIES

Article 39 § 1 of the Code of Administrative Procedure stipulates that the public administration body shall deliver letters to the electronic delivery address,[22] unless the delivery is made to an account in the body's ICT system or at the body's place of establishment. Under Article 39 of the Code of Administrative Procedure, the default delivery method in the basic mode is delivery based on the public service of registered electronic delivery (PURDE) to an electronic delivery address (ADE). Apart from the default method, in Article 39 of the Code of Administrative Procedure, the legislator provided two exceptions, which are additional delivery methods, i.e. delivery to an account in the authority's ICT system or at its place of establishment. The basic mode, however, does not provide for the possibility of delivering letters through employees or other authorised persons or bodies.

2.2.1. DELIVERY TO AN ELECTRONIC DELIVERY ADDRESS USING PURDE

In the new delivery procedure, the default delivery method in the basic mode is delivery to an electronic delivery address (ADE),[23] i.e. delivery using the public service of registered electronic delivery (PURDE). Article 2(8) of the Act stipulates that the public registered electronic delivery service is a registered electronic delivery service, as referred to in Article 3(36) of Regulation 910/2014, provided by a designated operator, and therefore a service that enables data to be sent between third parties electronically, providing evidence related to the processing of the transmitted data, including proof of sending and receiving the data,

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[22] Also referred to in this document as "ADE".

[23] Article 2(1) of the Act stipulates that the electronic delivery address is the electronic address referred to in Article 2(1) of the Act of 18 July 2002 on the Provision of Electronic Services (Journal of Laws of 2020, item 344), of an entity using a public service of registered electronic delivery or a public hybrid service or a qualified service of registered electronic delivery, ensuring clear identification of the sender or recipient of the data sent using these services.

and protecting the transmitted data from the risk of loss, theft, damage or any unauthorised alteration. A characteristic feature of the public electronic delivery service is the fact that this service is provided by a designated operator.[24] Registered electronic deliveries are trust services within the meaning of the eIDAS Regulation – Article 38(3) of the Act specifies that the designated operator providing public service of registered electronic delivery, ensures:

1) identification of the sender before sending the data;
2) identification of the addressee before delivering the data;
3) secure mailing and receipt of data with an advanced electronic seal in a way that prevents undetectable data changes;
4) notification sent to the sender and the addressee regarding any change in data necessary for the purpose of sending or receiving data; and
5) indication of the date and time of sending, receipt, and any change of the data, using a qualified timestamp.

For this reason, the additional reservation referred to in Article 39 § 1 of the Code of Administrative Procedure, stipulating that delivery to an electronic delivery address takes place "against receipt", is redundant because the elements that constitute its substantive components are carried out under PURDE, e.g. by indicating the date and time of receipt, using a qualified electronic timestamp.[25]

It should also be noted that PURDE delivery, despite ensuring identification of the sender and the addressee, does not release the authority from affixing the letter with an electronic signature or seal. The PURDE delivery concerns letters fixed in electronic form, to which, pursuant to Article 14 § 1a of the Code of Administrative Procedure, the authority shall affix a qualified electronic signature, trusted signature, personal signature or a qualified electronic seal with the indication in the body of the letter of the person affixing the seal, subject to Article 14 § 1b of the Code of Administrative Procedure.

The authority makes deliveries to ADE; however, it should be noted that this address not only does not constitute an e-mail address, but is also incompatible with ordinary mailboxes intended for creating and sending e-mails – therefore it is not possible to send an e-mail to ADE and vice versa. At the moment, accounts and inboxes on the ePUAP platform are also incompatible with ADE and PURDE (or qualified service), and therefore it is not possible to send messages from ePUAP accounts to ADE and vice versa.[26] To put it simply, these restrictions correspond to the fact that it is not possible to send an e-mail to a landline telephone number and vice versa.

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[24] A similar trust service within the meaning of the eIDAS Regulation is the qualified electronic delivery service (hereinafter also referred to in the abbreviated form: "qualified service"), which is provided by entities other than the designated operator. It should be emphasised, however, that public entities are obliged to make registered electronic deliveries with the participation of the designated operator, and thus use the public service of registered electronic delivery (PURDE), as confirmed, i.a., by Article 4(1) of the Act.

[25] See also Article 42 of the Act on Electronic Deliveries.

[26] The purpose of the changes is, among others, to shut down the ePUAP platform completely, which will be functioning only in the transitional period, i.e. during the period of sequential implementation of the provisions of the Act; this is related, among others, to the so-called rule

An electronic delivery address (ADE) is a string of characters intended for the implementation of registered electronic delivery service (i.e. PURDE and qualified service), which allows to receive and send correspondence by electronic means. This address has the following structure: AE:PL-XXXXX-XXXXX-YYYYY-ZZ, where 'AE' is the type of identifier, meaning an electronic address; 'PL' is the country code in accordance with the ISO 3166 standard; 'X' is a digit; 'Y' is a letter; and 'ZZ' are digits representing the checksum.[27]

Another issue to be considered is the need to determine where the authority conducting the case proceedings should obtain the ADE of the party or participant with the rights of a party. Article 39[1] of the Code of Administrative Procedure specifies that in the case of delivery in the manner referred to in Article 39 § 1, letters shall be delivered to the party or other participant in the proceedings to the electronic delivery address entered in the BAE[28] referred to in Article 25 of the Act, and in case of a representative – to the electronic delivery address indicated in the application.

Let us start with the first variant, i.e. the obligation to deliver letters to the address entered in the BAE. In order to satisfy the above criterion, before sending a letter in the case, the authority conducting the proceedings will be obliged to verify whether the letter addressee (e.g. a party to the proceedings) is in the database, and if that is the case, it is obliged to deliver the letter via PURDE to the address indicated in the database. It should be noted that by entering an electronic delivery address into the BAE, a given entity (e.g. a party) submits the so-called digital declaration.[29] Article 7 of the Act stipulates that entering an electronic delivery address into the BAE is tantamount to a request for delivery of correspondence by public entities to this address. Moreover, on 5 October 2021, the legislator changed Article 41 § 1 of the Code of Administrative Procedure which previously stated that: "In the course of the proceedings, the parties and their representatives and attorneys are obliged to notify the public administration body of any change of their address, including electronic address", by removing the phrase "including electronic address", considering it redundant.[30] In other words, before sending an electronic document, the public entity will verify whether the addressee wishes to receive correspondence in electronic form.[31] In the draft amendment

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of equivalent effects from Article 147 of the Act. According to Article 148(1) of the Act, the correspondence collected in ePUAP is available to the owner of the account or the inbox in ePUAP in a way that allows to view, copy and delete it until 30 September 2029. After this deadline, the minister competent for computerisation removes user accounts and electronic inboxes with their content from ePUAP (Article 148(2) of the Act). This date is a derivative of the last date for updating the obligation to apply the Act (cf. Article 155 of the Act).

[27] Address example: AE:PL-12345-67890-ABCDE-12, source: https://www.gov.pl/web/e-doreczenia/pytania-i-odpowiedzi, accessed on 5 November 2022.

[28] The database of electronic delivery addresses, also referred to as: "BAE".

[29] Wilbrandt-Gotowicz, M., in: *Doręczenia…*, op. cit., p. 143.

[30] However, it should be emphasised that the above assumption that the obligation to inform about a change of electronic address is redundant does not take into account the several-year transitional periods referred to in Article 155 of the Act, so it is difficult to consider it to be justified.

[31] Sejm Paper No. 239, p. 32.

explanatory memorandum, the legislator explains that checking and finding ADE should not be burdensome for public entities. He further underlines that a similar solution exists in health insurance, where it is required to verify each time that a patient using health services of the National Health Fund has health insurance, not only in the case of a single doctor's appointment, but also on a daily basis if the patient is admitted to the hospital.[32] However, given the fact that in jurisdictional proceedings the authority may need to deliver one letter to several, several dozen or even several hundred entities,[33] one may doubt the above assurances.

One of the advantages of this solution, however, is that the database is integrated with other databases and registers, such as the PESEL register, which in the long run may eliminate underlying causes of a number of deficiencies in qualified administrative decisions.[34] Article 27 of the Act stipulates that in the event of a change in the PESEL register regarding: PESEL number, first or last name of a non-public entity being a natural person and the administrator of the delivery box, the data is automatically updated in the BAE. In parallel, if the death of a natural person or a delivery box administrator has been recorded in the PESEL register, this information is automatically sent to the BAE. Similar solutions have been designed for the National Court Register (Article 31(1) of the Act) and the Central Business Register and Information Service (Article 31(2) of the Act).

However, lack of any address in the database does not lead to an automatic transition to the 1st and 2nd degree supplementary delivery modes, including the public hybrid service (PUH). In the case of a specific group of entities which are not obliged to have ADE in the BAE (entities other than those indicated in Article 9 of the Act), it is possible to have an ADE without entering it into the database, and thus without submitting the so-called digital declaration referred to in Article 7 of the Act. This address must then be associated with the qualified registered electronic delivery service (qualified service) and not the service provided by the designated operator (PURDE). Creating ADE associated with PURDE is connected with an automatic entry in the database, and consequently with the submission of a digital declaration. Thus, in this situational variant, the authority makes a delivery to the electronic delivery address associated with the qualified service of registered electronic delivery used to submit the application.

It should also be noted that in the case of a representative, the authority delivers documents to the electronic delivery address indicated in the application. Therefore, the above is an exception to the rule of delivery of documents to the address entered in the database because in this regard priority is given to the ADE indicated in the application,[35] even if the entity also has an address in the BAE. This solution, despite some controversies, seems to be justified. While, as a rule, pursuant to Article 32(1) of the Act, only one ADE may

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32 Sejm Paper No. 239, p. 32.

33 Unless the authority has legal grounds and will deliver documents by public announcement, and therefore will not deliver letters individually under Article 39 of the Code of Administrative Procedure.

34 For example, if the addressee is a deceased natural person.

35 Wilbrandt-Gotowicz, M., in: *Doręczenia…*, op. cit., p. 450.

be entered in the database, there are no legal obstacles to having several addresses not listed in the BAE. Moreover, the entities enumerated in Article 32(2) of the Act[36] (e.g. an attorney or legal adviser) enter the electronic delivery address for the purposes of business activity, professional activity or official duties in the database, regardless of the ADE in the BAE unrelated to business activity, professional activity or official duties. This means that the listed entities may have more than one address in the database, which could generate a number of errors when the authority marks a specific address.

Interpretation dilemmas arise in the case where the representative does not provide this address in the application. According to the first position presented by M. Wilbrandt-Gotowicz, delivery should then be made to the address from which the application was sent, and if the application was submitted in paper form, to the ADE entered in the BAE.[37] Agreeing with the above, it should only be added that in the absence of ADE in the database, correspondence should be delivered to the representative in accordance with the supplementary procedures of the first and second degree[38] – because not all representatives are obliged to dispose of an ADE, including an electronic delivery address entered in the BAE. However, P. Przybysz has a different view on this issue, pointing out that the entity obliged under the Act to have an ADE provides this address when taking the first action in the case, and if this address is not provided, then the application has a formal defect, and the entity is subject to Article 64 § 2 of the Code of Administrative Procedure.[39] However, it should be underlined that the entities indicated in Article 9(1) of the Act are required not only to have an ADE, but also to have an address entered in the BAE. Requesting these entities to supply the address would therefore constitute an unjustified procedural formalism, as the authority has access to the BAE. In addition, there is no provision that would require representative to provide ADE with their first procedural act, even when he/she is required to have an address entered in the database. It is worth emphasising that formal deficiencies of the application within the meaning of Article 64 of the Code of Administrative Procedure may only occur when specific requirements are stated explicitly in generally applicable law.[40]

As far as determining the delivery date is concerned, Article 39^4 of the Code of Administrative Procedure should be noted here, which stipulates that in the case of a registered electronic delivery Article 42 of the Act applies to determine the delivery date. This means that in the case of delivery of correspondence by a public entity using PURDE:

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[36] I.e. a natural person who is an entrepreneur entered in CEIDG and an advocate, legal advisor, tax advisor, restructuring advisor, notary, patent attorney, attorney at the General Prosecutor's Office of the Republic of Poland, and court bailiff.

[37] Wilbrandt-Gotowicz, M., in: *Doręczenia…*, op. cit., p. 450.

[38] Ibidem.

[39] Przybysz, P., *Kodeks postępowania administracyjnego. Komentarz aktualizowany*, LEX/el., 2022, Article 39(1), Lex/el, nb 4.

[40] See judgment of the Voivodship Administrative Court in Kraków of 16 October 2019, III SAB/Kr 142/19, LEX No. 2738920.

1) Delivery to a non-public entity takes place at the time of receipt of correspondence indicated in the proof of receipt, i.e. after receipt of correspondence sent to the ADE of the non-public entity. "Receipt of an electronic document"[41] is understood as any action of the addressee who has an electronic delivery address which allows them to dispose of the document sent to this address and read its content (Article 41(2) of the Act). On the other hand, for situations when the non-public entity does not collect the document, the legislator uses fictitious delivery,[42] because the correspondence is deemed to have been delivered on the day following the 14-day period from the date indicated in the confirmation of receipt of the correspondence to the electronic delivery address of the non-public entity. The receipt of an electronic document at the electronic delivery address is understood as existence of technical conditions enabling the addressee to receive the document (Article 41(3) of the Act). According to the literature, the presumption of delivery may be rebutted if the addressee proves that, despite receiving the letter, they had no objective possibility to read it for reasons beyond their control.[43] It will be the case if, for instance, the file is corrupted, and it is not possible to reproduce its content.
2) Delivery to the public entity at the time indicated in the proof of receipt: receipt of correspondence, i.e. after receipt of correspondence to the electronic delivery address of the public entity within the meaning of Article 41(3) of the Act.

The above results in a different approach to public and non-public entities in determining the moment of delivery of a given letter.[44] While in relation to the former it is the moment of receipt of the letter by ADE, in relation to the public entity, apart from its receipt by ADE, such entity is required to collect it, unless fictitious delivery is applicable under Article 41(1)(3) of the Act.

In addition to the above, it should be added that failure to perform PURDE constitutes failure of the addressee to familiarise himself/herself with the contents of the data after 24 hours, confirmed by mailing proof, for reasons attributable to the designated operator (Article 55(4) of the Act).

2.2.2. DELIVERY TO THE AUTHORITY'S ICT SYSTEM ACCOUNT

Following amendment of 5 October 2021, another amendment to Article 39 § 1 of the Code of Administrative Procedure entered into force on 7 July 2022.[45] Its main purpose was, *expressis verbis*, to provide for the possibility to make deliveries

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[41] The concept of a "document recorded in electronic form" used by the Code of Administrative Procedure is included in the scope of the term "electronic document" used in the Code. For more on electronic documents see Sejm Paper No. 239, p. 89, and Biskup, R., Ganczarz, N., 'Komunikacja elektroniczna w postępowaniu administracyjnym', *Państwo i Prawo*, 2008, No. 1, p. 63.

[42] Czaplicki, K., Świtała, K., in: Wilbrandt-Gotowicz, M. (ed.), *Doręczenia elektroniczne. Komentarz*, Warszawa, 2021, p. 333.

[43] Czaplicki, K., Świtała, K., in: *Doręczenia*…, op. cit., p. 334.

[44] Ibidem, p. 333.

[45] Pursuant to Article 1 of the Act of 8 June, 2022 amending certain acts to automate the handling of certain matters by the National Revenue Administration (Journal of Laws of 2022, item 1301).

to accounts in ICT systems. The draft amendment explanatory memorandum underlined that the main purpose was to automatise certain procedures of the National Revenue Administration (KAS) using KAS ICT systems (e-Tax Office).[46]

The normative change was justified i.a. by Article 3(1)(d) of the Act, which states that the Act on Electronic Deliveries does not apply (and therefore, deliveries using PURDE and PUH do not apply) if separate provisions envisage delivery of correspondence using technical and organisational solutions other than the electronic delivery address, in particular to accounts in ICT systems. The draft amendment explanatory memorandum explains that due to the conditional nature of the exclusion referred to in Article 3(1) of the Act, it is applicable after determining that there is a separate technical solution which could be used to deliver documents under various procedures to a person using this solution.[47] In other words, the exclusion in question is open – it refers to specific provisions that establish technical and organisational solutions enabling exchange of correspondence, the result of which is delivery to accounts in ICT systems.[48] If there are no specific provisions, there is no exclusion from the Act and deliveries using PURDE or PUH apply. In order to avoid doubts, in Article 39 § 1 of the Code of Administrative Procedure, it was expressly stipulated that delivery is possible to an account in the ICT system. In the presented situational variant, as a rule, we do not apply the provisions on electronic deliveries to make deliveries in this system. The exclusion referred to in Article 3(1)(d) of the Act is comprehensive, which means that the entire Act is not applicable.[49]

Examples of an ICT system[50] include the e-Tax Office mentioned in the explanatory memorandum for the amendment but, most importantly, the electronic platform for public administration services (ePUAP) referred to in Article 3(13) of the Act, which is defined as an ICT system for public institutions to provide services through a single Internet access point.[51] Therefore, the above normative change raises serious doubts. Given the fact that not only the e-Office, but also the ePUAP platform is an ICT system providing public services, does the new provision of Article 39 §

[46] Sejm Paper No. 2138, p. 1 et seq.

[47] Sejm Paper No. 2138, p. 3.

[48] Wilbrandt-Gotowicz, M., in: *Doręczenia…*, op. cit., p. 124.

[49] Ibidem, p. 116. Therefore, it is impossible to agree with the statement expressed in the explanatory memorandum of the draft amendment that: "Delivery of letters to ICT system accounts, by its very nature, does not actually cause a general exclusion of the application of the provisions of the Act of November 18, 2020 on Electronic Deliveries, but rather it affects the hierarchy of deliveries specified in Article 39 § 1 of the Code of Administrative Procedure if relevant conditions (opportunities) arise to make such deliveries" (Sejm Paper No. 2138, p. 3). If the purpose of the legislator was actually to make a specific exemption, and not a comprehensive one, they should do so in the form of exclusions referred to in Article 6 of the Act, defining its objective and subjective scope.

[50] Article 3(3) of the Act on Computerisation of Activities of Entities Performing Public Tasks of 17 February 2005 (consolidated text, Journal of Laws of 2021, item 2070; hereinafter referred to as: "UOI Act") stipulates that an ICT system is a group of IT equipment and software ensuring the processing, storage, as well as sending and receiving data via telecommunications networks using a terminal device appropriate for a given type of telecommunications network within the meaning of the Act of 16 July 2004 – Telecommunications Act.

[51] See enumeration of other examples of ICT systems prepared by Wilbrandt-Gotowicz, M., in: *Doręczenia…*, op. cit., pp. 125–127.

1 of the Code of Administrative Procedure mean that even after updating the obligation to make deliveries using PURDE and PUH until September 30, 2029 (Article 148(1) of the Act), i.e. until the last day of operation of the ePUAP platform – public authorities will be able to use this communication channel, given the exclusion referred to in Article 3(1)(d) of the Act? If this is the case, and the literal content of the provisions referred to above seems to prove it, then the actual implementation of electronic deliveries using PURDE will be postponed until nearly the end of 2029. Was this really the purpose of the change made by the legislator in connection with the implementation of the E-Tax Office?

Another issue related to possible deliveries to accounts in the ICT system is the mismatched scope of Article 39^4 of the Code of Administrative Procedure. This provision stipulates that in the case of deliveries referred to in Article 39 § 1, Article 42 of the Act is applied to determine the delivery date.[52] However, as we already pointed out, pursuant to Article 3(1)(d), the Act does not apply to deliveries to accounts in ICT systems.

2.2.3. DELIVERY AT THE AUTHORITY'S PLACE OF ESTABLISHMENT

Delivery at the authority's place of establishment may take place when the entity authorised to collect the letter is at of the authority's place of establishment.[53] This delivery method is closely related to the form of the procedural act, therefore only paper documents may be delivered using this method. It should also be noted that, in the basic mode, the legislator did not provide for the possibility of delivery outside the authority's place of establishment, made by its employees or by other authorised persons or authorities.

2.3. SUPPLEMENTARY METHODS OF INDIVIDUAL DELIVERIES – 1ST AND 2ND DEGREE

It will not always be possible to use basic delivery modes due to factual limitations (e.g. the addressee does not have an ADE, there are technical limitations related to the file size and format[54]) or legal limitations (e.g. the addressee is imprisoned, the letter

[52] This problem is also pointed out by Sibiga, G., 'Jak nie informatyzować administracji', *Rzeczpospolita*, 17 July 2022

[53] Article 42 § 2 of the Code of Administrative Procedure states that letters may be delivered to natural persons also at the premises of the public administration body, unless special provisions provide otherwise. Cf. Gołęba, A., 'Komentarz do art. 42', in: Knysiak-Sudyka, H. (ed.), *Kodeks postępowania administracyjnego. Komentarz*, Warszawa, Lex/el., 2019, marginal ref. 4.

[54] Preparation of a letter recorded in paper form by the authority does not constitute by itself a reason to withdraw from delivery to ADE. The form of the procedural act should be correlated with the delivery method required by law. It should be emphasised that Article 4 of the Act in conjunction with Article 155 of the Act establishes a legal obligation towards public entities, not a right: "The public entity shall deliver correspondence with proof of mailing or receipt using the public service of *registered electronic delivery* to the electronic delivery *address* listed in the electronic address database." A different interpretation regarding provisions of the Code of Administrative Procedure and the Act would mean that the authority may waive this

contains classified information). The exclusions are presented in section 3 below. At this stage of our analysis, it should be highlighted that when it is not possible to deliver correspondence in the basic mode or there is no legally effective obligation to do so (via methods referred to in Article 39 § 1 of the Code of Administrative Procedure), the public administration body should consider whether supplementary delivery methods apply under Article 39 § 2 and 3 of the Code of Administrative Procedure. The legislator has envisaged two groups of supplementary modes, where the second-degree supplementary mode is applicable only when delivery in the first-degree supplementary mode is not possible. These provisions should, therefore, be applied in a specific order.

Article 39 § 2 of the Code of Administrative Procedure, which regulates the 1st degree supplementary mode, stipulates that if delivery is not possible, as referred to in Article 39 § 1 of the Code of Administrative Procedure (in the basic mode), the public administration body delivers letters with proof of receipt:
(a) using a public hybrid service;
(b) by its employees or by other authorised persons or bodies.

The second-degree supplementary mode regulated under Article 39 § 3 of the Code of Administrative Procedure is applicable only when it is not possible to use the basic modes and delivery via a public hybrid service. This is the case, for example, when it is necessary to send maps larger than A4.[55] In the described situational variant, depending on the choice of the authority, delivery is then made either by registered mail[56] or by its employees or by other authorised persons or bodies. The main difference between the 1st and 2nd degree supplementary mode, therefore, comes down to whether the delivery takes place in the form of a public hybrid service or registered mail, hence they can be referred to as "default". Let us note that the possibility of delivery by employees or other authorised persons or authorities is provided for in both mode I and mode II, which confirms their accessory nature.[57]

Delivery with the use of a "traditional" registered letter has been and will be the basic default mode, until updating the obligation to use the new delivery procedure by a given public entity. Hence, this procedure is not only well known in practice, but has also been described exhaustively in the literature.[58]

Therefore, we can immediately move on to the closer characteristics of PUH. Article 2(7) of the Act defines it as a postal service, referred to in Article 2(1)(3) of the Postal Law, provided by the designated operator, if the sender of the letter

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obligation by drawing up letters only in paper form. Differently: Wróbel, A., *Komentarz do Kodeksu Postępowania Administracyjnego, Komentarz do art. 39*, Lex/el., 2022, marginal ref. 10.

[55] See Regulations for the provision of public registered electronic delivery services and public hybrid services Chapter III § 5 et seq. (https://bip.poczta-polska.pl/wp-content/uploads/Regulamin-świadczenia-PURDE-i-PUH-v.1.0.pdf; accessed on 12 November 2022).

[56] I.e. the letter referred to in Article 3(23) of the Act of 23 November 2012 – Postal Act (Journal of Laws of 2022, item 896 and 1933), hereinafter "the Postal Law".

[57] In Article 39(2) and (3), the legislator did not use the word "unless", as they did in Article 39 § 1 of the Code of Administrative Procedure.

[58] See Golęba, A., *Komentarz do art. 39*, in: Knysiak-Sudyka, H. (ed.), *Kodeks postępowania administracyjnego. Komentarz*, Warszawa, *Lex/el*, 2019.

is a public entity. Article 2(1)(3) of the Postal Law specifies that postal service constitutes a domestic or international commercial sending of postal items by means of electronic communication, if at the stage of receiving, transporting or delivering an information message it takes the physical form of a letter item. The above shows that the PUH service is characterised by three constitutive elements:

(a) it is a postal service provided only by the designated operator (Article 45(1) of the Act);
(b) only a public institution may be the sender; and
(c) the service consists in converting the information message received by means of electronic communication into the form of a "traditional" letter. In other words, the designated operator converts an electronic document sent by a public entity from an electronic delivery address into a letter in order to deliver this correspondence to the addressee (Article 46(1) of the Act).

The Act regulates the basic rules of providing Public Hybrid Services (PUH). The most important rules are as follows:

(a) confidentiality rule – conversion of electronic documents should be automatic, ensuring secrecy of correspondence[59] at every stage of the service (Article 46(1) of the Act). The draft amendment explanatory memorandum underlined that all transformation activities would be carried out while ensuring secrecy of correspondence;[60]
(b) diligence rule – as part of the conversion referred to in Article 46(1), the designated operator shall ensure that the electronic document is printed with due diligence and technical quality, in accordance with the minimum requirements specified on the basis of Article 48, allowing the addressee to read the content of their correspondence without the need to verify this content with the electronic document (Article 47(1)(1) of the Act);
(c) compliance rule – as part of the conversion referred to in Article 46(1), the designated operator shall ensure compliance of the content of the printed electronic document and the document containing the result of verification of the electronic signature or seal with the content of the corresponding electronic documents (Article 47(1)(12) of the Act);
(d) rule of equal legal force – printouts of documents referred to in Section 1 have the power equal to the power of the documents from which they were made (Article 47(2) of the Act);
(e) regularity rule – obligation to provide PUH services with a frequency ensuring delivery of letters at least on every working day and not less than 5 days a week, except public holidays (Article 45(2)(5) of the Act);
(f) accountability rule – obligation to provide PUH services in a way that ensures that the sender of the electronic document (i.e. a public entity) obtains a proof of receipt of the registered letter, as referred to in Article 3(23) of the Postal Law (Article 45(2)(6) of the Act). In addition, the designated operator provides confirmation of the date and time of the electronic document conversion (Article 46(2) of the Act). The designated operator sends the letter referred to in Section 1 with

59 Postal secrecy is regulated in Article 41 of the Postal Law.
60 Sejm Paper No. 239, p. 21.

an attached printout of the document containing the result of the electronic signature or seal verification or proof that the integrity and origin of the electronic document from the public entity have been ensured via electronic identification means (Article 46(3) of the Act).

It results from the above that the final subject of a PUH delivery, pursuant to Article 39 § 2 of the Code of Administrative Procedure, is *de facto* a printout of an electronic document and a document containing the result of the electronic signature or seal verification or proof that the integrity and origin of the electronic document received from a public entity have been ensured via electronic identification means. A printout from an electronic document is not the original of the letter, as it was in the form of a letter recorded in electronic form, and the printout takes the form of a letter recorded in paper form. For this reason, the legislator decided that the legal force of the printout referred to in Article 47(1) of the Act is equal to the force of the documents from which they were made[61] (Article 47(2) of the Act). In the literature, it is pointed out that the legislator did not use the construction of a rebuttable legal presumption,[62] and therefore the only way to obtain legal protection in the event of a discrepancy between the electronic document and the delivered printouts is to demonstrate that there has been non-performance[63] or improper performance[64] of the PUH.

At this point, it should be emphasised that not all electronic documents can be transformed into letters due to technical reasons, i.e.:

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[61] This solution is similar to delivering a printout of a letter pursuant to Article 39[3] of the Code of Administrative Procedure, though the conversion is done by the public administration body conducting the proceedings rather than by the designated operator. Cf. Sibiga, G., '»Odwrócona cyfryzacja« w postępowaniu administracyjnym ogólnym po nowelizacji Kodeksu postępowania administracyjnego z 16.4.2020 r.', *Monitor Prawniczy*, 2020, No. 18, passim; Łaszczyca, G., 'Przedmiot doręczeń', in: Łaszczyca, G., Matan, A. (eds), *Czynności procesowe w postępowaniu administracyjnym ogólnym. Tom III. Część 3,* Warszawa, 2021, p. 699.

[62] Czaplicki, K., Świtała, K., in: *Doręczenia…*, op. cit., p. 350.

[63] The Regulation of the Minister of State Assets of 9 August 2021 on the implementation of the public hybrid service in domestic trading (Journal of Laws of 2021, item 1503; hereinafter referred to as the "Regulation on the implementation of PUH") stipulates in § 10 that: "The public hybrid service is considered non-performed if:

(1) the date of delivery, notification of delivery attempt or refusal to accept a letter registered under the public hybrid service included in the electronic document referred to in § 6 is later than 14 days from the date of sending this item, as confirmed by the electronic document referred to in § 5 – subject to Article 55(3) of the Act;
(2) the registered letter delivered under the public hybrid service has been lost.' It is worth noting that Article 55(3) of the Act stipulates that the period referred to in Article 55(2) of the Act (which is repeated in Article 10(1) of the regulation) does not include public holidays.

[64] In Article 11 of the Regulation on the implementation of PUH, it is specified that: "The public hybrid service is considered to be improperly performed if:

(1) the printout of an electronic document delivered to the addressee as part of the public hybrid service does not meet the conditions set out in Article 47(1) of the Act;
(2) the printout of the document referred to in Article 46(3) of the Act has not been attached to the printout of the electronic document delivered under the public hybrid service, or this printout has not been made with due diligence and technical quality enabling the addressee to read its content;
(3) the document referred to in Article 6 has not been placed in the sender's delivery box."

(a) due to their form, in particular when it is a sound or audiovisual recording, 3D graphics, database, software (Article 49(1)(1) of the Act); or
(b) due to other reasons, if it is impossible to read the entire content of the document after conversion (Article 49(1)(2) of the Act).

If the electronic document cannot be converted, the designated operator immediately informs the sender about this fact using the electronic delivery address (Article 49(2) of the Act). In this situation, the authority conducting the proceedings in the case is obliged to use the 2nd degree supplementary modes, including in particular the traditional registered letter referred to in Article 3(23) of the Postal Law.

Article 46(4) of the Act specifies that unless separate provisions provide otherwise, the date on which correspondence was sent using the public hybrid service is the date of receipt of the electronic document by the designated operator. The designated operator immediately issues an automatic proof of correspondence receipt.

3. EXCLUSIONS

The legislator provided for a number of cases in which the authority is entitled or obliged to withdraw from the basic procedures and/or specific variants of the first- and second-degree supplementary modes. The analysed available normative material allows to distinguish three groups of exclusions, which are discussed below.

3.1. EXCLUSIONS REGARDING PURDE AND PUH DELIVERIES

Exclusions regarding PURDE and PUH deliveries may be mandatory or optional. As far as mandatory exclusions are concerned, the analysis of the available normative material shows that two basic groups of provisions can be distinguished, i.e. general exclusion from the application of the Act in its entirety (Article 3 of the Act) and exclusion from the application of the provisions relating to PURDE and PUH (Article 6 of the Act) while the other provisions of the Act remain applicable.

3.1.1. GENERAL (COMPREHENSIVE) EXCLUSIONS FROM APPLICATION OF THE ACT (ARTICLE 3 OF THE ACT)

Article 3 of the Act contains a list of exclusions from the scope of the Act. They are of a comprehensive nature, i.e. they refer to non-application of the provisions of the Act in its entirety, and not only its parts.[65] Therefore, general exemptions consist in a complete exclusion from the scope of the Act, resulting not only in the inability to use registered electronic deliveries and public hybrid service, but also in the lack of the obligation to fulfil other requirements provided for in the Act. Considering subject of this study related to administrative jurisdictional proceedings regulated

[65] Wilbrandt-Gotowicz, M., in: *Doręczenia…*, op. cit., p. 116.

by the provisions of the Code of Administrative Procedure, two of these exemptions should be mentioned in particular:

(a) Article 3(1)(a) of the Act, which states that: "the Act shall not apply to delivery of correspondence: containing classified information".[66] Referring the above to the issue of administrative jurisdiction, it should be noted that the authority conducting the proceedings in the case will not be able to use PURDE and PUH when the document to be delivered contains classified information; and
(b) Article 3(1)(d) of the Act, which states that: "the Act shall not apply to delivery of correspondence, if separate provisions provide for delivery of correspondence using technical and organisational solutions other than the electronic delivery address, in particular to accounts in ICT systems used for court proceedings or document repositories".[67]

3.1.2. EXCLUSION FROM APPLICATION OF THE PROVISIONS RELATING TO PURDE AND PUH (ARTICLE 6 OF THE ACT)

The exclusion referred to in Article 6 of the Act is not comprehensive. It covers only Articles 4 and 5 of the Act, and therefore excludes the application of the provisions governing PURDE and PUH deliveries rather than the entire Act. Pursuant to Article 6 of the Act, the provisions of Articles 4 and 5 of the Act, which regulate PURDE and PUH, do not apply if:

1) The entity requests delivery of the original document drawn up in paper form.
2) Correspondence cannot be delivered to an *electronic delivery* address or using a public hybrid service because:
   (a) it is not possible to prepare and submit a document in electronic form due to separate provisions;
   (b) it is not possible to use a public hybrid service due to separate provisions;
   (c) it is necessary to deliver a non-transformable document fixed in non-electronic form or an item;
   (d) important public interest is involved, related in particular to national security, defence or public order;
   (e) there are technical and organisational limitations resulting from the volume of correspondence and other reasons of technical nature.[68]

Importantly, the existence of the conditions listed above is assessed by the sender (Article 6(2) of the Act), and therefore in administrative jurisdiction – by the authority conducting the proceedings in the case. It is also noteworthy that the legislator

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[66] See Act of 5 August 2010 on the Protection of Classified Information (consolidated text, Journal of Laws of 2019, item 742).

[67] See Section 2.2.II *Delivery to an ICT system account of the authority* above.

[68] The above corresponds to Article 49(1) of the Act which states that: "The designated operator shall not transform an electronic document into a letter if:
(1) the document cannot be converted into a paper form due to its form, in particular when it is a sound, audiovisual recording, 3D graphics, database, software;
(2) due to other reasons, after the conversion, it would not be possible to read the entire content of the document".

reiterated the premise of item (d) in Article 39 § 4 of the Code of Administrative Procedure, where an important public interest, in particular national security, defence or public order, does not absolutely exclude the possibility of using PURDE and PUH, but only makes it possible to withdraw from using them. Therefore, there is a need to assess the mutual relationship between the Act and the Code of Administrative Procedure. It seems that the provisions regulating PURDE and PUH in the Code of Administrative Procedure are *lex specialis* in relation to the model regulations provided for in the Act,[69] hence they will have to be given priority in this regard.

3) Separate provisions provide for the possibility of making deliveries using methods other than the public service of registered *electronic delivery* or public hybrid service, in particular through employees, and the sender, in specific circumstances, considers a different delivery method to be more effective. Referring the above to administrative jurisdictional proceedings, it should be emphasised that the separate provisions referred to above can be found not only in Articles 39 § 2 and 3 and Article 39[3] but also in Article 39 § 1 of the Code of Administrative Procedure to the extent that the letter may be delivered at the authority's place of establishment.[70] Therefore, it remains to be considered how to interpret the phrase: "in specific circumstances, considers a different delivery method to be more effective". It seems that it refers to specific circumstances arising from a particular case, and therefore not general exclusions but individual *in concreto* exclusions. Therefore, a situational variant can be considered in which the basic default mode, i.e. delivery using PURDE, would be possible because the addressee has ADE, while according to the authority, due to specific circumstances, it is more efficient to have it delivered by its employees or by other authorised persons or bodies, as it would be quicker.[71]

As already mentioned, the inclusions in the scope of making deliveries using PURDE and PUH may be obligatory or optional. With regard to the latter, it is worth mentioning Article 39 § 4 of the Code of Administrative Procedure, which stipulates that:

(a) in the case of delivery of a decision which has been made immediately enforceable by the public administration authority, or a decision that is immediately enforceable by law;
(b) in personal matters of officers and professional soldiers;
(c) due to an important public interest, in particular national security, defence or public order;

– the public administration body may deliver the decision in the manner specified in Article 39 § 3 of the Code of Administrative Procedure, i.e. by registered mail, referred to in Article 3(23) of the Postal Law or through its employees or other

[69] In this spirit, cf. Sejm Paper No. 239, p. 10.
[70] Similarly, Wilbrandt-Gotowicz, M., in: *Doręczenia…*, op. cit., p. 142.
[71] Cf. in this spirit Wilbrandt-Gotowicz, M. (in: *Doręczenia…*, op. cit., p. 142), who explains that in the circumstances of a particular case, delivery by employees or other authorised persons or bodies may be faster than with the use of the PUH service, which proves the effectiveness of the former.

authorised persons or bodies. It should be stressed that the above is a right and not an obligation to withdraw from delivery using PURDE and PUH, hence we refer to this exclusion as optional.

3.2. EXCLUSION REGARDING THE POSSIBILITY OF PURDE DELIVERIES

The analysis of the normative material shows that it is possible to distinguish situations where the public entity will not be able to make a delivery using PURDE. This concerns in particular Article 5 of the Act, which states that the public entity delivers correspondence with confirmation of mailing or receipt using PUH, not only when it is not possible to deliver correspondence to the electronic delivery address in accordance with Article 4 of the Act, but also when the entity knows that the natural person with an electronic delivery address is imprisoned. This means that when the authority conducting the proceedings obtains information that a party to the proceedings has been imprisoned, it is obliged to make deliveries without PURDE, even though that party has an address for electronic deliveries. The above exclusion is mandatory.

3.3. EXCLUSIONS REGARDING PUH DELIVERIES

The application of the new delivery procedure does not always mean that the authority will be obliged to use PURDE and PUH in jurisdictional proceedings. The legislator provided for an additional intertemporal regulation in Article 155(6) of the Act, which stipulates that local government units and their associations as well as metropolitan associations and local government budgetary establishments are obliged to apply the provisions of the Act when delivering correspondence using PURDE from the date specified in the communication issued on the basis of Article 155(10) of the Act, and for PUH deliveries – from 1 October 2029. This means that if the authority conducting jurisdictional administrative proceedings is, for instance, a local government unit, then even if it applies the new electronic delivery procedure, it will not be obliged to apply PUH before 1 October 2029 and will have the right to apply the 2nd degree supplementary mode immediately, including in particular delivery using registered mail. The above exclusion is optional.

4. CONCLUSION

One of the purposes of the Act was to address the fragmentation of regulations concerning electronic communication, so by providing model solutions in the field of communication with the participation of public entities the Act was supposed to reverse the phenomenon referred to as fragmentary electronisation.[72] However,

[72] Wilbrandt-Gotowicz, M., in: *Doręczenia…*, op. cit., p. 34.

the method of implementing new standards in the field of the electronic delivery procedure, subsequent changes regarding new obligations to apply the Act, including in particular the latest amendments to the Code of Administrative Procedure of 7 July 2022, have not been positively reviewed in the literature.[73] The analysis of the new procedure for individual deliveries in jurisdictional administrative proceedings, including the interpretative dilemmas that have emerged, and often legislative shortcomings or even legislative errors, seems to show that the values of good governance, which are undoubtedly the purpose of the processes of computerisation of public administration in Poland, have not been achieved.[74] The quality of the legislation and its instability[75] seem to support the idea that the real barriers to these processes are, in addition to technical and organisational deficiencies, legal regulations *per se*.[76]

The amendment of Article 39 § 1 of the Code of Administrative Procedure regarding possible deliveries to accounts in ICT systems, and the resulting – perhaps not fully intended – exclusion of the Act, suggests that the legislator has taken a big step back in terms of unifying the rules of communication with the participation of public entities, and has even jeopardised the purpose of the current reform of electronic deliveries.[77]

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