ISSN 1897-5577
ONLINE ISSN 2545-0271

Ius Novum

Vol. 18
Number 1
2024

JANUARY–MARCH

ENGLISH EDITION

QUARTERLY OF THE FACULTY OF LAW AND ADMINISTRATION
OF LAZARSKI UNIVERSITY

ISSN 1897-5577
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DOI: 10.26399/iusnovum.v18.1.eng.2024

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OF LAZARSKI UNIVERSITY

Warsaw 2024

The texts of articles in Polish and in English are available on:
https://iusnovum.lazarski.pl/ius-novum-online/archiwum/ and https://sciendo.com/pl/journal/IN

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ADDITIONAL INFORMATION

In 2019 the *Ius Novum* quarterly, following the verification procedure and obtaining a positive parametric grade, was placed on the list of journals scored by the Ministry of Science with **100 points** awarded for a publication in the quarterly (the Communication of the Minister of Science of 5 January 2024 about the list of scientific journals and reviewed materials from international conferences, item 30019, no. 200245).

Further information on this topic are available at: https://www.gov.pl/web/edukacja-i-nauka/nowy-rozszerzony-wykaz-czasopism-naukowych-i-recenzowanych-materialow-z-konferencji-miedzynarodowych

ISSN 1897-5577, online ISSN 2545-0271

LAZARSKI UNIVERSITY PRESS
02-662 Warsaw, ul. Świeradowska 43
tel. +48 22 54 35 450
www.lazarski.pl
e-mail: wydawnictwo@lazarski.edu.pl

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Ius Novum

2024, vol. 18, no. 1, pp. 1–12

CRIMINAL LAW ASSESSMENTS OF THE EXPLOITATION OF PROSTITUTION PRACTISED BY HUMANOID ROBOTS

JERZY LACHOWSKI*

DOI 10.2478/in-2024-0001

Abstract

The subject of this study is the criminal law issue of exploiting prostitution practised by humanoid robots. Interest in this issue stems from two main reasons. Firstly, the development of new technologies, including artificial intelligence capable of self-education, analysis of the surrounding reality, and decision-making necessitates the consideration of its legal subjectivity. Secondly, the emergence of brothels employing humanoid robots prompts reflection on the criminal responsibility of those who benefit from the prostitution facilitated by them. This article aims to highlight the phenomenon of using humanoid robots in prostitution, offer a criminal law assessment of such behaviour from the perspective of Polish criminal law, and suggest the direction for the development of domestic criminal law to accommodate this phenomenon in the future. Additionally, it addresses the issue of criminal liability for harm caused by a humanoid robot equipped with artificial intelligence while providing sexual services. The article predominantly employs the dogmatic-legal method, performing an exegesis of the provisions of Article 204 of the Criminal Code in the context of the issue signalled. The analyses have concluded that this norm does not encompass in which the perpetrator facilitates, induces prostitution of a humanoid robot or derives financial benefits from such activities, despite such behaviour being detrimental to morality, the fundamental good protected under Article 204 of the Criminal Code. *De lege lata*, a humanoid robot may also not be subject to criminal liability if it harms a person using its sexual services, as such an 'essence' does not align with the current structure of crime and the concept of criminal punishment. However, the liability of manufacturers or users of such devices is not ruled out. It should be noted that as humanoid robots become more autonomous, holding producers or

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users criminally liable for damages they cause becomes less justifiable, and the applicability of artificial intelligence liability similar to the criminal liability of legal persons becomes more relevant.

Keywords: law, criminal law, exploitation of prostitution, artificial intelligence, humanoid robots

INTRODUCTION

The relationship of artificial intelligence (hereinafter 'AI') to criminal law is increasingly addressed in the doctrine. Discussions include whether AI may be subject to criminal liability, and how the manufacturer, seller, or user of an AI-based device should be liable if the device causes harm to a third party. There is no doubt that AI's actions or usage can lead to negative consequences, such as the death of a human, damage to health, or destruction of protected information, yet the question of AI's own criminal liability remains contentious. This is particularly intriguing given AI's ability to learn and make decisions based on gathered information.

Provisions in the Criminal Code where the object of the executive act may be another person include the offence under Article 204 § 1 and 2 of the Criminal Code ('CC'), which criminalises soliciting, facilitating the practice of prostitution by another person, or deriving financial benefit from another's prostitution.[1] With the rapid development of technology, including AI, the question arises whether it can be treated as a 'person' within the meaning of the mentioned standard.

The criminal assessment of profiting from prostitution by humanoid robots, until recently, might have seemed a concept from science fiction. Yet, this phenomenon already exists in reality. In 2018, Neesweek published an article entitled 'Sex with a robot? A new Moscow attraction awaits football fans'. The article reported on the creation of Moscow's first brothel where customers could spend the night with a robot, each equipped with AI and a distinct character.[2] The potential for this phenomenon to expand is undeniable, with humanoid robots being created using both organic and inorganic elements, including AI (*homo digitalis*).[3] The German literature has already addressed the criminal assessment of providing sexual services by robots, although it was deemed 'contrived'.[4] However, the example of the Moscow brothel illustrates otherwise.

Polish law does not have a separate statute legalising prostitution; instead, Article 204 § 1–2 CC criminalises the exploitation of prostitution. This raises the

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1 In view of the topic of this study, the provision of Article 204 § 3 CC remains outside the area of interest.

2 'Seks z robotem? Nowa moskiewska atrakcja czeka na kibiców futbolu', *Newsweek Polska, https://www.newsweek.pl/swiat/spoleczenstwo/seks-z-robotem-w-moskwie-otwartodom-publiczny-z-seks-robotami/6ftqbwd* [accessed on 5 April 2024].

3 Radutniy, O.E., 'Adaptation of criminal and civil law in view of scientific-technical progres (artificial intelligence, DAO and digital human)', *Проблеми законності*, 2019, Вип. 144, p. 139.

4 Hilgendorf, E., 'Introduction: Digitalization and the Law – A European Perspective', in: *Robotik und Recht. Digitalization and the Law*, Baden-Baden, 2018, p. 12.

question of whether, in cases where the perpetrator facilitates or profits from prostitution practised by a humanoid robot resembling a human, one can still speak of criminal liability under Article 204 § 1 or 2 of the Criminal Code, or if this standard requires amendment to criminalise such phenomena.

CRIMINAL LIABILITY FOR EXPLOITATION OF PROSTITUTION IN POLAND *DE LEGE LATA*

According to Article 204 § 1 CC, criminal liability is imposed on anyone who induces or facilitates another person to engage in prostitution for financial gain. Meanwhile, Article 204 § 2 CC states it is an offence to derive financial benefit from another's prostitution.

These provisions fall within the chapter on offences against sexual freedom or morality. Acts under Article 204 CC primarily harm morality, as the exploitation of prostitution and the provision of sexual services for money are viewed negatively from a moral standpoint.[5] Some literature suggests human dignity is also a protected interest under this regulation,[6] though this has been criticised since the perpetrator's actions under Article 204 § 1 and 2 of the Criminal Code do not directly threaten the dignity of those engaging in prostitution.[7] Additionally, these provisions are interpreted as protecting public order by preventing the proliferation and normalisation of prostitution, a source of crime.[8] M. Budyn-Kulik criticised the view that the action described in Article 204 CC does not have to be performed in public.[9]

Prostitution is defined as the repeated provision of sexual services in exchange for remuneration. In its current formulation, it consists of offering one's body for another's use, aiming to profit. In the context of prostitution, there is no emotional involvement from the service provider, and there is a limitation on the right to

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[5] See judgment of the Administrative Court in Szczecin of 12 February 2020, II AKa 263/19, OSA 2020, No. 5, item 5; Warylewski, J., Nazar, K., in: Stefański, R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, commentary on Article 204, thesis 2, Legalis 2023; judgment of the Administrative Court in Wrocław of 13 November 2013, II Aka 330/13, Legalis; see also Warylewski, J., in: Stefański, R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2015, p. 1284; on social evaluations of prostitution see, for example, Kowalczyk-Jamnicka, M., *Społeczno-kulturowe uwarunkowania prostytucji w Polsce*, Bydgoszcz, 1998, p. 8 et seq.; and Warylewski, J., in: Warylewski, J. (ed.), *System Prawa Karnego. Tom 10. Przestępstwa przeciwko dobrom indywidualnym*, Warszawa, 2016, pp. 913–914.

[6] Cf. e.g., Hypś, S., in: Grześkowiak, A., Wiak, K. (eds), *Kodeks karny. Komentarz*, Warszawa, 2019, p. 1089; Kłączyńska, N., in: *Kodeks karny. Część szczególna. Komentarz*, Warszawa, 2014, p. 566.

[7] See Budyn-Kulik, M., Kulik, M., in: Królikowski, M., Zawłocki, R. (eds), *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117–221*, Warszawa, 2017, p. 803.

[8] Hypś, S., in: *Kodeks…*, op. cit., p. 1089, and authors cited therein; see also Bielski, M., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117–211a*, Warszawa, 2017, p. 817.

[9] Budyn-Kulik, M., Kulik, M., in: *Kodeks…*, op. cit., p. 804; for more on the subject of protection under Article 204 CC see Piórkowska-Flieger, J., 'Tak zwane przestępstwa okołoprostytucyjne', in: Mozgawa, M. (ed.), *Prostytucja*, Warszawa, 2014, pp. 78–79, and authors cited therein.

choose one's sexual partners.[10] It is irrelevant to the definition of prostitution whether the service user feels emotionally involved in the sexual act. Both the provider and the recipient 'regard each other not personally but in transactional terms'.[11] The voluntariness or coercion of the prostitute is immaterial to the definition of prostitution. These circumstances are not part of the essence of the concept. If the essence of prostitution were to include the individual's full awareness and freedom of will in the course of the practice, then coercion would negate its existence, rendering Article 203 of the Criminal Code unreasonable and inherently contradictory. This norm concerns forced prostitution, whereas in the case of coercion, which may limit free will to a great extent, one could not speak of prostitution at all.

Facilitating prostitution encompasses actions that make practising prostitution easier. The law does not specify the behaviours that constitute this facilitation, so any action that simplifies the practise of prostitution applies. This could include connecting the service provider with their client, offering premises or transport, providing travel funds, or ensuring the service provider's safety during the transaction.[12]

Soliciting involves various persuasion methods to engage in prostitution, distinguished by the absence of unlawful threats or violence.[13] In such instances, Article 203 CC may apply.

Benefiting from prostitution establishes a causal link between the asset increase of the perpetrator or a third party and the prostitution practised by another person.[14] It signifies that the offender's assets increase as a result of another's prostitution, though it need not be a substantive offence. A financial gain is any asset increase for the perpetrator or another person, and it is acknowledged in literature that it need not be the sole or primary source of income for the perpetrator.[15]

The content of the provisions of Article 204 § 1 and 2 CC may prompt questions as to whether a single act of soliciting, facilitating, or obtaining financial gain from prostitution already fulfils the elements contained therein, or whether repetition of such behaviour is necessary. According to J. Warylewski, 'Facilitating prostitution and pimping described in Article 204 of the Criminal Code do not exhaust themselves in one-off behaviours. They are procedural in nature, just like prostitution itself.'[16] Conversely, M. Budyn-Kulik and M. Kulik advocate for the view that one-off

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[10] Antoniszyn, M., Marek, A., *Prostytucja w świetle badań kryminologicznych*, Warszawa, 1985, p. 6; Hypś, S., in: *Kodeks…*, op. cit., thesis 4; Warylewski, J., Nazar, K., in: *Kodeks…*, op. cit., Warszawa, 2023, commentary on Article 203, thesis 2, Legalis 2023.

[11] See Charkowska, K., *Zjawisko prostytucji w doświadczenia prostytuujących się kobiet*, Kraków, 2010, pp. 11–12.

[12] Budyn-Kulik, M., Kulik, M., in: *Kodeks…*, op. cit., p. 804; Kłączyńska, N., in: *Kodeks…*, op. cit., p. 566.

[13] See, e.g., Budyn-Kulik, M., Kulik, M., in: *Kodeks…*, op. cit., p. 804; Warylewski, J., in: *Kodeks…*, op. cit., Warszawa, 2015, p. 1285; Kłączyńska, N., in: *Kodeks…*, op. cit., p. 566.

[14] Warylewski, J., in: *System Prawa…*, op. cit., p. 933.

[15] Budyn-Kulik, M., Kulik, M., in: *Kodeks…*, op. cit., p. 805, and the authors cited therein.

[16] Warylewski, J., in: *Kodeks…*, op. cit., p. 1284; idem, in: *System Prawa…*, op. cit., p. 932; similarly, Kłączyńska, N., in: *Kodeks…*, op. cit., p. 566, who, with regard to pimping, refers to the fact that Article 204 § 2 CC uses the plural of the noun 'benefit'; see also Berent, M., Filar, M., in: Filar, M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, pp. 1266–1267.

behaviours can also fulfil the elements indicated in the provision.[17] M. Bielski presents a similar stance regarding facilitating prostitution and pimping.[18] A literal interpretation of the provisions of Article 204 § 1 and 2 of the Criminal Code does not preclude acceptance of the latter view. Inducement, facilitation, and profiteering can be understood, in a grammatical sense, as activities occurring over a longer period or on a one-off basis. Systemically, endorsing the former position would erroneously suggest that incitement (Article 18 § 2 CC) and aiding and abetting (Article 18 § 3 CC) are also multi-actual in nature. Regarding profiteering from prostitution, it is significant to note that when the legislator envisages a specific procedure comprising such behaviour, it is explicitly highlighted. This is the case in Article 65 of the Criminal Code, which pertains to deriving a permanent income from committing crimes. The phrasing of Article 204 § 1 and 2 CC does not imply such a requirement. The use of the plural in Article 204 § 2 CC is insufficient to support a thesis advocating for the necessity of multiple actions. It is conceivable that the perpetrator, on a single occasion, obtains various types of financial benefits (e.g., receives money, securities, and a car). To assume that deriving varied benefits on one occasion is not punishable would place the perpetrator at odds with the legal interest protected by Article 204 § 2 CC.

From the perspective of fundamental considerations, the executive act's object under Article 204 § 1 and 2 CC, which is another person, is crucial. It is generally accepted that this refers primarily to a natural person engaged in prostitution, regardless of gender. However, it remains an open question whether other human-like 'entities', such as 'electronic persons' or humanoid robots, could also fall under this definition.[19]

The subjective side of the offence under Article 204 § 1 CC involves acting with the intent to obtain a pecuniary benefit, i.e., to enrich oneself. Soliciting or facilitating prostitution, whether for personal gain or not, does not constitute an offence under Article 204 § 1 CC. Article 204 § 2 CC does not specify any intent; however, it pertains to deriving a pecuniary benefit from another person's prostitution. Thus, the perpetrator need not have a predefined commercial intent; the benefit may be incidental, but must be accepted as the provision addresses 'taking advantage'. Gaining personal benefit from prostitution does not meet the criteria of the offence under Article 204 § 2 CC.

CRIMINAL LAW ASSESSMENTS OF THE EXPLOITATION OF PROSTITUTION PRACTISED BY HUMANOID ROBOTS

Addressing whether the use of robots equipped with artificial intelligence for prostitution purposes circumvents provisions of Article 204 § 1 and 2 CC necessitates determining whether such an entity could be regarded as a person, the subject of

[17] Budyn-Kulik, M., Kulik, M., in: *Kodeks…*, op. cit., p. 804.
[18] Bielski, M., in: *Kodeks…*, op. cit., pp. 820–821.
[19] This issue will be elaborated on later in the paper.

an executive act within the scope of the said norm.[20] It is essential to examine what are the attributes of the artificial intelligence with which the humanoid robot is equipped. Subsequently, it is also necessary to consider whether such a robot can partake in prostitution.

The literature indicates that such a robot may have the following skills:

> 'perception of information, memory without gaps, exchange, analysis, comparison, evaluation of certain data, generalisation and the most optimal use of information for solving problems, recognition of all objects and their classification, perception of all signals of the surrounding world without exception, true summing-up of any situation, effective selection of strategy and method of its behaviour, planning, generation of new knowledge, full awareness of the principles of its construction and work, self-education, self-development, self-rebuilding, self-improvement (the first version forms an improved version of itself and thus rewrites the programme to infinity), accelerated decision-making speed, processing of significant spaces of information and their effective use, full concentration of attention, construction of value judgements, independent decision-making and independent implementation, self-organisation.'[21]

The capabilities of artificial intelligence that can be incorporated into humanoid robots encourage the consideration that such technology might surpass human beings in terms of capabilities and could, therefore, be regarded as something more than a natural person. Given that under Article 204 § 1 and 2 of the Criminal Code, the term 'person' is typically understood to denote a human being, and considering artificial intelligence's superior capabilities, it might well be argued that AI could be considered the object of the executive act. Indeed, it could be viewed as an 'electronic person' in essence, especially since the provisions of Article 204 § 1 and 2 of the Criminal Code do not explicitly state that only natural persons are implicated. This argument gains further credence in light of steps towards the legal recognition of artificial intelligence at the European Union level, notably the European Parliament's resolution of 16 February 2017, which contains recommendations to the European Commission on civil law provisions on robotics advocating creation of an electronic

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[20] The criminal law doctrine includes discussion on the phenomenon of so-called virtual rape, purportedly committed by an avatar controlled by a human or a participant in the virtual world (for more details see Piesiewicz, P.F., 'Przestępstwo w wirtualnym świecie', in: Gardocki, L. et al. (eds), *Aktualne zagadnienia prawa karnego materialnego i procesowego*, Warszawa, 2009, pp. 135–136; the description of this case is also reproduced by Sobczak, J., 'Odpowiedzialność za przestępstwo popełnione w sieci: czy można zgwałcić awatara?', in: Mazurkiewicz, J., Szymaniec, P. (eds), *Prawne i administracyjne aspekty komunikacji elektronicznej*, Wałbrzych, 2018, pp. 37–38). The perpetrator, a participant in the game, appropriated the identity of another person and impersonated her, took control over the avatar of a female user also participating in the game, and the rape was said to consist of describing in text form how this female user, existing in virtual reality as an avatar, sexually satisfies the perpetrator, with the text being available to other users (Piesiewicz, P.F., 'Przestępstwo…', op. cit., pp. 135–136; Sobczak, J., 'Odpowiedzialność…', op. cit., pp. 37–38). It seems, however, challenging to relate this event to the subject under consideration in this paper, since it takes place in a virtual world. This paper focuses on humanoid robots, which are already an element of the reality that surrounds us, thus existing objectively and also interacting with humans in a tangible way in the real world, unlike the virtual realm.

[21] Radutniy, E., 'Adaptation…', op. cit., p. 144.

legal person.[22] Similarly, granting citizenship to the Sophia robot in Saudi Arabia aligns with the trend towards recognising artificial intelligence,[23] not as a natural person, but granting it a status comparable to that of a legal person, i.e., as a legal entity that is non-human. As such, a humanoid robot equipped with artificial intelligence could potentially be considered a person within the meaning of Article 204 § 1 and 2 of the Criminal Code, suggesting that the current regulation indeed covers the phenomenon addressed in this paper.

It is crucial to note, however, that despite artificial intelligence's capabilities far exceeding those of humans, there are significant differences between the two. Firstly, artificial intelligence makes decisions based on specific algorithms in an automated manner, unlike the reflective decision-making process in humans. Secondly, humans possess the capacity for emotion, including the ability to experience pain and suffering, attributes that artificial intelligence lacks. Thirdly, human decision-making often involves intuition, a trait absent in artificial intelligence. Additionally, humans have the conscious ability to refrain from certain actions (freedom of choice), a capacity not afforded to an artificially intelligent entity programmed to act in predetermined situations. These considerations imply that a humanoid robot equipped with artificial intelligence cannot be regarded as a person. However, this does not relegate it to the status of a mere tool. Given its capabilities and potential to surpass human abilities, it may be more accurately described as intermediate between a physical person and an object (device). Nonetheless, categorising such a robot as an 'electronic person' under Article 204 § 1 and 2 of the Criminal Code would constitute an expansive interpretation of the norm, which is not permissible under Polish criminal law.

Considering a humanoid robot as an entity between a human being and a device with the above-mentioned abilities may raise the question of its capacity to engage in prostitution, if we recall that prostitution fundamentally involves the provision of sexual services in exchange for benefits. In other words, it is a specific service that is not provided for free, but for a specific compensation, primarily economic. It is true that up to now, the practice of prostitution has been equated with human activity.[24] The concept that sexual services could only be provided by a woman or a man now requires reevaluation in light of technological advancements leading to the creation of humanoid robots capable of fulfilling human sexual needs. This situation differs markedly from the use of sexual gadgets for erotic satisfaction, as a humanoid robot can interact with a potential client establishing what their erotic needs are, and then it is the humanoid robot that adapts its service to these needs. In this case, the client is talking to the service provider, so it is an extremely different situation from the one in which a human uses erotic tools, such as a vibrator. The client in question will certainly not talk to the vibrator, and this device will not adapt 'its service' to all

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[22] Another European Parliament resolution of 6 October 2021 concerns the use of artificial intelligence by the police and the judiciary.

[23] See Auleytner, A., 'Can a robot incur criminal liability', *Law and Standards*, 2017, No. 12, p. 78.

[24] See also, e.g., Sobczak, J., 'Prostytucja w internecie', in: Mozgawa, M. (ed.), *Prostytucja*, Warszawa, 2014, pp. 212–213.

the client's needs, a level of interaction not achievable with inanimate objects such as vibrators. Furthermore, the act of posting nude photographs or pornographic content online for sexual gratification is also deemed prostitution.[25] This is one of the manifestations of so-called e-prostitution, which does not necessitate direct physical contact between the client and service provider. Therefore, if such activities are considered prostitution, the provision of erotic services by a humanoid robot, which receives payment for its services, should be regarded similarly. However, it cannot be concluded that the person using a humanoid robot to satisfy another's erotic needs is practising prostitution, as the entity does not provide any erotic service directly.

Considering the foregoing, it should be concluded that a humanoid robot may engage in prostitution, i.e., provide erotic services and accept payment for them. However, the perpetrator taking advantage of prostitution facilitated by a humanoid robot might only meet some criteria of the statutory elements defined under Article 204 § 1 or 2 of the Criminal Code. Undoubtedly, such an individual could facilitate a robot's engagement in prostitution in a manner corresponding to the elements of Article 204 § 1 CC. Conversely, persuasion to engage in such practices is hard to envisage if the robot operates in an automated manner, possibly programmed to provide such services. It should be emphasised that programming a robot for prostitution does not equate to incitement. Furthermore, financial benefits can indeed be derived from the prostitution practiced by a humanoid robot equipped with artificial intelligence. In this instance, the focus is not on a person, as no human is involved, but on a 'being' capable of engaging in prostitution. Such actions do not satisfy the criteria under Article 204 § 3 CC, which pertains to minors. A humanoid robot cannot be considered in these terms. Thus, an individual exploiting prostitution facilitated by a humanoid robot does not fulfil all the offence elements under Article 204 § 1, 2, and 3 CC.

The question then arises whether, *de lege lata*, an individual who facilitates or profits financially from prostitution practiced by a humanoid robot could be liable for an ineffectual attempt under Article 204 § 1 or 2 of the Criminal Code. Under Article 13 § 2 of the Criminal Code, an attempt also occurs when the perpetrator is not himself aware of the fact that committing it is impossible because of the lack of a suitable object on which to perpetrate the prohibited act or because of the use of means not suitable for perpetrating this prohibited act. It is pertinent to consider whether this 'another person' referred to in Article 204 § 1 and 2 of the Criminal Code constitutes the object or the means referred to in Article 13 § 2 of the Criminal Code. Since facilitating prostitution involves a specific individual, it must be assumed that, in this context, the individual is the object of the executive action, with facilitation centred on this very subject. A different assessment applies to profiting from another person's prostitution. Here, the other individual merely serves as a means to an end in the form of obtaining financial gain from prostitution, with their activity generating these benefits. Consequently, the executive act's object is the financial gain derived, while the individual practising prostitution is merely

[25] Ibidem, pp. 222–223.

a means to committing the act under Article 204 § 2 CC. Considering the issue from the perspective of the object, it is evident that in the case of exploiting prostitution practiced by a humanoid robot, as described in Article 204 § 1 or 2 of the Criminal Code, neither the object of the executive act nor the means in the form of a person suitable for committing the act exists. This scenario renders committing an offence under Article 204 § 1 and 2 of the Criminal Code objectively impossible, suggesting that the elements of an ineffectual attempt are partially met. Nevertheless, we cannot overlook the subjective aspect of an ineffectual attempt, focusing on the perpetrator's unawareness that performing the prohibited act is not feasible. It is difficult to justifiably assume that an individual utilising a humanoid robot for the acts specified in Article 204 § 1 and 2 of the Criminal Code would contend in court that they were unaware of the robot's non-person status. Such a claim would subject them to criminal liability under the provision of Article 13 § 2 of the Criminal Code in conjunction with Article 204 § 1 and 2. Instead, it is likely that they would argue that they always regarded the robot as distinct from a human being and were fully aware that committing the offence under Article 204 § 1 and 2 of the Criminal Code was not possible. This scenario falls outside the scope of Article 13 § 2 of the Criminal Code, indicating a situation where the perpetrator is cognisant that these offences cannot be committed and thus undertakes actions that mimic the causative action specified in Article 204 § 1 and 2 of the Criminal Code.

These deliberations lead to the conclusion that employing a humanoid robot for activities specified in Article 204 § 1 and 2 of the Criminal Code remains unpunished *de lege lata*. Consequently, the Polish legal framework permits financial gain and facilitation of prostitution by humanoid robots for financial profit. Such behaviours are morally condemnable and detrimental to the legal good that lies at the heart of criminal law protection under Article 204 § 1 and 2 of the Criminal Code. This necessitates considering future amendments to these provisions to include humanoid robots alongside the concept of 'person'.

The inability to attribute the offence under Article 204 § 1 and 2 of the Criminal Code to a perpetrator who uses a humanoid robot in the specified manner precludes the possibility of ruling the forfeiture of such a robot under Article 44 § 2 of the Criminal Code. Since the offence has not been committed, this measure is inapplicable. Moreover, it is questionable whether a humanoid robot qualifies as an ordinary object within the meaning of Article 44 § 2 CC. Similarly, the financial benefits derived by the perpetrator within the meaning of Article 204 § 2 CC cannot be subjected to forfeiture (Article 45 § 1 of the Criminal Code) either, as they are neither directly nor indirectly obtained from the offence.

It is also pertinent to explore the criminal liability of a humanoid robot engaged in prostitution, as employed by the perpetrator, for causing harm to the service user or committing theft against the client.

This inquiry relates to the broader issue of whether artificial intelligence is subject to criminal liability *de lege lata*. To address this, one must compare characteristics of artificial intelligence with the structural elements of crime. It appears implausible to attribute a criminal act to artificial intelligence, fundamental to criminal law

assessment.[26] It is worth recalling that such an act comprises an objective side, manifested as behaviour in the form of action or omission, and a subjective side, involving perception of external stimuli and action based on free will. Although a humanoid robot equipped with AI may exhibit various behaviours and may also receive and process external stimuli, it is doubtful that it can act based on free will. Free will is the ability to make a conscious decision and choose between different behaviours, whereas AI operates based on data processing and automated decision-making guided by its programming and algorithms. Its decisions are determined not by free will but by software. Therefore, AI is unlikely to be acknowledged as committing an act within the criminal law context. Although an AI (humanoid robot) may occasionally meet the objective criteria of a criminal act, challenges arise concerning the subjective aspect.[27] It is impossible to ascribe intent, a will-based action, to an AI, as it does not operate on the basis of free will. It is difficult to conceive that a robot desires something or anticipates and accepts a certain outcome, given that its decisions are automated and AI likely lacks self-awareness of its surrounding reality. Its perception of reality is indeed algorithm-based and automatic, unrelated to consciousness and will, which underpin human actions. Lastly, we must consider the possibility of attributing fault to an AI (robot) in a normative sense.[28] Guilt, in this context, implies accusing the perpetrator because, faced with a choice between lawful and unlawful conduct, they opt for the latter. The foundations for attributing guilt include age, sanity, awareness of illegality, and action in a typical motivational scenario. The first criterion is irrelevant for AI. The second is incompatible with AI, as sanity consists in the ability to recognise the significance of an act and direct one's behaviour, which is improbable for a humanoid robot (AI) given its dependency on algorithmic operation. Consequently, such a being's actions are predetermined, making it difficult to discuss its ability to control its behaviour. While it may operate under normal or less typical conditions and select actions based on those circumstances, this is not indicative of free will but rather algorithmic analysis and compelled action selection. Therefore, attributing guilt in the strict legal sense, as applicable to individuals, is unfeasible. The justification for holding a robot criminally responsible is thus questionable. Furthermore, the concept of criminal punishment, entailing specific disadvantages for the offender, is incompatible with such an 'entity'.[29] A robot (AI) cannot experience discomfort, rendering traditional criminal punishment ineffective.

The impossibility of criminally prosecuting a prostitution robot for harm caused to a person using its services does not exclude the liability of the entity utilising the robot or that of the manufacturer. In the latter case, criminal liability

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[26] In the literature, it is possible to identify authors who believe that AI can fulfil the external element of the criminal act, known as *actus reus*. See, e.g., Hallevy, G., 'The criminal liability of Artificial Intelligence Entities – from science fiction to legal social control', *Acron Intellectual Property Journal*, 2016, Vol. 4, Issue 2, Article 1, p. 187. What is more, the author argues for independent criminal liability of AI.

[27] Similarly, Filipkowski, W., 'Prawo karne wobec sztucznej inteligencji', in: Lai, L., Świerczyński, M. (eds), *Prawo sztucznej inteligencji*, Warszawa, 2020, Legalis 2023.

[28] Ibidem.

[29] Ibidem.

for an intentional offence is conceivable if the manufacturer knowingly constructs the 'device' in a manner likely to harm or damage another person. If the user is also aware of this risk, then liability for an intentional act is likewise conceivable.[30] It is pertinent to note, however, that if the robot possesses self-education capabilities and can learn independently, the more knowledge it acquires, the more autonomous it becomes, reducing the likelihood of criminal liability for the manufacturer or user.[31] This likelihood decreases further if the manufacturer informs the user, and the user, in turn, informs the customer of such risks. The manufacturer's criminal liability is also negated if the customer uses the robot in a manner contrary to the provided instructions, thereby exposing themselves to harm or damage. Criminal liability for unintentional offences of exposing a person to direct danger (Article 160 § 3 CC) or for unintentional harm (Article 157 § 3 CC, Article 156 § 2 CC) may also be relevant. Generally, this liability is determined by a breach of the precautionary principle at the production stage, when constructing the usage instructions by indicating any risks associated with the robot's use, upon making it available to the customer, and in informing them of the usage rules.[32]

While it is true that *de lege lata* it is not possible to impose criminal liability on a humanoid robot (artificial intelligence), future legislation (*de lege ferenda*) should contemplate the possibility of introducing vicarious liability for such an 'entity', dependent on the criminal liability of the producer or user, similar to the liability of collective entities for criminal offences. A robot equipped with artificial intelligence exists somewhere between a human being and a legal entity, similar to a legal person. Given that legal systems recognise corporate liability,[33] it is worth considering the applicability of such liability to robots. The issue, however, is whether this liability should always rely on the responsibility of the user or manufacturer, as the more autonomous the entity becomes through its knowledge and experience, the less it depends on the manufacturer or user, and consequently, the less their criminal liability should influence the robot's liability. Moreover, legislation should allow for the removal of such a 'being' from the market, especially when there is no criminal liability of the manufacturer or user, despite the absence of a conviction for damages caused by the robot (artificial intelligence). Potential measures could include the robot's forfeiture through destruction, a prohibition on its production or future use.[34] Admittedly, all these measures restrict rights and freedoms (property rights, liberty), their implementation would be justified by the protection of public order and safety, as per Article 31(3) of the Polish Constitution.

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[30] Giannini, A., Kwik, J., 'Negligence failures and negligence fixes. A comparative analysis of criminal regulation of AI and autonomous vehicles', *Criminal Law Forum*, 2023, No. 34, p. 72.

[31] Cf. ibidem, p. 44.

[32] For a more extensive discussion on liability based on the unintentional unawareness of an artificial intelligence producer, see ibidem, p. 60.

[33] Similarly, Jankowska-Prochot, I., 'Criminal liability and the activity of autonomous robots. Challenges in the Polish and global scientific discourse', in: Chmielnicki, P., Minich, D. (eds), *Law as a future project*, Warszawa, 2022, pp. 172 and 182.

[34] Ibidem, pp. 184–185.

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Cite as:

Lachowski J. (2024) '*Criminal law assessments of the exploitation of prostitution practised by humanoid robots*', Ius Novum (Vol. 18) 1, 1–12. DOI 10.2478/in-2024-0001

Ius Novum
2024, vol. 18, no. 1, pp. 13–34

FEAR AND AGITATION AS THE NORMATIVE ELEMENTS OF LEGITIMATE SELF-DEFENCE EXCESS

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DOI 10.2478/in-2024-0002

Abstract
The authors of this publication have explored the importance of justifying fear and agitation underpinning the transgression of necessary self-defence. According to Article 25 § 2 and 3 of the Criminal Code, they identified five scenarios, differing in how a perpetrator's mental state is determined, affecting the criminal law consequences of unlawfully infringing on or exposing the aggressor's legal interests. The authors validated the preliminary hypothesis that the legislator assumed legitimate self-defence excess results from fear or agitation due to the circumstances of the assault, necessitating procedural confirmation. Their occurrence leads to the defender's impunity, regardless of the type of legal interests infringed and the extent of legitimate self-defence excess. A shortfall in the mental state circumstances of a defender, as referred to in Article 25 § 3 of the Criminal Code in a specific factual state, opens the possibility of applying a general, complementary provision, i.e., Article 25 § 2.

Keywords: criminal law, justification, self-defence, self-defence excess, fear and agitation

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INTRODUCTION

The issue of legitimate self-defence is among those in criminal law that evoke significant emotions, not solely due to the complexity of interpreting its justification criteria. These emotions stem from the reality that, in scenarios described in Article 25 of the Criminal Code, anyone can find themselves involved at any moment,[1] not only as a crime victim but as a deliberate perpetrator of a major *malum prohibitum*. The situation of a direct attempt on a legal interest, especially one's own or that of someone close, and the legitimate decision to fend off such an attempt, is not an everyday occurrence, nor is it comfortable. In some cases, it may be an extreme situation, exceeding what an average person can bear.[2] While it has been decided to allow fending off such attempts under the justification of legitimate self-defence, which cannot be deemed lawless, it has also been restricted by requiring self-defence in a manner proportional to the threat posed by an attempt (Article 25 § 2 of the Criminal Code). This requirement may often be challenging to meet, considering being caught by surprise; hardly anyone is prepared to face such situations. For this reason, Article 25 § 2 of the Criminal Code stipulates that in the case of a perpetrator who exceeded the limits of legitimate self-defence, either extraordinary mitigation of punishment or waiver is possible. A more favourable regulation, resulting in excluding the punishability of legitimate self-defence excess, is set forth in Article 25 § 3 of the Criminal Code. It becomes applicable in cases where legitimate self-defence excess occurs under the influence of fear or agitation justified by the circumstances of an attempt. Thus, it is important to highlight that the provision in § 3 constitutes another level of a cascade view of circumstances modifying criminal responsibility in cases of legitimate self-defence excess.[3] The legislator, addressing this circumstance, used rather vague language that requires precise interpretation, a challenging task given the conflict between the legal interests of the assaulted and those of the assailant. Moreover, it is significant that the legislator set no limits on the subject matter scope of the provision based on the type of interest violated during legitimate self-defence excess. In other words, killing an assailant does not preclude the possibility of exemption from penalty, warranting a particularly detailed examination of the criteria mentioned in § 3. It is noteworthy that the provision set out in Article 25 § 3 of the Criminal Code is the only construction of its kind in criminal law, providing an unconditional exemption from criminal liability despite not fulfilling the conditions of secondary legality due to a specific mental state of a perpetrator.

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[1] Cf. Grudecki, M., Kleszcz, M., 'Pozbawienie życia napastnika w obronie koniecznej a katalog dóbr prawnych podlegających ochronie', *Roczniki Administracji i Prawa*, 2020, Issue 3, p. 140.

[2] See: Borys, B., 'Sytuacje ekstremalne i ich wpływ na stan psychiczny człowieka', *Psychiatria*, 2004, Issue 2, p. 98; decision of the Administrative Court in Szczecin of 20 June 2013, II AKa 100/13, LEX No. 1324778.

[3] Clear cascade has been somewhat distorted by the introduction of the provision set forth in Article 25 § 2a of the Criminal Code, although that issue is essentially beyond the scope of the present research.

This article focuses on analysing Article 25 § 3 of the Criminal Code, particularly in relation to its connection with Article 25 § 2 of the Criminal Code. It is crucial to address the question: In what situations is the circumstance excluding punishability applicable? It may be hypothesised that the legislator initially presumed that legitimate self-defence excess results from fear or agitation due to the circumstances of an assault (which, however, requires confirmation in court proceedings). Thus, emphasis will be placed not on a comprehensive presentation of legitimate self-defence excess but rather on its subjective element in the form of fear or agitation emotions and their impact on a defendant's mental state.

THE ESSENCE OF LEGITIMATE SELF-DEFENCE

Legitimate self-defence is a justification wherein the unique features of this criminal law institution are more visible than in any other.[4] Based on it, the legislator allows the assaulted to fend off an attempt, thereby infringing on the assailant's legal interests, which, at that moment, continue to hold particular value for society. Their protection is diminished but remains. Formally, the defendant's action meets the statutory criteria of *malum prohibitum*.[5] Its scope matches that of a regulated norm but differs in application.[6] This is because legitimate self-defence, tolerated by societies and the legislator, represents the choice of 'the lesser evil' in conflicts between two legally protected interests. This choice is justified in various ways, ranging from the belief that every individual inherently has the right to self-defence within the bounds of values important to them, to the notion that legitimate self-defence upholds the principle that law must not yield to lawlessness (defending the abstract idea of law),[7] including the solidarity aspect of enabling individuals to protect others' interests, and even the controversial idea of individuals taking public order protection into their own hands.[8] Hence, it can be argued, as M. Mozgawa and A. Marek do, that the rationale behind legitimate self-defence stems from two reasons: individualistic, and generally preventive (social).[9] It is a subjective (natural) right of a human being to protect their own interests, and the motion of that law has

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[4] On the features of justifications: Grudecki, M., *Kontratypy pozaustawowe w polskim prawie karnym*, Warszawa, 2021, p. 302.

[5] Marek, A., *Obrona konieczna w prawie karnym: teoria i orzecznictwo*, Warszawa, 2008, p. 20.

[6] Grudecki, M., Kleszcz, M., 'Pozbawienie…', op. cit., p. 139.

[7] Legutko-Kasica, A., 'Eksces w obronie koniecznej', *Przegląd Sądowy*, 2011, Issue 5, p. 81.

[8] Mozgawa, M., 'Obrona konieczna w polskim prawie karnym (zagadnienia podstawowe)', *Annales Universitatis Mariae Curie-Skłodowska Lublin-Polonia Sectio G*, 2013, Issue 2, pp. 175–176; Gurgul, J., 'Psychiatryczno-psychologiczne aspekty związane z wersją obrony koniecznej', *Palestra*, 2003, Issue 5–6, p. 103; Marek, A., 'Obrona konieczna w nowym polskim kodeksie karnym', in: Wolf, G. (ed.), *Przestępczość przygraniczna. Tom 2. Nowy polski kodeks karny*, Frankfurt (Oder)–Słubice–Poznań, 2003, pp. 93–95.

[9] Mozgawa, M., 'Obrona…', op. cit., p. 175; Marek, A., *Obrona konieczna w prawie…*, op. cit., p. 19.

been extended to include the possibility of the self-defence of the others' interests, *ipso facto*, contributing to the prevention of the public order violations.[10]

Regardless of the justification for the existence of legitimate self-defence within the criminal law system, based on the provisions of Article 25 of the Criminal Code, the following elements, constituting conditions for this justification and, *ipso facto*, the circumstances limiting the application of a particular sanctioned norm that protects an assailant's legal interests, can be identified:

1. A lawless and direct attempt on any legally protected interest.
2. A conscious (intentional) act of fending off that attempt by incarceration in a manner that infringes on the assailant's legal interests, meeting the criteria for that type of *malum prohibitum*, i.e. self-defence.
3. A manner of self-defence proportional to the threat posed by the attempt.

Some authors additionally suggest that an attempt must be real and actual, meaning it must truly threaten legal interests rather than merely being perceived as such by the person being attacked; otherwise, it would be considered imaginary legitimate self-defence, evaluated according to Article 29 of the Criminal Code.[11] However, it seems incorrect (and inappropriate, as it is not specified in any provisions of Article 25 of the Criminal Code) to refer to these conditions specifically because a direct attempt cannot be unreal.[12] This perspective is also supported by the Supreme Court, which found that '[…] situations in which the existence of an attempt threat is solely subjectively presumed should definitely be excluded from the concept of a d i r e c t [*emphasis added by MG, OS*] threat of attempt […].'[13] Moreover, an unreal, imaginary attempt is not an attempt at all and, therefore, poses no danger, let alone a direct one.

The specific conditions of legitimate self-defence have been extensively discussed in published works.[14] The aim of this article is not to reanalyse all these conditions but rather to focus on the requirements of directness and the proportionality of self-defence to the threat posed by an attempt. It is the breach of this proportionality that is referred to as legitimate self-defence excess, both extensive and intensive, which is particularly relevant from the perspective of defining the excess of justification discussed herein and significant for this article.[15]

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[10] Marek, A., *Obrona konieczna w prawie…*, op. cit., p. 19; Marek, A., 'Obrona konieczna w nowym…', op. cit., p. 93.

[11] For instance, Mozgawa, M., 'Obrona…', op. cit., p. 180; Marek, A., 'Obrona konieczna w nowym…', op. cit., p. 99; 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. 91.

[12] The same observation in: Sosik, R., *Obrona konieczna w polskim i amerykańskim prawie karnym*, Lublin, 2021, p. 142.

[13] Decision of the Supreme Court of 15 April 2015, IV KK 409/14, LEX No. 1729286.

[14] It is worth citing at least a few of the most recent monographs: Marek, A., *Obrona konieczna w prawie…*, *passim*; Góral, R., *Obrona konieczna w praktyce*, Warszawa, 2011; Pohl, Ł., Burdziak, K., *Praktyka instytucji obrony koniecznej*, Warszawa, 2018; Sosik, R., *Obrona…*, *passim*.

[15] See: Grudecki, M., 'Bezpośredniość zamachu oraz współmierność sposobu obrony – granice obrony koniecznej w najnowszym orzecznictwie Sądu Najwyższego i sądów apelacyjnych', *Problemy Prawa Karnego*, 2017, Vol. 1, p. 91.

THE DIRECTNESS OF AN ATTEMPT AND EXTENSIVE EXCESS

The requirement for an attempt to be direct relates to determining the time interval (*temporis vicinitas*) between an assault and the commencement of defence against that assault.[16] It is presumed that this requirement is met when an assailant begins an assault, indicating a high likelihood of immediate legal interest violation.[17] Therefore, an attempt is considered direct when the infringement of legal interest is imminent unless countered by self-defence.[18] From the perspective of the stages of an attempt, it is sufficient for a perpetrator to initiate it, as its d i r e c t outcome will be committing *malum prohibitum*.[19] It is assumed that an attempt remains direct as long as it results in danger to legal interests posed by an assailant, including scenarios where an assailant temporarily halts the assault without abandoning their intention and plan.[20] However, it should be emphasised that sustained danger must be direct; if it does not lead to immediate legal interest violation, the attempt itself is no longer direct. In cases of ongoing offences (e.g., unlawful imprisonment), the right to legitimate self-defence is always applicable, and the attempt is always considered direct because a legal interest remains violated.[21]

However, it is worth noting that the term 'direct' has multiple meanings, as it can refer to temporal, spatial, sequential, or causal aspects. It is also important to remember that this concept appears in various laws and is mentioned several times in the Criminal Code itself. In criminal law, 'direct' is used in regulations of different kinds, both expanding criminalisation scope (e.g., defining an attempt) and limiting or excluding liability (as in the case of legitimate self-defence). This means that the term affects the law 'in two directions', and consequently, an interpretation favourable to a defendant based on one regulation simultaneously worsens the defendant's situation according to another regulation (thus, the principle *in dubio pro reo* is completely ineffective even if it is assumed to be permissible in interpretation in the first place).

A problematic issue arises when considering that a direct attempt could involve actions like installing protective systems against potential assaults, such as crossbows or electrified fences, or having house yards patrolled by aggressive animals.[22] Some authors do not exclude categorising such behaviours as meeting legitimate self-defence criteria,[23] while others opposing this view argue that such

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[16] Sosik, R., *Obrona…*, op. cit., p. 138.

[17] See: Sosik, R., *Obrona…*, op. cit., p. 138; Grudecki, M., 'Bezpośredniość…', op. cit., p. 92; Marek, A., *Obrona konieczna w prawie…*, op. cit., p. 57; Marek, A., 'Obrona konieczna w nowym…', op. cit., p. 97, and references therein.

[18] Decision of the Administrative Court in Warsaw of 7 June 2013, II AKa 152/13, LEX No. 1350431; Iwaniuk, P., 'Obrona konieczna podczas bójki i pobicia na tle orzecznictwa Sądu Najwyższego', *Ius Novum*, 2011, Issue 1, p. 29.

[19] Decision of the Administrative Court in Łódź of 17 December 2013, II AKa 207/13, LEX No. 1416080.

[20] Mozgawa, M., 'Obrona…', op. cit., p. 179.

[21] Ibidem.

[22] See, e.g., Sosik, R., *Obrona…*, op. cit., p. 142.

[23] Mozgawa, M., 'Obrona…', op. cit., pp. 179–180; Krukowski, A., *Obrona konieczna na tle polskiego prawa karnego*, Warszawa, 1965, pp. 39–40.

a 'protective system' deters potential rather than direct attempts.[24] Those advocating for considering such actions as legitimate self-defence counter by stating that the mentioned devices activate only in the event of an actual attempt, making the danger to legal interests direct.[25] However, this is a misconception because a perpetrator employing such means is not defending against an attempt but preventing it. Therefore, this viewpoint should be rejected without simultaneously determining the lawfulness of such actions.

However, the aforementioned non-criminal nature does not stem from justification but is inherently primary. As J. Wawrowski correctly points out, questioning the right to install such protective systems would contradict the natural subjective rights of an individual.[26] Certain 'anti-burglary' actions do not breach the principle of treating a legal interest, such as health or bodily integrity, respectfully. Society accepts these measures based on civil law, granting every property owner the right to protect their property from unlawful intrusions by third parties (Article 342 of the Civil Code).[27] It is debatable whether these principles require warning potential assailants about the dangers they face, for example, by placing a sign that a fence is electrified,[28] primarily to prevent harm to non-assailants (e.g., postman, doctor, court enforcement officer, etc.). There is little doubt that such measures should not encompass actions that threaten the life of a person infringing legal interests (e.g., the mentioned crossbows or electrified fences that could be fatal). However, a more comprehensive analysis of this issue is beyond the scope of this article. Nonetheless, it should be noted that if such a viewpoint is accepted, evaluating self-defensive behaviour as more intense than the assailant's actions based on regulations pertinent to legitimate self-defence excess will not be feasible.

Referring to the final moment when an attempt is considered direct, it should be determined that this moment arrives when the imminent threat to a legal interest disappears, for instance, when an assailant is no longer capable of causing harm, or has withdrawn and abandoned the assault.[29] However, this does not imply the complete absence of danger. That threat may persist, albeit unlikely to constitute a direct threat to violating legal interest. An attempt may also conclude when it has been completed or reached a stage where it definitively meets the criteria of a specific type of *malum prohibitum*.[30] Should actions taken by a person defending against an assailant continue in such a scenario, they would no longer fall within the scope of self-defence and would become unlawful retribution.[31] This evaluation does

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[24] Kilińska-Pękacz, A., 'Nowe…', op. cit., p. 89; decision of the Supreme Court of 23 April 1974, IV KR 38/74, LEX No. 18834.

[25] Wawrowski, J., 'Obrona konieczna a zabezpieczenia techniczne', *Prokuratura i Prawo*, 2006, Issue 9, pp. 36–37.

[26] Ibidem, p. 38.

[27] Similarly, Gardocki, L., *Prawo karne*, Warszawa, 2021, p. 121.

[28] Different view expressed, e.g., in: Wawrowski, J., 'Obrona…', op. cit., pp. 36–37.

[29] Grudecki, M., 'Bezpośredniość…', op. cit., p. 93.

[30] Gubiński, A., *Wyłączenie bezprawności czynu (O okolicznościach uchylających społeczną szkodliwość czynu)*, Warszawa, 1961, p. 19.

[31] Grudecki, M., 'Bezpośredniość…', op. cit., p. 93; decision of the Administrative Court in Katowice of 30 October 2013, II AKa 363/13, LEX No. 1391901.

not apply to exceptional situations where an assailant temporarily halts their assault without relinquishing their intent. An example is when an assailant, slightly injured by a defending individual, runs to their bag to retrieve a knife and resume their assault on a victim. The imminent threat to the legal interest persists, necessitating the perception of the attempt as direct.[32] Similarly, if an assailant, having initially abandoned their attempt, resumes their assault upon noticing the victim's departure, thereby rendering the same attempt direct once again. This assessment should also apply to scenarios where an attempt evolves into a continuous act or a crime comprising multiple actions, involving sequential rather than constant activity, and thus, a danger. The right to legitimate self-defence is exercisable only when the involved danger can be deemed direct.

According to doctrinal representatives, extensive excess is characterised by premature self-defence (*defensio antecedens*) or, alternatively, delayed self-defence (*defensio subsequens*), referring to situations where an attempt cannot be considered direct.[33] It is assumed that such cases involve a breach of the temporal correlation between an attempt and self-defence,[34] leading a defending individual to surpass the boundaries of legitimate self-defence, rendering their behaviour no longer secondarily lawful by virtue of justification. The scope of application of a sanctioned norm prohibiting causing specific harm to an assailant's legal interests begins to encompass the actions of a defendant once again. It is noteworthy that the act's regulations themselves do not apply to this form of legitimate self-defence excess.

Considering the perspective within the doctrine, which suggests that legitimate self-defence excess can only be acknowledged if the conditions of legitimate self-defence are met, it is questionable whether it is appropriate to distinguish extensive excess as a form of legitimate self-defence,[35] given the absence of a direct attempt in such cases. The lack of a direct attempt implies absence of actions within the scope of legitimate self-defence, thereby precluding the possibility of committing an excess of justification.[36] Adopting this view leads to categorising cases falling under extensive excess not as instances of legitimate self-defence excess but rather as actions erroneous in terms of justification (Article 29 of the Criminal Code).[37]

Nevertheless, it warrants consideration whether, under current law, it is indeed inappropriate to distinguish extensive excess as a form of legitimate self-defence. Accepting the notion that intensive excess is the sole type of excess would contravene the prohibition of interpreting matters *per non est*. However, the legislator, in Article 25

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[32] See decision of the Administrative Court in Cracow of 6 October 2004, II AKa 183/04, LEX No. 143005.

[33] See, instead of many, Kulesza, J., in: *System*…, op. cit., p. 279; or Marek, A., *Obrona konieczna w prawie*…, op. cit., p. 134 et seq.

[34] Szczepaniec, M., 'Przekroczenie granic obrony koniecznej motywowane strachem lub wzburzeniem usprawiedliwionym okolicznościami zamachu', *Prokuratura i Prawo*, 2000, Issue 9, p. 13.

[35] See: Zontek, W., in: Królikowski, M., Zawłocki, R. (eds), *Kodeks karny. Tom I. Część ogólna. Komentarz. Artykuł 1–116*, Warszawa, 2021, p. 592; Grudecki, M., 'Bezpośredniość…', op. cit., pp. 93–94.

[36] Zontek, W., in: *Kodeks*…, op. cit., p. 592.

[37] Ibidem, pp. 592–593; Grudecki, M., 'Bezpośredniość…', op. cit., p. 95.

§ 2 of the Criminal Code, employs the term 'in particular', indicating that employing a manner of self-defence disproportionate to the danger posed by an attempt is one of the forms of legitimate self-defence excess. Consequently, there must be another kind of excess, namely, extensive excess, which takes the form of premature self-defence when an attempt occurs but has yet to become direct. An example is a scenario where an assailant is finalising their preparations for an attempt. Engaging in self-defensive actions in such a situation would constitute legitimate self-defence excess in the form of extensive excess. Concurrently, it is established that exceeding the limits of legitimate self-defence through so-called delayed self-defence is not feasible, since in such instances an attempt is no longer underway, thus lacking the conditions for legitimate self-defence and, *ipso facto*, its excess.

THE PROPORTIONATE CHARACTER OF THE MANNER OF SELF-DEFENCE TO THE DANGER POSED BY AN ATTEMPT AND INTENSIVE EXCESS

The requirement for the manner of self-defence to be proportionate to the danger posed by an attempt arises directly from the nature of this justification, ultimately serving as a basis for permitting the violation of particularly valuable legal interests of an assailant. It is asserted that behaviours classifiable as legitimate self-defence are socially acceptable if their outcome is less harmful than the damage that would result from assailant's actions.[38] However, self-defence resulting in harm or mistreatment comparable to that intended by an assailant is also deemed socially acceptable. This is because, commonly, saving a life at the cost of an assailant's life is justified, and the same principle applies to health. Furthermore, the legislator does not strictly require a balance between the inflicted result and the value of the interest threatened by an assailant's actions but rather invokes the concept of 'proportionate character'. Nevertheless, it is crucial to acknowledge that absolute and unrestricted self-defence, in terms of fending off an attempt, would transform into a mechanism for inflicting harm on an assailant, thus serving as a means rather than an end, and consequently violating Kant's categorical imperative.[39]

By establishing the aforementioned requirement, the legislator specifically demanded that the chosen methods of self-defence ensure minimal harm to an assailant's health, if feasible.[40] The manner of self-defence is proportionate to the danger posed by an attempt when it enables a defendant, through its application,

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[38] Peno, M., 'Obrona konieczna – granice i moralne uzasadnienie instytucji', in: Łaszewska-Hellriegel, M., Kłodawski, M. (eds), *Granice Prawoznawstwa wobec etyki, prawa człowieka i prawa karnego*, Zielona Góra, 2018, p. 187.

[39] Radecki, W., 'Podjęcie obrony koniecznej w świetle prawa and moralności', *Nowe Prawo*, 1976, Issue 7–8, pp. 1017–1018; Grudecki, M., Kleszcz, M., 'Pozbawienie…', op. cit., p. 143.

[40] Grudecki, M., Kleszcz, M., 'Pozbawienie…', op. cit., pp. 143–144; Wawrowski, J., 'Obrona…', op. cit., p. 35; Kilińska-Pękacz, A., 'Nowe…', op. cit., p. 86; Marek, A., 'Obrona konieczna w nowym…', op. cit., p. 101.

to gain the necessary advantage to counteract the attempt,[41] thereby legitimising the action.[42] Thus, to successfully fend off an attempt, self-defensive actions should slightly surpass the intensity of the assailant's behaviour.[43] It is important to remember that in most instances an assailant benefits from the element of surprise and is generally better prepared for a confrontation than a defendant.[44] If multiple self-defence methods are available, a defendant should opt for the most effective yet least harmful approach towards an assailant.[45] Determining a method effectiveness is challenging based solely on objective criteria, as the subjective perception of a defendant and their personal capabilities also merit consideration.[46]

The degree of danger posed by an attempt is influenced by several factors, including the type and manner of utilising dangerous means during the attempt, the assailant's characteristics (e.g., the intensity of their aggressive behaviour), the circumstances of the attempt (e.g., location and time, presence of minors, rapid progression, etc.), and the nature (value) of the threatened interest.[47] It is worth indicating that the more valuable the legal interest under assault, the greater the danger posed by the attempt.[48] Consequently, proportionality of the manner of self-defence to the danger posed by an attempt is also determined by the value of the threatened interest.[49]

Significantly, a person subjected to assault may be unaware of the means an assailant intends to use, even if their assessment is conducted during the attempt. A victim of armed robbery cannot ascertain whether a perpetrator is prepared to 'merely' intimidate, injure, or even kill to seize money. It should also be emphasised that such an assessment is sometimes unfeasible even *ex post*, particularly if a perpetrator's intended result was not realised. In such cases, the materialisation of the danger posed by an assault represents a hypothetical future scenario, impossible to definitively ascertain even during legal proceedings.

Intensive excess refers to instances of legitimate self-defence excess arising from employing a manner of self-defence disproportionate to the danger posed by an attempt. At the outset of discussions on this topic, it must be highlighted that disproportionate character should not be determined solely based on the consequences of a defendant's actions (e.g., harm to health or the loss of life of an assailant).[50] The evaluation should

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41 Decision of the Supreme Court of 14 May 1968 II KR 44/68, LEX No. 112062; Grudecki, M., 'Bezpośredniość…', op. cit., p. 95.

42 Wawrowski, J., 'Obrona…', op. cit., p. 34.

43 Decision of the Administrative Court in Cracow of 5 December 2012, II AKa 165/12, LEX No. 1312606; Grudecki, M., 'Bezpośredniość…', op. cit., p. 95; Wawrowski, J., 'Obrona…', op. cit., p. 35; Iwaniuk, P., 'Obrona…', op. cit., p. 31. Other responsibilities of the defendant in terms of the manner of defence are detailed in: Gurgul, J., 'Psychiatryczno-psychologiczne…', op. cit., p. 106.

44 Tabaszewski, T., 'Eksces intensywny obrony koniecznej w orzecznictwie', *Prokuratura i Prawo*, 2010, Issue 12, p. 80.

45 Ibidem, p. 72.

46 Ibidem, p. 78.

47 Decision of the Administrative Court in Warsaw of 4 November 2013, II AKa 350/13, Legalis No. 747199; Grudecki, M., 'Bezpośredniość…', op. cit., p. 95; Grudecki, M., Kleszcz, M., 'Pozbawienie…', op. cit., pp. 143–144; Sosik, R., *Obrona…*, op. cit., p. 203.

48 Grudecki, M., Kleszcz, M., 'Pozbawienie…', op. cit., pp. 143–144.

49 Sosik, R., *Obrona…*, op. cit., p. 205.

50 Decision of the Administrative Court in Cracow of 30 July 2012, II AKa 115/12, LEX No. 1235622.

encompass the entire range of actions undertaken or potentially feasible in a given situation, rather than just their outcomes.[51] Therefore, assessing the danger posed by an assault and the appropriateness of the chosen method of self-defence should occur *ex ante*, at the moment of the attempt, rather than *ex post*, based on the resulting consequences.[52] Intensive excess may involve infringing on an interest beyond what is indispensable to thwart an attempt or harming an interest of the assailant that was not legitimately necessary for effective self-defence.[53]

LEGITIMATE SELF-DEFENCE EXCESS

Initially, the Criminal Code of 1997 addressed issues related to legitimate self-defence excess through two provisions: according to Article 25 § 2, in instances of legitimate self-defence excess, particularly when a perpetrator adopted a manner of self-defence disproportionate to the danger posed by an attempt, the court could either apply extraordinary mitigation of punishment or decide against imposing any punishment. Meanwhile, based on Article 25 § 3, the court would opt for the latter approach if legitimate self-defence excess resulted from fear or agitation justified by the circumstances of an attempt. M. Wantoła notes that, in its original wording, Article 25 § 3 of the Criminal Code was unique compared to the rest of the Criminal Code because it mandated judges to forego punishment, only allowing for the imposition of punitive measures for crimes resulting from legitimate self-defence excess.[54] This framework underwent modification in 2009[55] when legitimate self-defence excess stemming from fear or agitation justified by the circumstances of an attempt became a factor excluding criminal liability. The most recent amendment related to legitimate self-defence excess occurred in 2017,[56] introducing Article 25 § 2a into the Criminal Code, which stipulates that any legitimate self-defence excess in the context of repelling an attempt involving unlawful entry into a dwelling, premises, house, or a fenced area adjacent to any of those, or countering an attempt preceded by such an action in any of those locations, unless the legitimate self-defence excess was egregious, should not result in punishment. Given that this article focuses on legitimate self-defence excess resulting from fear or agitation justified by the circumstances of an attempt, the 2017 amendment falls outside the scope of the present research.

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[51] Zając, D., 'Naruszenie reguł postępowania z dobrem prawnym jako kryterium określenia stopnia przekroczenia granic obrony koniecznej', *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*, 2014, Issue 2, p. 75; Wawrowski, J., 'Obrona…', op. cit., p. 35; Giezek, J., 'Glosa do postanowienia Sądu Najwyższego z 3 I 2002, IV KKN 635/97', *Państwo i Prawo*, 2002, Issue 11, pp. 107 and 109; Szczepaniec, M., 'Przekroczenie…', op. cit., p. 18; decision of the Supreme Court of 14 June 1984, I KR 123/84, LEX No. 17585.

[52] Tabaszewski, T., 'Eksces…', op. cit., p. 72.

[53] Decision of the Supreme Court of 6 September 1989, II KR 39/89, LEX No. 18000.

[54] Wantoła, M., 'Materialnoprawny charakter instytucji przekroczenia granic obrony koniecznej pod wpływem lęku lub wzburzenia i karnoprocesowe konsekwencje jej zastosowania', *Internetowy Przegląd Prawniczy TBSP UJ*, 2016, Issue 2, p. 184.

[55] Journal of Laws, No. 206, item 1589.

[56] Act of 8 December 2017 amending the Criminal Code (Journal of Laws of 2018, item 20).

Although it is indisputable that legitimate self-defence necessitates defendant's conscious effort to repel an attempt, it is worth contemplating whether this requirement is also relevant to excess justification, thus addressing whether involuntary excess is possible. J. Giezek correctly observes that a defendant often navigates 'a thin red line' between acknowledging a result that inflicts harm on an assailant's particular interests (e.g., life or health) and lacking deliberate action in this regard,[57] likely manifesting as so-called recklessness. The abuse of permission granted by legitimate self-defence does not hinge on the subjective stance since it exists independently of their judgment.[58] A defendant may either intend to exceed those boundaries and accept such a consequence or merely foresee the possibility of exceeding them.[59] However, it should be noted that these considerations are somewhat misplaced. The applicability of a norm does not depend on the actions of the individual subject to it but on its stipulations. Therefore, the question arises whether the provisions of Article 25 § 2–3 of the Criminal Code impose limitations on the subjective aspect. In our opinion, they do not. No normative restriction is placed on this aspect, and Article 8 of the Criminal Code is irrelevant in this context.

LEGITIMATE SELF-DEFENCE EXCESS RESULTING FROM FEAR OR AGITATION JUSTIFIED BY THE CIRCUMSTANCES OF AN ATTEMPT

Fear (encompassing fear, anxiety, or panic) is an inherent emotion accompanying individuals in situations presenting danger or at moments of sudden exposure to external stimuli, complicating the appropriate assessment of a new situation.[60] Fear influences human behaviour in various ways.[61] In certain instances, it may lead to overestimating an adversary's capabilities and the potential threat posed by an attempt.[62] Fear constitutes a rational response to an external and objective threat, prompting an individual to either seek escape or engage in self-defence, thereby enhancing preparedness.[63] Conversely, it is arguable that had the legislator intended for the term fear to signify a rational reaction, it would not have been applied in the context of legitimate self-defence excess. Therefore, it appears that the term was employed in its colloquial sense to denote intense anxiety associated with 'a clear and present danger' and uncertainty regarding the unfolding event.[64]

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[57] Giezek, J., 'Glosa…', op. cit., p. 107.

[58] Ibidem, pp. 107–108.

[59] Ibidem, p. 108.

[60] Kolasiński, B., 'Szczególny wypadek przekroczenia granic obrony koniecznej (art. 25 § 3 k.k.)', *Prokuratura i Prawo*, 2000, Issue 1, pp. 65–66; Szczepaniec, M., 'Przekroczenie…', op. cit., p. 14.

[61] Szczepaniec, M., 'Przekroczenie…', op. cit., p. 14.

[62] Kolasiński, B., 'Szczególny…', op. cit., p. 66; Szczepaniec, M., 'Przekroczenie…', op. cit., p. 14.

[63] Korpysz, A., 'Przekroczenie granic obrony koniecznej w wyniku lęku lub wzburzenia usprawiedliwionych okolicznościami zamachu z art. 25 § 3 k.k. z perspektywy psychologicznej', *Annales Universitatis Mariae Curie-Skłodowska Lublin Polonia. Sectio G*, 2020, Issue 2, pp. 115 and 119.

[64] On a side note, it should be mentioned that in the wording of Article 190 § 1 of the Criminal Code the legislator used the term 'apprehension' (*obawa*), to which – as it seems –

Agitation should be understood as a fleeting, intense emotion (impulse) that disrupts mental equilibrium and diminishes the capacity for rational thought (logical reasoning) in human behaviour.[65] It is a physiological phenomenon[66] where emotions overshadow logic.[67] Both fear and agitation can impede the rational evaluation of one's situation.[68] The reality perceived by such individuals becomes significantly narrowed as their mind absorbs less external information.[69] Consequently, when countering an attempt, they struggle to choose self-defence means appropriate to the threat[70] and to gauge the risk to their legal interests. According to A. Limburska, the terms 'fear' (*strach*) and 'agitation' (*wzburzenie*) are so broadly defined that they encompass almost all negative emotions experienced by a person subjected to an attempt.[71]

It is noteworthy that, unlike Article 148 § 4 of the Criminal Code, Article 25 § 3 of the Criminal Code does not include the adjective 'strong' in reference to agitation. This implies that the intensity of this state of unrest, where emotions dominate intellect, need not be as severe as in situations of physiological affect, the basis of Article 148 § 4 of the Criminal Code.[72] The regulations do not specify any particular degree of intensity for these negative emotions to render the institution under discussion applicable.[73]

In academic literature, one encounters assertions that fear or agitation, as described in Article 25 § 3 of the Criminal Code and leading to the exclusion of punishability for a perpetrator's act, must maintain a cause-and-effect relationship with legitimate self-defence.[74] According to some doctrinal and judicial interpretations, invoking the aforementioned condition is only feasible when the specific circumstances of a given attempt j u s t i f y such a perpetrator's reaction, namely their fear or agitation.[75] Some contend that these emotions must be exceptionally intense,[76]

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a more rational meaning should be ascribed, namely the assumption that the foreboded event will actually occur.

[65] Kilińska-Pękacz, A., 'Nowe…', op. cit., pp. 95–96; Kolasiński, B., 'Szczególny…', op. cit., p. 66; Korpysz, A., 'Przekroczenie…', op. cit., p. 120.

[66] Decision of the Administrative Court in Warsaw of 8 November 2022, II AKa 102/22, LEX No. 3451128.

[67] Kilińska-Pękacz, A., 'Nowe…', op. cit., p. 96; Kolasiński, B., 'Szczególny…', op. cit., p. 67.

[68] Szczepaniec, M., 'Przekroczenie…', op. cit., p. 17.

[69] Ibidem; Legutko-Kasica, A., 'Eksces…', op. cit., p. 87.

[70] Szczepaniec, M., 'Przekroczenie…', op. cit., p. 17; Legutko-Kasica, A., 'Eksces…', op. cit., p. 88.

[71] Limburska, A., 'Niekaralność przekroczenia granic obrony koniecznej w świetle art. 25 § 2a k.k.', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2017, Issue 4, p. 15.

[72] Raj, Ł., 'Przekroczenie granic obrony koniecznej pod wpływem lęku lub wzburzenia usprawiedliwionych okolicznościami zamachu (art. 25 § 3 k.k.), a zabójstwo pod wpływem silnego wzburzenia usprawiedliwionego okolicznościami (art. 148 § 4 k.k.) – wzajemne relacje', *Przegląd Ustawodawstwa Gospodarczego*, 2019, Issue 3, p. 200; Korpysz, A., 'Przekroczenie…', op. cit., p. 121.

[73] Kulesza, J., in: *System…*, op. cit., p. 303.

[74] Kolasiński, B., 'Szczególny…', op. cit., p. 65; Kilińska-Pękacz, A., 'Nowe…', op. cit., p. 95.

[75] Kilińska-Pękacz, A., 'Nowe…', op. cit., p. 96; Korpysz, A., 'Przekroczenie…', op. cit., p. 122; Zoll, A., in: *Kodeks karny. Część ogólna. Tom I. Komentarz do art. 1–52*, Warszawa, 2016, p. 572; Gensikowski, P., 'Problematyka karnoprawnych skutków przekroczenia obrony koniecznej', *Przegląd Sądowy*, 2010, Issue 11–12, p. 136.

[76] Szczepaniec, M., 'Przekroczenie…', op. cit., p. 21.

a position not supported by the legal text. L. Gardocki emphasises the importance of determining whether a defendant had grounds to react in such a manner under those conditions;[77] presumably, the author referred to fear or agitation inducing legitimate self-defence excess. Therefore, fear or agitation must be typical in such contexts.[78] Doctrinal discussions emphasise the need for findings to be based on objective criteria, utilising the concept of a model, rational, and mentally stable citizen.[79] K. Cesarz notes, '[…] invoking these states must […] be rationally explainable through an objectified (external) assessment […].'[80] Some authors, for instance, point to factors that could elicit such reactions, including surprise, a large number of assailants, nighttime, and uncertainty regarding an assailant's intentions or the nature of the attempt.[81] This view was also shared by the Supreme Court in its decision of 14 February 2002, which is worth quoting *in extenso*: 'The situation described in Article 25 § 3 of the Criminal Code must be confined to those cases where it is presumed that the objectively assessed circumstances of the attempt rationally justify the induction of a state of fear or agitation, and that state dictates the manner of repelling the attempt.'[82] However, in another decision, the Supreme Court emphasised that:

> 'A direct, unlawful, and actual attempt on a protected legal interest necessitating legitimate self-defence to repel such an attempt invariably induces a certain level of mental agitation, apprehension, or unrest, rendering it difficult to envisage a lawless attempt that would not evoke fear or agitation in the person assaulted. However, this does not imply that the conditions listed in Article 25 § 3 of the Criminal Code are met in every instance.'[83]

Fear or agitation are acknowledged as negative emotions accompanying the act of repelling an attempt but do not always justify the application of the institutions referred to in Article 25 § 3 of the Criminal Code.[84]

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[77] Gardocki, L., *Prawo…*, op. cit., p. 126. Similarly, Zontek, W., in: *Kodeks…*, op. cit., p. 598 and Administrative Court in Warsaw in decision of 20 December 2018, II AKa 447/18, LEX No. 2622686.

[78] Gardocki, L., *Prawo…*, op. cit., p. 126.

[79] Zoll, A., in: *Kodeks…*, op. cit., p. 572; Gensikowski, P., 'Problematyka…', op. cit., p. 137; Kulesza, J., in: Paprzycki, L.K. (ed.), *System Prawa Karnego. Tom 4. Nauka o przestępstwie. Wyłączenie i ograniczenie odpowiedzialności karnej*, Warszawa, 2016, p. 291.

[80] Cesarz, K., 'Przekroczenie granic obrony koniecznej w wyniku lęku lub wzburzenia usprawiedliwionych okolicznościami zamachu (art. 25 § 3 k.k.) w świetle orzecznictwa Sądu Najwyższego', in: Majewski, J. (ed.), *Okoliczności wyłączające bezprawność czynu. Materiały IV Bielańskiego Kolokwium Karnistycznego*, Toruń, 2008, p. 57. Similar view expressed in the decision of the Administrative Court in Poznań of 7 July 2017, II AKa 97/17, LEX No. 2663233.

[81] Kilińska-Pękacz, A., 'Nowe…', op. cit., p. 96; Kolasiński, B., 'Szczególny…', op. cit., p. 68; Korpysz, A., 'Przekroczenie…', op. cit., p. 122; Mozgawa, M., 'Obrona…', op. cit., p. 188; Sosik, R., *Obrona…*, op. cit., p. 256.

[82] Decision of the Supreme Court of 14 February 2002, II KKN 337/01, LEX No. 53735.

[83] Decision of the Supreme Court of 22 February 2007, WA 6/07, LEX No. 257827. Very similarly on these feelings as invariably characterising the person assaulted: Filar, M., 'Podstawy odpowiedzialności karnej w nowym kodeksie karnym', *Palestra*, 1997, Issue 11–12, p. 15, and Legutko-Kasica, A., 'Eksces…', op. cit., p. 87.

[84] Decision of the Administrative Court in Warsaw of 11 October 2022, II AKa 413/21, LEX No. 3435750.

It is also conceivable to encounter perspectives suggesting that while fear or agitation should objectively exist, the personality and mental attributes of a perpetrator must also be considered.[85] P. Gensikowski argues that Article 25 § 3 of the Criminal Code should not apply in scenarios where fear or agitation are exacerbated by alcohol or another intoxicant consumption, or, alternatively '[…] when, among other factors, the basis of an attempt arises from a conflict between an assailant and a victim, the assailant is unarmed, and the victim is not, or when a victim anticipates an attempt and prepares to counter it, for instance, by arming themselves with a firearm'.[86]

P. Gensikowski further clarifies that not every case of legitimate self-defence excess stems from fear or agitation, and even when these emotions are present, they are not always linked to the threat posed by an attempt.[87] It is also untenable to claim that any instance of agitation or fear justifies employing the most injurious means of self-defence, thus precluding the possibility of intensive excess.[88] Nevertheless, it is accurate that individuals under assault rarely 'keep a cool head' and defend themselves without experiencing the aforementioned emotions.[89]

To comprehend the essence of legitimate self-defence excess, a novel approach to examining several specific model cases is proposed,[90] with each scenario evaluated differently. These cases primarily differ in the mental state of a defendant (including affect and mood, impulse for action, cognitive processes, identity, behaviour, and self-perception),[91] which was described in detail in the third section, leading to varied legal consequences for such self-defence from a criminal law perspective (based on different legal grounds).

1. A perpetrator exceeds the boundaries of legitimate self-defence without experiencing fear or agitation. An illustrative scenario could involve a defendant repelling an attempt by disarming an assailant and causing them to fall, then, as the latter (now unarmed) attempts to rise, presumably to retrieve a dangerous tool), slowly and acting 'in cold blood' stabs them in the neck with the assailant's knife. Although such situations may not be common, their occurrence cannot be entirely ruled out, as it is plausible that fear or agitation inherently accompany every defendant due to the assault itself.[92] Rarely does an assaulted individual remain emotionally unaffected in their response.[93] However,

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[85] Gensikowski, P., 'Problematyka…', op. cit., p. 137.

[86] Ibidem.

[87] Gensikowski, P., 'Nowelizacja art. 25 § 3 kodeksu karnego', *Prokuratura i Prawo*, 2009, Issue 9, p. 135. Similarly: Raj, Ł., 'Przekroczenie…', op. cit., p. 201.

[88] Szczepaniec, M., 'Przekroczenie…', op. cit., p. 17.

[89] Filar, M., 'Podstawy…', op. cit., p. 15; Korpysz, A., 'Przekroczenie…', op. cit., p. 113–114.

[90] The discussed provision of Article 25 § 2 and 3 of the Criminal Code allows for the identification of 4 cases, however – for the sake of a complete normative scope – a fifth case was also indicated, based on Article 25 § 2a, which essentially lies outside the scope of the present research. A similar view is put forward in: Kulesza, J., *System…*, op. cit., p. 303.

[91] https://www.aptelia.pl/czytelnia/a380-Czym_jest_stan_psychiczny__jak_wyglada_dobry_a_jak_zly [accessed on 23 August 2022].

[92] Gurgul, J., 'Psychiatryczno-psychologiczne…', op. cit., p. 108; Szczepaniec, M., 'Przekroczenie…', op. cit., pp. 16 and 21; Gensikowski, P., 'Nowelizacja…', op. cit., p. 135.

[93] Cf. Szczepaniec, M., 'Przekroczenie…', op. cit., p. 21.

the possibility that a defendant may not experience the discussed circumstances due to their personal reaction to a legitimate self-defence situation being influenced by their temperament cannot be discounted.[94] This category also encompasses scenarios where the attempt is made by someone familiar or dear to the defendant, thereby not triggering fear or agitation; nonetheless, the assaulted individual decides to counter the attempt, committing legitimate self-defence excess.

2. A perpetrator oversteps the limits of legitimate self-defence influenced by fear or agitation, which are instigated by the occurrence of a lawless and direct attempt and can be justified by such an attempt. It can be presumed that such emotions are justified when deemed explainable and rational.[95] An example could be a scenario where a defendant, due to aforementioned emotions, shoots an assailant in the chest instead of the hand holding a dangerous weapon. In this case, Article 25 § 3 of the Criminal Code, which excludes punishability for an action undertaken by a defendant committing legitimate self-defence excess, should be applied. As P. Gensikowski notes, besides these feelings, other emotions, such as anger, may be experienced, although it is unlikely they would predominate over fear or agitation in a defendant's emotional experience.[96] Thus, the occurrence of an attempt generally justifies fear or agitation, under which influence a defendant surpasses the confines of legitimate self-defence.
3. A perpetrator surpasses the boundaries of legitimate self-defence under the influence of fear or agitation, with these emotions triggered by the event of a lawless and direct attempt, yet they cannot be justified by such an attempt. This category encompasses an exceedingly rare scenario where fear or agitation induced by an attempt leads to legitimate self-defence excess but cannot be deemed justified. For instance, this might occur in situations where fear for one's life is incited by an attempt to tarnish one's good name through insult, ultimately resulting in the adoption of a disproportionately aggressive self-defence tactic relative to the threat posed by the attempt. It is the prosecution's responsibility to demonstrate such circumstances. In these instances, Article 25 § 3 of the Criminal Code does not apply, but the court may resort to Article 25 § 2 of the Criminal Code, considering the directives and rules of administering a penalty.[97] Nevertheless, the conditions stipulated by these directives and principles must be met, implying that the comprehensive context of the factual situation should support the conclusion that imposing a penalty is unwarranted.[98]

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[94] Korpysz, A., 'Przekroczenie…', op. cit., p. 118.

[95] It is worth referring again to Article 190 § 1 of the Criminal Code, which concerns a **justified** apprehension.

[96] Gensikowski, P., 'Problematyka…', op. cit., p. 136.

[97] Ibidem, pp. 131–132, 136.

[98] Teleszewska, M., 'Konsekwencje prawne przekroczenia granic obrony koniecznej', *Przegląd Sądowy*, 2014, Issue 7–8, pp. 162–163.

4. A perpetrator breaches the limits of legitimate self-defence influenced by fear or agitation, yet these emotions are not provoked by a lawless and direct attempt.[99] A conceivable scenario involves an individual already in a state of agitation prior to the assault, possibly due to familial discord, workplace issues, or distress over their favourite football team's loss, subsequently facing an assault. By committing legitimate self-defence excess, the perpetrator channels their negative emotions (effectively 'taking it out' on the assailant), which, however, do not justify the attempt as these emotions stem from the perpetrator's external environment. Another example of unjustified fear concerning the circumstances of an attempt involves apprehension towards an assailant as an individual, not triggered by the assault per se, but rather by the widespread belief that the assailant is dangerous.[100] It also seems feasible to interpret the actions of a defendant exceeding the limits of legitimate self-defence, driven by a different type of fear (phobia), hence emotional tension unjustified by the situation, in a similar manner.[101] In such cases, Article 25 § 3 of the Criminal Code does not apply, but the court may invoke Article 25 § 2 of the Criminal Code, taking into account the directives and rules of administering a penalty.[102] However, fulfilling the criteria outlined in these directives and rules is essential; the totality of the factual circumstances should underpin the view that penalty imposition is unnecessary.[103]
5. A perpetrator exceeds the boundaries of legitimate self-defence influenced by fear or agitation, yet these emotions arise not from a lawless and direct attempt, or commits legitimate self-defence excess without being driven by those emotions while repelling an attempt involving unlawful entry into a dwelling, premises, house, or an adjacent fenced area, or countering an attempt preceded by such an action in any of those locations, unless the legitimate self-defence excess was egregious, which should not result in punishment. An illustrative case might involve an individual encountering a burglar in their home at night and, as the burglar attempts to flee the scene, striking the burglar's head with a heavy vase, causing destruction and creating a situation where the burglar could die or suffer significant health damage. This action, however, is not performed under the influence of fear or agitation resulting from the attempt's circumstances but, for example, due to a desire for revenge against the burglar. In such instances, Article 25 § 2a of the Criminal Code should be applied. Often, the application scopes of the institutions mentioned in Article 25

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[99] Also referred to in: Gensikowski, P., 'Problematyka…', op. cit., p. 136. See also: decision of the Administrative Court in Gdańsk of 21 September 2016, II AKa 261/16, LEX No. 2157821.

[100] See decision of the Administrative Court in Warsaw of 25 April 2022, II AKa 265/21, LEX No. 3347799.

[101] Raj, Ł., 'Przekroczenie…', op. cit., p. 12; Korpysz, A., 'Przekroczenie…', op. cit., pp. 114–115. According to Ł. Raj, we are then dealing with imaginary legitimate self-defence.

[102] Cf. Gensikowski, P., 'Problematyka…', op. cit., pp. 131–132, 136.

[103] Teleszewska, M., 'Konsekwencje…', op. cit., pp. 162–163.

§ 2a, and Article 25 § 3 of the Criminal Code may intersect[104] because an attempt on domestic peace typically evokes the aforementioned emotions in a defendant. Consequently, the regulatory significance of this provision may be questioned.[105]

It is imperative to assert that in case of scenarios outlined in points 2 and 3 one should not attempt to assess the influence of an attempt's circumstances on the mental state of a defendant committing self-defence excess by employing the concept of a model or an average citizen, etc. Such an approach leads to the absurdity of querying what reaction is standard/average in the face of a present danger, as if each individual did not react differently.[106] The objective of the institution under discussion is to exclude the punishability of legitimate self-defence excess in every instance where the excess results from fear or agitation justified by the attempt's circumstances. Importantly, justification is feasible in virtually all cases of excess due to these reasons, unless specific considerations suggest otherwise. As K. Cesarz points out, it is conceivable to encounter situations that induce fear or agitation, which, however, cannot be justified by the attempt circumstances due to a lack of 'equilibrium' between those emotional states and their triggers.[107] Generally, the absence of punishability in cases delineated in Article 25 § 3 of the Criminal Code is linked to the low degree of guilt of a defendant who, overwhelmed by emotions stemming from a direct and unlawful attempt on any legally protected value, struggles to comply with the law by selecting an appropriate self-defence tactic (specific motivation).[108] When a defendant is taken by surprise during an assault, their reaction time is limited, making it unreasonable to expect them to weigh various motivational factors that could enable them to choose a self-defence method aligned with the posed threat, thus, demanding impartiality or even sheer self-control is similarly unreasonable.[109] Fear or agitation represent a fully justified, innate response to experiencing a lawless attempt on a legal interest.[110] Although not explicitly stated, it is generally accepted that a perpetrator is justified by the mere fact that the attempt triggered their fear or agitation.[111] Less is expected from such an individual than from someone whose experience of an attempt did not elicit such a state. Consequently, this person does not warrant criminal liability.[112] These assertions align with the rationale behind the 2009 amendment, which suggested that the change '[…] will facilitate avoiding unnecessary legal proceedings and the associated traumatic experiences for an individual who committed an excess, including a conviction with exoneration.'[113] An individual who exceeds

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[104] Limburska, A., 'Niekaralność…', op. cit., p. 16; Sosik, R., *Obrona…*, op. cit., p. 270.

[105] Sosik, R., *Obrona…*, op. cit., p. 270.

[106] Szczepaniec, M., 'Przekroczenie…', op. cit., p. 19.

[107] Cesarz, K., 'Przekroczenie…', op. cit., p. 58.

[108] Gensikowski, P., 'Nowelizacja…', op. cit., pp. 133–134; Wantoła, M., 'Materialnoprawny…', op. cit., p. 189; Filar, M., 'Podstawy…', op. cit., p. 15; Korpysz, A., 'Przekroczenie…', op. cit., pp. 117–118.

[109] Korpysz, A., 'Przekroczenie…', op. cit., p. 114; Sosik, R., *Obrona…*, op. cit., p. 255.

[110] Sosik, R., *Obrona…*, op. cit., p. 255.

[111] It seems a similar view is expressed in: Mozgawa, M., 'Obrona…', op. cit., pp. 187–188.

[112] Gensikowski, P., 'Nowelizacja…', op. cit., p. 132.

[113] Ibidem, p. 127. See also: Barczyk-Kozłowska, J. et al., 'My home is my castle – czyli słów kilka o rozszerzeniu granic obrony koniecznej w polskim kodeksie karnym', in: Gurdek, M. (ed.), *Badania nad źródłami prawa i efektami jego stosowania. Tom I*, Warszawa, 2020, p. 19.

the limits of legitimate self-defence due to fear or overwhelming emotions triggered by an attempt simply does not merit punishment, thereby avoiding the stigma associated with criminal proceedings.

M. Szczepaniec highlights the subjective element in terms of a defendant's emotional resilience, personality, and response to stressful situations.[114] She asserts that legitimate self-defence excess induced by fear or agitation stemming from emotional or neurotic hyperactivity of the individual who committed the excess should be evaluated differently than excess triggered by the particularly threatening nature of an attempt.[115] This perspective holds validity when considering the aforementioned correlation; if a perpetrator exceeded limits due to their neurotic personality and frequent temper loss, with agitation not arising from the attempt itself, Article 25 § 3 of the Criminal Code is inapplicable. Conversely, if the attempt provoked agitation, the neurotic personality or excessive hyperactivity of the individual committing the excess are irrelevant for excluding punishability based on Article 25 § 3 of the Criminal Code.

Simultaneously, it should be noted that failing to meet the conditions specified in the third paragraph results in a defendant being evaluated under criminal law according to the second paragraph, which broadens the category of behaviours identified as legitimate self-defence excess.[116] This regulation (§ 2) does not establish any prerequisites for availing the privileges contained within and not assured otherwise. The legislator presumed that any attempt might limit the decision-making options available to a defendant, thereby diminishing the seriousness of their guilt. The ultimate appraisal of excess, while considering the distinct nature of legitimate self-defence, must be grounded in the general principles of penalty imposition.

Furthermore, doctrinal discussions have not addressed whether the condition described in Article 25 § 3 of the Criminal Code, following the 2009 amendment, eliminates unlawfulness, guilt, or perhaps punishability itself.[117] The answer to this query depends on the adopted model of crime and the understanding of the punishability framework. The assertion that, in such cases, a perpetrator's guilt is especially minimal remains uncontroversial.[118] Detailed deliberations on this topic exceed the scope of the issues broached in this article. It is merely advisable to note that any act of legitimate self-defence excess will always be unlawful, thereby entitling its victim to exercise their right to legitimate self-defence. Moreover, irrespective of the adopted theoretical framework, legitimate self-defence excess resulting from fear or agitation provoked by the attempt's circumstances leads to either not initiating or discontinuing proceedings based on Article 17 § 1(4) of the Code of Criminal Procedure. Consequently, the sole practical distinction between self-defence within statutory boundaries and legitimate self-defence as outlined in

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[114] Szczepaniec, M., 'Przekroczenie…', op. cit., p. 18.

[115] Ibidem.

[116] Bearing in mind, of course, that the second special circumstance is excess for the sake of defending domestic peace, therefore, the above-mentioned § 2 completes the two normatively singled out excesses.

[117] Wantoła, M., 'Materialnoprawny…', op. cit., p. 186.

[118] See, among others, Szczepaniec, M., 'Przekroczenie…', op. cit., pp. 13–14.

Article 25 § 3 of the Criminal Code, is that, in the latter scenario, an assailant is entitled to such justification.[119] Naturally, the difference in legal proceedings should not be overlooked; if a court determines during criminal proceedings that a perpetrator's act remained within the limits of legitimate self-defence, it is obligated to acquit the accused. However, if it is established that the conditions set forth in Article 25 § 3 of the Criminal Code are met, the court should terminate the proceedings,[120] which, as M. Wantoła observes, is perceived as a less definitive resolution by public opinion than an acquittal.[121] This perspective is accurate since such a procedural outcome based on Article 17 § 1(4) of the Code of Criminal Proceedings, due to the 'not amenable to penalty' clause, signifies that although all criteria for classifying an act as a crime are satisfied, the legislator deems neither necessary nor justifiable to impose punishment on the perpetrator.[122]

RECAPITULATION

To summarise the discussions presented in this article, the main theses highlighting the correlation between paragraphs 3 and 2 in Article 25 of the Criminal Code are outlined as follows:

1. Contrary to common assertions in doctrine and jurisprudence, it is unfeasible to employ the notion of a model (average) citizen, frightened or agitated, in evaluating legitimate self-defence excess; such a standard does not exist as each individual reacts uniquely to threats and defines danger differently.
2. Fear or agitation are emotions commonly experienced by individuals when facing danger; often, a defendant who remains within the confines of legitimate self-defence will experience these emotions.
3. It is imperative not to disregard scenarios where repelling an attempt does not evoke fear or agitation; a defendant might decide to protect their (or another person's) legal interests rationally, for example, when the attempt is made by an acquaintance known to be non-threatening. Even in such circumstances, legitimate self-defence excess is not precluded; here, Article 25 § 2 of the Criminal Code might be applicable.
4. A defendant experiencing fear or agitation while countering an attempt does not always result from the assault itself. For instance, repelling an attempt by a spouse under the influence of alcohol, where a defendant exceeds the bounds of legitimate self-defence due to agitation sparked by marital strife (partner's alcoholism), rather than the assault per se, typifies such a scenario. In this situation, legitimate self-defence excess may be governed by Article 25 § 2 of the Criminal Code, or, extending beyond the primary discussion, Article 25 § 2a of the Criminal Code.

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[119] Similar view expressed in: Filar, M., 'Podstawy…', op. cit., p. 16.

[120] See also: Gensikowski, P., 'Nowelizacja…', op. cit., p. 133.

[121] Wantoła, M., 'Materialnoprawny…', op. cit., p. 194.

[122] Sitarz, O., in: Dukiet-Nagórska, T., Sitarz, O. (eds), *Prawo karne. Wykład akademicki*, Warszawa, 2021, p. 436.

5. When fear or agitation stemming from an assault trigger legitimate self-defence excess, the provisions of Article 25 § 3 of the Criminal Code are applicable if justified. Entities adjudicating such conduct should not investigate the intensity of these emotions or employ the concept to ascertain whether 'a model citizen' would surpass legitimate self-defence boundaries in a given case. Nor is it relevant if the individual who did exceed them exhibited emotional hyperactivity.[123] In Article 25 § 3 of the Criminal Code, the legislator mandates that fear or agitation should be justified by the circumstances of the attempt, rather than – as pointed out by R. Sosik – '[…] justified by circumstances r e s u l t i n g [emphasis added by MG, OS] from an already executed attempt'.[124] It should be added that justification pertains to fear or agitation, not the conduct of the individual committing the excess. The latter's justification is a secondary matter, addressed under Article 25 § 3 of the Criminal Code.

Thus, it is essential to reiterate that the distinctions in Article 25 § 3 and 2, primarily concern the depiction of a defendant's mental state, which consequently influences the legal treatment of such self-defence. However, it is crucial to emphasise that the legally prescribed spectrum of responses relevant to criminal law does not hinge on the value of the violated interest by a defendant, nor on the discrepancy between the preserved and sacrificed values, nor even on the degree of deviation from the principle of proportionality or simultaneity between the posed threat and self-defence. The differentiating criterion between these two provisions is a specific atypical motivational circumstance experienced by a defendant: (1) initially presumed by the legislator (based on empirical and psychological insights), yet requiring verification by the specific factual situation, leading to non-punishability; or (2) not delineated by the legislator, alternative (distinct) from § 3,[125] allowing for a deviation in penalty imposition (§ 2). Each case necessitates an examination of the mental state of the individual committing the excess to determine which of the aforementioned scenarios occurred, thereby establishing whether the act was influenced by fear or agitation and, if so, attributing these emotions to either the attempt or another cause.

It should be acknowledged that M. Filar's perspective, which suggests that the discussed institution effectively precludes the application of Article 25 § 2 of the Criminal Code, is correct. This results in a scenario where it becomes practically impossible to punish a perpetrator who commits an excess in almost every instance of legitimate self-defence.[126] This approach, however, embodies humanitarianism within criminal law. It would be unduly harsh for the state to penalise someone who was defending the legal order but struggled to meet the criteria for justifying self-defence due to emotions elicited by an assault. In essence, it would lead to the punishment of the individual wronged by the crime, who, in most cases, due to

[123] Cf. Korpysz, A., 'Przekroczenie…', op. cit., p. 114.
[124] Sosik, R., *Obrona…*, op. cit., p. 257.
[125] And, of course, in § 2a of the analysed provision.
[126] Filar, M., 'Podstawy…', op. cit., pp. 15–16.

the spontaneous nature of the attack, has limited control over the unfolding situation and is unable to rationally determine what constitutes lawful self-defence.[127] Thus, the assailant-perpetrator bears the risk that any unlawful harm inflicted on them might remain unpunished by criminal law (or that the punishment could be substantially reduced).

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[127] Barczyk-Kozłowska, J. et al., 'My home…', op. cit., pp. 18–19.

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Cite as:

Grudecki M., Sitarz O. (2024) '*Fear or agitation as normative elements of legitimate self-defence excess*', Ius Novum (Vol. 18) 1, 13–34. DOI 10.2478/in-2024-0002

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Ius Novum

2024, vol. 18, no. 1, pp. 35–53

CRIMINALISATION OF THE SO-CALLED FORCED MARRIAGE IN THE POLISH CRIMINAL LAW

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DOI 10.2478/in-2024-0003

Abstract

This article discusses the issue of so-called forced marriages, the criminalisation of which was introduced into Polish criminal legislation by the Act of 13 January 2023 amending the Code of Civil Procedure and some other acts. Introducing the provisions of Article 191b into the Criminal Code aims to fulfil the obligation arising from Article 37 of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence of 11 May 2011 (Journal of Laws of 2015, item 961). In addition to outlining the statutory features of new types of crimes, the article addresses issues such as criminal liability, the concurrence of regulations, and the issue of the so-called cultural defence.

Keywords: Istanbul Convention, forced marriage, relationship corresponding to a marriage in the perpetrator's religious or cultural environment, violence, unlawful threat, abuse of the relationship of dependence, use of a critical situation, deception, cultural defence

1. INTRODUCTION

The subject covered in this article is the issue of so-called forced marriage, the criminalisation of which was introduced in Polish criminal legislation by the Act of 13 January 2023, amending the Code of Civil Procedure and some other acts[1] through the addition of Article 191b to the Criminal Code ('CC'). The amendment aims to strengthen the protection of individuals suffering from domestic violence and to align the law in force with the requirements of the Council of Europe

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1 Journal of Laws of 2023, item 289.

Convention on Preventing and Combating Violence against Women and Domestic Violence, opened for signature in Istanbul on 11 May 2011.[2]

The Convention mandates the criminalisation of intentional conduct that forces an adult or a child to enter into a marriage (Article 37(1)) and luring an adult or a child to the territory of a Party State other than the one in which they reside, with the purpose of forcing this adult or child to enter into a marriage (Article 37(2)). 'Forcing' is used in the Convention in a broad sense, encompassing both physical and psychological influence.

A conventional requirement set forth in Article 41 includes the penalisation of intentional aiding and abetting in the commission of the offences referred to in Article 37 (Article 41(1)) and intentional attempts to commit the offences referred to in Article 37 (Article 41(2)). Article 42 of the Convention prohibits establishing domestic legal regulations that regard culture, custom, religion, tradition, or the so-called honour as justification for acts of violence covered by the Convention. Given that minors are often incited to commit such acts, thereby usually avoiding criminal liability, the Convention obliges Parties to take necessary legislative or other measures to ensure that incitement of a child by any person to commit any of the acts of violence covered in the Convention does not diminish the criminal liability of that person for the acts committed. The drafters of the Convention emphasise that a large number of offences listed in the Convention are usually committed within relationships between family members as well as by persons who are members of the victims' immediate social environment. Furthermore, pursuant to Article 43 of the Convention, all offences established in accordance with the Convention should apply irrespective of the nature of the relationship between victims and perpetrators (e.g., relationship between spouses or parents and children).

The solution consisting of separate criminalisation of a forced marriage, in a way that takes into account the specific characteristic of such an offence as well as the intentional misleading of an adult or a child to bring them to the territory of another country with the intention of forcing them to enter into a marriage, was recommended to Polish authorities by GREVIO.[3] As outlined in the GREVIO report, although the Istanbul Convention does not require that the Parties establish separate provisions penalising every form of violence against women, it aims to support the Parties in creating a legal framework to ensure effective intervention and prosecution. At the same time, it was noted that in the absence of data on the incidence of forced marriages in Poland and the number of reports to social welfare services or law enforcement bodies, assessing the number of women who are or may be at risk of a forced marriage and determining the usefulness of general provisions of criminal law for prosecution and sentencing is difficult. Information provided to GREVIO by

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[2] Journal of Laws of 2015, item 961, and of 2021, item 844, hereinafter referred to as 'Istanbul Convention'.

[3] The Convention establishes a monitoring mechanism aimed at the assessment of the level of its implementation by the Parties. The monitoring mechanism is composed of two pillars: Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), a body of independent experts, and the Committee of the Parties, a political body composed of representatives of the Parties to the Convention.

civil society representatives suggests that forced and early marriages are practiced in some Roma communities. The problem may also affect women and children from migrant backgrounds. Owing to the need for a comprehensive approach, GREVIO strongly encourages Polish authorities to ensure that any criminal justice solution is accompanied by a comprehensive strategy for preventing and detecting this form of violence as well as by support for women and girls facing a forced marriage.[4]

At the stage of joining the Istanbul Convention, the Polish draftsmen emphasised that acts referred to in Article 37 of the Convention could be prosecuted in Poland in accordance with Article 191 CC (coercing someone into behaving in a certain way). In turn, luring may be classified as aiding and abetting in criminal coercion to certain conduct.[5] On the other hand, in the justification of the governmental Bill amending Act: Code of Civil Procedure and some other acts (print No. 2615), it was stated that:

> 'in the opinion of the draftsman, Article 191 CC does not contain all the elements of a crime under Article 37 of the Istanbul Convention. The Criminal Code does not provide for a separate offence of luring an adult or a child to the territory of a Party State or a state other than the one in which he or she resides for the purpose of forcing them to enter into a marriage.' It should also be added that, as the explanatory report to the Convention suggests, the term 'luring' used in the provision means every type of behaviour that the perpetrator uses to tempt the aggrieved person to travel to another country, for example under a pretext or by inventing a reason such as visit to a sick family member. The intention must include the act of luring a person abroad as well as the purpose of forcing that person to enter into a marriage (paragraph 197). GREVIO also drew attention to this fact and recommended in the final evaluation report that the Polish authorities criminalise the intentional conduct of misleading an adult or a child in order to bring them to the territory of another country with the intention to force them to enter into a marriage, in accordance with Article 37(2) of the Istanbul Convention.[6] For the above reasons, a new type of crime was introduced in Article 191b CC (Article 5(4)), which contains the features of the entire offence under Article 37 of the Convention.

However, the above statement raises doubts. As the Supreme Court notes in the opinion of 24 October 2022 on the governmental Bill amending Act: Code of Civil Procedure and some other acts (print No. 2615):

> 'criminal law creates a certain logical system in which various forms of criminal phenomena, not only perpetration in the strict sense, are criminalised. As indicated in Article 18 § 3 CC, whoever, with the intention to make another person commit a prohibited act, facilitates its commission by his behaviour, is liable for aiding and abetting. Therefore, there should be no doubts that a person who lures another person to the territory of another country so that the main perpetrator can commit a prohibited act consisting, in fact, in entering into a forced marriage is such an entity. Therefore, the proposed regulation should be considered unnecessary due to the fact that it would not introduce additional criminalisation, but only expand the existing provisions.'[7]

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4 GREVIO/Inf(2021)5 Polska, p. 80.

5 See print No. 2515: *Rządowy projekt ustawy o ratyfikacji Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej, sporządzonej w Stambule dnia 11 maja 2011 r.*

6 GREVIO Baseline Evaluation Report Poland, GREVIO/Inf(2021)5, Adopted by GREVIO on 23 June 2021, p. 64, www.coe.int/conventionviolence [accessed on 5 April 2024].

7 *Opinia SN z dnia 24.10.2022 r. do rządowego projektu ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustawa* (print No. 2615), https://orka.sejm.gov.pl/Druki9ka.nsf/0/A88C237C1AF86014C12588EC00465263/%24File/2615-004.pdf [accessed on 5 April 2024].

2. CHARACTERISTICS OF STATUTORY FEATURES

Article 191b § 1 CC stipulates criminal liability for causing a person to enter into a marriage within the meaning of the Polish legal system as well as to enter into relationships corresponding to a marriage in the perpetrator's religious or cultural environment. In turn, § 2 penalises the conduct consisting of persuading another person to leave the territory of the Republic of Poland for the purpose of committing the offence referred to in § 1.

For a full characterisation of the types of prohibited acts under Article 191b CC, a classical arrangement based on the traditional division of statutory features was adopted. Moreover, reference was made to such issues as criminal liability and the concurrence of provisions.

2.1. OBJECT OF PROTECTION

Article 191b was added to Chapter XXII, which groups offences against freedom. This solution deserves approval. It is assumed in the literature that the typical object of offences specified in this Chapter is freedom to make decisions, which may be violated by depriving another person of the ability to make decisions at all (e.g., deprivation of the possibility to move), or the aggrieved by force or threat is brought to make a certain decision in line with the will of the person using violence or threat.[8] Freedom, perceived as a person's right, is subject to protection, as expressed in Article 31(1) of the Constitution of the Republic of Poland.[9]

Under Article 191b § 1 CC, the freedom to take a decision on entering into a marriage or a relationship corresponding to a marriage in a certain religious or cultural environment is an individual object of protection. The secondary object of protection may include freedom, bodily inviolability, and dignity, which are related to the multitude and variety of causative activities.[10] In turn, Article 191b § 2 CC protects, first and foremost, a person's freedom to decide where the aggrieved person wants to stay. The additional object of protection is the same interest as in the case of Article 191b § 1 CC.[11]

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[8] Zoll, A., *Komentarz do rozdziału XXIII, Nt 2*, in: Wróbel, W., Zoll, A. (eds), *Kodeks karny. Część szczególna. T. 2. Cz. 1. Komentarz do art. 117–211a*, Warszawa, 2017.

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

[10] See Królikowski, M., Sakowicz, A., *Komentarz do art. 191b KK, Nb 3,* in: Królikowski, M., Zawłocki, R. (eds), *Kodeks karny. Część szczególna. Komentarz do artykułów 117–221*, Vol. II, Warszawa, 2023.

[11] Lachowski, J., *Komentarz do art. 191(b), Nt 2,* in: Konarska-Wrzosek, V. (ed.), *Kodeks karny. Komentarz*, LEX/el. 2023.

2.2. PERPETRATOR OF A PROHIBITED ACT

The types of prohibited acts under Article 191b § 1 and § 2 CC are, in general, common crimes, i.e., they may be committed by anybody. With regard to the features: 'by violence, unlawful threat', 'taking advantage of a critical situation', as well as 'with the use of deception', they are common crimes. However, only the perpetrator who is in such a relationship can abuse the relationship of dependence. In this respect, the types of crimes under Article 191b § 1 and 2 CC are individual offences.

The legislator did not provide for the possibility of holding a minor criminally liable for committing these prohibited acts pursuant to Article 10 § 2 CC.

2.3. OBJECT OF A PROHIBITED ACT

The behaviour specified in Article 191b § 1 CC consists in causing another person to enter into a marriage or a relationship that corresponds to a marriage in the perpetrator's religious or cultural environment. The commission of a prohibited act must take place with the use of violence, unlawful threats or abuse of the relationship of dependence, or taking advantage of a critical situation. However, unlike in the case of the type under Article 191b § 2 CC, deception is not mentioned among modal features.

In turn, the type of a prohibited act specified in § 2 consists in persuading another person to leave the territory of the Republic of Poland with the use of deception or abuse of the relationship of dependence or a critical situation for the purpose of committing an offence under § 1.

2.3.1. CAUSATIVE ACTIVITY

In order to match the features of the type under Article 191b § 1 CC, the statute requires that another person be caused to enter into a marriage or a relationship that corresponds to a marriage in the perpetrator's religious or cultural environment.

In accordance with the dictionary definition, the Polish verb *doprowadzić* (to cause) means: 'be a cause of something, cause somebody to do something, cause something to happen, trigger something'. The verb *doprowadza* (causes) is classified as a functional-causative feature. It is used in the description of many offences[12] and indicates the need for a different result each time. Its use in Article 191b § 1 CC determines the causative nature of the offence in question.

One can speak about *doprowadzenie* (causing somebody to do something) referred to in Article 191b § 1 CC only when the perpetrator's conduct matching the features specified in the provision is a condition for entering a marriage or a relationship that corresponds to a marriage in the perpetrator's religious or cultural environment. There must be a causative and normative connection between the perpetrator's

[12] See, e.g., Article 124 § 1, Article 151, Article 153 § 1, Article 197 § 1–2, Article 198, Article 199 § 1–3, Article 200 § 1, Article 203, Article 281, Article 282 and Article 286 CC.

conduct and the act of entering a marriage or a relationship corresponding to a marriage in the perpetrator's religious or cultural environment.

The statutory result consists in causing another person to enter a marriage or a relationship corresponding to marriage in the perpetrator's religious or cultural environment. Therefore, the offence is committed the moment a marriage or a relationship referred to in this provision is actually entered into. In the event the perpetrator intends to achieve such a result but fails to achieve it, we deal with an attempt.

A monogamous marriage between a man and a woman is the form of marriage recognised in the Polish legislation (Article 1 § 1 of the Family and Guardianship Code ('FGC')). Article 18 of the Constitution of the Republic of Poland also defines marriage as a union of a man and a woman. A person who is married cannot enter into another marriage (Article 13 § 1 FGC).

In accordance with Article 191b CC, however, it concerns not only a legally regulated marriage but any relationship that corresponds to a marriage, but at the same time is permissible in the light of a specific religion or in a given cultural environment. The Polish legislator decided to go beyond the scope of Article 37 of the Istanbul Convention, the regulations of which apply only to forced marriages and not to relationships 'corresponding to them' based on specific criteria. The concept of 'a relationship corresponding to a marriage within the perpetrator's religious or cultural environment' is not easy to define and does not facilitate the interpretation of Article 191b CC, as already noted in the literature.[13] Criminal liability in light of this provision depends not only on the regulation of the institution of marriage in the Polish legal system, but also on religious and cultural customs.[14] A same-sex partnership may also be considered a relationship 'corresponding to a marriage in the perpetrator's religious or cultural environment.' In the light of Polish law, such a relationship cannot be recognised as a marriage, although it seems that in the context of the features of Article 191b CC, it matches the features of 'a relationship corresponding to a marriage in the perpetrator's religious or cultural environment.'[15]

In accordance with Article 191b § 1 CC, the identity of a person using violence, unlawful threat or abuse of the relationship of dependence, or taking advantage of a critical situation for the purpose of causing someone to enter a marriage and a person who enters into a marriage with the aggrieved is not required.

It should be noted that Article 32 of the Convention imposes an obligation to take necessary legislative or other measures to ensure that marriages concluded under force may be voided, annulled, or dissolved without imposing undue financial or administrative burden on the victim. These provisions of the Convention align with the solution provided in Article 15 § 1 FGC, i.e., marriage annulment. It is possible to annul a marriage concluded by a person who, for any reason, was in a state excluding conscious expression of their will; under the influence of a m i s t a k e as to the identity of the other party; as well as under the influence of u n l a w f u l

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[13] Mozgawa, M., *Komentarz do art. 191(b), Nt 3*, in: Budyn-Kulik, M., Kozłowska-Kalisz, P., Kulik, M., Mozgawa, M. (eds), *Kodeks karny. Komentarz aktualizowany,* LEX/el. 2023.

[14] Thus Lachowski, J., *Komentarz do art. 191(b), Nt 9,* in: *Kodeks karny. Komentarz*…, op. cit.

[15] For a similar stance see: Mozgawa, M., *Komentarz do art. 191(b), Nt 3*, in: *Kodeks karny. Komentarz aktualizowany*…, op. cit.

threat from the other party or a third person, if the circumstances indicate that the person making a declaration could have feared that they or another person was in serious personal danger. Therefore, the circumstances referred to in Article 191b § 1 CC in which a marriage is concluded do not make it voidable *ab initio*. A spouse who made a defective declaration may request the annulment of a marriage. One cannot request the annulment of a marriage after six months from the end of the state that excluded conscious expression of will, from the detection of a mistake or from the end of the fear caused by unlawful threat; and in any case, after three years from the conclusion of a marriage. A prosecutor may also instigate a lawsuit to annul a marriage and determine whether it does or does not exist (Article 22 FGC).

The type of prohibited act under Article 191b § 2 CC consists in persuading another person to leave the territory of the Republic of Poland with the use of deception or abuse of the relationship of dependence or taking advantage of a critical situation with the purpose of committing the crime referred to in § 1 herein. In accordance with the content of the implemented Article 37(2) of the Istanbul Convention, 'Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of luring an adult or a child to the territory of a Party or a State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage is criminalised.' As it was indicated above, in this provision, 'luring' means any conduct by which the perpetrator tempts the aggrieved person to travel to another country.

Taking into account linguistic aspects, the use of the verb *nakłaniać* (to induce, persuade) by the Polish legislator is fully understandable. Inducing/persuading is understood as influencing the will of another person in order to prompt them to take a specific action or to omit to take it.[16] In accordance with Article 191b § 2 CC, it concerns a decision to leave the territory of the Republic of Poland. This activity of inducing must be directed at an individual person.

Interpretation of the functional feature under Article 191b § 2 CC should be made in accordance with the applicable provision of Article 37(2) of the Convention, which quotes 'luring' and gives this conduct a formal character. It seems that despite the traditional understanding of 'luring' as a functional and consequential feature, it should be assumed that the prohibited act under Article 191b § 2 CC constitutes an ineffective (formal) offence. In order to match the features of a prohibited act, it is not necessary to prompt a persuaded person to leave the territory of the Republic of Poland,[17] nor to actually change his or her place of residence.

Article 191b § 2 CC is applied only in a situation when the aggrieved is staying in the territory of the Republic of Poland at the time the offence is committed. However, the scope of criminalisation does not cover a situation in which such

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[16] See, e.g., judgement of the Appellate Court in Kraków of 8 July 1999, II aKa 121/99, KZS 1999, No. 8–9, item 37.

[17] See Królikowski, M., Sakowicz, A., *Komentarz do art. 191b KK, Nb 11,* in: *Kodeks karny. Część szczególna…*, op. cit.; Lachowski, J., *Komentarz do art. 191(b), Nt 9,* in: *Kodeks karny. Komentarz…*, op. cit.

a person is abroad, e.g., on holiday.[18] It should be admitted that the analysed provision concerning the place of residence of the aggrieved person was defined too narrowly in comparison to the implemented Article 37(2) of the Istanbul Convention.

2.3.2. MODAL FEATURES

Each of the above-mentioned modal features referred to in Article 191b CC defining the manner of influencing the aggrieved person generates a series of interpretational problems that have long been raised in the literature and in case law. The features appear in the descriptions of many types of prohibited acts. Due to the framework of the present study, their characteristics will be limited to basic issues relevant for the correct interpretation of Article 191b CC.

2.3.2.1. VIOLENCE

Violence is a feature of many offences listed in the current Criminal Code. It should be pointed out that the linguistic contexts in which the Criminal Code uses the term 'violence' differ in the Polish language, e.g., *zastosowanie przemocy* (single use of violence) (Article 115 § 3 CC, Article 115 § 22 (1) CC)), *stosowanie przemocy* (repeated use of violence) (Article 118a § 2 (5) CC, Article 119 § 1 CC, Article 191 § 1 CC), *używanie przemocy* (resorting to violence) (Article 191a § 1 CC). In Article 191b § 1 CC a phrase *przemocą (…) doprowadza* ((who) by violence (…) causes) is used.

The concept of violence has not been defined by statute; and determination of its meaning has been left to the doctrine and the judiciary. It should be noted that in common parlance 'violence' means: 'force that outweighs someone's force; physical advantage used for unlawful acts against someone; unlawfully imposed power, domination; unlawful acts with the use of coercion; an outrage';[19] as well as 'the advantage, usually physical, used to impose one's will on someone or to force something on someone; power illegally imposed on someone, an outrage'.[20]

Referring to the systemic interpretation, one should indicate a legal definition of 'domestic violence' laid down in Article 2(1)(1) of the Act of 29 July 2005 on Counteracting Domestic Violence.[21] Violence is also defined in international legal documents. The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, done in Istanbul on 11 May 2011, formulates the following definitions: 'violence against women' is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life (Article 3(a)); 'domestic violence' shall mean all acts of physical, sexual,

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[18] Cf. the opinion of the Ombudsman of 1 December 2021 on the Bill of 7 October 2021 amending Act: Code of Civil Procedure and some other acts, https://bip.brpo.gov.pl/pl/content/rpo-przemoc-domowa-lepsza-ochrona-ms-opinia [accessed on 5 April 2024].

[19] Szymczak, M. (ed.), *Słownik języka polskiego PWN*, Vol. II, Warszawa, 1979, p. 986.

[20] Dubisz, S., *Wielki Słownik Języka Polskiego PWN*, Vol. III, Warszawa, 2018, p. 1076.

[21] Consolidated text: Journal of Laws of 2021, item 1249, as amended.

psychological or economic violence that occur within the family or domestic unit (…) (Article 3(b)). In turn, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime,[22] in paragraph 18 defines violence in a family as violence which could cover physical, sexual, psychological or economic violence and could result in physical, mental or emotional harm or economic loss.

In accordance with the Criminal Code provisions, the legislator clearly distinguishes certain types of violence, which is important for determining the scope of designates of the feature. In Article 191b § 1 CC, the legislator uses the term 'violence' and not, for example, 'violence against a person'[23] or 'violence other than violence against a person'.

The concept of 'violence against a person' is understood as the use of physical force targeted directly at a person, which is immanently associated with the violation of at least this person's bodily inviolability; therefore, it can only consist of direct physical influence on a person and does not include indirect influence (the so-called indirect violence) through dealing with a thing.[24] Violence against a person means only direct physical influence on a person, which prevents or breaks resistance or influences the formation of his will through the use of physical pain.[25]

In turn, 'violence other than violence against a person' is indicated in Article 115 § 9a CC in relation to a particularly aggravated type of larceny. In the literature, it is pointed out that violence other than violence against a person is indirect, taking the form of influence on the aggrieved through physical force targeted at an object or animal. In the provision, the legislator indicated situations in which a perpetrator physically exerts influence on objects to exert influence on the human psyche, i.e., uses violence against things.[26]

In accordance with Article 191b § 1 CC, the legislator did not decide to limit violence to a specific type, which makes it possible to use the term in its broad sense, in accordance with the meaning given to it in the literature and case law.[27]

Among many definitional concepts, one should distinguish T. Hanausek's view that violence is influence with the use of physical means that, by preventing or breaking the resistance of the coerced person, are intended to prevent the formation or execution of their will decision or, by exerting pressure on their motivational processes with the use of currently caused affliction, set these decisions in the

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[22] OJ L 315, 14.11.2012, p. 57.

[23] The legislator clearly distinguishes the concept of violence from violence against a person in the Criminal Code. Violence is referred to in e.g.: Article 64 § 2, Article 115 § 3 and 22, Article 118a § 2 (4) and (5), Article 124 § 1, Article 127 § 1, Article 128 § 1 and 3, Article 197 § 1, Article 202 § 3 CC; and violence against a person is referred to in: Article 72 § 1b, Article 75 § 1a, Article 119 § 1, Article 191 § 1, Article 191a § 1, Article 280, Article 281 CC.

[24] See the Supreme Court resolution of 10 December 1998, I KZP 22/98, *Orzecznictwo Sądów Polskich*, 1999 No. 2, item 39 with glosses by: Zoll, A., *Orzecznictwo Sądów Polskich*, 1999, No. 5, pp. 242–244; Cieślak, W., *Przegląd Sejmowy*, 1999, No. 10, pp. 141–145; Kulesza, J., *Palestra*, 1999, No. 5–6, pp. 191–193.

[25] Gardocki, L., *Prawo karne*, Warszawa, 1998, p. 299.

[26] See Daniluk, P., in: Stefański, R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, p. 805.

[27] For more on the concept of violence in the doctrine of criminal law and case law see Romańczuk-Grącka, M., *Pojęcie i funkcje przymusu psychicznego w prawie karnym*, Warszawa, 2020.

direction desired by the perpetrator.[28] This definition indicates the basic feature of violence in the form of influence with the use of physical means, i.e., such that can directly cause an objective change, either in the coerced person or in his environment.

In the doctrine, coercion (in the context of violence used by the perpetrator) is divided into absolute and compulsive. It is pointed out that violence may take the form of *vis absoluta* (absolute coercion) or *vis compulsiva* (relative coercion).[29] The former pertains to efforts to violate the ability to make will decisions or to implement such decisions. When the perpetrator uses *vis compulsiva*, they take advantage of the aggrieved person's ability to consciously shape his or her will based on the analysis of factors affecting that person. The use of this ability consists in the imposition by the perpetrator of motives that cause the coerced person to make a decision in accordance with the perpetrator's wishes.[30] Such a broad interpretation of violence is approved in case law.[31]

The object targeted constitutes an important criterion of violence. Violence referred to in Article 191b CC may directly target the aggrieved person but also adopt an indirect form: through an object or a third person. In the latter case, the object of influence is the aggrieved person's environment, i.e., third persons and the surrounding things, provided that this way the perpetrator wants to exert influence on the aggrieved person's conduct and the extent of affliction justifies the assumption that he is under coercion. The Supreme Court's view formulated based on the feature of violence laid down in Article 167 § 1 CC of 1969 maintains topicality. According to its judgment, violence means:

> 'a physical act in a broad sense that is targeted either directly at the aggrieved, obligating them to submit to the will of the perpetrator and behave in a certain way, or at an object owned by the aggrieved which limits the will of the aggrieved person in the field of possessing this item, disposing of it, or using it'.[32]

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[28] See Hanausek, T., *Przemoc jako forma działania przestępnego*, Kraków, 1966, p. 65. For more on the issue of this feature see, inter alia: Bigoszewski, T., 'Przemoc jako znamię strony przedmiotowej', *Czasopismo Prawa Karnego i Nauk Penalnych*, 1997, No. 2, p. 19 et seq.; Wawrowski, J., 'Przestępstwa z użyciem przemocy – przemoc a przemoc wobec osoby', *Przegląd Sejmowy*, 2007, No. 6, p. 121 et seq.; Wysocki, M., 'Przemoc wobec osoby w rozumieniu art. 191 k.k.', *Prokuratura i Prawo*, 1999, No. 3, p. 60 et seq.

[29] Cf. the Supreme Court judgement of 6 September 1994, II KRN 159/94, OSNK, 1994, No. 9–10, item 61; Spotowski, A., in: Andrejew, I., Kubicki, L., Waszczyński, J. (eds), *System Prawa Karnego. O przestępstwach w szczególności*, Vol. 4, Part 2, Wrocław–Warszawa–Kraków–Gdańsk–Łódź, 1989, p. 42.

[30] Hanausek, T., *Przemoc jako forma…*, op. cit., p. 104 et seq.; cf. Warylewski, J., *Przestępstwa przeciwko wolności seksualnej i obyczajności. Rozdział XXV Kodeksu karnego. Komentarz*, Warszawa, 2001, p. 33.

[31] See the Supreme Court judgements: of 12 August 1974 – Rw 403/74, OSNKW, 1974, Issue I, item 216; of 16 January 1976 – VI KZP 36/75, OSNPG, 1976, Issue 3, item 2; the Supreme Court resolutions: of 27 April 1994, I KZP 8/94, OSNKW, 1994, Issue 5–6, item 28; of 24 June 1994 – I KZP 13/94, OSNKW, 1994, Issue 7–8, item 42; of 18 November 1997 – I KZP 31; 97, OSNKW 1998, Issue I-2, item 2.

[32] The Supreme Court judgement of 12 August 1974, Rw 403/74, OSNKW, 1974, No. 11, item 216.

Violence referred to in Article 191 § 1 CC may also be targeted at third persons, e.g., persons in such a relationship with the aggrieved that an attack against them affects the aggrieved,[33] although this does not have to be a person closest to them.

2.3.2.2. UNLAWFUL THREAT

An unlawful threat is another method of acting by the perpetrator. The feature of an unlawful threat is defined in Article 115 § 12 CC. It encompasses not only a threat specified in Article 190 § 1 CC (punishable threat) but also a threat of causing criminal proceedings or other proceedings in which an administrative fine may be imposed, as well as spreading a message dishonouring the person at risk or their closest relative. Therefore, within the meaning of this provision, an unlawful threat covers three types of threats: (1) a threat of committing an offence to the detriment of the person at risk or a person closest to them (Article 190 CC); (2) a threat of causing a criminal proceeding; (3) a threat of spreading a message dishonouring the person at risk or one closest to them. However, the announcement of instigating a criminal proceeding or another proceeding in which an administrative fine may be imposed is not a threat if it is aimed only at protecting the right infringed by an offence or conduct carrying an administrative penalty of a fine.

It seems that there are no normative reasons for adopting a different interpretation of this feature in light of a crime under Article 191b § 1 CC.

The essence of an unlawful threat consists in exerting strong psychological pressure on the victim to force them to behave in the way desired by the perpetrator. It is an influence on the psyche of another person by predicting harm to the person at risk by the threatening person or another person whose behaviour is under their influence.

It is rightly pointed out in the doctrine that an unlawful threat is a form of compulsive pressure on the victim's decision-making process aimed at forcing them to take a specific action, to refrain from doing something, or to endure the threat of violation of their rights protected by law. A threat, similarly to violence, is a means of coercion, and as such plays a major role in shaping a coercive situation through psychological influence. A threat is therefore a specific means of *vis compulsive* in the form of psychological coercion.[34]

2.3.2.3. RELATIONSHIP OF DEPENDENCE

'The abuse of the relationship of dependence' is also one of the features of the analysed offences under Article 191 §§ 1 and 2 CC. The relationship of dependence means 'a legal or actual relationship that gives one person an opportunity to exert certain direct or indirect influence on another person's fate and legal, social and economic situation'.[35] The essence of the relationship of dependence consists in the fact that dependent persons remain in this relationship with the perpetrator,

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[33] Judgement of the Appellate Court in Katowice of 26 March 1998, II AKa 8/98, OSA, 1998, No. 11–12, item 66.

[34] Romańczuk-Grącka, M., *Pojęcie i funkcje*…, op. cit., p. 187.

[35] The Supreme Court expressed such an opinion on numerous occasions. See, e.g., judgement of 29 May 1933, Zb.O., 1933, item 155; in accordance with the CC in force see, e.g., the

and that a conflict with him threatens their economic and non-economic interests. Therefore, dependent persons must avoid entering into a conflict with the person on whom they depend. Dependent persons must be aware of the need to submit to the demands or wishes of the person on whom they depend.[36]

In accordance with Article 207 CC, the Supreme Court assumed that

> 'the relationship of dependence on the perpetrator occurs when the aggrieved persons are not able to voluntarily oppose the mistreatment and endure it for fear of deterioration of their current living conditions (loss of job, means of maintenance or accommodation, separation, or breakup of sexual life). This kind of relationship may exist by the force of law (…) or an agreement (…). It may also result from an actual situation giving the perpetrator an opportunity to mistreat the victim with the use of the advantage provided by their financial, personal, or emotional bonds. Living together may create the relationship of dependence.'[37]

The relationship of dependence always signifies the existence of a specific relationship between the perpetrator and the aggrieved person. The essence of this relationship lies in the real possibility of influencing the aggrieved persons' motivations and decisions, which allows him to direct their further conduct. The relationship of dependence may result from family relationships and all those that entail a certain element of authority, on the one hand, or dependence, on the other hand.[38]

In Article 191b CC, unlike in Article 207 § 1 CC characterising mistreatment, the legislator did not specifically state that it is 'a permanent or temporary relationship of dependence on the perpetrator.' Based on Article 207 CC, it is argued that the relationship of dependence cannot be a mere temporary relationship. The requirement of permanence or transience presupposes a certain longer period of its existence. Thus, a short-term accidental situational bond is excluded.[39]

Therefore, based on Article 191b CC, it should be assumed that the relationship of dependence could be permanent (constant) or transient in nature. However, an occasional relationship or one determined by the situation would also be sufficient, although in the context of the types of crime analysed, such situations will be rather rare.

Article 191b CC will be applicable not only when there is a legal relationship of dependence resulting from the law or contract, but also when specific actual circumstances create such a situation in which the features of dependence of the aggrieved person on the perpetrator are evident,[40] and this dependence may vary

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Supreme Court ruling of 18 December 2008, V KK 304/08, OSNwSK, 2008, No. 1, item 2691; the Supreme Court ruling of 17 September 2014, V KK 130/14, Legalis No. 1092074.

36 See the Supreme Court judgement of 6 May 2014, V KK 358/13, *Prokuratura i Prawo*, supplement, 2014, No. 9, item 2, p. 5.

37 The Supreme Court ruling of 29 January 2019, IV KK 752/18, Legalis No. 1872596.

38 See the Supreme Court judgement of 4 March 2009, III KK 348/08, *Prokuratura i Prawo*, supplement, 2009, No. 9, item 8; the Supreme Court judgement of 31 March 2020, II CSK 124/19, LEX No. 2978466.

39 See Falandysz, L., 'Przestępstwa przeciwko rodzinie', in: Lernell, L., Krukowski, A., *Prawo karne. Część szczególna. Wybrane zagadnienia*, Warszawa, 1969, p. 76; Tobis, A., *Główne przestępstwa przeciwko rodzinie. Charakterystyka prawna i skuteczność kary pozbawienia wolności*, Poznań, 1980, p. 52.

40 See the Supreme Court judgement of 8 May 1972, III KR 53/72, OSNPG, 1972, No. 7, item 153.

in nature (financial, personal, or moral). There are no obstacles to assuming that it may be a temporary relationship if it results in dependence and influences the shaping of the aggrieved person's fate. The relationship of dependence should exist at the latest when the perpetrator starts this behaviour, but there is no requirement for it to have existed earlier.

Moreover, the perpetrator must abuse the relationship of dependence. The mere act of commencing certain behaviour towards persons in the relationship of dependence is not sufficient to assign liability under Article 191b § 1 or § 2 CC. It is still necessary that the perpetrator has abused the dependence; and the fact of abuse does not emerge from the very nature of the relationship between the perpetrator and the aggrieved person.[41] The abuse of the relationship of dependence includes the perpetrator's conscious use of this relationship as an element of pressure on the aggrieved person's psyche. In the case of the type of a prohibited act under Article 191b § 1 CC, it causes the aggrieved person to agree to enter into a marriage or a union corresponding to a marriage in the perpetrator's religious or cultural environment; and in the case of the type of offence under Article 191b § 2 CC, it causes the person to leave the territory of the Republic of Poland.

2.3.2.4 CRITICAL SITUATION

The feature of 'critical situation' appears in the legal definition of the codified term 'trafficking in human beings' (Article 115 § 22 (5) CC), and the description of the offences of causing another person to engage in sexual conduct (Article 199 § 1 CC), and causing someone to work as a prostitute (Article 203 CC). It is related to the feature of 'the state of necessity' appearing only in Article 304 § 1 CC, which criminalises usury. The perpetrator concludes a contract 'taking advantage of the state of necessity in which another natural or legal person, or an organisational unit without legal personality finds themselves'.

In case law, 'the state of necessity' is understood as an objective state of threat of significant affliction; and it does not matter whether it results from the aggrieved persons' carelessness (the so-called culpable threat of insolvency), or from factors completely beyond their control (e.g., serious illness).[42] It must be so unfavourable that it poses a direct threat of great suffering (e.g., in the case of a natural person: the inability to satisfy the basic life needs of oneself and the family, loss of home, etc.). The essence of 'the state of necessity' is also the necessity to obtain a benefit to improve the situation and the inability to reverse the unfavourable situation in any way other than by concluding an agreement imposing a disproportionate benefit.[43]

It should be recognised *in abstracto* that a 'critical situation' is more difficult than 'the state of necessity', and since the legislator used different terms, they cannot be equated. A critical situation is one that is very challenging and difficult to bear. It

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[41] Cf. the Supreme Court judgement of 4 March 2009, III KK 348/08, KZS, 2009, No. 9, item 35, pp. 22–23.

[42] See the Supreme Court ruling of 31 October 1966, Rw 904/66, OSNKW, 1967, No. 1, item 6.

[43] See the judgement of the Appellate Court in Katowice of 28 August 2014, II AKa 240/14, KZS 2015 No. 2, item 53.

signifies a particularly serious situation in which the aggrieved persons are at risk of serious (significant) personal or financial loss. In accordance with Article 199 CC, it is assumed that critical situation is a state in which a person is at risk of suffering a specific damage, and appropriate behaviour by the perpetrator is able to prevent this danger. The essence of this danger is a threat to the aggrieved person's personal or property rights;[44] the affliction threatening the person aggrieved as a result of the critical situation must be aggravated, and qualified in nature. Even when the Criminal Code of 1932 was in force, L. Peiper indicated that the 'critical situation' should not be understood as such a situation in which the life and health of the victim depends on the perpetrator's interference; it is sufficient that the perpetrator's assistance (e.g., granting a loan, grace for debt payment) will free a given person from unpleasant consequences, e.g., a given person is at risk of severe financial or moral damage, loss of position, inability to meet his or her immediate needs or the needs of the closest persons, etc. However, it is not required that given persons be unconditionally unable to obtain help from elsewhere, i.e., they have reached a dead end.[45]

A critical situation does not have to result from a specific interpersonal relationship, but it can also stem from an incident. Unlike the relationship of dependence, which is an interpersonal relationship resulting from the functions or social roles performed, a critical situation may be an unfavourable set of circumstances independent of interpersonal relationships.[46] The reasons behind a critical situation may differ and result from an accidental event (e.g., fire, sudden death of a person providing maintenance), unemployment, health problems, heavy indebtedness, and insolvency.[47]

Taking advantage of this condition is a conscious use of the situation by the perpetrator who makes the release of the aggrieved persons from their critical situation (in other words, the elimination of the real danger threatening the legal interests of the aggrieved) dependent on entering into a marriage or a relationship corresponding to a marriage in the perpetrator's religious or cultural environment.

Based on Article 170 CC of 1969 (fornication with a dependent person), an opinion was expressed that in the case of the analysed means of criminal activity in the form of abuse of the relationship of dependence or taking advantage of a critical situation, the perpetrator employs the instrument of compulsive coercion, influencing victims' will decisions through their awareness of the possibility of suffering specific affliction. This mechanism is identical to the mechanism of threat and violence in the form of *vis compulsiva*, with the only difference that in the *vis compulsiva* case a victim is in the state of necessity resulting from threat and violence, while in the analysed case it results from dependence or a critical situation exploited by the perpetrator.[48]

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[44] Hypś, S., in: Grześkowiak, A., Wiak, K. (eds), *Kodeks karny. Komentarz*, Warszawa, 2015, p. 995.

[45] Peiper, L., *Komentarz do Kodeksu karnego i prawa o wykroczeniach*, Kraków, 1936, p. 426.

[46] Thus, rightly, Hypś, S., in: *Kodeks karny. Komentarz…*, op. cit., p. 995.

[47] Konarska-Wrzosek, V., 'Komentarz do art. 199, teza 7', in: Lach, A., Lachowski, J., Oczkowski, T., Zgoliński, I., Ziółkowska, A., Konarska-Wrzosek, V. (eds), *Kodeks karny. Komentarz*, Warszawa, 2020.

[48] Filar, M., in: Andrejew, I., Kubicki, L., Waszczyński, J. (eds), *System Prawa Karnego…*, op. cit., p. 186.

It is unanimously indicated in the literature that the relationship of dependence as well as a critical situation must objectively exist. It is emphasised that it is necessary to take into account the aggrieved persons' individual life situation, in particular their earning possibilities.[49] In this context, doubts are raised regarding evaluation of the situation in which such a relationship of dependence or critical situation does not actually occur, but the perpetrator created an erroneous belief in the victim's psyche that they exist or consciously exploited such a belief. It seems that such conduct does not match the features of the prohibited act under Article 191b § 1 CC. This is because it consists in causing a person to enter into a marriage by deception, and this type of conduct is not mentioned in Article 191b § 1 CC. It does not exhaust the features of the offence under Article 191 CC, either. However, the situation should be evaluated differently in the case of conduct consisting in luring the aggrieved person to leave the territory of the Republic of Poland. In this situation, deception is one of the methods of exerting influence used by the perpetrator.

2.3.2.5. DECEPTION

The features of abuse of the relationship of dependence and the use of a critical situation should be interpreted identically in accordance with Article 191b § 2 CC. However, unlike § 1, § 2 provides for the penalisation of the perpetrator's conduct with 'the use of deception', too.

In substantive criminal law, deception functions as a feature describing several offences. It is specified as a way of the perpetrator's behaviour, inter alia, in the case of: Article 118a § 2 (4), Article 124 § 1, Article 143 § 1–2, Article 145 § 1 (2)(a), Article 153 § 1, Article 166 § 1–3, Article 191a § 1 and Article 197 § 1 CC

Deception, unlike violence or threats, is not considered a means of coercion because it does not induce a state of coercion. The perpetrator employs it to cause the aggrieved person to give consent, which would not be forthcoming in a different situation, i.e., without deception, or to prevent the aggrieved party from expressing a refusal to give consent.[50] The criterion of fear is highlighted in doctrine as a tool to distinguish deception from a threat. K. Daszkiewicz-Paluszyńska rightly draws attention to the fact that in the case of 'deception', the aggrieved is convinced of the perpetrator's honest intentions and, therefore, does not experience fear as in the case of a threat, where the person threatened is aware of the potential danger and the fact of being coerced. In the case of deception, there is no element of coercion.[51]

The immanent feature of deception is misleading another person or taking advantage of a mistake that the aggrieved person has already made.[52]

Supreme Court judgements have expressed the view that misleading means the perpetrator, through his insidious actions, causes another person to adopt an

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[49] See, e.g., in accordance with Article 199 CC of 1997, Warylewski, J., in: Wąsek, A. (ed.), *Kodeks karny. Część szczególna. T. I. Komentarz*, Warszawa, 2004, p. 852.

[50] Warylewski, J., in: Warylewski, J. (ed.), *System Prawa Karnego, Przestępstwa przeciwko dobrom indywidualnym*, Vol. 10, Warszawa, 2016, pp. 691–693.

[51] Daszkiewicz-Paluszyńska, K., *Groźba w polskim prawie karnym*, Warszawa, 1958, pp. 129–130.

[52] See the Supreme Court judgement of 4 March 2009, IV KK 339/08, KZS, 2009, No. 6, item 23.

erroneous impression of the actual state of things, while the exploitation of the error consists in the perpetrator's use of the already existing aggrieved person's opinions or ideas that do not reflect reality.[53]

2.4. FEATURES OF THE PERPETRATOR

The offence classified in Article 191b § 1 CC is deliberate and may only be committed with direct intention.[54] According to the commonly adopted view on the offence characterised by the feature of aim, special form of action (e.g., extraordinary cruelty) or the use of specific means (e.g., use of violence) are always committed with direct intention. In this case, the direct intention results from the type of means used by the perpetrator.

The type of prohibited act under Article 191b § 2 CC may only be committed with direct (targeted) intention. In this case, it is necessary to prove that, when persuading, the perpetrator's intention was to lead to a marriage referred to in Article 191b § 1 CC in the way indicated in the provision.

3. CRIMINAL LIABILITY

The types of prohibited acts under Article 191b CC constitute offences carrying an identical penalty in the form of deprivation of liberty for a period from three months to five years. It is puzzling why the legislator decided to equalise the penalty for the type under § 1 with the type under § 2. It seems that persuading another person to leave the territory of the Republic of Poland for the purpose of committing the offence referred to in Article 191b § 1 CC constitutes *de facto* an act preparatory in nature, which should be reflected in the statutory penalty.

De lege lata, the statutory penalty does not exclude the possibility of applying the benefits resulting from Articles 37a or 37b CC or the conditional discontinuation of a proceeding (Article 66 § 1 CC).

Offences under Article 191b CC are subject to public prosecution, i.e. prosecuted *ex officio*.

4. STAGE AND CIRCUMSTANCE RELATED FORMS

The Polish construction of circumstance and stage related forms fully implements the requirement for the criminalisation of aiding and abetting the commission of gender-based offences referred to in Article 41 of the Convention, including those under Article 37, as well as attempts to commit them.

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[53] Thus the Supreme Court in the judgement of 27 October 1986, II KR 134/86, OSNPG, 1987, No. 7, item 80.

[54] For a different approach see: Lachowski, J., who assumes that also with oblique intent; Lachowski, J., *Komentarz do art. 191(b), Nt 11,* in: *Kodeks karny. Komentarz…*, op. cit.

5. ISSUE OF CULTURAL DEFENCE[55]

Additionally, it should be pointed out that Article 42 of the Convention prohibits the domestic law from recognising cultural, religious and social norms, tradition, or the so-called honour as justification for acts of violence. In accordance with this provision,

> 'Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called honour shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour.'

This directly results in an obligation to exclude the possibility of referring in particular to cultural differences, and thus excludes the effectiveness of the so-called cultural defence in the event of an offence of a forced marriage.

The Polish legal system meets the standards set out in Article 42 of the Convention. In Polish legislation, there are no regulations that would allow culture, custom, religion, tradition, or the so-called honour to justify the commission of acts of violence. In Polish literature, there is a view expressed that there is no reason to completely exclude and not take into account cultural defence in the case of voluntary marriages, e.g., Roma ones.[56]

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[55] The strategy of *cultural defence*, although of Anglo-Saxon provenance, has been recently observed also in the continental system, and is becoming a helpful instrument in defence of ethnic minorities. *Cultural defence* assumes that a person coming from a cultural minority in which the manifestations of the norms of its culture are seen in everyday behaviour should not be recognised to be fully responsible for his/her act infringing the law of the country of residence if this act is in compliance with the obligations of this culture. *Cultural defence* is defined as situations in which a law enforcement body takes (or does not take) into account the fact that some specific cultural norms that considerably differ from general social standards are obligatory in a certain social group. Therefore, the necessary elements that must occur when this instrument is referred to are: (1) membership of the cultural minority (of both the victim and the perpetrator; actual bonds with the group); (2) functioning of a model of behaviour within this minority, which is fully accepted by the members of the given community but is in conflict with the state law; (3) influence of the model on the behaviour of an individual. For more see Zajadło, J., *Fascynujące ścieżki filozofii prawa*, Warszawa, 2008, pp. 69–72; for more on the issue see Zajadło, J., 'Uniwersalizm praw człowieka w konstytucji – bezpieczne i niebezpieczne relatywizacje', *Przegląd Sejmowy*, 2007, No. 4, p. 99 et seq.; Sykuna, S., Zajadło, J., 'Kontrowersje wokół tzw. obrony przez kulturę – okoliczność wyłączająca winę, okoliczność łagodząca czy nadużycie prawa do obrony', *Przegląd Sejmowy*, 2007, No. 6, p. 27; Sitarz, O., 'Culture defence a polskie prawo karne', *Archiwum Kryminologii*, 2008, Vol. 29–30, p. 647; Wojciechowski, B., *Interkulturowe prawo karne. Filozoficzne podstawy karania w wielokulturowych społeczeństwach demokratycznych,* Toruń, 2009, p. 369; Dudek, M., 'Czy każda kultura zasługuje na obronę? Kilka wątpliwości dotyczących *cultural defence* i prawa karnego w dobie multikulturalizmu', *Archiwum Filozofii Prawa i Filozofii Społecznej*, 2011, No. 2(3), pp. 47–60; Kleczkowska, A., 'Rola *cultural defence* w wymiarze sprawiedliwości karnej', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2012, Issue 2, pp. 71–84. See Kleczkowska, A., 'Rola *cultural defence*…', op. cit., p. 71 et seq.

[56] Zalewski, W., *Komentarz do art. 42*, in: Bieńkowska, E., Mazowiecka, L. (eds), *Konwencja o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej,* Warszawa, 2016.

6. CONCURRENCE OF PROVISIONS

There is no cumulative legal classification of Article 191b CC with Article 190 CC or Article 191 CC. However, typical concurrence may occur if the violence used by the perpetrator results in detriment to the health of the aggrieved. Then, there is a cumulative legal classification under Article 191b CC with relevant provisions concerning offences, e.g., under Articles 156 and 157 CC.

In the event the perpetrator ill-treats or harasses the victim for the purpose of making that person enter into a marriage, it is justified to apply a cumulative classification under Article 207 § 1–2 CC (ill-treatment) or Article 190a § 1 CC (harassment).

If the perpetrator uses violence against objects to cause another person to enter into a marriage and as a result damages an object, there is a typical concurrence of provisions of Article 191b with Article 288 § 1 or § 2. If the perpetrator directs violence against the victim's animal, it is possible to consider cumulative classification under Article 191b § 1 or § 2 in conjunction with Article 35(1) or (2) of the Act of 21 August 1997 on the Protection of Animals.[57,58]

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[57] Consolidated text, Journal of laws of 2023, item 1580, as amended.

[58] Thus, rightly, Mozgawa, M., *Komentarz do art. 191(b), Nt. 9*, in: *Kodeks karny. Komentarz aktualizowany…*, op. cit.

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Cite as:

Kosonoga-Zygmunt J. (2024) '*Criminalisation of the so-called forced marriage in the polish criminal law*', Ius Novum (Vol. 18) 1, 35–53. DOI 10.2478/in-2024-0003

sciendo

Ius Novum

2024, vol. 18, no. 1, pp. 54–79

FORMATION OF SOME ELEMENTS OF THE RIGHT TO DEFENCE IN MISDEMEANOUR PROCEEDINGS

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DOI 10.2478/in-2024-0004

Abstract

The text analyses normative solutions concerning the right to defence in Polish proceedings in cases of offences. It discusses the formation of selected elements of the right to defence, from the pre-war solutions to modern times. The author highlights the autonomy of the solutions in force in the 2001 Code of Proceedings in Misdemeanour Cases, and their similarities to the right to defence in criminal cases, constituting the most comprehensive model of this right.

Keywords: defence, defendant, defence counsel, procedural guarantees, offenders, misdemeanour proceedings, criminal proceedings

The right to legal defence is widely recognised by Polish legal scholars as an essential element of a fair criminal process,[1] and the principles underpinning this right are among the most crucial procedural safeguards.[2] Without these safeguards, the proper

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1 Tylman, J., in: Grzegorczyk, T., Tylman, J., Świecki, D. (ed.), Olszewski, R. (ed.), Małolepszy, A., Rydz-Sybilak, K., Misztal, P., Kasiński, J., Kurowski, M., Błoński, M., *Polskie postępowanie karne*, Warszawa, 2022, p. 183; Skowron, A., 'Rzetelny proces karny w ujęciu Karty Praw Podstawowych Unii Europejskiej oraz Europejskiej Konwencji Praw Człowieka i Podstawowych Wolności', *Prokuratura i Prawo*, 2017, No. 11, p. 9; Kardas, P., 'Prawo karne w świetle standardów konstytucyjnych', *Państwo i Prawo*, 2022, No. 10, p. 93; Vitkauskas, D., Dikov, G., *Protecting the right to a fair trial under the European Convention on Human Rights – A handbook for legal practitioners*, Strasbourg, 2012, pp. 87ff.

2 Wiliński, P., in: Wiliński, P. (ed.), Stachowiak, S., Gerecka-Żołyńska, A., Janusz-Pohl, B., Karlik, P., Kusak, M., *Polski proces karny*, Warszawa, 2020, p. 347.

functioning of a democratic state governed by the rule of law would be impossible.[3] The current structure of misdemeanour procedures and the associated institutions has evolved over many years, reflecting the concept of how such proceedings should be conducted, whether they should adhere to the traditional path of criminal-administrative proceedings or adopt the characteristics of a court procedure, effectively extending the reach of criminal justice. Considering the second option viable leads to further questions: should these judicial proceedings be categorised as another specialised type of proceedings governed by the criminal procedure code, or should they constitute an independent proceeding with its own legislation? When pondering the potential structure of these procedures, the first significant aspect is the shift from labelling them as 'criminal-administrative',[4] as was the case in the 1970s, towards a gradual 'judicialisation'. This transition initially took the form of a separate Chapter 46 within the no longer binding 1969 Code of Criminal Procedure and has since evolved into an entirely independent process, encompassing legal institutions that extend far beyond what can be considered within the scope of judicial criminal justice. The intention of the article's author is to illustrate the evolution that certain aspects of the right to defence in misdemeanour cases have undergone in the 20th and 21st centuries. However, a comprehensive discussion of all components of this right would necessitate a different format of presentation, potentially resulting in a monograph.[5]

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The right to defence, a fundamental principle in misdemeanour procedures, distinguishes itself from various other principles inherent in the process.[6] It does not originate from the provisions of the 1997 Polish Code of Criminal Procedure (hereinafter referred to as 'PCCP') but is instead based on Article 4 of the 2001 Code of Misdemeanour Procedure.[7] In this respect, it represents an autonomous solution, albeit with some limited originality.

The autonomous nature of the right to defence in misdemeanour cases is a consequence of the unique characteristics of these cases. Misdemeanours involve acts with lower social impact and simpler procedures compared to most other

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[3] Jabłoński, M., Węgrzyn, J., 'Prawo do obrony i domniemanie niewinności', in: Jabłoński, M. (ed.), *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, Wrocław, 2014, p. 109; Stefański, R.A., 'Konstytucyjne prawo do obrony a obrona obligatoryjna w świetle noweli z dnia 27 września 2013 roku', in: Kolendowska-Matejczuk, M., Szwarc, K. (eds), *Prawo do obrony w postępowaniu penalnym. Wybrane aspekty*, Warszawa, 2014, p. 17.

[4] On the incompatibility of this term, see Waltoś, S., *Postępowania szczególne w procesie karnym (Postępowania kodeksowe)*, Warszawa, 1973, pp. 302–303.

[5] Similarly, Murzynowski, A., *Istota i zasady procesu karnego*, Warszawa, 1994, p. 272.

[6] Like the principle of: substantial truth (Article 2 PCCP), objectivism (Article 4 PCCP), presumption of innocence (Article 5 PCCP), free assessment of evidence (Article 7 PCCP), jurisdictional independence of courts (Article 8 PCCP), acting of processual authorities *ex officio* (Article 9 PCCP), the initiation of proceedings upon the request of a prosecutor (Article 14 PCCP) or the principle of processual loyalism, that is a duty to provide information to those involved in the proceedings on their rights and duties (Article 16 PCCP).

[7] Act of 24 August 2001 – the Code of Misdemeanour Procedure (consolidated text: Journal of Laws of 2022, item 1124), hereinafter referred to as 'CMP 2001' or the '2001 Code'.

criminal cases. As a result, procedural institutions are simplified, time limits are shortened, and the number of participants in the process is reduced, potentially leading to a weakening of certain procedural safeguards. It is essential to note that individuals enjoying this right in misdemeanour cases differ from those in typical criminal proceedings. Nonetheless, similar to the typical criminal process, these individuals also face penalties specified by the law and/or penal measures. The current form of the 2001 law may serve as a prime example of the wisdom that cautions against using excessive force for minor issues, similar to firing cannons at sparrows. Despite this, some scholars advocate for further simplification of the procedure, even to the extent of involving administrative authorities in adjudicating the most trivial misdemeanours while maintaining the current standards appropriate for such cases.[8] However, reducing the safeguards provided to the charged person in terms of their right to defence may not be advisable, given that misdemeanours are categorically recognised as a 'criminal offence', as mentioned in Article 6 of the Convention on Human Rights, making it applicable to misdemeanour cases.[9]

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The distinct nature of misdemeanour procedures, in terms of legislative separation, can be considered somewhat of an 'inherited' feature. This is evident when we consider that the current Code of Misdemeanour Procedure succeeded the 1971 Code of Misdemeanour Procedure,[10] which, in turn, followed the 1951 Law on Penal and Administrative Adjudication.[11] Both of these laws contained core provisions that were to be applied to misdemeanour cases. It is worth noting that the 1951 Law, unless it had contrary provisions (it read 'unless the provisions of this Law provide to the contrary'), mandated the respective application of provisions related to the administrative procedure. These provisions covered exclusion of individuals (members of authorities) from hearing specific cases, filing of petitions, minutes, case file notes, orders to appear before administrative authorities as well as service of documents, time limits, and evidence (Article 60 of the 1951 Law on Penal and Administrative Adjudication).[12] In contrast, the 1971 Code did not contain a similar reference to separate legal provisions. This gave the impression of greater complexity and independence compared to the former law. However, the assumptions on which the 1971 Law was based proved

[8] See Ryszard A. Stefański's conference speech on the reform of misdemeanour law; citation based on: Czarnecki, P., 'Sprawozdanie z konferencji nt. "Postępowanie w sprawach o wykroczenia – w poszukiwaniu optymalnego modelu" (Dębe, 19–21 października 2014)', *Prokuratura i Prawo*, 2015, No. 6, p. 186.

[9] Światłowski, A., 'Komentarz do art. 1', in: Sakowicz, A. (ed.), *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, Warszawa, 2020, p. 11.

[10] Act of 20 May 1971 – the Code of Misdemeanour Procedure (Journal of Laws No. 12, item 116, as amended), hereinafter referred to as 'CMP 1971'.

[11] Act of 15 December 1951 on Penal and Administrative Adjudication (consolidated text: Journal of Laws of 1966, No. 39, item 233, as amended), hereinafter referred to as 'PAA 1951'.

[12] Initially, this entailed applying the provisions of the President of the Republic's Decree of 22 March 1928 on administrative proceedings (Journal of Laws, No. 36, item 341, as amended), and as of 1 January 1961, Act of 14 June 1960 – the Code of Administrative Procedure (consolidated text: Journal of Laws of 2022, item 2000, as amended).

inadequate in practice. The brevity of the law and its failure to address 'numerous detailed issues', including the interpretation of procedural principles, necessitated the analogous application of the closest provisions of the Code of Criminal Procedure.[13] To avoid such issues, the 2001 Code directly stipulated the subsidiary application of provisions contained in the Code of Criminal Procedure[14] but only in a strictly specified scope,[15] as reflected in Article 1 § 2 CMP 2001. This approach, according to S. Stachowiak, prevents the analogous application of procedural provisions, except for those that are explicitly specified.[16] Consequently, the procedure in misdemeanour cases is governed by 'the provisions of this Code'. Although a similar idea may have been expressed in Article 1 of the 1971 Code, the current legislator, as evident from the 2001 Code, seems to be much more resolute in this regard.[17] While there are numerous references to the Code of Criminal Procedure in the 2001 Code (nearly 300), they are detailed and unambiguous,[18] rather than taking the form of a general clause. Additionally, the provisions within the 2001 Code are more precise and internally consistent, which does not discourage some legal scholars from referring to it as a 'conglomerate'.[19]

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What is significant is that among the multiple fundamental principles of the criminal procedure[20] that were applied to the procedure in misdemeanour cases, there was no specific 'right to defence' principle. In this regard, the 2001 Law establishes its own rule, which is quite similar to the equivalent rule in criminal procedure. Specifically, it grants the right to defence to the passive party in the procedure. In criminal procedure, the passive party is the suspect[21] or the accused.[22] However, the statutory

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[13] Marek, A., *Prawo wykroczeń*, Warszawa, 1996, p. 158.

[14] Decision of the Polish Supreme Court of 12 June 2007, Case No. V KZ 29/07, LEX No. 569378.

[15] The reference to the appropriate application is a 'widely used legislative technique' aimed at ensuring greater conciseness and coherence throughout the entire legal system or within legal institutions; see Chauvin, T., Stawecki, T., Winczorek, P., *Wstęp do prawoznawstwa*, Warszawa, 2009, p. 91. Legislators commonly resort to this method when formulating legal texts. especially when creating procedural rules; cf., Wójcicka, E., 'Odpowiednie stosowanie przepisów kodeksu postępowania administracyjnego do rozpatrywania petycji', *Zeszyty Prawnicze UH-P w Częstochowie*, 2021, No. 20(3), p. 267.

[16] Stachowiak, S., 'Wniosek o ukaranie w ujęciu kodeksu postępowania w sprawach o wykroczenia', *Prokuratura i Prawo*, 2002, No. 12, p. 34.

[17] Grzegorczyk, T., *Kodeks postępowania w sprawach o wykroczenia. Komentarz,* LEX 2012, commentary 1 on Article 1 [accessed on 25 February 2023].

[18] Kotowski, W., *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, LEX 2003, commentary 2 on Article 1 [accessed on 25 February 2023].

[19] Światłowski, A.R., 'Rozdział 2.2. Postępowanie w sprawach o wykroczenia', in: Hofmański, P. (ed.), *System Prawa Karnego Procesowego. Tom I. Zagadnienia ogólne*, LEX 2013 [accessed on 3 March 2023].

[20] The Code of Misdemeanour Procedure was originally intended to include a catalogue of specific principles; however, those plans were ultimately abandoned during the works on the bill; cf. Grzegorczyk, T., *Kodeks postępowania w sprawach o wykroczenia*, Warszawa, 2002, p. 85.

[21] Baj, A., 'Czy osoba podejrzana jest stroną postępowania przygotowawczego?', *Prokuratura i Prawo*, 2016, No. 10, p. 86.

[22] Marszał, K., *Proces karny*, Katowice, 1997, pp. 135–137; Steinborn, S., Wąsek-Wiaderek, M., 'Moment uzyskania statusu biernej strony postępowania karnego z perspektywy konstytucyjnej

interpretation of the concept of 'accused' deviates from its colloquial interpretation due to Article 71 § 2 PCCP. In the procedure in misdemeanour cases, initially, only the charged person (*obwiniony*) was considered the passive party.[23] However, in 2015,[24] there was a significant expansion of the subjective limits of the right to defence in misdemeanour cases. This expansion granted this right to individuals to whom Article 54 § 6 CMP 2001 applied. Regrettably, this change was not a result of the legislator's self-reflection. Instead, it was brought about through a decision made by the Constitutional Court, which found[25] the original text of Article 4 CMP 2001 to be inconsistent with Article 2, Article 42(2), and Article 31(3) of the Polish Constitution.[26] In the past, the charged person could be considered the subject of the right to defence under Article 8 CMP 1971 and, under Article 24(1) PAA 1951, only as the subject of the right to receive the assistance of an attorney. The 1951 Law did not explicitly express the principle of the right to defence but instead specified a range of separate rights granted to the charged person. These rights constituted individual components of the right to defence, making the law in question casuistic and incomplete. The discussed right included, in addition to the aforementioned right to receive the assistance of an attorney, the right to be heard (Article 21(2) PAA 1951), the right to initiate evidence collection (Article 21(3) PAA 1951), the right to be informed of the charge (Article 26(1) PAA 1951), and the right to the 'last word' (Article 31 PAA 1951).

The inclusion of the charged person as a passive party in the procedure is not merely a scholarly endeavour to categorise and dissect the legal framework; it carries significant practical implications. Indeed, we cannot expect the passive party to undertake any actions that might compromise the fundamental guarantees of the right to defence. The fundamental significance of the right to defence itself is a natural consequence of its elevation to the status of a constitutional right (Article 42(2) of the Polish Constitution). It is functionally linked with the right to access the court and recognised as a precondition for a fair criminal trial.[27] This right is also acknowledged as 'an elementary standard of a democratic state governed by the rule of law'.[28] In constitutional law, the right to defence, both in substance

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i międzynarodowej', in: Rogacka-Rzewnicka, M., Gajewska-Kraczkowska, H., Bieńkowska, B.T. (eds), *Wokół gwarancji współczesnego procesu karnego. Księga jubileuszowa Profesora Piotra Kruszyńskiego*, Warszawa, 2015, p. 447.

[23] Dąbkiewicz, K., *Kodeks postępowania w sprawach o wykroczenia*, LEX 2017, commentary 2 on Article 20; Skowron, A., *Kodeks postępowania w sprawach o wykroczenia. Komentarz,* LEX Warszawa, 2010, commentary 2 on Division III [accessed on 25 February 2023].

[24] Article 1(1) of the Act of 15 May 2015 amending the Code of Misdemeanour Procedure (Journal of Laws, item 841).

[25] Judgment of the Polish Constitutional Tribunal of 3 June 2014, Case No. K 19/11, OTK-A 2014, No. 6, item 60. See also Rogalski, M., in: Kiełtyka, A., Paśkiewicz, J., Rogalski, M. (ed.), Ważny, A., *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, Warszawa, 2022, p. 41.

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

[27] Judgment of the Voivodship Administrative Court in Szczecin of 10 September 2020, Case No. II SA/Sz 359/20, LEX No. 3100523; judgment of the Voivodship Administrative Court in Warsaw of 26 November 2019, Case No. I SA/Wa 230/19, LEX No. 2944945; judgment of the Court Appeal in Poznań of 5 October 2017, Case No. II AKa 35/17, LEX No. 3008993.

[28] Sarnecki, P., 'Komentarz do art. 42', in: Garlicki, L., Zubik, M. (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* LEX 2016, commentary 12 [accessed on 25 February 2013].

and in form, serves 'each individual in relation to whom the criminal proceeding is conducted'. This suggests that, given the legal separation of misdemeanour proceedings from general criminal proceedings, the right in question falls outside the scope of Article 42(2) of the Polish Constitution. Without exploring this discussion further, it should be emphasised that the linguistic similarity between Article 42(2) of the Polish Constitution and Article 4 CMP 2001 (and Article 6 PCCP) should not dictate an interpretation of Article 42(2) of the Constitution as if it had a 'procedural' nature. Such an interpretation could distort the framework found in the former provision.[29] It is generally undisputed among legal scholars[30] that the term 'criminal proceedings' in Article 42(2) of the Polish Constitution encompasses all proceedings in which there is a risk of legal responsibility. This includes both criminal proceedings *sensu stricto* and misdemeanour cases as well as disciplinary proceedings. This interpretation ensures the systemic coherence of proceedings that can be categorised as court proceedings, as required by Article 177 in connection with Article 175(1) of the Polish Constitution. The model of the right to defence embedded in the Constitution is far superior to that shaped by the infamous 1952 Constitution,[31] which granted the aforementioned right only to the accused.

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Legal scholars emphasise that Article 4 CMP 2001 is equivalent to Article 6 PCCP. This equivalence is both obvious and expected when we consider that both of these rights to defence serve the same fundamental purpose: to counter criminal charges accompanied by the potential risk of criminal responsibility. Considering that the right to defence model in Polish criminal proceedings is the broadest and most comprehensive model found in Polish law, the question is whether a rational legislator should seek alternative solutions. The legislator of 2001 draws many solutions from the models found in the Code of Criminal Procedure, doing so thoughtfully and deliberately. We can observe a certain mirroring of such models by the legislator, particularly at the textual level. In both procedures, we encounter the 'right to defence' or a 'defence lawyer' as a legal assistant to the charged person. Furthermore, there are convergent situations in which these individuals participate (for example, see Article 21 § 1(1) CMP 2001 and Article 79 § 1(2) PCCP, or Article 22 CMP 2001 and Article 78 § 1 PCCP).

Both Article 4 CMP 2001 and Article 6 PCCP establish the right to defence principle for the proceedings they encompass.[32] However, it is essential to distinguish that within the scope of criminal procedure, this principle is rightly acknowledged as a fundamental one,[33] holding significance for the very structure of the criminal

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[29] Kardas, P., 'Prawo…', op. cit., p. 94.

[30] Florczak-Wątor, M., 'Komentarz do art. 42', in: Tuleja, P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, LEX 2021, commentary 4 [accessed on 25 February 2023].

[31] The Constitution of the People's Republic of Poland, adopted on 22 July 1952 (consolidated text: Journal of Laws of 1976, No. 7, item 36, as amended).

[32] Lewiński, J., *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, LEX 2011, commentary 2 on Article 4 [accessed on 23 February 2023].

[33] Kil, J., 'Prawo do obrony jako publiczne prawo podmiotowe', *Zeszyty Prawnicze*, 2022, No. 22(1), p. 203.

process.[34] In contrast, the pre-war Code of Criminal Procedure remained silent on this aspect, despite granting the accused a comprehensive set of procedural rights, including the right to be assisted by a defence lawyer (Article 84 of the 1928 Code of Criminal Procedure).[35] The introduction of the right to defence principle in criminal proceedings occurred with the enactment of Article 63(2) of the 1952 Constitution, followed by the introduction of Article 9 of the 1969 Code of Criminal Procedure.

The similarity between the right to defence in misdemeanour cases and its original counterpart in criminal procedure suggests that the former can coexist with the presumption of innocence[36] and *in dubio pro reo* principles, as outlined in Article 5 PCCP (applied in accordance with Article 1 § 2 in conjunction with Article CMP 2001). While the application of this provision should be 'respective'[37] rather than direct when it comes to the presumption of innocence principle, it does not necessitate fundamental adjustments to align with the specifics of misdemeanour procedures. As noted in scholarship, a 'respective application' does not always require modifying existing provisions;[38] it may involve minor adjustments, like using appropriate terminology that reflects the unique aspects of the misdemeanour procedure for which the term was not originally intended.

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As mentioned earlier in this paper, the initial focus of the right to defence in the 2001 Code was exclusively on the charged person. The 1971 Code of Misdemeanour Procedure, as outlined in Article 8, did not clearly define the subjective limits of this right. However, it was evident even then that these limits were too restrictive, and the right should have extended to individuals summoned (*osoby wezwane*) in accordance with Article 19(1) of the 1971 Code to provide explanations. Although this provision allowed for 'gathering necessary data to draft a request for punishment', 'supplementing' such a request, or 'verifying facts mentioned in the request', it did not specify who should provide these explanations. This omission was explained in the scholarship of that time, citing Article 34 § 3(3) CMP 1971, which explicitly associated

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[34] Waltoś, S., *Proces karny. Zarys systemu*, Warszawa, 1996, p. 196.

[35] Decree of the President of the Republic of Poland of 19 March 1928, Code of Criminal Procedure (Journal of Laws No. 33, item 313, as amended).

[36] Legal scholars rightly observe that both principles, namely the right to defence and the presumption of innocence, 'in a particular manner define the [model] of criminal procedure, mutually complementing each other' – see Jamróz, L., 'Konstytucyjne prawo do obrony przed sądem RP', in: Matwiejuk, J. (ed.), *Konstytucyjno-ustawowa regulacja stosunków społecznych w Rzeczypospolitej Polskiej i Republice Białoruś*, Białystok, 2009, p. 264.

[37] However, see Article 22 *in fine* CMP 2001, which refers to Article 78 § 2 PCCP which applies 'directly' rather than 'in an appropriate manner'. The direct application of Article 78 § 2 PCCP is mandatory because the word 'applies' has been used. Similarly, Article 27 § 5 CMP 2001 refers to Article 55 § 3 PCCP, Article 66 § 4 CMP 2001 refers to Article 613 § 2 PCCP and Article 92a(5) CMP 2001 refers to Article 177 § 1a PCCP.

[38] Korzeniewska-Lasota, A., 'Odpowiednie stosowanie przepisów kodeksu postępowania karnego w postępowaniu w sprawach odpowiedzialności dyscyplinarnej adwokatów. Część 1. Zagadnienia ogólne', *Palestra*, 2013, No. 9–10, p. 73.

'explanations' with the charged person.[39] This explanation was risky, given that the status of the charged person under Article 29 of the 1971 Code was not contingent on 'drafting the request for punishment' but on 'submitting the request for punishment', which, in turn, served as the 'basis for initiating proceedings in a misdemeanour case' (as per Article 20 of the 1971 Code). This implied that during the explanatory phase, the person called upon to provide explanations lacked a clearly defined procedural status, and the terms used to describe such individuals were not determined. This situation was similar to that of a person referred to in Article 54 § 6 CMP 2001, where the legislator hesitated to use the term 'suspected of a misdemeanour' or a similar phrase.

The person mentioned in Article 54 § 6 CMP 2001 remained excluded from the right to defence[40] for a significant period, lasting until 1 August 2015.[41] Initially, Article 4 CMP 2001 granted this right exclusively to the charged person, as defined in Article 20 § 1 of the same code. This definition was in line with the prevailing understanding of the term at that time. However, the situation changed after the Constitutional Court criticised the original version of Article 4 CMP 2001 and found it to be in violation of Article 2 and Article 42 § 2, in connection with Article 31 § 3 of the Polish Constitution.[42] The 2015 amendment transferred the previous content of Article 4 to the newly created § 1 of that article. Simultaneously, in § 2 of the same article, it was made explicit that the right to defence, including the right to be assisted by a defence lawyer, was granted to the person referred to in Article 54 § 6 CMP 2001. This right was acquired 'upon the initiation of the interrogation of that person, after presenting the charges, or when calling that person to provide a written explanation'. Expanding the scope of the right to defence was a desired change, but it came relatively late. This is because, since 2003, explanatory activities had become a mandatory component of misdemeanour proceedings,[43] and the person referred to in Article 54 § 6 CMP 2001 is, in fact, an individual suspected of committing a misdemeanour, even though such a clear designation was absent in the Code itself.[44]

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[39] Siewierski, M., in: Siewierski, M., Lewiński, J., Leoński, Z., Gościcki, J., *Komentarz do kodeksu postępowania w sprawach o wykroczenia oraz do ustawy o ustroju kolegiów do spraw wykroczeń*, Warszawa, 1979, p. 34.

[40] However, this did not apply to situations in which explanatory actions were taken on the court's order issued under Article 60 § 1(6) CMP 2001 for the purpose of 'performing [by the Police or another authority] specific evidentiary actions'. Among such 'evidentiary actions' we could distinguish interrogations conducted under Article 54 § 6 CMP 2001, but in this case, it was an action conducted in relation to charged persons (Article 55 § 3 CMP 2001). Such persons, even though 'Article 54 § 6 applies accordingly' to their interrogation, acquire the right to defence not by virtue of Article 4 § 2 CMP 2001 but through its § 1. This is so because they maintain their status of charged persons during such interrogation, as indicated by Article 55 § 3 in conjunction with Article 20 § 1 CMP 2001.

[41] Article 1(1) of the Act of 15 May 2015 amending the Code of Misdemeanour Procedure (Journal of Laws, item 841).

[42] Judgment of the Polish Constitutional Tribunal of 3 June 2014, Case No. K 19/11, OTK-A 2014, op. cit.

[43] Article 1(8) of the Act of 22 May 2003 amending the Code of Misdemeanour Procedure (Journal of Laws, No. 109, item 1031).

[44] Stefański, R.A., 'Czynności wyjaśniające w sprawach o wykroczenie', *Prokuratura i Prawo*, 2001, No. 12, p. 103.

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The right to defence, as defined in the 2001 Code, is just as complex as the right to defence specified in Article 6 PCCP. This complexity exists even though neither of these provisions refers to other sections of the Code. In both cases, we are dealing with a collection of rights rather than a single, uniform legal concept. The complexity of the right to defence becomes apparent when we examine Article 42 § 2 of the Polish Constitution, which encompasses both the substantive and procedural aspects of this right.[45] Similarly, Article 4 CMP 2001 follows a similar structure for this right. This framing of the right to defence is generally acceptable; however, in misdemeanour cases, this framework only emerged with the adoption of the 1971 Code of Misdemeanour Procedure. The prior 1951 Law on Penal and Administrative Adjudication did not explicitly address this matter. It only briefly mentioned 'the right to use the assistance of a defence lawyer' in Article 24 § 1, while the remainder of the article focused on defence lawyers themselves and the procedures for authorising them to act (subsections 2–4). This minimalistic approach to the right to defence appears relatively advanced when compared to the 1928 Decree on Penal and Administrative Proceedings,[46] hereinafter referred to as the '1928 Decree'. It only mentioned the right to defence in the context of an order issued to the charged person to bring witnesses to court and provide additional evidence necessary for their defence.[47] It is unclear whether this was an oversight by the legislator or if it was based on the belief that the semi-administrative nature of the case did not require the strict procedural safeguards usually applied to participants in legal proceedings. In the 1928 Decree, the charged person, after receiving a penalty through the penal-administrative procedure, could request that their case be transferred to a court procedure (Article 34 of the 1928 Decree, the first sentence). This court procedure was governed by the 'provisions governing the procedure before the court of first instance', with modifications specified in Articles 40–44 of the 1928 Decree (Article 39 of the 1928 Decree). The significance of referencing the provisions governing penal procedure was that the charged person (*obwiniony*) now became the accused (*oskarżony*), and 'the decision of the administrative authority in the court procedure replaced the indictment' (Article 36 of the 1928 Decree, third sentence). This subjective transformation also extended to the 'administrative authority' responsible for 'administering the punishment'. This authority or any other body substituting it within the jurisdiction of the regional court could file an indictment instead of or alongside the public prosecutor (Article 38 of the 1928 Decree). As a result of referencing the 'provisions governing the procedure before the court of first instance',[48] the charged person (now the accused) became subject to

[45] Florczak-Wątor, M., 'Komentarz…', op. cit., commentary 4 on Article 42 [accessed on 1 March 2023].

[46] Decree of 22 March 1928, on Penal and Administrative Proceedings (Journal of Laws 38, item 365, as amended).

[47] Or it 'alternatively' required that the charged person should 'indicate that evidence, in writing or orally, to the authority to be used by that authority at the trial'.

[48] Upon the request of the administrative authority or prosecutor, the case could, however, be subject to simplified proceedings under Articles 845^{1}–845^{10} of the 1864 Code of Criminal Procedure, with the appropriate application of Articles 34–42 of the 1928 Decree. Cf. Act of 25 February 1921 on

the provisions of the right to defence contained in the Code of Criminal Proceedings. This undoubtedly strengthened the accused's procedural rights, including measures such as the right to receive assistance from a defence lawyer and the right to remain silent (see Articles 81 and 84 of the pre-war Code of Criminal Procedure).

Before the Code's implementation, Article 60 of the 1951 Law on Penal and Administrative Adjudication made reference to the 'provisions on administrative proceedings' for various aspects of misdemeanour cases, including the exclusion of individuals from specific cases, filing petitions, maintaining case records, orders to appear before administrative bodies, and the service of documents, time limits, and evidence. As a result, the applicable provisions for misdemeanour cases were initially those of the 1928 Decree of the President of the Republic of Poland,[49] and from 1 January 1961, the provisions of the Code of Administrative Procedure.[50] The 1928 Decree recognised the rights of the charged person, referred to as a 'party' in the proceedings, to file petitions regarding witnesses (Article 57(1)) and experts (Article 62(1) in conjunction with Article 63). It also contained provisions regarding the participation of parties in the examination of witnesses and experts (Article 66). The subsequent Code of Administrative Procedure introduced additional elements, including the initiative as to evidence (Article 72[51] [78]) and active participation in the collection of evidence procedures (Article 73 [79] § 2). It also affirmed the charged person's rights to speak about the evidence presented and to explain their perspective[52] (Article 73 [79] § 2 and 62 [67] § 2(2)). However, it is worth noting that the provisions on hearing explanations from parties to the proceedings were quite brief. None of the provisions in the then-existing Code of Administrative Procedure referred to the hearing of witnesses, although they did so in relation to experts (Article 78, second sentence). As of 1999, changes were made, and provisions relating to parties to the proceedings

changes in criminal legislation, applicable in the former Russian partition (Journal of Laws No. 30, item 169).

[49] Decree of the President of the Republic of Poland on Administrative Procedure of 22 March 1928 (Journal of Laws No. 36, item 341, as amended).

[50] Act of 14 June 1960 – the Code of Administrative Procedure (consolidated text: Journal of Laws of 2022, item 2000, as amended).

[51] These are the original article numbers. The current numbers are indicated in [brackets].

[52] However, it should be remembered that administrative law scholars denied explanations from the party any significance as evidence, and giving those explanations was intended to determine the content and scope of the request, as well as the factual circumstances requiring determination. Cf. Siedlecki, W., *Postępowanie cywilne w zarysie*, Warszawa, 1972, p. 344; Adamiak, B., in: Adamiak, B., Borkowski, J., *Kodeks postępowania administracyjnego. Komentarz*, Warszawa, 2011, pp. 361, 368. Z.R. Kmiecik also opposes including explanations as evidence. See Kmiecik, Z.R., 'Rozdział V. Przesłuchanie strony', in: *Przesłuchanie świadka i strony w postępowaniu administracyjnym*, LEX 2022, available at: https://sip.lex.pl/#/monograph/369526874/46?tocHit=1 [accessed on 5 March 2023]. While this matter falls outside the scope of our current discussion, it is important to highlight that the exclusion of explanations from the category of evidence and the diminishment of their evidentiary significance pose challenges when considering the amended Article 86 of the Administrative Procedure Code in 1980. This provision permits the 'examination of the parties', 'after exhausting other means of evidence' or in cases of 'inability to clarify essential facts', precisely for the purpose of establishing such facts. Therefore, explanations may be regarded as part of the evidentiary process, as supported by their placement within the 'proceedings' and their regulation under Chapter 4, Section II, dedicated to 'Evidence'.

were amended based on Article 86.[53] This amendment did not significantly affect individuals charged with a misdemeanour since they had long been governed by the provisions of the 1971 Code of Misdemeanour Procedure. The Code approached this topic in a complex and systemically autonomous manner, which did not require the subsidiary application of administrative developments. At most, it might have required the analogous application of provisions from criminal procedure, which were more closely related to misdemeanour cases.

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The 1971 Code, which addresses the right to defence in a broad sense, primarily granted charged persons the right to seek the assistance of a defence lawyer (as mentioned in Article 8 CMP 1971). However, in contrast to the current Article 4 § 1 CMP 2001, it did not require that charged persons be informed of the right to defence or the right to use the assistance of a defence lawyer, which was a component of the latter. When we compare the provisions governing the procedure in misdemeanour cases with those for criminal cases, it becomes clear that the requirement for informing the charged person or the absence of that requirement was a shared characteristic of the two simultaneous codifications. The 1971 legislator followed a similar approach to the one taken by the 1969 legislator, just as the 2001 Code aligned with the former 1997 Code. In both of these Codes, the legislator not only used the same terminology, 'the right to use the assistance of a defence lawyer', but also applied an identical phraseological structure, specifying that the charged person 'should be informed of that'. What distinguishes the information covered by Article 4 § 1 CMP 2001 from that referred to in Article 6 PCCP is that the former specifies the maximum number of defence lawyers, while the latter information is contextual in nature: it must be provided when the accused is found to be in violation of Article 77 PCCP (as stated in Article 16 § 2 PCCP).

The inclusion of the duty to inform the charged person about their rights in the provisions governing misdemeanour cases serves the purpose of aligning this procedure with the principles of fairness.[54] This can be considered a 'fair' process, particularly when it comes to upholding the principle of procedural fairness,[55] especially regarding the fundamental guarantees afforded to the charged person.

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[53] Article 86 amended by Article 2(5) of the Act of 29 December 1998 amending certain laws in connection with the implementation of the structural reform of the state as of 1 January 1999 (Journal of Laws of 1998, No. 162, item 1126).

[54] It was untenable to consider conducting judicial proceedings for both crimes and misdemeanours based on differing standards. Such an approach would run counter to the principles outlined in Article 45 § 1 of the Constitution of the Republic of Poland, which mandates fair and prompt adjudication by a competent, impartial, and independent court, without allowing for deviations.

[55] Gostyński, Z., 'Obowiązek informowania uczestników postępowania o ich obowiązkach i uprawnieniach jako przejaw zasady uczciwego (rzetelnego) procesu', in: Czapska, J., Gaberle, A., Światłowski, A., Zoll, A. (eds), *Zasady procesu karnego wobec wyzwań współczesności. Księga ku czci Profesora Stanisława Waltosia*, Warszawa, 2000, p. 364; Kulesza, C., 'Komentarz do Article 16', in: Dudka, K. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX 2020, commentary 1 [accessed on 3 March 2023].

This is the rationale behind the reference to Article 16 PCCP in Article 8 CMP 2001, which establishes a respective application. Article 16 PCCP, in the context of § 1 of that article, provides protection to the charged person against the lack of essential information or incorrect information, specifically in situations described in Article 4 CMP 2001 (concerning the right to defence and the right to seek the assistance of a defence lawyer). It also safeguards the charged person in situations described in:

– Article 20 § 3 CMP 2001 in conjunction with Article 175 PCCP (the right to provide an explanation and the right to refuse answers to individual questions or to decline explanations).
– Article 67 § 2 (first sentence) CMP 2001 (the right to decline explanations or answers to questions, the right to use the assistance of a defence lawyer, the right to bring witnesses to a courtroom and present evidence for defence, or the right to indicate that evidence, the right to view case files, and the right to make a petition referred to in Article 58 § 3 CMP 2001).
– Article 67 § 2 (second sentence) CMP 2001 (the right not to appear in court and the right to be tried in absentia).
– Article 67 § 3 CMP 2001 (the right to send explanations to court in writing).
– Article 81 CMP 2001 in conjunction with Article 386 PCCP (the right to provide explanations, the right to refuse answers to individual questions or to decline explanations, the right to ask questions to persons in interrogation at the trial, and the right to provide explanations concerning each piece of evidence conducted).
– Article 38 § 1 CMP 2001 in conjunction with Article 100 § 6 PCCP (the right to appeal, the time limit for the appeal, and the mode of bringing the appeal).

Additionally, the person mentioned in Article 54 § 6 CMP 2001 must be instructed on:

– Article 4 § 2 (second sentence) CMP 2001 (the right to defence, including the right to use the assistance of one defence lawyer).
– Article 54 § 6 (second sentence) CMP 2001 (the right to decline explanations and the right to petition for evidence).
– Article 54 § 7 (second sentence) CMP 2001 (regarding the charge itself[56] and the possibility to send explanations in writing when oral interrogation has been waived).
– Article 54 § 9 CMP 2001 in conjunction with Article 23a PCCP (the right to initiate mediation, its purpose, and the principles by which it is governed).

The 2001 legislator appears to be more concerned about some of the aforementioned rights, as the charged person must receive instructions on the right to make explanations, the right to refuse answers to questions, and the right to refuse explanations on several occasions throughout misdemeanour proceedings, similar to criminal proceedings. The first instruction occurs during explanatory activities (as per Article 54 § 6 CMP 2001), the second is provided when the charged person

[56] This can, in turn, be easily associated with the right to procedural information, and more specifically, the right to know the charges, which is a necessary condition and perhaps the most important aspect of a comprehensive criminal defence. See Daszkiewicz, W., 'Taktyka kryminalistyczna a procesowe gwarancje jednostki i prawa obywatelskie', *Państwo i Prawo*, 1985, No. 3, p. 58.

is notified of the trial date, and the third is given just before the examination of the charged person during the trial. The duty to instruct the charged person on these rights is also stipulated in Article 20 § 3 CMP 2001 in connection with Article 175 § 1 PCCP. However, the latter provision does not specify the moment at which the instruction should occur, and it serves as a model of instruction that has no equivalents in the instructions that take place during misdemeanour proceedings. The inconsistency between the contents of instructions according to Articles 54 § 6 CMP 2002, 67 § 2 CMP 2001, 81 CMP 2001 in conjunction with Article 386 PCCP, and the contents based on Article 20 § 3 CMP 2001 in conjunction with Article 175 PCCP, is due to the failure to consider in these provisions that both 'the refusal to answer questions' and 'the refusal of explanations' do not require any reasons to be given when the right to refuse is exercised ('without giving reasons'). This omission essentially distorts and diminishes the existing model of instruction, especially when it comes to an element that may influence the charged person's attitude. This issue is also noticeable in criminal proceedings. However, it should not be considered an excuse for the legislator.[57] Fortunately, this omission has been rectified by the Minister of Justice in delegated legislation based on Article 67 § 6 CMP 2001, as the instruction template (referred to in Article 67 § 2 CMP 2001) mentions 'the right to make explanations, the right to refuse explanations, and the right to refuse to answer individual questions, without the need to provide reasons for such refusals' (see item 1 of the template).[58]

The range of instructions given in accordance with Articles: 54 § 6 CMP 2001, 67 § 2 CMP 2001, and 81 CMP 2001 in conjunction with Article 386 PCCP is certainly sufficient for situations in which those instructions must be provided since they precede the examination of a person against whom there is a well-founded ground for making a petition for punishment (as per Article 54 § 6 CMP 2001) or the charged person (as outlined in Article 67 § 2 CMP 2001 and Article 81 CMP 2001 in conjunction with Article 386 PCCP), not to mention that there may be doubts regarding the incompleteness of the former instruction. In the first situation, the instruction is limited to informing the individual of their 'right to refuse explanations',[59] while information about the 'right to answer a question' is not required. This limitation raises the question of whether it might be considered a violation of Article 16 § 1 PCCP in conjunction with Article 8 CMP 2001. It should be noted that such a limitation could potentially lead to disregarding explanations given by a person who is unaware of their procedural rights.

The broadest scope of rights, which collectively constitute the right to defence, is enjoyed by the charged person. This is expressed in Article 20 § 3 CMP 2001, which provides for the respective application of the provisions of the Code of Criminal

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[57] Cf. the interpretations of Articles 175, 300, and 386 PCCP as presented by P.K. Sowiński in his work, *Uprawnienia składające się na prawo oskarżonego do obrony. Uwagi na tle czynności oskarżonego i organów procesowych*, Rzeszów, 2012, pp. 85–86.

[58] Regulation of the Minister of Justice of 13 April 2016, specifying the template for informing on the rights and obligations of the charged person in misdemeanour proceedings (Journal of Laws, item 511).

[59] And of the right to 'submit requests as to evidence'.

Procedure mentioned in that article to the charged person. Among these provisions are Article 72 § 1 and 2,[60] Article 74 § 1 and 2, Article 75, Article 76, and Article 175 of the Code of Criminal Procedure. Each of these provisions independently grants the charged person an additional right, which Article 4 CMP 2001 does not address. Together, these provisions form an extended system of procedural safeguards owed to the charged person for the sake of their right to defence. While it is clear why these additional rights are granted to the charged person, it is less clear why the same rights are not extended to the person referred to in Article 4 § 2 in conjunction with Article 54 § 6 CMP 2001, not to mention the person suspected of committing a misdemeanour (Article 54 § 5 CMP 2001).[61] One question that arises is whether the reason these persons do not have the right to be assisted by a translator or interpreter (as outlined in Article 72 § 1 and 2 PCCP) is that, according to the literature,[62] the explanatory activities (as per Article 54–56 CMP 2001) in which these persons participate are not considered part of the misdemeanour procedure but are instead categorised as 'procedural activities remaining out of the official procedure'. Furthermore, we might question whether there are valid reasons why out of the two persons who have the right to be assisted by a defence lawyer (Article 4 § 1 and 2 CMP 2001), only the charged person may be assisted by a translator/interpreter, while the person referred to in Article 4 § 2 in conjunction with Article 54 § 6 CMP 2001, may not have this privilege as they are not directly mentioned as 'the charged person' in Article 20 § 3 CMP 2001 in conjunction with Article 72 § 1 and 2 of the Code of Criminal Procedure.[63] There is no indication that the provisions covering the charged person should be applied, at least respectively, to persons described in Article 4 § 2 in conjunction with Article 54 § 6 CMP 2001. This assertion, which is far from optimistic, may be challenged, at least in part, by the fact that Article 42 § 3 CMP 2001 refers to Articles 204–206 of the Code of Criminal Procedure.[64] While this reference pertains to the position of translators/interpreters only ('to translators […] should be applied'), it implies that Article 204 § 1(1) or (2) PCCP will enforce the involvement of a translator/interpreter in those explanatory activities in which deaf or speech impaired persons (Article 54 § 5 or 6) participate, where written communication with these individuals is insufficient (item 1), or if they do not have a command of the Polish language (item 2). However, even the reference found in Article 42 § 3 CMP 2001 to Article 204–206 PCCP to be applied respectively to translators does not mandate their involvement in consultations between persons

[60] A reference to Article 72 § 1 and § 2 PCCP which was added to Article 20 § 3 CMP 2001 on 1 July 2015, by Article 18(4) of the Law of 27 September 2013 amending the Code of Criminal Procedure and some other laws (Journal of Laws, item 1247, as amended).

[61] However, persons suspected of committing a misdemeanour are governed by, Article 74 §§ 3 and 3a, and Article 308 § 1 PCCP (Article 54 § 5 CMP 2001), applied respectively.

[62] Grzegorczyk, T., *Kodeks…*, op. cit., LEX 2012, commentary 1 on Article 20 [accessed on 3 March 2023].

[63] T. Grzegorczyk appears to share this position, when he contends that 'Article 20 § 3 [CMP 2001] requires Article 74 § 2 [PCCP] to the charged person, that is an individual against whom a request for punishment has been filed.' Cf. Grzegorczyk, T., *Kodeks…*, op. cit., commentary 4c on Article 20 [accessed on 3 March 2023].

[64] None of the provisions contained in the 1971 CMP governed translators/interpreters, nor did it refer to the then-binding Article 159 PCCP 1969.

described in Article 54 § 6 CMP 2001 and their defence lawyers. The aforementioned right to be assisted by translators/interpreters is governed by Article 72 § 3 PCCP, which applies solely to charged persons.

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The reference found in Article 20 § 3 CMP 2001 results in the charged person being governed by, among other provisions, Article 175 PCCP, which will apply respectively. This solution has both advantages and disadvantages. One of the disadvantages is the limitation on the application of the aforementioned provision to only one of the two persons who are the subjects of the right to defence, namely the charged person. Since the 2016 amendment of Article 4 § 2 CMP 2001, there is another subject of the right in question, namely the person described in Article 54 § 6 CMP 2001. Given that the latter person may be subject to interrogation, it was necessary to find a separate basis for the right to remain silent for that person. This basis is currently provided in Article 54 § 6 (second sentence) CMP 2001. However, within the relevant scope, the aforementioned article provides only for 'the refusal to make explanations' and does not address the 'right to refuse answers to individual questions', a right that is governed by Article 175 PCCP when applied to the charged person. This omission would make sense in the case of a withdrawal from an oral examination of a person referred to in Article 54 § 6 CMP 2001, followed by the summoning of that person to 'send explanations to the relevant authority within 4 days' from the date of the withdrawal. In such a case, the explanations are, in fact, an uninterrupted report from that person, not 'fuelled' by questions asked by the interrogator. However, the situation is different when the oral examination takes place in accordance with the typical rules of the process, with the interrogator assuming an active role in the proceedings and having the legal and factual position allowing for asking questions that might shape the final contents of the explanations given.

Both solutions, namely the one contained in Article 20 § 3 CMP 2001 in conjunction with Article 175 PCCP, and the one contained in (though far from perfect) Article 54 § 6 CMP 2001, at least directly express the rights of the persons mentioned in those provisions to give explanations and to refuse such explanations. This contrasts with the 1971 Code, the wording of which compelled legal scholars at the time to exert interpretive efforts to imply the aforementioned rights from the broadly understood right to defence and/or the presumption of innocence principle (Article 7 § 1 of the 1971 Code). M. Siewierski, who reflected on the topic, considered the right to remain silent as being 'obvious' and an achievement of 'progressive legal thinking'. He did not entertain the thought that 'in the socialist system it would be possible to contradict the binding force of that principle.'[65] In a more forgiving assessment of the then 'achievements of the people's political system', it could be observed that the same socialist lawmaker was not as optimistic since in criminal procedure, the right to make explanations and the right to refuse explanations were expressly secured in the law, to be precise in Article 63 of the 1969 Code of Criminal Procedure. It seems that

[65] Siewierski, M., in: Siewierski, M. et al., *Komentarz…*, op. cit., pp. 12, 53.

the popularity of the assertion regarding the broader scope of rights of the charged person, which claimed that those rights were to encompass not only those 'reflected in the bundle of legal provisions contained in the 1971 Code', but also those which 'were not clearly specified in the Code, but otherwise evident, considering the procedural situation of the charged person', was an attempt to cover up the legislator's reluctance toward those committing misdemeanours, the majority of whom were the subject of political games during the challenging and turbulent times of communism.[66]

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Article 30 § 1 of the 1971 Code, which is not currently in force, made it admissible to serve as a defence lawyer in misdemeanour cases, not only for persons entitled to serve as defence lawyers under the law governing the structure and regime of the Bar, but also for 'other reliable persons' and those 'admitted by the president of the adjudicating authority or the adjudicating panel'. The use of a phrase 'other reliable persons' demonstrated that members of the Bar were inherently considered 'reliable' by the legislator, as was the case with other individuals mentioned in that Article, such as 'representatives of a trade union or a social organisation in which the charged person participated'. It should be noted that only these 'other persons' were subject to additional verification by the authority. The verification did not take place based on legal education, as at that time, such a criterion was unknown in legislation. The assessment was conducted individually because it did not concern the entire organisation in which the potential defence person belonged but the individual person themselves. The lack of any statutory indications as to who could be this person led A. Gubiński to assert that the person in question should be 'an individual representing positive personal and social values', against whom 'it would be impossible to make charges that would disqualify them in the eyes of the public' or 'not punished for an act committed out of morally questionable motives'.[67] Depriving the charged person of any legal measures that could aim at challenging the decision on the non-admittance of that 'other person' as a defence lawyer turned the charged person into a hostage of the authority, which at that time might serve (and indeed served) some extra-procedural purposes. Leaving aside the fact that extending the right to defend persons charged with misdemeanours to non-professionals stemmed from the view that misdemeanour cases were considered less complicated and that such cases should be heard with the broadest possible participation of the public. This concerned not only the composition of adjudicating panels but also other participants in the proceedings.

Article 30 § 1 of the former Code of Misdemeanour Procedure abolished the restriction referred to in Article 24 § 1 of the 1950 Law on Penal and Administrative Adjudication, subject to exceptions specified in sub§ 3.[68] The restriction implied the

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[66] Gubiński, A., *Prawo wykroczeń*, Warszawa, 1980, p. 405.

[67] Ibidem, p. 410.

[68] A person authorised to appear before a court based on the provisions governing the Bar could act as defence counsel in misdemeanour cases specified in Article 9 § 1 (3)(a) and (3)(c), as well as in cases covered by other special laws for which the collegiate authorities (*kolegia*

inadmissibility of defending charged persons by professional defenders without a license. The 'other reliable person' admitted to be a defender in misdemeanour cases pursuant to Article 30 § 1 CMP 2001, considering the then Article 59 § 1 of the Code of Misdemeanours,[69] could not accept remuneration for being a defender. This was because the latter Article penalised 'the performance of professional activities' by persons 'without relevant licenses or exceeding the license'. The defence performed by that 'other reliable person' was, in fact, a voluntary service, which did not constitute a source of sustenance for them.

The non-professional defender lost their reason for existence upon the entry into force of the 2001 Code. This change was in line with the prevailing trend at the time to professionalise legal assistance. However, this professionalisation did not extend to cases involving violations of public finance discipline. For such cases, based on Article 170 of the public finance law[70] in conjunction with Article 3(2) of the introductory provisions to the new Code of Misdemeanour Procedure,[71] Article 30 of the 1971 Code continued to apply until June 2005.[72]

The current legal framework only allows 'advocates or legal advisors' to serve as defenders for both charged persons and individuals mentioned in Article 54 § 6 CMP 2001. It should be emphasised that Article 24 § 1 CMP 2001 is significant in this context. Unlike Article 82 PCCP, it doesn't use the phrase 'person authorised to defend pursuant to the advocacy or legal advisors law', which might suggest that Article 82 restricts the scope of individuals authorised to be defenders to those holding professional titles. However, such an interpretation is incorrect for systemic reasons. In more complex cases, considering both legal and factual complexity, the legislator permits other individuals to act as defenders, albeit to a limited extent, specifically, trainees under advocates and legal advisors. Trainees are allowed to act as substitutes for advocates and legal advisors in the performance of the relevant procedural function, as specified in Article 77 of the Advocacy Law[73] and Article 351 of the Law on Legal Advisors.[74] As T. Grzegorczyk observed, the explicit mention of 'advocates' and 'legal advisors' in Article 24 § 1 was intended to eliminate any doubts about the permissibility of non-members of these two professions acting as defenders. This clarification was not meant to modify the rules governing the

ds. wykroczeń) were empowered to impose the prison sentence. In all other cases heard by district collegiate authorities, this authorisation began from the filing of an appeal.

[69] Act of 20 May 1971 – the Misdemeanours Code (consolidated text: Journal of Laws of 2022, item 2151, as amended).

[70] Act of 26 November 1998 on Public Finance (consolidated text: Journal of Laws of 2003, No. 15, item 148, as amended).

[71] Act of 24 August 2001 introducing provisions for the Code of Misdemeanour Procedure (Journal of Laws, No. 106, item 1149, as amended).

[72] Article 198 of the Act of 17 December 2004 on Liability for Violation of Public Finance Discipline (consolidated text: Journal of Laws of 2021, item 289, as amended) repealing Article 170 of the Public Finance Act as of 1 July 2005.

[73] Act of 26 May 1982 – Advocacy Law (consolidated text: Journal of Laws of 2022, item 1184, as amended).

[74] Act of 6 July 1982 on Legal Advisors (consolidated text: Journal of Laws of 2022, item 1166).

substitution of advocates and legal advisors by trainees.[75] Trainees do not become 'defenders'; they merely substitute for advocates and/or legal advisors to the extent defined by the relevant laws. In my opinion, Article 24 § 1 CMP 2001 reflects an example of enforced autonomisation of procedural solutions. It emphasises that it governs the right to perform defence 'in misdemeanour cases', an issue already apparent from Article 1 § 1 of that Code. The same legislator from 2001 deserves credit for extending the right to perform defence in misdemeanour cases to legal advisors. This extension not only opened up the market for these services but also, in the long run, weakened the arguments of those who opposed the unification of tasks performed by members of the two legal professions even with respect to criminal offences, which happened 15 years later.[76] Given the equalisation of responsibilities between advocates and legal advisors as stipulated in Article 24 § 1 CMP 2001, it seems redundant to specify in § 3 of the same article that whenever defence lawyers or advocates are referred to in provisions of the Code of Criminal Procedure applied pursuant to Article 1 § 1 CMP 2001, these terms should also be understood as including 'legal advisors'. Article 24 § 3 seems to be a holdover from a period when defence in criminal matters could only be performed by members of the Bar (advocates).

The Constitutional Court's view on the inconsistency of Article 4 CMP 2001 with several provisions of the Polish Constitution[77] led to the inclusion of defence lawyers in the process of explanatory activities. This change was prompted by recognising the person mentioned in Article 54 § 6 CMP 2001 as a subject of the right to defence on par with the charged person. Prior to 2016, individuals described in Article 54 § 6 CMP 2001 had the right to contact an advocate or legal advisor,[78] but members of these professions did not have the status of a defence lawyer. Furthermore, this right only applied when the individual in question was actually arrested, as per Article 46 § 4 CMP 2001. In this specific situation, it was not problematic that the legal status of advocates or legal advisors was left unspecified. However, this selective and imperfect provision regarding legal assistance was unsatisfactory. It did not align with the model of criminal defence outlined in Article 42(2) of the Polish Constitution. The Constitutional Court's intervention and the subsequent changes were aimed at rectifying these issues.

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[75] Grzegorczyk, T., *Kodeks…*, op. cit., LEX 2012, commentary 2 on Article 24. Similarly, Świecki, D., *Metodyka pracy sędziego w sprawach o wykroczenia*, LEX 2007, p. 37; Kiełtyka, A., in: Kiełtyka, A., Paśkiewicz, J., Rogalski, M. (ed.), Ważny, A., *Kodeks postępowania…*, op. cit., commentary 1 on Article 24; Skowron, A., *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, LEX 2010, commentary 2 on Article 24; Lewiński, J., *Kodeks postępowania…*, op. cit., commentary 2 on Article 24 [accessed on 3 March 2023].

[76] Article 82 PCCP was amended by Article 1(27) of the Act of 27 September 2013 amending the Code of Criminal Procedure and certain other acts (Journal of Laws, item 1247, as amended), changing this provision as of 1 July 2015.

[77] Judgment of the Polish Constitutional Tribunal of 3 June 2014, Case No. K 19/11, op. cit.

[78] Skowron, A., 'Udział obrońcy w postępowaniu w sprawach o wykroczenia', *Przegląd Sądowy*, 2005, No. 3, p. 91.

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The concept of public defenders was not recognised in the 1971 Code, and the legislation was quite unclear about this. It seemed that the legislator suggested that charged persons could appoint a reliable person as their defender.[79] It might have been assumed that in cases where non-professionals provided defence, the issue of expenses did not arise since these non-professionals were not compensated. At that time, none of the legal scholars seemed to think about the problem of inequivalence between the defence provided by professionals and that provided by 'other reliable persons'. This inequivalence resulted from the different educational backgrounds and a lack of relevant procedural experience among the non-professional defenders. The situation changed significantly with the enactment of the 2001 Code, which abolished non-professional defence and introduced the concepts of public defence and mandatory defence, aligning these concepts more closely with their counterparts in criminal procedure.

According to Article 22 CMP 2001 and Article 78 CMP 2001 in conjunction with Article 378 PCCP, a public defender may be appointed for individuals facing charges who have not chosen a defence attorney for themselves. This implies that public defence, much like in criminal cases, is considered a secondary option. It comes into play when the charged person has not selected their own defence attorney and does not fall under mandatory defence.[80] In cases not covered by Article 21 § 1 CMP 2001, public defence is optional and hinges on the fulfilment of three key conditions: (1) A request from the charged person; (2) A demonstration that the person cannot afford the expenses of the defence without causing significant harm to themselves or their family; (3) Alignment with the interests of justice. While the first two conditions are identical to those in criminal cases, the third condition introduces a new dimension not previously seen in national law. It ties the availability of public defence to the broader interests of justice. In certain situations, the use of this criterion could potentially hinder a charged person's access to public defence, as it introduces an element of subjectivity.[81] However, it should be emphasised that the use of this criterion does not violate the fair trial standard. In fact, it is in line with Article 6(3)(c) of the European Convention on Human Rights.[82] Additionally, the decision of the court president to refuse the appointment of a public defence attorney can be appealed, reflecting the principle that such decisions may only

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[79] Siewierski, M., in: Siewierski, M. et al., *Komentarz…,* op. cit., p. 56; Gubiński, A., *Prawo…,* op. cit., p. 410.

[80] Sowiński, P.K., *Prawo oskarżonego do obrony w procesie karnym. Obrona formalna*, Rzeszów, 2022, p. 48.

[81] According to Article 22 (second sentence) CMP 2001, the basis for refusing to appoint a defence counsel *ex officio* cannot be the defendant's use of free legal aid or free civil advice services as provided for in the Act of 5 August 2015 on Free Legal Aid, Free Civil Advice, and Legal Education (Journal of Laws of 2021, item 945). This is an identical limitation to the one mentioned in Article 78 § 1 (second sentence) PCCP.

[82] The Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, amended by Protocols No. 3, 5, and 8, and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284, as amended).

be contested in specific situations as outlined by the law. It is worth mentioning that the absence of this third condition in the official template of the instructions provided to charged persons can be confusing, making the template incomplete,[83] and should be assessed in accordance with Article 16 § 1 PCCP in conjunction with Article 8 CMP 2001.

The admissibility of challenging the refusal to appoint a public defender has apparently been overlooked by A. Kiełtyka,[84] who, despite the amendment to Article 23 § 3 CMP 2001 more than seven years ago, still mistakenly asserts that the decision in question may not be challenged in court.[85] In reality, even a decision to refuse appointment, issued by a referendary operating in the court with jurisdiction over the case, can be challenged. Although Article 23 § 3 CMP 2001 does not explicitly mention this admissibility, the general principle of contestability of referendary's decisions (amounting to the nullification of such decisions), as expressed in Article 103 § 3a CMP 2001, applies in such cases. What might be considered questionable in both cases is the overly broad group of individuals who have the right to contest the refusal to appoint a public defender. Instead of limiting this group to the charged persons, who are most affected by the refusal, both Article 103 § 3 (in its second sentence) and § 3b (in its first sentence) point out that the parties to the proceedings have the right to contest. The rule that the president of the court or a court's referendary appoints the *ex officio* defender is subject to exceptions. Article 78 CMP 2001 in conjunction with Article 378 § 2 PCCP assigns this authority to the court. This occurs when the court releases the current defender during the trial, which can happen either at the defender's request or upon the petition of the charged person. Furthermore, the court appoints new *ex officio* defenders if it observes during the proceedings that there is a conflict of interests among charged persons represented by the same *ex officio* defender. This is stipulated in Article 24 § 1 CMP 2001 in conjunction with Article 85 § 2 PCCP.

The decision to appoint an *ex officio* defender is not permanent. This is due to Article 22 (third sentence) CMP 2001 allowing for the direct application of Article 78 § 2 PCCP, which grants the court the authority to revoke the appointment if it determines that 'the circumstances on which the defender's appointment was based no longer exist.' Additionally, the decision to withdraw the appointment of a defender can be subject to appeal. It is worth noting that the authority to hear such an appeal lies with another panel of judges, rather than a higher court.

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[83] The model information regarding the appointment of a defence counsel *ex officio* is as follows: 'If the charged person demonstrates that he or she cannot afford a defence counsel, the court may appoint a defence counsel *ex officio* (Article 22).'

[84] Kiełtyka, A., in: Rogalski, M. (ed.), *Kodeks…*, op. cit., commentary 4 on Article 23.

[85] Article 23 § 1 was amended by Article 2(1) of the Act of 12 June 2015 amending the Code of Criminal Procedure and the Code of Misdemeanour Procedure (Journal of Laws, item 1186), amending the Code of Misdemeanor Procedure as of 17 September 2015. This change was prompted by the judgment of the Constitutional Tribunal of 8 October 2013 (K 30/11, OTK-A 2013, No. 7, item 98), establishing the unconstitutionality of the provision denying the right to judicial review of the refusal to appoint a defence counsel *ex officio* under Article 81 § 1 of the Polish Code of Criminal Procedure due to a contradiction with Article 42 § 2 in conjunction with Article 45 § 1 and Article 78 of the Constitution of the Republic of Poland.

The 'circumstances' referred to in Article 22 (first sentence) CMP 2001 primarily encompass the charged person's financial status but also include factors that influenced the determination that the appointment of a public defender is necessary in the interest of justice. A renewed request for the appointment of a public defender based on the same circumstances is left unexamined (Article 23 § 1a CMP 2001). Unlike in criminal proceedings, a public defender cannot be appointed 'for the purpose of performing a specific procedural act' in misdemeanour proceedings. This is because Article 78 § 1a PCCP was not incorporated into misdemeanour proceedings, and the 2001 Code itself does not provide an autonomous solution in this regard.

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It is rather surprising that mandatory defence in misdemeanour proceedings only appeared with the adoption of the current Code of Misdemeanour Procedure.[86] The previous legislation did not recognise mandatory defence, despite the excessive emphasis at the time on the significance that the socialist state attached to the realisation of the right to defence and other procedural guarantees aimed at the proper application of the law. Whether this omission was intentional from a legislative standpoint or constituted a kind of 'encouragement' to apply the relevant provisions of criminal procedure by analogy, the then legal scholars remained silent on this matter. The issue is now addressed by Article 21 § 1 CMP 2001, which provides for mandatory defence for the charged person in cases brought before a court in misdemeanour matters.[87] Mandatory defence is required if the charged person is deaf, mute, or blind (point 1) or if there is reasonable doubt about their sanity (point 2). Similar to criminal proceedings, mandatory defence in misdemeanour proceedings is a permissible restriction on the decision-making autonomy of the passive party, who is not obliged to seek such assistance actively but cannot decline it when offered.

The absence of a reference point in the form of previously applicable misdemeanour regulations necessitates a comparison of Article 21 CMP 2001 with Article PCCP, which is the counterpart of the former. A preliminary analysis alone reveals that mandatory defence in misdemeanour cases is a significantly diluted version of this form of representation known from the Code of Criminal Procedure. Presumably, due to the lowering of the minimum age of criminal responsibility to 17 years by Article 8 of the Misdemeanours Code (*Kodeks wykroczeń*),[88] the legislator did not decide to extend mandatory defence to offenders who 'have not reached the

[86] However, the issue of mandatory defence had to be assessed in light of the provisions applicable in simplified proceedings (Article 455 of the former Code of Criminal Procedure) at the moment the case was referred to the 'judicial procedure' at the request of the charged person made under Article 86 CMP 1971.

[87] As a result, the scope of mandatory defence was defined more narrowly than in criminal proceedings, and it did not cover procedural activities undertaken before the president of the court issued an order to initiate proceedings (Article 59 § 2 CMP 2001).

[88] Act of 20 May 1971 – the Misdemeanours Code (consolidated text: Journal of Laws of 2022, item 2151, as amended).

age of 18', as has been the case since 2015,[89] in Article 79 § 1(1) PCCP. This legislative decision likely aimed to avoid a surge in such cases. However, it also signifies that, in this instance, lofty principles have yielded to harsh reality and simple economics.

The three types of physical impairments mentioned in Article 21 § 1(1) CMP 2001 are identical to those used in Article 79 § 1(2) PCCP, and should be interpreted in a similar manner.[90] However, there is a notable difference concerning the condition for mandatory defence outlined in Article 21 § 1(2) CMP 2001, which is 'reasonable doubt about the [charged person's] sanity'. Despite the unquestionable autonomy of the 2001 Code, it is concerning that the legislature adheres to a concept that does not align with procedural realities and fails to address the urgent need for the modification of the concept in line with the provisions specified in Article 79 § 1(3) and (4) PCCP. Adhering to the existing language of Article 21 § 1(2) CMP 2001 results in this provision not being well harmonised with its § 2. The latter provisions mention the expert opinion regarding 'the exclusion or significant limitation of the ability to understand the significance of one's actions or to direct one's conduct' at the time the act was committed as well as the expert opinion on the charged person's 'mental condition' assessed based on his ability to 'participate in the proceedings and defend himself reasonably and independently'. The latter situation, however, does not equate to the charged person's 'sanity'. The psychiatric opinion drawn up by one (and not two experts, as required by Article 202 § 1 PCCP) is not binding on the court, however, the mere consideration of this opinion as justified leads to the termination of mandatory defence for such an accused and should result in the release of the defender from their duties. As a result, unlike in criminal proceedings, the court 'relieves' the defender of the charged person, as per Article 21 § 2 (second sentence) CMP 2001.

Article 21 § 2 CMP 2001 initially contained the same error as Article 79 § 4 PCCP prior to 2013. Both provisions created the illusion of the court being 'bound' by the content of the psychiatric opinion (the 'obligation to use the assistance of defence counsel if the appointed expert confirms…'), which contradicted the principle of the court's freedom to assess all evidence in a case.[91] Amended in 2013, Article 21 § 2 CMP 2001 finally establishes the correct sequence of events: presenting the psychiatric opinion to the court, the court's evaluation of this opinion, and the court's ruling on the issue of formal defence. This better reflects the court's paramount position and its role in determining legally relevant circumstances, including those that impact decisions on purely procedural matters. The same amendment deprived the court of the ability to make an alternative decision regarding the continuation of formal defence, as allowed by Article 21 § 2 CMP 2001 before its amendment. However, it did not specify whether such a decision should make the defence mandatory for

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[89] Before that date, there was no need to provide such a defence for the individuals mentioned in Article 79 § 1 point 1 as 'minors', as they were not held responsible for misdemeanours. See Grzegorczyk, T., *Kodeks…*, op. cit., commentary 2 on Article 21.

[90] See more on this, Sowiński, P.K., *Prawo…*, op. cit., pp. 105–113; Stefański, R.A., *Obrona obligatoryjna w polskim procesie karnym*, Warszawa, 2012, pp. 107–122.

[91] Article 18(5) of the Act of 27 September 2013 amending the Code of Criminal Procedure and certain other acts (Journal of Laws, item 1247, as amended), amending this provision as of 1 July 2015.

a longer period, which seems impossible given the normative nature of mandatory defence, or to the continuation of formal defence as non-mandatory representation, as Article 79 § 4 *in fine* PCCP does in criminal cases (where 'other circumstances suggest that the accused should have a defence counsel appointed *ex officio*'). The lack of an option for the court in this regard has been justifiably criticised by legal scholars.[92] In turn, the opposing view, which suggests that the court can still decide differently and maintain the obligation of formal defence, 'despite the expert's opinion confirming the accused's sanity',[93] appears to be incorrect.

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Article 4 § 1 CMP 2001 indicates that in misdemeanour proceedings, it is permissible for only one defence counsel to represent the charged person (or the person referred to in Article 54 § 6 CMP 2001) simultaneously. This resembles the mechanism applied in criminal cases under Article 77 PCCP, but with the difference that the limit set there is higher, allowing for simultaneous representation by up to three defence counsels. It's worth noting that in the 1997 version of the Code of Criminal Procedure, this limitation was given a separate editorial unit, while in the 2001 Code of Misdemeanour Procedure, the issue was addressed somewhat incidentally within the provision granting the charged person the right to defence. The 1971 CMP, on the other hand, did not have a clear limitation on the number of defence counsels. Some interpreted this from the fact that Article 8 of that Code used the word 'defence counsel' in the singular form, not in the plural.[94] Furthermore, there was a debate about whether it was necessary to apply, by analogy, Article 68 of the 1969 Code of Criminal Procedure, which increased this limit to three defence counsels. This was seen as a solution specific only for criminal cases, matching their legal and evidentiary complexity.[95]

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The law now mandates that defence counsels must act solely in the interest of the charged person. This is the result of Article 24 § 2 CMP 2001 referring to Article 86 PCCP to be applied in misdemeanour proceedings.[96] It appears that, even without specific legal regulations in the Code, the orientation of professional defence counsel's activities can be inferred from the provisions governing advocates and legal advisors. This is because Article 1 § 1 in conjunction with Article 4 § 1 of

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[92] Dąbkiewicz, K., *Kodeks*…, op. cit., commentary 9 on Article 21 [accessed on 7 March 2023].

[93] See, however, Kiełtyka, A., in: Rogalski, M. (ed.), *Kodeks*…, op. cit., commentary 6 on Article 21 [accessed on 7 March 2023].

[94] This argument falls short when one considers that the use of the singular number is often an expression of a linguistic convention employed by the legislator, who prefers this grammatical form.

[95] Siewierski, M., in: Siewierski, M. et al., *Komentarz*…, op. cit., p. 56; Marek, A., *Prawo*…, op. cit., p. 201.

[96] Judgment of the Regional Court in Gliwice of 7 April 2015, Case No. VI Ka 138/15, LEX No. 1831992.

the Advocacy Act as well as Article 2 in conjunction with Article 4 of the Legal Advisors' Act specify that the primary scope of their professional activities is the provision of 'legal assistance'. Legal assistance is a special type of help, which in the Polish language means 'support to another person'[97] or 'actions for the benefit of another person'.[98] Despite the absence, in the former Code of Misdemeanour Procedure, of specific indications about where the activities of a defence counsel should go, legal scholars questioned the legality of defence actions that ran counter to the interests of the charged person, and even the goal of 'revealing the truth' did not justify such actions.[99]

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While the 2001 Code regulates the principle of the right to defence autonomously, borrowing all other principles from the 1997 Code of Criminal Procedure, the way in which the principle and the components of the right to defence are regulated does not make them significantly new or fundamentally different from their counterparts found in the 1997 Code. There are differences between these principles and the content of the right to defence, but these are more quantitative than qualitative. Perhaps it was precisely the number of these deviations that made it impossible to transplant the right to defence into misdemeanour proceedings in its form known from the 1997 Code. This would have resulted in applying Article 6 PCCP in a convoluted manner, relying on numerous exceptions. However, it is clear that under both procedures, the right to defence is not an absolute right[100] and can be subject to numerous, albeit not fundamental, limitations. This right serves the passive party, and recent legislative actions have also granted the right to defence to a 'suspected person',[101] bringing it closer to the constitutional standard set by Article 42 § 2 of the Polish Constitution. This proximity is also emphasised by Article 4 § 1 CMP 2001, which recognises the right of the charged person to the assistance of a defence counsel, an action almost identical to those undertaken by both those who created the Constitution and the 'ordinary' legislator in Article 6 *in fine* PCCP. There is no doubt that the current form of the right to defence for the charged person (and the person defined in Article 54 § 6 CMP 2001) may undergo further changes, even if they are not directly aimed at this participant in the proceedings, but the right to defence is realised in particular procedural contexts. As a result, even changes in those contexts can influence the content of the right in question; it appears to be highly sensitive and susceptible to even indirect influences.

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[97] https://sjp.pl/pomoc [accessed on 3 March 2023].

[98] https://sjp.pwn.pl/slowniki/pomoc%20.html [accessed on 3 March 2023].

[99] Gubiński, A., *Prawo…*, op. cit., p. 409; see also Siewierski, M., in: Siewierski, M. et al., *Komentarz…*, op. cit., p. 55. The mention of the defence lawyer's actions being taken solely for the benefit of the charged person sometimes occurred without specifying any basis for such an inference. Cf. Marek, A., *Prawo…*, op. cit., p. 200.

[100] Wiliński, P., in: Wiliński, P. (ed.), et al., *Polski…*, op. cit., p. 351.

[101] Janusz-Pohl, B., in: Wiliński, P. (ed.) et al., *Polski…*, op. cit., p. 790.

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Cite as:

Sowiński P.K. (2024) '*Formation of some elements of the right to defence in misdemeanour proceedings*', Ius Novum (Vol. 18) 1, 54–79. DOI 10.2478/in-2024-0004

Ius Novum
2024, vol. 18, no. 1, pp. 80–98

LIMITS OF THE EVIDENCE INITIATIVE OF THE COURT OF FIRST INSTANCE AND THE RELIABLE EVIDENCE PROCEDURE

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DOI 10.2478/in-2024-0005

Abstract
This article aims to delineate the boundaries of the evidence initiative of the Court of the First Instance, which bears the responsibility to fulfil the goals of criminal proceedings, as outlined in Article 2 § 1 item 1 and § 2 of the Code of Criminal Procedure, from the perspective of evidence reliability, an essential component of the fair criminal trial concept. The court's evidentiary actions were thus examined through the lens of requirements stemming from Article 6(1) and (3) of the ECHR, especially the principles of independence, impartiality, adversarial process, immediacy, and access to criminal proceeding materials. The article adopts a dogmatic approach, building on an analysis of current national legal standards and the Rome Convention's provisions, viewed through doctrine and jurisprudence of national courts and the Court in Strasbourg. This makes the publication relevant for both legal scholars and practitioners involved in criminal proceedings. The analysis suggests that the court's initiative to introduce evidence, its methods of evidence gathering, and access to collected materials during proceedings must not curtail the rights of the parties, especially the accused, to conduct their evidentiary activities. Depriving the court of the primacy of independence and impartiality, restricting the parties' capacity to engage in dispute in favour of an inquisitorial jurisdictional body violates the right to fair evidentiary proceedings. The court, in safeguarding the principle of material truth, must remember its role as a justice administrator and balance all arguments accordingly. Seeking evidence solely to establish the accused's guilt contradicts the procedural function of adjudication and compromises the court's neutrality, making it an extension of the prosecution. Hence, a thorough elucidation of case circumstances by the court should not disempower the parties, particularly regarding their initiative to present evidence.

Keywords: criminal proceedings, evidence initiative of the court, impartiality of the judge, reliable evidence proceedings, the accused

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INTRODUCTION

In criminal proceedings, accurate factual findings are derived from evidence presented by procedural authorities, especially the court adjudicating at first instance When dispensing justice, the court must adhere to the objectives of criminal proceedings mandated by law, including obligation specified in Article 2 § 1(1) of the Code of Criminal Procedure[1] ensuring a precise criminal response in the process and rendering all decisions in accordance with the principle of substantive truth outlined in Article 2 § 2 of the Code of Criminal Procedure.[2] This grants the court an active role in evidentiary proceedings, independent of the evidentiary efforts of the parties. Furthermore, the court holds a dominant position, as although parties may submit evidence requests, only the court conducts evidence during hearings, including evidence requested by the parties.

Subsequent legislative changes[3] reinstated legal solutions shaping the main trial model, which were in force until 1 July 2015. Enacted through two extensive amendments to the Code of Criminal Procedure,[4] the brief period of limiting the court's evidentiary activity[5] in favour of granting parties broader rights to conduct disputes at the jurisdictional stage, thereby strengthening the adversarial nature of the main hearing, was short-lived.[6] In the current legal framework, Ryszard A. Stefański's viewpoint remains pertinent, suggesting that in trials before the court of first instance, the process is adversarial in nature with inquisitorial elements, similar to the theoretical model of a relatively inquisitorial trial, where parties have the initiative to provide evidence and present it, while the court is obligated to conduct it on its initiative if necessary to clarify case circumstances.[7]

In the present legal framework, shaped by the Act of 11 March 2016 which continues the provisions of the Act of 19 July 2019, there has been a clear resurgence

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1 Act of 6 June 1997 Code of Criminal Procedure.

2 In line with the position expressed in the judgment of the Supreme Court of 3 October 2008, III KK 121/08, OSNKW, 2008, No. 12, item 101. Therefore, the basis for decisions in criminal proceedings should be factual findings that correspond to the truth, and it is the court's responsibility to strive to uncover it.

3 Act of 11 March 2016 amending the Code of Criminal Procedure and other acts (Journal of Laws 2016, item 437), and Act of 19 July 2019 amending the Code of Criminal Procedure and certain other acts (Journal of Laws 2019, item 1694).

4 Act of 27 September 2013 amending the Code of Criminal Procedure and other acts (Journal of Laws of 2013, item 1247) and Act of 20 February 2015 amending the Code of Criminal Procedure and other acts (Journal of Laws of 2015, item 396).

5 The amended Article 167 § 1 of the Code of Criminal Procedure stipulated that in court proceedings initiated at the behest of a party, evidence is taken by the parties after its admission by the presiding judge or the court. Should the party, at whose request the evidence was admitted, fail to appear, or in exceptional cases justified by special circumstances, the court shall take the evidence within the limits of the evidentiary thesis. In exceptional cases, justified by special circumstances, the court may admit and take evidence *ex officio*.

6 Indeed, the model limiting the court's evidentiary activity was in effect from 1 July 2015 to 15 April 2016, i.e. until the date of entry into force of the aforementioned Act of 11 March 2016.

7 Stefański, R.A., 'Referat rzetelne postępowanie przed sądem pierwszej instancji', in: Skorupka, J., Jasiński, W. (eds), *Rzetelny proces karny, Materiały konferencji naukowej Trzebieszowice 17–19 września 2009 r.*, Warszawa, 2010, pp. 61–65.

of the main hearing model, which was in effect until 1 July 2015. Introduced through two extensive amendments to the Code of Criminal Procedure on 27 September 2013 and 10 February 2015, the restriction of the court's evidentiary activity[8] in favour of granting parties broader rights to conduct disputes at the jurisdictional stage, thereby reinforcing the adversarial nature of the main hearing, was but a brief episode. Thus, the perspective articulated by Ryszard A. Stefański remains pertinent, suggesting that in trials before the court of first instance, these trials possess an adversarial nature with inquisitorial elements, aligning with the theoretical model of a relatively inquisitorial trial, wherein the onus of proof lies with the parties who present evidence, with the court obligated to do so on its own initiative, if necessary to elucidate the case's circumstances.

It is noteworthy that the relatively inquisitorial nature of the main trial, as aptly described by Ryszard A. Stefański, underpins the quest for truth in Polish criminal trials. This approach functioned under previously applicable procedural acts[9] and has been ingrained since the enactment of the Code of Criminal Procedure in 1997, thereby permeating the legal consciousness of judges presiding over criminal cases and constituting a significant element of their legal culture.

This approach has persisted since the enactment of the Code of Criminal Procedure of 1928, followed by the Code of Criminal Procedure of 1969, and remains in force under the current Code of Criminal Procedure of 1997. It must be emphasised that it has become deeply ingrained in the legal awareness of judges adjudicating in criminal cases, constituting a significant element of their legal culture.

When considering the court's evidentiary initiative, it is imperative to delineate its boundaries to ensure it does not undermine or exclude the rights of the parties to the proceedings. The limits of this activity are undeniably contingent on viewing jurisdictional proceedings through the lens of the validity of the concept of a fair criminal process, particularly a reliable evidentiary procedure. Such an approach is justified not only in theoretical considerations with regard to the main hearing model but should also serve as a guideline that will indicate the direction of potential changes that could attempt to return to certain provisions established based on the aforementioned acts of 27 September 2013 and 10 February 2015.

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[8] The amended Article 167 § 1 of the Code of Criminal Procedure stipulated that in court proceedings initiated at the behest of a party, evidence is taken by the parties after its admission by the presiding judge or the court. Should the party, at whose request the evidence was admitted, fail to appear, or in exceptional cases justified by special circumstances, the court shall take the evidence within the limits of the evidentiary thesis. In exceptional cases, justified by special circumstances, the court may admit and take evidence *ex officio*.

[9] Ordinance of the President of the Republic of Poland of 19 March 1928 – Code of Criminal Procedure (Journal of Laws 1928, No. 33, item 313), Act of 19 April 1969 – Code of Criminal Procedure (Journal of Laws 1969, No. 13, item 69).

THE CONCEPT OF THE EVIDENCE INITIATIVE

The initial step for further deliberation is to ascertain the meaning of the concept of 'evidence initiative'. According to Marian Cieślak, the evidence initiative pertains to the one who introduces evidence into proceedings before a given procedural body.[10] In legal terms, the 'introduction of evidence' denotes the act of incorporating sources of evidence into a criminal trial within the framework of criminal procedural law, aiming to utilise the information derived from these sources in proceedings before a given procedural body, concerning the subject of proof (evidence) for the purpose of reaching factual findings.[11] As the court's commitment to obtaining true factual findings necessitates utilising all legally permissible means to secure evidence enabling such findings and rendering accurate and equitable decisions,[12] the initiative of proof constitutes a fundamental attribute facilitating the application of the principle of substantive truth. Thus, the described concept should be construed as the authority and competence of the competent body to introduce evidence into proceedings based on its jurisdiction to establish true factual findings, and the right to request the inclusion of evidence in proceedings by parties other than the procedural authorities. This encapsulates an evidentiary initiative in a strict sense. Within this framework, it is enacted based on the norm articulated in Article 167 of the Code of Criminal Procedure, which stipulates that evidence is obtained at the request of the parties or *ex officio*. Additionally, the court's evidentiary activity is governed by Article 366 § 1 of the Code of Criminal Procedure, which mandates that the presiding judge oversees the hearing to ensure all pertinent circumstances of the case are elucidated. However, the initiative of a procedural authority encompasses not only the right to introduce evidence but also the obligation to conduct evidentiary proceedings, thereby initiating an appropriate course of proceedings, including the method of obtaining evidence. This encompasses an evidence initiative in a broader sense.[13]

For the purpose of further examination, the concept of the court's evidentiary initiative will be construed in a broader sense. This entails not only the authority of this body to introduce specific evidence into the proceedings but, equally importantly, extends to the manner of its conduct. The method of taking evidence is closely tied to the principles of adversarial and direct nature. However, a broader interpretation of the concept of evidentiary initiative encompasses the adjudicating court's right to access the entire preparatory proceedings files. By scrutinising the case files, the court can evaluate the value and utility of the collected evidence for the purpose of reaching true factual findings and appropriately directing its own evidentiary activity.

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[10] Cieślak, M., *Dzieła wybrane. Tom I. Zagadnienia dowodowe w procesie karnym*, Waltoś, S. (ed.), Kraków, 2011, p. 269.

[11] Woźniewski, K., *Inicjatywa dowodowa w polskim prawie karnym procesowym*, Gdańsk, 2001, p. 16.

[12] Gaberle, A., *Dowody w sądowym procesie karnym*, Warszawa, 2010, p. 56; Grzegorczyk, T., in: Grzegorczyk, T., Tylman, J., *Polskie postępowanie karne*, Warszawa, 2011, p. 493.

[13] Woźniewski, K., *Inicjatywa dowodowa*…, op. cit., p. 16; Kmiecik, R., in: Kmiecik, R. (ed.), *Prawo dowodowe. Zarys wykładu*, Kraków, 2005, p. 157.

THE CONCEPT OF THE RELIABLE EVIDENCE PROCEDURE

The fair criminal trial concept represents a set of universally understood values, sometimes viewed as a specific general clause.[14] Considering the varied interpretations and approaches to the fair trial concept in Polish procedural studies,[15] it is pertinent to acknowledge it as an element in describing the procedural model, and therefore a guiding principle for shaping the entire procedure. The nature of the process, whether adversarial or mixed, does not inherently specify the rules upon which its course is based or the values it embodies, as there may be a formally mixed process model that nonetheless lacks reliability and integrity. Regarding the mutual relationship between the concept of a fair trial and the principle of substantive truth, it can be asserted that the principle of substantive truth delineates the objective of the proceedings, while its method is governed by the concept of a fair criminal trial.[16] A modern process model should be characterised by at least two, and likely three features: structure, purpose, and method. Structurally, it is considered a mixed process. Its objective is the pursuit of material truth. Its method emphasises the reliability of the procedure.[17] An integral aspect of the fair criminal trial, evaluated from the standpoint of the court's evidentiary activity, is the reliable evidentiary proceedings. This concept facilitates the analysis of the provisions regulating evidentiary proceedings, as appropriately structured and conducted reliable evidentiary proceedings uphold the right to a fair trial.[18] There are reliable evidentiary proceedings *in abstracto* and *in concreto*. In the former, the term describes shaping evidentiary proceedings in a manner that allows for the implementation of fair trial standards. Reliable evidentiary proceedings *in concreto* are those assessed positively from the standpoint of Article 6 of the European Convention on Human Rights[19] (hereinafter 'ECHR') requirements and numerous procedural guarantees entitled to the party, particularly the accused, as emanating from procedural law. This approach is beneficial for further analysis, enabling examination of legal norms

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[14] Wiliński, P., 'Pojęcie rzetelnego procesu karnego', in: Gerecka-Żołyńska, A., Górecki, P., Paluszkiewicz, H., Wiliński, P. (eds), *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi*, Warszawa, 2008, p. 399.

[15] Cieślak, M., *Polska procedura karna. Podstawowe założenia teoretyczne*, Warszawa, 1984, pp. 367–368; Wędrychowski, M.P., 'Prawo do "uczciwiej rozprawy" w Europejskiej Konwencji Praw Człowieka', *Przegląd Sądowy*, 1991, No. 2, p. 64; Barącz, M., 'Pojęcie i cechy "uczciwego procesu karnego"', *Państwo i Prawo*, 1991, No. 2, p. 75; Murzynowski, A., *Istota i zasady procesu karnego*, Warszawa, 1994, p. 54; Hofmański, P., *Świadek anonimowy w procesie karnym*, Kraków, 1998, p. 36; Pagiela, A., 'Zasada "fair trial" w orzecznictwie Europejskiego Trybunału Praw Człowieka', *Ruch Prawniczy, Ekonomiczny i Społeczny*, 2003, No. 2, p. 125; Szymanek, J., 'Pojęcie rzetelnego procesu sądowego', in: Szymanek, J. (ed.), *Rzetelny proces sądowy. Doktryna. Prawo. Praktyka*, Warszawa, 2021, p. 33 et seq.

[16] Wiliński, P., 'Pojęcie rzetelnego…', op. cit., p. 407.

[17] Ibidem, p. 407, idem, 'Pojęcie rzetelnego procesu karnego', in: Wiliński, P. (ed.), *Rzetelny proces karny*, Warszawa, 2009, pp. 26–27.

[18] Lach, A., *Rzetelne postępowanie dowodowe w sprawach karnych w świetle orzecznictwa strasburskiego*, Warszawa, 2018, p. 12.

[19] Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, amended by Protocols No. 3, 5 and 8, and supplemented by Protocol No. 2.

influencing the court's evidentiary activity. Notably, judgments from both national courts and the European Court of Human Rights in Strasbourg (hereinafter referred to as 'the ECtHR'), which establish a direction in interpreting evidentiary law norms, are always made in specific cases. These determine whether the adjudicating court upheld the fair criminal trial standard and its element of reliable evidentiary proceedings. Thus, limits of the court's evidentiary initiative should be viewed through the lens of norms set out in Article 6(1) and (3) ECHR and the ECtHR interpretations, alongside decisions from appellate and Supreme Courts at the national level.

It is noteworthy to point out that, as noted by Arkadiusz Lach, the concept of a fair trial, particularly concerning evidence as outlined in Article 6 ECHR, is fundamentally a procedural guarantee of a formal nature. It does not assure accurate factual findings or correct application of substantive law, given the fact that ECHR uses the concept of a 'fair trial' rather than 'fair verdict', focusing on procedural rather than substantive justice.[20] This position has dominated the Court's jurisprudence with the landmark judgment in case *Anderson v. the United Kingdom*[21] becoming a reference for numerous subsequent decisions. In the commented case it was held that:

> 'This Court is not a court of fourth instance and will not intervene generally on the basis that a domestic court has come to a wrong decision. The domestic court heard all the evidence against the applicant and were therefore in the best position to rule on the admissibility of the evidence. There would not appear, therefore, to be any indication of a breach of Article 6 of the Convention.'

The primacy of national courts in assessing evidence, even that requested by a party, was affirmed by the Court in *Delta v. France*.[22] According to the ECtHR, only if decisions are deemed arbitrary or manifestly unreasonable, may there be a violation of Article 6(1) ECHR due to the failure to comply with the requirement of the prosecutor to prove guilt beyond reasonable doubt and the principle of *in dubio*

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[20] Lach, A., *Rzetelne postępowanie…*, op. cit., p. 16.

[21] *Anderson v. the United Kingdom*, ECtHR decision of 5 October 1999, application no. 44958/98, similarly in the case of *Vidal v. Belgium*, judgment of the ECtHR of 22 April 1992, application no. 12351/86, in which it was stated: 'It is not the function of the Court to express an opinion on the relevance of the evidence thus offered and rejected, nor more generally on Mr Vidal's guilt or innocence.'

[22] *Delta v. France*, judgment of the ECtHR of 19 December 1990, application no. 11444/85, according to which: 'The admissibility of evidence is primarily a matter for regulation by national law and, as a general rule, it is for national courts to assess the evidence before them. […] The procedure laid down by law for the Criminal Court also applies in principle to the Court of Appeal, but subject to an important provision in the second paragraph of Article 513 of the Code of Criminal Procedure, which reads: Witnesses shall be heard only if the Court [of Appeal] so orders.' In the opinion of the Court, it is therefore not a court of appeal against the judgments of national courts and its task is not to control the correctness of factual findings and assessment of evidence – the Convention bodies can only examine the manner in which evidence was taken, and not its assessment by the national court, unless there has been gross dishonesty or arbitrariness. Similarly, in the case of *Doorson v. the Netherlands*, judgment of the ECtHR of 26 March 1996, application no. 20524/92.

pro reo.[23] This view was in particular confirmed by the Court in the civil cases *Van Kuck v. Germany*,[24] *Khamidov v. Russia*,[25] and in the case of *Berhani v. Albania*,[26] wherein the Court held that the applicant's conviction was based on unreliable evidence, considering the assessment of the evidence as arbitrary and violating Article 6(1) ECHR.

In light of Strasbourg jurisprudence, as far the issue of evidence admissibility is governed by national law and thus, national courts evaluate the evidence presented to them, determine facts, and interpret national law, it is impossible to ignore the issuance of judgments that may be characterised as 'appear arbitrary' or 'manifestly unreasonable' because they violate standard of a fair trial provided under Article 6(1) ECHR. Hence, the adjudicating court's evidentiary activity must necessitate conducting evidentiary proceedings in a manner such that, in the event of a conviction, there are substantive grounds for establishing the defendant's guilt. The evidence collected in the case is therefore intended to objectively and reliably uphold the obligation resulting from Article 6(2) ECHR, which guarantees the presumption of innocence of the accused. Thus, despite the absence of reference in ECHR provisions to the concept of 'justice of the verdict', the adjudicating court should be compelled to take the initiative in evidence collection, as it is then supposed to make factual findings that cannot be accused of being evidently unjustified decisions, and a conviction is intended to preserve the guaranteeing nature of the presumption of innocence. Consequently, notwithstanding the evidentiary activity of the parties, the court retains prerogative in its own evidentiary activity and must possess the means to ascertain the truth and issue a substantive verdict.

THE COURT'S EVIDENCE INITIATIVE AND THE RULES SHAPING THE RELIABLE EVIDENCE PROCEEDINGS

From the perspective of Article 6(1) ECHR and the proper execution of the court's evidentiary initiative, the right to have a case heard by an independent and impartial court is paramount, while from the standpoint of Article 6(3) ECHR, adherence to the principles of adversarial and direct nature as well as the right of access to the proceedings files are of significant importance. In the latter case, the previously mentioned right of the court to dispose of the case files should not impede the parties to the proceedings, especially the accused, from accessing the evidence collected in the case files.

According to the assessment of the requirements that an independent court should meet, this attribute of a judge's power should be considered on two levels. On the one hand, it concerns independence from the executive power (judicial independence), and on the other, independence from the parties and various pressure

[23] Nowicki, M.A., *Wokół Konwencji Europejskiej, Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa, 2010, p. 445.

[24] *Van Kuck v. Germany*, judgment of the ECtHR of 12 June 2003, application no. 35968/97.

[25] *Khamidov v. Russia*, judgment of the ECtHR of 15 November 2007, application no. 72118/01.

[26] *Berhani v. Albania*, judgment of the ECtHR of 27 May 2010, application no. 847/05.

groups (independence of the judiciary). The ECtHR formulates three conditions for judicial independence: examining the method of appointing judges and the duration of their term of office, mechanisms protecting judges against external pressure, and whether a given body (judge) appears to function independently.[27] This publication does not aim to evaluate legal solutions significantly undermining the guarantees of judicial independence, leading to a serious rule of law crisis in Poland.[28] Nevertheless, it cannot be ignored that only a judge independent of other authorities, particularly the executive power exercised by the Minister of Justice, not subject to their pressure and unrestrained by the threat of disciplinary punishment for offenses that do not fall into the category of 'obvious and flagrant offences to the law', meets the criterion of a judge functioning independently and capable of properly fulfilling the obligation to take the initiative in evidence collection. In other words, an independent judge is the cornerstone of a fair trial and fair evidentiary proceedings.

An impartial judge serves as a guarantor of the standard specified in Article 6(1) ECHR. The criterion of a judge's impartiality was carefully examined in the case of *Piersack v. Belgium*,[29] in which, according to the Court:

> 'Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 § 1 (Article 6-1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.'

The challenge of maintaining impartiality by a judge who initiates evidence provision is significant as his role extends beyond being a passive arbiter of the parties' dispute to actively collecting and conducting evidence. Since the judge is obligated to issue a judgement based on true factual findings, he must strive to uncover them. Thus, impartiality assessed in this manner should be understood as 'the opposite of arbitrariness'. Impartiality does not require complete detachment from the social or cultural context but demands a comprehensive analysis of relevant circumstances in a case.[30] Therefore, impartiality is a 'directive' guiding the court to maintain impartiality towards the parties and other participants in the process, without taking a directional stance towards the case itself.[31] Hanna Kuczyńska accurately portrays the role of an evidence-active judge, asserting that

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[27] Nowak, C., 'Prawo do rzetelnego procesu sądowego w świetle EKPC i orzecznictwa ETPC', in: Wiliński, P. (ed.), *Rzetelny proces karny*, Warszawa, 2009, p. 106 and the large body of ECtHR case law cited therein.

[28] Judgments of the Court of Justice of the European Union: of 15 July 2021, C-791/19, and of 5 June 2023, I C-204/21.

[29] *Piersack v. Belgium*, judgment of the ECtHR of 1 October 1982, application no. 8692; and *Advance Pharma sp. z o.o. v. Poland*, judgment of the ECtHR of 3 February 2022, 1469/20.

[30] Jasiński, W., 'Zasada bezstronności', in: Wiliński, P. (ed.), *System Prawa Karnego Procesowego. Tom III. Cz. 2*, Warszawa, 2014, p. 1207.

[31] Waltoś, S., Hofmański, P., *Proces karny*…, op. cit., p. 229, the authors correctly assert that the concept of objectivity is broader than that of impartiality.

in the continental model, emphasis on the judge's internal, subjective attitude to the case may cause indifference despite the ability to influence the substance of evidence and knowledge of case files.[32] The court is meant to be impartial, yet actively involved in evidentiary proceedings. The continental model does not recognise the loss of impartiality by the court through its engagement in introducing evidence at trial.[33] This insight is pertinent when delineating the limits of a judge's impartiality concerning his involvement in evidence collection. While there is no doubt about the necessity of the judge's involvement in uncovering the truth, favouring one party or even providing 'relief' in the implementation of its evidentiary initiative should be deemed a violation of impartiality, both subjectively and objectively, exceeding the framework outlined in Article 6(1) ECHR.

Therefore, when analysing the limits of a judge's impartiality concerning his evidentiary activity, 'fundamental' decisions defining the court's obligations should be acknowledged. According to the Supreme Court:[34]

> 'The Polish legal system does not release the court from its duty to seek the truth as the foundation for its judgments, including through its evidentiary initiative, regardless of the burden of proof borne by the public prosecutor who may not demonstrate sufficient activity in this respect. Negligence in this area may undoubtedly constitute grounds for a cassation appeal.'

In another ruling, the Supreme Court stated[35]: 'The court (including the appellate court) is obligated to seek, *ex officio*, a comprehensive explanation of all the circumstances of the case. Failure to take the initiative in this direction in the circumstances of a specific case may be as a blatant violation of Article 167 of the Code of Criminal Procedure.'

However, the Supreme Court[36] recognises maintaining impartiality as a crucial limitation on court-initiated actions, stating:

> 'Courts administer justice, primarily tasked with evidence verification, whereas its collection and reporting are responsibilities of other entities or, in cases of auxiliary, subsidiary, or private accusations, other parties. Although deviating from such procedural role divi-

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[32] Kuczyńska, H., *Analiza porównawcza modelu rozprawy głównej. Między kontradyktoryjnością a inkwizycyjnością*, Warszawa, 2022, p. 167.

[33] Ibidem, p. 184.

[34] Judgment of the Supreme Court of 19 March 1997, IV KKN 13/97, *Prokuratura i Prawo* – insert 1997/12, item 10.

[35] Judgment of the Supreme Court of 26 March 2003, V KK 382/02, LEX nr 80704, similarly in judgment of 29 April 2021, V KK 142/21, LEX nr 3215605, the Supreme Court held that: 'The provision of Article 167 of the Code of Criminal Procedure grants the procedural authority both the right and the obligation to detect and conduct evidence concerning the relevant circumstances of the case. The procedural authority is required to take *ex officio* all evidence necessary to ascertain the circumstances relevant to deciding on the guilt of the accused, the legal qualification of the acts he is accused of, and the issue of possible punishment (see the judgment of the Supreme Court of 7 June 1974, V KRN 43/74 , OSNKW, 1974, No. 11, item 212). The passivity of the parties in not demanding the taking of evidence did not absolve the court from taking the appropriate initiative to provide evidence. The lack of activity posed, *in concreto*, a real threat of issuing an unfair judgment, which necessitated the admission of certain evidence.'

[36] Decision of the Supreme Court of 18 November 2003, III KK 505/02, LEX No. 82314.

> sion might be understandable when these entities accuse without professional assistance (without attorneys), the court's evidence initiative manifestation, instead of the prosecutor or acting case representative, could face accusations of violating the principle of impartiality. It also involves the court maintaining equal distance from opposing parties' procedural interests. Given the appellate court's additional evidence-taking constraints concerning case essence, especially new evidence (Article 452 § 1 of the Code of Criminal Procedure) (repealed), arising from the two-instance judicial proceedings principle, admitting such evidence *ex officio* by the appellate court must be dictated by an extraordinary procedural situation, e.g., the risk of losing crucial new evidence if uncollected.'

The Court of Appeal in Kraków also acknowledges this interpretation of court impartiality.[37]

It is also worth noting that a significant departure from the obligation, emphasised by the Supreme Court, to comprehensively explain all the circumstances of the case, can be observed in the case law of the Courts of Appeal, particularly the Court of Appeal in Kraków.[38] In a well-established line of case law, it presents the view that: 'The evidentiary activity of the court over the evidentiary initiative of the parties (Article 167 of the Code of Criminal Procedure) is justifiable only when its absence poses a clear risk of judgment injustice as referred to in Article 440 of the Code of Criminal Procedure.' The Supreme Court perceives the limit of the first instance court's evidentiary activity through the lens of issuing an unfair judgment, declaring:[39]

> 'The adjudicating court is obliged to take the evidentiary initiative *ex officio* when parties do not take such initiative in circumstances justifying such action, and when failing to do so could lead to issuing a grossly unfair judgment. Hence, if a cassation appeal alleges neglect of Article 167 of the Code of Criminal Procedure (court's lack of evidentiary initiative), the appeal success fundamentally requires explaining why the party failed to initiate and linking it with the charge of breaching Article 440 of the Code of Criminal Procedure.'

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[37] Judgment of the Court of Appeal in Krakow of 12 October 2017, II Aka 263/17, LEX No. 2678688, stating that: 'The court cannot be expected to take *ex officio* evidence that ought to be submitted by the parties to pursue their procedural interests, nor can the presiding judge of the chamber be expected to undertake this under Article 366 of the Code of Criminal Procedure. Doing so would undermine the court's position as a body that administers justice impartially, evaluates the evidence and claims of the parties, and decides on the validity of their arguments in a procedural dispute. It would reduce the court's role to merely searching for evidence and ensuring that one of the parties is right, allowing for the parties' passivity. This would mean a departure from the division of procedural roles, which is one of the cornerstones of the criminal process.'

[38] Judgments: of 29 December 1997, II AKa 229/97, *KZS* 1998/1, item 25, of 28 January 1998, II AKa 254/97, *KZS* 1998/3, item 45, of 12 April 2000, II AKa 6/00, *KZS* 2000/5, item 46, judgment of the Court of Appeal in Wrocław of 17 February 2016, II AKa 12/16, LEX No. 2008332.

[39] Decision of the Supreme Court of 16 December 2020, IV KK 479/20, LEX No. 3093387; a similar position was also held by the Supreme Court in its decision of 9 January 2019, II KK 466/18, LEX No. 2616213, stating that: 'The court of first instance does not violate the provision Article 167 of the Code of Criminal Procedure when it does not take the initiative to provide evidence *ex officio*, if it considers the evidence already collected in the case to be sufficient for delivering a fair judgment.'

Nonetheless, according to Andrzej Gaberle, adopting such a view would imply that it is possible to forego the initiative to provide evidence and for shortcomings to occur, particularly resulting in an error in factual findings. However, these errors cannot lead to upholding a 'grossly unfair' judgment.[40]

By promoting one of these concepts, the loss of the court impartiality violates the guarantee of conducting reliable evidentiary proceedings when the evidentiary initiative of this body aims solely at gathering evidence against one party, often the accused (only allowing evidence detrimental to them). The apparent 'taking over' the public prosecutor's role in the wake of their passivity or failure to present convincing evidence of guilt leads the court to side with the prosecutor and favour him over the weaker party, which is undoubtedly the accused, even when assisted by a defence attorney. The comprehensive clarification of the circumstances of the case, emphasised in the case law, must also never lead to a situation where the prosecutor adopts a passive stance and transfers the evidence initiative burden to the first instance court, thereby directing it solely in favour of one party. Hence, it is crucial for parties to demonstrate evidentiary activity in jurisdictional proceedings, with the court aiming to clarify all relevant case circumstances by supplementing parties' activities with its initiative, without replacing them. Only then will the court fulfil its adjudicating function, administering justice. Maintaining impartiality entails adhering to objectivity, requiring the court to consider circumstances favouring and countering the accused (Article 4 of the Code of Criminal Procedure). An ancillary criterion in assessing impartiality may be the structuring the court's evidentiary initiative in a manner that prevents issuance of a manifestly unfair judgment in the case referred to in Article 440 of the Code of Criminal Procedure. However, it is worth noting that the necessity of making true factual findings does not overly limit the court's scope of action in this matter.

Moving on to the next condition for the reliability of evidentiary proceedings – granting the right of access to evidence, it is worth making the following remarks. The provision of Article 334 § 1 of the Code of Criminal Procedure stipulates that the files of preparatory proceedings shall be transmitted to the court together with the indictment. From that moment, the court, having all the files from the first stage of the criminal trial, collects in these files all documents that arise in the course of the jurisdictional proceedings. The solution adopted in Article 334 § 1 of the Code of Criminal Procedure raises a legitimate question in the literature as to whether the judge's review of the entire preparatory proceedings file will allow them to remain impartial. Consequently, is an impartial judge one who, having knowledge of all activities carried out in the preparatory proceedings, will impartially verify their correctness as well as the results compliance with the true course of events, personally actively seeking evidence and continuing to build the criminal case files initiated by the prosecutor's office or the police?[41]

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[40] Gaberle, A., *Dowody*…, op. cit., p. 77.

[41] Kremens, K., 'Dostęp sądu do akt postępowania przygotowawczego po nowelizacji k.p.k. – czego powinniśmy nauczyć się od Amerykanów', in: Wiliński, P. (ed.), *Kontradyktoryjność w polskim procesie karnym*, Warszawa, 2013, p. 379.

Article 334 § 1 of the Code of Criminal Procedure entitles the court to use all the preparatory proceedings materials to subsequently construct jurisdictional proceedings files. This solution also raises the question of how a judge should behave impartially in the context of examining case files. Is an impartial judge one who has no prior knowledge of the case until entering the courtroom, or one who, aware of all activities carried out in the preparatory proceedings, impartially verifies their accuracy and compliance of their results with the true course of events, personally actively seeking evidence and further developing the files of a criminal case initiated by the prosecutor's office or the police?

Undoubtedly, even the most experienced and conscientious judge, when preparing for a trial, initially examines the validity of the evidence cited in support of the indictment, potentially concurring with the arguments contained therein. This could significantly impact their impartiality in its subjective aspect, even if maintaining objective impartiality in party assessment. The solution adopted in Article 334 § 1 of the Code of Criminal Procedure legitimises the 'all-knowing judge' model, as described figuratively by Hanna Kuczyńska, where knowledge originates solely from the files prepared by the public prosecutor. At the evidentiary stage in jurisdictional proceedings, the parties initially face unequal positions since the judge is acquainted with only one party's arguments before case examination.[42] This provision also reinforces judges' belief that, given the comprehensive and accusatory evidence-containing preparatory proceeding files, limiting trial evidentiary proceedings to this evidence presentation suffices, negating direct stage conduct. This approach evidently infringes the accused's defence right and nearly renders the adversarial principle implementation illusory.

These arguments underpin the assertion that in the 'all-knowing judge' model, where knowledge is drawn from files and significant evidence initiative is exhibited, ensuring the accused's comprehensive file and gathered evidence access is the only guarantee of the proceedings fairness. Lack of access to the case materials clearly precludes effective defence. The commented right of the accused results, on the one hand, from the principles of an adversarial process and equality of arms, and on the other hand, from the right to defence. In the light of the position of the ECtHR, it is important to allow access to the evidence and obtaining copies of the documents in order to prepare the defence, otherwise a violation of Article 6(1) and (3) ECHR may be established.[43] Access restrictions to case files may be justified by exceptional circumstances, such as national security concerns or the need to protect witnesses, but it is the court's duty to weigh these restrictions against the rights of the accused.[44] The situation where the prosecutor's office fails to disclose evidence from operational activities to the court of first instance, revealing it only before the court of appeal, is a clear example of a violation of the right to a fair trial.[45] According to

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[42] Kuczyńska, H., *Analiza porównawcza…*, op. cit., pp. 349–351.

[43] *Foucher v. France*, judgment of the ECtHR of 14 January 2010, application no. 29889/04.

[44] *Jasper v. the United Kingdom*, judgment of the ECtHR of 16 February 2000, application no. 27052/95.

[45] *Rove and Davis v. the United Kingdom*, judgment of the Grand Chamber of 16 February 2000, application no. 28901/95.

the ECtHR, access to the case file on the part of the accused must also encompass the right to take notes to facilitate the defence. The inability to use personal notes, taken during the hearing or in the secret registry, to show them to the expert or to use them for any other purpose, effectively prevented the accused from using the information contained therein, as he had to rely solely on his memory.[46] In the Court's view, the role of the trial court is to weigh these exceptional grounds for refusing access to the case file against the accused's right to disclosure of relevant evidence, and to analyse the decision-making procedure to ensure that, as far as possible, it complies with the requirements of adversarial proceedings and equality of arms and incorporates adequate safeguards to protect the interests of the accused. Therefore, if the accused is denied access to the files, he or she has the right to demand that the court examine whether the application of surveillance measures was lawful and, secondly, whether it violates the principle of equality of arms.[47] The right to access the case files of an accused deprived of liberty is crucial to ensure the reliability of evidentiary proceedings. Submitting an appropriate application should result in the sending of materials to the penitentiary unit at every stage of the court proceedings, even if this involves certain difficulties related to the need to send the entire case file and the involvement of prison officers. It is of particular importance to ensure this right for the accused before the date of the hearing, during which they are to provide explanations and, possibly, respond to the evidence collected in the files. The accused's explanations are a unique means of defence in criminal proceedings, and they should submit them with full knowledge of the evidence collected in the case files.

Article 6(3) ECHR indicates the adversarial nature of the dispute as a criterion for deeming evidentiary proceedings reliable, pertaining to witnesses,[48] yet the ECtHR has expanded the concept of a witness, declaring that it includes victims, experts, and other persons testifying before the court.[49] The adversarial principle serves as a directive, allowing an entity directly interested in the proceeding outcome to engage in a procedural battle before an impartial court against an opposing entity for a favourable decision.[50] The activity of the parties carried out within the framework of this principle undeniably facilitates the implementation of the principle of substantive truth, because, as Stanisław Waltoś aptly points out, confrontation of contradictory statements before a reasonable judge is the optimal method to find the truth.[51] According to the ECtHR, as mentioned previously, the condition of detecting the substantive truth is not predominant, unlike the need to guarantee procedural

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[46] *Luboch v. Poland*, judgment of the ECtHR of 15 January 2008, application no. 37469/05.

[47] *Leas v. Estonia*, judgment of the ECtHR of 6 March 2012, application no. 59577/08.

[48] Article 6(3)(d) states that everyone charged with a criminal offense has at least the right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.'

[49] Lach, A., *Rzetelne postępowanie…*, op. cit., p. 72.

[50] Cieślak, M., *Polska procedura…*, op. cit., p. 254.

[51] Waltoś, S., 'Kontradyktoryjność a prawda materialna', in: Wiliński, P. (ed.), *Kontradyktoryjność w polskim procesie karnym*, Warszawa, 2013, p. 39.

fairness, which was expressed in the following judgment:[52] 'It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence.' The ECtHR therefore emphasises that:[53] 'The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.' Hence, the adversarial principle guarantees familiarisation with the evidence collected in the trial and the statements submitted by the other party.[54] In the case of the main trial conducted in an adversarial manner with inquisitorial elements, the court's evidentiary activity restricts the activity of the parties.

Previously mentioned impartiality guarantees relate to ensuring adversarial nature of the process, since the evidentiary activity of the parties allows the court to uphold objectivity and impartiality attributes. From this perspective, since the adversarial nature facilitates learning and commenting on the other party's arguments, excessive evidentiary activity of the court means that the party is deprived of this right and, additionally, is unable to comment on the evidentiary activity of the court.

A misunderstood adversarial nature of court proceedings should never result in the accused and their defence attorney being in a dispute with the court rather than with the prosecutor. Such involvement of the court always poses a threat to the accused because, aside from contradicting principle of contentiousness, the accused does not have any legal instruments to effectively challenge the court's evidentiary activity. Additionally, the effect of this activity in terms of making factual findings will only be known to the accused when the judgment concluding the proceedings is delivered, along with the reasons stated in its written justification.

Therefore, the adversarial nature of the proceedings should not lead to a situation, as often seen in Polish courtrooms, where the parties, mainly the accused and their defence attorney, argue solely with the court instead of arguing with the prosecutor. Arguing with the court is a threat to the accused because, even if we overlook the distortion of the dispute's essence, the accused has no means to counter the court's evidentiary activities, especially since the outcomes of these activities, in the form of factual findings, will only be disclosed in the final judgment and the reasons provided in its written justification.

This condition of the adversarial nature of the process is emphasised by the ECtHR,[55] which points out that: 'both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. […] However, whatever method is chosen, it should ensure that the other party will be aware that observations have been

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[52] *Rowe and Dawis v. the United Kingdom*, judgment of the Grand Chamber of 16 February 2000, application no. 28901/95.

[53] *Brandstetter v. Austria*, judgment of the ECtHR of 28 August 1991, application no. 11170/84.

[54] *Barbera, Messegue and Jabardo v. Spain*, judgment of the ECtHR of 6 December 1988, application no. 10590/83.

[55] *Brandstetter v. Austria*, judgment of the ECtHR of 28 August 1991, application no. 11170/84.

filed and will get a real opportunity to comment thereon.' In the case of the court's observations, it is difficult for the accused to comment on them during the hearing, and their arguments can only be presented during the appeal proceedings. At that stage, they must demonstrate the existence of a relative ground for appeal under Article 438 (2) of the Code of Criminal Procedure to the extent that it could have influenced the content of the contested judgment.

An example of the adversarial principle is the approach outlined in Article 370 of the Code of Criminal Procedure, which regulates the manner of interrogation, and the order in which questions are asked. In the current legal context, the provision formed by the amendment to the Act of 11 March 2016, restores the leading role of the chairman and other members of the adjudicating panel, in effect until 1 July 2015. It is important not only that Article 370 § 1 of the Code of Criminal Procedure gives the parties priority in questioning the person being interviewed and places the last exercise of this right with the members of the adjudicating panel, but also that Article 370 § 2a of the Code of Criminal Procedure states that, if necessary, members of the adjudicating panel may ask additional questions out of turn. It should also not be forgotten that if evidence is admitted *ex officio*, members of the adjudicating panel ask questions first. According to the Court of Appeal in Katowice,[56] violation of the order of questioning as provided in Article 370 of the Code of Criminal Procedure may lead to a breach of the procedural law provisions specified in Article 438(2) of the Code of Criminal Procedure, provided that the complainant demonstrates their impact on the judgment's content, and in particular, that by testifying fully in accordance with the order of questioning, the witness might have testified differently.

Another condition for the reliability of evidentiary proceedings is the broad consideration of the demands arising from the principle of directness. This principle aims to bring the adjudicating court examining a case as close as possible to the main fact, thereby shortening the chain of circumstances that connects the awareness of the procedural authority with the act under investigation.

There is a close relationship between the principles of adversarial proceedings and directness because the implementation of the first principle is only possible by observing the principle of directness in evidentiary proceedings. A dispute concerning the essence of the case can only be conducted by submitting evidence to the court for evaluation.[57] Therefore, the principle of directness requires the court to take evidence at the hearing, personally come into contact with the source of evidence and the means of proof, with primary evidence being the main means of proof on which its findings are based.[58]

The importance of the principle of directness can also be articulated as follows: while the principle of material truth determines the goal of evidentiary proceedings,

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[56] Judgment of 28 April 2016, II AKa 92/16, LEX No. 2061873.

[57] Gardocka, T., 'Podstawowe zasady postępowania dowodowego na rozprawie głównej', *Studia Iuridica*, 1985, No. 13, p. 61.

[58] Cieślak, M., *Dzieła wybrane …*, op. cit., p. 171; Świecki, D., *Bezpośredniość czy pośredniość w polskim procesie karnym, Analiza dogmatycznoprawna*, Warszawa, 2013, p. 23; Waltoś, S., Hofmański, P., *Proces karny. Zarys systemu*, Warszawa, 2018, p. 267.

the principle of directness crucially dictates its method.[59] This method of conducting evidentiary proceedings is significant from the perspective of the considerations that interest the author because, in its current normative form, the legislator introduces so many restrictions on the direct taking of evidence that one might even be tempted to say that this rule currently has the status of an exception, while the indirect nature of the evidentiary proceedings is dominant. When analysing the current course of evidentiary proceedings in jurisdictional proceedings, the following important limitations of the principle of directness should be noted:

1. Article 374 § 1 of the Code of Criminal Procedure allows for the optional participation of the accused in the main hearing, and in the event of their failure to appear pursuant to Article 389 § 1 of the Code of Criminal Procedure, their previously submitted explanations are read.
2. Article 350a of the Code of Criminal Procedure gives the chairman of the adjudicating panel the discretion to refrain from summoning witnesses to the hearing who have been questioned, are staying abroad, or are to ascertain circumstances that are not so significant that it would be necessary to hear them directly at the trial, particularly those whom the accused did not mention in his explanations, except for persons who, pursuant to Article 182 of the Code of Criminal Procedure, have the right to refuse to testify.
3. Article 185a § 3 and Article 185c § 2 of the Code of Criminal Procedure require the court to waive the hearing at the trial and to reproduce the minutes of the hearing prepared in the preparatory proceedings as evidence from the injured party in a specific category of crimes, and to read the minutes of their hearing.
4. Article 391 § 1 of the Code of Criminal Procedure allows, to a wide extent under the conditions specified therein, for the witness's testimony to be read.
5. Article 392 § 1 of the Code of Criminal Procedure permits the reading at the main hearing of the reports from the hearings of witnesses and defendants, prepared both in the preparatory proceedings and before the court or in other proceedings as provided for by law, when the direct taking of evidence is deemed unnecessary and none of the parties present opposes, and the regulation provided for in Article 392 § 1 of the Code of Criminal Procedure applies to situations other than those specified in Articles 389 and 391.[60]
6. Article 393 of the Code of Criminal Procedure allows reading official and private documents, excluding previously mentioned ones, which include inspection, search, item seizure reports, expert opinions, institutes, facilities or institutions, criminal record data, community intelligence results, and private documents generated outside criminal proceedings.
7. Article 19(15) of the Police Act[61] in conjunction with Article 391 § 1 first sentence of the Code of Criminal Procedure, lays the foundation for reading all operational surveillance collected materials.

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[59] Cieślak, M., *Polska procedura…*, op. cit., p. 330.

[60] Judgment of 31 October 2012, II AKa 121/12, LEX No. 1239834, judgment of the Court of Appeal in Łódź of 25 March 2014, II AKa 33/14, LEX No. 146933.

[61] Act of 6 April 1990 on the Police.

8. Article 394 of the Code of Criminal Procedure permits the court to abstain from reading aforementioned documents, introducing them into the trial by 'disclosing them' without reading, and Article 394 § 2 of the Code of Criminal Procedure further deviates from the directness principle, allowing minutes and documents reading at the hearing only upon a party's request, who previously had no access to the content, or when deemed necessary by the court.
9. Article 405 § 2 and 3 of the Code of Criminal Procedure dictates that at court proceedings' conclusion, all protocols and documents meant for hearing reading, previously unread, are disclosed without reading, encompassing:
   – evidence indicated by the prosecutor in the indictment, indictment, not requested for main hearing presentation, excluding evidence for which the court rejected the evidence application,
   – parties indicated in the evidence application that were included,
   – evidence admitted by the court *ex officio*.

In the current legal situation, the legislator grants the adjudicating court the right to initiate evidence, yet introduces numerous mechanisms for deviating from the directness principle, significantly undermining the method through which resolving the case according to the material truth principle is feasible. It is possible to structure proceedings where evidence is introduced and forms the judgment basis using the 'disclosed without reading' formula. This method of 'proving' in the main hearing currently applies to the accused's explanations, witness statements, expert opinions and other documents prepared in criminal proceedings. However, this undoubtedly deprives the accused of the right to initiate a dispute with the accusation, especially since the evidence conducted during the trial will be disclosed during the preparatory proceedings which, as already mentioned, are intended to support the thesis contained in the indictment. Such a method of taking evidence warrants assessment from the point of view of compliance with the guarantee of ensuring the accused's right to reliable evidence, implemented by ensuring the directness of the proceedings. Therefore, the ECtHR emphasises[62]:

> 'the notion of a fair and adversarial trial presupposes that, in principle, a tribunal should attach more weight to a witness's statement in court than to a record of his or her pre-trial questioning produced by the prosecution, unless there are good reasons to find otherwise. Among other reasons, this is because pre-trial questioning is primarily a process by which the prosecution gather information in preparation for the trial in order to support their case in court, whereas the tribunal conducting the trial is called upon to determine a defendant's guilt following a fair assessment of all the evidence actually produced at the trial, based on the direct examination of evidence in court.'

Bearing in mind that in Polish criminal proceedings the principle of free evaluation of evidence, as expressed in Article 7 of the Code of Criminal Procedure, mandates that the value of evidence is analysed through the prism of the rules set out in this provision, it is apparent that the significant impoverishment of evidentiary proceedings at the main hearing and the restriction to merely accepting the reports

62 *Erkapić v. Croatia*, judgment of the ECtHR of 25 April 2013, application no. 51198/08.

from the preparatory proceedings as disclosed distort the sense of conducting the hearing. This approach exceeds the framework of a trial conducted in accordance with the principle of directness. This, in turn, results in a violation of the right to fair evidentiary proceedings. It is challenging to presume that the court, by limiting itself to the 'evidence as disclosed, without reading it' approach, can reliably evaluate veracity and usefulness of such evidence for the purpose of issuing a fair judgment.

CONCLUSIONS

The observations made allow us to conclude that the basic element shaping the evidentiary initiative of the court of first instance, in line with the conditions of a fair criminal trial and reliable evidentiary proceedings constituting its element, is the judge's impartiality. Therefore, in response to the question posed at the beginning of the study – how far should the court's evidentiary initiative extend so as not to weaken or even exclude the rights of the parties to the proceedings – the following criteria are important: the limits of the evidentiary initiative are set by an impartial judge who guarantees the proper administration of justice. Compliance with this condition primarily involves maintaining impartiality in a subjective sense, i.e., the judge's personal belief about the case, but it also affects its objective aspect. The judge's impartiality ensures that the parties have the right to an adversarial hearing. The evidentiary activity of a judge, even if aimed at clarifying all important circumstances of the case, should complement the activity of the parties and must not lead to involvement in the dispute on the side of one of the parties, especially the prosecutor. Additional criteria ensuring the fairness of jurisdictional proceedings also include: ensuring that the parties have the right to access the case files and that the court has direct contact with the evidence at the hearing. Both factors contribute to providing the accused with the right to defence and an adversarial trial. The first one gives the accused a real opportunity to challenge the evidence forming the basis of the indictment, as the accused is aware of the evidence the prosecutor possesses. However, significant limitations in the application of the principle of directness, as currently provided in the Procedural Act, raise doubts about whether this method of introducing evidence at the main hearing aligns with the concept of a fair criminal trial, as they allow evidence to be considered as disclosed without reading, effectively all the evidence that the court is to consider, thus depriving the parties of the opportunity to conduct the dispute.

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Cite as:

Skwarcow M. (2024) '*Limits of the evidence initiative of the court of first instance and the reliable evidence procedure*', Ius Novum (Vol. 18) 1, 80–98. DOI 10.2478/in-2024-0005

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Ius Novum

2024, vol. 18, no. 1, pp. 99–117

MODEL OF JUDICIAL MANAGEMENT OF EVIDENCE-TAKING PROCEEDINGS IN THE ITALIAN CIVIL TRIAL (CARTABIA REFORM)

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DOI 10.2478/in-2024-0006

Abstract

The article presents a model of judicial management of the evidence-taking proceeding in the Italian civil procedure following the reform introduced by Law No. 206 of 26 November 2021, implemented, inter alia, on 28 February 2023 and 30 June 2023 by means of Legislative Decree No. 149 of 10 October 2022 (the reform was named *riforma Cartabia* after its author, former Minister of Justice, Marta Cartabia). Post-reform, the model has become significantly formalised and more detailed, limiting the judge's decision-making freedom in organising proceedings. From the perspective of the principle of procedural material concentration and judicial management of the evidence-taking proceeding, the preliminary stage is critical: from the plaintiff's summons of the defendant to court (*in ius vocatio*), which is essentially a lawsuit, to the hearing for the first appearance of the parties and case verification. At this stage, parties are required to present facts, legal elements of a claim, means of evidence, and all defence arguments in their pleadings within statutory deadlines. The subsequent stage of collecting procedural material important for the case resolution is a hearing scheduled for the first appearance of the parties and verification of the case (often termed 'a preliminary hearing'). Here, the judge freely questions the parties and, based on the presented facts, clarifies matters necessary to resolve the case. After questioning the parties, the court may decide to conduct a conciliation proceeding. If not, the judge rules on the parties' evidence-related motions and, considering the nature, urgency and complexity of the case, sets a timetable for subsequent hearings and specifies actions to be taken at each. A hearing intended for the taking of evidence

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must be scheduled within 90 days. The court may also rule on taking evidence *ex officio*. Then, according to the timetable developed, the judge takes evidence. The final stage of an ordinary proceeding occurs when the judge determines that the case is mature enough for resolution because it has been appropriately and definitively prepared, and the necessary evidence has been collected, or there is no need for further evidence collection. One tool for managing an evidence-taking proceeding may include the so-called abuse of procedural law. The Italian civil procedure does not explicitly regulate this issue. The concept of abuse of procedural law has been defined in case law and doctrine. However, procedural regulations mandate acting in court according to the principle of honesty and loyalty, with various sanctions stipulated for conduct that violates this rule, such as the obligation to pay compensation, reimburse trial costs, or imposition of a fine.

Keywords: Cartabia Reform, judicial management of a proceeding, evidence-taking proceeding, in ius vocatio, preliminary hearing, Italian civil procedure, principle of honesty and loyalty

The Italian legal system has undergone significant reform based on Law No. 206 of 26 November 2021, implemented on 28 February 2023 and 30 June 2023 by Legislative Decree No. 146 of 10 October 2022 (the reform was named after its author, former Minister of Justice Marta Cartabia – *riforma Cartabia*). These changes also encompassed the Code of Civil Procedure (*Codice di procedura civile*, hereinafter c.p.c.) and concerned, among other things, the management of civil proceedings to enhance their efficiency,[1] methods of alternative dispute resolution, enforcement of court judgements, arbitration, and digitalisation. The legislator's interference particularly affected the preliminary inquiry proceeding. It includes requirements for the content of summons, adjustment of the minimum time limits for defence counsel's procedural activities, and the defendant's appearance in court as well as the overall organisation of the initial stage of the ordinary inquiry proceeding.[2] The Italian model of presenting litigation documents and judicial management of the evidence-taking proceeding, particularly after the Cartabia Reform, is highly formalised and restricts judicial discretion significantly. The most important stage of the proceeding, from the perspective of trial material concentration and judicial management of the evidence-taking proceeding, is the preliminary phase: from the service of a summons (*in ius vocatio*), which effectively constitutes a lawsuit (Articles 163 and 163-bis c.p.c.), to the first hearing intended for the parties' appearance and case verification (Article 183 c.p.c.). This phase is formalised, setting strict deadlines for performing procedural and judicial activities related to

[1] Sudio Legale Jacobacci & Associati; jacobacci-law.com, post of 27 February 2023; https://www.jacobacci-law.com/news-and-publications/cartabia-reform-of-the-italian-civil-procedure-points-to-bear-in-mind-for-litigation-management-in-italy-28-february-2023 [accessed on 8 April 2024].

[2] Carratta, A., *Le riforme del processo civile D.Lgs. 10 ottobre 2022, n. 149, in attuazione della L. 26 novembre 2021, n. 206*, Torino, 2023, pp. 30–32; Donne, C.D., 'La fase introduttiva, prima udienza e provvedimenti del giudice istruttore (artt. 16, 163-bis, 164, 165, 166, 1+67, 168-bis, 171, 171-bis, 171-ter, 182, 183, 184, 185, 187 c.p.c.)', in: Tiscini, R. (ed.), *La riforma Cartabia del processo civile. Commento al d.lgs. 10 ottobre 2022, n. 149*, Pisa, 2023, p. 269 et seq.

the presentation of claims, allegations, and evidence as well as the gathering of litigation material by the parties and the court.

Formally, a trial begins with a summons to appear at the first court hearing called '*notificazione di citazione*'.[3] The delivery of this summons to the defendant results in the suspension of the dispute, in accordance with Article 39 par. 3 c.p.c. The plaintiff usually chooses the date of the court hearing. The dates of the first sittings (intended for the first appearance of the parties and case verification) are set at the beginning of each judicial year by the president of the court (Article 163 c.p.c.). A summons is in fact a lawsuit, but in order to continue the proceeding resulting from its submission, it is necessary to take further steps, which will be discussed later in this paper. Apart from indicating, inter alia, such formal elements as identification data of the parties and solicitors and the name of the court to which the lawsuit is filed, this pleading should also include:

1. A specification of the subject matter of the claim.
2. A clear and substantive presentation of facts and legal aspects that constitute grounds for the claim together with relevant conclusions that result from them.
3. A detailed indication of the means of proof the plaintiff intends to use, in particular documents presented as evidence.

These requirements were introduced as a result of the Cartabia Reform and correspond to the principle of clarity and conciseness laid down in Article 121 c.p.c., which stipulates that all procedural acts shall be drawn up in a clear and concise manner. This regulation is based on the parties' obligation to maintain honesty and integrity, as expressed in Article 88 c.p.c. It serves to fully exercise the right to defence, but a reasonable duration of the proceeding must also be ensured.[4] The requirements seek, on one hand, to facilitate the judge's comprehension of the pleadings submitted by the parties and, on the other hand, to enable the defendant to adopt a precise position on the factual circumstances raised by the plaintiff, thereby identifying all uncontested and indisputable facts. Pursuant to Article 115 c.p.c., unless otherwise stipulated by law, the judge must base their decisions on evidence presented by the parties or a prosecutor, and on facts that have not been expressly challenged by the opposing party. However, the judge may, without the need for evidence, base their decisions on commonly known facts consistent with common knowledge and experience.[5] Hence, the provision introduced in Article 163 c.p.c. aims to delineate the procedural material by obviating the need for evidence concerning undisputed

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[3] Dalfino, D., 'Chapter VI. Characteristics of Procedure. Ordinary proceedings in first instance', in: De Cristofaro, M., Trocker, N. (eds), *Civil Justice in Italy*, Nagoya University Comparative Study of Civil Justice, Vol. 8, 2009, section 3.3.

[4] Reali, G., 'La cognizione in primo grado', in: Dalfino, D. (ed.), *La riforma del processo civile L.26 novembre 2021 N. 206, E D.LEC. 10 ottobre 2022 N. 149 E 151*, 2023, pp. 97–98; Panzarola, A., 'La visione utilitaristica del processo civile e le ragioni del garantismo', *Rivista trimestrale di diritto pubblico*, 2020, No. 1, p. 105, thus also Finocchiaro, G., 'Il principio di sinteticità nel processo civile', *Rivista trimestrale di diritto pubblico*, 2020, No. 1, p. 853.

[5] For more on the issue see Carratta, A., *Le riforme…*, op. cit., pp. 34–35; Mandrioli, C., Carrata, A., *Diritto processuale civile*, Torino, 2022, pp. 7–12; Reali, G., 'La cognizione…', op. cit., p. 99; Cass., ord. 27 gennaio 2022, n. 2402, ForoPlus; ord. 9 novembre 2022, n. 33026, Ibidem; ord. 26 novembre 2020, n. 26908, Poro it' Rep. 2021, voce Procedimento civile, n. 184; ord. 9 maggio 2018, n. 11032, ForoPlus; 22 settembre 2017, n, 22055, id. Rep., 2017, voce Prova civile in genere,

circumstances between the parties or those not directly contested. As posited in legal doctrine, the obligation to present facts and legal grounds for a claim (elements of law) clearly and concisely allows for the comprehensive examination of a request before the court and prevents the protraction of proceedings without distorting the adversarial system principle. The requirement of conciseness, in turn, acts as a filter of thoroughness, selecting only those elements of the factual and legal state necessary and sufficient to identify the grounds for the claim.[6]

The stipulation in Article 163 par. 3 and 4 c.p.c. (the specification of the request that is the subject of the summons, clear and specific presentation of facts and legal elements that constitute the grounds for the request, and relevant conclusions resulting from them) is of such significance that their absence or unclear specification results in the invalidity of the request (*citazione*). The plaintiff is then granted a deadline to supplement or rectify it (Article 164 c.p.c.). However, the violation of merely formal rules regarding editorial matters (e.g., verbosity, repetition of arguments) does not invalidate the summons. Invalidity arises when the breach of the obligation of clarity and precision transcends the purely formal aspect and affects the essence of the request, or when the summons is illegible or vague regarding essential elements.[7]

In the process of gathering evidence in an Italian civil trial, statutory deadlines for carrying out particular procedural activities, especially those for the exchange of procedural documents, which were extended as a result of the Cartabia Reform, play a significant role. They constrain the judge's discretion in making decisions regarding the management of the evidence-taking procedure. The deadlines for specific procedural activities of the parties are outlined as follows:

1. The time limit linking the moment the pendency of the dispute occurs by means of serving the summons (*citazione*) on the defendant with the date of the initial court session dedicated to the parties' appearance and verification of the case (preliminary hearing) is 120 days if the service of the summons occurs within Italy and 150 days if it happens abroad (Article 163 [1] par. 1 c.p.c.). Following the Cantabria Reform, this deadline cannot be shortened.[8] This limitation curtails the judge's discretion to manage the proceedings but gives the defendant a guarantee that they will be properly prepared for their defence.
2. The plaintiff should file their claim to the court within 10 days from the date of serving the summons on the defendant, which effectively occurs through various formalities. The specified request, along with the factual and legal grounds, is already expressed in the *atto di citazione*. These formalities encompass the submission of an application to enter the case in the court's register, along with the original *atto di citazione*, any power of attorney and other relevant documents, completion of a form containing essential case details (such as information on the parties and their legal representatives, the case subject matter, etc.), and

n. 30; 19 ottobre 2016, n. 21075, id' Rep., 2016, voce cit., n. 22; 15 ottobre 2014, n. 21847, id' Rep., 2014, voce cit., n. 33.

[6] Donne, C.D., 'La fase…', op. cit., p. 273 et seq.

[7] Reali, G., 'La cognizione…', op. cit., pp. 99–100.

[8] Carratta, A., *Le riforme…*, op. cit., pp. 34–35.

payment of the court fee (Article 165 c.p.c.).[9] Failure by the plaintiff to register the case does not impede its trial, provided the defendant enters into a dispute within 70 days before the initial session date (Article 307 in conjunction with Article 166 c.p.c. and Article 171 c.p.c.).[10]

3. *Citazione* should encompass, among other things, summoning the defendant to appear (to undertake defensive measures) within 70 days before the date of the first hearing and to present themselves before the judge conducting the proceedings (investigating/examining judge – *il giudice istruttore*) assigned to handle the case (Article 168 bis c.p.c.).[11] Within this period, the defendant is obligated to submit a defence response to the lawsuit, known as *comparsa di risposta*, in accordance with Article 167 c.p.c. In response to the lawsuit, the defendant should, among other things, present all defence arguments, clearly and specifically address the facts cited by the plaintiff on which the claim is based, list the evidence they intend to cite, present documents to be disclosed, and formulate defence conclusions. Legal doctrine indicates that the defendant has the following rights: (1) to refute the opposing party's statements and allegations; (2) to introduce additional facts; (3) to lodge a counterclaim; (4) to bring actions against third parties; (5) to adopt a passive stance.[12] Under the threat of forfeiture, the defendant should submit counterclaims and procedural and substantive allegations that cannot be discovered by the court *ex officio*. Since, according to Article 115 par. 1 c.p.c., the court's decisions may also be based on facts that have not been expressly challenged, the defendant should explicitly contest the circumstances quoted in the *citazione*. Simultaneously, this means that the facts not challenged by the defendant will not require proof in the same manner as the facts the defendant has expressly admitted.[13] If the defendant opts for a passive stance, fails to appear before the judge, and does not submit a defence response, and there are no formal obstacles, the proceedings will be conducted in the defendant's absence (*contumacia*). This does not determine the final outcome of the case, but the defendant will forfeit the right to bring allegations, cite facts, and present evidence unless the deadlines for submitting claims and evidence are reinstated after proving that their failure to appear and present a defence response was not their fault. However, in the defendant's absence, the

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[9] Dalfino, D., 'Chapter VI. Characteristics of Procedure…', op. cit., section 5.

[10] Carratta A., *Le riforme…*, op. cit., pp. 35–36.

[11] Civil cases in the Italian civil trial are usually conducted, managed and resolved by a single (monocratic) judge (*il giudice istruttore*), described as an examining judge, investigating judge or a judge conducting the proceeding. In some special situations stipulated by law and laid down in Article 50 bis c.p.c., a case is managed and resolved by a collective bench (*collegio*) or managed by an investigating judge and next resolved by a collective bench.

[12] Dalfino, D., 'Chapter VI. Characteristics of Procedure…', op. cit., para. 4; it is also pointed out that the defendant may present constitutive facts (constituting the source of law, which must be proved in order to make use of them), facts indicating that the law has been amended or expired, or that particular factual circumstances are ineffective – Ferrari, M., 'Comparsa di costituzione e riposta: la guida completa. I requisiti, le difese proponibili e le eccezioni sollevabili', *Altalex*, https://www.altalex.com/guide/Comparsa-di-costituzione-e-risposta, 29.06.2020 [accessed on 8 April 2024], para. 8.

[13] Dalfino, D., 'Chapter VI. Characteristics of Procedure…', op. cit., para. 4.

evidence-taking proceedings will be limited to confirming the facts justifying the plaintiff's claim and indicating certain rights they are entitled to.[14]

4. Within 15 days following the expiration of the deadline referred to in Article 166 c.p.c. (70 days after serving the *atto di citazione* on the defendant), the judge conducting the proceedings shall conduct a preliminary examination of the case, including verification of the following premises: the admissibility of the proceedings, the effectiveness of the commencement of the dispute, the necessary procedural participation in the case (Article 102 par. 2 c.p.c.), the correctness of the *citazione* (Article 164 par. 2, 3, 5, and 6 c.p.c.), the appearance of the defendant and the correctness of the defence response (Article 167 par. 2 and 3, Article 171 par. 3 c.p.c.), the correctness of the power of attorney (Article 182 c.p.c.), etc. Additionally, the judge may point out to the parties the issues that they consider important for resolving the case and necessary for clarification *ex officio*. This includes not only procedural issues but also substantive ones, such as the suspicion of abusive provisions in the contract. Raising such issues enables the parties to amend their claims and allegations and propose motions to conduct an evidence-taking proceeding.[15]
5. If, following the preliminary examination of the case, it becomes necessary for the court or the parties to issue orders or undertake additional actions, the judge conducting the proceedings may, if deemed necessary, postpone the date of the hearing scheduled for the initial appearance of the parties and the case consideration for a period not exceeding 45 days.
6. The subsequent stage of trial preparation involves the exchange of supplementary pleadings as per Article 171 ter c.p.c., within the specified deadlines laid down therein. In accordance with the provision, the parties, under the threat of forfeiture, may:
   (1) At least forty days before the hearing referred to in Article 183 c.p.c. (the hearing scheduled for the initial appearance and case verification), report claims and allegations resulting from the claim of the opposing party or allegations made by the defendant or third parties, and specify or change claims, allegations and conclusions reported previously. In the same pleading, the plaintiff may apply for permission to summon a third party to appear in court if such a need arises from the defence in the pleading submitted by the defendant.
   (2) At least twenty days before the trial, respond to new claims and allegations made by the opposing party, report allegations resulting from new claims reported in the pleading referred to in par. 1 as well as indicate means of evidence and submit documents.
   (3) At least ten days before the trial, respond to the new allegations and indicate opposing evidence.

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[14] Ibidem.

[15] Luiso, F.P., *Il Nuovo Processo Civile. Commentario breve agli articoli riformati del codice di procedura civile*, 2023, pp. 69–71.

The above-mentioned provision entitles the parties to submit three pleadings, which the judge shall ensure. Failure to meet the deadlines laid down in Article 171 ter c.p.c. results in the 'lapse of time', and thus the parties are deprived of the right.[16]

This stage of the preparatory phase serves to definitively specify the factual and legal state that is to be subject to examination and adjudication, and to outline the evidence to be examined and assessed by the court (*thema decidendum et probandum*). This solution, introduced by the Cartabia Reform, aims to comprehensively prepare the case for adjudication in the trial and thus prevent the proceedings from prolonging.[17] The submission of supplementary pleadings does not require the judge's consent. Unlike before the Cartabia Reform, the right to submit them and deadlines for their submission are laid down in statute and are not subject to any modification by the judge. However, the parties may waive their right to submit preparatory pleadings by relinquishing their submission.[18] The first supplementary pleading enables the parties to cite new factual circumstances, but within the limits permissible through the proper use of the so-called *ius poenitendi*, i.e. specification of the existing statements, allegations and conclusions. The function of the second pleading is to fully define *thema decidendum*. It may include: a response to new or changed statements and allegations made by the opposing party, a presentation of new allegations resulting from the new statements, and allegations related to the use of *ius poenitendi* by the parties in the first pleading. It also clarifies *thema probandum* by giving parties the last opportunity to finally specify their evidence-related conclusions. The third pleading, in turn, results from the 'replicating power' in relation to the issues raised in the second pleading.[19] Doctrine points out that the above provisions only consider the opposing party's defence. They do not stipulate that the need to provide further evidence may result from new allegations properly formulated by the defendant in the second pleading, or even from allegations made therein for the first time. In such a case, the third pleading should serve to indicate evidence necessary to demonstrate the falsehood of facts that are grounds for allegations, and not only, as the provision stipulates, to report opposing evidence. For this reason, it is proposed that the right to admit such evidence be derived from the right to defence guaranteed in the Constitution or from the appropriate application of the instrument of the deadline restoration (Article 153 c.p.c.).[20]

The above-presented procedure may, of course, undergo certain deviations due to events beyond the control of the parties, such as the judge's illness and other unforeseen circumstances, counterclaims filed, intervention by a third party, or the need to rectify the *citazione* or *comparsa di risposta*. However, the model solutions for judicial management of evidence-taking proceedings in the preparatory phase of the

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16 Iannicelli, L., Angelone M., 'La fase introduttiva e di trattazione nella cognizione di rito ordinario in primo grado dinanzi al tribunale', in: Didone, A., De Santis, F. (eds), *Il Processo Civile Dopo La Riforma Cartabia*, Milano, 2023, pp. 157–158.

17 Carratta A., *Le riforme*…, op. cit., pp. 34–35; Donne, C.D., 'La fase…', op. cit., p. 287 et seq.

18 Reali, G., 'La cognizione…', op. cit., p. 115.

19 Iannicelli, L., Angelone, M., 'La fase introduttiva…', op. cit., pp. 158–160.

20 Reali, G., 'La cognizione…', op. cit., pp. 115–116.

Italian civil trial are stipulated within statutory limits, which leave little discretion to the judge.

When the exchange of pleadings concludes, in line with Article 171 ter c.p.c., in the Italian civil proceeding, the parties' ability to submit further statements and evidence generally ceases. They should be submitted before the case examination enters the decision-making phase. In the Italian system, there is no provision for further submission of statements and evidence, comparable to Polish Article 205 [12] par. 1 CCP (and similar). Nonetheless, it is possible to reinstate the deadline for carrying out a procedural activity, including submitting statements and evidence, in accordance with Article 153 c.p.c. To meet the requirement for deadline reinstatement, the party must demonstrate that they failed to meet the activity deadline through no fault of their own, owing to unforeseen circumstances or force majeure, indicating an inability to avoid missing the deadline despite diligent behaviour.[21]

The next stage of collecting procedural material relevant to resolving the case is the hearing scheduled for the first appearance of the parties and verification of the case in accordance with Article 183 c.p.c. (referred to as a preliminary hearing). As per this provision, the parties are obligated to attend the initial hearing intended for the first appearance and case verification. During this hearing, the judge freely interrogates the parties and, based on the reported facts, elucidates the issues necessary for resolving the case. The unjustified absence of the parties is evaluated according to Article 116 par. 2 c.p.c., within the principle of free assessment of evidence. The duty of the parties to appear in person may be fulfilled by their representatives (Article 185 c.p.c.). Conducting a hearing of the parties in writing is also permissible (Article 127 ter c.p.c.).[22]

Following the parties' statements, the court may opt to initiate conciliation proceedings. If such a decision is not made, the judge decides on the parties' claims based on evidence and, considering the nature, urgency, and complexity of the case, issues a decision on the timetable of subsequent hearings and specifies the actions to be taken at each. A hearing concerning admitted evidence should be scheduled within 90 days.[23] The court may also decide to take evidence *ex officio*. In such instances, each party may, within the deadline set by the court in the same evidence-related decision, present evidence they deem necessary in connection with the evidence ruled *ex officio* as well as submit a response within the subsequent deadline set by the court. Next, the court decides on any evidence-related requests submitted in response to the admission of evidence by the court *ex officio*. Furthermore, even at a later stage of the proceeding, the court may indicate the issues crucial for case resolution, which will be considered *ex officio*. However, in accordance with Article 101 par. 2 c.p.c., the court is obliged, under penalty of nullity, to set a period of not less than twenty days and not more than forty days from the date of the service of the order for submitting pleadings concerning the issue. This provision ensures the implementation of the principle of procedural fairness and equal rights of the parties.

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21 Dalfino, D., 'Chapter VI. Characteristics of Procedure…', op. cit., par. 8.

22 Luiso, F.P., *Il Nuovo Processo*…, op. cit., pp. 79–83.

23 Iannicelli, L., Angelone, M., 'La fase introduttiva…', op. cit., p. 165.

Thus, the preliminary hearing is not limited solely to examining the effectiveness of court proceeding initiation; it can and should include the examination of contentious issues and, in any case, the specification of facts contested by the parties as well as the clarification of evidence-related theses and the definition of the limits of the evidence-taking proceeding.[24] It constitutes, as described in legal doctrine, a 'completed interrogation' because the parties can no longer change their claims and, as a rule, any statements and evidence become subject to a statute of repose. For these reasons, the obligation to interrogate the parties seems unnecessary in cases where there is no need for additional explanations after the submission of pleadings pursuant to Article 171-ter c.p.c., e.g., when the dispute concerns only the law.[25] Moreover, such a strict definition of the rules of the preliminary hearing is questioned in legal doctrine due to the fact that many variables may thwart its course and make it necessary to postpone the hearing.[26] This hearing, however, is a key moment in the examination of the case in the sense that, at this hearing, the judge decides on the regime under which the case will be handled.[27] Thus, the judge may refer the case to conciliation. Furthermore, in accordance with Article 183 – quater c.p.c., the claim may be rejected (the so-called interim order rejecting the claim) if it is manifestly unfounded or if the lawsuit does not clearly indicate the claim, or the facts that are the subject of the claim are not indicated. In the event of a successful appeal against the order, the proceeding continues before a judge other than the one who issued it. This solution is criticised in the literature due to the expressly wide scope of the judge's discretion to assess the existence of the premise of obvious groundlessness of a lawsuit, which is not based on objective criteria.[28] Subsequently, having assessed the complexity of the dispute and having heard the parties, the judge may rule to continue the proceeding in a simplified mode if the facts are not contested or if the claim is based on evidence resulting from documents or is easy to adjudicate or requires uncomplicated investigation (Article 183 – bis c.p.c.).[29] The judge may also, in accordance with Article 183 – ter c.p.c., issue a decision to accept the claim if the actual circumstances justifying the claim have been proven and the opposing party's allegations seem obviously unfounded (it is the so-called provisionally enforceable payment order). In the event of a successful appeal, the proceeding continues before a judge other than the one who issued the order. It is indicated in the doctrine that premises for issuing an interim payment order (particularly those relating to the allegations of the defence) are abstract, undefined, and not based on objective criteria, and the judge's discretion to assess those premises is excessive.[30] Further decisions

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[24] Dalfino, D., 'Chapter VI. Characteristics of Procedure…', op. cit., par. 4.

[25] Reali, G., 'La cognizione…', op. cit., pp. 117–118.

[26] Ibidem, pp. 122–123.

[27] Iannicelli, L., Angelone, M., 'La fase introduttiva…', op. cit., pp. 162–165; Reali, G., 'La cognizione…', op. cit., pp. 117–118.

[28] Liuzzi, G.T., 'Le nuove ordinanze definitorie (artt. 183-ter e 183-quater c.p.c.)', in: Dalfino, D. (ed.), *La riforma del processo civile*, Gli Speciali del Foro Italiano, 2023, pp. 128–129 and 135.

[29] Iannicelli, L., Angelone, M., 'La fase introduttiva…', op. cit., pp. 165–170; Luiso, F.P., *Il Nuovo Processo*…, op. cit., pp. 82–84.

[30] Liuzzi, G.T., 'Le nuove…', op. cit., pp. 128–129 and 131; Scarselli, G., 'I punti salienti dell'attuazione della riforma del processo civile di cui al decreto legislativo 10 ottobre 2022,

on the choice of an appropriate path for examining the case include the initiation of the issuance of a prejudicial ruling by a collective bench (Article 187 c.p.c.) and continuation of the proceeding in an ordinary mode by preparing a trial timetable and setting a hearing for the purpose of an evidence-taking proceeding within 90 days (Article 183 c.p.c.).[31] However, it is an instructional deadline.[32] Development of a trial timetable referred to in Article 183 c.p.c. is obligatory to continue the proceeding. Admitting evidence, the judge is also obliged to make a forecast regarding the research needs and the time necessary to examine the case.[33] This activity of the judge constitutes, as it were, a culminating moment in judicial management in general, and in the management of the evidence-taking proceeding in particular. The assessment of the level of the case complexity as well as the anticipation of the proceeding duration require a preliminary substantive assessment of claims, statements and allegations. The further course of the proceeding, the number and scope of undertaken procedural activities and evidence-taking depend on the results of this preliminary assessment of statements and evidence by the investigating judge.

Then, in accordance with Article 188 c.p.c., in compliance with the trial timetable he has developed, the investigating judge takes evidence. In this phase, an important disciplinary measure for the parties is provided, the application of which, however, does not depend on the judge's discretion. According to Article 208 c.p.c., if the party at whose request the evidence-taking proceeding is to be conducted does not appear, the investigating judge declares that the party has lost the right to present the evidence unless the opposing party requests it. At the subsequent hearing, the concerned party may request that the judge revoke the ruling on the loss of the right to present evidence. The judge revokes his former ruling if he recognises that the failure to appear was due to a reason beyond the party's control. This is a rather rigorous measure, considering that the party has effectively submitted an evidence-related motion and the party's failure to appear, as a rule, does not prevent the taking of evidence.

The last phase of the ordinary proceeding occurs when the judge decides that the case is mature for resolution because it has been adequately and definitively prepared and the necessary evidence has been collected or there is no need to collect it (Articles 187 and 188 c.p.c.). Article 209 c.p.c. stipulates the formal closing of the evidence-taking proceeding when all admitted evidence is presented or when the party lost the right to present evidence pursuant to Article 208 c.p.c., and there are no other means of evidence to be taken, or when the judge decides that further taking of evidence is unnecessary due to the results already achieved.

As a rule, in the first instance ordinary proceeding, the decision on the case rests with the judge who conducted it and to whom the evidence was presented. Thus,

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n. 149', *Giustizia Insieme*, 15 novembre 2022, https://www.giustiziainsieme.it/en/news/74-main/136-riforma-cartabia-civile/2529-i-punti-salienti-dell-attuazione-della-riforma-del-processo-civile-di-cui-al-decreto-legislativo-10-ottobre-2022-n-149?hitcount=0 [accessed on 8 April 2024].

31 Iannicelli, L., Angelone, M., 'La fase introduttiva…', op. cit., pp. 165–170; Luiso, F.P., *Il Nuovo Processo*…, op. cit., pp. 82–84.

32 Reali, G., 'La cognizione…', op. cit., p. 121.

33 Iannicelli, L., Angelone, M., 'La fase introduttiva…', op. cit., pp. 165–170.

this judge performs different functions depending on the stage of the proceeding (an investigating judge – an adjudicating judge).[34] The primary task of the judge conducting the proceeding (a managing judge, *il giudice istruttore*) is to exercise all the powers necessary to carry out the proceeding as quickly and fairly as possible. This judge sets subsequent hearings and deadlines for the performance of procedural activities that the parties must meet (Article 175 c.p.c.). This judge directs and manages the proceeding; inter alia, selects evidence, decides on its admission and ensures its collection. However, the procedural decisions that the investigating judge takes are not binding on a single-member or a collective adjudicating bench. The investigating judge adjudicates on the case, except for the cases in which the regulations provide for the resolution by a collective bench. They are laid down in Article 50 bis c.p.c. In those cases, the investigating judge is appointed only to examine the case and prepare it for resolution, and the issuance of the decision is entrusted to a collective bench, which is composed of the chairperson, another judge and the same investigating judge, who presents the results of the former proceeding to the bench.[35]

Regardless of the proceeding organisation and the model of judicial management of the evidence-taking proceeding presented above, the Italian Code of Civil Procedure provides for a detailed solution aimed at implementing the principle of evidence concentration. It concerns Article 210 c.p.c. Its purpose is to make the parties present evidence. It stipulates that the judge conducting the proceeding may, at one party's request, order the other party or a third person to present to the court a document or another thing that he considers necessary to show at the hearing. If a party fails to comply with the order to produce evidence without justified reasons, the court orders the party to pay a fine ranging from EUR 500 to EUR 3,000 and, in addition, assesses such conduct on the principle of free evaluation of evidence (Article 116 par. 2 c.p.c.). The third person may be ordered to pay a fine ranging from EUR 250 to EUR 1,500. However, the sanction is not automatic because the court should assess the reasons behind the refusal to present evidence and may consider them justified.

One of the tools for managing the evidence-taking proceeding may consist of the abuse of procedural law. The Italian civil procedure does not explicitly regulate it. The concept of procedural law abuse has been defined in case law and doctrine and is derived from the principle of equity and good faith expressed in Article 1775 of the Italian Civil Code.[36] The rules can be applied in an abstract manner not

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[34] Dalfino, D., 'Chapter VI. Characteristics of Procedure…', op. cit., par. 9.

[35] Ibidem.

[36] For the issue of evolution of the concept of abuse of law see e.g.: Perlingieri, G., Di Nella, L., 'A proposito della traduzione italiana "De l'abus des droits" di Louis Josserand', in: Josserand, L., *L'abuso dei diritti* (1905), trad. it. di L. Tullio, Napoli, 2018, and references cited therein. In merito, cf.: Ranieri, F., 'Eccezione di dolo generale', *Digesto (discipline privatische) sez. civile*, Vol. VII, Torino, 1991, p. 311ff, and Dolmetta, A.A., 'Exceptio doli generalis', *Enciclopedia Giuridica Treccani*, Roma, 1997, p. 1ff; and earlier Bigiavi, W., 'L'*exceptio doli* nel diritto cambiario', *Il Foro Italiano*, 1938, Part IV, c. 203ff; on abuse as counterfunctional exercise of the right: Tullio, L., *Eccezione di abuso*, Napoli, 2005, pp. 121 and 153ff [after Perlingieri, P., Femia, P., *Nozioni introduttive e principi fondamentali del diritto civile*, Napoli, 2004, p. 143 and Irti, N., *Dal diritto civile al diritto agrario (Momenti di storia giuridica francese)*, Milano, 1962, p. 45ff, who considers anti-functional' the act of abuse (*ivi*, p. 47)]. Cf. also: Restivo, C., *Contributo ad una teoria dell'abuso del diritto*,

only to natural and legal rights but to every situation in which a specific entity is given certain tools, instruments, or powers to defend a specific interest deemed worthy of protection.[37] Those tools and powers can be implemented in the area of both substantive and procedural law. The limit of those powers is to direct them towards the implementation of a specific interest. Therefore, similarly to Polish law, the condition for assessing whether the abuse of law has occurred is to determine whether the party exercises their rights in compliance with the purpose for which they were granted. If the rights are exercised in a dysfunctional manner, the legal system prohibits their exercise at the level of substantive law and their enforcement at the level of procedural law.[38] An allegation of the abuse of law is an oppositional

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Milano, 2007; Robles, M., 'Abuso del diritto e dinamiche sanzionatorie nella prospettiva costituzionale', *Rassegna di diritto civile*, 2009, Vol. XXIX, No. 3, p. 755ff; Vettori, G., 'L'abuso del diritto', *Obbligazioni e contratti*, 2010, No. 3, p. 168ff; Gentili, A., 'L'abuso del diritto come argomento', *Rivista di diritto civile*, 2012, No. 3., p. 297ff; in jurisprudence see: Pret. Parma, 30 March 1950, in *Foro civ.*, 1950, p. 336ff; Pret. Sondrio, 18 June 1988, in *Banca borsa tit. cred.*, 1989, II, p. 525ff; Trib. Milano, 2 March 1994, in *Giur. it.*, 1996, I, 2, c. 59ff; of particular interest is judgment in case of 18 September 2009, n. 20106, in *Rass. dir. civ.*, 2010, p. 577ff, who stated in a particular case an abuse of the right as a result of the exercise of the right of withdrawal ad nutuma, despite the fact that the parties stipulates such a possibility in the contract. In this regard, Giorgini, E., 'Recesso ad nutum secondo ragionevolezza', *Rassegna di diritto civile*, 2010, No. 2, p. 602, underlines the need to apply the principle of reasonableness when assessing whether there has been an abuse of the right by the person entitled to exercise it; See also Gentili, A., 'Abuso del diritto e uso dell'argomentazione', *Responsabilità civile e previdenza*, 2010, No. 2. p. 354ff; critically, Orlandi, M., 'Contro l'abuso del diritto (in margine a Cass., 18 settembre 2009, n. 20106)', *Rivista di diritto civile*, 2010, Vol. 56, No. 2, p. 147ff, who denies the possibility of constructing prohibition of abuse of rights as a general rule. For a detailed analysis on the abuse of right in Germany, see Di Nella, L., 'L'abuso delle situazioni giuridiche negli ordinamenti europeo italiano e tedesco: profili civilistici e tributari', in: del Prato E. (ed.), *Studi in onore di Antonino Cataudella*, Vol. I, Napoli, 2013, p. 695.

[37] Romano, S., 'Abuso del diritto', *Enciclopedia del diritto*, Annali, Vol. I, Milano, 1958, p. 166ff. e di Rescigno, P., 'L'abuso del diritto', *Rivista di diritto civile*, 1965, Vol. 1; Rescigno, P., *L'abuso del diritto*, Bologna, 1998, p. 11ff; in literature, see: Levi, G., *L'abuso del diritto*, Milano, 1993; Messinetti, D., 'Abuso del diritto', *Enciclopedia del diritto*, Annali, Vol. II, Milano, 1998, p. 1ff; Sacco, R., 'L'esercizio e l'abuso del diritto', in: Alpa, G., Graziadei, M., Guarneri, A., Mattei, U., Monateri, P.G., Sacco, R., *La parte generale del diritto civile. 2. Il diritto soggettivo*, Torino, 2001, p. 313ff; Messina, M., *L'abuso del diritto*, Napoli, 2004; Pellecchia, E., *Scelte contrattuali e informazioni personali*, Torino, 2005, p. 89ff; Tullio, L., *Eccezione*…, op. cit., p. 99ff; Perlingieri, G., *Profili civilistici dell'abuso tributario. L'inopponibilità delle condotte elusive*, Napoli, 2012, p. 10ff; Astone, A., *Il divieto di abuso del diritto. Diritto scritto e diritto vivente*, Milano, 2017, p. 3ff. Discretion can be understood as freedom regarding the choice of suitable means to achieve a benefit, not merely as 'freedom to choose the end to be achieved, given that the determination of the end is the prerogative of the legal system.' Thus Villella, A., *Per un diritto comune delle situazioni patrimoniali*, Napoli, 2000, p. 83, who refers on this point to Nuzzo, M., *Utilità sociale e autonomia privata*, (1975), reprint, Napoli, 2011, pp. 125, commentary 107, and 194, commentary 94.

[38] For comparison see: Perlingieri, P., *Profili del diritto civile*, Napoli, 1994, p. 109; Ferroni, L., 'Spunti per lo studio del divieto d'abuso delle situazioni soggettive patrimoniali', in: Perlingieri, P. (ed.), *Temi e problemi della civilistica contemporanea. Venticinque anni della "Rassegna di diritto civile"*, Napoli, p. 313. According to Messinetti, D., *Abuso*…, op. cit., p. 1 the technique of abuse constitutes a form of control implemented 'through a heteronomous evaluation of the ways in which the power is exercised.' More generally, see Zaccaria, G., 'L'abuso del diritto nella prospettiva della filosofia del diritto', *Rivista di diritto civile*, 2016, Vol. 62, No. 3, p. 744ff.

measure against a claim in the civil proceeding, which is used for dysfunctional purposes (*exceptio doli generalis*).[39]

As indicated above, the Italian Code of Civil Procedure does not contain a provision prohibiting the abuse of procedural rights by the parties, which would be the equivalent of Polish Article 4 [1] CCP. However, under Article 88 c.p.c., the parties and their lawyers are obliged to act in court in accordance with the principle of honesty and loyalty. The norm may be considered equivalent to the good manners clause in civil proceedings expressed in Article 3 CCP. Thus, the obligation to act loyally and honestly before the court has been viewed in Italian civil procedure from a positive perspective. The violation of this obligation may result in negative procedural consequences. The first of them is provided for in Article 88 c.p.c. The provision authorises the court to notify the authorities that exercise disciplinary powers over solicitors who violate the obligation laid down in Article 88 c.p.c. Further sanctions that may be imposed on the party violating the principles under Article 88 c.p.c. are laid down in Article 96 c.p.c.[40] Firstly, in accordance with the provision, if it turns out that the losing party acted or defended before the court in bad faith or with gross negligence, the court, at the request of the other party, shall order that party to pay compensation in addition to the trial costs (Article 96 par. 1 c.p.c.). Secondly, the court may order a plaintiff or a creditor to pay such damages if it recognises that there is no right (claim) in respect of which a protective measure has been taken or a lawsuit has been filed, a judicial mortgage has been registered or enforcement has been carried out, if the plaintiff or the creditor had acted without ordinary prudence (Article 96 par. 2 c.p.c.). Thirdly, ruling the reimbursement of trial costs, the court may order the losing party to pay an appropriate sum of money (Article 96 par. 3 c.p.c.). Fourthly, as an additional sanction in all three of the above cases, the court may impose on a party a fine of not less than EUR 500 and not more than EUR 5,000 (Article 96 par. 4 c.p.c.).[41]

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[39] Ranieri, F., *Eccezione*…, op. cit., p. 311ff, and Dolmetta, A.A., 'Exceptio…, op. cit., p. 1ff; and earlier Bigiavi, W., 'L'*exceptio doli*…', op. cit., c. 203ff.

[40] It should be pointed out that abuse of procedural law may concern all individual laws, rights and entitlements that the legal system grants the parties: Comoglio, L.P., 'Abuso del processo e garanzie costituzionali', *Rivista di diritto processuale*, 2008, Vol. 63(2), p. 328. On this subject see Lipari, N., 'L'abuso del diritto e la creatività della giurisprudenza', in: Lipari, N., *Il diritto civile tra legge e giudizio*, Milano, 2017, p. 33ff; with regard to the abuse of process, see numerous arguments in: Dondi, A., 'Abuso del processo (diritto processuale civile)', *Enciclopedia del diritto*, Annali Vol. III, Milano, 2010, p. 1ff; Montanari, M., 'Note minime in tema di abuso del processo', *Corriere giuridico*, 2011, No. 4, p. 556ff; Consolo, C., 'Note necessariamente divaganti quanto all'«abuso sanzionabile del processo» e all'«abuso del diritto come argomento»', *Rivista di diritto processuale*, 2012, No. 5, p. 1284ff; Scarselli, G., 'Sul c.d. abuso del processo', *Jucicium*, 2012, p. 1450ff; Ghirga, M.F., 'Recenti sviluppi giurisprudenziali e normativi in tema di abuso del processo', *Rivista di diritto processuale*, 2015, Vol. 70, No. 2, p. 445ff; Taruffo, M., 'Abuso del processo', *Contratto e impresa*, 2015, Vol. 31, No. 4–5, p. 832ff; Tropea, G., *L'abuso del processo amministrativo. Studio critico*, Napoli, 2015, p. 17ff; Verde, G., 'L'abuso del diritto e l'abuso del processo (dopo la lettura del recente libro di Tropea)', *Rivista di diritto processuale*, 2015, Vol. 70, No. 4–5, p. 1085ff; Fornaciari, M., 'Note critiche in tema di abuso del diritto e del processo', *Rivista trimestrale di diritto e procedura civile*, 2016, Vol. 70, No. 2, p. 593.

[41] Mastrogiovanni, G., in: Didone, A., De Santis, F. (eds), *Il Processo Civile Dopo La Riforma Cartabia*, Milano, 2023, pp. 199–200.

The above provision regulates the so-called aggravated (qualified) procedural liability for recklessness of the dispute, including cases of liability for damages for the parties' actions or procedural conduct and any harmful effects that may result from such actions for the opposing party.[42] Only a losing party can incur the liability provided for in Article 96 c.p.c. Contrary to the Polish procedure, the Italian c.p.c. regulation does not provide for targeted sanctions that may be applied regardless of the outcome of the trial (Article 226 [2] par. 2 CCP). The conditions for awarding compensation pursuant to Article 96 par. 1 c.p.c. include the exercise of the power contrary to the purpose for which it was granted (objective condition), and acting intentionally or with gross negligence (subjective condition). In the event of compensation based on Article 96 par. 2 c.p.c., it is sufficient to state that a party was even slightly negligent or that if they had acted with due diligence (ordinary caution), they would have known that they were not entitled to a specific substantive right or claim.[43] In both of the above cases (Article 96 par. 1 and 2 c.p.c.), compensation is awarded at the request of the aggrieved party, thus the burden of proof is on this party; it is the aggrieved who must prove that the opposing party acted unlawfully as well as that damage resulted from it and what its size was.[44] Under Article 96 par. 1 and 2 c.p.c., compensation should cover both material and non-material damage. Therefore, it should include redress.[45]

Unlike under the regulation laid down in Article 96 par. 1 and 2 c.p.c., pursuant to Article 96 par. 3 c.p.c., the court may *ex officio* order the party abusing procedural powers to pay an appropriate (fair) amount to the other party. The amount is awarded regardless of the winning party's claims and does not require that damage be proved. Therefore, it is a type of punitive damages paid to the other party but in the interest of the justice system and is left to the judge's discretion.[46] The provision

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[42] Parlato, I., 'Responsabilità aggravata', *AltalexPedia*; par. 2; Tribunale Massa, 16/11/2018, n. 804; Cass. Civ., 3 March 2010, n. 5069; Cass. Civ., 24 July 2007, n. 16308; Cass. Civ., 12 March 2002, n. 3573; Cass. Civ., 4 April 2001, n. 4947 (available at: https://www.altalex.com/documents/altalexpedia/2019/03/07/responsabilita-aggravata) [accessed on 8 March 2024].

[43] Parlato, I., 'Responsabilità…', op. cit., par. 2; Viterbo Court, 18 September 2018, n. 1273; Cass., 6 July 2003, n. 9060; Cass. Civ., 12 January 2010, n. 327; Cass. Civ., 8 September 2003, n. 13071; Cass. Civ., 21 July 2000, n. 9579; Cass. Civ., 29 September 2016, n. 19285; Cass. Civ., 19 April 2016, n. 7726; Cass. Civ., 22 February 2016, n. 3376; Cass. Civ., 30 October 2015, n. 22289; Cass. Civ., 11 February 2014, n. 3003 (available at: https://www.altalex.com/documents/altalexpedia/2019/03/07/responsabilita-aggravata) [accessed on 8 April 2024]; Cass. Civ., 9 November 2017, n. 26515; (available at: https://www.altalex.com/documents/news/2017/11/20/responsabilita-aggravata) [accessed on 8 April 2024].

[44] Parlato, I., 'Responsabilità…', op. cit.; par. 8; Trib. Rome, 10 July 2018, n. 14223; Trib. Rome, 2 October 2017, n. 18514; Cass. Civ., 6 November 2005, n. 21393; Cass. Civ., 19 July 2004, n. 13355; Cass. Civ., 15 April 2013 n. 9080; Cass. Civ., 8 June 2007, n. 13395; Cass. Civ., 15 February 2007, n. 3388; Cass. Civ., 12 December 2005, n. 27383; Cass. Civ., 9 September 2004, n. 18169 (available at: https://www.altalex.com/documents/altalexpedia/2019/03/07/responsabilita-aggravata) [accessed on 8 April 2024].

[45] Parlato, I., 'Responsabilità…'; par. 5, 6 and 7; Cass. Civ., 12 October 2011, n. 20995); Cass. Civ., 12 October 2011, n. 20995; Cass. Civ., 12 October 2011, n. 20995; (available at: https://www.altalex.com/documents/altalexpedia/2019/03/07/responsabilita-aggravata) [accessed on 8 April 2024].

[46] Cf. Zeno-Zencovich, V., 'Pena privata e punitive damages nei recenti orientamenti dottrinali americani', in: Busnelli, F.D., Scalfi, G. (eds), *Le pene private*, Milano, 1985, p. 375ff;

of Article 96 par. 3 c.p.c. has a nature of a sanction and is not just compensation; it is intended to prevent conduct that abuses procedural law, which is contrary to the principle of procedural loyalty.[47]

As a result of the Cartabia Reform, par. 4 has been added to Article 96 c.p.c., which strengthened sanctions imposed on the losing party who has abused their procedural rights. The regulation provides for an additional obligation to pay a fine ranging from EUR 500 to EUR 5,000 to the fine fund. The fine may be imposed on the party if one of the situations described in Article 96 par. 1–3 c.p.c. occurs and it constitutes a kind of compensation for the damage caused to the justice system in the form of unnecessary expenditure on conducting a court proceeding. This solution is intended to strengthen the guarantee of compliance with the principle of procedural loyalty, which is the basis of a fair trial.

Another solution that gives the judge an instrument to counteract the lengthiness of a court proceeding and a tool to discourage parties from abusing their procedural rights is connected with the decision on the costs of the trial. In accordance with Article 92 c.p.c., deciding on the costs of the proceeding, the court may:

1. Disregard the costs incurred by the winning party, which it considers excessive or unnecessary.
2. Regardless of the outcome of the case, order one party to reimburse the other party for the costs incurred (even if they are not subject to reimbursement), which were caused because the party failed to fulfil the obligation laid down in Article 88 c.p.c. (breach of the duty of loyalty and honesty before the court).

The regulation under Article 92 par. 1 c.p.c. is similar to the solution adopted in the Polish civil procedure in Article 98 par. 1 CCP and Article 226 [2] par. 2 (3a) CCP, and detailed in the subsequent provisions. The solution has been formulated in a slightly different way, not from the negative side (by indicating what the court does not take into account), but from the positive side (what the court may take into account). Pursuant to Article 98 par. 1 CCP, the losing party is obliged to reimburse the opposing party, at his request, only for the costs necessary for the purposeful pursuit of rights and purposeful defence. However, in accordance with Article 226 [2] par. 2 (3a) CCP,

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Ponzanelli, G., 'I punitive damages, il caso Texaco e il diritto italiano', *Rivista di diritto civile*, 1987, Vol. II, p. 409ff; Quarta, F., *Risarcimento e sanzione nell'illecito civile*, Napoli, 2013, p. 8ff; Malomo, A., *Responsabilità civile e funzione punitiva*, Napoli, 2017, p. 7ff; Grondona, M., *La responsabilità civile tra libertà individuale e responsabilità sociale. Contributo al dibattito sui «risarcimenti punitivi»*, Napoli, 2017, p. 105ff; Lasso, A., *Riparazione e punizione nella responsabilità civile*, Napoli, 2018, p. 64ff; Cicero, C., 'Il perimetro dei "risarcimenti punitivi"', in: Cicero, C. (ed.), *I danni punitivi, Tavola rotonda – Cagliari 9 maggio 2018*, Napoli, 2019, p. 41ff. For a comparison with foreign experiences, see Benatti, F., 'Inadempimento del contratto e danni punitivi', *Rassegna di diritto civile*, 2013, Vol. 3, p. 846ff; Parlato, I., 'Responsabilità…'; par. 9; Trib. Rome, 28 September 2017; Cass. Civ., 8 February 2017, n. 3311; Cass. Civ., 19 April 2016, n. 7726; Cass. Civ., 8 February 2017, n. 3311; Cass. Civ., 19 April 2016, n. 7726; Cass. Civ., 11 February 2014, n. 3003 (available at: https://www.altalex.com/documents/altalexpedia/2019/03/07/responsabilita-aggravata) [accessed on 8 April 2024].

[47] Rinaldi, M., 'Lite temeraria: si alla sanzione pecuniaria per scoraggiare l'abuso del processo', *Tribunale Lamezia Terme, sez. civile*, 11 June 2012 (https://www.altalex.com/documents/news/2012/12/11/lite-temeraria-si-alla-sanzione-pecuniaria-per-scoraggiare-l-abuso-del-processo) [accessed on 8 April 2024].

in the event an abuse of procedural law by a party is recognised, the court may order the abusing party to cover the trial costs increased in proportion to the increase in the opposing party's workload necessary for conducting the case as a result of this abuse, but not more than twofold. The regulation under Article 92 par. 2 c.p.c. is similar to the solutions adopted in the Polish procedure in Article 226 [2] par. 2 (2) CCP and Article 103 par. 1 and par. 3 CCP. The provisions make it possible to impose on a party or an intervening party, regardless of the outcome of the case, an obligation to reimburse for the costs resulting from their negligent or obviously inappropriate conduct, and in the event of an abuse of procedural law, also an obligation to reimburse for the costs in a greater part than the outcome of the case would indicate and even reimbursement for all the costs. The sanctions are applied, inter alia, when a party has abused procedural rights, e.g., by submitting untruthful explanations, concealing evidence or delaying its presentation, or multiplying evidence that is irrelevant to the resolution of the case.

CONCLUSION

The Italian model of judicial management of evidence-taking proceedings differs significantly from the Polish one. In most areas, the Italian judge does not enjoy much discretion and decision-taking freedom in the field of collecting procedural material. Strict deadlines for the submission of pleadings and the moment after which further presentation of claims and evidence is not possible are laid down by statute. There are no special provisions in the Italian procedural law that would enable the parties to submit further statements and evidence, either, in the event the parties did not produce them through no fault of their own or when the need to provide them occurred after the deadline for submitting statements and claims. The parties can only use the general measure of restoring a deadline if they failed to meet one for a procedural step of submitting claims and evidence (e.g., filing a preparatory pleading).

The judge's managerial activities in the Italian civil procedure in the area of preliminary substantive examination of the case are strongly emphasised. At the preliminary hearing, the judge has the right to draw the parties' attention to certain matters that are important for the resolution of the case, which should be clarified, and to admit evidence *ex officio*. However, he is obliged to enable the parties in such a situation to take a stance on the issues raised by the judge and to lodge potential evidence related motions in connection with the evidence admitted *ex officio*. Having examined the case at the preliminary hearing, the investigating judge also takes a decision, inter alia, based on substantive considerations, whether the case will be heard in an ordinary or a simplified proceeding, whether it is justified to render an interim order to accept the claim or reject the request. The procedure is similar to the one functioning in the Polish CCP, i.e., a simplified procedure of dismissing an obviously unfounded claim (Article 191 [1] CCP). Another important feature that differentiates the Italian model from the Polish one is the more formalised course of the trial: the exchange of pleadings before set deadlines; a preliminary hearing

and a decision specifying the limits of the evidence-taking proceeding; a hearing devoted to the taking of evidence by the investigating judge; resolution of the case by the investigating judge or a collective bench. In the Polish model, the court or the presiding judge may take steps aimed at arousing the parties' initiative in explaining the circumstances relevant to the resolution of the case and modify the course of the proceeding in response to changes in the procedural situation and the parties' stance until the conclusion of the trial. The court or the presiding judge may, in particular, oblige the parties to submit preparatory pleadings, or admit evidence *ex officio* at any stage of the case, obviously within the limits of statutory requirements, which, however, grant the judge a fairly wide scope of discretionary powers. In this respect, the Polish model is more flexible while the Italian model encourages the parties to maintain procedural discipline.

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Cite as:

Manowska M. (2024) '*Model of judicial management of evidence-taking proceedings in the Italian civil trial (Cartabia Reform)*', Ius Novum (Vol. 18) 1, 99–117. DOI 10.2478/in-2024-0006

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Ius Novum

2024, vol. 18, no. 1, pp. 118–135

CONSTITUTIONAL RIGHTS AND OBLIGATIONS OF CITIZENS TOWARDS THE ENVIRONMENT UNDER THE CONDITIONS OF SUSTAINABLE DEVELOPMENT

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DOI 10.2478/in-2024-0007

Abstract

The aim of this article is to determine the status of citizen's rights to 'a clean environment' and their obligations towards the environment under sustainable development conditions, considering international and domestic regulations. It analyses three interlinked aspects: human rights to a clean environment, obligations of citizens and public authorities towards the environment, and environmental protection in accordance with the principle of sustainable development. Human rights to 'a clean environment' are enshrined in the Constitution, drawing on the Universal Declaration of Human Rights and the Rio de Janeiro 'Environment and Development' Declaration. These rights are implemented by public authorities through ensuring ecological safety and the use and protection of environmental resources, adhering to the sustainable development principle. In addition every citizen has obligations towards the environment, because he should take care of environmental resources and use them in accordance with the principles of environmental protection law. The analysis of legal doctrine and legislation highlights a clear relationship between the necessity for public authorities to ensure constitutional rights to a 'clean environment' and their obligations towards the environment through the protection of environmental resources in line with the sustainable development principle. This entails balancing the human right to a 'clean environment' against the environmental right to the continuity and sustainability of resources (natural balance), while also ensuring economic growth. An example of these principles in action is Agenda 2030, currently being implemented in Poland and other EU Member States.

Keywords: human rights, environmental protection law, constitutional obligations of public authorities, sustainable development principle, Agenda 2030

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INTRODUCTION

The right to life, closely linked to the right to a 'clean' environment, is a fundamental human right. Since life on Earth is unsustainable without environmental resources such as water, air, and soil, these human rights must be considered collectively. Environmental resources of adequate quality and quantity, when protected, can be secured for society. J. Ciechanowicz-McLean posits that environmental protection, through human rights as a substantive guarantee, also manifests as an instrumental right, facilitating the safeguarding of fundamental human rights. Thus, human rights to the environment cannot be exercised separately. Protection of a human right to life is a good example of such an attitude.[1] The international human rights catalogue, rooted in the Universal Declaration of Human Rights of 1948,[2] serves as a foundation for regulations concerning human rights protection in many subsequent constitutions and international agreements. According to the literature, passing the Declaration initiated the process of constructing an international universal system for human rights protection.[3] Therefore, the Declaration became a 'cornerstone' of this system and supporting individual rights protection systems at regional and national levels. Alongside the International Covenant on Economic, Social and Cultural Rights[4] and the International Covenant on Civil and Political Rights,[5] it forms the International Bill of Rights[6]. The human right to life is affirmed in Article 3 of the Declaration: 'Everyone has the right to life, liberty and the security of person.'

The Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, plays a pivotal role in the European system of human rights protection.[7] It aimed to foster greater unity among its members through the protection and advancement of human rights and fundamental freedoms. The Convention is viewed as a means to achieve unity of the member states in developing and respecting individual rights standards. It defines protected rights and mandates state parties to respect the rights of those exercising convention-based rights. The

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1 Ciechanowicz-Mclean, J., Nyka, M., 'Human rights and the environment', *Przegląd Prawa Ochrony Środowiska*, 2012, No. 3, p. 90.

2 Universal Declaration of Human Rights, adopted by the UN General Assembly by Resolution 217/III A on 10 December 1948 in Paris.

3 Johnson, G., Symonides, J. (eds), *The Universal Declaration of Human Rights, a History of its Creation and Implementation 1948–1998*, UNESCO, 1998; Jaskólska, J., 'Treść Powszechnej Deklaracji Praw Człowieka', *Człowiek w Kulturze*, 1998, No. 11, pp. 49–97; Symonides, J., 'Powszechna Deklaracja Praw Człowieka (po 60 latach od jej przyjęcia)', *Państwo i Prawo*, 2008, No. 12, pp. 3–16; Liżewski, B., Myślińska, M., 'Mechanizm ochrony praw człowieka w systemie Rady Europy i w systemie interamerykańskim (teoretyczna analiza prawnoporównawcza)', *Studia Iuridica Lublinensia*, 2014, No. 21, p. 108.

4 International Covenant on Economic, Social and Cultural Rights, opened for signature in New York on 19 December 1966 (Journal of Laws of 1977, No. 38, item 169).

5 International Covenant on Civil and Political Rights, opened for signature in New York on 16 December 1966 (Journal of Laws of 1977, No. 38, item 167).

6 See more: Kędzia, Z., '70 lat powszechnej Deklaracji Praw Człowieka – pomnik czy żywy dokument?', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2018, Vol. LXXX, Issue 4, and literature cited therein.

7 Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws of 1993, No. 61, item 284).

convention performs constitutional functions (i.e. filling the gaps, being a model and being an impulse), and the degree of performing them varies from one state-party to another.[8] Poland ratified the Convention in 1993, committing to consider the human rights it encompasses in its legislative, administrative, and judicial actions.[9]

Human rights to the environment within the EU are encapsulated in the Charter of Fundamental Rights of the European Union[10] and are often associated with a catalogue of political and social rights, also falling within the scope of solidarity rights or third-generation rights. For the exercise of human rights to a 'clean environment', society must have access to essential environmental resources of appropriate quality and quantity, safeguarded by adequate legal protection. As per international and EU rules, environmental protection is implemented in line with the principle of sustainable development, the tenets of which are outlined in the Rio de Janeiro Declaration on Environment and Development.[11] Its preamble highlights the centrality of human beings in sustainable development, advocating for a life in harmony with nature. Sustainable development rests on the pillars of international human rights law, environmental law, and economic law. This principle obliges states as entities responsible for the protection and rational use of the environment, to ensure that society can utilise environmental assets based on principles of reality and equality, facilitating the rational use of non-renewable resources and the restoration of renewable resources without surpassing environmental safety limits.[12]

The concept of sustainable development in the EU's human rights context is integral to Agenda 2030 for sustainable development,[13] implemented by Member States. Human rights to a 'clean environment' in Polish law, and citizen's obligations towards the environment are outlined in the Constitution of the Republic of Poland,[14] through programmes and legal acts regulating environmental protection

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[8] Jurczyk, T., 'Geneza rozwoju praw człowieka', *Homines Hominibus*, 2009, No. 1(5), p. 37; Pazura, A., Uniejewski, J., 'Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności jako fundamentalny akt prawa europejskiego – czy twierdzenie to nadal zachowuje aktualność?', *Przegląd Prawa Konstytucyjnego*, 2016, No. 2(30), p. 72, doi: 10.15804/ppk.2016.02.03.

[9] Cichoń, Z., 'Europejska Konwencja Praw Człowieka nadal najskuteczniejszym na świecie instrumentem ochrony prawa człowieka (w 55. rocznicę podpisania Konwencji)', *Palestra*, 2005, No. 11–12, p. 179. See also: Garlicki, L. (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do artykułów 1–18*, Warszawa, 2010, p. 66 et seq.

[10] Charter of Fundamental Rights of the European Union (2016/C 202/02) (OJ EU C 202/389, 7.6.2016).

[11] Rio Declaration on Environment and Development, http://libr.sejm.gov.pl/tek01/txt/inne/1992.html [accessed on 8 April 2024], hereinafter 'Rio Declaration'.

[12] See more: Ciechanowicz, J., *Międzynarodowe prawo ochrony środowiska*, Warszawa, 1999; Roliński, M., 'Z problematyki zasad ochrony środowiska', *Studia Iuridica Lublinensia*, 2014, No. 21, pp. 145–155.

[13] Resolution adopted by the General Assembly on 25 September 2015. 70/1, *Transforming our world: the 2030 Agenda for Sustainable Development* (UN A/RES/70/1), hereafter referred to as 'the 2030 Agenda'.

[14] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483, as amended) hereinafter: 'the Constitution of the Republic of Poland'.

and use principles in accordance with the sustainable development principle, such as the 2001 Environmental Protection Act (EPA).[15]

This article aims to elucidate the status of human rights to a 'clean environment' and individual obligations towards the environment under sustainable development conditions, considering international and domestic frameworks. It explores three interconnected aspects: (1) human rights to a clean environment, (2) obligations of citizens and public authorities towards the environment, and (3) environmental protection according to the sustainable development principle. The study employs a dogmatic and legal methodology, analysing regulations from the Universal Declaration of Human Rights, conventions, the Polish Constitution, and other domestic laws regarding environmental resource use, alongside relevant literature.

RIGHT TO A CLEAN ENVIRONMENT

On the international forum, three generations of human rights can be distinguished: first-generation rights include liberal defence rights in the form of classic civil and political liberties; second-generation rights cover economic, social, and cultural aspects; and third-generation rights address comprehensive issues, such as the right to a clean environment, right to peace, and the right to self-determination, participation and communication.[16] Hence, the human rights in question comprise three generations of rights, namely: (1) political rights and liberties as well as personal liberties (classic human rights); (2) economic, social, cultural and educational rights (also known as social or welfare rights), and (3) 'solidarity rights', i.e. a catalogue of rights which include the right to development, the right to peace, the right to environment, the ownership right to the common heritage of mankind and the right to communication. The concept of environmental rights emerged in the 1980s, alongside the World Committee for Environment and Development. Today, it is acknowledged that people are entitled to rights concerning the environment, which are understood in a variety of ways. These rights can be, on the one hand, a collection of subjective rights and entitlements associated with individual fundamental components of the environment, such as the right to clean water, soil, and air. On the other hand, they are received as unified subjective rights, comprising a combination of such rights, i.e. the right to a clean and unpolluted environment, the right to ecological balance, or simply the right to the environment.[17] The rights to the environment constitute a complex of one's rights to its resources, which

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[15] Environmental Protection Law of 27 April 2001 (consolidated text: Journal of Laws of 2022, item 2556 as amended), hereinafter referred to as 'EPA'.

[16] Vasak, K. (ed.), *International dimensions of human rights*, Vol. 1, Vol. 2, Paris, 1982; Riedel, E., 'Trzecia generacja praw człowieka jako strategia urzeczywistniania praw politycznych i społecznych', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1990, Vol. LII, Issue 3–4, pp. 117–118.

[17] Sommer, J. (ed.), *Prawo człowieka do środowiska naturalnego*, Wrocław–Warszawa–Kraków–Gdańsk–Łódź, 1987; Ciechanowicz-McLean, J., Dembicki, P., *Prawa człowieka do życia i do środowiska*, in: Gronowska, B., Rakoczy, B., Kapelańska-Pręgowska, J., Karpus, K., Sadowski, P. (eds), *Prawa człowieka a ochrona środowiska – wspólne wartości i wyzwania*, Toruń, 2018, p. 52; Drzewicki, K., 'Trzecia generacja praw człowieka', *Sprawy Międzynarodowe*, 1983, No. 10; Rakoczy, B.,

remain uncontaminated by anthropogenic pollution to an extent that could harm individuals.[18]

The subject literature highlights a contradiction within third-generation rights concerning the right to life in an unpolluted environment and the right to development. This contradiction emerges from the right to life (first generation), the right to healthcare and social security (second generation), and the right to a clean environment alongside the right to development (third generation).[19] Consequently, one can claim that by exercising the right to development, one contributes to environmental pollution, potentially undermining the ability to guarantee the right to live in 'a clean environment'. The general proclamation of the third-generation right to the environment is contained in Article 28 of the Universal Declaration of Human Rights, which states: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.' The third generation includes the right to a clean and sustainable environment, often linked with or included in the catalogue of political and welfare rights. This is affirmed by the inclusion of environmental rights within the group of solidarity rights, the third generation, in the Charter of Fundamental Rights of the European Union.[20]

The essence of the subjective human right to the environment is articulated in the 1972 Declaration of Stockholm on the Human Natural Environment,[21] which recognises a direct link between human rights and the environment. This document emphasises the importance of the right to the environment, safeguarding its natural resources, intergenerational justice, resource management and rationality of planning.[22] Regarding intergenerational justice, the Declaration provides for responsibility for environment protection and improvement for the present and future generations (principle 1) and for securing Earth's non-renewable resources against exhaustion so that all of humanity benefits from their use (principle 5).[23] Principle 1 reads: 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.' This highlights the global acceptance of the right

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Ograniczenie praw i wolności jednostki ze względu na ochronę środowiska w Konstytucji Rzeczypospolitej Polskiej, Toruń, 2006, p. 234.

18 Wierzbowski, B., Rakoczy, B., *Podstawy praw a ochrony środowiska*, 1st ed., Warszawa, 2004, pp. 15–17.

19 Mazur-Bubak, M., 'Prawo do rozwoju a prawo do życia w środowisku wolnym od zanieczyszczeń – analiza problemu i kilka propozycji redukcji konfliktu', *Polityka i Społeczeństwo*, 2019, No. 3(17), p. 30.

20 Charter of Fundamental Rights of the European Union (2016/C 202/02) (OJ C 202/389, 7.6.2016).

21 Stockholm Declaration, Resolution of the Stockholm Conference of 14.6.1972, concerning the natural human environment, https://dfaeurope.eu/wordpress/wp-content/uploads/2014/05/stockholm-declaration_english.pdf [accessed on 5 April 2024], hereinafter 'Stockholm Declaration'.

22 Ciechanowicz-McLean, J., *Międzynarodowe prawo ochrony środowiska*, Warszawa, 2001, pp. 22–23.

23 Final Documents of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, Earth Summit, Warszawa, 1993.

to the environment as a universally recognised principle.[24] Similarly, the right to a healthy environment is provided in principle 1 of the Declaration of Rio de Janeiro on Environment and Development, which states that people are 'at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.'[25]

The term 'right to a healthy environment' is also used in the world report on domestic legislation concerning environmental protection, prepared in 2019 as part of the United Nations Environment Programme (UNEP).[26] This term is defined as follows: 'This right asserts that the environment must meet certain basic benchmarks of healthfulness and includes affirmative substantive rights, such as the right to clean air and water, and defensive substantive rights, such as the right to be free from toxic wastes or pollution.' The right to a healthy environment is thus a fundamental environmental right and it can be expressed in various ways, including as a 'right to a clean environment' or a 'right to a sustainable development'. In essence, it relates to the value of maintaining 'a clean environment'.[27]

Citizens' rights in Polish law are mentioned in Article 5 of the Constitution of the Republic of Poland: 'The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development.' Although the Constitution does not directly specify the right to a clean environment, it does refer to other rights contained in Chapter II 'The Freedoms, Rights and Obligation of Persons and Citizens', which can be regarded as environmental rights, e.g., the right to information on the quality and protection of the environment (Article 74 (3)), the right to support activities aimed to protect and improve the quality of the environment (Article 74 (4)), the right to healthcare by preventing harmful consequences of the environment degradation (Article 68 (4) in conjunction with Article 68 (1)), the right to submit petitions, proposals and complaints in the public interest, i.e., with a view to environmental protection (Article 63).[28] The guarantee of ecological security by the state, as an obligation of public authorities under Article 74 (1), is particularly significant. According to L. Garlicki, incorporating ecological security into internal security is fully justified. This way environment care falls under the security subgroup,

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[24] Karski, L., 'Prawa człowieka i środowisko', *Studia Ecologiae et Bioethicae*, 2006, No. 4, p. 317.

[25] Ciechanowicz-McLean, J., Dembicki, P., op. cit., pp. 69–71; Bukowski, Z., 'Koncepcja zrównoważonego rozwoju a prawa człowieka', in: Gronowska, B., Rakoczy, B., Kapelańska-Pręgowska, J., Karpus, K., Sadowski, P. (eds), *Prawa człowieka a ochrona środowiska – wspólne wartości i wyzwania*, Toruń, 2018, p. 41.

[26] UNEP, *Environmental Rule of Law. First Global Report*, Nairobi, 2019, pp. 154–156, https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report [accessed on 4 April 2024].

[27] Kenig-Witkowska, M.M., 'Prawo do środowiska w prawie międzynarodowym', *Państwo i Prawo*, 2000, No. 8; Kuźniar, D., 'Prawo do zdrowego środowiska jako konstytucyjnie gwarantowane prawo podmiotowe', *Przegląd Prawa Konstytucyjnego*, 2021, No. 3(61), p. 203, doi: 10.15804/ppk.2021.03.13.

[28] Karski, L., op. cit., pp. 323–324.

i.e. ecological security, defined as maintaining an environmental status that allows for human habitation and development.[29] The environmental protection doctrine defines this term as a complete elimination or minimisation of various threats to human life and health emanating from the living environment – the biosphere. These threats, often resulting from both deliberate and unintentional human actions, are referred to as anthropogenic ones and directed against humans.[30] The very concept of ecological security encompasses actions aimed at achieving and maintaining the desired state of the natural environment and at mitigating these threats.[31] Ecological security is achieved by safeguarding the natural environmental resources in line with the sustainable development principle, which will be explored further in this article.

Citizen's rights to the environment are also articulated in the EPA, and they are implemented as part of the environmental use. This act of law provides for three types of use of environmental resources: common, ordinary, and special. According to Article 4(1) of the EPA, every citizen is entitled to common use of the environment. This type of use does not apply to using installations and includes meeting individual and household needs, including sport and leisure, with respect to introducing substances or energy into the environment or other types of common water use as outlined in the provisions of the Water Law Act of 20 July 2017 (WLA).[32] This type of environmental use applies to resources owned by the State Treasury, i.e. public waters and forests. Ordinary environmental use is regulated in Article 32 (1) and (2) of WLA. It stipulates that everyone is entitled to use public inland surface waters, marine internal waters and territorial sea waters. Common use of water involves satisfying individual, household or farm needs without using special technical devices for leisure, tourism, water sports, and amateur fishing.

Environmental use that exceeds common use under Article 4 (2) and (3) of EPA may require obtaining a permit that establishes a specific scope and conditions, issued by the competent environmental protection authority (ordinary and special use). Ordinary use of the environment extends beyond its common use, with respect to which no permit is required. Ordinary water use is also regulated by the Water Law. According to Article 33, a land owner is entitled to ordinary use of the waters and groundwaters on their property. However, the right to ordinary land use does not entitle one to construct water devices without obtaining a water law permit. Ordinary water use is intended to meet the needs of one's household and farm.

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[29] Garlicki, L., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 3, Warszawa, 2003, p. 3.

[30] Ciechanowicz, J., *Międzynarodowe prawo ochrony…*, op. cit., pp. 46–47; see also: Zębek, E., 'Bezpieczeństwo ekologiczne w zakresie zapewnienia obywatelom odpowiedniej jakości zasobów wody pitnej', in: Grabińska, T., Spustek, H. (eds), *Bezpieczeństwo personalne a bezpieczeństwo strukturalne państwa. Wolność i bezpieczeństwo obywatela*, Wrocław, 2013, pp. 115–128; Zębek, E., 'Bezpieczeństwo ekologiczne jako podstawowa potrzeba społeczeństwa wobec współczesnych zagrożeń środowiska', in: Ura, E., Sitek, B. and Graca, T. (eds), *Potrzeby jako współczesny determinant treści praw człowieka*, Józefów, 2017, pp. 241–262.

[31] Krajewski, P., in: Chodak, P. (ed.), *Leksykon bezpieczeństwa. Wybrane pojęcia*, Józefów, 2015, p. 64; see also: Trzcińska, D., Kierzkowska, J., *Bezpieczeństwo ekologiczne w realizacji zadań publicznych*, Warszawa, 2020.

[32] Water Law of 20 July 2017 (consolidated text: Journal of Laws of 2022, item 2625, as amended), hereinafter referred to as 'the WLA'.

Special water use is the third type of water use. It extends beyond ordinary and common use and requires a water law permit. Special use of water is designated for business activities.[33]

OBLIGATIONS OF PUBLIC AUTHORITIES AND CITIZENS TOWARDS THE ENVIRONMENT

Obligations of public authorities are extensively addressed in the Constitution of the Republic of Poland, especially in Article 68(4), which mandates that public authorities combat epidemic diseases and prevent harmful effects of environmental degradation on human health. A catalogue of these obligations is also outlined in Article 74(1), (2), and (4) of the Constitution. According to this article, public authorities are required to implement policies that ensure ecological security for present and future generations. Environmental protection is thus a fundamental duty of public authorities, who are also expected to support citizens' initiatives aimed at protecting and enhancing environmental quality. The inclusion of obligations related to environmental protection and ecological security in the Constitution is justified by Article 1, which declares that the Republic of Poland is the common wealth of all its citizens. This provision underpins the notion of environmental protection as a communal asset safeguarded by public authority.[34] This is because environmental protection is an integral part of sustainable development as stipulated in Article 5 of the Constitution and now a fundamental principle of international law, thereby binding all legal subjects to these norms and obligations. As such, public authorities are compelled to prevent any entity from undertaking actions that negatively impact the environment and to take preventive actions. At the same time, the state administration should take actions aimed at counteracting or preventing an adverse impact on the environment in order to improve its status. Hence, it is the state's responsibility to ensure that the environment – its communal asset – is used rationally to prevent potential ecological damage and address any resultant environmental harm.[35] Moreover, Article 74(1) of the Constitution of the Republic of Poland serves as programmatic norms, making it challenging to delineate specific individual rights, especially in the context of potential claims against the state. Article 68 may indicate the necessity, underpinned by legal claim, for actions to mitigate the environmental impacts on the individual's health.[36]

When considering the citizens' obligations towards the environment, attention should be directed to Article 86 of the Constitution, which states that everyone

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[33] See more: Szymańska, U., Zębek, E., *Ochrona środowiska naturalnego jako interdyscyplinarna dziedzina wiedzy*, Olsztyn, 2014, p. 120 et seq.

[34] Ciechanowicz-McLean, J., *Prawo i polityka ochrony środowiska*, Warszawa, 2009, pp. 20–21.

[35] Bukowski, Z., *Prawo międzynarodowe a ochrona środowiska*, Toruń, 2005, pp. 17–18.

[36] Dąbrowski, M., 'Ochrona środowiska i bezpieczeństwo ekologiczne', in: Chmaj, M. (ed.), *Wolności i prawa człowieka w Konstytucji Rzeczypospolitej Polskiej*, Warszawa, 2016, p. 230. See also: Babula, M., 'Konstytucyjne gwarancje w zakresie czystego środowiska a pozycja jednostki', *Dyskurs Prawniczy i Administracyjny*, 2019, No. 1.

is obligated to maintain the environmental status and is accountable for any degradation they cause.[37] The principles of such responsibility are specified in the law. Consequently, environmental protection is considered a shared value, obligating everyone within the Republic of Poland to be vigilant about environmental conditions. This obligation extends to all individuals as well as legal and other entities. The duty to refrain from actions that harm the environment is tied to the responsibility to manage any negative consequences of such actions.[38] Thus, it is incumbent upon everyone to protect environmental elements in line with the principles established in international and domestic law, with sustainable development as the overarching principle.

LEGAL PROTECTION OF THE ENVIRONMENT IN ACCORDANCE WITH THE SUSTAINABLE DEVELOPMENT PRINCIPLE

The concept of sustainable development is believed to date back to 1983 when the World Commission on Environment and Development was established. The term 'sustainable development' was first used by the United Nations in its 1987 report, *Our Common Future* (Brundtland Report). Sustainable development was defined as a type of development that meets the needs of the present without compromising the ability of future generations to meet their own needs, ensuring stable development while taking into account changes in resource exploitation, investment directions, technological progress, and institutional adjustments, all aimed at fulfilling the needs and aspirations of both current and future generations.[39] The Declaration of Stockholm on the environment,[40] adopted on 16 June 1972, was of fundamental importance for environmental protection in accordance with the sustainable development principle on an international scale. Key principles from this document include:

> Principle 1: Man bears a solemn responsibility to protect and improve the environment for present and future generations; Principle 2: The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate; Principle 3: The capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved; Principle 5: The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that

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[37] Karski, L., 'Prawa człowieka…', op. cit., pp. 323–324.

[38] Szwed, K., 'Konstytucyjny obowiązek prowadzenia polityki zapewniającej bezpieczeństwo ekologiczne współczesnemu i przyszłym pokoleniom', *Przegląd Prawa Konstytucyjnego*, 2022, No. 3(67), p. 69, doi: 10.15804/ppk.2022.03.05.

[39] See Bukowski, Z., *Zrównoważony rozwój w systemie prawa*, Toruń, 2012, pp. 23–24; Olejarczyk, E., 'Zasada zrównoważonego rozwoju w systemie prawa polskiego – wybrane zagadnienia', *Przegląd Prawa Ochrony Środowiska*, 2015, No. 2, pp. 122–123, doi: 10.12775/PPOS.2016.013.

[40] Stockholm Declaration, Resolution of the Stockholm Conference of 14.6.1972, concerning the natural human environment, https://dfaeurope.eu/wordpress/wp-content/uploads/2014/05/stockholm-declaration_english.pdf [accessed on 5 April 2024].

benefits from such employment are shared by all mankind; Principle 8: Economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.

The 2nd Earth Summit – the UN Conference on Environment and Development, themed 'Environment and Development', was another significant milestone in the development of environmental protection law.[41] The Conference adopted two fundamental documents that set the direction for civilisational development in the 21st century while considering the protection of environmental resources. These were the Rio de Janeiro Declaration on Environment and Development of 14 June 1992, which includes a set of 27 principles of sustainable development, and Agenda 21 – a comprehensive programme of actions aimed at achieving sustainable development, with over 2,500 recommendations.[42] The Declaration of Rio de Janeiro extensively addresses sustainable development in a broad sense. Its preamble emphasised the need to take an integrated approach to environment and development issues within a global partnership system. Key issues addressed in the Declaration included, for example, the right to life in harmony with nature (principle 1), intergenerational justice (principle 3), international cooperation (principle 7, 27), information on the environment (principle 10, 18, 19), and resources (2, 23). The Declaration asserts that harmonisation of development should be based on the following assumptions: environmental protection is an integral part of the development process (principle 4); eradicating poverty is an indispensable requirement for development (principle 5); it is necessary to provide aid to environmentally vulnerable countries (principle 6); to achieve sustainable development, it is necessary to eliminate the unsustainable patterns of production and consumption (principle 8); it is necessary to introduce environmental standards (principle 11) and undertake an environmental impact assessment (principle 17).[43]

The sustainable development principle was analysed using a holistic approach, i.e., without limiting it merely to the environmental protection aspects. This approach was presented during the Global Summit on Sustainable Development (RIO+10), held in Johannesburg in 2002, and during the Global Summit RIO+20 in Rio de Janeiro on 20–22 June 2012. These meetings resulted in the adoption of a declaration titled 'Future that we want', and actions were initiated aimed at developing a new set of Sustainable Development Goals (SDGs). It was emphasised that there was a need to intensify institutional actions on an international scale, highlighting the necessity for the development of environment management as part of the international institutional structure and promoting sustainable economic and social

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41 Latoszek, E., 'Koncepcja zrównoważonego rozwoju w teorii i praktyce ONZ', in: Latoszek, E., Proczek, M., Krukowska, M. (eds), *Zrównoważony rozwój a globalne dobra publiczne w teorii i praktyce organizacji międzynarodowych,* Warszawa, 2016, p. 27.

42 Kozaczyński, W., 'Zrównoważony rozwój a bezpieczeństwo człowieka', *Bezpieczeństwo Teoria i Praktyka*, 2012, No. 4(9), p. 77.

43 Rosicki, R., 'Międzynarodowe i europejskie koncepcje zrównoważonego rozwoju', *Przegląd Naukowo-Metodyczny*, 2010, No. 4, pp. 44–56; Kenig-Witkowska, M., *Międzynarodowe prawo środowiska. Wybrane zagadnienia systemowe*, LEX 2011.

integration as well as environmental protection and sustainable development.[44] Another significant event was the Summit of the Agenda for Sustainable Development 2030,[45] held on 25–27 September 2015 at the UN Headquarters in New York. During the Summit, a document entitled 'Transforming our world: Agenda for Sustainable Development – 2030' was adopted, defining 17 main sustainable development goals.[46] The sustainable development principle was also considered in the European Union's primary and secondary law, especially in Article 11 of the Treaty on the Functioning of the European Union (TFEU),[47] where sustainable development forms the basis for integrating environmental protection with sectoral policies. Notably, Article 191 defines the objectives of Union policy on the environment as follows: (a) preserving, protecting and improving the quality of the environment; (b) protecting human health; (c) prudent and rational utilisation of natural resources; and (d) promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.[48] In January 2019, the Commission presented a document titled 'Towards a sustainable Europe by 2030', which opened the debate on the goals of sustainable development,[49] promoting the implementation of environment and climate-friendly practices. These practices are currently pursued in programs such as the European

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[44] Lipiński, A., *Prawne podstawy ochrony środowiska*, Warszawa, 2010, pp. 17–18; Olejarczyk, E., 'Zasada…', op. cit., pp. 124–126.

[45] United Nations, Resolution adopted by the General Assembly on 25 September 2015. 70/1 Transforming our world: 2030 Agenda for Sustainable Development, A/RES/70/1.

[46] Sustainable Development Goals: Goal 1. End poverty in all its forms everywhere; Goal 2. End hunger, achieve food security and improved nutrition, and promote sustainable agriculture; Goal 3. Ensure healthy lives and promote well-being for all at all ages; Goal 4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all; Goal 5. Achieve gender equality and empower women and girls; Goal 6. Ensure availability and sustainable management of water and sanitation for all; Goal 7. Ensure access to affordable, reliable, sustainable and modern energy for all; Goal 8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all; Goal 9. Build resilient infrastructure, promote inclusive and sustainable industrialisation and foster innovation; Goal 10. Reduce inequality within and among countries; Goal 11. Make cities and human settlements inclusive, safe, resilient and sustainable; Goal 12. Ensure sustainable consumption and production patterns; Goal 13. Take urgent action to combat climate change and its impacts; Goal 14. Conserve and sustainably use the oceans, seas and marine resources for sustainable development; Goal 15. Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss; Goal 16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels; and Goal 17. Strengthen the means of implementation and revitalize the global partnership for sustainable development.

[47] Journal of Laws of 2004, No. 90, item 864/2 as amended.

[48] Consolidated version of the Treaty on the Functioning of the European Union, Part Three – Internal Policies and Actions of the Union. Title XX – Environment, Article 191 (former Article 174 TEC), OJ EU C 202, 7.6.2016, pp. 132–133.

[49] European Commission, Opening document of the debate Towards a Sustainable Europe by 2030, https://op.europa.eu/en/publication-detail/-/publication/3b096b37-300a-11e9-8d04-01aa75ed71a1/language-en/format-PDF [accessed on 5 April 2024].

Green Deal,[50] circular economy,[51] 'Ready for 55',[52] and the 'From Field to Table' strategy.[53] The goal of these programs is to achieve climate neutrality by 2030 by limiting greenhouse gas emissions, increasing the share of energy generated from renewable sources, enhancing the protection of water and soil, and biodiversity, for example, by planting forests and creating legally protected areas, such as Natura 2000 sites, effectively using raw materials, thus minimising the amount of waste produced, and promoting sustainable production and consumption of healthy food.

In Polish law, the need to protect the environment in accordance with the sustainable development principle is enshrined in Article 5 of the Constitution. It is accepted in legal doctrine that sustainable development is both a constitutional and directive principle, particularly concerning the obligation to protect the environment. This stems largely from the provision placement in the first chapter of the Constitution.[54] Therefore, the sustainable development principle is regarded as integral to the state's function of environmental protection,[55] with specific obligations outlined for public authority organs. This principle is central to the most significant act concerning environmental protection – EPA. Article 1 of the EPA sets out its objective: to establish environmental protection principles and conditions for using its resources, considering sustainable development principles. Article 3 (50) of the EPA defines it as socio-economic development that integrates political, economic, and social actions while preserving the natural balance and sustainability of basic natural processes, ensuring the satisfaction of community or citizen needs, both now and for future generations.

According to literature on the subject, the concept of sustainable development arose from the need to address environmental concerns threatened by excessive economic growth and the extensive exploitation of resources. Sustainable development is understood to denote economic growth that considers the requirements of environmental protection, societal needs, and the conservation of environmental resources for future generations. Consequently, sustainable development assumes an interdependence and balance of economic growth, the status of the natural environment, and societal development.[56] Thus, sustainable

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[50] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640 final.

[51] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new Circular Economy Action Plan For a cleaner and more competitive Europe, COM(2020) 98 final.

[52] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality, COM(2021) 550 final.

[53] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system, COM(2020) 381 final.

[54] Kielin-Maziarz, J., 'Zasada zrównoważonego rozwoju – uwagi na tle jej miejsca w Konstytucji RP', *Krytyka Prawa*, 2020, Vol. 12, No. 1, pp. 206–228.

[55] Ciechanowicz, J., Mering, L., 'Ochrona środowiska w Konstytucji RP', in: Mik, C. (ed.), *Konstytucja Rzeczypospolitej Polskiej z 1997 roku a członkostwo w Unii Europejskiej*, Toruń, 1999.

[56] See more: Zabłocki, G., *Rozwój zrównoważony idee, efekty, kontrowersje*, Toruń, 2002, p. 42; Gruszecki, K., *Prawo ochrony środowiska. Komentarz*, 6th ed., LEX WKP, 2022.

development is a three-component concept comprising economic, social, and ecological aspects. It includes not only nature conservation and the development of spatial order but also considerations for proper social and civilizational development. The sustainable development principle considers constitutional values, proposing an economic model that consciously shapes the relationship between economic growth, environmental protection, and quality of life, corresponding to the interpretation of natural balance provided by the law. This term is defined as a state of balance in the mutual impacts exerted by humans, components of animate nature, and a system of habitat conditions created by components of inanimate nature (Article 5(32) of EPA).[57]

These considerations provide the basis for concluding that every entity is obliged to care for the status of environmental elements in accordance with the sustainable development principle and other derived environmental protection principles. All actions concerning the use of environmental resources should comply with the rules defined in environmental protection law. An analysis of these rules should start with the principle of comprehensiveness expressed in Article 5 of EPA, which states that one or several natural elements should be protected while considering the protection of other elements. This means it is unacceptable to protect one element of the environment at the expense of others; the environment should be protected as a whole. The next rule of prevention is defined in Article 6(1) of EPA, which obliges every entity starting activities with a potential negative impact on the environment to prevent such impacts. The precautionary principle, an extension of the prevention principle, is stated in Article 6(2) of EPA: 'Whoever starts an activity whose negative environmental impact is not fully explored is obliged, being guided by caution, to take every possible preventive measure.' Therefore, steps should be taken to prevent pollution and degradation of environmental elements even when any negative effects of one's actions cannot be predicted. It is also important to mention the 'polluter pays' principle, expressed in Article 7(1) and (2) of EPA, understood in a dual way: firstly, obligating every environmental polluter to bear the cost of removing pollution effects; secondly, requiring every potential polluter to bear the cost of preventing pollution. The third principle involves integrating environmental protection law into the state's strategic and planning documents. According to Article 8 of EPA, policies, strategies, plans, or programmes concerning, in particular, industry, power industry, transport, telecommunication, water management, waste management, spatial management, forestry, agriculture, fishery, tourism, and land use should take into account environmental protection and sustainable development principles.[58]

The policy and programmes of environmental protection are regulated in Polish law under the EPA, specifically in Section III of the same name. According to Article 13 of this act, environmental protection policy consists of a group of measures aimed at creating conditions essential for environmental protection, in accordance with the sustainable development principle. Agenda 2030 is one of the latest programmes

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[57] Krajewski, P., op. cit., p. 66; Dąbrowski, M., op. cit., p. 228; Zębek, E., 'Relacje człowiek – środowisko w aspekcie ekologicznym i prawnym', in: Górecki, R. (ed.), *Człowiek a środowisko*, Olsztyn, 2020, pp. 49–58.

[58] See also: Zębek, E., 'Relacje człowiek – środowisko…', op. cit., p. 57; Zębek, E., *Gospodarka odpadami w ujęciu prawnym i środowiskowym*, Olsztyn, 2018, p. 112 et seq.

that implement ecological policy compliance with this principle in the EU and Poland.[59] This document includes 17 goals of sustainable development and 169 tasks associated with them, addressing three dimensions of sustainable development: economic, social, and environmental. The most important goals pursued as part of Agenda 2030, taking into consideration each person's right to the environment and its protection in accordance with the sustainable development principle, include: Goal 6: Ensure availability and sustainable management of water and sanitation for all; Goal 7: Ensure access to affordable, reliable, sustainable and modern energy for all; Goal 13: Take urgent action to combat climate change and its impacts; Goal 15: Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss; Goal 17: Strengthen the means of implementation and revitalize the global partnership for sustainable development.[60]

In pursuit of these goals, especially Goal 6, Poland has committed to providing universal and equitable access to safe drinking water at an affordable price by 2030 as well as access to proper sanitary and hygienic conditions. Furthermore, by 2030, Poland aims to improve water quality by reducing pollution, eliminating dumpsites, limiting the use of harmful chemicals and other hazardous materials as well as halving the amount of raw wastewater and significantly increasing the rate of recycling and safe reuse of materials on a global scale. These tasks also include a considerable increase in the effectiveness of water use across all sectors and ensuring sustainable intake and resources of fresh water to address the water shortage issue. The goals also encompass implementation of integrated water resources management at all levels, including through appropriate cross-border cooperation as well as protecting and restoring water-dependent ecosystems, including mountainous areas, forests, wetlands, rivers, lakes, and aquifers. In pursuit of Goal 13, Poland should enhance its adaptability and resilience to climate threats and natural disasters, including integrating measures aimed at preventing climate change into policies, strategies, and plans as well as increasing the level of education, awareness, and human and institutional capacity to address, adapt to, and mitigate the effects of climate change, and implementing early warning systems. The pursuit of Goal 15 of Agenda 2030 should include providing protection, restoration, and sustainable use of land and inland freshwater ecosystems, particularly forests, wetlands, mountainous areas, and drylands, in line with international commitments. These measures should include promoting sustainable management of all forest types, containing the deforestation processes, restoring degraded forests, and significantly intensifying afforestation and reforestation on a global scale. Another goal in this area includes combating desertification and restoring degraded areas and soil, including lands affected by desertification, droughts, and floods. The protection of mountainous ecosystems, including their biodiversity, should be ensured to increase their capacity to provide benefits necessary for achieving sustainable development.[61]

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[59] The 2030 Agenda.

[60] Climate and Sustainable Development Agenda, http://www.un.org.pl/files/170/Agenda2030PL_pl-5.pdf [accessed on 30 November 2022].

[61] Ministry of Development and Technology, *Sustainable Development Goals*, https://www.gov.pl/web/rozwoj-technologia/cele-zrownowazonego-rozwoju [accessed on 30 November 2022].

CONCLUSIONS

This analysis demonstrates that the fundamental rights and obligations of citizens and public authorities concerning the environment are comprehensively regulated in the Constitution of the Republic of Poland and other legislative acts related to environmental protection. These regulations are grounded in the Universal Declaration of Human Rights, the Declaration of Rio de Janeiro as well as conventions, EU programmes, and directives that have been incorporated into Polish law. These rights form a group of subjective rights and entitlements tied to essential environmental elements, such as the right to clean water, soil, and air. Therefore, the right to a 'clean environment' is closely linked to the fundamental human right to life, as no life or socio-economic development can exist on Earth without environmental resources. These rights are guaranteed by the Constitution and are enacted by public authorities through the provision of ecological security and the protection of environmental resources in accordance with the sustainable development principle. As outlined in the Environmental Protection Act of 2001, these rights are exercised through the common use of the environment, which includes the use of public waters and forests, ordinary use by landowners, and special use by business entities. Additionally, every citizen has obligations towards the environment, as they must care for environmental resources and use them following environmental protection principles.

In light of the aspects discussed – human rights to a clean environment, obligations of citizens and public authorities towards the environment, and environmental protection following the sustainable development principle – it is clear that these elements are closely interconnected. There are three categories of relationships: (1) human-environment, (2) citizen-environment, and (3) public authorities-environment. The first category addresses the assurance of basic constitutional human rights to a 'clean environment', i.e., access to environmental resources essential for life and proper functioning. However, this is only feasible when environmental resources are adequate and of acceptable quality, and when, according to the sustainable development principle, they are maintained in a state of natural balance, allowing them to be regenerated for present and future generations. The principle of ecological justice dictates that environmental resources should be accessible equally across intragenerational and intergenerational dimensions. The citizen-environment relationship pertains to the use of environmental resources not only for daily needs (common and ordinary use) but also for business activities (special use). On one hand, a citizen has the right to utilize environmental resources for various purposes, including business activities, and on the other hand, when using these resources, they are obliged to protect them following the legal provisions for environmental protection (sustainable development, comprehensiveness, prevention, and precaution). If an activity negatively impacts the environment, the individual is also required to obtain the necessary administrative permissions for such activities regarding installations and emissions and to bear the costs of environmental pollution and its prevention, according to the 'polluter pays' principle. Without adequate and quality environmental resources, their use, even for

industrial purposes, becomes unfeasible. Therefore, environmental protection also has a practical aspect in this context. The relationship between public authorities and the environment concerns their obligations regarding environmental protection, not only set forth in the Constitution of the Republic of Poland but also in the relevant legal acts. These obligations are extensively treated in Polish law, beginning with ensuring ecological security, providing society with information on the status and protection of the environment, and involving them in developing environmental programmes, plans, and policies, to issuing administrative decisions permitting environmental use and overseeing the observance of environmental protection regulations. Thus, it is the responsibility of public authorities to meet societal needs by providing environmental resources of sufficient quality and quantity. This is achieved through the legal protection of environmental resources in accordance with the sustainable development principle, which aims to satisfy society's basic needs and those related to economic growth with minimal environmental impact. This must be accomplished in a manner that balances the human right to a 'clean environment' with the environmental right to the continuity and sustainability of resources (natural balance) while simultaneously ensuring economic growth.

The sustainable development concept in Poland and other EU Member States is currently implemented as part of Agenda 2030, whose main goals address two overlapping areas: access to drinking water and climate change, which contribute to the semi-desertification of land and water shortages. Thus, it is justified to link the pursuit of these goals with actions aimed at the sustainable management of ecosystems, particularly forests and wetlands, to mitigate water deficits. The goals of sustainable development are currently pursued through EU programmes such as the European Green Deal, the circular economy, 'Ready for 55', and the 'From Field to Table' strategy. These initiatives focus on achieving climate neutrality and adapting to climate change, protecting water and soil, preserving biodiversity, transforming into efficient raw material management, reducing waste production, and promoting sustainable production and consumption of healthy food. All these measures contribute to mitigating climate change and ensuring human rights to environmental resources of sufficient quality and quantity. Therefore, it can be asserted that the goals of sustainable development outlined in Agenda 2030 and EU programmes are closely linked to the protection of environmental resources essential for the sustenance and flourishing of humanity, i.e. guaranteeing the right to life and to a 'clean environment'.

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Cite as:

Zębek E. (2024) '*Constitutional rights and obligations of citizens towards the environment under the conditions of sustainable development*', Ius Novum (Vol. 18) 1, 118–135. DOI 10.2478/in-2024-0007

Ius Novum
2024, vol. 18, no. 1, pp. 136–152

PERMISSION FOR MUNICIPALITIES TO ESTABLISH AND FINANCE PRIZES AND AWARDS FOR ATHLETES IN ELECTRONIC SPORTS

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DOI 10.2478/in-2024-0008

Abstract
The article, original in nature, was devoted to the issue of awards and prizes for e-sports players. The motivational financial instruments in question are regulated in the Sports Law, specifically in Article 31. The author has attempted to solve the legal problem of finding an answer to the question of the legal possibility for municipalities to establish and finance prizes and awards for e-sports players under Article 31 of the Sports Law. Due to the singular and causal works in the field of e-sports funding, which do not address the issue of establishing and funding prizes and awards for e-sports players under Article 31 of the Sports Act, the elaboration of this issue within the framework of the article will, in the author's opinion, undoubtedly enrich the current literature on the subject.
The introductory considerations focus on presenting the essence of the definition of sport and attempt to qualify e-sports as a sport under the Sports Act, which is significant for the possibility of local authorities establishing prizes and awards. The key views of the literature, judicial decisions, and the state of the law in this area were presented. Investigations in this area have led to the conclusion that, with a few reservations, it is possible to qualify e-sport as a sport. Subsequently, the focus was on the legal aspects concerning the possibility for municipalities to establish and finance prizes and awards for e-sports players. The problem concerning the understanding of competition under the Sports Act was resolved, and it was pointed out that e-sports players, despite the lack of a Polish e-sports association, can participate in sports competitions under the Sports Act. In addition, the problematic premise concerning the importance of a given sport for a local authority has been clarified. The final considerations in this area have allowed *de lege ferenda* postulates to be formulated.

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The analysis is based on legal norms and statements of doctrine and jurisprudence. The article contains considerations concerning the normative and dogmatic sphere as well as the sphere of law application by administrative courts. The research has a national character. In this article, the dogmatic-legal method has been applied, consisting of the analysis of legal regulations on the establishment and financing of awards and prizes for players of electronic sports.
The subject matter discussed is divided into several main editorial units. The different parts correspond to the main outline of the problem and its relation to important scientific and practical issues.

Keywords: e-sports, sports awards and prizes, sports performance, sports competition, e-sports player

INTRODUCTION

Electronic sport, also referred to as 'e-sport', is undoubtedly a phenomenon of our times, particularly popular among young people. Practically every year, in every major city in Poland, more or less professional tournaments in this field involve players and, above all, fans from local communities. In Poland, the most famous rivalry occurs in Katowice, under the name of Intel Extreme Masters, where the sum of prizes in recent years has exceeded USD 1 million per year.[1] It is worth mentioning that, in 2022, it was estimated that, globally, the e-sports industry generated between USD 1.8 billion and USD 3.2 billion in profit,[2] some of which went to professional players and coaches.

The growing public interest in e-sports has led to the planned inclusion of e-sports games in the Summer Olympics, scheduled to be held in Paris in 2024.[3]

Despite the fact that e-sport has become an important part of social life nowadays, it has not yet been comprehensively regulated or even legally defined in Polish law (unlike in South Korea[4] or France[5]). This state of affairs implies a number of legal problems, particularly regarding the permissibility of financing e-sports from public funds, including those at the disposal of local government units.

The only regulation relating to the subject matter of this article is the Sports Act of 25 June 2010[6] (hereinafter also referred to as 'the Sports Act'), particularly as amended following entry into force of the Act of 20 July 2017 amending the Sports

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1 https://intelextrememasters.com [accessed on 5 December 2022].

2 https://www.pb.pl/ile-jest-wart-obecnie-polski-rynek-esportu-1104979 [accessed on 5 December 2022].

3 https://conowego.pl/testy-i-recenzje/na-igrzyskach-olimpijskich-moze-zobaczymy-e-sport-ale-bez-brutalnych-gier-23802 [accessed on 7 January 2023]; https://www.polsatsport.pl/wiadomosc/2017-08-09/paryz-chce-esportu-na-igrzyskach-olimpijskich-w-2024-roku/ [accessed on 7 January 2023].

4 More on this topic, see Sosnowski, W., 'Prawne i organizacyjne uwarunkowania rozwoju e-sportu w Republice Korei (Korei Południowej)', in: Klimczyk, Ł., Leciak, M. (eds), *E-sport. Aspekty prawne*, Warszawa, 2020, pp. 15–30; Grzybczyk, K., 'E-sport w Korei Południowej', in: Grzybczyk, K. (ed.), *E-sport. Prawne aspekty*, Warszawa, 2021, pp. 296–320.

5 Kunc-Urbańczyk, K., 'Analiza prawna regulacji e-sportowych we Francji', in: Grzybczyk, K. (ed.), *E-sport. Prawne aspekty*, Warszawa, 2021, p. 321 et seq.

6 That is Journal of Laws of 2022, item 1599, as amended.

Act and the Act on the disclosure of information on documents of state security organs from 1944–1990 and the content of such documents.[7] As a result of this amendment, the following paragraph 1a was added to Article 2: '1a. Competition based on intellectual activity, aimed at achieving a sporting result, shall also be regarded as sport', which became the basis for legal considerations about the possibility of qualifying e-sport as a sport under this Act, and consequently, about the possibility of funding e-sport from public funds.

LEGAL CLASSIFICATION OF E-SPORTS AS A SPORT WITHIN THE MEANING OF ART. 2(1A) OF THE SPORTS ACT

As we begin our discussion of sport, it should be mentioned that the etymology of the word 'sport' derives from the Latin word 'disporto', which can be translated as 'outside the gate' ('porta' – 'gate', 'dis' – 'outside'), used to describe games organised for city dwellers outside the walls.[8] In Poland, the word 'sport' was first documented in 1856 by the Polish prose writer, poet and publicist Konstanty Gaszyński in the one-act comedy 'Horse Racing in Warsaw'.[9] The literature indicates that sport is a conscious human activity consisting of the following elements[10]:

(1) individual or team competition (sometimes with the participation of animals) in overcoming time, space, natural or artificial obstacles and an opponent (these elements may occur together or separately);
(2) improvement of physical qualities as well as mental strength;
(3) voluntary participation;
(4) subordination of participants to the rules of the game;
(5) no direct non-sporting objectives.

Sport as a legal term has seen a definition, which can be found in Article 2(1) of the Sports Act, where it is defined that sport is any form of physical activity which, through *ad hoc* or organised participation, influences the development or improvement of physical and mental fitness, the development of social relations or the achievement of sporting results at any level. Competition based on intellectual activity with the aim of achieving a sporting result is also regarded as sport (Article 2(1a) of the Sports Act). Furthermore, sport, together with physical education and physical rehabilitation, makes up physical culture. The above legal definition, as seen from the explanatory memorandum to the draft Sports Act of 28 August 2009,[11] takes as its starting point the definition of sport established by the Council of Europe and used by the European Commission in formulating the European Union's policy in this area in the White Book on Sport, according to which

[7] Journal of Laws item. 1600.
[8] Fundowicz, S., *Prawo sportowe,* Warszawa, 2013, p. 15.
[9] Kazimierczak, A., *Zarys pedagogiki sportu. Podręcznik dla studentów nauk o wychowaniu*, Łódź, 2019, p. 10.
[10] Lipoński, W., *Humanistyczna encyklopedia sportu*, Warszawa, 1987, p. 312.
[11] https://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/2313 [accessed on 7 January 2023].

> 'Sport means any form of physical activity which, through casual or organised participation, influences the development or improvement of physical and mental fitness, the development of social relations or the achievement of sporting results at any level.'[12]

It should be noted that until the amendment of the Sports Act of 20 July 2017, only physical activity was considered as sport, while mental activity was omitted. This approach was problematic, especially when one considers that a number of hitherto recognised intellectual sports had their own sports associations (e.g., the Polish Chess Federation or the Polish Association of Sports Bridge). Thus, the above-mentioned narrow treatment of sport was inadequate and should be assessed as erroneous; therefore, this amendment was essential to include intellectual competition within the framework of sport.

When considering the *ratio legis* of this amendment, it should be emphasised that the explanatory memorandum to the Act of 20 July 2017[13] indicates that

> 'the bill amending the Sports Act (…) expands the definition of sport to include intellectual activity. The current regulation focuses exclusively on physical activity. The inclusion of sports such as chess, checkers or sports bridge in this category may have been questionable until now.[14] The proposed amendment will clarify this issue. In addition, the extension of the definition of sport to include intellectual activity will allow the highly popular category of electronic sports (e-sports) to be included in the regulation.'[15]

With the above in mind, the legal possibility of e-sports qualifying as a sport may be fundamental to the admissibility of municipal funding for, among other things, awards and prizes for e-sports players.

Thus, the question arises – can e-sports be qualified as sport under the Sports Act?

In answering this question, it is first necessary to analyse whether e-sports meet the statutorily defined prerequisites expressed in Article 2(1a) of the Sports Act. This provision contains three elements that must occur cumulatively for an intellectual activity to qualify as a sport. These are:

(1) competition,
(2) the basis (of the competition) of the intellectual activity, and
(3) the objective (of the competition based on intellectual activity), aimed at achieving a sporting result.

It is worth noting that the legislator does not explain any of the above-mentioned concepts within the Sports Act. Thus, there are no legal definitions of them, which would significantly facilitate the interpretation process. It is therefore necessary to consider the linguistic interpretation of the provision and decode the content based on the common meaning of the term in question. According to the colloquial understanding of the word 'competition', presented in the 'Great Dictionary of

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[12] Ibidem.

[13] Journal of Laws 2017, item. 1600.

[14] Badura, M., Basiński, H., Kałużny, G., Wojcieszak, M., 'Art. 2', in: Badura, M., Basiński, H., Kałużny, G., Wojcieszak, M. (eds), *Ustawa o sporcie. Komentarz*, Warszawa, Lex/el. 2011.

[15] https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1410 [accessed on 7 January 2023].

the Polish Language', competition is considered as 'striving to gain priority in something over another person or group of persons'.[16] In addition, for the purposes of interpreting this concept, one may consider using the legal definition of the term 'sports competition' found in the already repealed Act of 29 July 2005 on Qualified Sport.[17] Pursuant to Article 3(4) of that Act, 'sports competition is an individual or collective rivalry of persons, aiming at achieving results appropriate for a given sport discipline.'

The literature[18] indicates that the term 'competition' can be considered in two ways:

(1) narrowly, i.e., competitions can only be organised by sports associations, having regard to Articles 7 and 13 of the Sports Act,
(2) broadly, i.e., competitions may be organised by any entity that sets the rules of competition.

Based on a linguistic and systemic interpretation, one must conclude that it follows from Article 2(1a) in conjunction with Articles 7 and 13 of the Sports Act that competitions may be organised by any entity that establishes the rules of competition.

Furthermore, it should be noted that within the framework of a competition, which may be amateur or professional, in order for a given competition to be recognised as a sport, it must have established rules as its basis. In case of electronic sports, the rules of competition are drawn up by private law entities and, as emphasised in the literature, have the character of model contracts within the meaning of Articles 384-3854 of the Civil Code Act of 23 March 1964.[19]

In conclusion, by competition the author of this paper will consider individual or collective rivalry within the framework of predetermined rules, with the ultimate goal of achieving a specific result.

Another concept to be clarified is intellectual activity. According to the 'Great Dictionary of the Polish Language', 'activity' means 'undertaking activities of a certain kind and performing them most often in a lively, intensive manner', while 'intellectual' is related to the intellect, i.e., 'the entire mental capacity and knowledge of a person'. Thus, in the colloquial sense, intellectual activity is undertaking of activities of a certain type, related to the use of a person's mental faculties and knowledge. It is worth noting that within mental games, e.g., within a game of checkers or chess, some physical activity is also performed, in the form of, for example, moving pawns. However, the main activity will be the intellectual one, based on the player's well-thought-out moves within the framework of a chosen

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[16] https://wsjp.pl/haslo/podglad/10570/wspolzawodnictwo [accessed on 23 December 2022]; similarly in Sobol, E., *Słownik języka polskiego PWN*, Warszawa, 2007, p. 1173, it is explained that competition is 'the vying of several individuals or groups for priority in something, to gain something'.

[17] Journal of Laws No. 155, item. 1298, as amended; see also: Cajsel, W., 'Problemy prawne zatrudnienia w e-sporcie', in: Klimczyk, Ł., Leciak, M. (eds), *E-sport. Aspekty prawne*, Warszawa, 2020, p. 51.

[18] Biliński, M., *Sport elektroniczny. Charakter prawny*, Warszawa, 2021, p. 46.

[19] Słowik, S., 'Analiza regulaminów turniejów e-sportowych', in: Grzybczyk, K. (eds), *E-sport. Prawne aspekty*, Warszawa, 2021, p. 174 et seq.

strategy, while the physical one will be somewhat incidental. Similarly, the Voivodship Administrative Court in Warsaw (hereinafter: 'WSA in Warsaw') ruled in a judgment of 27 March 2019 that:

> 'It should also be borne in mind that a professional approach to playing chess, checkers, sports bridge as well as electronic sports requires participants to be physically active. In addition, games of chess, checkers, sports bridge and electronic sports develop reaction speed and strategic thinking. It should be assumed that not only physical activity, but also intellectual activity, can lead to a sporting result and, in addition, foster the strengthening of social bonds or self-esteem. This justifies extending the tax exemption also to winnings from e-sports competitions.'[20]

In summary – by basing (competition) on intellectual activity, the author of this thesis will consider competition related to undertaking activities within the framework of a chosen strategy, related to the use of a person's mental abilities and knowledge.

The last concept to be clarified is the goal (of competition), aimed at achieving a sporting result. An objective, according to the colloquial definition, is 'a result that one wants to achieve through some action',[21] while the result is 'that which has come about as a consequence of some action, event or process'.[22] That is to say, within the framework of this premise, the result intended to be achieved, which will be the achievement of a certain outcome of a given competition of athletes, will be relevant.

It is noteworthy that, when defining sport, the legislator used, within the framework of its last constructive premise, the notion of 'sporting result', which is a logical error when creating the provision (*idem per idem* error, i.e. 'the notion of sport is translated by means of a related and equally indefinite in terms of content notion of sporting results').[23] As emphasised in the literature – rightly, in the opinion of the author of this article – the last condition is superfluous, due to the fact that its meaning has already been consumed by the first premise, i.e. competition.[24]

On the sidelines of the premise defining sport and concerning the sporting result, the literature points out that achieving a significant result in e-sports competition is connected with significant financial gratifications (e.g., for winning a tournament)

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[20] Judgment of the Voivodship Administrative Court in Warsaw of 27 March 2019, III SA/Wa 1079/18, LEX No. 2691347.

[21] https://wsjp.pl/haslo/podglad/26528/cel/4641329/dzialan [accessed on 23 December 2022]; similarly in Dubisz, S., *Uniwersalny Słownik języka polskiego PWN. A-J*, Warszawa, 2008, p. 377, it is explained that a goal is 'what you are aiming for, what you are aiming at, what you want to achieve'.

[22] https://wsjp.pl/haslo/podglad/3829/wynik/4817815/dzialan [accessed on 23 December 2022]; similarly in Sobol, E., *Słownik języka polskiego PWN*, Warszawa, 2007, p. 1206, it is explained that a goal is 'what results from some activity, work, phenomenon'.

[23] This problem was highlighted in the legal opinion of 27 April 2017 on the government's draft act on amendments to the Act on Sports and the Act on Disclosure of Information on Documents of State Security Organs from 1944–1990 and the Content of Such Documents (Sejm print no. 1410), drawn up by the Bureau of Sejm Analyses, https://www.sejm.gov.pl/sejm8.nsf/opinieBAS.xsp?nr=1410 [accessed on 27 December 2022]; see also: Badura, M. et al., 'Art. 2…', op. cit.

[24] Biliński, M., *Sport elektroniczny. Charakter prawny*, Warszawa, 2021, p. 50.

as well as the possibility of concluding contracts with professional e-sports teams or sponsorship agreements (e.g., with manufacturers of equipment for gamers).[25]

With the above in mind, if the statutory criteria are met, it will be possible to recognise e-sports as sports within the meaning of the Sports Act. However, it should be noted that the decisive factor in this respect will be the nature of the specific competition, and therefore not every e-sports competition will be a sport within the meaning of the Sports Act. What will be important, therefore, is for the competition to be based on specific rules known to the competitors, based on intellectual activity for the most part, and leading to the achievement of a set goal, which is the assumed result of the competition. For example, these criteria are met by competition in games such as Starcraft[26] or League of Legends,[27] where there are e-sports leagues, playing in a seasonal system, and competition in these games is based on the implementation of well-thought-out strategies.[28]

The above conclusion also seems to be accepted by court rulings. In the already quoted ruling of the WSA in Warsaw of 27 March 2019, the court emphasised in its reasoning: 'It is not the case that automatically all electronic games should be considered as sport. What is relevant here is the wording of the provision of Article 2(1a) of the Sports Act 2010 – competition based on intellectual activity, not competition in all types of electronic games, can be considered as sport.'[29]

In view of the foregoing argument, bearing in mind the rather general premises arising from the provision of Article 2(1a) of the Sports Act, one must conclude that e-sports should, in principle, be regarded as sports under the Act.

AWARDS AND PRIZES FOR ELECTRONIC SPORTS PLAYERS

In the previous chapter it was explained that e-sports can be considered a sport under Polish legislation. It is therefore necessary to move on to the solution of the eponymous problem, namely – whether it is possible for municipalities to establish and finance prizes and awards for e-sports players under Article 31 of the Sports Act.

Article 31(1) of the Sports Act stipulates that prizes and awards may be established and financed by local authorities (including municipalities) for natural persons for sporting achievements (i.e., athletes). We can see that only natural persons may be the beneficiaries of prizes and awards for athletes. *A contrario*, legal persons,

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[25] Myrna, S., 'E-sport w świetle nowelizacji ustawy o sporcie', *Prawo mediów elektronicznych*, 2020, No. 1, p. 18.

[26] Kopańko, K., *Polski e-sport*, Kraków, 2021, pp. 70–90.

[27] Ludyga, M., 'Czy e-sport jest sportem?', in: Grzybczyk, K. (ed.), *E-sport. Prawne aspekty*, Warszawa, 2021, pp. 18–20; see also Kopańko, K., *Polski e-sport*…, op. cit., p. 390 et seq.

[28] See more on e-sports leagues in: Brzozowski, M., 'Organizacja e-sportowa', in: Grzybczyk, K. (ed.), *E-sport. Prawne aspekty*, Warszawa, 2021, p. 56 et seq.

[29] Judgment of the Voivodship Administrative Court in Warsaw of 27 March 2019, III SA/Wa 1079/18, LEX No. 2691347.

associations or sports clubs cannot receive these gratuities.[30] Therefore, in order to solve the problem posed, the author will strive to clarify the concept of an athlete.

In colloquial language, the concept of a competitor is often equated with the concept of an athlete, but it is not legitimate action to equate it, as the latter term has a broader meaning. As pointed out in the literature on the subject, the term 'sportsman' is not limited to an individual taking part in a competition, but means in general anyone practising sport.[31] It is futile to find in the current Polish legislation any explanation of the term 'athlete'. According to the explanatory memorandum to the draft Sports Act,

> 'the terms 'physical culture', 'sports competition', or 'sports club', 'national team' or 'athlete' have been abandoned, as the definitions so far have not always correctly and comprehensively described reality. Moreover, these concepts are commonly understood, while it is difficult to see the need to give them a different, special meaning from the perspective of the proposed law.[32]

For the sake of insight, however, the author will present the statutory definitions of a competitor that were previously applicable. Article 3(6) of the Physical Culture Act of 18 January 1996[33] provides that 'a competitor is a person practising a specific sport discipline.' The act further distinguished between professional players, who received a salary, and amateur players, who could only receive a stipend. Another sports regulation, i.e. Article 3(5) of the Qualified Sports Act of 29 July 2005,[34] specified that 'a competitor is a person practising a specific sport discipline and holding a competitor's licence entitling them to participate in sports competition.'

Although the Sports Act currently in force does not make a distinction between amateur and professional athletes, internal acts do, indicating that amateur athletes will be those athletes who do not have a contract with a sports club.[35]

With these considerations in mind, an e-sports competitor should be defined as a natural person taking part in e-sports competition (based on intellectual activity), either amateur or professional.

Further terms to be clarified are the terms 'prize' and 'award'. It is worth noting that the Sports Act also lacks a legal definition of these terms. The PWN Dictionary of the Polish Language (*Słownik języka polskiego PWN*) considers an award to be 'a diploma, decoration, money or valuable object, being a form of recognition or distinction for an achievement, victory in a competition, in a contest, etc.'[36] A distinction, on the other hand, is 'a prize in a competition, lower than the first

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[30] Kuczkowski, P., 'Stypendium sportowe dla zawodników ustanowione i finansowane przez gminy w orzecznictwie sądów administracyjnych – zagadnienia wybrane', *Roczniki Prawa i Administracji*, 2021, Issue 1, pp. 64–65.

[31] Fundowicz, S., *Prawo sportowe …*, op. cit., p. 41.

[32] https://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/2313 [accessed on 2 January 2023].

[33] That is Journal of Laws of 2007, No. 226, item 1675, as amended.

[34] Journal of Laws No. 155, item 1298.

[35] Biliński, M., 'Uczestnicy rynku sportowego', in: Leciak, M. (ed.), *Prawo sportowe*, Warszawa, 2018, p. 240.

[36] https://sjp.pwn.pl/szukaj/nagroda.html [accessed on 2 January 2023]; similarly in Sobol, E., *Słownik języka polskiego PWN*, Warszawa, 2005, p. 497, it is explained that a prize is

prizes.'[37] From the aforementioned colloquial understanding of both terms, we can conclude that in terms of meaning they are very close to each other. In the dictionary definitions presented in this paper, a distinction is considered to be somewhat synonymous with a prize (a prize lower than the first prizes), albeit of lesser value. In doctrine, a sports award is defined as a unilateral, non-returnable monetary or in-kind benefit granted for the achievement of a specific sporting result.[38] Thus, an award may be a gratification expressed in money (monetary award), or expressed in things (prize in kind) for the achievement of a sporting result. For the definition of the term 'award', the already repealed Ordinance of the Minister of Sport of 22 September 2006[39] on Distinctions and Prizes for Athletes, where awards for athletes were defined as badges, cups and diplomas, is useful. The sports law literature indicates that a distinction is a type of consolation prize.[40]

Bearing in mind the above terminological findings, which will be relevant to the solution of the problem posed in this chapter, it is necessary to present the statutory regulations for the establishment and financing of awards and prizes for e-athletes by municipalities. Pursuant to Article 31(1) of the Sports Act, 'Local government units[41] may establish and finance periodic sports scholarships and prizes and awards to individuals for sports performance.' In addition, Article 31(3) of the Sports Act includes a specific authorisation to issue a normative act in the form of a resolution for the governing body (also a municipality), defining, inter alia, detailed principles, procedures for granting and withdrawing as well as types and amounts of prizes and distinctions, taking into account the importance of a given sport for that local government unit and the sports result achieved. An analysis of the aforementioned provisions leads to the conclusion that a municipality, as a local government unit (hereinafter also referred to as 'LGU'), may establish and finance prizes and distinctions for athletes who are natural persons and who achieve sporting results within a given sport which is important for that local government unit. The jurisprudence of the administrative courts[42] and the literature on the subject[43] state that a resolution issued pursuant to Article 31(3) of the Sports Act

'a monetary sum, a diploma, a distinction, etc., which is a form of remuneration, recognition or distinction, for good results, achievements, victory in a competition, contest, etc.'

37 https://sjp.pwn.pl/szukaj/wyroznienie.html [accessed on 2 January 2023]; similarly in Sobol, E., *Słownik języka polskiego PWN*, Warszawa, 2007, p. 1215, it is explained that an award is 'a reward for good performance in studies, work, sports, etc., lower than the first awards'.

38 Tetłak, K., 'Finanse publiczne i podatki w sporcie', in: Leciak, M. (ed.), *Prawo*…, op. cit., pp. 257–258.

39 Journal of Laws No. 181, item 1332.

40 Badura, M., Basiński, H., Kałużny, G., Wojcieszak, M., 'Art. 31…', op. cit.

41 Under Polish constitutional law, local government units include municipalities, districts and voivodships.

42 It is an act of local law because it is of a general nature, being addressed to a circle of entities not specified by name, and abstract because it pertains to repeated factual situations; see more: Judgment of the Supreme Administrative Court of 22 March 2022, II GSK 1357/20, LEX No. 3325849.

43 Kuczkowski, P., 'Glosa aprobująca do wyroku Naczelnego Sądu Administracyjnego z dnia 1 grudnia 2017 r. Sygn. akt II GSK 282/16', *Roczniki Prawa i Administracji*, 2021, Issue 4, p. 289.

is an act of local law,[44] which has significant consequences in the event that this normative act is declared invalid (with *ex tunc* effect) by supervisory bodies or the provincial administrative court.[45] In addition, the provisions of the Act of 27 August 2009 on Public Finances[46] state that public expenditures should primarily be made in accordance with the provisions on particular types of expenditures and in an expedient manner. This indicates that there needs to be a legal basis for making the expenditure, for example norms of a material legal nature, contained in acts of both generally binding and internal law.[47] Purposefulness, in turn, means that the expenditure must be incurred as necessary for the performance of a public task.[48]

It is therefore essential for the LGU to correctly draft the resolution in formal and substantive terms, within the limits of statutory authority.[49] The present work may be helpful in this respect and provide not only a theoretical, but also a practical solution to a problem, which – in the case of prizes and awards for e-sports players – has not yet seen any publication.

Turning to the solution of the eponymous issue, it should be emphasised that Article 31(1) of the Sports Act indicates that prizes and awards may be granted to natural persons for their sports performance. Firstly, it follows from this provision, as already mentioned above, that both athletes with amateur status and athletes with professional status (awarding prizes to natural persons without specifying the status of an athlete) can be included in the scope. Secondly, the athletes must have achieved a specific sporting result, as determined by the LGU. The concept of sporting result has not been clarified by the legislator and, as is clear from the colloquial understanding of this concept presented in this thesis, a result is 'what has come about as a result of some action, event or process'.[50] Thus, a sporting result will be the result of a specific action of an e-sports player in competition. It is the municipality, within the framework of an important discretionary power, that has the prerogative to determine the sports result that will entitle the athlete to receive either a prize or an award. E.J. Krześniak, states that it is not necessary for the sporting results to be outstanding or high in any way.[51] Such a view is most

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[44] The prerequisites for a resolution to be considered an act of local law are set out, *inter alia*, in: Chmaj, M., Herc, G., 'Akty prawa miejscowego organów samorządu terytorialnego oraz procedura uchwałodawcza', in: Chmaj, M. (ed.), *Ustrój samorządu terytorialnego w Polsce*, Warszawa, 2005, p. 186; Bułajewski, S., 'Rada gminy jako organ stanowiący', in: Chmaj, M. (ed.), *Status prawny rady gminy*, Warszawa, 2012, pp. 88–124, see more in: Dąbek, D., *Prawo miejscowe*, Warszawa, 2020, pp. 85–103.

[45] Chmielnicki, P., *Akty nadzoru nad działalnością samorządu terytorialnego w Polsce*, Warszawa, 2006, pp. 212–22.

[46] Journal of Laws of 2022, item 1634, as amended.

[47] Cilak, M., 'Art. 44', in: Ofiarski, Z. (ed.), *Ustawa o finansach publicznych. Komentarz*, LEX/el. 2021.

[48] Kleszczewski, K., 'Art. 44', in: Dzwonkowski, H., Gołębiowski, G. (eds), *Ustawa o finansach publicznych. Komentarz prawno-finansowy*, Warszawa, 2014, LEX/el. 2021.

[49] Kaczor, J., 'Delegacje ustawowe do stanowienia aktów prawa miejscowego w zakresie finansowania sportu', in: Babczuk, A., Talik, A., *Finasowanie sportu ze środków publicznych*, Warszawa, 2014, pp. 99–104.

[50] https://wsjp.pl/haslo/podglad/3829/wynik/4817815/dzialan [accessed on 23 December 2022].

[51] Krześniak, E.J., *Ustawa o sporcie. Komentarz*, Warszawa, 2020, Article 31.

legitimate if one takes into account the criterion of the result necessary for a coach to receive an award. Pursuant to Article 31(2) of the Sports Act, awards may be established and financed for coaches who provide training to athletes achieving high sporting results in international sports competition or national sports competition. Thus, in this case, the legislator has specified that these must be high results, and for that within the framework of international sport competition or national sport competition.[52]

What is of significance in the present work, is that under Article 7(1) of the Sports Act, 'In order to organise and conduct competition in a given sport, a Polish Sports Association may be established', and under Article 13(1) of the Sports Act, the Polish Sports Association has the exclusive right to organise and conduct sports competition for the title of Polish Champion and Polish Cup in a given sport (paragraph 1). At this point the question should be asked – since there is currently no Polish e-sports Association, is it possible for an e-sports competitor to achieve a sporting result (within the framework of a competition)?

A linguistic interpretation of the provision of Article 7(1) of the Sports Act leads to the conclusion that the legislator has granted, inter alia, the Polish Sports Association (*Polski Związek Sportowy*, hereinafter 'Polish Sports Association' or 'PSA') the right to organise and conduct the competition, however, it does not follow from this provision that the association is exclusively authorised in this respect. The line of reasoning according to which the Polish Sports Association does not have the exclusive right to organise and conduct the competition is endorsed by W. Cajsel, who points out that in view of 'the use of the term "may" by the legislator, it follows that a situation in which competition in a given sport is conducted by an entity other than a Polish Sports Association is permissible'.[53] B. Ulijasz, emphasises that the PSA has the exclusive right to organise and conduct competition for only two titles indicated in the Act, therefore in the remaining competitions competition may also be organised by other entities and PSA has no power to object.[54] A similar opinion is expressed by S. Fundowicz, who emphasises that the Polish Sports Association is not the only entity which is authorised to organise and conduct competition within a given discipline, but such entities may also include other entities and natural persons.[55] This view is also confirmed by the result of applying the inference *a contrario* from Article 13(1) of the Sports Act. Since, pursuant to Article 13(1), the Polish Sports Association has the exclusive right to organise and conduct sports competition for the title of Champion of Poland and for the Polish Cup, other types of competition may be conducted by other entities.

Taking the above into account, in the opinion of the author of the article, since it is not only the Polish Sports Association that is authorised to organise and

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[52] Incidentally, it should be noted that there is no valid argument for such a distinction, as the same criteria should be set by the legislator for both athletes and their coaches in order to motivate both to achieve significant results.

[53] Cajsel, W., *Ustawa o sporcie. Komentarz*, Lex/el. 2011, Article 7.

[54] Ulijasz, B., *Wykonywanie i organizowanie sportu w Polsce. Studium administracyjno-prawne*, Toruń, 2019, p. 97.

[55] Fundowicz, S., *Prawo sportowe*…, op. cit., p. 76.

conduct sports competition, it is necessary to conclude that within the framework of e-sport, natural or legal persons, including e.g., producers of computer games, may be an entity authorised to organise sports competition (except for organising and conducting sports competition for the title of Champion of Poland and for the Cup of Poland).[56]

Pursuant to Article 31(3) of the Sports Act, when issuing a local act concerning the establishment of prizes and awards for individuals, the municipal council must take into account, in addition to the sporting result achieved by those individuals, the importance of the sport in question for that local government unit. Unfortunately, also in this case, the legislator has not clarified how this concept is to be decoded. In the colloquial sense, to 'have significance' is to have value, to be important to someone.[57] Undoubtedly, guidance provided in the case law of administrative courts will also be helpful in analysing this notion. In the judgment of the Provincial Administrative Court in Łódź of 11 July 2019, it was indicated that:

> 'Thus, when determining the rules for awarding a scholarship [*this also applies to prizes and awards – author's note*], it is the duty of the authority first of all to determine the sports disciplines that are of significance for the given local self-government unit. Such disciplines could be, for example, disciplines with a well-established local or supra-local tradition, popular among the residents, which would obviously be part of the fulfilment of the authority's own task of creating conditions conducive to the development of sport.'[58]

However, a more liberal view is also noticeable in the case law, pointing out that the international rank or prestige of a discipline is as acceptable premise as a local or supra-local tradition in practising sport.[59] An analysis of the court rulings leads to the conclusion that the constituting authority has considerable freedom to define the sports which are important for a given LGU. Thus, it may do so by indicating specific sports in the resolution or by indicating other criteria which will make it possible to determine the scope of the designation of 'a given sport', e.g., winter sports or athletics.[60] In addition, the case-law considers that, in accordance with the guidelines under Article 31(3) of the Sports Act, it cannot be sufficient to

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[56] The opposite view is presented by Derlecki, P., 'Dopuszczalność finansowania przez jednostki samorządu terytorialnego stypendiów sportowych przeznaczonych dla zawodników sportów elektronicznych', *Przegląd prawa publicznego*, 2021, No. 12, pp. 112–113.

[57] https://sjp.pwn.pl/szukaj/znaczenie.html [accessed on 23 December 2022].

[58] Judgment of the Voivodship Administrative Court in Łódź, 11 July 2019, II SA/Łd 375/19, LEX No. 2703695; likewise: Judgment of the Voivodship Administrative Court in Gdańsk, 6 April 2017, III SA/Gd 89/17, LEX No. 2274654 'When establishing the principles for awarding scholarships, the authority is therefore obliged, in the first instance, to identify the sports that are significant for the given local government unit. Such disciplines may be those with well-established local or supra-local traditions, popular with the local population, which – for obvious reasons – would be part of the local government's own task of creating conditions conducive to the development of sport (Art. 27(1) of the Act). It was also the intention of the legislator (Article 31(3) of the Act) to link the amount of the benefit granted to the importance of the sport in question for the specific local government unit.'

[59] Judgment of the Supreme Administrative Court in Warsaw, 19 March 2019, I OSK 1222/17, LEX No. 2699310.

[60] Judgment of the Voivodship Administrative Court in Olsztyn, 30 June 2022, II SA/Ol 340/22, LEX No. 3365890.

define in too general terms the sports which are of significance for the community, e.g., sports included in the programme of the Olympic or Paralympic Games.[61] Significantly, justifications to the judgments further emphasise that 'it is not the task of the administrative court to penetrate and verify why the municipality considered certain sports to be of significance to it (…).[62]

Bearing in mind the above interpretative considerations regarding the phrase 'significance of a given sport' for a given LGU, including the attitude of the administrative courts, one would have to conclude that, in the case of many municipalities, it would be legitimate to include e-sports as one which is of significance for the local community. Such a conclusion is justified by the fact that this is a type of sport which, firstly, is very popular especially among young people in the area, and has become even more important in light of the COVID-19 pandemic. Secondly, professional e-sports competitions have been organised for many years in many localities in Poland, e.g., Intel Extreme Masters in Katowice,[63] Games Clash Masters in Gdynia or Poznań Game Arena.[64] Thirdly, for several years now, e-sports competitions have been organised in many smaller towns and cities by public or private entities under the patronage of local governments. Fourthly, in many localities, through cyclical e-sports tournaments, this sport becomes important for the community of a given local authority. According to the author, the importance of e-sports for a given community can also be demonstrated by the fact that e-sports players reside in the municipality, who achieve successes in this field in the national or world arena, and thus promote both their local authority in the national arena and e-sports among their local society.

It is worth noting at this point that the first local government on the map of Poland has already appeared, namely the City of Sosnowiec, which adopted a resolution taking into account the results in e-sports competition and its importance for the local community, admittedly not in terms of awards and prizes, but periodic scholarships for players.[65] Importantly, the resolution in question was positively reviewed by the supervisory authority and was published in the official gazette of the Śląskie Voivodship.

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[61] Judgment of the Supreme Administrative Court in Warsaw, 5 April 2019, I OSK 1623/17, LEX No. 2714312.

[62] Judgment of the Supreme Administrative Court in Warsaw, 19 March 2019, I OSK 1222/17, LEX No. 2699310.

[63] https://intelextrememasters.com [accessed on 7 January 2022].

[64] https://imbaseat.com/najwazniejsze-e-sportowe-wydarzenia-w-polsce/ [accessed on 7 January 2022].

[65] Resolution No. 550/XXX/2020 of the Sosnowiec Municipal Council of 27 August 2020 on the Establishment of Sports Scholarships of the City of Sosnowiec (Official Journal of the Silesian Voivodship of 2020, item 6483).

CONCLUSION

The 21st century is undoubtedly a period of unprecedented development of modern information technologies. It is also referred to as the age of digitalisation or the age of the information society.[66] As a result, the concept of sport, which has been encoded in social thinking to date, is also undergoing significant transformations at a rapid pace. In view of these changes, it has become necessary for Polish law to include regulations concerning the phenomenon that is e-sport. A prelude to this process was undoubtedly the enactment of the Act of 20 July 2017 amending the Sports Act and the Act on the Disclosure of Information on Documents of State Security Organs from the Years 1944–1990 and the Content of Such Documents, which should be welcomed. The amendment mainly broadened the definition of sport to include intellectual competition, it is, however, due to the residual regulation of e-sports that legal controversies arise. One of these controversies, which the author of this publication has tried to resolve, is the issue of establishing and financing prizes and awards for e-sports players. The Public Finance Act stipulates that public expenditures should, first of all, be made in accordance with the provisions on particular types of expenditures and in an expedient manner. This means that local authorities, including municipalities, must be particularly careful when it comes to spending funds on prizes or awards for e-sports players. This is important in the context of the proper drafting of a resolution pursuant to Article 31(3) of the Sports Act, because if the resolution is annulled with *ex tunc* effect, the material and legal basis on which public funds were granted to the beneficiary falls away. It is worth noting in passing that at present there are about 2480 municipalities in Poland alone, which means that the issue for bodies applying the law is significant.

Within the framework of this study, the author has come to the conclusion that – making certain assumptions – e-sport can be classified as sport within the meaning of Article 2(1a) of the Sports Act. Thus, it will be a competition based on specific rules known to the players, largely reliant on intellectual activity and aimed at achieving a predetermined goal, which is the assumed result of the competition.

Moreover, the article explains that e-sports competitions may be organised and conducted not only by Polish Sports Associations (e-sports does not have such an association), but also by other entities, including natural or legal persons, as indicated by the interpretation of the provisions of Article 7(1) or Article 13(1) of the Sports Act. Therefore, e-sports athletes will be able to obtain a certain sporting result within the framework of the competitions referred to in Article 31 of the Sports Act as fulfilling the condition for the award or distinction.

This article proves that the importance of a given sport for the community as a premise for gratification will be considered by indicating e-sports in the resolution issued pursuant to Article 31(3) of the Sports Act, bearing in mind the popularity of e-sports among the local community, but also through the occurrence of periodic tournaments in a given area or the residence of e-sports players in the municipality

[66] Krztoń, W., 'XXI wiek – wiekiem społeczeństwa informacyjnego', *Modern Management Review*, 2015, No. 3, p. 101 et seq.

who achieve success in this field on the national and/or world stage and thus promote this entity as well as e-sports among the public.

It must therefore be concluded that, despite the lack of a comprehensive e-sports regulation, it is possible for municipalities to establish and finance awards and prizes for e-sports players.

As a *de lege ferenda* conclusion, it is necessary to postulate the introduction of a regulation to the Polish legal system that would, above all, comprehensively address the issue of e-sports, bearing in mind its specificity and difference from traditional sport. Currently, due to the lack of a Polish e-sports association, e-sports organisations as well as players and coaches, cannot take advantage of some of the financial support regulated by the Sports Act (for example, the lack of support for coaches under Article 31(2) of the Sports Act).

The legislator, bearing in mind the problematic nature of this article, should establish, among other things, an unambiguous legal definition of e-sport as well as clarify the understanding of the notion of 'the importance of a given sport for this local government unit', so that there is no controversy over the meaning of these terms, which are of fundamental importance for e-sport financing (even administrative courts encounter problems in this regard in practice).

The last demand is that in the proposed comprehensive e-sports law the criteria for the establishment and financing of awards currently set out in Article 31(1) of the Sports Act for e-sports players should be equated with the criteria for awards for coaches set out in Article 31(2) of the Sports Act, due to the lack of compelling arguments for maintaining dissimilarity in this respect. The same award conditions would motivate both of them to achieve sports results that are significant for the respective LGU.

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Cite as:

Kuczkowski P. (2024) '*Permission for municipalities to establish and finance prizes and awards for athletes in electronic sports*', Ius Novum (Vol. 18) 1, 136–152. DOI 10.2478/in-2024-0008

Ius Novum

2024, vol. 18, no. 1, pp. 153–161

GLOSS ON THE JUDGEMENT OF THE SUPREME ADMINISTRATIVE COURT OF 21 OCTOBER 2022, III OSK 4468/21* (CONCERNING THE PROVISION OF PUBLIC INFORMATION BY A FOUNDATION)

PRZEMYSŁAW SZUSTAKIEWICZ**

DOI 10.2478/in-2024-0009

Abstract

In its judgment of 21 October 2022, III OSK 4468/21, the Supreme Administrative Court considered that a foundation is obliged to provide public information because, in accordance with Article 1 of the Act on Foundations, it should accomplish socially and economically useful objectives that comply with the interests of the Republic of Poland. These are objectives that should also be accomplished by public administration; thus, they are, in fact, the State's objectives. In such a situation, the Court decided that the informative obligation of foundations that are not public law entities applies, in fact, to every aspect of their activities. This should be recognised as correct, because the constitution-maker specified in Article 61(1) of the Constitution of the Republic of Poland a very broad range of entities obliged to provide public information, ensuring that every field of the State's activity is transparent.

Keywords: Supreme Administrative Court, public information, foundation, obligation to provide data

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I. Whether a given entity is obliged to provide information depends on the prior determination of whether its actions meet the criteria of 'performing public tasks'.
II. To establish the existence and scope of public tasks, it is necessary to find in the provisions of law a relevant task norm addressed to an administrative body, i.e., one that determines the conduct of an administrative body necessary to carry out a specified state aim.
III. Article 1 of the Act on Foundations is a legal norm that constitutes grounds for assuming that a foundation carries out public tasks.

The glossed judgment concerns the subjective scope of the Act of 6 September 2022 on Access to Public Information.[1] It was issued by the Supreme Administrative Court as a result of hearing the cassation complaint about the judgment of the Voivodship Administrative Court in Warsaw of 13 November 2020, II SAB/Wa 121/20, which recognised the Foundation's inaction in dealing with the complainant's request to provide public information concerning the Programme for Non-Governmental Organisations in Poland, carried out in the financial perspective of 2009–2014 by means of answering questions asked in the request. It should be added that the Foundation requested to provide information had not been founded by public administration bodies or state-owned companies obliged to provide public information.

The Foundation responded that it does not perform public tasks in relation to the Programme and does not possess public assets; therefore, it is not obliged to provide public information concerning the subject matter.

In this situation, the claimant filed a complaint to the Voivodship Administrative Court in Warsaw, which recognised that the complaint was well-founded. The first instance court explained that the addressee of the request to provide public information is the Foundation that the Financial Mechanism Office (FMO) in Brussels had chosen as an operator of the above-mentioned programme within the Fund for Civil Society. The operators are responsible, inter alia, for programme preparation, intake of applications, selection of projects, monitoring of the implementation, and promotion of the programme. In the Court's opinion, the allocation of funds obtained by Poland, including the funds spent on the development of civil society, undoubtedly constitutes the performance of public tasks within the meaning of the Act on the Provision of Public Information.

Being an operator appointed to carry out the programme for Non-Governmental Organisations in Poland, the Foundation is an entity performing public tasks referred to in Article 4(1)(5) of the AAPI and, within this scope, is also an entity obliged to provide public information in accordance with Article 6(2) of the APPI. Taking into account the fact that the Foundation performs public tasks, it is not important whether it possesses public assets or funds. Thus, it is sufficient for a given entity to perform public tasks to recognise that it is obliged to provide public information. In light of the above, the Foundation was obliged to deal with the claimant's request to provide public information.

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[1] Journal of Laws of 2022, item 902, hereinafter 'AAPI'.

The Foundation filed a cassation complaint about the judgment of the Voivodship Administrative Court in Warsaw, alleging that the first instance court had violated the provisions of substantive law, i.e., Article 1(1) in conjunction with Article 3(2) in conjunction with Article 6(2) in conjunction with Article 4(1)(5) and Article 4(3) of the AAPI in conjunction with Article 61(1) of the Constitution of the Republic of Poland in conjunction with Article 149 § 1 subsections 1 and 3 in conjunction with Article 151 of the Act of 30 August 2002: Law on the procedure before administrative courts,[2] by their incorrect interpretation reflected in the recognition that the request concerned public information subject to provision by the Foundation although it is not included in the group of entities carrying out public tasks (performing tasks of public authorities) or possessing public assets, which excludes it from the governance of the regulations of the Act on access to public information and, moreover, by the arbitrary and incorrect determination of the scope of the concept of public tasks by the Court of first instance.

The Supreme Administrative Court dismissed the cassation complaint. It was raised in the justification that the subjective scope of the right of access to public information is only partly regulated by Article 61(1) of the Constitution of the Republic of Poland. The provision stipulates that:

> 'A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such right shall also include receipt of information on the activities of self-governing economic and professional organs and other persons or organisational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury.'

Therefore, Article 61(1) of the Constitution of the Republic of Poland determines the subject of the right of access to public information (information about activities of the entities indicated in the provision) and who has the right (a citizen). However, the wording of the provision does not answer the question of what entity is obliged to provide public information. It does not also indicate that the concept of public task is identical to exercising public authority and performing the tasks of public authorities. In particular, it does not result from the regulation contained in the provision concerning the subject matter of the right of access to public information (and not the subjective scope of the right), in accordance with which the right of access to public information covers 'information on the activities (…) of other persons or organisational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury.'

Entities obliged to provide public information have been directly specified in Article 4(1) of the AAPI, which states: 'entities obliged to provide public information are public authorities and other entities performing public tasks, in particular (…).' The construction of the provision does not raise any doubts that, firstly, entities obliged to provide public information include entities performing public tasks in which the legislator also includes public authorities and, also, secondly, taking into account the phrase 'in particular' used in the provision, that other entities performing public tasks include entities indicated in the open catalogue of entities

[2] Journal of Laws of 2002, item 329, as amended.

listed in Article 4(1)(1)–(5) of the AAPI. Therefore, the content of Article 4(1)(1)–(5) of the AAPI means that within the meaning of the AAPI, it is sufficient to determine that a given entity is one listed in the open catalogue of Article 4(1)(5) of the AAPI. At the same time, recognition that a given entity is not listed in the open catalogue of Article 4(1)(5) of the AAPI does not mean that it is not obliged to provide public information. The absence of a given entity in the open catalogue of Article 4(1)(5) of the AAPI does not mean that this entity does not perform public tasks. Thus, essentially, the answer to the question whether a given entity is obliged to provide public information depends on the prior determination of whether its activities meet the statutory criterion of 'performing public tasks'.

The concept of public tasks, in turn, is a legal term understood as tasks addressed by the legislator to the bodies administering this normative designation of the conduct of the administrative apparatus that is necessary to accomplish a specific State objective using designated means and forms of action. It is a normative obligation of the administration to implement the defined goal of the State through specified application of the designed means. Public tasks result from special norms, the so-called task norms, which means that in order to recognise the existence and determine the scope of a public task, it is necessary to find an adequate task norm addressed to the administrative body in legal provisions, i.e., one that determines the administrative body's conduct necessary to accomplish a specific objective of the State. Determination of the task and the aim of action of the public administration body is tantamount to the imposition of an obligation to perform a given task or an obligation to achieve a set target on this entity. This results from the assumption that a specific state of things, the achievement of which the task norm orders, is to be achieved regardless of the existing circumstances. That is why in the case of norms of this kind the circumstances surrounding performance of a given task are usually not determined. The characteristic feature of task norms is that the obligation set in them cannot be implemented by means of one activity, but its implementation consists in the performance of a series of mono-generic or multi-generic, legal or actual activities. The category of tasks is also connected with citizens' legal situation. The existence of a given public task enables a citizen to demand that it be performed. The guarantee that a given task will be carried out with the use of public funds is not a necessary element of the classification of a given norm as a task norm and, as a result, a necessary element of the classification of a given task as a public task. The type of competence and the planned forms of the performance of a public task (including civil law forms) do not influence the classification of a given task as a public one. The determination of tasks does not automatically result in the ability to undertake specific activities.

Moreover, one forms of decentralisation of public administration as well as an expression of the principle of subsidiarity and the requirement of bringing administration closer to the citizen, is the privatisation of public tasks. This entails, inter alia, that these tasks, while retaining their public character, are carried out by entities other than public authorities' entities. Thus, the entities performing public tasks are not exclusively the State and public authorities' entities in a broad sense, as in the process of privatisation of public tasks, they can be delegated to private entities. It should be emphasised that tasks performed by public authorities are also

public tasks. The legislator's use of the concept 'public tasks' in the construction of Article 4(1)(1)–(5) of the AAPI justifies the thesis already established in administrative case law according to which performing public tasks as a determinant of the list of entities obligated to provide public information is not an exclusive attribute of public authorities. Such tasks may be performed by various entities that are not the authorities' bodies, and their characteristic features include commonness and usefulness for the community as well as being conducive to achieving the objectives laid down by the Constitution or statute.

The performance of public tasks by a given entity should be related to and result from specified statutory norms or resolutions based on statutory norms that entrust (commission) specified public tasks to specified entities. However, one cannot pre-emptively exclude the performance of public authorities' tasks by specified entities as a result of activities of public authorities' bodies that are not clearly anchored in the provisions of law. A comprehensive assessment of the legal state and the activities of a given entity is necessary in every case to determine whether this entity performs public authorities' tasks (public tasks).

The Act of 6 April 1984 on Foundations[3] stipulates that 'A foundation may be established for the purpose of accomplishing socially or economically useful objectives that comply with the interests of the Republic of Poland, in particular such as: health protection, development of economy and science, education and upbringing, culture and art, social care and aid, environment protection, and care of antiquities' (Article 1), and 'Foundations may be founded by natural persons regardless of their citizenship and place of residence or legal persons that have their head offices in Poland or abroad' (Article 2(1)). Against this background, the criterion regarding, inter alia, the aim of a foundation is distinguished in the doctrine for public (public utility) foundations, which 'are established for the purpose of accomplishing public objectives, serve general interests and an indefinite number of people', and private foundations, which serve the 'interests or good of a particular group, e.g., a family'. The division is not identical to the division of foundations into civil law foundations and public law foundations based on the criterion concerning the method of their establishment, where private law foundations are established based on private law acts, and public law foundations are established based on public law acts (statutes, international agreements, administrative acts). This means that a private law foundation also has the features of a public foundation. Therefore, at present, in the light of Article 1 of the Act on Foundations (the requirement of a socially and economically justified aim in compliance with the fundamental interests of the Republic of Poland), only public foundations may be established.

Therefore, it should be assumed that Article 1 of the Act on Foundations is a legal norm that constitutes grounds for recognising that a foundation performs public tasks. Although the statute uses a general phrase: 'socially or economically useful objectives in compliance with the fundamental interests of the Republic of Poland', it provides examples of those aims, such as 'health protection, development of economy and science, education and upbringing, culture and art, social care and aid, care of antiquities'.

[3] Journal of Laws of 2020, item 2167.

These are objectives which also public administration is appointed to accomplish. In fact, these are basic objectives of the State, which results from the provisions of the Constitution, e.g., Article 5, Article 6, Article 68(3–4) or Article 70(4) and (5).

Thus, Article 1 of the Act on Foundations determines normative obligations of a foundation to accomplish the set objective of the State, and this activity matches the above-mentioned specification of public tasks. Therefore, the Court of first instance, assuming that the concept of public tasks is broader than the concept of public authorities' tasks and has the features of commonness and usefulness for the community as well as is conducive to achieving aims determined by the Constitution or statute, rightly interpreted the concept referred to in Article 4(1) of the AAPI. It was also correct to assume that it is sufficient for a given entity to perform public tasks to recognise that it is obliged to provide public information.

The judgment of the Supreme Administrative Court concerns determination of conditions for recognising that, in accordance with Article 4(1) of the AAPI, a specific entity may be classified as another 'entity performing public tasks'; thus, it is obliged to provide public information. In line the stance of the Voivodship Administrative Court in Warsaw, the Cassation Court assumed that classification within this group is sufficient if two requirements are met jointly. Firstly, such an entity performs public tasks, and secondly, the performance of those tasks is based on statutory provisions. It should be emphasised that the adoption of this stance means that foundations, regardless of who established them or whether they possess public assets, in the same way as public authorities, are always obliged to provide information about their activity. This is a radical opinion, but it seems to be correct. However, it should be pointed out that the stance expressed in the glossed judgment of the Supreme Administrative Court causes many more informative obligations to be imposed on foundations than, for example, on building societies (cooperatives), which, in accordance with the resolution of the Supreme Administrative Court of 11 April 2005, I OPS 1/05, are not classified as entities referred to in Article 4(1)(5) of the AAPI. Passing the above resolution, the Supreme Administrative Court stated that the provisions of the Act of 16 September 1982: Law on Cooperatives[4] cannot be used to draw a conclusion that

> 'the activity of a building society is identical to the performance of public tasks within the meaning of Article 4(1) of the Act on Access to Public Information because the activities of building societies are limited to the accomplishment of their basic aim, i.e., satisfying the housing needs of their members and their families, thus a limited number of people associated in a given cooperative. At the same time, it is necessary to draw attention to the fact that in order to become a member of an association such as a building society, a person joining it is obliged to submit a declaration in writing, i.e., a membership declaration, under the threat of invalidity. It is required by law to indicate the number of shares and pay an entry fee. It should also be added that only the members of a cooperative decide on the scope of its activities, the duration of operations, liquidation, division, etc. Therefore, a building society is an organisational unit that has a strictly determined circle of persons and is not of a common nature.'[5]

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[4] Journal of Laws of 2021, item 648, as amended.

[5] *Orzecznictwo Naczelnego Sądu Administracyjnego i Wojewódzkich Sądów Administracyjnych*, 2005, No. 4, item 63.

Thus, the Supreme Administrative Court recognised that the provisions of the Law on Cooperatives do not determine that building societies accomplish public tasks. Just the opposite, the cooperatives of this type act only in the interest of their members who voluntarily associate to achieve their individual aims because 'cooperatives are organisational units that are not of a common nature (as administrative courts used to assume), but have a strictly determined circle of persons. As a result, they are not in possession of public information and are not obliged to provide information, i.e., are not subject to the requirements laid down in the Act on access to public information.'[6] Resolution of 11 April 2005, I OPS 1/05 clearly indicates that the performance of public tasks should stem from legal provisions. Therefore, an entity performing public tasks, even though it is not authorised to do so by the law, will not be obliged to provide public information pursuant to Article 4(1) of the AAPI. This was the case, for example, in early 2022, when associations, religious organisations, and even *ad hoc* groups of citizens were performing public tasks by providing assistance to war refugees from Ukraine, as state services proved to be to be inadequate in this regard.

However, it is indicated that

> 'The constitution-maker, in Article 61(1) second sentence *in fine*, listed the most numerous group of entities obliged to provide information within this scope. These are other persons and organisational units, thus entities that in some situations perform the so-called delegated functions within the scope of public tasks, and accomplish public tasks on a larger scale. Those entities include: foundations, administrative organisations (e.g., museums, hospitals, schools, detoxication centres) and non-governmental organisations. These organisations do not change their legal nature due to the functions delegated to them and their performance then. For this purpose, it is necessary to distinguish between activities performed within the scope of public tasks and those that are those entities' own activities'.[7]

Article 61(1) of the Constitution of the Republic of Poland stipulating the right to public information does not mention foundations as entities directly obliged to provide public information and, thus, it should be considered that, like in the case of other non-governmental entities, they are obliged to provide public information only within the scope in which they perform public tasks or manage public assets. The public law foundations are the only exception, because 'what determines the public law status of those foundations is only the fact that they were established by force of special legal acts.'[8] It is obvious that foundations established through special laws are a kind of direct extension of the execution of the state authority tasks, although in a particular form. Therefore, it there should be no doubt that in their case, the obligation to provide public information applies to every scope of their activity. However, the issue arises regarding the scope of information disclosure by other 'private' foundations, i.e., those not established by public entities.

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[6] Sarnecki, P., 'Glosa do uchwały NSA z dnia 11 kwietnia 2005 r., I OPS 1/05', *Przegląd Sejmowy*, 2005, No. 6, p. 203.

[7] Chmaj, M., *Komentarz do Konstytucji. Art. 61, 62*, Warszawa, 2020, p. 80.

[8] Przybysz, P., *Instytucje prawa administracyjnego*, Warszawa, 2020, p. 175.

In the glossed judgment, the Supreme Administrative Court ruled that the obligation to provide information for foundations not classified as public law foundations essentially applies to every area of their activity. Thus, it is not limited to situations where, for example, as a result of performing a task entrusted to them by 'public authorities', the obligation to disclose information concerns the scope of this task or public funds expended on it. The Cassation Court derived its stance from the former judgments of the Supreme Administrative Court, which recognised that, in accordance with Article 4(1) of the AAPI, 'public tasks is a concept broader than the concept of public authorities' tasks' (Article 61 of the Constitution of the Republic of Poland). The concepts differ concerning the subjective scope; public authorities' tasks may be performed by authorities' bodies or entities entrusted with those tasks based on specific statutory norms. The concept of 'public tasks' used in Article 4 of the AAPI instead of the concept 'public authorities' tasks' used in Article 61 of the Constitution of the Polish Republic ignores the subjective element and means that public tasks may be performed by various entities that are not authorities' bodies, with no necessity for handing those tasks over. Interpreted this way, 'public tasks' have the features of commonness and usefulness for the community as well as are conducive to achieving the objectives laid down by the Constitution or statute. The performance of public tasks is always connected with exercising citizens' basic public rights.[9] Thus, 'public task' has two elements distinguishing it from other 'non-public' tasks: firstly, it can be performed by any entity, and secondly, the nature of the tasks being performed indicates that they serve the common good, and therefore not just particular goals.

Thus, in the glossed judgment, the Supreme Administrative Court derived from the content of Article 1 of the Act on Foundations that the accomplishment of public tasks results from the essence of the foundations activities. In line with the above-mentioned provision, 'a foundation may be established for the purpose of achieving socially and economically useful aims that comply with the basic interests of the Republic of Poland.' A foundation cannot be established and it cannot act for a purpose different than the one determined in Article 1 of the Act of 6 April 1984, and 'in accordance with the norm laid down in the discussed Article, the aim of a foundation should be of a socially and economically useful nature. The group of socially useful aims includes those that are accomplished in the interest of society.'[10] The aim of establishing a foundation corresponds to public tasks as a necessary element obliging to provide public information. Therefore, if foundations 'as a whole' are established to perform tasks that are public in nature, every aspect of their activities should be subject to revealing regardless of whether they are performed based on a commission or with the use of public assets.

Thus, in the judgment of 21 October 2022, III OSK 4468/21, the Supreme Administrative Court continued the adjudication line of administrative courts existing from the beginning of the functioning of the Act on Access to Public

[9] Cf. judgements of the Supreme Administrative Court of: 18 August 2010, I OSK 851/10, 4 November 2016, I OSK 900/15 and 18 May 2021, III OSK 306/21, CBOSA.

[10] Gura, G., *Ustawa o fundacjach. Komentarz*, Article 1, Legalis 2021.

Information consisting in its broad interpretation so that access to public information in subjective and objective terms would be as wide as possible,[11] which should be recognised as correct because it corresponds to the constitution-maker's intention expressed in Article 61(1) of the Constitution of the Republic of Poland, which defines entities obliged to provide public information in a broad manner, because 'it is in the public interest to ensure openness of the activities of all entities statutorily authorised to perform the functions of public authorities, beside the state, self-governmental and any other entities, as, for example, social organisations';[12] thus, the political right of access to public information is always applicable where the State's tasks are performed, regardless of the entity performing those tasks.

It is worth emphasising that the opinion expressed in the glossed judgment implies that all, even the smallest foundations are obliged to provide public information on every aspect of their activities. Furthermore, they are to fulfil a series of organisational obligations, including, first of all, the obligation laid down in Article 8(2) to develop and update *Biuletyn Informacji Publicznej*. It is a serious organisational challenge, which small foundations may fail to meet. On the other hand, it cannot be denied that the extension of the subjective and objective scope is undoubtedly conducive to social control over the subsequent segment of social life.

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Cite as:

Szustakiewicz P. (2024) '*Gloss on the judgement of the Supreme Administrative Court of 21 October 2022, III OSK 4468/21 (concerning the provision of public information by a foundation)*', Ius Novum (Vol. 18) 1, 153–161. DOI 10.2478/in-2024-0009

[11] Cf. Trzciński, J., 'Sądownictwo administracyjne gwarantem konstytucyjnego praw dostępu do informacji publicznej', in: *Dostęp do informacji publicznej – rozwój czy stagnacja. Materiały z konferencji zorganizowanej 6 czerwca 2006 r. w Warszawie przez INP PAN, NSA i RPO*, Warszawa, 2008, pp. 22–29.

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Ius Novum
2024, vol. 18, no. 1

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